



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J. Weare  
**Respondent:** Countrywide Estate Agents t/a Bairstow Eves  
**Heard at:** East London Hearing Centre  
**On:** 16 November 2021  
**Before:** Employment Judge Massarella

## Representation

**Claimant:** In person  
**Respondent:** Mr H. Sheehan (Counsel)

# RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. the Claimant has acted unreasonably in his conduct of these proceedings;
2. he shall pay to the Respondent the amount of £475.50 in respect of its costs, in nine monthly instalments of £50, and one of £27.50, on the first working day of each month, starting on 4 January 2022.

# REASONS

*This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was V (CVP). A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.*

## Background to the application

1. The case came before me today. I had three witness statements from the Respondent and what was described as a Respondent's bundle. There was no witness statement from the Claimant. According to the Respondent, the Claimant had never provided disclosure of his documents, and had not served a witness statement on the Respondent.
2. I concluded that, in the absence of a witness statement from the Claimant, the claims could not fairly be heard today. I postponed the case and relisted it for three days (to include liability, deliberation, judgment and remedy, if appropriate) in May 2022, when it will be heard by a judge sitting (without members) in the virtual region. I gave further directions to ensure that the case is ready for hearing by then.
3. Having announced my decision on postponement, the Respondent made an application for costs. The Claimant confirmed, both before and after the application, that he was content for it to be dealt with today, notwithstanding that he had not had notice of it. I took evidence on oath from him both as to the reason for his conduct of these proceedings and his means. Mr Sheehan cross-examined him briefly and then made submissions, to which the Claimant briefly replied. I am satisfied that the Claimant had a reasonable opportunity to make representations hearing. Furthermore, I permitted the Claimant to lodge additional documents within seven days, in order to show that (contrary to the Respondent's position) he had, in fact, made disclosure to the Respondent.

## The application

4. The Respondent seeks a costs order against the Claimant. The application is made pursuant to Rule 76, Sch. 1 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 ('the Rules'). The Respondent submits that the Claimant acted unreasonably in the way that he had conducted the proceedings, within the meaning of Rule 76(1)(a), by failing to make disclosure of his documents and failing to provide a witness statement.
5. The costs sought were essentially the costs thrown away of today's hearing:
  - 5.1. Counsel's refresher of £750 plus VAT (his brief fee was incurred on 23 September 2021, and was not claimed);
  - 5.2. the costs of those instructing him for today's hearing, including taking instructions from witnesses and preparing them for the hearing, in the amount of £500 (2 to 2.5 hours' work at either Grade A or Grade B);
  - 5.3. the cost of copying the revised bundle (to include the Claimant's documents) and couriating it to the Claimant: 500 pages at 11p per page = £60.50 plus £15 courier cost.

## The law to be applied

6. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provide as follows (as relevant):

**(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;**

[...]

7. 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).

8. 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'**

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

10. 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.'**

11. In *Pinnock v Birmingham City Council*, UKEAT/0185/13/MC at [48-50]. The EAT held:

**‘As to procedure, rule 38(9) does not require that a hearing be designated specifically as a “costs hearing” or that written notice necessarily be given of it. Rule 38(9) requires only that the party against whom an order is sought has an opportunity (which no doubt means a fair and reasonable opportunity) to give reasons why an order should not be made.**

**It is not at all unusual for an oral application to be made for a costs order. Where, as here, the order related to the costs of a specific postponement, it is usually in the interests of all parties for the matter to be addressed while the circumstances are fresh in their minds. Generally speaking, an oral application will inform the party concerned why the application is being made and in what amount; and usually it will be sufficient to permit the party concerned to reply on the day of the application.**

### **Findings of fact**

12. The Claimant was employed between 4 June 2018 and 1 December 2020 as a Lettings Branch Manager. By a claim form presented on 25 February 2021, after an ACAS early conciliation period between 1 December 2020 and 2 December 2020, the Claimant claimed unfair dismissal, a redundancy payment and breach of contract (unpaid commission payments and a payment for placing someone in the business). The Claimant alleged that there was a plan to remove him from the business and that the disciplinary proceedings, for which he was ostensibly dismissed, were a sham.
13. On 21 May 2021, the Tribunal sent the parties a notice of hearing for a one-day hearing on 23 September 2021 by CVP. The notice contained standard directions for mutual disclosure and exchange of witness statements. The order for disclosure specified that:
- ‘this includes documents relevant to financial losses and what the Claimant has done to find another job. Documents include recordings, emails, text messages, social media and other electronic information. You must send all relevant documents you have in your possession or control even if they do not support your case.
14. The order for witness statements specified that:
- ‘the Claimant and the Respondent must send each other copies of all their witness statements. A witness statement is a document containing everything relevant the witness can tell the Tribunal. Everybody who is going to be a witness at the hearing, including the Claimant, needs a witness statement.’
15. On 31 May 2021, the Claimant sent to the Tribunal, but not the Respondent, a breakdown of compensation claimed. The claim in respect of commission was approximate only.
16. On 18 June 2021, the Respondent submitted its ET3. It contended that the dismissal for conduct was fair.
17. On 10 August 2021, the Respondent applied to postpone the one-day hearing, and to relist it for a three-day hearing because, the Respondent proposed to call three witnesses and one day was not sufficient. The Claimant opposed the

application on 10 August 2021 on the ground that the Respondent had had ample opportunity to prepare for the hearing.

18. On 23 August 2021, the Respondent chased a response to its application. It also made an application for further information and disclosure. It asked for particularisation of the compensation claim. It asked the Claimant to disclose these documents by 27 August 2021, and proposed exchange of witness statements on 2 September 2021. The Respondent followed this up with a letter to the Claimant explaining exactly what he needed to do.
19. On 25 August 2021, EJ Gardiner refused the postponement request on the basis of the issues in the case were capable of being decided within the existing one-day estimate. EJ Gardiner stated that, if the Respondent required clarification of the Claimant's case, it should make a request for further information. It is apparent from this that the Respondent's letter of 23 August 2021 was not before EJ Gardiner when he made this decision.
20. The Respondent wrote to the Claimant again on 26 August 2021, saying that it had not received documents from him, and asking him to provide them, and warning him that it would apply for an unless order. The Claimant said that he thought he had already provided what was needed.
21. On 15 September 2021, the Respondent applied for an unless order against the Claimant on the basis that he had not provided disclosure, or the further information it had requested. The Respondent renewed its request for a postponement of the September hearing, and asked that it be converted to a preliminary hearing for case management. No objection was received from the Claimant.
22. On 17 September 2021, EJ Lewis acknowledged the Respondent's letter and wrote:

‘the issue of whether the Claimant has fully complied with the case management orders and his objection to providing disclosure of all relevant documents can be addressed at the hearing on 23 September 2021 by the Employment Judge, as can the time allocation and timetabling the hearing and the application to convert the hearing to a preliminary hearing closed. The Employment Judge hearing the case will make a decision having heard from the Claimant and the Respondent.
23. On the day of the hearing, the case was postponed because of a lack of judicial resources. It was relisted to 16 November 2021, without any further case management in accordance with the order of EJ Lewis. In the letter confirming the postponement, the parties were again instructed to send their documents and witness statements to the Tribunal before the hearing. The Claimant accepted that he did not do so: ‘I felt what I provided was adequate’.

#### Disclosure

24. The Respondent says that the Claimant never made the disclosure of his documents. The Claimant initially accepted this, but later said that he had made disclosure. His account as to when he did this was confused. I gave him seven days to produce the emails demonstrating this.

25. Under cover of an email sent to the Tribunal and the Respondent on 23 November 2021, he submitted 19 separate documents. The covering letter contains no explanation as to how they related to the purported disclosure of documents. The Respondent, in its submissions in response, has gone to the trouble of analysing the documents. I accept that analysis and have concluded that, for the reasons given by the Respondent, the documents do not assist the Claimant in showing that he disclosed documents, in compliance with the Tribunal's orders as part of these proceedings, in support of his case. The position in relation to the witness statement remains as set out in the following paragraphs.

Witness statements

26. The Claimant accepted that he had not produced a witness statement in accordance with the Tribunal's direction. He gave two different explanations: that he thought that the narrative contained in his ET1 would stand as his witness statement; and that he had been encountering mental health difficulties and was overwhelmed by the process. I agree with Mr Sheehan that those explanations are in tension with one another. I have concluded that neither explanation is satisfactory. The Tribunal's direction clearly stated that the Claimant was required to prepare a witness statement for himself. The fact that a date for this was given long after the claim form been presented made it obvious that this was a different document.
27. Nor am I satisfied that the Claimant's health/mental health prevented him from complying with the directions. The Claimant acknowledged that he had been well enough to conduct proceedings in the civil court relating to custody of his children. Moreover, he was able to correspond with the Respondent/Tribunal to oppose the Respondent's postponement applications and to take issue with the Respondent's proposal to remove certain pages from the bundle. Finally, he was willing and able to attend the final hearing, at which he proposed to represent himself: there was no application by him for a postponement on grounds of ill-health. There is no evidence before me that the Claimant was unable to comply with the directions for health reasons.

The Claimant's means

28. The Claimant is not in employment. He receives universal credit in the amount of £377 a month on average. He has no other income. He has no savings or investments. He does not own his own property. He separated from his wife, has a new partner, but the relationship is recent and he cannot turn to her for financial assistance. He lives with his mother, who works as a manager in a firm of estate agents. She stocks the fridge and provides food to the house. She also helps him financially, for example by paying his phone bill.
29. As for outgoings, he pays no rent. He pays £75 a month on his credit card and contributes what he can to housekeeping ('the odd £20 here or there'). Child maintenance sums are in the course of been calculated. He will incur them in the future but does not at present.
30. Consequently, although the Claimant's income is small, so are his outgoings.

## Conclusions

### Has the Claimant acted unreasonably?

31. I have concluded the threshold for a costs order has been met. I am satisfied that the Claimant has acted unreasonably. Disclosure of documents and exchange of witness statements were ordered twice by the Tribunal and sought by the Respondent both by way of applications to the Tribunal and correspondence directly with the Claimant. There is no reasonable explanation as to why the Claimant failed to provide this material.

### Should the Tribunal exercise its discretion to make an award of costs?

32. I then considered whether it was appropriate to exercise my discretion to award costs and concluded that it was. I accept Mr Sheehan's submission that the Claimant's failure to produce a witness statement, for which he provided no good explanation, was fatal to the possibility of this hearing going ahead today, and caused the Respondent to incur costs, which it would otherwise not have incurred. Had the Claimant produced a statement, the Tribunal may well have acceded to the Respondent's request that the hearing go ahead, even if it meant going part-heard: additional days would probably have been available such that the case could be concluded considerably before May 2022. I have concluded that the Claimant's failure to produce a statement was wilful: he considered that he had done enough and decided not to do more. In the circumstances, an award of costs is justified.

### What should the amount of the award be? Should the Tribunal have regard to the Claimant's means?

33. I then turned to the question of the amount of the award.
34. I considered the Respondent's calculations in its schedule of costs and concluded that the work done, the amount of time spent on it, and the charging rate were reasonable and proportionate.
35. Mr Sheehan claimed his refresher of £750. He invited me to award VAT on it. Absent any satisfactory explanation (which I gave the Respondent an opportunity to provide at the hearing) as to why costs should be awarded inclusive of VAT, I do not do so, as it seems likely that the Respondent will be VAT-registered, and able to reclaim the relevant sums.
36. I do not consider that it is just to award the costs of those instructing Mr Sheehan, as the work done by them (taking instructions, preparing witnesses for the hearing etc) was work which would have had to be done in any event, and will not now need to be done - at least the same extent - for the resumed hearing.
37. I have decided to take into account the Claimant's means. He has limited means at present, and I do not consider that it would be proportionate to award the costs of Counsel's attendance in full; I have decided to award £400, by way of a substantial contribution, while taking means into account.
38. I consider that it is just to award in full the administrative costs of £75.50 claimed in relation to copying and couriering the revised bundle to the Claimant.

39. Accordingly, I award the Respondent costs in the amount of £475.50. By way of a further adjustment because of the Claimant's means, I order that he pay this sum in nine monthly instalments of £50, and one of £27.50, on the first working day of each month, starting with 4 January 2022.

**Employment Judge Massarella  
Date: 9 December 2021**