

# THE INDUSTRIAL TRIBUNALS

CASE REF: 3322/19

**CLAIMANT:** David Porter

**RESPONDENT:** Chief Constable of the Police Service of Northern Ireland

## COSTS JUDGMENT

The unanimous judgment of the tribunal is that respondent's application for costs is refused.

### CONSTITUTION OF TRIBUNAL

**Employment Judge:** Employment Judge Orr

**Members:** Mrs F Cummins  
Mrs D Adams

### APPEARANCES:

The claimant was represented by Ms N Leonard, Barrister-at-Law, instructed by Edwards and Company Solicitors.

The respondent was represented by Mr J Kennedy, Barrister-at-Law, instructed by the Crown Solicitor's Office.

### BACKGROUND

1. The claimant presented a claim to the tribunal on 31 January 2019 claiming disability discrimination on two grounds; direct discrimination and a failure to make reasonable adjustments. At the hearing the claimant withdrew his claim of direct disability discrimination. His remaining case of reasonable adjustments related to the respondent's decision to apply its absence management policy and issue him with a formal written improvement notice following sickness absence for a period of 132 days.
2. The hearing took place on 21-22 October 2019 and 19-21 November 2019. The judgment was issued to the parties and recorded in the register on 31 January 2020. This judgment should be read in conjunction with that judgment.
3. There was no dispute between the parties that the claimant suffered from a bowel condition and a musculoskeletal back condition. The respondent accepted at all

times that the claimant's bowel condition was a disability under the Disability Discrimination Act 1995, however it disputed that the claimant's musculoskeletal back condition amounted to a disability under the legislation.

4. The unanimous judgment of the tribunal was that the claimant's musculoskeletal back condition did not amount to a disability for the reasons set out in paragraph 79 of the tribunal judgment. The tribunal further determined that even had the claimant been disabled, the respondent did not have the requisite knowledge of this disability and therefore the claimant's claim for reasonable adjustments would have also failed for the reasons set out in paragraph 81 of the judgment.
5. The respondent made an application for costs by email dated 27 February 2020 on the basis that the claimant had acted unreasonably in the bringing of the proceedings and that the claimant had no reasonable prospects of success.
6. A Review Case Management Preliminary Hearing took place on 24 August 2020 at which the parties were directed to exchange and submit written submissions, relevant authorities and agree a bundle for the purposes of the Preliminary Hearing.

## RELEVANT LAW

7. There was no dispute between the parties on the legal principles which the tribunal must apply in respect of an application for costs. The representatives helpfully provided the tribunal with a bundle containing copies of the relevant legal authorities and these were fully considered by the tribunal.
8. The tribunal's power to award costs is contained in Part 13 of Schedule 1 to the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020 ("the Rules").

*73 – (1) A tribunal may make a costs order or 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) All or part of any claim or response has no reasonable prospect of success.*

9. ***Harvey on Industrial Relations and Employment Law, Division P1 Practice and Procedure*** at paragraphs 1044-1120 sets out the tribunal's jurisdiction in relation to costs.
10. The tribunal reminded itself of the comments of Sir Hugh Griffiths in the case of ***Marler ET v Robertson [1974] ICR 72***;

*"Ordinary experience of life frequently teaches us that what is plain for us all to see once the dust of battle has subsided was far from clear to the combatants once they took up arms."*

11. The representatives referred the tribunal to the case of **Ayoola v St Christopher's Fellowship [2014] UKEAT0508/13** which summarises the relevant principles on the exercise of the discretion to award costs.

*“17. As for the principles that apply to an award of costs in the Employment Tribunal under the 2004 Rules, the first principle, which is always worth restating, is that costs in the Employment Tribunal are still the exception rather than the rule, see Gee v Shell UK Ltd [2002] IRLR 82 at page 85, Lodwick v London Borough of Southwark [2004] ICR 884 at page 890, Yerrekalva v Barnsley MBC [2012] ICR 420 at paragraph 7. Second, it is not simply enough for an Employment Tribunal to find unreasonable conduct or that a claim was misconceived. The Tribunal must then specifically address the question as to whether it is appropriate to exercise its discretion to award costs. Simply because the Tribunal's costs jurisdiction is engaged, costs will not automatically follow the event. The Employment Tribunal would still have to be satisfied that it would be appropriate to make such an order, see Robinson and Another v Hall Gregory Recruitment Ltd UKEAT/0425/13 at paragraph 15.*

*18. On this point, albeit addressing the previous costs jurisdiction under the 2001 Employment Tribunal Rules, the EAT (HHJ Peter Clark) in Criddle v Epcot Leisure Ltd [2005] EAT/0275/05 identified that an award of costs involves a two-stage process: (1) a finding of unreasonable conduct; and, separately, (2) the exercise of discretion in making an order for costs. In Criddle there was no indication in the Tribunal's Reasons that the Tribunal Chairman had carried the second stage of the requisite exercise and the EAT was not satisfied, in the absence of such indication, that the Chairman had in fact done so. The appeal was thus allowed against the costs order.*

*19. The extension of the Tribunal's costs jurisdiction to cases where the bringing of the claim was misconceived has been seen as a lowering of the threshold for making costs awards, see Gee v Shell UK Ltd per Scott Baker LJ. In such cases the question is not simply whether the paying party themselves realised that the claim was misconceived but whether they might reasonably have been expected to have realised that it was and, if so, at what point they should have so realised, see Scott v Inland Revenue Commissioners [2004] ICR 1410 CA per Sedley LJ at paragraphs 46 and 49. Equally, in the making of a costs order on the basis of unreasonable conduct, the Tribunal has to identify the conduct, stating what was unreasonable about it and what effect it had, see Barnsley MBC v Yerrekalva per Mummery LJ at paragraph 41”.*

12. Cost Orders are exceptional in the tribunals; unlike the Civil Courts, costs do not normally follow the event. As per LJ Sedley **Gee v Shell UK Ltd [2003] IRLR 82**:-

*“It is nevertheless a very important feature of the Employment Jurisdiction that it is designed to be accessible to ordinary 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”.*

13. In **McPherson v BNP Paribas [2004] EWCA Civ 569** the Court of Appeal held there was no necessity for a causal link between a party's unreasonable behaviour and the costs incurred by the receiving party:

*“40 The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring BNP Paribas to prove that specific unreasonable conduct by Mr McPherson caused particular costs to be incurred ...*

*41 ... the unreasonable conduct is a precondition of the existence of the power to order costs and it is also a relevant factor to be taken into account in deciding whether to make an order for costs and the form of the order”.*

14. In the Court of Appeal, in the case of **Sud v London Borough of Ealing [2013] EWCA Civ 949**, LJ Fulford reviewed the legal authorities on the tribunal's costs jurisdiction and specifically the relevance of Calderbank letters in Employment Tribunals:-

*“69. As described by the Court of Appeal in **Lodwick v Southwark London Borough Council [2004] ICR 884**, as a general proposition it is undoubtedly the case that orders for costs are only made exceptionally in the Employment Tribunal, and that the reason for and the basis of any such orders should be clearly specified (Per Pill LJ, at para 26).*

*70. In **Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR420** it was emphasised that the tribunal has a broad discretion, and it should avoid adopting an over analytical approach, for instance by dissecting the case in detail or attempting to compartmentalise the relevant conduct under separate hearings such as “nature”, “gravity” and “effect”. The words of the rule should be followed and the tribunal needs “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 so doing to identify the conduct, what was unreasonable about it and what effects it had” (paras 39-41).*

*71. The Court of Appeal in that case made it clear that although causation was undoubtedly a relevant factor, it was not necessary for the tribunal to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. Furthermore, the circumstances do not need to be separated into sections, each of which in turn forms the subject of individual analysis, risking the court losing sight of the totality of the relevant circumstances (para 41).*

...

*82. As the tribunal accepted, the consequences of **Calderbank** offers to settle that can have consequences for costs in civil proceedings do not apply in the Employment tribunal. However, in certain circumstances, the failure by a party to respond to or consider a reasonable offer of settlement can amount to unreasonable conduct (see **G4S Services v Rondeau UKEAT/0207/09/DA**), a case in which it took five months for an offer of*

settlement to be accepted). In *Kopel v Safeway Stores PLC* [2003] IRLR753 Mitting LJ observed;

*“18 ... It does not follow that a failure by an appellant to beat a Calderbank offer should, by itself, lead to an order for costs being made against the appellant. The Employment Tribunal must first conclude that the conduct of an appellant in rejecting the offer was unreasonable before rejection becomes a relevant factor in the exercise of its discretion (under Schedule 1, Rule 14(1)(a) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001) ...”*

## THE RESPONDENT’S APPLICATION

15. The respondent’s costs application is set out in a letter dated 27 February 2020 to the tribunal. The relevant extract is as follows:

*“In the instant case, the respondent is of the view that both 73(1)(a) and 73(1)(b) apply and this application will be made under both provisions.*

*The respondent sent the claimant a costs warning letter dated 16 October 2019 putting him on notice that if he continued with his claim and that respondent was successful that an application for costs would be made (sic) – the previous costs rules were referenced (the word misconceived no longer appears in the relevant provisions (para 40(3) contained this wording in the 2005 Constitution and Rules)). The respondent informed the claimant that it did not accept that DDA applied to the claimant’s back condition, specifically citing the claimant’s own medical report, and, in the alternative that the decision to issue the WIP was in any way in breach of the DDA. It was pointed out to the claimant that the bringing or continuing of the proceedings was unreasonable and that the proceedings themselves were misconceived.*

*Whilst the costs warning letter only allowed until 18 October 2019 for a response, the report relied upon by the claimant was dated 13 September 2019 and was served on 14 October 2019, with the hearing scheduled to begin on 21 October 2019 the claimant could be allowed no further time to consider his position”.*

16. In summary the respondent contends that the claimant acted unreasonably in bringing and pursuing a claim that his musculoskeletal back condition amounted to a disability under the DDA in light of the evidence available to him. The respondent points to and replies on the contents of the Occupational Health Welfare Notes, the claimant’s GP Notes and Records, Dr McMurray’s report (which was specifically commissioned for the purposes of these proceedings) and the claimant’s own evidence of his physical activities both inside and outside the workplace, including his use of the gym, being an HGV lorry driver and activities at a relative’s farm. The respondent’s representative characterised the claimant’s pursuit of his disability claim as unreasonable in that, he displayed *“a bullish, blinkered and uncompromising attitude in the face of this evidence”*. The respondent argues that the claimant maintained an unreasonable belief that his musculoskeletal back condition was a disability and persisted in this belief in the face of a lack of medical evidence, his own evidence and the evidence contained in the respondent’s witness

statements.

17. In addition, the respondent relies on the contents of a costs warning letter dated 16 October 2019:-

*“WITHOUT PREJUDICE SAVE AS TO COSTS*

*The purpose of this correspondence is to place you on notice that in the event of my Client’s success after the hearing of these proceedings, an application will be made for costs to be awarded against your client. The tribunal has jurisdiction to order costs under Rule 38 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005. If a Cost Order is made against your client at the conclusion of a hearing this could be up to a maximum of £10,000.*

*The basis for this application is as follows;*

*The Respondent does not accept that the Disability Discrimination Act 1995 applied to the Claimant in relation to his back condition. The medical evidence provided to date supports this view. The medical report by your expert, Dr McMurray fails to answer the question posed as to whether, in relation to his back condition, the Claimant would be considered to fall within DDA.*

*The respondent will ask the Office of the Industrial Tribunals and Fair Employment Tribunal to draw an adverse inference and moreover deny that there is any case that the decision to issue your client with a written improvement notice was in any way in breach of DDA; even should the Tribunal find that the Claimant was DDA at the time, and that the Respondent should have regarded him as such.*

*My Client will submit that you have acted unreasonably in bringing and continuing to pursue these proceedings, and further that the proceedings are misconceived.*

*I would ask you to note that I have instructions that should you inform the Tribunal by 5.00 pm on 18 October 2019 that your client wishes to withdraw these proceedings, my Client will be willing to bear its own costs and further more will not apply for costs against you.”*

18. The respondent argues that by the time the claimant received the costs warning letter dated 16 October 2019 it ought to have been abundantly clear to the claimant and his legal advisers that the claimant’s case was unmeritorious. At this juncture the claimant and his advisors had in their possession all the medical evidence, the claimant’s witness statement, the respondent’s witness statement and the report of Dr McMurray. Therefore the pursuit of his claim given the content of the costs warning letter was entirely unreasonable. The respondent specifically referred the tribunal to the witness statement of Mr Reid which sets out unequivocally the respondent’s understanding of the claimant’s musculoskeletal back condition. Furthermore this witness statement goes on to make clear that regardless of whether the claimant was disabled or not, the written improvement notice would have issued. The witness statement provided evidence of the treatment of a fellow

employee who was disabled and received a written improvement notice (WIN) due to absence in the same way as the claimant.

19. There was no suggestion on behalf of the respondent that the claimant acted unreasonably in the manner in which he conducted the proceedings or pursued his claim.

## **THE CLAIMANT'S SUBMISSIONS**

20. The claimant's representative disputes that the claimant's conduct was unreasonable or that the claim had no reasonable prospects of success for the following reasons:

- Nowhere in the medical report of Dr McMurray does it state that the claimant was not disabled.
- There was considerable ambiguity on the issue of disability. The claimant was at all times recognised and accepted as disabled pursuant to the DDA by reason of his bowel condition. The claimant throughout held a genuine belief that the DDA applied to his back condition, in support of this the tribunal was referred to the claimant's Form 90/1 where he makes it clear that, he considered himself disabled.
- The claimant was entitled to challenge the respondent's evidence in relation to actual or constructive knowledge of his disability.
- A tribunal in approaching the question of disability must not rely solely on medical evidence but all the evidence available including that of the claimant and the respondent.
- The respondent's costs warning letter was sent by email on the afternoon of 17 October 2019, providing a deadline of 5.00 pm on 18 October 2019 which was a completely unreasonable timeframe within which to expect the claimant to make a decision.
- In considering the 'whole picture' (as per the legal authorities) this is not an appropriate case for the tribunal to exercise its discretion to award costs.

## **CONCLUSION**

21. The tribunal is not satisfied that the claimant has acted unreasonably in bringing and pursuing these proceedings nor does the tribunal find that the claimant's claim of Disability Discrimination had no reasonable prospects of success. In reaching this determination the tribunal took into consideration the following:

- (1) The question of whether the claimant is disabled is a matter of fact and law for the tribunal to determine (see para 79 of the judgment) and this is a determination to be reached after consideration of all the evidence on the issue of disability. The tribunal finds that the claimant was genuine in his belief that his musculoskeletal back condition satisfied the definition of disability – as accepted by the respondent at the costs hearing "he was consistent in his belief and in his evidence". Although the claimant was

ultimately unsuccessful in his claim before this tribunal that of itself does not amount to unreasonable conduct on the part of the claimant. The tribunal takes into account that the claimant was considered by the respondent as a “permanently DDA” officer.

- (2) The issue of knowledge of the claimant’s disability (constructive and/or actual), is a matter to be determined by the tribunal after scrutiny of the relevant facts and all the evidence and was a matter the claimant was entitled to challenge in cross-examination. As per the legal authorities set out at paragraph 36 of the tribunal’s judgment, the issue for the tribunal is what the employer could reasonably have been expected to know and in making such an assessment of reasonableness of that nature, the exercise is factual in character (*Donelien v Liberata UK Ltd [2018] EWCA Civ 219*).
- (3) What amounts to a reasonable adjustment is an objective test and is ultimately what the tribunal views as reasonable after an assessment of what is required to eliminate the disabled person’s disadvantage. As per the legal authorities referred to in the judgment – (see paragraphs 23-25 of the tribunal’s judgment).

22. Accordingly it is the unanimous judgment of the tribunal that the claimant’s conduct does not meet the requisite test of unreasonableness under the Rules.
23. Had the threshold of unreasonableness been established, the tribunal would then have had to determine if it was reasonable in all the circumstances of the case to exercise its discretion to award costs and whether it was appropriate to do so. The tribunal unanimously determines that even had the threshold been met, taking into consideration that costs are exceptional in the tribunals it would not have exercised its discretion. In this regard the tribunal considers that the costs warning letter was served at a very late stage in the proceedings with very limited time for due consideration, furthermore it was not in the tribunal’s view sufficiently detailed as to the reasons why the pursuit of or the bringing of the claim amounted to unreasonable conduct nor is it sufficiently detailed as to why the claim had no reasonable prospects of success.
24. Therefore in considering the totality of the issues, the tribunal unanimously determines that this is not an appropriate case to exercise its discretion to award costs, accordingly the respondent’s application for costs is refused.

**Employment Judge:**

**Date and place of hearing: 22 October 2020, Belfast.**

**This judgment was entered in the register and issued to the parties on:**