



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms C Havers

**Respondent:** Cheshire West and Chester Council

**Heard at:** Liverpool

**On:** 24 October 2024  
(in chambers)

**Before:** Employment Judge Ainscough

## REPRESENTATION:

**Claimant:** Not in attendance

**Respondent:** Not in attendance

# JUDGMENT ON COSTS

The respondent's application for costs is unsuccessful.

# REASONS

## Introduction

1. Following a preliminary hearing on 6 August 2024, at which the claimant did not attend, the respondent made an application for costs in accordance with rule 77 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. I agreed to deal with the application without a hearing following receipt of a written response from the claimant dated 1 October 2024.

## The Proceedings

2. The claimant submitted the ET1 form on 11 January 2022 and complained about unlawful deduction from wages and detriments because of a protected disclosure/health and safety concerns.

3. On 9 February 2022 the Tribunal gave notice of a case management preliminary hearing on 19 September 2022 and notice of the final hearing from 14 November 2023 – 16 November 2023.

4. On 8 March 2022 the respondent submitted a response denying the claim.
5. On 20 May 2022 and 16 June 2022 the claimant applied to stay the proceedings as a result of her ill health. On 20 June 2022 the respondent asked the Tribunal to direct the claimant to provide further information about her ill health.
6. On 14 July 2022 the Tribunal postponed the case management preliminary hearing until 10 November 2022 and stayed the proceedings until 1 November 2022. The claimant was informed that should she require any further stay on proceedings she would need to provide medical evidence in support of her position.
7. On 3 November 2022 the claimant provided a completed agenda in preparation for the case management preliminary hearing and a schedule of loss. On 4 November 2022 the respondent provided the file of papers for use at the hearing.
8. On 9 November 2022 the claimant applied for a postponement of the case management hearing because she had been involved in an accident but was able to respond to the respondent's request for further and better particulars. The hearing was postponed but the claimant was directed to provide medical evidence about her ability to participate in the proceedings.
9. On 14 December 2022 the claimant's GP wrote directly to the Tribunal about the claimant's ill health but did not send a copy to the respondent's representative. The claimant's GP advised that the claimant had numerous physical and mental health impairments but was capable of attending telephone and video hearings. On 17 December 2022 the claimant informed the Tribunal and the respondent that she was in hospital.
10. Therefore, on 6 January 2023 the respondent applied to strike out the claim on the basis that the claimant had failed to comply with the direction to provide medical evidence. A preliminary hearing was listed for 29 March 2023.
11. On 29 January 2023 the claimant applied for a postponement of the preliminary hearing because she was still in hospital undergoing tests.
12. On 20 February 2023 the Tribunal agreed to postpone the hearing. The claimant was directed to provide further medical evidence about her condition and the Tribunal provided the respondent with a copy of the GP report dated 14 December 2022. The preliminary hearing was relisted for 24 May 2023.
13. Both parties attended the preliminary hearing. The final hearing was relisted by CVP from 20 November 2023 – 23 November 2023. The respondent withdrew the application to strike out the claim and the parties agreed orders to prepare for the final hearing.
14. On 29 May 2023 the claimant applied to amend her claim to include complaints of automatic unfair dismissal, bullying, discrimination and victimisation and payment for flexi time. The respondent objected to the amendment.
15. On 1 August 2023 the Tribunal directed the claimant to provide more details about the amendment before it would consider the application. On 14 August 2023

the claimant provided further information. The respondent continued to object to the application.

16. On 23 August 2023 the claimant made an application for specific disclosure. The respondent objected to the application on the basis that the documents requested were irrelevant to the list of issues. The Tribunal listed a preliminary hearing on 18 October 2023 to determine both applications.

17. Both parties attended the preliminary hearing, and the claimant was given permission to amend the claim to include a complaint of automatic unfair (constructive) dismissal because of a protected disclosure. The respondent was also ordered to disclose some documentation.

18. On 28 October 2023 the claimant applied to postpone the final hearing on the basis that the respondent had failed to disclose the documentation. The respondent disputed that it had failed to disclose documentation and objected to the postponement application. The claimant's application was refused on the basis any outstanding disclosure issues could be resolved at the start of the final hearing.

19. On 1 November 2023 the claimant repeated her application for a postponement on the basis that she did not have physical copies of the documents, and this had impeded her preparation of her witness statement. The respondent objected to the application.

20. On 8 November 2023 the Tribunal refused the claimant's application and reiterated that any outstanding issues about disclosure could be resolved at the start of the final hearing.

21. On 15 November 2023 the claimant made another request for a postponement on the grounds of her continued ill health and inability to prepare for the hearing. The Tribunal refused the application on the basis that the claimant had not provided any medical evidence to support her application.

22. On 16 November 2023 the claimant repeated her application and sought to rely on the GP report of 14 December 2022 and a hospital appointment on 23 November 2023. The respondent objected to the claimant's application and confirmed it was ready to progress to the final hearing.

23. The Tribunal refused the claimant's application on the basis that she had failed to provide up to date medical evidence in support and that the claimant's medical appointment could be accommodated within the hearing timetable.

24. On 18 November 2023 the claimant repeated her application for a postponement. The claimant sought to rely on the GP report of 14 December 2022 and provided evidence of a medical appointment on 20 November 2023 and asserted she was undergoing surgery on 22 November 2023. As a result, the Tribunal postponed the final hearing and listed a case management preliminary hearing for 17 May 2024.

25. On 14 December 2023 the respondent applied to strike out the claim and made an application for costs. The case management preliminary hearing was converted to

a preliminary hearing to consider the respondent's application. The claimant was directed to provide up to date medical evidence to support her application for postponement of the final hearing.

26. On 5 February 2024 the claimant informed the Tribunal that she was unable to attend any hearing due to her ill health. The claimant provided a letter from a consultant oral, facial plastic and head and neck reconstructive surgeon dated 1 December 2023 which confirmed the claimant would require surgical intervention to manage her condition.

27. On 11 February 2024 the Tribunal refused the claimant's application to postpone the hearing on the basis that she had not provided medical evidence to suggest she would be unable to attend the hearing. On 28 February 2024 the claimant stated she was awaiting further medical appointments before she could provide the necessary evidence.

28. On 7 March 2024 the Tribunal maintained the refusal of the claimant's application in the absence of adequate medical evidence in support.

29. On 18 April 2024 the claimant repeated her application for a postponement of the hearing. The claimant provided an undated letter from her dentist confirming the severity and debilitating nature of her condition. The claimant also provided an incomplete bank statement and witness statement in response to the respondent's applications.

30. The claimant's application was refused on the basis of inadequate medical information. The Tribunal gave the parties the option of determining the respondent's application in writing on the papers.

31. On 17 May 2024 the claimant made an application to postpone the preliminary hearing because she was in hospital. The Tribunal postponed the hearing but issued an Unless Order for the outstanding medical evidence in support of the claimant's condition. The preliminary hearing to determine the respondent's application was relisted for 6 August 2024. The final hearing was relisted for 6 January 2025 – 9 January 2025.

32. The claimant failed to comply with the Unless Order and her claim was dismissed on 4 July 2024. On 17 July 2024 the claimant applied to set aside the dismissal of her claim. The hearing on 6 August 2024 remained listed to consider the claimant's application.

33. At 8.55pm on 5 August 2024 the claimant applied to postpone the hearing on the grounds of her ill health. The claimant's application was refused on the basis that she had not provided medical evidence in support of her application.

34. The preliminary hearing proceeded in the claimant's absence. The Tribunal considered the claimant's written application and the respondent's response and determined that it would not be in the interests of justice to set aside the dismissal of the claim. The Tribunal determined that it would deal with the respondent's application for costs on the papers after the claimant was given a further opportunity to respond.

35. The respondent updated the application on 4 September 2024 and the claimant provided a response on 1 October 2024. I sat in chambers on 24 October 2024 to determine the application.

### **Respondent's Application**

36. The respondent made an application for costs in accordance with rule 77 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The application was made on the basis that:

- (a) The claimant had acted otherwise unreasonably in the conduct of the proceedings; and
- (b) The final hearing listed 20 November 2023 – 23 November 2023 was postponed following an application made by the claimant less than 7 days before 20 November 2023.

37. The respondent asserted that the claimant behaved unreasonably because she repeatedly applied to postpone hearings without providing supportive medical evidence.

38. The respondent submitted that it had incurred increased costs in responding to each application and in fully preparing for the final hearing.

39. The respondent maintained that the claimant misled the Tribunal when insisting that she receive documents via the postal service because she did not have access to the internet. It is the respondent's contention that the claimant has communicated with the Tribunal and the respondent via email and repeatedly failed to collect hard copy documents from the postal service.

### **Claimant's Response**

40. In a response dated 1 October 2024, the claimant repeated her application to set aside the dismissal of her claim. I have not dealt with this application as any application for reconsideration of the decision made on 6 August 2024 and sent to the parties on 23 August 2024 should have been made within 14 days of the decision being sent to the parties.

41. The claimant denied acting unreasonably. The claimant asserted that she was unable to provide medical evidence in support as her symptoms were dismissed by her local NHS Trust.

42. The claimant maintained that she has limited access to emails on a small device from which she could not produce or receive extensive correspondence.

43. The claimant submitted that she was still suffering ill health and was still awaiting surgery. The claimant supplied the same medical evidence in support of her condition and additional medical evidence that has been redacted. Unfortunately, the medical evidence does not explain why the claimant was not able to attend the final hearing.

## Relevant Legal Principles

44. Rule 76(1) states:

### **“When a costs order or a preparation time order may or shall be made**

- (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; or
  - (b) any claim or response had no reasonable prospect of success.
  - (c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

45. Rule 77 states:

### **“Procedure**

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. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.”

46. Rule 84 provides the Tribunal can have regard to the paying party’s ability to pay, but the Tribunal is not obliged to take this into account when determining whether to make a costs order.

47. In **Lodwick v Southwark London Borough Council 2004 ICR 884, CA**, the Court of Appeal determined that at both stages of the Tribunal’s discretion to make a costs award, the fundamental principle that costs awards are compensatory not punitive, must be observed.

48. In **AQ Ltd v Holden (2012) IRLR 648, EAT**, the Employment Appeals Tribunal determined that a litigant in person should not be judged by the same standards as a professional representative.

49. In **McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA**, the Court of Appeal determined that when considering unreasonable conduct, a Tribunal should look at the “nature, gravity and effect” of the unreasonable conduct.

50. In **Yerrakalva v Barnsley Metropolitan Borough Council and others (2012) ICR 420, CA** the same court said a Tribunal must look at the totality of the circumstances and reiterated that costs in the Employment Tribunal are the exception rather than the rule.

51. The issues for the Tribunal to determine were as follows:

1) Was the claimant's conduct unreasonable and/or was the final hearing postponed following an application made by the claimant less than 7 days before the start of the hearing?

2) If so, is it appropriate to exercise the discretion of the Tribunal to make a costs order?

3) If so, how much should the Tribunal award?

## **Discussion and Conclusions**

### Are the grounds made out?

52. Whether the claimant's conduct has been unreasonable is based on the facts of the proceedings.

53. In the initial stages of the proceedings the claimant made applications for postponements and was able to obtain a report from her GP on 14 December 2022 to explain the nature of her condition and how it might affect her participation in the proceedings.

54. The Tribunal granted a short stay which allowed the claimant to participate in the proceedings by providing a schedule of loss and responding to the respondent's request for further and better particulars. The claimant was also able to attend two case management preliminary hearings to allow progression of the case.

55. However, with less than a month until the final hearing, the claimant made multiple applications to postpone the hearing, firstly on the basis that disclosure was incomplete and subsequently on the basis of her continued ill health.

56. The Tribunal directed the claimant to provide the necessary medical evidence to support her application, but the claimant did not do so. The Tribunal only agreed to postpone the final hearing on 18 November 2023 when the claimant provided evidence of a medical appointment on 20 November 2023, which could not be accommodated during the final hearing timetable.

57. The claimant then subsequently made numerous applications to postpone the preliminary hearing to determine the respondent's applications to strike out the claim and for costs. The Tribunal asked the claimant to provide medical evidence to support the assertion that she could not attend any hearing, but the claimant was unable to do so.

58. The preliminary hearing was only postponed at the last minute as the claimant stated she was in hospital. The Tribunal took the draconian step of requiring the claimant to comply with an Unless Order to provide the medical evidence in support of her inability to attend hearings and admission to hospital. The claimant failed to comply with the order.

59. The hearing on 6 August 2024 was specifically listed to hear the claimant's application to set aside the dismissal of the claim but she failed to attend and did not provide medical evidence in support of her non-attendance.

60. The claimant maintains that her conduct was not unreasonable because she was unable to obtain evidence from her NHS Trust because it had dismissed her condition. However, the claimant did not attempt to provide GP records or hospital admission records to evidence her difficulties, even if the investigations had not proven conclusive.

61. The claimant had previously obtained a report from her GP in December 2022. The claimant could have provided an updated report and asked the GP to specifically comment on her ability to prepare for and attend a final hearing but did not do so.

62. I have therefore determined that from October 2023 the claimant's conduct in these proceedings was unreasonable. The consequence of the claimant's conduct led to the postponement of the final hearing less than 7 days before the start date.

63. The respondent has incurred unnecessary costs from October 2023 when dealing with responses to the claimant's multiple applications and in preparing for the final hearing.

64. The claimant knew the Tribunal required evidence of her ill health and inability to attend hearings but repeatedly failed to provide any evidence about this specific issue even when under the threat of an Unless Order.

Should a costs order be made?

65. Costs in the Tribunal are the exception rather than the rule on the outcome of a case. Despite the grounds for a costs order being met, the Tribunal must also consider whether to exercise the discretion to make a costs order.

66. Costs are compensatory and not punitive. I have made a finding that the claimant's conduct was unreasonable from October 2023 onwards. I am reminded of the determination by the Court of Appeal that I must consider the nature gravity and effect of the claimant's unreasonable behaviour and the totality of the proceedings.

67. By October 2023 the parties had completed disclosure and a file of papers for use at the hearing had been prepared. All that was left to do was exchange witness statements and attend the hearing. The bulk of the costs had been incurred by the respondent by this date.

68. The postponement of the final hearing avoided the cost of the respondent's attendance at the final hearing. However, the respondent has had to continuously respond to the claimant's applications to postpone hearings since October 2023 and had to attend a preliminary hearing on 6 August 2023 and these were unnecessary costs.

69. Despite identifying that the respondent has incurred unnecessary costs from October 2023, it is clear from the claimant's correspondence that she has struggled to engage with her NHS Trust about her condition such that she has yet to receive a conclusive diagnosis and treatment plan. This has hampered the claimant in providing



the Tribunal with the necessary conclusive evidence about her ability to attend any hearing.

70. The lack of conclusive evidence has also hampered the claimant from assessing whether she had any other evidence which would support her contention that she was struggling to continue with these proceedings in light of her ill health. The claimant was a litigant in person and did not have the benefit of independent and professional advice.

71. The claimant has provided evidence of her means. The claimant's only source of income is Universal Credit of approximately £1100 per month. Unfortunately, the respondent has not provided a breakdown of the costs incurred in these proceedings. Notwithstanding this fact, it is unlikely that the claimant would be able to pay the unnecessary costs incurred by the respondent.

72. Litigation cannot be stayed indefinitely. This would not be in accordance with the overriding objective. Whilst the claimant's conduct was unreasonable and led to unnecessary costs for the respondent from October 2023, the claimant was a litigant in person who was unwell and trying to juggle journeys through the NHS and the legal system. Consequently, the claimant was unable to consider whether there was any other medical evidence to support her position and was without the benefit of legal advice. I have therefore determined that a costs order should not be made.

Employment Judge Ainscough  
Date 23 December 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
6 January 2025

FOR THE TRIBUNAL OFFICE

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