



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case Number: 4109507/2018**

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**Held in chambers on 25 November 2019**

**Employment Judge: M Sutherland (sitting alone)**

10 **Lesley Blair**

**Claimant**

**Inverclyde Taxis Ltd**

**Respondent**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Tribunal is that the Respondent's application for expenses in respect of the postponed final hearing is refused.

**REASONS**

1. The Claimant made a claim for unfair dismissal which was dismissed following a final hearing before Judge Garvie on 3 and 4 June 2019. On 22 May 2019 the Respondent made an application for payment of legal expenses of £4,233 in respect of the postponement of the final hearing, initially listed for 3 days commencing 4 February 2019, on the ground that the Claimant's application for postponement was made less than 7 days before the hearing. The Claimant opposed the application for expenses.
2. Judge Garvie directed that the application for expenses be considered by the judge who had determined the application for postponement. The stated preference of both parties was that the matter be considered by way of written representations and the matter was determined in chambers. Parties were given reasonable opportunity to make written representations in relation to the application and those representations have been taken into consideration.

3. Under Rule 77 a party may apply for a costs order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. The application for expenses was made prior to the final hearing and is accordingly made in time.
- 5 4. Under Rule 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— ... (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”
5. The application for expenses entails consideration of the following:
  - 10 a. Was a hearing postponed on the application of the Claimant made less than 7 days before the hearing?
  - b. If so, should the tribunal make any award of expenses in the exercise of its discretion and if so, what should be that amount of that award?

15 **Was a hearing postponed on the application of the Claimant made less than 7 days before the hearing?**

6. A final hearing was initially listed for 3 days commencing 4 February 2019. Following the Respondent’s application for strike out, the first day was converted to a preliminary hearing. At that preliminary hearing on 4 February 2019 the Claimant made an application for postponement of the final hearing due to commence the following day on 5 February 2019. Her application was granted. Accordingly, the criteria set out in Rule 76(1)(c) are met.

**Should the Tribunal make any award and if so, how much?**

7. The Tribunal must consider whether it is appropriate to exercise its discretion in favour of awarding costs against the party, taking into account the circumstances of the case and any relevant factors. Under Rule 84 in deciding whether to make a costs order, and if so, in what amount, the Tribunal may have regard to the paying party’s ability to pay.
- 25 8. Awards of costs are rare, remaining the exception rather than the rule and do not necessarily follow the event.

9. On 5 November 2018 a final hearing was listed for 3 days commencing 4 February 2019. On 21 December 2018 the Claimant's representative withdrew from acting. The Claimant wished to secure alternative representation but had not taken any steps to do so because of the sudden death of her father 7 days later on 28 December 2018. On 28 December 2018 the Claimant's father died suddenly in a house fire and following a postmortem his funeral was held on 1 February 2019. Despite receiving communication from the Respondent's representative, there was no communication from the Claimant to the Respondent's representative in the period from 21 December 2018 until 1 February 2019.
10. On 11 January 2019 the Respondent made an application for strike out pursuant to rules 37 (b), (c) or (d) namely the manner in which the proceedings have been conducted has been unreasonable; there has been non-compliance with the tribunal order of 7 September; or the claimant has not been actively pursued. On 1 February 2019 the Claimant advised the Respondent's representative regarding the death of her father and the timing of his funeral. Immediately before the commencement of the hearing on 4 February 2019 the Claimant made an application for postponement to allow time to seek alternative representation on the grounds of exceptional circumstances following the sudden death, post mortem and delayed funeral of her father.
11. On 1 February 2019 it was determined by the tribunal that the first day of the final hearing would be converted to a preliminary hearing to consider the application for strike out and the substantive hearing was postponed to start on 5 February 2019 for 2 days if not otherwise struck out. This decision was not intimated to the parties until the start of the hearing on 4 February.
12. The Respondent's application for strike out was refused for reasons provided in oral judgment. The Claimant's application for postponement was granted given the exceptional circumstances and having regard to the overriding objective. It was explained to the parties that notwithstanding the desire to proceed without delay, the Claimant was entitled to some limited time to secure alternative representation, and it was not reasonably practicable for

her to do so following the sudden death of her father and the delay to his funeral caused by the post mortem. Whilst recognising the prejudice to the Respondent in having the hearing postponed this prejudice did not outweigh that to be suffered by the Claimant in not being provided with a practical opportunity to secure alternative representation.

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13. The Claimant was afforded a period of 1 month in which to secure alternative representation. It is understood that the Claimant secured alternative representation on or before 20 February 2019. Notice of the dates of the postponed final hearing were issued to parties on 2 March 2019.
- 10 14. The Respondent advises that it is was put to additional time, work and expense in order to prepare for a delayed hearing. The Respondent provided a schedule of legal costs incurred in the period from 24 January 2019 to 4 March 2019 in sum of £4233 (after deduction of time spent in relation to the strike out application). The Respondent has advised it was ready to proceed with the postponed final hearing due to commence on 5 February 2019. Accordingly, the costs incurred by the postponement must be restricted to the period from 5 February 2019 onwards. The costs incurred prior to that, as narrated on the schedule, are necessary preparatory steps that are relevant to the final hearing whenever heard. Furthermore, it is not reasonable for the costs associated with the delay to amount to a third of the total legal costs (understood to be £12,500).
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15. The Claimant is in receipt of universal credit and has no capital or savings.
16. On balance, taking into account the circumstances of the case and the relevant factors including the Claimant's ability to pay, it is considered inappropriate to award costs against the Claimant and the application is refused.
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Employment Judge:

Michelle Sutherland

Date of Judgement:

15 January 2020

Entered in Register,

5 Copied to Parties:

20 January 2020