EMPLOYMENT TRIBUNALS

Claimant: **Mr M. Sheppard**

Respondent: **Nestle UK Ltd**

JUDGMENT

The judgment of the Tribunal is that: -

1. **the Claimant's case is struck out (1) because he has failed to comply with Tribunal orders (2) because he has conducted the proceedings unreasonably and (3) because he has failed actively to pursue his case;**

2. **he shall pay to the Respondent the amount of £12,606 in respect of its legal costs.**

REASONS

Background to the application

1. By an order dated 19 March 2026, sent to the parties on 20 March 2026. I made an unless order providing for the automatic dismissal of the claim if the Claimant did not, by 27 March 2026, explain his non-attendance at the hearing on that date with supporting medical evidence.

2. Further, I warned the Claimant that I was considering striking his case out on the grounds of repeated non-compliance with Tribunal orders, unreasonable conduct of the proceedings, failure actively to pursue the case, and that a fair trial was no longer possible.

3. I gave the Claimant an opportunity to make written representations on the Respondent's applications for a strike-out and for its costs by 16 April 2026; I gave him an opportunity to provide evidence of his means; I was clear that I intended to deal with both applications on the papers and that, if he did not make representations, the applications would still be decided.

4. I set out my reasons for making these orders in the order. I reproduce those reasons here for convenience:

1. The claim form was presented on 18 March 2024, after an ACAS early conciliation period between 12 January 2024 and 23 February 2024.

2. There was a preliminary hearing on 29 July 2024 before EJ Housego. At that hearing the Judge clarified the nature and scope of the Claimant's claims, refused the Respondent's applications for strike-out and for a deposit order and made detailed case management orders. The Judge also recorded that the Claimant has severe dyslexia and will require additional time when referred to documents at the final hearing. The case was listed for final hearing over five days on 25-28 November and 2 December 2025 (in person).

3. On 18 November 2024 REJ Burgher ordered that there should be a 2-hour PH to consider adjustments for the final hearing, having regard to the Claimant's dyslexia. On 20 November 2024 that hearing was listed for 27 March 2025.

4. On 24 February 2025, the Respondent's representative emailed the Claimant with an updated hearing bundle, reminding him that EJ Housego had ordered the parties to exchange witness statements on 28 February 2024. She suggested an extension of time to 28 March 2025 to give the Claimant further time to review the bundle. The Claimant replied:

   > 'Thank you for sending me the updated information. Please could we extend the deadline to the 28th of March. As soon as I have the witness statements, I will forward these to you.'

5. On 26 February 2025, the Respondent wrote to the Claimant saying that the Respondent would notify the Tribunal about the extension. She explained that witness statements are usually exchanged simultaneously and proposed 4pm on 28 March 2025 as the time for exchange, asking the Claimant to confirm his agreement to that proposal. On 27 February 2025, Ms Dixon informed the Tribunal about the agreed extension.

6. The preliminary hearing on 27 March 2025 was conducted by EJ Elgot. The Claimant attended, assisted by his partner. Adjustments for the final hearing were discussed and agreed. The Claimant explained that his partner would read documents to him, which enables him to understand and absorb them.

7. At the hearing it was agreed that the deadline for exchanging witness statements should be extended to 24 April 2025.

8. The Respondent contacted the Claimant on that date by phone at 10:09, by email at 10:10 and again by phone at 11:05 and 13:39 asking him to confirm that he would be ready to exchange at 4p.m. He did not take the calls or reply to the email. At 16:09 the Respondent sent him their statements, password protected, the password to be provided on receipt of the Claimant's statement. He did not reply.

9. On 2 May 2025 the Respondent phoned the Claimant and left a voicemail asking him to call back; he did not do so.

10. On 8 May 2025, Ms Dixon wrote to the Claimant noting that, despite earlier emails of 25 April, his witness statements had still not been received. She recorded that several attempts had been made to telephone him without success and warned that, if he did not respond by 9 May, the Respondent would apply for an unless order seeking dismissal for continued non-compliance.

11. The Respondent phoned the Claimant on 12 May 2025; he did not pick up.

12. The Respondent phoned the Claimant on 28 May 2025; he did not pick up.

13. On the same day, the Respondent applied for an unless order, requiring the Claimant to provide his witness statement within 7 days of the order.

14. That application was dealt with on 14 July 2025. EJ Carpenter refused the Respondent's application for an unless order. The Claimant was nonetheless reminded of the obligation to comply with the Case Management Orders and to remedy any non-compliance promptly.

15. The Respondent wrote to the Claimant on 18 July 2025 asking him to confirm whether he intended to comply with the Case Management Orders and to provide his witness statements by 1 August 2025, followed by a phone call that the Claimant declined. By that stage the exchange of witness statements was more than three months overdue; the Claimant had given no explanation for his non-compliance or failure to engage.

16. On 12 August 2025 the Respondent renewed its application for an unless order.

17. The Respondent phoned the Claimant on 18 July 2025; he did not pick up.

18. On 13 October 2025, the Tribunal ordered the Claimant to confirm to the Respondent and to the Tribunal by 17 October 2025 that he was ready to exchange witness statements with the Respondent. He was warned that, if he did not do so, an Employment Judge may strike his case out because a fair hearing was no longer possible.

19. The Claimant did not comply.

20. On 20 October 2025 the Respondent applied to strike out the Claimant's case on the basis that a fair hearing was no longer possible.

21. On 24 November 2025, EJ Crosfill noted that the Claimant had failed to provide any witness statements and had not engaged with correspondence for many months. As a fair trial on 25 November 2025 was no longer appeared possible, he postponed the Final Hearing and listed a public Preliminary Hearing for 2 December 2025 to determine whether the claim, or parts of it, should be struck out for non-compliance, failure actively to pursue, or unreasonable conduct, and to consider any related costs.

22. On 28 November 2025, the Respondent lodged an application for costs.

23. On 1 December 2025 the Tribunal vacated the hearing on 2 December because of lack of judicial resources. On 4 December this hearing was listed:

> 'At the hearing, an Employment Judge will decide whether the Claimant's claims, or some of them, should be struck out on the basis that the Claimant has not complied with an order of the tribunal and/or that he has not actively pursued his claim and/or that he has behaved unreasonably. The tribunal may also consider any application for costs arising out of the need to postpone the final hearing.'

24. The Claimant made no attempt to contact the Respondent or the Tribunal between 24 November 2025 and today, apart from a single WP communication with the Respondent through ACAS the day before this hearing.

Summary of the position

25. By way of summary, the Claimant breached the order of EJ Elgot to exchange his statement on 24 April 2025; did not respond to the very substantial efforts the Respondent has made to contact him before and after that date; he has not replied to any of their emails or phone calls; he ignored EJ Carpenter's warning of 14 July 2025 to remedy his failure to exchange his witness statement promptly; he failed to comply with the Tribunal's order of 13 October 2025 to confirm that he was ready to exchange statements by 17 October 2025; he did not provide a witness statement before the dates listed for the final hearing, which had to be vacated.

The hearing

26. At around 09:00 this morning, the Tribunal office received a message from the central Loughborough ET call centre that the Claimant had called to say he was going to hospital; he had been asked to email the Tribunal to confirm this. The office monitored the East London Employment Tribunal mailbox for any emails. At 09:30, the office confirmed to me that no email had been received from the Claimant notifying the Tribunal whether he would be attending the hearing that morning.

27. I asked my clerk to phone the Claimant, who took her call at 10:47. He told her that he would not be attending the hearing today because he was currently in A&E. He said he had sent

the Tribunal an email earlier this morning. I asked her to phone him again and ask him to re-send his email.

28. It emerged that Ms Parry (the Claimant's partner) had sent an email to the Tribunal at 09:06 - without putting the case name or number on the subject header - which read:

> 'Marc Sheppard is due for a preliminary hearing today. Unfortunately he has to go to hospital due to a back injury. I am sending this on his behalf due to his dyslexia.'

29. At 10:50 Ms Parry sent a photograph of what appeared to the Claimant's arm with an NHS armband on it.

30. The Claimant had made no application to postpone the hearing. There was no medical evidence to explain his non-attendance. There was no detailed information as to why the Claimant had had to go to hospital on the day of the hearing.

31. The Respondent had incurred the cost of attendance. The Tribunal had assigned a day of judicial and administrative time to the hearing. As things stand, there was no adequate explanation for the Claimant's non-attendance. I decided to proceed in the Claimant's absence and to give him an opportunity to make representations in writing, should he wish to do so, as to why the Respondent's applications should be rejected.

The Respondent's submissions on strike-out

32. Mr Kapadia (Counsel for the Respondent) submitted that the Claimant's case should be struck out on multiple grounds.

33. First, he set out the Claimant's repeated and serious non-compliance with Tribunal orders, specifically his failure to serve a witness statement despite numerous extensions, reminders, telephone calls and emails. The Claimant had been given multiple opportunities to comply yet had never provided a witness statement.

34. Secondly, he argued that the Claimant had failed actively to pursue his case. He had not engaged meaningfully with the Respondent or the Tribunal since 27 March 2025.

35. Thirdly, Mr Kapadia submitted that the Claimant's conduct of the litigation had been unreasonable, given his refusal to respond to correspondence, answer phone calls, or engage with case management directions, and his failure to provide any explanation for this persistent non-engagement. They noted that none of this behaviour was attributable to his dyslexia, since he had had ample time to absorb information and act on it.

36. Fourthly, he contended that, as a result of this non-compliance and non-engagement, a fair trial was no longer possible; indeed the dates listed for the hearing had been vacated for that very reason. He referred me to the case of *Emuemukoro v Croma Vigilant (Scotland) Ltd*, which makes clear that a Tribunal may strike out a claim where a fair trial within the allotted trial window is no longer possible, and that fairness is not limited to the narrow question of whether witnesses' memories remain sufficiently intact. Instead, fairness must also account for the undue expenditure of time and money, the demands of other litigants, and the finite resources of the court, which all sit squarely within the overriding objective. A trial could almost always be made possible if unlimited time and resources were deployed, but doing so without regard to delay, cost, and the impact on other court users would itself be inconsistent with fairness. The test is therefore broader than whether a trial is physically feasible: it includes whether, in the circumstances, requiring the Tribunal and the parties to continue would be disproportionate and contrary to the efficient and fair administration of justice.

37. Taken together, the Respondent submitted that the case met every ground under Rule 37 for strike-out: persistent breach of orders, failure to pursue the claim, unreasonable conduct, and the impossibility of a fair hearing.

Costs

38. Mr Kapadia submitted that a costs order was justified because the Claimant's conduct of the proceedings from 25 April 2025 to 19 March 2026 had been exceptionally unreasonable,

consisting of repeated failures to comply with Tribunal orders, persistent refusal to engage with correspondence or phone calls, and a wholesale failure to provide a witness statement despite multiple extensions and reminders. He argued that this prolonged non-engagement had forced the Respondent to incur substantial and avoidable legal costs in chasing the Claimant, preparing applications, and attending hearings that should not have been necessary. The Respondent emphasised that none of the Claimant's behaviour was attributable to his dyslexia, because he was plainly able to read communications - as evidenced by his knowing not to attend the final hearing and knowing of the present hearing - and his choice not to respond amounted to deliberate disregard of the process.

39. He further submitted that, given the exceptional nature of the Claimant's conduct, the Tribunal should exercise its discretion to award the full amount set out in the Respondent's schedule of costs, including the solicitors' work (undertaken largely at associate level to minimise expense) and Counsel's brief fees for the vacated final hearing and the preliminary hearing.

Unless order

40. In relation to the Claimant's non-attendance today, I have decided to make an unless order, requiring him to provide an explanation for his absence supported by evidence. In doing so, I had regard to the serious nature of the sanction, to the overriding objective and the requirement of proportionality.

41. The Claimant has, over a prolonged period, repeatedly failed to comply with Tribunal orders, failed to engage with correspondence or telephone calls, and failed actively to pursue his claim; against that background, his absence today is wholly unexplained, save for a late and unsupported assertion of hospital attendance, which provides no adequate account of why he could not attend.

42. If the Claimant provides an explanation and accompanying evidence by the date set, his case will not stand dismissed. I will go on to consider the adequacy of the explanation/evidence when considering the Respondent's applications.

43. If he does not provide an explanation/evidence at all, I consider that would effectively be confirmation of an intention on his part to disregard Tribunal orders and no longer actively to pursue his case; in that case, I consider that automatic dismissal of the case would be a proportionate step.

The Claimant's opportunity to make further submissions

44. As to the Respondent's applications, I considered it necessary, in accordance with the overriding objective, to give the Claimant a final opportunity to make written submissions. This strikes the appropriate balance between ensuring procedural fairness to the Claimant - who should be permitted to respond applications with potentially serious consequences – while preventing further delay and prejudice to the Respondent, which has engaged consistently and has already incurred unnecessary costs as a result of the Claimant's failures.

45. I have given generous time limits for the Claimant to comply with these orders so that he can seek assistance from his partner - or any other person - in replying.'

The Claimant's response to the orders

5. The Claimant purported to comply with the unless order by sending an email to the Tribunal on 24 March 2026, attaching three photographs. The first shows a wrist wearing an NHS hospital identification band bearing the name 'Sheppard Marc' and identifying numbers. The second shows a close-up of a pharmacy label for diazepam 5mg tablets issued by Harlow Pharmacy with dosage instructions and a dispensing date. The third shows a further view of the diazepam medication label, with a date of 19 March 2026, including the patient's name and dosage instructions.

6. I accept that these photographs show that the Claimant had attended A&E on the day of the hearing and had been prescribed medication. There was no other medical evidence from the hospital or his GP, not even the usual documentation given to a patient on admission and discharge.

7. His explanation in the covering email was as follows:

> 'Please find attached photo evidence as to why I could not make the hearing on the 19th of March. I did call on the morning to say I was unable to attend. My partner also emailed this information as well as I needed to go to A&E. This was due to having spasms in my back and severe back pain. This made me unable to walk two steps. I have no medical notes as I am seeing my doctor for a follow up appointment. As I need another MRI scan. As this needs to have further investigation.'

8. I consider that there has been material compliance with the unless order (albeit scant) and so the sanction of automatic dismissal does not apply.

9. However, I consider that her explanation for the Claimant's non-attendance is wholly inadequate; there is no proper medical evidence in support of his assertion of back spasm/severe back pain, or when the spasm occurred; there was no medical evidence confirming that rendered him unfit to attend the hearing; if the Claimant was 'unable to walk two steps', I think it unlikely that he was able to make his way to A&E, but not able to attend a video hearing from his own home, if only to make an application for a postponement. I have concluded that the Claimant's attendance at A&E was in part to avoid having to attend the hearing.

10. I turn now to the Respondent's strike-out and costs applications.

Strike-out

11. I set out the history of the Claimant's failure to comply with Tribunal orders and take steps to progress his case in the summary I have quoted above.

The law

12. Rule 38 of the Employment Tribunal Procedure Rules 2024 provides:

> **(1) The Tribunal may, on its own initiative or on the application of a party, strike out all or part of a claim, response or reply on any of the following grounds—**
>
> > **[…]**
> >
> > **(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;**
> >
> > **(c) for non-compliance with any of these Rules or with an order of the Tribunal;**
> >
> > **(d) that it has not been actively pursued;**
> >
> > **(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim, response or reply (or the part to be struck out).**
>
> **(2) A claim, response or reply may not be struck out unless the party advancing it has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.**

[…]

13. In deciding whether to strike out a party's case for non-compliance with an order under Rule 37(1)(c), the Tribunal must have regard to the overriding objective (Rule 2). In *Weir Valves and Controls (UK) Ltd v Armitage* [2004] ICR 371 the EAT held that this requires the Tribunal to consider all the relevant factors, including:

    13.1. the extent and magnitude of the non-compliance;

    13.2. whether the default was the responsibility of the party or his or her representative;

    13.3. what disruption, unfairness or prejudice has been caused;

    13.4. whether a fair hearing would still be possible, and

    13.5. whether striking out or some lesser remedy would be an appropriate response to the disobedience.

14. When a Tribunal is considering a strike-out on the ground of non-compliance with orders, it must consider whether such an order is a proportionate response to the non-compliance (*James v Blockbuster Entertainment Ltd* [2006] IRLR 630). The EAT held that the ET had erred by striking out the Claimants' claims on the basis that they had failed to provide schedules of loss and had not exchanged witness statements. A proportionate response required the Tribunal to consider whether there was a less drastic means of addressing the Claimants' failures and achieving a fair trial for the parties. An adjournment of the hearing, with appropriate unless orders and awards of costs, would have avoided the conclusion that a fair trial was impossible and would thereby have ensured fairness and justice as between the parties without debarring the Claimants altogether.

15. In *Arrow Nominees Inc v Blackledge* [2000] 2 BCLC 167 at [55] it was held:

> **'Further, in this context, a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court.'**

16. A Tribunal is entitled to strike a claim out when it is no longer possible to conduct a fair trial in the trial window (*Emuemukoro v Croma Vigilant (Scotland) Ltd.*):

> **'I do not accept [Counsel's] proposition that the power can only be triggered where a fair trial is rendered impossible in an absolute sense. That approach would not take account of all the factors that are relevant to a fair trial which the Court of Appeal in Arrow Nominees set out. These include, as I have already mentioned, the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court. These are factors which are consistent with taking into account the overriding objective. If [Counsel's] proposition were correct, then these considerations would all be subordinated to the feasibility of conducting a trial whilst the memories of witnesses remain sufficiently intact to deal with the issues. In my judgment, the question of fairness in this context is not confined to that issue alone, albeit that it is an important one to take into account. It would almost always be possible to have a trial of the issues if enough time and resources are thrown at it and if scant regard were paid to the consequences of delay and costs for the other parties. However, it would clearly be inconsistent with the notion of fairness generally, and the overriding objective, if the fairness question had to be considered without regard to such matters.'**

17. Striking out a case for failure actively to pursue it will usually be appropriate where the default is intentional and contumelious (showing disrespect or contempt for the Tribunal and/or its procedures); or the conduct has resulted in inordinate and inexcusable delay such as to give rise to a substantial risk that a fair trial would not be possible or there would be serious prejudice to the other party (*Rolls Royce plc v Riddle* [2008] IRLR 873, EAT).

18. The overriding objective also provides as follows:

> **The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.**

19. In *Smith v Tesco Stores Limited* [2023] EAT 11 at [34], HHJ Tayler noted that parties are not merely requested to assist the Tribunal in furthering the overriding objective, they are required to do so.

Conclusion

20. Dealing first with the Claimant's non-compliance with orders, I have concluded that its extent and magnitude has been wholesale and sustained. He has never complied with the central order to exchange witness statements, originally due on 24 April 2025 and extended thereafter. That default persisted for many months: he failed to respond to repeated emails and telephone calls in April, May and July 2025, did not engage with correspondence warning of an unless application, failed to comply with the Tribunal's order of 13 October 2025 requiring confirmation of readiness to exchange, and never provided a witness statement before the listed final hearing, which was consequently vacated. This amounts to non-compliance.

21. The default was entirely the Claimant's responsibility. There is no evidence that matters outside his control prevented compliance. He was able to communicate when he chose, for example in February 2025 when requesting an extension, and attended the preliminary hearing on 27 March 2025 with his partner, where adjustments were considered. Thereafter, he failed to engage. His dyslexia does not explain or excuse this: adjustments were identified, he had assistance, and he was given ample time. His subsequent conduct, including his failure to engage with this strike-out application, is consistent with a conscious decision not to participate.

22. The disruption, unfairness and prejudice caused has been very substantial. The Respondent has incurred significant time and cost attempting to secure compliance. Most significantly, the five-day final hearing had to be vacated because no witness statement had been provided, resulting in wasted Tribunal resources and clear prejudice to the Respondent.

23. I am satisfied that a fair hearing is no longer possible. The absence of any witness statement means the case is not ready for trial, and the Claimant's continued non-engagement, including his failure to make meaningful representations in response to my orders, tells me that there is no realistic prospect that this will change. Fairness also includes the proper and proportionate use of Tribunal resources which, in my judgment, can no longer be achieved here.

24. I have considered whether a lesser sanction would suffice. The Claimant has already been given multiple opportunities to comply, including extensions, warnings, and a further opportunity to make representations. I have no confidence that a further extension, unless order or relisted hearing would secure compliance.

25. In all the circumstances, striking out the claim is the only proportionate response.

26. For the same reasons, I am satisfied that the Claimant has conducted these proceedings unreasonably and his case should also be struck out on that basis. His persistent non-compliance and failure to engage fall well outside the bounds of reasonable litigation conduct.

27. I am also satisfied that the claim should be struck out on the separate ground that it has not been actively pursued, applying *Rolls Royce plc v Riddle*. The Claimant has shown a prolonged and inexcusable failure to engage: he has taken no meaningful steps to progress the case since March 2025, ignored correspondence and Tribunal orders, and failed to provide the basic material required for trial. Absent any evidence to the contrary, I am satisfied that this was deliberate and contumelious disregard of the process. There is no basis to conclude that he would alter his approach if the proceedings continued. His failure to provide proper medical evidence for his non-attendance, and to make substantive representations on the strike-out and costs applications, are consistent with someone who has no serious intention of engaging.

28. It is not proportionate for further Tribunal resources, judicial and administrative, to be assigned to this case, nor would it be just to the Respondent or other litigants. A fair trial is no longer possible; the case is struck out.

Costs: the law to be applied

29. Rule 74 of the Employment Tribunal Procedure Rules 2024 provides as follows (as relevant):

> **(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.**
>
> **[…]**

30. Rule 76 provides:

> **(1) A costs order may order the paying party to pay—**

> **(a) the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;**
>
> **(b) the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined—**
>
> > **(i) in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998(**1**), or by the Tribunal applying the same principles;**
>
> **[…]**

31. Orders for costs in employment Tribunals are the exception, not the rule (*Gee v Shell UK Ltd* [2003] IRLR 82 CA *per* Sedley LJ at [35]). However, the facts of a case need not be exceptional for a costs order to be made. The question is whether the relevant test is satisfied (*Vaughan v London Borough of Lewisham and others* [2013] IRLR 713).

32. The EAT in *Haydar v Pennine Acute NHS Trust* UKEAT/0141/17 held that the determination of a costs application is essentially a three-stage process (*per* Simler J at [25]):

> **'The words of the Rules are clear and require no gloss as the Court of Appeal has emphasised. They make clear (as is common ground) that there is, in effect, a three-stage process to awarding costs. The first stage - stage one - is to ask whether the trigger for making a costs order has been established either because a party or his representative has behaved unreasonably, abusively, disruptively or vexatiously in bringing or conducting the proceedings or part of them, or because the claim had no reasonable prospects of success. The trigger, if it is satisfied, is a necessary but not sufficient condition for an award of costs. Simply because the costs jurisdiction is engaged, does not mean that costs will automatically follow. This is because, at the second stage - stage two - the Tribunal must consider whether to exercise its discretion to make an award of costs. The discretion is broad and unfettered. The third stage - stage three - only arises if the Tribunal decides to exercise its discretion to make an award of costs, and involves assessing the amount of costs to be ordered in accordance with Rule 78"**

33. 'Unreasonable' has its ordinary meaning. It is not equivalent to 'vexatious' (*Dyer v Secretary of State for Employment* UKEAT/183/83).

34. Costs awards are intended to be compensatory, not punitive. The costs awarded should be no more than is proportionate to the loss caused to the receiving party by the unreasonable conduct (*Barnsley Metropolitan Council v Yerrakalva* [2012] IRLR 78). However, unlike the wasted costs jurisdiction, in exercising its discretion to order costs, the Employment Tribunal does not have to find a precise causal link between any relevant conduct and any specific costs claimed. Mummery LJ gave the following guidance at [41]:

> **'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. The main thrust of the passages cited above from my judgment in McPherson was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the**

> **circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances.'**

Conclusions

35. I remind myself that orders for costs in the Employment Tribunal are the exception rather than the rule.

36. I have already found that the Claimant has conducted these proceedings unreasonably, and the threshold for engaging the costs jurisdiction is therefore satisfied.

37. I have then considered whether it is appropriate to exercise my discretion to make a costs order. In doing so, I take into account the nature, extent and duration of the Claimant's unreasonable conduct, which persisted over many months and directly led to the vacating of the final hearing and the need for further applications and hearings. I also take into account that, although given a clear opportunity to do so, the Claimant has not made any substantive representations in opposition to the application and has not advanced any explanation which might justify or mitigate his conduct. In those circumstances, I am satisfied that this is an appropriate case in which to exercise my discretion.

38. Turning to quantum, I am satisfied that the Respondent's schedule of costs is reasonable. The costs claimed reflect work which was properly and necessarily undertaken in response to the Claimant's unreasonable conduct. I further consider that the rates charged are proportionate. There has been minimal partner supervision; the majority of the work has been done by an associate, with some input from a trainee. Counsel's fees are appropriate to his level of call.

39. In relation to the amount, I consider it just and proportionate to award the full sum claimed. Although the Claimant was given a clear opportunity to make representations and to provide evidence as to his means, he has failed to do so. In those circumstances, I am unable to take his means into account, and there is no proper basis on which to reduce the award. However, I do not award a sum in respect of VAT, as it seems probable that the Respondent will be VAT-registered, and able to reclaim the relevant sums.

40. Accordingly, I award the Respondent costs in the amount of £12,606.

Employment Judge Massarella
Date: 1 May 2026