Law Centre NI

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A GUIDE TO

COSTS IN THE

EMPLOYMENT TRIBUNAL

Introduction

A claim in the Employment Tribunal can be a daunting prospect in itself. Many claimants also worry about the prospect of having to pay their opponent's costs if they are unsuccessful in their claim.

At Law Centre NI, we get lots of queries about costs, with people asking what is the risk that they will be asked to pay. This guide seeks to dispel some of the myths around an award of costs in the tribunal.

In this guide, we outline when a costs order might be made and the factors a tribunal should consider in deciding a costs application. We also provide guidance on the relevance of a costs warning letter and what to do if you receive an application for costs.

This guide is intended to provide information and guidance to employees. It does not deal with the position of employers or respondents.

Our employment law advisers provide advice and, in some cases, representation in defending applications for costs. For tailored advice and assistance, telephone our Employment Law Advice Line on (028) 90244401

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The exception rather than the rule

The first thing to know about costs orders in the tribunal is that they are the exception rather than the rule. Unlike the County or High Court, costs in the tribunal do not follow the event. If you lose your case in the tribunal, you will not automatically become liable for the other party's costs. Having said this, although costs are not the norm, tribunals are not a no-costs forum.

What types of order can a tribunal make in respect of costs?

There are two types of order in respect of costs that a tribunal can make against a party to the proceedings:

Costs order

A costs order is when a tribunal orders a party to make payment to another party in respect of the costs they have incurred as a result of representation. This could be because they have been legally represented or represented by a lay representative who charges for representation.

Even if a party benefits from free representation, for example from a trade union or law centre, a costs order can still be made in their favour.

Costs include fees and expenses incurred by the party applying for a costs order.

Preparation time order

If you represent yourself at tribunal, you cannot ask the tribunal to make a costs order in your favour. A costs order cannot be made in favour of a personal litigant. However, a personal litigant can ask a tribunal to make a preparation time order in their favour. A preparation time order compensates a personal litigant for the time they have spent in preparing a case for tribunal.

When might costs become an issue?

Costs are the exception rather than the rule in the tribunal. However, costs might become an issue if:

- A claimant brings a case that has no or very little prospect of success.
- There is an issue with time limits or jurisdiction, which means the case has no prospect of succeeding.
- A claimant has been dishonest or unreasonable about their case.
- A respondent warned the claimant about difficulties with their case and that they will seek costs if the claimant is unsuccessful, and this warning was unreasonably ignored.
- A claimant acted disruptively or obstructively in relation to the proceedings. Potential examples of this are unreasonably failing to comply with tribunal directions or seeking an adjournment of a hearing at the last minute.
- A claimant has been abusive towards the respondent, for example, by making spurious allegations or conducting aggressive cross examination.

Can a costs order be made against me even if I am a personal litigant?

Yes, a costs order can be made against a personal litigant. Personal litigants are not immune from costs orders.

However, a tribunal should take into account that you are a personal litigant and should not expect you to conduct your case to the standard of a legally qualified representative. A tribunal will also take into account your ability to pay a costs order.

What must a respondent establish when applying for costs?

In order to make an application for costs, a respondent must establish one of the grounds under Rule 73, Schedule 1 of the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations 2020.

Rule 73 states:

> *'When a costs order or a preparation time order may or shall be made*
>
> *73. (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) all or part of any claim or response had no reasonable prospect of success.'*

The Rule 73 grounds

Vexatious, abusive, disruptive action

A claim to a tribunal might be considered vexatious if it has been brought out of spite or to harass the respondent. It might also be considered vexatious if the inconvenience and expense caused to the respondent by the proceedings is out of proportion to anything the claimant could achieve from the claim.

A claim brought merely to cause problems for the respondent might also be considered abusive.

A claimant might be guilty of abusive or disruptive conduct in the way they conduct the proceedings. For example, if they subject the respondent to false slurs and accusations or if they are antagonistic towards the respondent or tribunal.

A claimant might act disruptively in failing to comply with tribunal directions or conducting themselves inappropriately at hearing before a tribunal.

Unreasonableness

It is not necessary to show vexatious, abusive or disruptive behaviour to make an application for costs. Tribunals have a wide discretion to award costs where there has been unreasonable conduct in bringing or conducting the proceedings.

Examples of unreasonable conduct include knowingly pursuing a hopeless claim, unreasonably refusing an offer to settle and withdrawing a claim late in the day.

Whether a claimant acts unreasonably depends on all the circumstances of the case. A tribunal should consider all relevant factors including the nature, gravity and effect of any alleged unreasonable conduct.

A tribunal should not expect a personal litigant to assess or conduct a case to the standard of a professional representative.

When assessing reasonableness, a tribunal should look at the case from the claimant's perspective. It should consider what the claimant knew and didn't know about the case at that moment in time. A tribunal should not substitute its own view for that of the claimant.

A claim with no reasonable prospect of success

In the absence of legal advice, it can be difficult for a personal litigant to know if their case has no reasonable prospect of success. A tribunal will have to consider all the circumstances of the case before deciding if a hopeless case warrants a costs order. In most cases, a tribunal will not make a costs order unless the claimant knew their case had no hope of success.

The tribunal's discretion

Even if a tribunal decides that the respondent has successfully established one of the rule 73 grounds, it must then decide whether it is appropriate to exercise its discretion to make an order for costs against a claimant.

Just because a tribunal has preferred the evidence of one side over another and dismissed a claimant's case, does not of itself justify an application for costs.

The fact that a claimant is a personal litigant and their ability to pay, are relevant factors in the exercise of a tribunal's discretion.

Ability to pay

In exercising its discretion to award costs, a tribunal can take into account ability to pay. Rule 81 of Schedule 1 of the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations 2020 states:

'Ability to pay

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

What is the relevance of a costs warning letter?

When faced with a claim to the tribunal, a respondent will often write a letter to the claimant threatening an order for costs if the case is not withdrawn.

The respondent might also write a letter making an offer to settle and warning that, if the offer is rejected, an application for costs will be made if the claim is unsuccessful.

This second letter is usually entitled 'Without prejudice, save as to costs' and is sometimes known as a '*Calderbank* letter'. The tribunal will not know that the letter exists until the case is concluded.

If the respondent writes a letter, pointing out the deficiencies in the claimant's case, and the claimant unreasonably refuses to engage in negotiation, a tribunal might award costs.

However, it does not follow that a costs warning, or *Calderbank* letter will lead to an award of costs. A tribunal must first conclude that the claimant acted unreasonably in rejecting the offer.

I lost my case and have now received a letter enclosing a costs application, what should I do?

If you receive a letter enclosing a costs application, you should seek legal advice. Law Centre NI's employment law advisers provide free advice on defending costs applications. You can call our Employment Advice Line on (028) 90244401 from Monday to Friday 9.30am to 1pm.

It's important to make sure the costs application is in time. A respondent must make its application within 28 days of the date on which the judgment was sent to the parties. If the costs application is out of time, you might be able to ask for it to be struck out.

Once a costs application is made, a tribunal should list the application for Case Management Preliminary Hearing (CMPH). At the preliminary hearing, the tribunal might give directions and the case will be listed for full hearing.

At hearing, you will have the opportunity to make submissions to defend the costs application. In your submissions, you should address any allegations about your conduct, explaining why you do not consider the grounds set out in rule 73 are met. You should also highlight any attempts you made to seek advice and guidance about your claim. You should be given an opportunity to submit a statement of financial means and make submissions about your ability to pay.

No order for costs should be made until you have had a reasonable opportunity to make representations to the tribunal in writing or at a hearing.

I want to make a costs application against a respondent, how do I go about it?

An application for costs can be made at any stage of the proceedings up until 28 days after a final judgment is sent to the parties.

When applying for a costs or preparation time order, you should set out the rule 73 grounds that you are relying on and explain why you consider the respective ground is established. You should also prepare a schedule, showing the costs you have incurred, the time spent, and the amount claimed.

Final word

Receiving a large solicitor's bill from a respondent after the conclusion of your tribunal case, can be very intimidating. Before agreeing to pay, you should seek legal advice.

Our employment law advisers provide free and expert advice on defending costs applications. For further advice and assistance on any of the issues covered in this guide, contact Law Centre NI's employment team on (028) 90244401.

The information contained in this guide is correct at the date of writing – July 2023.

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