EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104874/2017

Heard in Glasgow 12 March 2018

Employment Judge: Rory McPherson

Mr Daniel Prisic	**Claimant** **Represented by:-** **In Person**
Dumfries and Galloway Council	**Respondent** **Represented by:-** **Ms K Graydon – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

(1) the claim for a redundancy payment is dismissed; and

(2) having considered the respondent's application for expenses against the claimant, the Tribunal **refuses** the application.

REASONS

Introduction

Preliminary Procedure

1. The claimant brought a complaint seeking a redundancy payment. The Tribunal heard evidence from the claimant on his own behalf. For the respondent, evidence was led from Mr Philip Michael McCann (PM) who was the claimant's Line Manager at the time. The Tribunal was also referred to a single set of documents prepared by the respondent (referred to hereafter as

the bundle. References to page number are to those in the bundle) and Ms. Grayson made closing submissions.

Findings in Fact

2. The Tribunal made the following findings in fact:

3. The claimant was employed in a regulated capacity as a Care Assistant from 19 October 2007 until he gave notice of his resignation on 13 April 2017, effective 13 May 2017.

4. The respondent is a Local Authority in Scotland.

5. PM, the sole respondent witness, has worked with the respondent for 16 and 1/2 years and his current post is Senior Manager managing the respondent's Day Services. At the material time he was the claimant's line manager and his post was Manager of Day Services with a responsibility for 20 staff who in turn covered 65 service users using the service in the community.

6. On 1 November 2016 the claimant submitted an ER1 form (page 41) to the respondent's Early Retirement/Voluntary Severance (ERVS) Workforce Transition Team.

7. ER1 forms are used by employees to express interest in Early Retirement/Voluntary Severance. Employees submit their request to the respondent for consideration. The ER1 form expressly states that employees *"understand that neither the Council nor I are placed under any obligation by this expression of interest"* and this was understood by the claimant.

8. The claimant had discussed the submission of the ER1 form with PM and had advised that it was his intention to leave employment and move to Edinburgh. While supportive of the claimant's application PM did not regard the claimant as particularly motivated in his role.

9. Prior to the process the claimant had not anticipated that his application would be accepted and he had anticipated that it would be declined.

10. The respondent acknowledged receipt of the application in an e-mail dated 8 November 2016 (page 43).

11. PM received an internal e-mail from the ERVS Team on 10 November 2016 (page p45) explaining the process. Where matters are submitted to the Pension Panel a final decision is made by the Pension Panel on affordability. Prior to this process anyone who applies gets a written estimate and their manager then meets the individual to consider whether a business case can be made to take the matter forward.

12. The respondent wrote to the claimant on 21 December 2016 (page 51 to 54) with an estimate of benefits. The letter outlined the process in connection with the request and confirmed that the claimant would need to meet with his line manager, PM, to discuss the details of his request. The letter set out that "*Your manager is required to meet with you to discuss the detail of your request and whether or not your retirement can proceed based on the option you choose*. *If your service supports your application they will submit a Business Case to the Pensions Panel for consideration.".* While the claimant had not heard of a process requiring a joint declaration other than by reference to the sentence within the letter which stated "*Up until you complete a joint declaration and acceptance form you nor the Council is obligated to proceed with the early retirement***"** he understood that the respondent's Pension Panel would make the final decision**.** The letter further stated that the *"information provided in this letter is an estimate. Finalised figures will only be confirmed if early retirement is approved by Pensions Panel and a joint declaration of acceptance is received. If finalised figures are materially different to the estimate you will be advised and be given the opportunity to withdraw your application".*

13. The claimant was 33 years of age at the time. The letter of 21 December 2016 set out a calculation using 31 March 2017 as the termination date.

14. The claimant understood that the calculation within the letter (page 54) referred to as "*DCP £6,277.48*" was an estimate of a redundancy payment and not an offer and that a payment was discretionary.

15. A copy of the calculation was provided to PM.

16. The respondent sent an e-mail to the claimant's personal e-mail account on 10 January 2017 (page 55) to enquire whether he wished to proceed with the application.

17. The claimant met with PM, to discuss his application in early January 2017. The claimant wished to proceed with his application and PM supported him in this. While no date for this meeting was identified by the respondent (in paragraph 13 of their paper apart to the ET3) and no copy of any note of the meeting was provided in the bundle, the claimant's recollection was that he met PM in January 2017 prior to the 10 of January 2017 e-mail. The claimant was aware that PM supported the application. The claimant was aware that the support of a Senior Service Manager is needed before an application is taken forward to the Pensions Panel for a decision.

18. The claimant had given notice to the landlord of his then flat in the middle of January 2017 in order to move to Edinburgh in the middle of March 2017. He had been planning to leave the respondent's employment whether or not his application for voluntary severance was successful and had planned to take up alternative employment in Edinburgh.

19. While he anticipated that PM would put a business case forward he did not know whether this would in fact happen.

20. The claimant was asked to attend a supervision session meeting with PM on 14 February 2017. Prior to this PM had contacted the Pension

Department directly and was advised that while it would generally be possible to make a role redundant as the claimant's role was regulated by the Care Commission the Council could not reduce staff.

21. Further and prior to the supervision session of 14 February 17 the claimant had contacted the respondent's pension department. However as this was not in accordance with the process, they were not able to provide specific information.

22. On 14 February 2017 at the supervision session PM discussed 3 separate issues with the claimant including but not restricted to the Early Retirement Voluntary Severance proposal (EVRS).

23. The claimant was advised at this meeting by PM that "*the offer of CAYS which Daniel was notified about could not be progressed to a business case because the post needed to be deleted and we need to maintain staffing levels in line with Care Inspectorate's staff schedule*".

24. The claimant however understood that PM was continuing to support an element of his application at this stage.

25. PM explained at this meeting that as they could not go down the original route he had made what was described as an "*ad-hoc application*" to the relevant senior manager, Angela Paterson (AP), for a one-off payment to the claimant. PM explained at this meeting that generally early retirement could only be given if the Council could re-deem the costs within a 3-year period (from staff reduction). PM explained that he could make a case that someone would come in to replace the claimant on the bottom of the Spinal Column Point salary banding (with effective savings). The claimant agreed to this approach describing that "*anything was better than nothing".*

26. The claimant was advised at this meeting by PM that while this ad-hoc application was worth trying it was uncertain whether it would be accepted.

27. The claimant's misunderstood elements of the discussion and believed that he was being advised that he would receive 1/2 of the sum if he agreed to give up his pension. PM was not sure if the claimant had understood the position and had sought to reassure him that his pension would be intact.

28. The claimant formed the belief that the approach taken by PM would result in a payment.

29. A record of the supervision session of 14 February 2017 was prepared and signed by PM (pages 57 and 58). Although not signed by the claimant it accurately recorded that in relation to "*the Early Retirement proposal… the offer of CAYS which Daniel was notified about could not be progressed to a business case because his post needed to be deleted and we need to maintain staffing levels in line with Care Inspectorate's staffing schedule*" and that PM had "*made an application to"* AP *"for a one-off payment due to savings accrued from the SCP salary of Daniel's replacement"* and while PM *"did not think this had been done before and was not sure if this proposal was acceptable - but it was worth trying*".

30. Subsequent to the meeting of 14 February 2017 and prior to 2 March 2017 PM made a business case to AP on the basis that a salary saving could be achieved. PM was advised that there was no precedent for such a payment but that in any event, due to changes in the salary scale, there would be no savings and this could not be progressed.

31. PM met again with the claimant on the Monday preceding 2 March 2017 and sought to explain the position, namely that this ad-hoc proposal had been rejected. He also sought to explain that his existing pension could be transferred to a new employer if that was another Council, NHS or another organisation paying into the Local Authority Pension Scheme.

32. No record of the meeting was provided. The respondent did not to take steps to write to the claimant setting out the matter discussed at this meeting. The claimant did not understand what he was advised at this meeting.

33. PM was subsequently contacted by a James McDowall (JD) in the respondent's HR Department who advised that the claimant had engaged his union representative. JD requested a note in order to put an explanation to a union representative for the claimant and PM sent JD an e-mail on 2 March (page 59).

34. No business case was prepared by the respondent for presentation to the Pension Panel.

35. The claimant was suspended on 7 March 2017 following unrelated allegations.

36. On 13 April 2017 the claimant resigned from his post giving notice that his last day of employment would be 13 May 2017. He was not made redundant.

37. A Disciplinary Hearing concerning the claimant arising out of the allegations which led to his suspension took place on 9 May 2017. The claimant was dismissed as a consequence with effect from 12 May 2017 although he was paid up to the end of his notice period on 13 May 2017.

38. The claimant relocated to Edinburgh shortly after 13 May 2017. The address in the ET1 was a temporary address and the claimant now resides elsewhere in Edinburgh. The claimant had moved to Edinburgh to start a new job. However this did not come to fruition for reasons connected with his Disciplinary Hearing and subsequent dismissal.

39. On 29 August 2017 the respondent's Employment Appeal subcommittee overturned the decision to dismiss the claimant and reduced the sanction to a written warning.

40. The claimant's former post remains in existence and some 20 employees in the regulated service had applied for but were turned down for redundancy in 2017.

41. Subsequent to the loss of his employment he secured employed on what he characterized as a zero hours contract and while his monthly take home varied between £500 and £1,000 his disposable income beyond rent and other utilities in some months would be £100.

42. The claimant had not been represented at any stage in the claim. The only legal advice he had received in pursuing his claim was from Citizens Advice who he understood to have advised only that legal aid funding was not available and not otherwise on the merits of the claim.

43. The claimant engaged with ACAS Early Conciliation and understood ACAS to have indicated that absent any response from the respondent in the Early Conciliation process he should proceed with his claim.

44. The respondents' agents issued 4 separate e-mails to the claimant prior to the hearing seeking information from the claimant. They issued emails Tuesday 20 February and Thursday 22 February providing a proposed and updated bundle and summarising their position as set out in the ET3, inviting his response by Friday 23 February and thereafter by Thursday 1 March 2018. The claimant did not respond to either having formed a view that any response would result in the hearing being delayed following the original two-hour hearing being re-listed to a 2-day Final Hearing. Thereafter the respondents' agents issued 2 emails in which they stated they reserved the right to rely on correspondence as part of any application for expenses. On Tuesday 6 March the respondents' agents asked the claimant to confirm by 5pm the following day whether he was pursing the claim and whether he would be in attendance at the hearing. On Thursday 8 March they sought confirmation that the claimant had been receiving their communication, that he was still pursuing his claim, that he would be attending the hearing on the following Monday and

for the identity of any witnesses that he was calling. The claimant responded by e-mail on Friday 9 March stating *"Yes I will be attending the hearing on Monday 12th March. Sorry for the lateness of my reply*".

Respondent submissions

45. The respondent provided written submissions. The respondent, in relation the application for a redundancy payment, invited the Tribunal to find that the claimant's application was unsuccessful and did not reach the stage at which either the employee or the respondent was obliged to proceed with voluntary redundancy. They also invited the Tribunal to find that the claimant's role was not made redundant and that the claimant resigned in April 2017.

46. In their conclusions they invited the Tribunal to hold that there was no redundancy. There was no agreement between the parties. There was no contractual entitlement or otherwise to a redundancy payment. The respondent further invited the Tribunal to hold that even if there was an agreement between the parties, the claimant having terminated the employment relationship prematurely was himself in breach of the same agreement and therefore cannot enforce it. In summary the respondent argued that no agreement was reached in relation to any redundancy payment.

47. They also sought expenses and I address that issue later in this judgment.

Claimant submissions

48. The claimant, as an unrepresented claimant, was afforded an opportunity to consider the written submissions over the lunch break on the first day. The claimant in his submission focused on the respondent's submission on expenses. He observed that had there been engagement by the respondent at the stage of early conciliation matters may have been resolved at that

stage. However, in relation to the redundancy payment claim, and by reference to his ET1 at 8.2, he submitted that he believed he had accepted an offer. The claimant also explained that he had not been represented and that the only legal advice he had received was from Citizens Advice who he understood to have advised simply that legal aid funding was not available in the Tribunal.

REDUNDANCY

Relevant Law

49. The issue for the Tribunal to consider was whether there was agreement that the respondent would make a redundancy payment to the claimant.

50. While I was not directed to any authority on the law of contract and/or obligations and where agreement may be achieved I am reminded that there is considerable authority in this area. On unilateral promises, in **A& G Paterson v Highland Railway Co 1927 S.C.(H.L.)32** Viscount Dunedin, speaking obiter in the House of Lords, expressly approved the approach of Lord Fraser in **Littlejohn v Hawden (1882) 20 SLR 5** *"… if I offer my property to a certain person a certain price and go on to say 'This offer is open up to a certain time', I cannot withdraw that offer before that date, if the person to whom I made the offer choose to accept it."*. An offer must be sufficiently definite in terms; **Harvela Investments Ltd v Royal Trust Company of Canada Ltd [1986] AC 207.** An invitation to take part in negotiations is not sufficient: in **Pharmaceutical Society of Great Britain v Boots Cash Chemist (1953) 1 QB 401** it was established by analogy that the placing of good on display in shops does not constitute an offer to sell those goods, it is merely an invitation to treat. Such advance notifications are no more than an expression of willingness to negotiate.

Discussion and Decision

51. It is noted that other material matters were confirmed to the claimant in clear written terms, including the outcome of the separate disciplinary process

culminating in the respondent's letter of 31 August 2017 confirming that his appeal against was in part upheld.

52. In considering what agreement if any had been reached I note that in the Supervision Record (page 57) it was stated that "*the offer of CAYS which Daniel was notified about could not be progressed to a business case because his post needed to be deleted and we need to maintain staffing levels in line with Care Inspectorate's staffing schedule*".

53. However, I also consider it important that the note continues by narrating that PM had *" made an application to"* AP *"for a one-off payment due to savings accrued from the SCP salary of Daniel's replacement"* and while PM *"did not think this had been done before and was not sure if this proposal was acceptable - but it was worth trying*". It is apparent from this that as at 14 February 2017 no offer of voluntary redundancy had been made to the claimant. All that had been put to the respondent by PM was a proposal which, if accepted, could have led to some kind of 'one off' payment being made to the claimant. However, that proposal was not one which the respondent decided to accede to. I am satisfied that there was no offer to make a payment to the claimant, whether subject to time or not. At best the respondent's letter of 21 December 2016 was merely an invitation to treat.

54. I am satisfied that as at 2 March 2017, and indeed by the preceding Monday the respondent had concluded that neither the original estimate of what the claimant would receive if his application for voluntary redundancy was successful, nor any variation, was available. While it is not clear that this position was successfully communicated to the claimant any such communication failure does not create an enforceable right on the part of claimant.

55. I am satisfied that the claimant's confusion as to the final outcome would have been resolved had the respondent written in clear terms to the claimant setting

out the conclusion which they appear to have articulated internally in their e-mail of 2 March 2017 from PM to JM.

56. While the claimant believed that he had an entitlement to a redundancy payment, the respondent's submissions are upheld since I am satisfied that no such entitlement was created by the parties' respective actings nor was any contractual agreement entered into giving rise to an obligation to make any payment. The claim for a redundancy payment is therefore dismissed.

57. I do not accept that the claimant terminated the employment relationship prematurely. He provided notice and this was accepted. However, this issue does not impact on the primary issue of whether there was an agreement between the parties.

58. The respondent in their written submission (para 2.4) invited me to accept that they acted reasonably. While I do not go so far as to suggest that the respondent acted unreasonably in all the circumstances having regard the absence of a written explanation having been issued to the claimant on the outcome of his application I do not accept that the respondent acted reasonably throughout. That is a matter relevant to the respondent's application for expenses to which I now turn.

EXPENSES

Relevant Law

59. As described above the respondent made an application for expenses against the claimant on the basis that the claim had no reasonable prospects of success (Rule 76(1) (b)) and unreasonable conduct by the claimant, it being

suggested that the claimant had acted vexatiously and unreasonably in the bringing of these proceedings and in the way that he had conducted the proceedings (Rule 76(1)(a)).

60. The issue which arises for the Tribunal is whether or not any of the circumstances set forth in Rule 76(1) apply:

> *76.(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) any claim or response had no reasonable prospect of success.*

61. While I was not directed to any authorities by the respondent in their submission I have reminded myself of Lord Justice Mummery's words of caution at paragraph 39 of the Court of Appeal's judgment in ***Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255*** reported at **[2012] IRLR 78,** , where he stated as follows:-"*I begin with some words of caution, first about citation and value of authorities on costs questions and, secondly, about the dangers of adopting an over-analytical approach to the exercise of a broad discretion."*

62. Nevertheless I do consider it appropriate to take account of what is said in certain other often cited judgments of the Court of Appeal, these being **Gee v Shell UK Ltd [2003] IRLR 82, Lodwick v London Borough of Southwark [2004] IRLR 554,** and **McPherson v BNP Paribas [2004] IRLR 558**, where it is recognised that expenses orders in the Employment Tribunal remain the exception and not the rule, and that in the majority of Employment Tribunal cases, the unsuccessful party will not be ordered to pay the successful party's costs, and that costs are compensatory, and not punitive.

63. **Yerrakalva** considered Rule **40** of the **Employment Tribunals Rules of Procedure 2004**. Notwithstanding the **Employment Tribunals Rules of Procedure 2013**, have been in force since 29 July 2013 this case law remains useful given the similarity in wording between the former and current Rules.

64. I recognise that expenses cases are very much fact dependent, as is made clear in **Dunedin Canmore Housing Association Limited v Donaldson [2009] UKEATS/0014/09**, which is consistent with the view of the Court of Appeal, in **Arrowsmith v Nottingham Trent University [2011] ICR 159,** at paragraph 33, that it is a fact-sensitive exercise. However guidance on the application of the legal test which applies is set out in **Abaya v Leeds Teaching Hospital NHS Trust [2017] UKEAT 0258/16** (01 March 2017).

65. In **Abaya**, Mr Justice Singh, at paragraphs 14 to 16, identifies that there are, in essence, three stages in the exercise involved when an Employment Tribunal considers a costs (in Scotland, expenses) application:

> *"14 ….. The first stage is to ask whether the precondition for making a Costs Order has been established. For example, in the present case, whether the claim or part of the claim had no reasonable prospect of success. However, that precondition is merely a necessary condition; it is not a sufficient condition for an award of costs.*
>
> *This is because the second stage of the exercise that has to be performed is that the Tribunal must consider whether to exercise its discretion to make an award of costs.*
>
> *15. The position was summarised by HHJ Eady QC in the **Ayoola** case at paragraphs 17 and 18. As she said at paragraph 17, at the second stage of the exercise:*

> ***"17. … 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 …"***
>
> *16. The third stage of the exercise only arises if the Tribunal decides that it is appropriate to make an award of costs. The third stage is to assess the quantum of that award of costs…."*

66. In **Abaya**, Mr Justice Singh emphasises, at paragraph 20, that all cases are fact-sensitive, that the assessment of whether to award expenses will depend on the particular circumstances of each case, and that "*the discretion under the 2004 Tribunal Rules is very broad [and I would say the same of the 2013 Rules]".*

67. In relation to **Rule 76 (1) (a)** the respondent submitted that "*the claimant has acted vexatiously and unreasonably in the bringing of these proceedings and by the way in which he has conducted these proceedings*".

68. While I am satisfied that ultimately there was no evidence of agreement between the parties and thus it could be said the claim had no reasonable prospects of success, I am reminded that is not a sufficient condition for an award of costs as I must thereafter consider whether it is appropriate to exercise discretion to make an award of costs.

69. In the exercise of this discretion I note that it is generally recognised by Tribunals that for conduct to be regarded as "*vexatious"*, there must be evidence of some spite or desire to harass the other side, or the existence of some other improper motive **(ET Marler v Robertson [1974] ICR 72).**

70. Simply being misguided is not sufficient to establish vexatious conduct **(AQ Ltd v Holden [2012] IRLR 648).**

71. The Court of Appeal, in **Scott v Russell [2013] EWCA Civ. 1432**, cited with approval, the definition of vexatious given by Lord Bingham in **Attorney General v Barker [2000] 1 FLR 759,** that the hallmark of a vexatious proceeding is that it has little or no basis in law (or at least no discernible basis), and that whatever the intention of the proceedings may be, its effect is to subject the other side to inconvenience, harassment and expense out of all proportion to any gain likely to accrue, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.

Discussion and Decision

72. Turning to the issue of whether the claimant can be said to have acted vexatiously, as the authorities referred to above make clear this requires that there must be evidence of some spite or desire to harass the other side, or the existence of some improper motive. Simply being misguided is not sufficient to establish vexatious conduct. I am satisfied that that nothing I saw or heard supported the conclusion that the claimant had behaved vexatiously.

73. Turning to the unreasonable limb of the test. I note that the claimant has had no legal representation. His only engagement with advice on the issues in this matter was with Citizens Advice at the outset who he understood did not offer comment on the merits of the claim. He understood ACAS to have indicated that absent any response from the respondent in the Early Conciliation process he should proceed with the claim.

74. The factual findings above, in connection with the interaction between the parties about the possibility of voluntary severance perhaps being available, show the position was actually quite complex. In all the circumstances, it is considered it would have been appropriate for the respondent to have written

to the claimant setting out in clear terms the position articulated internally in their e-mail of 2 March 2017.

75. In all the circumstances it is considered that it was not unreasonable for the claimant to raise and pursue this claim**.**

76. In relation to Rule 76(1)(a) in the respondent's application for expenses, they have applied on the basis that the claimant acted unreasonably in not responding to a number of requests by the respondent for response. The respondents' agents issued emails on 20 February and 22 February providing a proposed and updated bundle and summarising their position as set out in the ET3, inviting response. While neither contained an expense warning it is recognised that the absence of an expenses warning is not a precondition to the making of an expenses order by a Tribunal. The bundle did not contain any purported record of the meeting between the claimant and PM on the Monday preceding 2 March 2017 at which PM had sought to explain the respondent's final position. The claimant had felt that his best option was not to respond to communication (until the hearing) in order to prevent the hearing being postponed to a later date. The claimant was clearly mistaken in his position, although it is factually correct that the original two-hour hearing was re-listed to a 2-day Final Hearing. In all the circumstances I do not consider that the claimant's position was unreasonable.

77. Beyond the ET3 there were 2 specific e-mails issued by the respondents' agents both in March 2018 in which reference was made to the respondent reserving the right to rely on correspondence as part of any application for expenses**.** On Tuesday 6 March they asked the claimant to confirm by 5pm the following day whether he was pursing the claim and whether he would be in attendance at the hearing on the following Monday. On Thursday 8 March they sought confirmation that the claimant had been receiving their communication, that he was still pursuing his claim, that he would be attending the hearing on the following Monday and the identity of any witnesses that he was calling.

78. The claimant who remained unrepresented did respond, in a limited fashion, on Friday 9th March that he would be attending the hearing on Monday 12th March offering an apology for his delay. Although he did not address the respondent's requests to identify any additional witnesses, documents or provide amplification of his case he did not seek to introduce any additional documents or lead any additional witnesses at the hearing. In all the circumstances I do not consider that the claimant's delay and limited response of 9 March was unreasonable.

79. As the Court of Appeal commented in its judgment in **Yerrakalva**, it is important not to lose sight of the totality of the circumstances. The vital point for any Tribunal in exercising the discretion whether or not to order costs / expenses is to look at the whole picture and ask whether there has been unreasonable conduct by the potential paying party in bringing, defending or conducting the case and, in so doing, identify the conduct, what was unreasonable about it, and what effect it had.

80. Reasonableness is a matter of fact for the Employment Tribunal to decide upon, and in considering my decision in this matter, I have been conscious of the fact that Tribunals must be careful not to penalise parties unnecessarily by labelling conduct as unreasonable when it may, in fact, be legitimate in the circumstances. As the Court of Appeal reiterated in **Yerrakalva** costs/ expenses in the Employment Tribunal are still the exception rather than the rule.

81. In all the circumstances and having regard to the totality of the circumstances, including the respondent's omission in setting out the position articulated internally in their e-mail of 2 March 2017 in writing to the claimant, I do not consider it appropriate to exercise discretion to make an award of expenses.

82. Further and under Rule 84, the Tribunal is permitted (but not obliged) to take into account the paying party's ability to pay, when considering whether or not to make an Order and, if so, in what amount. The claimant, who was not

directly asked by the Respondent to comment on his ability to pay did, in response to a series of questions by the Tribunal, articulate that he was employed on what he characterized as a zero hours contract and while his monthly take home varied between £500 and £1,000 his disposable income beyond rent and other utilities in some months would be £100.

83. Had I found the respondent's expenses application well-founded, on the information before me as regards the claimant's ability to pay, I would have been entitled to have taken the view that the claimant, having regard to the uncertainty of his income, could not have afforded to pay any specific sum.

Employment Judge: R McPherson
Date of Judgment: 30 May 2018
Entered in register: 05 June 2018
and copied to parties