EMPLOYMENT TRIBUNALS

Claimant: James Pollard

Respondent: South East Access Limited

Heard at: London South (in chambers) **On: 2 January 2026**

Before: Employment Judge N Wilson

COSTS JUDGMENT

The respondent's application for costs is refused.

REASONS

1. The respondent makes a costs application dated 19 June 2025 following the full merits hearing which took place between 20,21 and 22 May 2025.

2. The claimant has not filed any response to the application.

3. The matter has been delayed because the application was not sent to EJ Wilson until 10 November 2024. I therefore apologise for the delay in providing this Judgment which was due to the delay in me receiving the application in the first instance, followed by other judicial commitments and a period of leave between 4 December 2025 and 5 January 2026.

4. No response has been received from the claimant to the application (and he was notably copied into it) and it was made several months ago. He was also

sent the letter dated 11 November 2025 from the ET informing him the costs application had been delayed. Yet again no reply was received from him. Having considered the grounds of the application and given the delay which has already occurred I consider it is in the interests of justice and appropriate for the application to be determined without further delay. As the claimant is not being ordered to pay costs it is not necessary to wait to receive his representations. The claimant can of course make an application for reconsideration in the usual way.

5. I consider the matter can be deal with appropriately on the papers without a hearing.

6. The application is made on the grounds that the claimant has acted vexatiously, abusively, disruptively or otherwise unreasonably in the way that the proceedings have been conducted (**pursuant to Rule 74(2)(a) of the ET Rules of Procedure 2024)** and/or that the claim had no reasonable prospects of success **(pursuant to Rule 74 (2) (b) of the ET Rules of Procedure 2024).**

7. Rule 74(2) provides that: "a 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; or (b) any claim, response or reply had no reasonable prospect of success.

8. Under Rule 76(1) a costs order may – (a) 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; (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles …"

9. Under Rule 82, in deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

10. Under Rule 74 (2) (a) therefore the tribunal must find that a party (or their representative) has acted *'vexatiously, abusively, disruptively or otherwise unreasonably'.*

11. Under Rule 74 (2) (b) the tribunal must decide whether or not the claim had reasonable prospects of success.

The Relevant Legal Principles

12. The correct starting position is that an award of costs is the exception rather than the rule. As Sedley LJ stated at para 35 of his judgment in ***Gee v Shell Ltd [2003] IRLR*** "It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that in sharp distinction from ordinary litigation in the UK, losing does not ordinarily mean paying the other side's costs …" Nonetheless the Employment Tribunal has a wide discretion where an application for costs is made under Rule 76(1)(a). As per Mummery LJ at para 41 in ***Barnsley BC v Yerrakalva [2012] IRLR 78 CA*** "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 conducting the case and, in doing so, to identify the conduct, what was unreasonable about it, and what effects it had." However, the Tribunal should look at the matter in the round rather than dissecting various parts of the claim and the costs application and compartmentalising it. There is no need for the tribunal to find a causative link between the costs incurred by the party making the application for costs and the event or events that are found to be unreasonable, see ***McPherson v BNP Paribas***, and also ***Kapoor v Governing Body of Barnhill Community High School*** in which Singh J held that the receiving party does not have to prove that any specific unreasonable conduct by the paying party caused any particular costs to be incurred.

13. 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?"

14. The Tribunal Rules under Rule 74 (2) (a) impose a three-stage test: first, the tribunal must ask itself whether a party's conduct falls within rule 74(2)(a) — in other words, is its costs jurisdiction engaged?; if so, secondly, it must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party. The third stage is the determination of the amount of any award.

15. In ***Brooks v Nottingham University Hospitals NHS Trust [*2019] WLUK 271, UKEAT/0246/18** the EAT confirmed that dealing with an application for costs requires a two-stage process. The first is whether in all the circumstances the

claimant has conducted the proceedings unreasonably. If so, the second stage is to ask whether the tribunal should exercise its discretion in favour of the claiming party, having regard to all the circumstances.

16. If a tribunal considers that there has been a marked failure by a highly experienced legal practitioner to apply the standard of judgement and legal expertise expected of such a person when representing a party in tribunal proceedings, this may expose the party concerned to an order for costs on the basis that the legal representative's conduct is 'otherwise unreasonable' within the terms of rule 74(2)(a).

17. A tribunal may also make a costs order against a party who has acted abusively or disruptively in bringing or conducting proceedings (or his or her representative has done so).

18. A costs order may also be awarded against a party under rule 74(2)(a) where the party (or his or her representative) has acted unreasonably in bringing or conducting proceedings. 'Unreasonable' has its ordinary English meaning and is not to be interpreted as if it means something similar to 'vexatious' ***— Dyer v Secretary of State for Employment EAT 183/83***. It will often be the case, however, that a tribunal will find a party's conduct to be both vexatious and unreasonable. In determining whether to make an order under this ground, 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***

19. The Court of Appeal in ***Yerrakalva v Barnsley Metropolitan Borough Council and anor 2012 ICR 420, CA*** commented that it was important not to lose sight of the totality of the circumstances. The vital point in exercising the discretion to order costs (or a PTO) is to look at the whole picture. The tribunal has to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting the case and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had.

20. Under Rule 74 (2) (b) the key question to ask when deciding on 'having no reasonable prospects of success' is not whether a party thought he or she was in the right , but whether he or she had reasonable grounds for doing so. ***(Scott v Inland Revenue Commissioners 2004 ICR 1410 CA).*** The tribunal is therefore required to assess objectively whether the claim had any prospect of success at any time of its existence.

21. The fact that a party in question is a litigant in person may well be a factor that is taken into account by a tribunal when exercising its discretion to award costs.

22. With regard to the paying party's ability to pay, Rule 82 allows the tribunal to have regard to the paying party's ability to pay, but it does not have to, see ***Jilley v Birmingham and Solihull Mental Health NHS Trust [2008]***

UKEAT/0584/06 and ***Single Homeless Project v Abu [2013] UKEAT/0519/12***. The fact that a party's ability to pay is limited, does not, however, require the tribunal to assess a sum that is confined to an amount that he or she could pay- see ***Arrowsmith v Nottingham Trent University [2011] ICR 159 CA; AQ Ltd v Holden [2012] IRLR 648*** where the EAT upheld a costs order against a claimant of very limited means and per Rimer LJ "her circumstances may well improve and no doubt she hopes that they will." One reason for not taking means into account is the failure of the paying party to provide sufficient and/or credible evidence of his or her means.

23. VAT should not be included in a claim for costs if the receiving party is able to recover the VAT, see ***Raggett v John Lewis plc*** which reflects the CPR Costs Practice Direction (44PD).

Conclusion

24. The claimant represented himself in these proceedings including at the final hearing.

25. The respondent is legally represented. The respondent's solicitors rely on the following grounds to make the application;

    a. *The Claimant failed to adhere to a number of case management directions in a timely fashion – necessitating further legal expenditure which was otherwise not required. We note for example that the Claimant was asked to provide specific disclosure of certain documents (like WhatsApp messages and evidence of mitigation) by both the Respondent and the Employment Tribunal but the Claimant either refused or otherwise failed to do so. The Claimant did however seek to adduce some WhatsApp or other text messages as evidence during the course of the Final Hearing (and notably after the witness had commenced giving their evidence).*

    b. *The Respondent made the Claimant an offer to settle his claims on a without prejudice (save as to costs) basis which was rejected by the Claimant who instead persisted in the pursuit of his claims – none of which succeeded at Final Hearing.*

26. The respondent's solicitors say this was unreasonable conduct and/or the claims had no reasonable prospects of success.

27. The respondent's solicitors do not provide details of the extent of the costs incurred nor the amount they are seeking.

28. There is a lack of particularity in relation to which case management directions were not responded to in a timely fashion and the impact of this and what additional 'further' legal expenditure the respondent has incurred which was otherwise not required (given this is a ground of the application).

29. The respondent refers to one specific instance of the claimant failing to comply with an application for specific disclosure made by the respondent. EJ Hart ordered the claimant to provide the disclosure or provide an explanation to the Tribunal as to why he could not. The final hearing was listed for 20 – 23 May 2025. The request for specific disclosure was not made by the respondent until 22 April 2025. The request was made specifically because whats app messages had been disclosed by the claimant as part of his disclosure, but the respondent asserted that the screenshots did not show the telephone number of the person which whom messages were exchanged. It is noted from the bundle the whats app messages disclosed by the claimant did disclose the name of the person from whom the messages were sent to and from. The respondent was therefore able to identify whom the exchange was purported to have been between and in fact did adduce witness evidence from that person. The respondent was also asserting no remedy disclosure had been provided. It is noted within that application the respondent confirms the parties had not yet finalised the bundle for the final hearing nor exchanged witness statements. It certainly appears by this time both parties had not complied with directions orders. It is not clear why the parties had not prepared a hearing bundle at this time (even if there remained issues about disclosure a bundle could be prepared including whatever had been disclosed with any further documents which may have been ordered to be provided further to the application being made being capable of being prepared by way of a supplemental bundle) . It is also not clear from the application why neither party had prepared and exchanged witness statements by this time (again with any additional disclosure capable of being addressed in supplemental witness statements). What is evident is that based on the CMO of EJ Heath dated 1 May 2024 following a case management hearing the parties were meant to have completed disclosure by 19 June 2024 and agreed the file of documents by 24 July 2024. Exchange of witness statements were due by 14 March 2025. Any disagreement regarding disclosure and impact on the conduct of proceedings ought to have become known to the respondent as far back as June and July 2024. Yet no explanation is given for why the specific disclosure application is not made until 22 April 2025 some 4 weeks before the final hearing.

30. Notably the claimant's application is not made under Rule 74 (3) but under Rule 74 (2) (a) and (b). Under Rule 74 (2) (a) therefore the tribunal must find that a party (or their representative) has acted *'vexatiously, abusively, disruptively or otherwise unreasonably'.* Under Rule 74 (3) there is no

requirement for this finding. It is sufficient under Rule 74(3) simply that the party has been in breach of an order, rule or Practice direction. The Tribunal can only use its discretion to make an order for costs under Rule 74 (3) on the application of a party (and not on its own initiative).

31. At the start of the final hearing, I specifically asked whether the application for strike out and/or for specific disclosure was being pursued by the respondent and their representative confirmed it was not. If the disclosure was important and failure to disclose what they were seeking was prejudicial to their defence it is difficult to understand why the application was not pursued. In those circumstances we did not have the opportunity to hear from the claimant as to his reasons for the failure to provide what had been requested/ordered.

32. I take note the final hearing was not impacted and was able to proceed. Neither party raised prejudice at the material time arising from the conduct of proceedings. We made no comment or findings about unreasonable or vexatious conduct during the hearing or as part our decision.

33. The additional costs incurred by the respondent as a result of this, given the application was not pursued in any event, is difficult to see. At the time of making the specific disclosure application they also had to ask for an extension to other directions orders which they too had not complied with. This correspondence would still have been necessary in the circumstances. The application was dealt with on the papers, so no additional cost was incurred by either party having to prepare for or attend a hearing and the application was abandoned at the final hearing.

34. Insofar as the claimant adducing further evidence during the hearing is concerned. The Tribunal admitted it as it was in the interests of justice to do so and we took note the claimant was not legally represented and matters of disclosure and what may or may not have been relevant may not have been as clear to him as they would have been to a legally represented party, because of not understanding the legal framework . Admitting it in evidence again did not prejudice the respondent but it did assist the Tribunal. We did not find the claimant had conducted himself unreasonably in this regard nor that there was deliberate omission on his part.

35. It appears both parties have been guilty of noncompliance with orders prior to the final hearing.

36. It does not follow that just because one party fails to comply with orders of the Tribunal this absolves the other party, but we are looking at the matter as a whole and in all the circumstances of this case find that on balance considering the nature of the alleged conduct, its gravity and the effect the claimant's

conduct falls below the threshold for engaging Rule 74. The first stage of the test for awarding costs is therefore not met.

37. Even if I had found the first stage had been met, I would not have exercised my discretion in favour of awarding costs against the claimant having regard to all the circumstances.

38. The respondent has also not persuaded me what was unreasonable about the claimant rejecting an offer made by the respondent. Having considered the claims brought by the claimant whilst he did not succeed with them I have considered whether he had any prospects of success at any time of its existence. The issues identified at the case management hearing (based on the claimant's ET1 and/or particulars of claim) certainly disclose triable issues. Objectively (at a high level) the claimant's case is that he made health and safety disclosures and was dismissed as a result. He also alleged sexual harassment from a female customer of the respondent which he says he reported to the respondent and they took no action. His claim was that he was treated less favourably than a female employee would have been in the same circumstances. He also made a claim for wrongful dismissal (notice pay).

39. Having heard the evidence at trial we did in fact find the claimant did make qualifying disclosures. However, we were not persuaded he was dismissed as result. This was only able to be determined after hearing the evidence and having regard to the relevant disclosure in the hearing bundle. Crucially we preferred the account of one witness to the claimant's in relation to a meeting which took place on 21 March 2023. Again, this was only able to be decided having heard witness evidence.

40. In relation to the allegation of sex discrimination we did find the claimant had complained about an incident of sexual harassment from a customer. Again, we preferred the respondent's witness' account about what action was or was not alleged to have been taken as a result by the respondent. Again, there was a difference in accounts between witnesses about what had been said and agreed, and we had to make findings about whose account we preferred after having heard from the witnesses.

41. We also had to make findings of fact about the claimant's probationary period and whether it had been signed off prior to his dismissal which was relevant to the notice pay claim.

42. Objectively, based on the allegations pleaded, the list of issues and our findings of fact I do not find the claimant's claims at any time had no reasonable prospects of success as much of the claims turned on witness evidence. The issues were triable.

43. Fort these reasons I find Rule 74 is not engaged. The first stage of the test for awarding costs under Rule 74 (2) (b) is accordingly also not met.

44. For all those reasons I find that the respondent's application for costs is refused.

45. However, I add for both parties and their legal representatives this decision is based on the circumstances as a whole of this case and the specific application made. It should not be considered as a green light for parties to disregard /fail to comply with Tribunal Orders and assume there will be no costs consequences.

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Employment Judge N Wilson
Dated: 2 January 2026

Sent to the parties on:

23 March 2026
For the Tribunal Office:
O.Miranda