

Q&A - Costs in the Employment Tribunal

The recent rejection of Lord Sugar's application for costs against Stella English should remind employers that the costs regime in the Employment Tribunal is markedly different from the costs regime in the civil courts.

Do costs follow the event in the Employment Tribunal?

No. If a party is successful in defending (or bringing) a claim, the Employment Tribunal will not necessarily make an order that the unsuccessful party pays their costs.

Who decides if a costs order should be made?

The Employment Tribunal (Constitution and Rules of Procedure) Regulations set out the criterion for when an Employment Tribunal Judge must or may make a costs order.

In what type of situation might a costs order be made?

The Tribunal may make a costs order, and must consider whether it should exercise its discretion to do so, where it finds that a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party (the specific ground); or where a party (or their representative) has acted vexatiously, abusively, disruptively, or otherwise unreasonably in the bringing or conducting of the proceedings; or any claim (or response) had no reasonable prospect of success (the general discretionary grounds).

Does the Employment Tribunal have to consider the paying party's ability to pay?

When considering either whether to make an order, or the amount of the order, the Tribunal *may* have regard to the paying party's ability to pay. The Employment Appeal Tribunal has held that the Tribunal should make a brief statement about whether it had decided to take ability to pay into account. If it does, then it should set out its findings on ability to pay and explain what impact this had on the decision.

Can an Employment Tribunal Judge make an order for costs against a Claimant who is unemployed?

Yes they can. Just because a person is unemployed does not necessarily mean that the Employment Tribunal Judge will not make a costs order against them. Only last year the Employment Appeal Tribunal upheld a decision to make a huge costs award of c. £87,000 against a claimant who was both unemployed and unrepresented. However, in that case, decided under the old rules, the claimant's claims were misconceived.

Philip Henson, Partner and Head of Employment Law, DKLM LLP
(www.dkml.co.uk)