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# Careless talk, costs, lies: EAT upholds £170,000 costs award (UK)

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It's all about the numbers in **Brooks -v- Nottingham University Hospitals NHS Trust**, a new case on when an Employment Tribunal can order costs against an unsuccessful participant – 18 alleged protected disclosures, 40 detriments, a 27-day hearing, a witness statement of 214 pages and over a *thousand* paragraphs and a hearing bundle of well over the same number of pages. Most particularly also, as none of that proved to be of any assistance at all to the claimant, a costs award against him of £170,000. Ouch.

The facts don't madly matter. Consultant surgeon Mr Brooks made some disclosures that in his view staffing levels and other matters in a Burns Unit posed a risk to patients. All sorts of reversals and disappointments then befell him, he said, including false allegations, inadequate investigation of complaints, underpayment, harassment, chronic undermining, marginalisation, you name it.

But there was a problem, which was that Brooks had made records of similar conduct occurring even before his first disclosure and was therefore quite unable to show that any of those later detriments had been caused by his disclosures. His claim failed on that basis and so he must have seen as really quite unsporting the application for costs then made against him by the Trust.

It said that his claim had no reasonable prospects of success and that he should have known it. In addition, the Employment Tribunal had described his evidence as, well, not deliberately dishonest, strictly, but certainly as unreliable, embellished and distorting of the truth. Moreover, said the Trust, over so many pages and paragraphs of argument, irrelevance and repetition, Mr Brooks' witness statement was just more than any one should have to bear.

The ET rejected the last reason (though Mr Brooks' monolithic statement was clearly a stand-out specimen, verbose, argumentative, repetitive and partly irrelevant witness statements are unfortunately a fact of life in that forum, whichever side you are on), but made the costs award on the other two grounds, lack of reasonable prospects and Brooks' unreasonable conduct of the proceedings.

Obviously the £170,000 figure makes this case notable by itself, but the points made by the EAT in rejecting Brooks' appeal are of application to costs orders of any size whether you are employer or employee:

- It is not a pre-condition of a costs award that the evidence given should be actively dishonest. Equally, there is no automatic consequence of dishonesty that a costs award will be appropriate.
- Where we are talking about the unreasonable conduct of proceedings for ET costs purposes, the question of unreasonableness is objective, not subjective. It did not matter that Brooks had persuaded himself that what he was saying was true. The short point was that this "*distorted perception*" was contradicted throughout by documentary evidence, some of it his own, and that no reasonable and objective person looking at that evidence would have seen the case as worth pursuing.
- The unreasonableness was in relation to a central theme of the case (the issue of causation) and not some peripheral matter of less import. If it were in connection to some minor issue which it was not necessary for the other party to address at any significant length, there would not necessarily be a costs order made.
- It was no defence to the order that Brooks had been able to show that he had made some protected disclosures and had suffered some detriment. Establishing two out of the three necessary components of his claim did not matter because the third component, causation, was so integral to his allegations that if that were clearly hopeless, there was no credit for showing the others.
- Brooks claimed that he had been legally advised that he had an arguable case, and therefore that he had not acted unreasonably in relying on that. The EAT said that this was potentially a decent argument. The starting point for considering the impact of professional advice on alleged unreasonable behaviour was to assume that the party had been "*properly and appropriately advised*". In this case that would obviously have been that Brooks should not proceed. If his advice had been much more positive, the Tribunal should have been told why. Otherwise it could not rule out the possibility that Brooks had not told his advisors the full story or that they had assumed that he would do better under cross-examination, or that they had just been negligent. A party seeking to rely on professional advice in defence of a costs claim must therefore be prepared to disclose that advice in full. Brooks did not disclose it at all, and so could not rely upon it as a shield against the allegation of unreasonable conduct of his claim.



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