Case Number: 6013303/2025

EMPLOYMENT TRIBUNALS

Claimant: B Mitchell

Respondent: Novaplex Business Solutions Limited

Heard at: London South Employment Tribunal
Before: Employment Judge Burge

JUDGMENT ON COSTS

The Judgment of the Tribunal is that

1. The wrongful dismissal claim had no reasonable prospects of success

2. The Claimant acted unreasonably in bringing and continuing to pursue the wrongful dismissal complaint

3. The Claimant is to pay £5,000 towards the Respondent's costs.

REASONS

Note: the case number is 6013303/2025, not 6013303/2024 as recorded in the original Judgment. A corrected version of the Judgment accompanies this Judgment.

The costs application

1. The Respondent made an application for its costs (summary assessment) on 6 November 2025 under Rule 74 of the Employment Tribunal Procedure Rules 2024. The application sought £20,000 in respect of its costs of defending the claim brought by the Claimant, which was dismissed by a Judgment sent to the parties on 15 October 2025.

2. The Respondent requested that the application be determined on written representations only to avoid the need for a hearing and the associated costs. The grounds relied on were that:

a. The Claim had no reasonable prospect of success (Rule 74(2)(b)); and

b. The Claimant acted vexatiously and/or unreasonably in bringing the Claim and/or in the way that he conducted the Claim (Rule 74(2)(a)).

3. The Respondent stated that the Claimant abandoned major heads of claim, including commission and share options, only at the start of the hearing despite pursuing them since April 2025 and being warned they were hopeless. They said the remaining claims for wrongful dismissal and pension contributions were plainly unsustainable on the contract and contemporaneous evidence. The Claimant ignored strike-out warnings and settlement offers and had specialist legal advice throughout.

4. The Respondent's Schedule of Costs totaled £25,314, but the application was limited to £20,000 under Rule 76(1)(a). The Respondent invited the Tribunal to make an order for £20,000 to avoid the disproportionate effort and expense of a detailed assessment. Attached to the application were the Schedule of Costs, a draft order for £20,000, and correspondence concerning the settlement offer of £2,568.30 made in March 2025.

5. The Claimant responded to the Respondent's application on 25 November 2025. He acknowledged that his claims for wrongful dismissal and unpaid pension contributions had been dismissed but argued that he had acted reasonably throughout the proceedings. The Claimant explained that he had been legally unrepresented for most of the case, drafting his own ET1, schedule of loss, disclosure requests, bundle, and witness statement. Bindmans LLP had only provided limited advice and instructed counsel shortly before the final hearing. He stated that he discontinued his claims for commission, share options, and breach of the ACAS Code only after receiving advice from Counsel on the morning of the hearing, and therefore could not have acted earlier.

6. The Claimant contended that there were significant factual disputes about his conduct and state of mind, as well as a non-trivial legal argument regarding the pension clause. He argued that the Respondent had provided no evidence to support its allegation that the claim was vexatious and maintained that a costs award would be punitive.

7. The Claimant disputed the Respondent's assertion that he owned two mortgage-free properties, stating that he part-owned one property and had a mortgage on the other. He argued that a £20,000 costs award would be disproportionate given his financial circumstances. He also challenged the proportionality of the Respondent's costs, expressing concern about duplication with costs incurred in parallel breach of confidence matters and questioning the £9,000 fee for junior counsel at a one-day hearing.

Relevant Law

8. Rule 3 of the Employment Tribunals Rules 2024 provides:

> ***3. Overriding objective***
>
> *(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.*
> *(2) Dealing with a case fairly and justly includes, so far as practicable—*
>
> *(a) ensuring that the parties are on an equal footing,*
> *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues,*
> *(c) avoiding unnecessary formality and seeking flexibility in the proceedings,*
> *(d) avoiding delay, so far as compatible with proper consideration of the issues, and*
> *(e) saving expense.*

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules, or
(b) interprets any rule or practice direction.

(4) The parties and their representatives must—

(a) assist the Tribunal to further the overriding objective, and
(b) co-operate generally with each other and with the Tribunal.

9. Rule 73 of the Rules provides:

73. Costs orders and preparation time orders

(1) A costs order is an order that the paying party make a payment to—

(a) the receiving party in respect of the costs that the receiving party has incurred while represented by a legal representative or a lay representative, or
(b) another party or witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at a hearing.

(2) A preparation time order is an order that the paying party make a payment to the receiving party in respect of the receiving party's preparation time while not represented by a legal representative.
(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings.
(4) The Tribunal may decide in the course of the proceedings that a party is entitled to either a costs order or a preparation time order but may defer its decision on the kind of order to make until a later stage in the proceedings.

10. Rule 74 of the Rules provides for when a costs order or a preparation time order may be made:

74. When a costs order or a preparation time order may or must be made

(1) The Tribunal may make a costs order or a preparation time order (as appropriate) on its own initiative or on the application of a party or, in respect of a costs order under rule 73(1)(b), a witness who has attended or has been ordered to attend to give oral evidence at a hearing.

(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
(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which that hearing begins.

(3) The Tribunal may also make a costs order or a preparation time order (as appropriate) on the application of a party where a party has been in breach of any order, rule or practice direction or where a hearing has been postponed or adjourned.

(4) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal must order the respondent to pay the costs incurred as a result of the postponement or adjournment if—

(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing, and
(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

11. Rule 75 provides:

75. Procedure

(1) A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties.

(2) The Tribunal must not make a costs order or a preparation time order against a party unless that party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order).

12. Rule 82 states that:

82. Ability to pay

In deciding whether to make a costs order, preparation time order, or wasted costs order, and if so the amount of any such order, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

13. Costs orders in the Employment Tribunal are the exception rather than the rule (*Yerrakalva v Barnsley Metropolitan Borough Council and anor* 2012 ICR 420, CA). The discretion afforded to an Employment Tribunal to make an award of costs must be exercised judicially (*Doyle v North West London Hospitals NHS Trust UKEAT/0271/11/RN*. The Employment Tribunal must take into account all of the relevant matters and circumstances.

14. "Unreasonable" has its ordinary English meaning (*Dyer v Secretary of State for Employment* EAT 183/83). A tribunal should take into account the "nature, gravity and effect" of a party's unreasonable conduct (*McPherson v BNP Paribas (London Branch)* 2004 ICR 1398, CA). This was clarified by Lord Justice Mummery in *Yerrakalva*:

"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had." (paragraph 41)

15. Litigants in person can be found to have behaved unreasonably and have costs awarded against them, whilst making allowance for their lack of experience and not holding them to the same standards as would be expected of a professional representative (*AQ Ltd v Holden* [2012] IRLR 648 EAT). In *Madu v Loughborough College* [2025] EAT 52 HHJ Tayler stated at paragraph:

"The question of whether a complaint had no reasonable prospects of success is wholly objective. However, the fact that a litigant acts in person may be relevant to whether he has acted unreasonably in pursuing the complaint. Whatever the threshold conduct, the fact that a litigant acts in person will generally be relevant to the discretionary question of whether to make an award of costs."

16. The rule in *Calderbank v Calderbank* has no place in tribunal proceedings, but a Calderbank offer is a factor a tribunal can take into account when considering what if any order for costs to make and how much, provided the rejection of the offer was unreasonable (*Raggett v John Lewis* [2012] 6 Costs LR 1053). However, the failure to beat a Calderbank offer should not, by itself, lead to an order for costs being made against the party who did not beat it (*Lake v Arco Grating UK Ltd* UKEAT/0511/04/RN).

Obstinately pressing for an "*unreasonably high award despite its success been pointed out and despite a warning that costs might be asked for or against that party were persisted in, the tribunal could in appropriate circumstances take the view that the party had conducted the proceedings unreasonably*" (*Kopel v Safeway Stores* [2003] IRLR 753 and *Power v Panasonic* UKEAT/0439/04/RN).

17. The EAT observed in *Solomon v University of Hertfordshire* UKEAT/0258/18/DA that it is: -

> *"important for an ET, when it is dealing with the question whether the conduct of litigation is unreasonable, to keep in mind that in many (though not all) circumstances there may be more than one reasonable course to take. The question for the ET is whether the course taken was reasonable; the ET must be careful not to substitute its own view but rather to review the decision taken by the litigant. Even when a party is legally represented there may be more than one reasonable course".*

18. The Respondent submits that "Vexatious" has the meaning given by Lord Bingham LCJ in *Attorney General v Barker* [2000] 1 FLR 759:

> *"[T]he hallmark of a vexatious proceeding is … that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process." (*cited with approval by the Court of Appeal in *Scott v Russell* [2013] EWCA Civ 1432, CA*).*

19. Both Rule 74(2)(b) and Rule 38 contain the wording "no reasonable prospect of success". Authorities on Rule 38 have pointed out that a claim has a reasonable prospect of success if there is "a prospect which is more than fanciful" that the claim will succeed (*A v B* [2010] EWCA Civ 1378).

20. When considering an application for costs the Tribunal should have regard to the two-stage process outlined in *Monaghan v Close Thornton* by Lindsay J at paragraph 22:

> *"Is the cost threshold triggered, e.g. was the conduct of the party against whom costs is sought unreasonable? And if so, ought the Tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances?"*

21. The Respondent submits that only if the tribunal decides to exercise its discretion to make an award of costs, the question of the amount to be awarded comes to be considered (*Haydar v Pennine Acute NHS Trust* UKEAT/0141/17).

22. Costs awards are compensatory, not punitive (*Lodwick v Southwark London Borough Council* [2004] ICR 884 CA).

Conclusions

23. There are therefore three stages in determining whether or not to award costs under Rule 74: first, whether the party has reached the threshold of establishing that a party had acted vexatiously, abusively, disruptively or otherwise unreasonably, or, that a claim had no reasonable prospects of success. Second, if the threshold has been

reached, the tribunal will go on to consider whether it is appropriate to make an order for costs. Finally, if it is appropriate to make an order for costs tribunal will go on to consider the amount.

24. In relation to his wrongful dismissal claim, the Tribunal concluded that:

> *"Instead, the Claimant disobeyed Ms Langton's reasonable instruction to leave his laptop untouched. He put his laptop into flight mode and downloaded 'Secure Eraser' software so that the Respondent would not be able to see what he had erased when the laptop was returned. The Claimant then said he had retained evidence and, depending upon their response, was going to disclose this evidence to his lawyers for consideration of onward disclosure to their competitor. This undermined his evidence to the Tribunal that he was only concerned about deleting his Personal OneDrive account and that is why he had refused to hand over his laptop without securely erasing his personal OneDrive. The Claimant's email demonstrated that he had retained sensitive information belonging to the Respondent. The Claimant's actions were willful which poisoned the relationship: they amounted to gross misconduct. I conclude that, on the balance of probabilities, the Claimant was guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract." (para 42)*

25. Rule 74(2)(b) is a backwards looking provision – the question is whether the complaint **had** no reasonable prospects of success. The Claimant knew what he had been asked to do – he knew his employer had asked him to leave his laptop untouched once they were alerted to him downloading files. He had, in opposition to that instruction, put the laptop into flight mode and downloaded a secure eraser to cover his tracks. He sent an email threatening to disclose retained evidence to his employer's competitor. The argument that this conduct was not so serious as to amount to a repudiatory breach had no reasonable prospects of success: the wrongful dismissal complaint had no reasonable prospects of success. The threshold is met.

26. There is no evidence that the effect of the litigation was to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court. The Claimant did not act vexatiously.

27. If he did not know at the time that it was unreasonable for him to bring these complaints as they had no reasonable prospects of success, he was told it was by the Respondent in its application for strike out within the Response:

> *"The claims presented have little or no reasonable prospects of success. The Claimant has less than 2 years' service and he was dismissed for downloading at least 1963 confidential company files onto a personal device. The Claimant does not deny that he did this but suggests that this was done inadvertently. The Respondents aver that this is simply not possible or true given the Claimants background in technology."*

28. Given the Claimant's willful actions, it was unreasonable conduct for him to continue with the wrongful dismissal complaint when he was explicitly warned by the Respondent that is had little or no reasonable prospect of success. The threshold is met.

29. The Claimant abandoned his claims for commission and share options at the start of the final hearing despite having pursued them from the outset of his claim in April 2025 and despite both claims forming a substantial proportion of the damages he sought (£26,250 for the commission claim, £11,993.93 for the share options). Abandoning them at the start of the hearing was an indication that he accepted they were hopeless. The Claimant also dropped the ACAS uplift at the final hearing. The Claimant says that he acted on advice from Counsel who was instructed for the hearing and so he could not have acted sooner. He was, however, previously advised by solicitors, although on a limited basis. It is not, on the face of it, unreasonable conduct to discontinue with complaints on the morning of the final hearing having received legal advice from Counsel instructed for the hearing. While I have some sympathy for the Respondent having to defend what, on the morning of the hearing, the Claimant was advised were complaints that had no reasonable prospects of success, I am mindful that I must not hold a litigant in person (with limited legal advice) to the standards as would be expected of a professional representative. I conclude this does not meet the threshold of unreasonable conduct.

30. The pension complaint is nuanced. The clause was not well drafted. It showed an intention to pay 8% but it was conditional upon "receiv[ing] all the administrative documents from NEST". The Claimant was expecting the Respondent to match the contributions that his previous employer had made. However, he did not notice that they were not paying it. I would not categorise that complaint as having no reasonable prospects of success. Nor was it unreasonable for the Claimant to pursue it. On 13 March 2025 the Respondent offered £2,568.30 to be paid towards the Claimant's pension. The Claimant refused that offer on 19 March 2025 but that was not unreasonable, he was seeking significantly more than the amount that the Respondent offered him. The threshold is not met in relation to the pension contributions complaint.

31. The threshold was not met in relation to the pension commission, the share options and commission complaints. The threshold has been met for the wrongful dismissal complaint but I must also consider whether to exercise discretion to award costs and having regard to the whole picture and all the circumstances. I have carefully considered the parties' submissions and the background history of this litigation. I appreciate that litigants in person may not necessarily have the emotional separation from the sense of grievance to see that objectively their claim has no reasonable prospects of success or that it is unreasonable for them to pursue it. However, the Claimant did have limited legal advice from solicitors throughout these proceedings and then Counsel for the final hearing, even though he conducted much of the litigation himself. He also knew the actions he had taken when his employer had asked him to leave his laptop untouched once they were alerted to him downloading files. He had, in opposition to that instruction, put the laptop into flight mode and downloaded a secure eraser to cover his tracks. He sent an email threatening to disclose retained evidence to his employer's competitor. Even if he felt a strong sense of grievance, it should have been clear to him that the complaint had little reasonable prospects of success and that it was unreasonable to pursue it.

32. The Claimant's wrongful dismissal complaint objectively had no reasonable prospects of success and he acted unreasonably in continuing to pursue it. In terms of the nature, gravity and effect, it meant that the Respondent was put to the expense of litigating and defending the complaint throughout the proceedings and at the one day final hearing. I have decided it is appropriate to exercise discretion to award costs.

33. I have scrutinised the sums claimed by the Respondent for legal costs. The Claimant says that some of those costs could be duplicated as parallel to these employment

proceedings the Respondent commenced legal proceedings against the Claimant for alleged breaches of confidence in relation to the retention of the Respondent's data and his use of that data to support his claims in these employment proceedings. Further, some of the costs relate to the pension contributions, share options and commission complaints, which I have decided did not meet the threshold. I am also mindful that there must be proportionality (Rule 3). While the Claimant was asking for relatively large sums up until the morning of the hearing, the final hearing was only listed for one day.

34. Doing the best I can on the limited evidence before me, I consider an award of £5,000 represents an appropriate contribution towards the Respondent's costs. I am satisfied this reasonably reflects the extent of the Claimant's unreasonable conduct and pursuance of the complaint that had no reasonable prospects of success whilst ensuring proportionality.

35. I have not been provided with evidence regarding the Claimant's means. However, I do take note of the Claimant's submissions about the property he jointly owns and the mortgage. I also take note of the well paid job that the Claimant moved on to.

36. In all the circumstances, I find the sum of £5,000 strikes a fair balance between recognising the Respondent's unnecessary expenditure resulting from the Claimant bring a complaint with no reasonable prospects of success/unreasonable conduct whilst avoiding undue hardship on the Claimant.

37. For these reasons, I order that the Claimant shall pay the Respondent the total sum of £5,000 as a contribution to its costs incurred in these proceedings. Such costs are to be paid by the Claimant within 28 days of the date this Judgment is sent to the parties.

Approved by:

Employment Judge Burge

9 December 2025

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision. If written reasons are provided they will be placed online.

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at https://www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found at www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/