



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

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Case No: 4105575/2016 Expenses Hearing by Written Submissions

Employment Judge: M A Macleod (sitting alone)

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Mr A Kelso

Claimant

Bayswell Park Hotel

Respondent

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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The Judgment of the Employment Tribunal is that the claimant's application for expenses is granted, and that the respondent is ordered to pay to the claimant the sum of **Six Hundred and Forty Three Pounds and Eight Pence (£643.08)** by way of expenses in respect of their unreasonable conduct in these proceedings.

### **REASONS**

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1. In this case, which has a long history, a Judgment was issued by Employment Judge d'Inverno on 19 February 2018, in which the respondent was ordered to make payment to the claimant of the sum agreed by way of settlement between them. That Judgment left outstanding the Employer's Contract Claim against the claimant, and following a Preliminary Hearing before the sitting Employment Judge, a hearing was fixed in order to adjudicate upon that outstanding claim.
2. That hearing was listed to take place over two days on 31 January and 1 February 2019. On 29 January 2019, the respondent's solicitor, emailed

the Tribunal to confirm that the Employer's Contract Claim was withdrawn, and asking that the hearing be vacated.

3. The hearing was duly vacated.

4. On 30 January 2019, the claimant wrote to the Tribunal making an application for expenses in respect of the withdrawal of the Employer's Contract Claim.

5. No response to the application has been received from or on behalf of the respondent.

6. The Tribunal therefore requires to consider the application in terms of the Employment Tribunals Rules of Procedure 2013, and has determined that it is in the interests of justice to do so on the basis of the application and the papers available to it.

### **The Background**

7. A hearing was fixed to take place on 31 January and 1 February 2019 in order to determine the Employer's Contract Claim. Preparations had been made by both parties in advance of that hearing.

8. On 29 January 2019 at 1706 hours, Mr Morton, for the respondent, emailed the Tribunal, with a copy duly intimated to the claimant, to confirm that *"We have now been instructed by the Respondent to withdraw that Counterclaim and to ask that the Hearing be vacated...We would therefore be grateful if this email could be placed before an Employment Judge for his/her consideration as a matter of urgency and if confirmation could be sent to the parties confirming that the Hearing has been vacated and that they do not require to attend on Thursday just as soon as possible."*

9. The claimant replied at 1846 hours that evening, copying his reply to Mr Morton. In that, he made several points. He said that he had "been here before", with an 11<sup>th</sup> hour agreement with the respondent which was subsequently "reneged on" (sic). He made the point that he had had to engage the services of a solicitor to pursue the original Judgment

(upholding his own claim) in Dumfries Sheriff Court. He said that he had incurred additional costs as a result of this, including three additional trips to the Edinburgh Employment Tribunal, costs in connection with the Sheriff Court case, and accommodation costs for the hearing due to commence on 5 31 January 2019.

10. He insisted that he receive payment of the sum ordered in Employment Judge d'Inverno's Judgment immediately. He went on to say that *"I am not prepared for any further delays. I am due to travel to Edinburgh at approximately 1400hrs, if the monies cannot be paid immediately, 10 tomorrow, I will be travelling to Edinburgh as planned, and the case must go (sic) ahead as planned. If you accept the above, I am prepared to waive all my extra travel and admin costs, and will contact my solicitor first thing in the morning to ascertain his costs so far, and will check the accommodation costs for the two nights, and will provide my bank details as 15 requested."*

11. Mr Morton responded to the claimant, at 2105 hours on 29 January, seeking to clarify the matter and to undertake to pass on his bank details to the respondent for payment of the original sum due.

12. The claimant then emailed the Tribunal at 1035 hours on 30 January 2019, 20 to object to the case being vacated as requested by the respondent, arguing this to be "just another delay tactic" to frustrate the process. He requested that the case proceed to a final hearing.

13. The Tribunal issued an email to the parties at 1255 hours on 30 January 2019 confirming that in light of the respondent's withdrawal of the 25 Employer's Contract Claim, the hearing of 31 January and 1 February was no longer required, and that that claim would be dismissed following its withdrawal. The Tribunal confirmed that although the claimant was seeking to insist on the hearing proceeding, there was no evidence for the Tribunal to hear, and therefore the hearing required to be vacated; and that if the 30 claimant wished to make an application for expenses he should do so in writing.

**The Application**

14. On 30 January 2019, the claimant wrote to the Tribunal in the following terms:

5       *“Further to the 11<sup>th</sup> hour withdrawal of the above referenced case by the respondent, I would like to submit my expenses/costs so far, for consideration, as I have been put to great expense to get a judgement on the whether there was an agreement, and to continue to defend the counterclaim.*

10       *Due to the withdrawal I have been denied the opportunity to prove my case and submit my costs.*

*Attendance at preliminary hearing 5<sup>th</sup> Sept 2017*

*Attendance at hearing 5<sup>th</sup> January 2018*

*Attendance at Preliminary Hearing 22 Nov 2018*

*Loss of two days 31<sup>st</sup> Jan & 01 Feb 2019*

15       *Petrol/Travel costs £65.00 x 3 = £195.00*

*Loss of Days pay net: £105.32 x 5 = £526.60*

*Loss of Representative days pay net £64.92 x 5 = £324.60*

*Hotel costs Edinburgh Haymarket Hub 30<sup>th</sup> & 31<sup>st</sup> Jan 2019 (non refundable) = £102.60*

20       *Hrs spent preparing for above 5 days of hearings plus cost of bundle preparations for 31 Jan/01 Feb due to failure of respondent (min 20 hours at £15/hr), stationery etc = £320*

*Interest at 8% on the £10,000.00 from the day the debt became due 06 August 2017 = £1,200.00*

25       *Total £2,668.20*

*I would be grateful if you could give this your consideration, and grant me these costs.”*

15. No response was received from the respondent in relation to this request.

### **Discussion and Decision**

5 16. The Employment Tribunals Rules of Procedure 2013 set out a number of rules relating to the award of expenses (or “costs”) to parties in particular circumstances.

10 17. In this case, the claimant’s application relates, as it seems to me, to the late withdrawal of the Employer’s Contract Claim, which the claimant alleges has caused him to incur certain expenses.

18. There is no response by the respondent to this application, which is curious, given that they were represented and had ample opportunity to respond.

15 19. It is necessary to consider the basis upon which this application is made by the claimant. The claimant is not legally qualified, and is represented by a lay representative, a Ms MacLeod, but the application is made by the claimant himself. No reference is made to any Rules of Procedure.

20. Rule 75(1) provides:

*“A costs order is an order that a party (‘the paying party’) make a payment to –*

20 *(a) another party (‘the receiving party’) in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;*

*(b) the receiving party in respect of a Tribunal fee paid by the receiving party; or*

25 *(c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual’s attendance as a witness at the Tribunal.”*

21. In this case, the claimant was represented throughout by a lay representative, and accordingly, a costs order under Rule 75(1)(a) may be applicable.

22. Rule 76(1) provides:

5        *“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*  
10        *been conducted; or*

*(b) any claim or response had no reasonable prospect of success; or*

*(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.”*

15        23. Rule 76(2) also allows the Tribunal to make such an order where 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.

24. In this case, it is plain that the claimant was very unhappy that the respondent withdrew the Employer’s Contract Claim on 29 January, 2 days  
20        before the hearing was due to take place in order to determine that matter. The source of his unhappiness appears to have been that the respondent waited until late in the proceedings before coming to that decision; that he was prevented from having his defence heard by the Tribunal; and that he incurred expense as a result of this and the respondent’s conduct in failing  
25        to implement the earlier Judgment issued by Judge d’Inverno.

25. What the Tribunal requires to do, then, is to ascertain whether there is a proper basis upon which an order for expenses should be made against the respondent in respect of the withdrawal of their Employer’s Contract Claim.

26. In the absence of a response to the application by the respondent, it is not possible to take into consideration any explanation given by them for the course of action which they took.

27. This is a case which has had a very long, and somewhat tortured history. It is not necessary to repeat that history here, but it is important to note that the dispute between the parties was first brought to the Tribunal in 2016 when the original claim was raised. On 19 February 2018, Judge d'Inverno issued the Judgment which confirmed that a binding settlement had been reached between the parties, and ordered that the respondent pay to the claimant the sum of £10,000. He left aside the Employer's Contract Claim, which he considered was not included within that settlement, a fundamental source of dispute between the parties before him.

28. The matter was therefore presented to the Tribunal for hearing only on the Employer's Contract Claim, and following a Preliminary Hearing in November 2018 before the sitting Employment Judge, a hearing was fixed for 31 January and 1 February 2019. Preparations were made for that hearing, but on the withdrawal of the Employer's Contract Claim on 29 January, the hearing was vacated as it was no longer required.

29. No explanation is available from the respondent as to why, having maintained their Employer's Contract Claim for some two years, they chose to withdraw it at "the 11<sup>th</sup> hour", as the claimant put it. They simply withdrew it and regarded that matter as at an end.

30. It is the respondent's conduct, judged according to their own or their representative's actions, which I must decide upon.

31. In this case, I consider that the respondent's actions in maintaining the Employer's Contract Claim until 29 January and then, without warning or explanation, withdrawing that claim, to be unreasonable. There is no doubt that there has been an ongoing dispute between the parties over a lengthy period of time, and that relations between them have been poor. The Tribunal is aware that the Judgment of February 2018 is the subject of enforcement proceedings in Dumfries Sheriff Court, and while it is not

appropriate for this Tribunal to make any comment as to how or why that has come about, since no evidence is available on which to draw any such conclusion, it is obvious that the Judgment has not concluded the dispute between them.

5 32. It is reasonable to infer from the respondent's conduct that they have decided that they were unlikely to succeed in the Employer's Contract Claim when it was to come to hearing on 31 January. Quite why they could not have reached that conclusion without having put the claimant to such inconvenience and expense as they did, and withdrawn their claim at a  
10 much earlier stage, is entirely unclear to the Tribunal. The claimant clearly believes that it was done deliberately in order to cause him the greatest inconvenience. Without a clear response from the respondent, it is not possible to make a finding that their actions were calculated to achieve this result, but in my judgment, waiting until 2 days prior to a hearing which had  
15 been required for a year since Judge d'Inverno's judgment, and had been listed for some months, was quite unreasonable, and did put the claimant to considerable inconvenience and expense.

33. I have therefore concluded that the late withdrawal by the respondent of the Employer's Contract Claim amounted to unreasonable conduct under Rule  
20 76(1)(a), and that an expenses order under Rule 75(1)(a) should be made in all of the circumstances against the respondent.

34. The next issue, then, is the amount to be paid by the respondent.

35. The difficulty about the claimant's claim for costs is that it takes into account costs which have not been incurred in consequence of the respondent's  
25 unreasonable conduct of the proceedings.

36. Taking each part of the claim individually, then, I assess them in the following way.

37. The claimant firstly makes reference to his attendance at hearings in September 2017, January 2018 and November 2018. In my judgment, he  
30 required to attend these hearings as part of the ongoing proceedings



between the parties, and not as a consequence of any unreasonable conduct on the part of the respondent. It may be the claimant's sense that the respondent never had any intention of proceeding with this hearing, but I have no basis upon which to conclude that. As a result, I am not prepared to make any award in respect of his attendance at the preliminary hearings referred to.

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38. The claimant then seeks an award in respect of the "loss of two days 31<sup>st</sup> Jan and 01 Feb 2019". It is entirely unclear what he means by this. He is not entitled to seek an award in respect of the loss of the opportunity to advance his defence, and he has not in any event quantified what this would mean. I can see no basis upon which to make an award under this particular heading.

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39. The next claim the claimant makes is for petrol and travel costs on three occasions. I understand this to be a reference to the three hearings he required to attend. Again, in my judgment, these costs were not incurred as a result of the respondent's unreasonable conduct, and therefore no award is made in this regard.

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40. The claimant then makes claims for loss of pay in respect of both himself and his representative. He has asked for 5 days in respect of each. Again, it is entirely unclear on what basis the Tribunal should or could make such an award, except to the extent that the claimant and his representative required to book time off for the 2 days of the hearing on 31 January and 1 February.

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41. I am prepared, therefore, to order the respondent to pay to the claimant and his representative the equivalent of 2 days' pay each, namely £210.64 to the claimant and £129.84 for his representative's lost pay.

42. The hotel costs arise specifically as a result of the need to attend the hearing on 31 January, and accordingly I am prepared to order the respondent to pay to the claimant the sum of £102.60 in this regard.

43. I am not prepared to award costs of preparing for all of the 5 days of hearings which the claimant claims for, but am prepared to make an award of £200 in respect of preparation for the hearing due to take place on 31 January and 1 February.

5 44. Finally, the claimant seeks interest on the sum awarded under Judge  
d'Inverno's Judgment of February 2018. That is not an application for costs,  
and relates to a Judgment issued by a different Judge. The enforcement of  
that Judgment is the subject of Sheriff Court proceedings, and therefore it is  
outwith the jurisdiction of the Tribunal to make any award in this regard.  
10 Accordingly, no award is made in this regard.

45. It is therefore my judgment that the respondent is ordered to pay to the claimant the sum of £643.08 by way of expenses in respect of their unreasonable conduct in these proceedings.

15 Employment Judge: Murdo A Macleod  
Date of Judgement: 25 March 2019  
Entered in register: 25 March 2019  
And copied to parties