



EMPLOYMENT TRIBUNALS

CLAIMANT: Dr Turton

RESPONDENT: Mid Kent College

HELD AT: London South (by CVP) **ON:** 2 October 2025
6-7 October 2025 (in chambers)

BEFORE: Employment Judge Hart, Mr Dixon and Ms Forecast

REPRESENTATION:

For the Claimant: Mr Horan (Counsel)
For the Respondent: Mr Pincott (Counsel)

RESERVED **COSTS JUDGMENT**

The unanimous Judgment of the Tribunal is that:

1. The claimant's first application for costs succeeds in part, and the respondent is ordered to pay the claimant's costs of **£12,465.15 plus VAT**. The amount awarded is for:
 - a. additional communications, totaling £460.00 plus VAT;
 - b. preparing the final hearing bundles, totaling to £8,005.15 plus VAT; and
 - c. counsel's fees for the delay in the start date to day 4, totaling £4,000 plus VAT.
2. All other costs sought by the claimant do not succeed.

REASONS

INTRODUCTION

1. Following the conclusion of submissions on remedy, the claimant submitted two applications for costs. These were opposed by the respondent.

2. For this part of the hearing we were provided with the following documents:
 - 2.1 A joint agreed costs application bundle of 191 pages. The references to page numbers in this Judgment are to the pages in this bundle. The bundle included:
 - 2.1.1 The claimant's first costs application at page 1-8;
 - 2.1.2 The claimant's second costs application at pages 9-11;
 - 2.1.3 Schedule A of work done on documents; and
 - 2.1.4 Schedule B of the whole costs
 - 2.2 The liability bundle, references to page numbers with the prefix "L/" are to pages in this bundle.
 - 2.3 The respondent's response to the claimant's application for costs (Respondent's Response).
3. The claimant's applications only identified that the costs were being sought under ET Rule, rule 74. At the hearing Mr Horan clarified that costs were being sought under rule 74(2) (a) (unreasonable conduct etc.) and 74(2)(b) (no reasonable prospect of success). Mr Pincott objected to the claimant only clarifying at the hearing the grounds of its application. We agree that this was an unsatisfactory state of affairs and offered him the option for an adjournment to take instructions. Mr Pincott confirmed that he was able to proceed without requiring an adjournment.
4. On 18 November 2025 the parties were sent a draft embargoed judgment for consideration. We have taken into account the parties' corrections in finalising this judgment.

RELEVANT LAW

5. Rule 74 of the Employment Tribunal Procedure Rules 2024 provides that:
 - (1) *The Tribunal may make a costs order on its own initiative or on the application of a party*
 - (2) *The Tribunal must consider making a costs order or a preparation time order where it considers that—*
 - (a) *a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings, or part of it, or the way that the proceedings, or part of it, have been conducted,*
 - (b) *any claim, response or reply had no reasonable prospect of success,**or*
6. This is a three-stage test:
 - 6.1 Whether one or more grounds for awarding costs are engaged i.e. whether the threshold for awarding costs has been met.
 - 6.2 If so, whether it is appropriate for the tribunal to exercise its discretion to award costs.
 - 6.3 If so, to determine the amount of costs to be awarded.

7. At the second stage, the tribunal has an unfettered discretion as to whether or not to use its discretion to award costs. The mere fact that the threshold for awarding costs has been engaged does not mean that costs should be awarded. Tribunals are 'no costs' jurisdictions, and costs remain the exception rather than the rule. Further, if awarded they should be compensatory not punitive.
8. Rule 74(2)(a) applies not just to the conduct of a claimant but also their representative. What is done in a party's name is presumptively, but not irrefutably, done on their behalf: **Bennett v London Borough of Southwark** [2002] ICR 881 CA. Therefore a claimant will be fixed with the conduct of their representative unless they dissociate themselves from what their representative has done. In **Beynon and Oths v Scadden and Oths** [1999] IRLR 700 costs were awarded against the paying party for the conduct of their representative (a trade union) who was pursuing a claim which it knew, or ought to have known, had no reasonable prospect of success for the collateral objective of achieving union recognition from the employer.
9. Under rule 74(2)(b) whether a claim has no reasonable prospect of success is an objective test. It is not sufficient for the party to genuinely believe in the wrongdoing; the test is whether they had reasonable grounds for that belief. This should be based on the information before them at the time of making the claim or response.
10. The respondent submitted that a claimant can only make an application for costs if they show that they will be the beneficiary of any order made: **Barry v University of Wales Trinity St David** (ET case no 1603120/2013). We do not agree and note that the subsequent EAT case of **Mardner v Gardner and Oths** (UKEAT/0483/13/DA) held that a claimant's insurance policy (which covered his legal costs) was an irrelevant consideration. A respondent should not be allowed to avoid the cost consequences of their unreasonable conduct because the claimant had prudently entered into insurance.
11. Rule 82 provides that the tribunal has a discretion, in deciding whether to make an order for costs and the amount of any costs, to take into account the claimant's ability to pay. There is however no absolute duty to do so, nor is a tribunal required to limit any order for costs to an amount that a party can pay.

DISCUSSION AND CONCLUSION

The delay in preparing the final hearing bundle (application 1 paragraph 3.1. 3.2 and 3.3)

Whether one or more of the threshold grounds are met

12. The claimant applied for the following costs under rule 74(2)(a) (unreasonable conduct):
 - 12.1 the cost of additional communications with the tribunal, totalling £621.00 plus VAT;

- 12.2 the cost of preparing the final hearing bundles and providing hard copies for the parties and the tribunal, totalling £8,005.15 plus VAT; and
 - 12.3 the cost of Counsel's fees for days 6-8, totalling £11,000 plus VAT.
13. The background to this application was follows:
- 13.1 The final hearing, which commenced on 21 October 2024, had been listed for 8 days.
 - 13.2 On day 1, there was no agreed hearing bundle. The claimant had served a bundle of 1659 pages and the respondent had served a bundle of 2086 pages. Neither party were ready to proceed with the hearing.
 - 13.3 The claimant applied for the respondent's response to be struck out on the grounds that the defence had not been actively pursued and / or for non-compliance with tribunal orders. The tribunal did not grant this application because we considered that it was still possible to have a fair hearing by starting on day 4: **pg 75-78** (Judgment para 17-24).
14. In terms of who was responsible for this situation, the Case Management Order made on 18 April 2023 (CMO) had ordered the respondent to send to the claimant the agreed hearing bundle by 31 October 2023: **pg 76** (Judgment paragraph 20). The respondent submitted that the claimant's former solicitors had orally agreed to produce the bundle during a telephone call on 5 August 2024. There is no evidence in support of this submission and there was no reference to this agreement in any subsequent correspondence. We considered it unlikely that such an agreement was reached, and even if it was that it survived the change in the claimant's solicitors on 20 September 2024. At the liability hearing we found that the respondent was largely responsible for the delays in the hearing preparation prior to September 2024 (Judgment para 23.1). We accepted that the claimant's representatives also bore some (albeit less) responsibility for this delay (Judgment para 23.1). We also accepted that the respondent's solicitor's delay up to 24 September 2024 could be attributed (in part) to settlement discussions between the parties. Although, as we stated at the liability hearing, a party is expected to continue to prepare for the hearing in tandem with such discussions, in case they do not succeed (as indeed happened in this case).
15. In any event, we found that the respondent was solely responsible for the delay following receipt of the claimant's strike out application on 24 September 2024: **pg 77** (Judgment para 23.2). From this date the respondent were on notice that it needed to take urgent action to prepare for the hearing, yet it failed to take any steps to prepare and produce the hearing bundle until the week before the hearing. At the liability hearing we found that this delay was "inexcusable": **pg 75** (Judgment para 19).
16. Mr Pincott referred us to the email exchange of 16-18 October 2024 as evidence that the claimant's solicitor had agreed to produce the bundle. We accept that on the 15 October 2024 the claimant's new solicitor agreed to create the hearing bundle and send it to the respondent: **pg 152**. We find that this was because the respondent had still not provided the hearing bundle a week before the hearing was due to commence and the claimant's solicitors felt under pressure to provide one themselves. In their correspondence, the claimant's

representative made it very clear that they considered that the respondent remained responsible for producing the bundle including delivery of hard copies to the tribunal, with reference to the CMO (see emails dated 16 and 17 October 2024: **pgs 153-154 and 164**). In the absence of a clear agreement that the claimant's solicitor had of their own volition agreed to take over responsibility for producing the hearing bundle and provide hard copies, we find that the responsibility for producing the hearing bundle remained with the respondent.

17. We considered that the lack of action by the respondent's solicitor following 25 September 2024 to prepare for the hearing amounted to unreasonable conduct. This was compounded by the failure to check its email security system, or contact the claimant's solicitor, regarding the non-receipt of the claimant's bundle which they were expecting on 16 and 17 October 2024. Instead on the 18 October 2024 the respondent produced and served its own bundle. That meant that the tribunal were provided with two large hearing bundles, the parties not being ready to commence the hearing on day 1 and the hearing being postponed for two days to enable the parties to prepare.
18. The claimant also applied for costs under rule 74(2)(b) that the response had no reasonable prospect of success. We do not accept the claimant's alternative submission that the failure to provide a hearing bundle meant that the response could not succeed. The respondent had produced a hearing bundle. The problem was that it had been produced on the last working day before the hearing and neither party was in a position to proceed with the hearing on day 1. The matter was resolved by providing the parties with extra time to prepare.

Whether to use our discretion to award costs in the claimant's favour

19. We noted that costs are the exception rather than the rule and that they should be compensatory not punitive.
20. Mr Pincott submitted that the failure to provide a hearing bundle in advance of hearing is "not out of the norm in employment tribunal proceedings". We do not agree, the respondent had professional legal representatives who are expected to comply with tribunal orders. Mr Pincott's submission is also undermined by his later submission that the failings of the respondent's former solicitors "*were so far outside the expected performance of professional legal representatives...*" that the respondent college should not be held liable for the conduct of their representative (Respondent's Response para 21).
21. We have decided to use our discretion to award costs in this case because the respondent's failure to produce an agreed hearing bundle in good time for the hearing, had significant consequences for the parties and the tribunal. We were unable to start the hearing on day 1 and had to adjourn to day 4. It was fortuitous that the Tribunal was able to delay the start of the hearing due to there being less witnesses than originally anticipated. Had this not been possible there may have been a stronger argument for the response to be struck out because a fair trial was not possible within the trial window.

22. Further, the failure to produce an agreed hearing bundle in good time put the claimant to an additional expense because her representatives had to take over preparation of the hearing bundle. Having served this bundle on the respondent on 16 October 2024, the respondent then failed to check their email system, resulting in their decision on 18 October to serve their own bundle.
23. Mr Pincott submitted with reference to the case of **Barry** that if the claimant had a damages based agreement with her representatives then she would not be entitled to any award of costs, since she would not be the beneficiary. This point is academic since the claimant, through her representative, denied that she was party to a damages based agreement.
24. Mr Pincott submitted with reference to the case of **Bennett** that the actions of the respondent's solicitors were "*so outside the expected performance of a professional legal representative that the presumption that it was done in the respondent's name is necessarily rebutted*". Mr Pincott accepted that the respondent did nothing explicitly to disassociate itself from its former solicitor representatives, submitting that such a dissociation should be implied from the representative's unreasonable conduct and that the claimant should have sought costs by applying for wasted costs against the respondent's former solicitors (DAS law). There is a real risk that if we accept the respondent's submissions that this will open the door to litigants seeking to avoid paying costs for the conduct of their representatives without having to take any active step to disassociate themselves at the time of the conduct. Whilst we accept the possibility that there may be exceptional circumstances where the behaviour of a representative is so egregious that rebuttal can be implied, in the ordinary case a rebuttal requires an active step by the party to disassociate themselves from what is being done in their name. The respondent could have changed solicitors, after all that is what the claimant did. Following the claimant's strike out applications on 25 September 2024 the respondent's should have been aware that their representative's conduct had put it in breach of tribunal orders, yet there is no evidence of them taking any steps to disassociate themselves: **pg L/77-81**. The case of **Beynon** does not assist the respondent since the EAT upheld the award of costs against the paying party despite finding that the trade union representative had acted for collateral purposes.
25. Mr Pincott further submitted that there had been no costs warnings in this case. Whilst we accept that this could be a factor to take into account it is not a precondition of an application for costs. In this case on 24 September 2025 the claimant had applied to strike out the respondent's response on the grounds that the respondent was not actively pursuing its defence and /or was in breach of tribunal orders. This should have put the respondent on notice of the risk of costs which is a less draconian sanction than striking out its defence and is an option before a tribunal under rule 6. Further the claimant did apply for costs on 18 October 2024.

What amount of costs to award

Additional communications

26. The claimant has applied for costs of £621 for 8 communications with the respondent's representative to prepare the matter for the final hearing (8 units), drafting the cost warning (15 units) and a telephone call with the respondent's representative (4 units). Whilst the particular communications being relied upon have not been identified we noted that the following emails sent by the claimant's solicitor concerned the preparation of the hearing bundle: 16 October 2024 at 13:40 pm (**pg 153**); 17 October 2024 at 10:04 and 16:09 (**pgs 157 and 164**); 18 October 2024 at 12:44, 12:49, 13:02, 13:19, 13:36, 13:50 and 15:10 (**pgs 170-171, 173, 175, 179, 181, and 187**). The attendance note of the telephone call with the respondent's solicitor on the 18 October 2024 concerned the problems that the respondent had with their email system and the delivery of the claimant's bundle: **pg 190**. We noted that only half of the costs application dated 18 October 2024 (**pg 165-168**) related to the respondent's failure to comply with tribunal orders, and therefore deduct 7 units.
27. Adopting a broad brush approach we award **£460¹ plus VAT**.

Preparing the final hearing bundles

28. We agree that the respondent should pay the costs incurred by the claimant's solicitor in preparing their own final hearing bundle and providing hard copies for the tribunal. The claimant only incurred these costs because of the respondent's failure in producing an agreed hearing bundle, in repeated breach of tribunal orders.
29. The respondent submitted that no costs should be awarded because the respondent had served its bundle on the claimant on 18 October 2024. This situation was not the fault of the claimant and had only arisen due to the respondent's email security system that no-one had checked.
30. The respondent did not challenge the amount of costs the claimant has sought and therefore we award **£8,005.15 plus VAT**.

Counsel's fees for the delay in the start date to day 4.

31. The claimant had claimed costs of £11,000 for counsel's fees. This was based on the difference in Mr Horan's brief fee and refreshers for a 5-day hearing ((£15,000 plus refreshers for 4 days at £2000 per day) and for an 8-day hearing (£20,000 plus refreshers of 7 days at £2000 per day).
32. However, the hearing had originally been listed for 8 days not 5 days and Mr Horan accepted that the 8-day brief fee had already been incurred at the start of the hearing. Therefore the claimant suffered no loss from the decision to reduce the number of hearing days on day 1 of the hearing.
33. We considered that the costs of attending day 1 would have been incurred in any event. Had the parties being ready to proceed on day 1, the tribunal would

¹ 20 units at £23 per unit

have spent the first day dealing with other preliminary matters and reading into the bundle and witness statements. Whilst we accept that day 1 was in fact spent dealing with the claimant's applications, the tribunal was able to make up the time in days 2 and 3. Had the evidence commenced on day 2 then it was likely that the evidence and submissions would have finished on day 6, the last two days being set aside for deliberation, instead of day 8. The consequence to the claimant of our decision to start hearing the evidence on day 4 instead of day 2 was two extra days of refresher fees. Therefore we award **£4,000 plus VAT**.

The failure to collect the hearing bundles on conclusion of the hearing (application 1 paragraph 3.4)

34. The claimant has applied for costs of £150.50 plus VAT arising out of the failure of the respondent to collect the hearing bundles from the employment tribunal pursuant to an agreement between the parties made on 29 October 2024: **pg 191**. As a result of this failure the tribunal destroyed bundles. The application is made under rule 74(2)(a) (unreasonable conduct).
35. We noted that there was correspondence on the tribunal file from the respondent's representative to the tribunal (which was not copied to the claimant) confirming that the bundles could be destroyed. Whilst it would have been courteous for the respondent to have informed the claimant of this decision, we do not consider that this was sufficiently serious to meet the threshold of unreasonable conduct.

The costs of the application to postpone (application 1 paragraph 3.4)

36. The claimant has applied for costs of £110.40 plus VAT arising out of its application to postpone the hearing on 25 September 2024 under rule 74(2)(a) (unreasonable conduct).
37. We do not agree that costs should be awarded on this basis, since the claimant's application to postpone was rejected by EJ Siddall on the 7 October 2024: **pg L/75**. The reason given was that "*at this stage the claimant's email suggests that a trial of the issues may still be possible notwithstanding any alleged failure to comply with directions*". If a trial of the issues was still possible within the time period then an application to postpone on the basis that a fair trial was no longer possible was unlikely to succeed. Indeed the strike out application before us also failed because even on the first day of the hearing we considered that a fair trial was still possible within the trial listing.
38. Further we have found that the claimant's former representatives were responsible in part (albeit to a lesser extent) for the delays in preparing for the hearing prior to 25 September 2024 and that the claimant's current representatives were at fault for not informing the respondent of the change in solicitors on 20 September 2024. Prior to receipt of the applications on the 25 September 2024 the respondent's representative had been in settlement negotiations with the claimant's former representative which were at an advanced stage, a settlement having been agreed in principle. Had the

claimant's solicitors contacted the respondent before making the application then there is a chance that the parties would have been able to cooperate with each other in agreeing steps to be taken for the final hearing and an application to postpone may not have been necessary.

Costs warning (application 1 paragraph 4)

39. The claimant has applied for costs of £2,013.38.38 plus VAT which it claims represents 35% of the cost of pursuing this the claim to a hearing under rule 74(2)(a) (unreasonable conduct) and /or rule 74(2)(b) (no reasonable prospect of success). It is understood that the unreasonable conduct relied upon is that the respondent pursued an unmeritorious defence.
40. When considering this matter we noted that the costs warning alleged that the respondent was dishonest. No such finding was made by the Tribunal. Further, the costs warning referred to the students being "very forthcoming" about Ms Woodman's conduct in their meeting with Mr Coyle on 4 January 2024. We have made findings that Mr Coyle repeatedly asked the students for examples and that they were not very forthcoming since the only example that they could provide was the 'head tapping incident': **pg 84** (Judgment para 45). Mr Coyle's view at the time was that what the students informed him was open to interpretation: **pg 84** (Judgment para 46). Whilst the tribunal has concluded that the head tapping was an act of discrimination that is with the benefit of additional evidence: **pg 83** (Judgment para 42).
41. We accept that in relation to some of the issues there were some glaring omissions in the statements of the respondent's witnesses and in relation to some of these omissions negative inferences were drawn. However, it does not follow that the respondent's defence in relation to those issues was without merit. Discrimination cases are highly fact sensitive. We noted that the claimant did not succeed on all her claims and our judgment was based on consideration of all the evidence not just whether a witness was called or whether an issue was addressed in a witness statement. Therefore we do not consider that the respondent's defence was wholly without merit.
42. Further, for similar reasons, we do not consider that it would have been clear at the commencement of proceedings that the respondent's defence had no reasonable prospect of success.

Cost of preparing the costs application (application 1 paragraph 5)

43. The claimant has applied for costs of £966.00 plus VAT for preparing the first costs application 1. Since the majority of the application for costs has not succeeded, and the respondent has been put to additional expense of defending those applications which did not succeed, we have used our discretion not to award costs on this basis.

Cost of instructing a joint medical expert able to comment on the claimant's neurodegenerative condition (application 2)

44. The claimant has applied for costs of £1,081 plus VAT for the time spent trying to find a suitable expert that could address the impact of any neurodegenerative condition that the claimant may have, under rule 74(2)(a) (unreasonable conduct).
45. On 19 December 2025, at the preliminary (case management) hearing to discuss instructing a joint expert, the tribunal granted the respondent's application that the expert be asked to address the impact of any neurodegenerative condition that the claimant may have.
46. On 10 March 2025 the claimant disclosed to the respondent a discharge letter from Dr Solway dated 15 September 2023 which noted that the claimant "*does not have a confirmed moderate to severe brain injury or long-term neurological condition*": **pg 10**. As a result the respondent's solicitors wrote to the claimant's solicitors asking "*what evidence does the claimant rely on in respect of the neurodegenerative condition*". The claimant informed the respondent that it had never been her case that she had a neurodegenerative condition and the parties agreed that the expert did not need to comment on this condition.
47. We considered the information before the respondent at the time that the application was made. During the liability hearing the claimant admitted that she had a head injury that had caused memory loss. The medical evidence in the liability hearing bundle had included a letter dated the 27 January 2023 which stated "*the CT head dated 6/1/2023 reveals focal cortical atrophy in the frontal region*": **pg L/289**. This is what the respondent relied upon when making the application. The respondent was unaware of Dr Solway's letter dated 15 September 2023 because that had not yet been disclosed to them. We also take into account the claimant was seeking around £480,000 in damages, including damages for personal injury: **pg L/1517d**. Therefore it was proportionate for the respondent to seek to explore all pre-existing medical conditions that the claimant may have. We noted that once the respondent had been provided with evidence that the claimant did not have a neurodegenerative condition, it acted swiftly in informing the claimant that it was no longer pursuing the matter. Therefore we did not consider that the respondent had acted unreasonably and award no costs on this basis.

Ability to pay

48. Mr Pincott did not address us on the ability of the respondent to pay under rule 82, but did ask us to take into account the overall remedy award "if anything near £600,000" being claimed by the claimant, when deciding whether to award costs. We have taken into account that the remedy award that we have made is a third of what the claimant sought. We also took into account that the amount of costs awarded was significantly less than was being sought and relatively modest. Further the respondent is an FE college, and despite evidence of a reduction in public funding (see Remedy Judgment) we considered that they are still likely to be able to pay the sum that we have ordered.

CONCLUSION

49. The claimant's first application for costs succeeds in part, and the respondent is ordered to pay the claimant's costs of **£12,465.15 plus VAT**. The amount awarded is for:
- 49.1 additional communications, totaling £460.00 plus VAT;
 - 49.2 preparing the final hearing bundles, totaling of £8,005.15 plus VAT; and
 - 49.3 counsel's fees for the delay in the start date to day 4, totaling £4,000 plus VAT.
50. All other costs sought by the claimant do not succeed.

This Judgment has been approved by:

Employment Judge Hart
Date: 18 December 2025