



# EMPLOYMENT TRIBUNALS

**Claimant:** Idowu Dahunsi

**Respondent:** London Borough of Southwark

## JUDGMENT ON COSTS

The respondent's application for a costs order fails. No order for costs is made against the claimant in respect of the respondent's costs of resisting the claimant's claims.

## REASONS

### Application for costs

1. By an application dated 26 August 2025, the respondent makes an application for a costs award of £23086 against the claimant.
2. The application is made on the basis that it is alleged that the claimant acted vexatiously, abusively, disruptively, or otherwise unreasonably in bringing the proceedings against the respondent or in the way proceedings have been conducted. The respondent relies on the fact that the respondent reserved its position to seek costs in the grounds of resistance and the amended grounds of resistance and on a costs warning contained in a letter to the claimant dated 9 May 2025 of which the Tribunal does not have sight.

### Claimant's response

3. In response the claimant submitted a response to the costs application, dated 5 December 2025.
4. The claimant opposes the respondent's application on the basis, inter alia, that she is a disabled person, that she brought her claim in good faith and that her conduct throughout the proceedings was reasonable and proportionate. The claimant also submitted a financial hardship declaration.
5. The application has been dealt with by EJ Rice-Birchall in writing, without a hearing, and alone in accordance with paragraph 18 of the Presidential Guidance on Panel composition.

## **Background**

6. The claimant was employed by the respondent, a local authority, as a Business Services Manager, from 4 February 2019. She has now left her employment under redundancy, although at all material times for this claim she was employed.
7. In fact, the material time for the purposes of this claim is the period leading up to her claim which was brought on 8 February 2024, commencing in the period following lockdown in which the respondent was seeking to effect a return to the workplace for all staff. The most notable event in that period was the refusal of the claimant's return to work request on 2 October 2023. Early conciliation started on 30 November 2023 and ended on 11 January 2024.
8. The claim was about an alleged failure to make reasonable adjustments. The respondent's defence was that they acted reasonably at all times.
9. Disability, in relation to pulmonary sarcoidosis, was conceded by the respondent. The claimant had pulmonary sarcoidosis since prior to her employment with the respondent.
10. The claimant withdrew the allegations of race discrimination. The Tribunal dismissed all of the claimant's remaining claims. Written reasons were provided.

## **Findings of Fact Relevant to the issues**

### The claim

11. The claimant was unrepresented throughout these proceedings.

### Costs warnings

12. In its grounds of resistance dated 13 March 2025, the respondent included the following paragraph: "Moreover, the respondent reserves the right to make an application for costs against the claimant at a Preliminary hearing or any other hearing under rule 76 (1) and (2) of the Employment Tribunal Regulations 2013."
13. Following a preliminary hearing for case management, the respondent submitted an amended response which contained the same wording.
14. The Tribunal is told that a further costs warning letter was sent to the claimant on 9 May 2025, but the Tribunal has not had sight of that letter, nor did the respondent's application set out what was said within it.

### Respondent's costs

15. The respondent says it has incurred costs of £23,086 "representing legal fees and associated costs incurred in defending the claim." No further detail is provided.

## Claimant's arguments in response

16. In response to the respondent's costs application, the claimant states the following:
- a. That she is a disabled person;
  - b. That her claim was brought in good faith and arose from genuine concerns about health and safety;
  - c. That at all times her conduct was reasonable, proportionate and compliant with Tribunal procedure;
  - d. That an award for costs would further worsen her health problems;
  - e. That her claim followed long delays by the respondent responding to her flexible working request;
  - f. That the outcome of her grievance was to find fault with her manager's handling of her grievance;
  - g. That the respondent later re-advertises a post in the same team with home working and hybrid options, allegedly contradicting their position during her employment;
  - h. The legal test for the Tribunal to award costs is not satisfied.

## The claimant's means

17. The claimant submitted a "Financial Hardship Declaration" which confirmed that the claimant is currently unemployed, receiving "modest" pension income. She rents her home and does not own any property. She has no significant savings or financial assets. Her monthly expenses include rent, utilities, food, transport and medical related costs. No further detail was given.

## **Law**

### The Tribunal Rules

18. Rule 74 of the Employment Tribunal Rules 2024 provides so far as is relevant: "When a costs order or a preparation time order may or shall be made 74.— (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, 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) or the way that the proceedings (or part) have been conducted.

### The test

19. This legal test applies whatever the complaint. The Employment Tribunal must determine whether one of the threshold criteria apply, such as that a party has acted unreasonably, and then decide whether to exercise the discretion to award costs: **Robinson v Hall Gregory Recruitment Ltd** [2014] IRLR 761. These are two separate stages of the decision making process.
20. The first stage of the test (the threshold test) is an objective one. For example, did the claim or defence, in fact, have no reasonable prospect of success at the start of the litigation, even though the party did not realise it at the time.

21. The second stage of the test (when the tribunal exercises its discretion) is subjective. For example, at the time, did the party know, or ought they have reasonably known, that its claim or defence had no reasonable prospect of success.
22. When considering these questions, the tribunal must be careful not to be influenced by the hindsight of taking account of things that were not, and could not have reasonably been, known at the start of the litigation. However, it may have regard to any evidence or information that is available to it when it considers these questions, and which casts light on what was, or could reasonably, have been known, at the start of the litigation.
23. The courts have repeatedly emphasised that costs in the Employment Tribunal are the exception not the rule, but that is on the basis that the costs regime in the Rules is tightly circumscribed and costs do not follow the event. There is no authority for any additional general test of exceptionality.

### The threshold criteria

*Acting vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted/ no reasonable prospect of success*

24. For conduct to be vexatious, there must be evidence of some spite or desire to harass the other side, simply being misguided is not sufficient. As regards unreasonable conduct, the Tribunal has to take into account the nature, gravity and effect of a party's unreasonable conduct.
25. The failure to accept an offer might also be relevant, although it does not of itself constitute unreasonable action in the bringing or conducting of proceedings (see **Anderson v Cheltenham and Gloucester PLC** [2013] 12 WLUK 163).
26. In **Kopel v Safeway Stores plc** [2003] IRLR 753 the claimant was found to have unreasonably refused a generous settlement offer in respect of claims that were "frankly ludicrous" and "seriously misconceived". The EAT held that the civil court rule in **Calderbank v Calderbank** [1975] 3 WLR 586, that a claimant who succeeds on liability but is awarded the same or less than a settlement sum previously offered by the defendant is responsible for their own costs and those of the defendant from the date the settlement was offered, had no place in the employment tribunal. However, a claimant's refusal of an offer was a factor that could be taken into account when a tribunal was deciding whether or not to make a costs order. In these circumstances, the tribunal had been entitled to find that the claimant had acted unreasonably in conducting proceedings and had been entitled to order that they pay costs.
27. In **National Oilwell Varco UK Ltd v Van de Ruit** UKEAT/0006/14 the Employment Appeal Tribunal noted in terms of abusive, disruptive or unreasonable conduct, "unreasonableness" bears its ordinary meaning and should not be taken to be equivalent of "vexatious".

28. **Radia -v- Jefferies International Ltd (2020)** IRLR 431 notes that tribunals should focus on what the parties knew about their cases at the time, not what the tribunal knows after hearing the evidence.

29. In **Radia** the EAT also said:

'61. It is well-established that the first question for a Tribunal considering a costs application is whether the costs threshold is crossed, in the sense that at least one of Rule 76(1)(a) or (b) is made out. If so, it does not automatically follow that a costs order will be made. Rather, this means that the Tribunal may make a costs order, and shall consider whether to do so. That is the second stage, and it involves the exercise by the Tribunal of a judicial discretion. If it decides in principle to make a costs order, the Tribunal must consider the amount in accordance with Rule 78. Rule 84 provides that, in deciding both whether to make a costs order, and if so, in what amount, the Tribunal may have regard to ability to pay.

62. At the first stage, accordingly, it is sufficient if either Rule 76(1)(a) (through at least one sub-route) or Rule 76(1)(b) is found to be fulfilled. There is an element of potential overlap between (a) and (b). The Tribunal may consider, in a given case, under (a), that a complainant acted unreasonably, in bringing, or continuing the proceedings, because they had no reasonable prospect of success, and that was something which they knew; but it may also conclude that the case crosses the threshold under (b) simply because the claims, in fact, in the Tribunal's view, had no reasonable prospect of success, even though the complainant did not realise it at the time. The test is an objective one, and therefore turns not on whether they thought they had a good case, but whether they actually did.

63. In this regard, the remarks in earlier authorities, about the meaning of "misconceived" in Rule 40(3) in the 2004 Rules of Procedure, are equally applicable to this replacement threshold test in the 2013 Rules. See in particular Vaughan v London Borough of Lewisham [2013] IRLR 713 at paragraphs 8 and 14(6). However, in such a case, what the party actually thought or knew, or could reasonably be expected to have appreciated, about the prospects of success, may, and usually will, be highly relevant at the second stage, of exercise of the discretion.

64. This means that, in practice, where costs are sought both through the Rule 76(1)(a) and the Rule 76(1)(b) route, and the conduct said to be unreasonable under (a) is the bringing, or continuation, of claims which had no reasonable prospect of success, the key issues for overall consideration by the Tribunal will, in either case, likely be the same (though there may be other considerations, of course, in particular at the second stage). Did the complaints, in fact, have no reasonable prospect of success? If so, did the complainant in fact know or appreciate that? If not, ought they, reasonably, to have known or appreciated that?

30. Where the case falls into a category in which costs may be awarded, the Tribunal has wide and unfettered discretion. This discretion will be exercised having regard to all the circumstances. A Tribunal must not move from a finding that conduct was vexatious, abusive, disruptive or unreasonable to the making of a costs order without first considering whether it should exercise its discretion to do so.
31. Factors which might be relevant to the Tribunal's discretion include: the fact that costs in the Tribunal will be the exception rather than the rule; whether there might be costs warnings; and whether the claimant was represented.
32. 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.
33. The respondent also refers the Tribunal to the Court of Appeal decision in **Yerrakella v Barnsley MBC** [2012] ICR 420, in which Lord Justice Mummery stated: "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 the effects it had."
34. The Tribunal may have regard to the paying party's ability to pay in deciding whether to make a costs order (Rule 84). If a party asks for its means to be considered, however, the Tribunal should state whether and how it has done so.

#### The amount of costs awarded

35. Where an Employment Tribunal exercises the discretion to award costs because of unreasonable conduct it is not required to precisely align the unreasonable conduct with the costs caused by it, but it is generally necessary to have regard to the nature, gravity and effect of the unreasonable conduct: **McPherson v BNP Paribas** (London Branch) [2004] ICR 1398, CA.
36. The means of the paying party are also likely to be a relevant factor in determining the amount of the costs order (rule 82).
37. Pursuant to Rule 78(1)(a) the Tribunal may order the paying party to pay the receiving party a specified amount not exceeding £20,000 in respect of the costs of the receiving party. This is often referred to as "unassessed costs".
38. It is well established that an award of costs should be compensatory not punitive. Costs should be limited to those "reasonably and necessarily incurred".
39. When having regard to a party's ability to pay the Tribunal should balance that factor against the need to compensate the other party who has

unreasonably been put to expense. The former does not necessarily trump the latter, but it may do so.

40. In **Atta v Football Beyond Borders** [2023] Case No: 2304318/2022 [para 28]) the following was said: “However, we remind ourselves that in **Benjamin v Inverlacing Ribbon Ltd** EAT 0363/05 it was held that where a Tribunal has been asked to consider a party’s means, it should state in its reasons whether it has in fact done so and, if it has, how this has been done.

## **Conclusions**

### Is one of the threshold criteria met?

#### *Unreasonable conduct/ no reasonable prospects of success*

41. The Tribunal is not satisfied that the claimant acted vexatiously and/or abusively and/or otherwise unreasonably by pursuing her claim, nor that the claim had no reasonable prospect of success.
42. The respondent has simply said in its application that “the claim was unreasonable”, that the claimant was “put on notice of the respondent’s intention to seek costs” and that she “continued to pursue the claim despite clear warnings and the absence of merit.” However, the respondent has provided no detail of what “clear warnings” the claimant was given, other than a reservation of a right to make a costs application in the grounds, and amended grounds, of resistance.
43. There is nothing before the Tribunal to suggest that the respondent has, at any time, set out to the claimant, or indeed to the Tribunal, why exactly the claimant’s pursuance of her claim was unreasonable or was without merit.
44. The respondent says that the claimant’s claim was misconceived and the claimant should have appreciated this from the onset, but does not say how the claimant should have appreciated that or what the respondent did to make that clear.
45. Therefore, although, in fact, the complaints had no reasonable prospect of success, there was no evidence to suggest that the claimant in fact knew or appreciated that, or indeed, ought to have done so. The respondent has not set out in detail why the claims were doomed to fail, and brought that to the claimant’s attention, other than in the response where it has defended the claims.

### Should the Tribunal exercise its discretion?

46. Even if it was satisfied that the threshold test was met, the Tribunal would not exercise its discretion to award costs.
47. Costs warnings alone are not sufficient, particularly when set out in the very bland terms set out in the respondent’s grounds of resistance.
48. It is not possible to identify, on the basis of the respondent’s application, when or why it says that the claimant’s conduct was unreasonable.

49. The Tribunal has considered the claimant's means in deciding whether to exercise its discretion to award costs and is satisfied, on the limited information provided, that the claimant does not have the means to pay a costs award.
50. On balance, the Tribunal is not satisfied that the circumstances of this application are sufficiently exceptional that it should exercise its discretion to award costs.

What amount of costs should be awarded?

51. In any event, the respondent gave no breakdown of the costs incurred and it is therefore impossible to ascertain how the costs were accrued or of any hourly rate applied and it would therefore not be possible to identify what costs should be awarded.

Approved by:

**Employment Judge Rice-Birchall**  
**8 January 2026**

JUDGMENT SENT TO THE PARTIES  
ON  
19 January 2026

FOR THE TRIBUNAL OFFICE

P Wing

**Notes**

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.