EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4105236/2017

Expenses Hearing (in Chambers) held in Glasgow on 8 August 2018

Employment Judge: Ian McPherson

Mr David Selbie	**Claimant** **per Written Representations**
Malakoff Limited	**Respondents** **per Written Representations by:** **Mr Maurice O'Carroll** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

(1) Having considered parties' written representations, on the respondents' opposed application for an award of expenses against the claimant, in terms

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of Rule 76(1>(a) of the Employment Tribunals Rules of Procedure 2013, the Tribunal grants the respondents' application for an award of expenses against the claimant, it being satisfied that the claimant's conduct of these Tribunal proceedings, post 23 March 2018, has been unreasonable, but otherwise refuses that application;

(2) Accordingly, the Tribunal, in respect of that unreasonable conduct of the proceedings by the claimant, finds that the respondents incurred expenses which should be reimbursed in part by the claimant, but the Tribunal refuses the respondents' application for an award of expenses in the sum of £20,000 against the claimant, it being disproportionate to order the claimant to pay the respondents the full sum sought of expenses of £20,000, when the Tribunal, having regard to information available about the claimant's whole means and assets, finds that the sum sought by the respondents is at such a high level that the claimant likely cannot afford to pay that full amount, having regard to his current financial circumstances;

(3) However, having regard to the information available to the Tribunal on the claimant's ability to pay, in terms of Rule 84 of the Employment Tribunals Rules of Procedure 2013, and in terms of Rule 78(1)fa> of the Employment Tribunals Rules of procedure 2013, the Tribunal orders the claimant to pay to the respondents the sum of ONE THOUSAND, FIVE HUNDRED POUNDS (£1,500) in respect of a contribution towards the respondents' expenses reasonably and necessarily incurred in defending these Tribunal proceedings raised against them by the claimant.

REASONS

Introduction

1 This case called before me, as an Employment Judge sitting alone, on the morning of Wednesday, 8 August 2018, at 10.00am, for a 3 hours in chambers Expenses Hearing, proceeding by way of written representations

from both parties, further to correspondence from the Tribunal, issued to the claimant, and respondents' representative, under cover of a letter from the Tribunal dated 11 July 2018, and a subsequent email of 6 August 2018.

2 Previously, the case had called before a full Tribunal, chaired by me, on Tuesday, 17 April 2018, for a 5 day Final Hearing for its full disposal, including remedy if appropriate, as per Notice Hearing issued to both parties' representatives by the Tribunal on 5 February 2018. However, the claimant not then being in attendance or represented, but having submitted a withdrawal of his claim, the Hearing proceeded in the absence of the claimant, the Tribunal taking into account, in terms of Rule 47 of the Employment Tribunal Rules of Procedure 2013, available information from the claimant, and oral submissions from counsel appearing for the respondents.

3 Thereafter, and as recorded in our full written Judgment and Reasons dated 20 April 2018, entered in the register and copied to both parties on 25 April 2018, in terms of Rule 51 of the Employment Tribunal Rules of Procedure 2013, the Tribunal noted the claimant's withdrawal of his claim, and he not having expressed a wish to reserve the right to bring a further claim against the respondents, the Tribunal granted the respondents' application, in terms of Rule 52, dismissing the claim.

4 Further, counsel for the respondents having then intimated that the respondents intended to seek an award of expenses against the claimant, in respect of the late withdrawal of the claim, the Tribunal ordered the respondents' solicitor to intimate to the Tribunal office, by e-mail, with copy sent to the claimant at the same time, as soon as possible, and certainly within 28 days of the date of this Judgment, a written application, identifying, by reference to the appropriate rules of procedure within the Employment Tribunal Rules of Procedure 2013 (Rules 74 to 84), the specific grounds for the application, the factors which the respondents rely upon in advancing their application for expenses, and specifying the amount of expenses

sought, including an explanation of the basis of calculation for those expenses, and produce any relevant vouching documents.

5 Finally, by consequential case management orders, as set forth at paragraphs (3) to (7) of our Judgment, we set out further procedure to be adopted in respect of any expenses application from the respondents, and any objection by the claimant. In particular, the claimant was ordered by the Tribunal, in terms of that Judgment, to intimate to the Tribunal, with copy sent at the same time to the respondents' solicitor, a written reply to the respondents' expenses application, making any comment or objection that he felt appropriate, addressing his grounds of resistance to their application, and addressing his ability to pay any such expenses, if ordered by the Tribunal, as also to intimate a statement of his means and assets, detailing and vouching his whole means, and his ability to pay, if any award was to be made against him by the Tribunal, and all that within 14 days of intimation of the respondents' application for expenses.

Background to the Claim

6 On 13 October 2017, following ACAS early conciliation, between 3 August and 14 September 2017, the claimant, then represented by Ms Lois Madden, Solicitor with Thompsons, Glasgow, presented an ET1 claim form, suing the respondents, in respect of alleged unfair, constructive dismissal, unlawful discrimination against him on the grounds of sex and / or sexual orientation, and unlawful deduction from wages. The claim was defended by the respondents, per an ET3 response, lodged on their behalf, on 22 November 2017, by Ms Kate Sharp, Senior Solicitor with BBM solicitors, Edinburgh.

7 Thereafter, Employment Judge Shona Maclean held an in person, Case Management Preliminary Hearing, with the claimant's solicitor, Ms Madden, and the respondents' counsel, Mr O'Carroll, on 25 January 2018, following which a written Note and Orders were issued to parties' representatives, under cover of a letter from the Tribunal dated 27 January 2018. The issues to be determined by the Tribunal were noted, and certain case management

orders were made as regards a schedule of loss, and a joint bundle of productions. A Final Hearing was fixed for 17, 18, 19, 20 and 23 April 2018 in Glasgow before a full Tribunal.

Postponement of Final Hearing refused by the Tribunal

8 On 23 March 2018, Ms Madden, the claimant's then solicitor, advised the Tribunal, and the respondents' solicitor, that her firm would no longer be representing the claimant, who would be seeking alternative legal representation, but Ms Madden applied for a postponement of the Final Hearing set down from 17 April 2018 to allow the claimant a further period of time to source a new legal representative.

9 After sundry correspondence, including objections from the respondents' solicitor, Ms Florence Fisher, on 26 March 2018, a reply from the claimant himself on 27 March 2018, and further comments from the respondents' solicitor, Ms Kate Sharp, on 3 April 2018, the postponement request was placed before me, as duty Employment Judge, on 6 April 2018.

10 Having considered the application to postpone, and the respondents' objections, the claimant's application was refused by me, on the basis the case was listed for the agreed dates as far back as the Case Management Preliminary Hearing before Employment Judge Maclean on 25 January 2018.

11 Further, I held that it was not in the interests of justice to postpone when, if the claimant was unable to secure new legal representation, there could still be a fair hearing given the Tribunal's duty, under Rule 2 of the Employment Tribunal Rules of Procedure 2013, to ensure parties are on an equal footing, as per the overriding objective, that the case is dealt with fairly and justly.

12 The Tribunal advised that it was well used to parties representing themselves and, having considered the balance of respective hardship and prejudice to the parties by allowing / refusing the postponement request, I agreed that there was likely greater prejudice to the respondents by allowing

the postponement, and so I refused the claimant's application, and the Tribunal's letter of 6 April 201 8 confirmed that the case remained listed for hearing on 17 to 20 and 23 April 2018.

Withdrawal of the Claim

13 The case file was referred to me on Monday, 16 April 2018, for a reading day, given that the claimant was an unrepresented, party litigant, and I was, in those circumstances, likely to have to take the claimant's evidence in chief, by asking a series of structured and focused questions of the claimant, designed to elicit the relevant and necessary evidence required by the Tribunal to understand his complaints against the respondents, as per the ET1 claim form.

14 It was further explained by the Tribunal that the claimant would then be cross examined by the respondents' counsel and asked questions from the Tribunal panel, in the normal way. In the course of reading .the case file, I made certain case management orders, as regards the listed Final Hearing, and these were sent, by email, to the claimant, and to the respondents' solicitor on the afternoon of Monday, 16 April 2018.

15 By email sent to the Glasgow Tribunal office, at 13:11 on 16 April 2018, but not copied to the respondents' solicitor, in terms of Rule 92 of the Employment Tribunal Rules of Procedures 2013, the claimant intimated that:

> *"With due consideration I am withdrawing my action against Malakoff Ltd... My withdrawal is due to the following reasons:*
>
> ***1.*** *Unable to obtain legal representation within the required timeframe for the Tribunal.*

2. *Due to the legal representatives from Malakoff Ltd pushing for time restrictions on evidence making facts impossible to be proven in the Tribunal.*

3. *Without sufficient representation on my behalf, I feel that the Tribunal will not be of an equal hearing or equal outcome."*

16 On referral of the claimant's email to me, I instructed a letter be sent, to the claimant, and the respondents' solicitor, seeking their urgent comments, by no later than 4pm that afternoon.

17 In response to the Tribunal's email, the claimant replied at 15:42. As his reply was again not copied to respondents' solicitor, it was copied to the respondents' solicitor by the Tribunal clerk. When a reply from the respondents' solicitor had not been received, by the time fixed for compliance, at 4.00pm, I instructed the clerk to telephone the respondents' solicitor, and make enquiry.

18 By an email from the Tribunal clerk, to the claimant, and the respondents' solicitor, sent at 17:17 on the afternoon of Monday 16 April 2018, the clerk advised parties that I was disappointed that, despite the clerk's telephone call to Ms Sharp, a response from the respondents had not been forthcoming.

19 In those circumstances, the email from the Tribunal stated that case would call as listed before the full Tribunal at 10.00am the following morning, Tuesday 17 April 2018. The clerk's email further advised the claimant that, if he did not attend in person, he could seek to join the Hearing by telephone conference call, should he wish, and he should advise the Tribunal office by 9.00am the following morning, so that call in details could be provided.

Hearing before the full Tribunal

20 When the case called before the full Tribunal, on the morning of Tuesday, 17 April 2018, the claimant was not in attendance, nor represented, and there had been no response received from him to the Tribunal clerk's email of the previous afternoon at 17:17. In these circumstances, the clerk to the Tribunal was instructed to make contact with the claimant, and ascertain his position. Unfortunately, the contact details for the claimant held by the Tribunal only included his email address, and postal address, but not any telephone number.

21 While scheduled to start at 10.00am, in the event, the Hearing did not commence until 10.35am, on account of the clerk's enquiry as regards the claimant's whereabouts, and position, and also to allow the full Tribunal to read, and consider, the terms of Ms Sharp's full and detailed response to the Tribunal's letter of the previous day, sent by her at 18:42 on Monday, 16 April 2018. We noted that her reply had been sent not only to the Tribunal clerk, but also copied, by email, to the claimant himself. In her reply, Ms Sharp had provided the Tribunal with comments on the claimant's withdrawal email, and addressing each of his points in turn, she had stated as follows:-

> *1. I cannot comment on whether the Claimant has been 'unable to obtain legal representation' other than to say that I have not received notification from any new solicitor instructed to act on the Claimant's behalf. I understand, therefore, that he is representing himself. Having said that, the Respondent's position is that the Claimant has had adequate time to instruct a new solicitor. We were notified of the withdrawal of Thompsons solicitors on 23 March which was over three weeks ago. Our views in relation to instructing a solicitor within this time period are set out in our emails of opposition to the Claimant's request for a postponement of the hearing.*
>
> *2. It is not accepted that we have '[pushed] for time restrictions on evidence,..'. This phrase is misleading and appears to suggest some inappropriate conduct on the part of QQM Solicitors. This is incorrect and completely refuted. I presume that the Claimant is referring, in this*

part of his email, to the deadlines for reaching agreement on the Joint Bundle. As per the Note of the Preliminary Hearing which was issued to parties, the bundle of documents was to be agreed by 27 March. A draft joint bundle was emailed to Thompsons solicitors on 23 March in order that they could advise whether there were any additional documents which they wished to add on behalf of the Claimant. We were advised the same day that Thompsons were withdrawing from acting, however we received an email from them to confirm that the Claimant was aware of the deadline for agreeing the joint bundle. The Claimant did not advise us of any documents that he wished to add to the bundle, therefore my colleague emailed him directly on 29 March to advise that we were prepared to allow him until 6 April to produce any such documents. This was in fairness to him as an unrepresented party. No response was received from the Claimant. I then emailed the Claimant on 12 April with an electronic copy of the bundle and advised that a hard copy would be provided at the hearing. This email was sent for completeness as no changes had been made to the bundle since it was sent to Thompsons and was sent in order to make absolutely sure that the Claimant had a copy of the bundle in advance of tomorrow's hearing. Every effort has been made to treat the Claimant fairly, particularly as he is unrepresented. This is further evidenced by the fact that a further email was sent to the Claimant on 13 April regarding the venue for the hearing in order to ensure he was clear as to where it was to be held.

3. The Respondent's position is that the letter from the tribunal dated 6 April 2018 makes it clear that there is an overriding objective to ensure that that the case is dealt with fairly and justly. That is a consideration which applies to both parties. It is clear, therefore, that the tribunal took matters of this sort into account when considering the Claimant's postponement request and reached the decision that a postponement would cause greater prejudice to Respondent. Further, it was made clear in the tribunal's letter that the tribunal is well used to parties representing themselves. The letter issued by the tribunal earlier today

regarding arrangements for final submissions and evidence in chief etc. also should have made this (and the fact that he would not be prejudiced by reason of not being legally represented) clear to the Claimant.

The Respondent's position is that the Claimant has, by virtue of his email timed 1.11pm this afternoon, withdrawn his Employment Tribunal claim. It is respectfully submitted that his withdrawal should be accepted by the Tribunal and the claim dismissed (which we shall move for tomorrow morning). The Respondent's position is that this case is without merit and our client reserves their right to seek to recover expenses from the Claimant, particularly given the proximity to the hearing (and the fact that all preparation is now complete).

22 The clerk to the Tribunal not having a telephone contact number, on file, for the claimant, she emailed the claimant at 9:50am, on Tuesday, 17 April 2018, seeking confirmation whether he would be attending in person, or whether he wished to apply to join the Hearing by telephone conference call. The claimant returned a reply, very promptly, at 10:02, stating:

> *"Thank you for your email. I will not be attending today as I am unable to do conference call as I am away to see what the results are for my blood tests and x-ray as I have problems breathing."*

23 The Tribunal noted that the claimant's response did not seek a postponement of the Final Hearing, on account of his inability, to date, to secure alternative legal representation, or on account of his unfitness, on medical grounds, to attend the Tribunal. It is also of note that the claimant's email made no reference to, or comment upon, Ms Sharp's email the previous evening at 18:42, although it had, as per Rule 92, properly been copied to the claimant at the same time as being sent to the Tribunal.

24 Further, despite the Tribunal's letter expressly drawing to the attention of the claimant the full terms of Rules 51 and 52, the claimant's response similarly did not address whether, given his withdrawal of the claim, he wished to

reserve the right to bring a further claim against the respondent, which might have made grant of a Rule 52 Dismissal Judgment inappropriate.

25 When the Hearing started, at 10.35am, Mr O'Carroll, Advocate, appeared for the respondents, instructed by Ms Sharp. Mr Dougie Stevenson, the respondent's Managing Director, was also in attendance.

26 Arising from a discussion between the Employment Judge, on behalf of the Tribunal, and Mr O'Carroll, on behalf of the respondents, the Tribunal noted the claimant's withdrawal of his claim, and we there and then orally granted the respondents' application, in terms of Rule 52, for a Dismissal Judgment.

27 Thereafter, enquiring of the respondents' counsel about the respondents' statement, in Ms Sharp's e-mail, that they reserved the right to seek an award of expenses against the claimant, Mr O'Carroll helpfully indicated that his instructions were that the respondents would be making such an application.

28 He stated that the respondents were fully prepared for this Final Hearing, with himself and instructing solicitor, the Bundles had been delivered, and arrangements made for all witnesses or the respondents to attend. Their MD was present, at this Hearing, having flown in from Shetland, and expenses had been incurred. Further, flights from Shetland for other witnesses had been paid irredeemably, and accommodation booked forthem, although the respondents may be able to get some savings on cancellation of bookings.

29 Counsel initially suggested that he would be inviting the Tribunal to award expenses against the claimant, as taxed by the Auditor of Court, but following enquiry by the Judge, as to the likely amount of expenses, and counsel advising it would be likely less than £20,000, he then stated that a statement of account of expenses, and vouching documents, would be prepared by those instructing him, and lodged with the application for expenses against the claimant, for the Tribunal's consideration.

30 Discussion then focussed on appropriate consequential orders, and case management of how any application for expenses, if opposed by the claimant, as seemed likely, would be dealt with by the Tribunal. We made the Orders set out at paragraphs (3) to (7) of our Judgment, in terms of Rule 29 of the Employment Tribunal Rules of Procedures 2013. That Hearing concluded at 10.50am.

Respondents' Application for Expenses against the Claimant

31 On 10 May 2018, the respondents' solicitor, Ms Sharp, intimated to the Tribunal, by email, at 10:58, with copy sent to the claimant, by the same email, the respondents' seven page, typewritten application for expenses against the claimant, prepared by counsel, Mr O'Carroll, on 8 May 2018, together with accompanying vouching documents and receipts, and a detailed spreadsheet. The full amount of expenses was there quantified at £34,123.62, but restricted to £20,000, under Rule 78 of the Employment Tribunal Rules of Procedure 2013.

32 In particular, the expenses sought by the respondents were shown, in detail, in that spreadsheet , by date, invoice number, description, net fee, VAT element, and total, including solicitor's fees from 25 August 2017 to 27 April 2018, at £18,234.00, plus £3,646.80 VAT, totalling £21,880.80 ; Counsel's fees from 16 November 2017 to 8 May 2018 (including drafting the expenses application), at £9,925.00, plus £1,985.00 VAT element, totalling £11,910.00; and accommodation and flight expenses for Mr Douglas Stevenson at £332.82, with no VAT element, with supporting vouchers from Premier Inn and Loganair. While invoice numbers, and amounts, for solicitor's and Counsel's fees, were shown on the spreadsheet, no copy invoices were produced to the Tribunal.

33 The respondents' application for expenses was in the following terms:-

1. Order sought by the Respondent

The Respondent seeks an Order for expenses against the Claimant for the expenditure incurred in defending the above proceedings. The Order is sought on the basis that in bringing the claim and in the conduct of it, the Claimant has acted vexatiously, abusively and otherwise unreasonably in terms of Rule 76(1)(a) of the Schedule to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

2. <u>The relevant rules</u>

Rule 75: Costs orders and preparation time orders

(1) A costs order is an order that a party ("the paying party") make a payment to—
(a) another party ("the receiving party') in respect of the costs that the receiving party has incurred while legally represented. ...

Rule 76: When a costs order or a preparation time order may or shall be made

(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, disrupti vely or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted.

Rule 78: The amount of a costs order

(1) A costs order may (a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party. ..

3. <u>Applicability of the rules and the extent of the Order sought</u>

The Respondent was legally represented throughout the proceedings. Rule 75(1)(a) applies.

In terms of Rule 78(1), the Respondent seeks payment of its legal and other expenses, necessarily and reasonably incurred in the defence of the present proceedings. The amount sought is an amount not exceeding £20,000, although the relevant expenses incurred by the Respondent are in excess of that sum.

Having said that, the Respondent is content for the Tribunal to make an order of such lesser amount as appears to the Tribunal to be appropriate once it has assessed the Claimant's means and assets. The Respondent has no wish to cause the Claimant undue financial hardship beyond what he may reasonably be expected to pay. It simply seeks reasonable compensation from the Claimant to mark the unnecessary expense incurred by the Respondent as a result of the Claimant's unreasonable behaviour in the conduct of these proceedings.

4. <u>The relevant time line of events</u>

13 October 2017 - Form ET1 submitted by Claimant with Assistance of Messrs Thompsons

22 November 2017 - Form ET3 submitted by Respondent denying all claims

25 January 2018 - PRH held before EJ MacLean. Documents deadline for 27 March 2018 fixed, with copies to be provided to ET by 16 April. Hearing set down for 17-20 and 23 April 2018.

23 March 2018 - Thompsons cease acting for Claimant and request for postponement of hearing made to allow alternative representation to be found. Application thereafter resisted by Respondent on grounds of prejudice.

6 April 2018 - EJ McPherson refuses request for postponement in light of ET's ability to assist unrepresented parties and requirements of Rule 2.

76 April 2018 - EJ McPherson issues Rule 45 timetable Direction detailing measures to assist Claimant in presenting his case.

16 April 2018 at 13.11h - Claimant intimates withdrawal of claim by email to ET (not copied to Respondent).

17 April 2018 - Respondent's Managing Director and intended witness, Douglas Stevenson attends ET along with counsel and instructing solicitor as ordered by EJ McPherson.

17 April 2018 at 10.02h - Claimant sends email to intimate he will not be attending Tribunal.

17 April 2018 - Claim dismissed by EJ pursuant to Respondent's application under Rule 52.

5. <u>The nature of the claim</u>

The only part of the claim admitted by the Respondent was that an incident occurred in the staff canteen during January 2015 (although the particular circumstances of that incident are disputed). Whether this could conceivably have amounted to discrimination by reason of sex or sexual orientation is at least highly doubtful. In any event, it was hopelessly out of time in terms of section 123 of the Employment Rights Act 1996.

The remainder of the allegations were both vague in terms of when they occurred and highly scandalous in nature. For example, at paragraph 2.7 of the page apart to the ET1, it is alleged:

"at least once a month during the Claimant's period of employment, Mr Russell [the Claimant's line manager] would make comments to the Claimant such as "you're gay, you're bent, "you like burly men" and "you swing both ways." (italics added)

The allegations caused great offence to Mr Russell who would have strenuously denied having made them had the Tribunal hearing proceeded. It is submitted that these allegations were included within the ET1 in order to

cause the maximum of disquiet, upset and embarrassment to the Respondent. This was particularly true given that other members of the small and close-knit community within Shetland inevitably became aware of those allegations.

The Respondent's position is that the Claimant had a work-related grievance in relation to having been overlooked for a position and that these allegations were completely without foundation. Obviously, in the absence of evidence, it is not possible now to categorically state that the Tribunal would have agreed with that position. However, their scandalous nature became a matter of common knowledge, the effect of which would have been known and indeed intended by the Claimant. By holding out such averments until the last possible moment, the Claimant allowed those scandalous allegations to persist for the longest possible period of time.

It is therefore submitted that the true intent of the claimant was not to pursue a genuinely held belief in the claim for discrimination but to use the Tribunal litigation for another purpose, an improper purpose, namely to cause embarrassment to his former employers. It was therefore an abuse of process and abusive in terms of Rule 76(1)(a).

Reference is made to the following case for an established definition of the term "vexatious" which is also used within Rule 76(1)(a).

Attorney-General v Barker [2000] 1 FLR 759 at paragraph 19:

> *"Vexatious" is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; 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"*

It is submitted that the Claimant's behaviour in the conduct of the claim fits squarely within this definition for the reasons set out above and for the further reasons set out below in relation to the other heads of "abusively" and "otherwise unreasonably" in terms of Rule 76(1)(a).

6. The withdrawal of the claim

It is further submitted that the claim was not only brought vexatiously and abusively for the reasons set out above, but that the Claimant's other conduct in relation to the late withdrawal of the claim also amounted to abusive and otherwise unreasonable behaviour justifying an award of expenses.

As the above timeline demonstrates, the claim was only withdrawn at the last possible moment before the intended start date of 17 April 2018. The Respondent's Managing Director who was to have been the first witness for the Respondent appeared on the first day of the Tribunal on 17 April 2018 and therefore incurred travel and accommodation expenses in connection with his attendance. Whilst he was able to obtain a refund for the remaining six nights, he required to pay for accommodation for the night of 16 April and incurred costs in travelling to and from Glasgow for the hearing. He also required to absent himself from work and could not carry out his functions of Managing Director while he was in Glasgow. At least a day of his working week was therefore wasted. Other flight and hotel arrangements had been put in place for other witnesses due to attend later in the week to give their evidence. This caused disruption and inconvenience to the Respondent's business. However, the associated costs were transferable (in the case of flights) and refundable (in the case of accommodation).

Both Counsel and his instructing solicitor appeared on 17 April 2013 having been fully prepared in anticipation of the hearing proceeding. They were fully prepared at the time of the Claimants email withdrawing the claim at 13.11h on 16 April 2018, The full expenditure connected with their employment had been incurred. A table is attached summarising the costs incurred for each.

Reference is made to an English Court of Appeal authority which arose in connection with the late withdrawal from proceedings, where the following principles were observed at paragraphs 29 and 40 by Mummery LJ:

McPherson v BNP Paribas [2004] ICR 558

> *"I agree with Mr Tatton-Brown, appearing for BNP Paribas, that tribunals should not follow a practice on costs, which might encourage speculative claims, by allowing applicants to start cases and to pursue them down to the last week or two before the hearing in the hope of receiving an offer to settle, and then, failing an offer, dropping the case without any risk of a costs sanction...*
>
> *The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring [the Respondent] to prove that specific unreasonable conduct by the applicant caused particular costs to be incurred. "*

4 *causal link between unreasonable behaviour and expenditure is not actually required to justify an Order for Expenses. However, in this instance, where preparation time significantly increases the nearer parties get to the first hearing date, the clear connection between the late withdrawal and the unnecessary costs incurred can be seen. Further, unlike the situation discussed in McPherson, this claim was not merely dropped in the last*

week or two before the hearing, but rather, was dropped in the afternoon on the eve of the hearing.

It is therefore submitted that in holding out until the last possible moment before withdrawing his claim, the Claimant acted abusively (in terms of process) and otherwise unreasonably in so doing. His actions caused the maximum amount of inconvenience and expense for the Respondent and were therefore unreasonable. Had the Claimant even withdrawn his claim on the Friday prior, that is to say by 14 April 2018, a substantial percentage of that time, inconvenience and expense could have been saved.

It is perhaps difficult to ascribe motive, but the Tribunal should also bear in mind the conduct of the Claimant in bringing the claim abusively and vexatiously as discussed in the first part of these submissions. It would be a reasonable inference to draw that the withdrawal of the claim was deliberately left until the last possible moment precisely in order to incur the maximum of inconvenience and expense on the part of the Respondent. Such conduct is unreasonable and abusive.

7. <u>The task of the Tribunal</u>

There are a number of cases which describe the process which the Tribunal must go through prior to making an Order for Expenses. One of the more recent of these is On! v Unison [2015] ICR D17.

In summary, the Tribunal is required to go through a three-stage process. Firstly, it must decide that the conduct in question is unreasonable. Secondly, it must then decide whether to exercise its discretion whether to make an award of expenses. Thereafter, it will assess the amount of an award having had regard to the paying party's submissions and his means and assets.

It is submitted that the Tribunal should have little difficulty in finding the Claimant's behaviour is unreasonable whether that is described as vexatious, abusive or otherwise unreasonable. It is also submitted that the Tribunal should exercise its discretion in favour of granting the Order sought because of (1) the scandalous nature of the pleadings and (2) the egregious delay in withdrawing the claim.

The On! case requires the Tribunal to have regard to whether either party is unrepresented. It should be remembered, however that the Claimant was until recently advised by Messrs Thompsons who, one might assume, advised the Claimant of the possibility of an award of expenses for unreasonable behaviour. The Tribunal might also care to consider the Supreme Court case of Barton v Wright Hassall [2018] 1 WLR 1119 in which it was held in relation to court proceedings conducted by an unrepresented party that:

> *"since the rules provided a framework within which to balance the interests of both sides, unrepresented litigants were not entitled to any greater indulgence in complying with them than represented parties; and that, unless the particular rule or practice direction was inaccessible or obscure, it was reasonable to expect a litigant in person to familiarise himself with the applicable rules."*

In other words, the rules are there to ensure fair play on both sides. Just because an unrepresented party might expect a greater degree of indulgence from the bench, it does not mean that lower standards of compliance with important rules aimed at ensuring fairness between the parties should apply.

8. *Conclusion*

It is submitted that by reference to Rule 76(1) (a), the Claimant has acted vexatiously, abusively and otherwise unreasonably in his conduct of the present proceedings.

The Tribunal is respectfully requested to find unreasonable behaviour on the part of the Claimant and to exercise its discretion in favour of the Respondent. Thereafter, it is requested to make on Order for Expenses for such amount is at considers appropriate having had regard to the Claimant's means and assets.

Case Law Authorities relied upon by the Respondents

34 With Mr O'Carroll's written application for expenses, he appended, at page 7, a note of 4 case law authorities on which the respondents relied, and he provided hyperlink access, through the online *Bailii* law reports, as follows:

1. Attorney-General v Barker [2000] 1 FLR 759;
http ://w ww. bailii. org/ew/cases/EW HC/Adm in/2000/453. htm l

2. McPherson v BNP Paribas [2004] ICR 1398;
http://www.bailii.org/ew/cases/EWCA/Civ/2004/569.html

[Counsel cited this as [2004] ICR 558, when it is [2004] ICR 1398. I have thus amended his citation. It is also reported at [2004] IRLR 558, and it may be this is what he meant to cite.]

3. Oni v Unison [2015] ICR D17;
http://www. bailii.org/uk/cases/U KEAT/201 5/037 1_1 4_1 702.html

4. Barton v Wright Hassall [2018] 1 WLR 1119;
http://www.bailii.Org/uk/cases/U KSC/201 8/12.html

Claimant's Objections

35 As the respondents' application for expenses was intimated on 10 May 2018, the claimant's 14 day period allowed by the Tribunal's Judgment for him to comment / object, expired on 24 May 2018.

36 On 28 May 2018, the respondents' solicitor, Ms Sharp, emailed the Tribunal, with copy to the claimant, at 09:19, stating that the respondents had not received any response from the claimant, and that it appeared he had not responded directly to the Tribunal either, and, if not opposed, seeking my approval as Judge to the respondents' application for expenses against the claimant being dealt with by me in chambers on an unopposed basis.

37 Her email resulted in an email reply from the claimant, sent to her, and copied to the Tribunal, at 12:38, where the claimant stated that he had not received any correspondence with regards to expenses form, assets forms or proof of expenses incurred, so he could not reply to something that he had never received. If and when they were to provide him the information, he stated that he would "*gladly give them a reply.*

38 In response, Ms Sharp, emailed the Tribunal, with copy to the claimant, at 16:39, stating that (1) the respondents had copied their expenses application, and supporting information, to the claimant on 10 May 2018, as was evident from her email of that date at 10:58, (2) she did not receive any "undeliverable" receipt, and (3) expressing her client's concern that the claimant's email *"may be an attempt on his part to delay matters or to otherwise seek* to *discourage the Tribunal from awarding expenses in favour of my client, which could ultimately be to their detriment."*

39 Ms Sharp's email attached a further copy of her email dated 10 May 2018 for the claimant's benefit. By email of 28 May 2018, at 17:56, the claimant wrote to the Tribunal, copied to Ms Sharp, and in doing so, he stated that he had *"only just received the expenses claims, between the councils* (sic) *and solicitors fees those are extortionate and I would like the Law Society to look into the total cost of the bill. If they are awarded this*

full amount I will have no assets and therefore would have no alternative other than to file for bankruptcy."

40 No further detail or specification of his grounds of objection was provided, nor was any statement of his means and assets provided by the claimant. He did not make any comment, or challenge in any way, the narrative given in the respondents' application, including the relevant time line of events at section 4. I pause to note and record that that timeline accords with the chronology of events as per the Tribunal's casefile.

Parties[7] Further Written Representations

41 On 5 June 2018, having had parties' correspondence of 28 May 2018 referred to me by the clerk to the Tribunal for my instructions, I gave instructions that day for a letter to be sent to the claimant, and copied to the respondents' solicitor, for a reply within 10 days. Unfortunately, due to administrative delay by the Tribunal's administation, my instructions were not acted upon until 25 June 2018.

42 On 25 June 2018, acting on my instructions given on 5 June 2018, a letter was sent from the clerk to the Tribunal to the claimant, copied to the respondents' solicitor, by email at 10:27, advising that parties' correspondence of 28 May 2018 was acknowledged and had been placed on the casefile. I directed the claimant to confirm that he had received the Tribunal's letter of 25 April 2018, enclosing the Tribunal's Judgment, as his email of 28 May 2018 at 12:38 suggested he may not have, and for him likewise to clarify that he had received BBM Solicitors' email of 10 May 2018 with the respondents' application for expenses and vouching, as also for him to clarify whether he wished to be heard in person, or the application considered in chambers, and to provide any information / vouching about his means, and that he should do so by 5 July 2018.

43 On 4 July 2018, the claimant emailed the Glasgow Tribunal only at 22:06. Again, he did not copy that email to the respondents' solicitor. The

claimant's email of 4 July 2018 was in reply to a Tribunal letter emailed to him, and Ms Sharp, the respondents' solicitor, at 12:19, on 27 June 2018, from the clerk's personal email address. That email of 27 June 2018 attached the Tribunal's letter of 25 June 2018, as the original emails sent by the clerk on that date, on behalf of Glasgow ET, had both bounced back as undeliverable, due to an IT issue at the Glasgow Tribunal not allowing clerks to sent attachments with emails from the Glasgow ET address. In that email reply of 4 July 2018, the claimant stated as follows:

> *"I wish for my application to be considered by the judge in chambers and can you please email me with what information I am required to provide you as I have only just managed to open the attached letter. Can all correspondence be done via email please/'*

44 His reply did not fully address all the points raised by the Tribunal in the letter of 25 June 2018. He did not clarify if he had received the Tribunal's Judgment, issued on 25 April 201 8, issued, as per standard practice by post to both parties. The letter addressed to him has not been returned to the Tribunal by the Royal Mail as undelivered.

45 In terms of Rule 90 of the Employment Tribunals Rules of Procedure 2013, where a document has been delivered to a party's address, as per Rule 86, given on the claim form or response, it shall, unless the contrary is proved, be taken to be received by the addressee on the day on which it would be delivered in the ordinary course of post, or if sent be electronic means, e.g. email, on the day of transmission. The Tribunal's letter of 25 April 2018 was sent to the claimant at the address on the ET1 claim form, he not having intimated any change of address to the Tribunal.

46 In any event, as per Rule 91, a Tribunal may treat any document as delivered to a person, notwithstanding any irregular service, if satisfied that the document in question, or its substance, has in fact come to the attention of that person.

47 While the claimant's email of 4 July 2018 did not clarify that he had received Ms Sharp's' email of 10 May 2018, on 10 May 2018, I was satisfied, from his email of 28 May 2018, at 17:56, that he had received the further copy sent by Ms Sharp at 16:38 that afternoon. From the respondents' application for expenses, it is I consider self-evident that it flows on from the Tribunal's Judgment, following the claimant's withdrawal of his claim.

48 While the claimant's email of 4 July 2018 clarified that he wished the expenses application to be considered in chambers, rather than at an in person Hearing, he appears to have confused that it was not his application, but the respondents' application, and his objections. Having considered the claimant's email of 4 July, on 9 July 2018, I instructed that a 1/2 day (3 hours) in chambers Expenses Hearing be fixed, on a date convenient to my diary, after I returned from annual leave w/c 6 August 2018, and I also instructed that a further letter be sent from the Tribunal to the claimant, and respondents' solicitor.

49 In consequence of those instructions from me, a letter dated 11 July 2018 was issued by the Tribunal to the claimant, with copy to the respondents' solicitor, by email sent to both at 11:52, in the following terms:

> *Further to the Tribunal's letter of 25 June 2018, the Tribunal has received the claimant's e-mail of 4 July 2018, at 22:06, which has been placed on casefile.*
>
> *Following referral to Employment Judge Ian McPherson, the Judge has noted that, despite Rule 92, requiring the claimant to copy all correspondence sent to the Tribunal to the respondents' representative, at the same time as sending to the Tribunal, the claimant has not done so.*
>
> *In these circumstances, the Judge has instructed that I advise the claimant of the need to do so, and to confirm to us that he has done so, in all future correspondence. On this occasion, however, the Judge has directed that I copy the claimant's email of 4 July 2018 to*

the respondents' representative, when copying them into this reply to the claimant.

Other than confirming his agreement that the respondents' opposed application for expenses against him should be dealt with in chambers, by Judge McPherson alone, the claimant's e-mail of 4 July 2018 does not provide any further representations on his behalf.

Further, despite the Tribunal's previous correspondence, and the terms of paragraphs (5) and (6) of the Judgment issued on 25 April 2018, the claimant has not made any substantive reply to those paragraphs, by way of written representations on his behalf. The only written representation received from him, in his email of 28 May 2018, at 17:56, is where he refers to the respondents' expenses as "extortionate", and states that if they are awarded the full amount, quantified at £34,123.62, but restricted to £20,000, under Rufe 78, he has "no assets", and would have no alternative but to file for bankruptcy.

The Judge notes the claimant's request, in his e-mail of 4 July 2018, for the Tribunal to email him with what information he is required to provide.

In that regard, and for the avoidance of any further doubt on the claimant's behalf, the Judge refers the claimant to the clear terms of those paragraphs (5) and (6) of the Judgment, namely:

(5) Thereafter, the Tribunal orders that, within 14 days of intimation of the respondents' application for expenses, the claimant shall submit to the Tribunal office a written reply to the respondents' application, making any comment or objection that the claimant feels appropriate, addressing his grounds of resistance to the respondents' application for expenses, and addressing the claimant's ability to pay any such expenses, if ordered by the Tribunal, and lodge his reply with the Tribunal office (by e-mail, with

attached Word document, not PDF) copying his reply to the respondents' solicitor, by e-mail, at that time, for any comment or objection that the respondents feel appropriate, addressing the claimant's reply, and his statement of means and assets, within 7 days of their receipt of the claimant's reply end statement of means and assets.

(6) The Tribunal further orders that, within 14 days of intimation of the respondents' application for expenses, the claimant shall intimate to the Tribunal office, by e-mail, with copy sent at the same time to the respondents' solicitor, a statement of means and assets relating to the claimant, detailing and vouching his income and expenditure, and any capital assets or savings, so as to give the Tribunal and respondents' solicitor advance fair notice of the claimant's whole means, and his ability to pay, if any award of expenses is to be made against him by the Tribunal;

Despite the passage of time since issue of the Tribunal's Judgment, and the extension of time granted to the claimant, in the Tribunal's letter of 25 June 2018, giving him to 5 July 2018 to do so, the Judge notes that the claimant has still provided no substantive written representations on his behalf, and no statement of his whole means and assets, related to his ability to pay any award of expenses, if so ordered by the Tribunal. He has merely asserted that he has no assets, and provided no information about his income and outgoings, or any savings.

To date, the only information which the Tribunal has, in relation to the claimant's means and assets, is the information provided in the claimant's Schedule of Loss, stating that, post termination of employment with the respondents, the claimant had received income from new employment with Eastern Airways @ £1,680.32 per month. The claimant, in replying to this letter, and updating his current earnings for the Tribunal's information, should confirm

whether he is still in receipt of pay from other employment at that rate, and, if not, provide details of his current earnings, along with any relevant vouching documentation that he wishes the Tribunal to take into account.

The Judge will proceed to determine this opposed application in chambers, at an Expenses Hearing, to be arranged for a date no sooner than Monday , 6 August 2018. Parties are not required to attend that Hearing. The Judge will take into account the respondents' application, and any written representations timeously received from the claimant.

As such, if the claimant wishes to make any written representations on his own behalf, and / or to provide a statement of his whole means and assets, for the Judge to take into account at the in chambers Expenses Hearing, then the claimant should do so without any further delay, and, in any event, certainly by no later than 4.00pm on Tuesday, 17 July 2018.

If any such written representations are to be intimated by the claimant, then, as per Rule 92, he should copy them, by email, to the respondents' representative, at the same time as sending them to the Tribunal, and further the Judge confirms that the respondents will thereafter have a period of no more than 7 days to intimate any comment / objection that they consider appropriate to make to the Tribunal by way of their own further written representations in response.

Claimants Means and Ability to Pay any Award of Expenses

50 The claimant did not reply to the Tribunal's letter of 11 July 2018 by 4.00pm on Tuesday, 17 July 2018, as ordered. However, by email to the Tribunal, copied to Ms Sharp, sent on 18 July 2018, at 08:01, the claimant acknowledged receipt of the Tribunal's letter of 11 July 2018, and he stated :

> *"I will get proof of income, outgoings and savings for this case and ability to pay. I have requested the details of these and I will take a few days to obtain. As soon as I have it I will forward it to yourselves."*

51 Later that same day, 19 July 2018, by email to the Tribunal, copied to the claimant, sent at 17:09, Ms Sharp, the respondents' solicitor, advised that while she noted the claimant had indicated he was now collating financial information for the Tribunal to consider, her clients were concerned that a fairly lengthy period of time has passed since their expenses application was made.

52 While appreciating it is a matter for the Tribunal whether the claimant is permitted to lodge information at this late stage, Ms Sharp's email further stated that she sought to have the application dealt with as soon possible, as her clients were concerned that their position may ultimately be prejudiced by the ongoing delay which appears to have arisen as a result of the claimant's failure to provide vouching.

53 By further email to the Tribunal, copied to Ms Sharp, sent on 19 July 2018, at 22:42, the claimant replied to her email at 17:08 , and he stated that :

> *"The situation is this, at present, I do not have continuous access to the internet due to my location, if the Tribunal would like to take my position as at 1CP May 2018 I was claiming Universal Credit with £0 savings as to date there is still £0 savings.*
>
> *As Shetland is a very small place where managers of companies talk to each other I was unable to obtain employment within the isles, therefore I have had to take the offer of employment outwith Shetland with a probationary period of 6 months.*

With this being my situation I have the expense of 2 houses for accommodation in case I am not offered a permanent position from this trial period and is also why I do not have the online facilities to obtain information as quick as it would be preferred.

Other than still having to pay for 2 accommodations, I have debts from having to borrow to get me to this opportunity for employment, I still have £0 savings and as soon as I can get all the information together that is required I will forward it to the tribunal."

54 On 21 July 2018, the case was listed for this in chambers Expenses Hearing. Parties were not sent any "information only" Notice of this Hearing, although the Tribunal's letter of 11 July 2018 had advised them both that there would be such a Hearing listed, no sooner than Monday, 6 August 2018, but that parties were not required to attend, and I would take into account the respondents' application, and any written representations timeously received from the claimant.

55 In my absence from the office, on 2 weeks' annual leave, an email of 23 July 2018 was received from Ms Sharp, the respondents' solicitor, sent on that date, at 16:62, and copied to the claimant. Whilst stating she did not wish to enter into a lengthy email exchange with the claimant on matters which are not strictly relevant to the determination of the expenses application, Ms Sharp advised that there were a number of points she wished to draw to the Tribunal's attention, and she requested that her email be added to the casefile.

56 In particular, she stated that she understood that the claimant initially obtained employment as a baggage handler at Sumburgh Airport for a period of time after resigning from his employment with the respondents. Further, whilst stating it is a matter for the claimant whether he wishes to work outwith Shetland, ***"it is not accepted (without evidence being provided to the contrary) that this is necessary, particularly for the***

reason ***suggested. My client wishes to refute any suggestion that they have discussed this case with other companies which might have had a detrimental effect on the Claimant's ability to obtain employment elsewhere in Shetland."***

57 Parties' correspondence of 18, 19 and 23 July 2018 was considered by me on Monday, 6 August 2018, on my return to the office from annual leave. In the circumstances, on my instructions, an email dated 6 August 2018 was sent to the claimant and Ms Sharp advising that their correspondence had been placed on the casefile, and that the respondents' opposed expenses application would be dealt with by me in chambers at this Expenses Hearing.

58 Further, in the Tribunal's email of 6 August 2018, the claimant was reminded that information was sought in the Tribunal's correspondence sent on 11 July 2018 which had not been received, and a reply was requested by 4pm on Tuesday, 7 August 2018. In granting that further extension of time, I was conscious of the difficulties the claimant seemed to be experiencing logistically in providing the requested information and vouching, and so, acting on my own initiative, I considered it appropriate, in terms of my powers under Rule 5 of the Employment Tribunals Rules of Procedure, 2013, to further extend the time for compliance, considering that appropriate having regard to my duty under Rule 2 to further the overriding objective to deal with this case fairly and justly.

59 There was no further correspondence from the claimant despite that reminder on 6 August 2018, and so I considered matters at this Hearing on the basis of the information available to me, being his email of 19 July 2018 at 22:42, and the respondents' of 23 July 2018, there being no statement of means and assets provided by the claimant, nor any vouching documents, as called for in the Order made originally on 17 April 2018, set forth in the Judgment issued on 25 April 2018, by the extended deadline of 6 August 2018, or at all.

Issues before the Tribunal

60 The issues before the Tribunal for determination at this Expenses Hearing were whether or not the respondents' application for expenses against the claimant was well-founded and, if so, whether or not to make an award of expenses against the claimant, and, if so, on what basis and in what amount, having regard to the information available to the Tribunal about his ability to pay any such award of expenses, if ordered by the Tribunal.

Relevant Law

61 In his written submission for the respondents, Mr O'Carroll briefly quoted from some of the relevant statutory provisions, as well as citing 4 specific case law authorities for the Tribunal's consideration. I refer to paragraphs 33 and 34 earlier in these Reasons for their full terms. In considering this matter, and writing up this Judgment I have read and taken into account those 4 cited judgments, using the hyperlinks provided.

62 I have also taken into account some further case law authorities commonly cited in expenses applications before the Tribunal, and thus known to me through judicial experience, albeit Mr O'Carroll has not referred me to any of them, although several are actually cited in the Oni judgment he has relied upon. I deal with them later when deliberating on the issues before the Tribunal.

63 The claimant, as an unrepresented, party litigant, has perhaps, unsurprisingly, not made any reference to the statutory provisions, or case law. In particular, he has not commented on any of the 4 authorities relied upon by counsel for the respondents, copied to him when the respondents' submissions were intimated, on 10 May 2018, and available to him through hyperlinks on the *Bailii* publicly available, free access website.

64 The relevant statutory provisions, relating to Costs / Expenses Orders, are asset forth in the Employment Tribunals Rules of Procedure 2013, at

Rule 2, and Rules 74 to 84, and I think it is helpful if, at this stage, I set out in full the relevant statutory provisions, and note that, so far as relevant for present purposes, it is provided as follows:-

"INTRODUCTORY AND GENERAL

Overriding objective

Rule 2: -

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly

Dealing with a case fairly and justly includes, so far as practicable -

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

COSTS ORDERS, PREPARATION TIME ORDERS AND WASTED COSTS ORDERS

Definitions

Rule 74:-

(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.

(2) "Legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who —

(b) is an advocate or solicitor in Scotland; or

Costs orders and preparation time orders

Rule 75:-

(1) **A costo** *order is an order that a party ("the paying party") make a payment to -*

(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;

When a costs order or a preparation time order may or shall be made

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-

(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.

Procedure

Rule 77:-

A party may apply for a costs order or a preparation time 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. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

The amount of a costs order

Rule 78:-

(1) A costs order may -

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles; ...

(e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

Ability to pay

Rule 84:-

In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard

to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay."

65 In determining this opposed expenses application, I have taken into account the 4 case law authorities cited to me by counsel for the respondents, as noted above at paragraph 34 of these Reasons, and I have also reminded myself of the Court of Appeal's judgment in Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ.1255, reported at [2012] IRLR 78, where Lord Justice Mummery, former President of the Employment Appeal Tribunal, at paragraph 39 of his judgment, stated as follows:

"/ 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."

66 At paragraph 49, Lord Justice Mummery further stated that:-

"/ am conscious that, as orders for costs are based on and reflect broad brush first instance assessments, it is not the function of an appeal court to tinker with them. Legal microscopes and forensic toothpicks are not always the right tools for appellate Judging. "

67 Yerrakalva, which is cited and referred to in the Oni judgment relied upon by Mr O'Carroll, considered the former Rule 40 within the Employment Tribunals Rules of Procedure 2004. Notwithstanding the Employment Tribunals Rules of Procedure 2013, in force since 29 July 2013, the old case law still holds good given the similarity in wording between the old and new Rules. Mrs Justice Simler, the EAT judge in Oni, and now the EAT President, cites Yerrakalva, and some of the other cases to which I refer later, including AQ Ltd, and Vaughan.

68 While taking note of Lord Justice Mummery's words of caution in Yerrakalva about citation and value of authorities on costs questions, I do think it is still appropriate to take account of certain other often cited Judgments of the Court of Appeal in 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, recognising 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.

69 In his application for the respondents, Mr O'Carroll cites Oni, although, in his first paragraph of his section 7, he does recognise that there are a number of cases which describe the 3-stage process which the Tribunal must go through prior to making any Order for Expenses. I recognise, of course, that expenses cases are very much fact dependent, and I refer in that regard to Lady Smith's Judgment in the Employment Appeal Tribunal on 8 July 2009 in Dunedin Canmore Housing Association Limited v Donaldson [2009] UKEATS/0014/09, which is consistent with the more recent view of the Court of Appeal, in Arrowsmith v Nottingham Trent University [2012] ICR 159, at paragraph 33, that it is a fact-sensitive exercise.

70 Helpfully, the relevant law on Costs / Expenses applications has recently been referred to in judgments from the Employment Appeal Tribunal, and I have referred myself specifically to the judicial guidance provided by the Honourable Mr Justice Singh, EAT judge, in Abaya v Leeds Teaching Hospital NHS Trust [2017] UKEAT 0258/16 (01 March 2017), and its cross reference to, amongst others, Ayoola v St Christopher's Fellowship [2014] UKEAT/0508/13, [2014] ICR D37, a judgment by Her Honour Judge Eady QC on 6 June 2014.

71 At paragraphs 17 to 20, in Ayoola, Her Honour Judge Eady QC states, as follows:-

"77. >4s *for the principles that apply to an award of costs in the Employment Tribunal under the 2004 Rules, the first principle, which is always worth restating, is that costs in the Employment Tribunal are still the exception rather than the rule, see Gee v Shell UK Ltd [2002] IRLR 82 at page 85, Lodwick y London Borough of Southwark [2004] ICR 884 at page 890, Yerrekalva y Barnsley MBC [2012] ICR 420 at paragraph* **7.** *Second, it is not simply enough for an Employment Tribunal to find unreasonable conduct or that a claim was misconceived. 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, see Robinson and Another v Hall Gregory Recruitment Ltd UKEAT/0425/13 at paragraph 15.*

18. On this point, albeit addressing the previous costs jurisdiction under the 2001 Employment Tribunal Rules, the EAT (HHJ Peter Clark) in Criddle v Epcot Leisure Ltd [2005] EAT/0275/05 identified that an award of costs involves a two-stage process: (1) a finding of unreasonable conduct; and, separately, (2) the exercise of discretion in making an order for costs. In Criddle there was no indication in the Tribunal's Reasons that the Tribunal Chairman had carried the second stage of the requisite exercise and the EAT was not satisfied, in the absence of such indication, that the Chairman had in fact done so. The appeal was thus allowed against the costs order.

19. The extension of the Tribunal's costs jurisdiction to cases where the bringing of the claim was misconceived has been seen as a lowering of the threshold for making costs awards, see **Gee** *v Shell UK Ltd per Scott Baker LJ. In such cases the question is not simply*

whether the paying party themselves realised that the claim was misconceived but whether they might reasonably have been expected to have realised that it was and, if so, at what point they should have so realised - see Scott v Inland Revenue Commissioners [20041 ICR 1410 CA per Sedley LJ at paragraphs 46 and 49. Equally, in the making of a costs order on the basis of unreasonable conduct, the Tribunal has to identify the conduct, stating what was unreasonable about it and what effect it had, see Barnsley MBC v Yerrekalva per Mummery LJ at paragraph 41.

20. *That said, an appeal against a costs order will be doomed to failure unless it is established that the order is vitiated by an error of legal principle or was not based on the relevant circumstances; the original decision taker being better placed than the appellate body to make a balanced assessment as to the interaction of the range of factors affecting the court's discretion. Again, see Yerrekalva per Mummery LJ at paragraph 9, and note also the observation at paragraph 49 that '...as orders for costs are based on and reflect broad brush first instance assessments, it is not the function of an appeal court to tinker with them. Legal microscopes and forensic toothpicks are not always the right tools for appellate judging'. "*

72 In his Judgment in Abaya, at paragraph 20, Mr Justice Singh places specific reliance on the reasoning of HHJ Eady QC in the Ayoola case, at her paragraphs 50 to 53, and it is helpful, in that regard, to note here what, so far as relevant for present purposes, HHJ Eady QC said there, as follows:-

"50. *Against that background, the question for me is whether the Employment Judge erred in granting costs at £10,000 or in failing to provide adequate reasons for granting that sum.*

51. *Although no particular procedure is laid down in the Tribunal Rules for a summary assessment of costs, the discretion as to the amount of an award must still be exercised judicially. One can take it a bit further. Although not bound by the same rules as the civil courts and although the discretion under the 2004 Tribunal Rules is very broad, the costs awarded should not breach the Indemnity principle and must compensate and not penalise; there must, further, be some indication that the Tribunal has adopted an approach which enables it to explain how the amount is calculated for the purpose of Rule 30(6) (f).*

52. *The Claimant, rightly, does not suggest that the question of procedural justice on a costs application requires the prior service of a Schedule of Costs or any particular process. Nor is he saying here that there is insufficient reasoning in terms of the calculation of costs such as to amount to a breach of Rule 30. He does contend, however, that this is a surprising sum given how little had transpired by this stage.*

53. *That is not an entirely fair picture. The case had previously been listed for hearing in July and apparently aborted late in the day. There had had to be various procedural steps taken as a result of the lack of clarity on the Claimant's case. More generally, Tribunal litigation costs tend, as with most civil cases, to be front-loaded. That said, it is fair to observe that £10,000 is a high award and the overall sum said to have been incurred, over £15,000, might seem surprising. I reach no final view on that. My concern is that there is no written explanation by the Employment Judge of her scrutiny of the figures sought by the Respondent. Although she has set out, as the Respondent no doubt did in submissions, some detail as to the amount the Respondent was seeking, what she does not do is indicate that she has conducted any independent scrutiny of those sums herself or set out the reasons for her conclusion that it*

> was *appropriate to award £10,000. That may be an error of approach in terms of the lack of scrutiny of the sum claimed or it may simply be an error in terms of adequacy of reasoning. I cannot be sure as to which .....* [11]

73 In his own judgment, in Abaya, Mr Justice Singh says, at paragraph 20, that all cases are fact-sensitive, and everything depends on the particular circumstances of each case, and in quoting from HHJ Eady QC, in Ayoola, at paragraph 51, he states that: *"the discretion under the 2004 Tribunal Rules is very broad [and I would say the same of the 2013 Rules]".*

JO

Discussion & Deliberation

74 In deciding upon the respondents' application for an award of expenses against the claimant, I have done so by carefully considering the various arguments advanced by Mr O'Carroll, counsel for the respondents, in his written application, and by the claimant in his written objections to that application.

75 Ms Sharp made the respondents' application for expenses against the claimant timeously, within 28 days after issue of the Tribunal's Dismissal Judgment issued on 25 April 2018, it being made on 10 May 2018.

76 Further, I am satisfied that the claimant, through his written objections, and email correspondence with the Tribunal, has had a reasonable opportunity, to which he is entitled under Rule 77, to make representations in response to the respondents' application for expenses against him, which opposed application has been carefully considered by me at this in chambers Expenses Hearing by my consideration of both parties' written representations.

77 If the application were to be granted, I am satisfied, under Rule 75(1) of the Employment Tribunals Rules of Procedure 2013, that the

respondents, as *"receiving party',* are entitled to an order against the claimant as *"paying party'.*

78 The respondents have been legally represented, in pursuit of their resistance to the claim brought against them in these Tribunal proceedings, by Ms Sharp, a solicitor from BBM Solicitors, Edinburgh, and she has acted as their representative throughout these proceedings before the Employment Tribunal.

79 In the respondents' application for expenses against the claimant, Mr O'Carroll applies for expenses against the claimant on the basis of vexatious, abusive and otherwise unreasonable conduct, in terms of Rule **76(1) (a),** but not **Rule 76(1)(b)** on the basis that the claim has **"no** *reasonable prospect of success".*

80 Further, while Rule 76(1)(a) refers to a party (or that party's representative) having *"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",* the respondents' application is on more a restricted basis that than, as per section 1 of counsel's written application, that :

> *"The Order is sought on the basis that in bringing the claim and in the conduct of it, the Claimant has acted vexatiously, abusively and otherwise unreasonably..."*

81 No application is made by the respondents on the basis of the claimant acting *"disruptively",* although that can be covered by the other grounds relied upon, nor in respect of anything done by the claimant's former legal representatives in bringing and conducting the claim, until they withdrew from acting on 23 March 2018. *"Unreasonable"* has its ordinary English meaning and it is not to be interpreted as if it meant something similar to vexatious, per the EAT's judgment in Dyer v Secretary of State for

Employment EAT 183/83, although it will often be the case that a Tribunal will find a party's conduct to be both vexatious and unreasonable.

82 While noting that there is no application by the respondents, under Rule 76(1)(b), on the basis that the claim has "no *reasonable prospect of success",* I have to pause and further note that that appears at odds with the respondents' stated position, in Ms Sharps' email to the Tribunal, on 16 April 2018, where she referred to this case as being *"without merit' .*

83 That said, despite an earlier Case Management Preliminary Hearing in this case, held on 25 January 2018, where both parties were then legally represented, and the case was listed for Final Hearing, the respondents never made any application for the Tribunal to consider strike out of the claim, under Rule 37(1)fa), on the basis that the claim had no reasonable prospect of success, nor to consider a Deposit Order against the claimant, under Rule 39, as a condition of allowing him to advance any specific allegation or argument in his claim.

84 As such, there is, in my view, no basis for now submitting that, in the bringing of the claim, the claimant has somehow acted on a basis entitling the Tribunal to award expenses against the claimant.

85 It is of significance that, in bringing his claim, the claimant did so with the benefit of legal assistance from Thompsons Solicitors, and in the lead up to the Final Hearing, the respondents, at no stage, sought strike out of the claim on the basis that in bringing it the claimant was acting scandalously or vexatiously or that the claim had no reasonable prospect of success, in terms of Rule 37(1Ma), or that, the manner in which the proceedings had been conducted by or on the claimant's behalf had been scandalous, unreasonable or vexatious, in terms of Rule 37(1)(b).

86 It is also of note that, even if such a Strike Out application had been sought, it may not have been granted, discrimination cases being generally regarded as fact sensitive, and Tribunals tending to take a cautious approach to Strike

Out applications where there are crucial facts in dispute and there has been no opportunity for parties to lead evidence in relation to those disputed facts : the well-known case law authorities of Anyanwu v South Bank Students' Union [2001] IRLR 305, HL, Ezsias v North Glamorgan NHS Trust [2007] IRLR 550, CA, and Balls v Downham Market High School [2011] IRLR 217, EAT, all refer.

87 I turn now to consider the specific grounds of the respondents' application, as also the claimant's objections. Although not clearly articulated, the claimant's principal ground of resistance appears to be the amount of expenses sought, which he describes, in his email of 28 may 2018, as "extortionate" but, I have also taken it, in the absence of any clarification from him to the contrary, that he is objecting to the Tribunal awarding any expenses against him, regardless of the amount..

88 While the claimant has not replied to any of the many points made in Mr O' Carroll's detailed written application for the respondents, I cannot assume that the claimant's silence in that regard is acceptance of the allegations made against him; that would require express acceptance by him, and there is no such express acceptance by the claimant.

Vexatious and / or Abusive Conduct / Abuse of Process

89 At section 5, Mr O'Carroll's application for the respondents founds on the "nature *of the claim",* stating, in the sixth paragraph of that section, that :

> *ft is therefore submitted that the true intent of the claimant was not to pursue a genuinely held belief in the claim for discrimination but to use the Tribunal litigation for another purpose, an improper purpose, namely to cause embarrassment to his former employers, ft was therefore an abuse of process and abusive in terms of Rule 76(1)(a).*

90 Further, at section 6, Mr O'Carroll's application founds on the "/ate *withdrawal"* of the claim, stating, in the opening paragraph, and the last two paragraphs, of that section, that :

> *It is further submitted that the claim was not only brought vexatiously and abusively for the reasons set out above, but that the Claimant's other conduct in relation to the late withdrawal of the claim also amounted to abusive and otherwise unreasonable behaviour Justifying an award of expenses,*
>
> *••
>
> *It is therefore submitted that in holding out until the last possible moment before withdrawing his claim, the Claimant acted abusively (in terms of process) and otherwise unreasonably in so doing. His actions caused the maximum amount of inconvenience and expense for the Respondent and were therefore unreasonable. Had the Claimant even withdrawn his claim on the Friday prior, that is to say by 14 April 2018, a substantial percentage of that time, inconvenience and expense could have been saved.*
>
> *It is perhaps difficult to ascribe motive, but the Tribunal should also bear in mind the conduct of the Claimant in bringing the claim abusively and vexatiously as discussed in the first part of these submissions. It would be a reasonable inference to draw that the withdrawal of the claim was deliberately left until the last possible moment precisely in order to incur the maximum of inconvenience and expense on the part of the Respondent Such conduct is unreasonable and abusive.*

91 The first issue which arises for the Tribunal is whether or not any of the circumstances set forth in Rule 76(1) apply. Mr O'Carroll refers to, and relies upon, the definition of *"vexatious"* in a family law case of Attorney-General v Barker. It was cited with approval by the Court of Appeal in

Scott v Russell [2013] EWCA Civ. 1432, CA, a case concerning costs (or expenses, as we say in Scotland) awarded by an Employment Tribunal.

92 Perhaps surprisingly, since it is such a well-known and familiar authority regularly cited in this Tribunal, Mr O'Carroll made no reference to ET Marler Ltd v Robertson [1974] ICR 72, NIRC, which describes a vexatious claim as one that is not pursued with the expectation of success but to harass the other side or out of some improper motive.

93 In considering the present expenses application, I have referred to the judgment of Sir Hugh Griffiths in Marler, and in particular the paragraph, at page 76E/F, where the learned Judge of the NIRC had stated:

> ***" If the employee knows that there is no substance in his claim and that it is bound to fail, or if the claim is on the face of it so manifestly misconceived that it can have no prospect of success, it may be deemed frivolous and an abuse of the procedure of the tribunal to pursue it. If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously, and likewise abuses the procedure. In such cases the tribunal may and doubtless usually will award costs against the employee."***

94 Further, it is helpful to note, at page 76H, the learned Judge also stated :

> ***"It is for the tribunal to decide if the applicant has been frivolous or vexatious and thus abused the procedure. It is a serious finding to make against an applicant, for it will generally involve bad faith on his part and one would expect a discretion to be sparingly exercised",***

95 In the final paragraph of his judgment in Marler, at page 77B, Sir Hugh Griffiths stated :

> *"Ordinary experience of fife frequently teaches us that that which is plain for all to see once the dust of battle has subsided was far from clear to the combatants when they took up arms",*

96 Lord Bingham of Cornhill's definition of *"vexatious",* in Attorney General v Barker, at paragraph 19. as included in Mr O'Carroll's list of authorities, refers, and, for brevity, I refer back to its quotation by counsel for the respondents here, in his written application, at section 5, reproduced above at paragraph 33 of these Reasons.

97 Accordingly, as I see things, for conduct to be classified as *"vexatious" ,* there must be evidence of some spite or desire to harass the respondents, or some evidence of the existence of some other improper motive. No such evidence has been produced by the respondents' solicitor or counsel, and all I have before me is Mr O'Carroll's bald assertion that vexatious conduct can somehow be inferred on the claimant's behalf.

98 In my view, it is important also to bear in mind what Sir Hugh Griffiths stated in the Marler judgment, that a finding of vexatious conduct is a *"serious finding"* to make against anybody, for it will generally involve *"bad faith".* Here, the respondents' application (at section 5, as already reproduced above at paragraph 89 of these Reasons) submits that *: "the true intent of the claimant was not to pursue a genuinely held belief in the claim for discrimination but to use the Tribunal litigation for another purpose, an improper purpose, namely to cause embarrassment to his former employers. It was therefore an abuse of process and abusive in terms of Rule 76(1)(a)."*

99 While it is alleged by the respondents' counsel that the claimant's *"improper purpose"* was to cause embarrassment to the respondents, no evidence

has been provided to this Tribunal to vouch that there has been any such embarrassment caused by him towards them. Assertion is not evidence.

100 In considering the Tribunal's casefile, I noted from an email of 26 March 2018, at 14:51, from a Ms Fisher, senior solicitor, at BBM Solicitors, for the respondents (objecting to the claimant's application to postpone the Final Hearing) that of the 5 stated grounds for objection, two related to ***"the Respondents have already suffered reputational damage"*** (point 2), and ***"the Claimant's allegations are groundless and deliberately scandalous in nature in order to embarrass the Respondent/'*** (point 4). Further, I also noted that in the claimant's reply e-mail, at 20:11 on 27 March 2018, he advised the Tribunal (at his point 2) that the respondents' solicitors had stated ***"if they win they will sue me for all of the costs/***

101 It is of note, however, that in the respondents' present application for expenses, their counsel has made no reference to any "Costs ***Warning"*** having been issued to the claimant, albeit Ms Sharp's e-mail to the Tribunal, on 3 April 2018, at 15:09, at point 2, states that ***/Finally, it has been made clear to the Claimant that the Respondent reserves their right to seek to recover expenses from the Claimant in the event of success, because of the nature of the allegations made."***

102 Further, it is of note that Mr O'Carroll, at section 7 of the respondents' application for expenses, at his fourth paragraph, refers to an ***"assumption"*** that the claimant's former solicitors at Thompsons might have advised the claimant of the possibility of an award of expenses for unreasonable behaviour, which rather suggests to me that his understanding was that the respondents' solicitors did not themselves issue any Costs Warning to the claimant.

103 While a Costs Warning is not a precondition to the making of an Expenses award, the absence or presence of such a warning can in some circumstances be a relevant factor for a Tribunal to consider. In the circumstances of the present application for expenses, I need say nothing

further, as there is no detailed information before me to show that there was such a Warning issued, nor when, to whom, or in what terms. While the claimant's email of 27 March 2018, stated that the respondents' solicitors had advised him *"if they win they wili sue me for all of the costs",* I was not able to resolve the apparent conflict between the claimant's stated position, and what is in counsel for the respondent' written submission. Had there been such a Costs Warning issued to the claimant, I would reasonably have expected the respondents' written submission making the present expenses application to have made express reference to it, and produced a copy for my perusal.

104 In my view, the respondents here have not established that, in conducting these Tribunal proceedings in the period since 23 March 2018, when his solicitors withdrew from acting for him, the claimant here has acted vexatiously, and / or abusively, towards them. Accordingly, I have refused the respondents' application for expenses insofar as it proceeds on that basis.

105 Further, there having been no evidence led from live witnesses, tried and tested before a full Tribunal, with cross-examination by the other party, and questions from the Tribunal, as the claimant withdrew his claim, and so there has been no Hearing into the merits of his allegations, or the respondents' grounds of resistance, there are no findings in fact made by this Tribunal, about any of the issues in this case. Specifically, there are no findings in fact by a Tribunal that the claimant has, in any way, acted in bad faith towards the respondents.

Unreasonable Conduct

106 In these circumstances, I turn now to consider whether or not there has been unreasonable conduct of the proceedings by the claimant, being the other pled basis of the respondents' application for an award of expenses against the claimant. The respondents' application refers, in particular, to

the claimant's late withdrawal of his claim on the eve of the listed Final Hearing.

107 The Court of Appeal, in McPherson v BNP Paribas (London Branch), [2004] EWCA Civ 569, ICR 1398 and IRLR 558 (CA), held that it is not unreasonable conduct, per se, for a claimant to withdraw a claim. As Mr O'Carroll's quotations from McPherson, as per his written expenses application, at section 6, relate only to paragraphs 29 and 40, it is necessary that I consider the fuller terms of that judgment.

108 The Court of Appeal observed (per Lord Justice Mummery, at paragraph 28) that it would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs on withdrawal in circumstances where such an order might well not be made against them if they fought on to a full Hearing and failed.

109 The Court of Appeal further commented that withdrawal could lead to a saving in costs, and that Tribunals should not adopt a practice on costs that would deter claimants from making "*sensible litigation decisions!'.* Further, as Lord Justice Thorpe observed during argument in that case notice of withdrawal might *7n*some cases be the dawn of sanity."*

110 On the other hand, per Lord Justice Mummery, at paragraph 29, in McPherson, the Court of Appeal was also clear that Tribunals should not follow a practice on costs that might encourage speculative claims, allowing claimants to start cases and to pursue them down to the last week or two before the Hearing in the hope of receiving an offer to settle, and then, failing an offer, dropping the case without any risk of a costs sanction.

111 Further, at paragraph 30, Lord Justice Mummery stated that the critical question in this regard was whether the claimant withdrawing the claim has conducted the proceedings unreasonably, not whether the withdrawal of the claim is in itself unreasonable.

112 The reasons given by the claimant for the withdrawal of his claim, on 16 April 2018, are those set forth by him in his email to the Tribunal on that afternoon at 13:11, as reproduced earlier in these Reasons at paragraph 15 above, to which I refer back for reference.

113 While last minute settlements, withdrawals, and postponement applications, are still very much a regular feature of litigation before the Employment Tribunals, the important feature to note in the present case is that in opposing the claimant's postponement application, made on his behalf by Thompsons, on 23 March 2018, the same day that they withdrew from acting for him, the respondents, through Ms Fisher's objections of 26 March 2018, made it clear that that application was being opposed, for various grounds there stated, and that the claimant still had sufficient time to secure alternative representation, if he so wished, but equally he was entitled to represent himself.

114 While, in his reply of 27 March 2018, the claimant stated that 3 weeks was an insufficient time to source an employment law solicitor, and to represent himself would not be an option due to his lack of legal training and knowledge, Ms Sharp's further email of 3 April 2018, clarified that there is no requirement for the claimant to be legally qualified in order to conduct the Hearing, should he so wish.

115 Further, the Tribunal's letter of 6 April 2018, refusing the claimant's postponement application, made it clear that if the claimant was unable to secure new legal representation, there could still be a fair Hearing given the Tribunal's duty under Rule 2 to ensure parties are on an equal footing, as per the overriding objective, to ensure the case is dealt with fairly and justly, and that the Tribunal is well used to parties representing themselves.

116 Ms Sharp's further email of 16 April 2018, commenting on the claimant's withdrawal, addressed each of his 3 points in turn, and I need not refer back to that, other than to endorse as well-founded her reference to the Tribunal's letter of 16 April 2018 regarding arrangements for the Final Hearing should

have made it clear to the claimant that he would not have been prejudiced by not being legally represented, where the running order was detailed, the Judge would have conducted his evidence in chief, and the respondents would have been called to make closing submissions before him, giving him a right to reply having heard from Mr O'Carroll, their counsel.

117 After carefully considering the matter, I am satisfied that it has been established by the respondents that, by withdrawing his claim, on 16 April 2018, the afternoon prior to the start of the listed Final Hearing assigned for the very next day, the claimant was acting unreasonably in his conduct of these proceedings, and so I have granted the respondents' application, being satisfied that the claimant's conduct of these Tribunal proceedings, post 23 March 2018, has been unreasonable.

118 All I know about the claimant's reasons for withdrawing at that late stage is what he set forth in his short email of 16 April 2018 to the Tribunal, as reproduced earlier in these Reasons at paragraph 15 above, where he writes that he did so with "due *consideration".* From that email alone, and in the absence of any written representations from him more fully explaining his rationale for withdrawing at that time, I cannot conclude, on the information available to me, that his withdrawn on the eve of the Final Hearing was "a *sensible litigation decision",* nor *"the dawn of sanity'* on his part, to adopt the phrases used by Lord Justices Mummery and Thorpe in the McPherson judgment.

Exercise of Discretion to award Expenses against the Claimant

119 I turn now to the next stage of the exercise. I am satisfied that the claimant has acted in a way that an Expenses Order may be made by the Tribunal, so I must now ask myself whether to exercise my discretion in favour of awarding expenses against the claimant.

120 As per Lord Justice Mummery at paragraph 41 of Yerrakalva: - *"The vital point in exercising the discretion to order costs is to look at the whole*

picture of what happened in the case and ask whether there has been unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had."

121 As the Court of Appeal commented, it is important not to lose sight of the totality of the circumstances. I am satisfied that the late timing of the withdrawal could have been avoided had the claimant intimated his withdrawal far earlier than he did, and had he paid heed to the reassurance being given by the Tribunal that he could represent himself, and that that not only was the Tribunal well used to party litigants acting on their own behalf, the Tribunal had a duty to ensure a fair Hearing, and the Judge had indeed made arrangements to try and level the paying field as between unrepresented claimant, and counsel for the respondents.

122 I consider the late timing of the claimant's withdrawal email was outstandingly late, and so beyond any reasonable conduct. In section 7 of the respondent's application, Mr O'Carroll refers, in the third paragraph of his submission, to the *"egregious delay in withdrawing the claim".* This ties in with his earlier comment, at the penultimate paragraph of section 6, that:

> *It is therefore submitted that in holding out until the last possible moment before withdrawing his claim, the Claimant acted abusively (in terms of process) and otherwise unreasonably in so doing. His actions caused the maximum amount of inconvenience and expense for the Respondent and were therefore unreasonable. Had the Claimant even withdrawn his claim on the Friday prior, that is to say by 14 April 2018, a substantial percentage of that time, inconvenience and expense could have been saved.*

123 It is disappointing to the Tribunal that the claimant was not reassured, by the terms of the Tribunal's letter of 6 April 2018, but the Tribunal is satisfied that the claimant's conduct of these Tribunal proceedings, between 23 March

2018 and 16 April 2018, has resulted in significant extra expense for the respondents which could readily have been avoided had the claimant dealt with his Tribunal claim reasonably and applied his mind to matters sensibly at an earlier stage of these Tribunal proceedings, after Thompsons withdrew as his agents on 23 March 2018.

124 In this regard, I have noted the terms of Mr O'Carroll's application, at the last paragraph of section 6, where he states:

> *It is perhaps difficult to ascribe motive, but the Tribunal should also bear in mind the conduct of the Claimant in bringing the claim abusively and vexatiously as discussed in the first part of these submissions. It would be a reasonable inference to draw that the withdrawal of the claim was deliberately left until the last possible moment precisely in order to incur the maximum of inconvenience and expense on the part of the Respondent. Such conduct is unreasonable and abusive.*

125 While agreeing with counsel for the respondents that it is perhaps difficult to ascribe motive to the claimant, I am of the view that it is indeed a reasonable inference that the claimant here deliberately left it to the last possible moment to withdraw in order to incur the maximum of inconvenience and expense on the part of the respondents as his former employer.

126 Even if he did not have that clear and pre-determined intent, the effect of maximising inconvenience and expense to the respondents was nonetheless there, as the case called before the Tribunal on the morning of 17 April 2018, when the respondents were in attendance, but the claimant was not, not even at the telephone, as offered by the Judge the previous day.

127 In all the circumstances of the present case, I am satisfied that an award of expenses against the claimant is appropriate. In coming to this decision, I have noted all that the claimant has presented to the Tribunal, by way of

objections and comments in his written representations, but none of what little he has had to say is sufficient to allow me to decide that this is a case where expenses should not be considered appropriate.

Amount x>fExpenses

128 Moving now to consider the basis of expenses sought by the respondents, and the *quantum* of any award of expenses to be awarded to the respondents, I have taken into consideration the claimant's stated objections to an award of expenses being made against him, in particular to the amount of expenses being claimed by the respondents at £20,000.

129 The respondents, like any employer sued by an ex-employee, have the right, if they so choose, to be professionally represented by solicitors, and I consider the respondents' defence to the claim has been proportionate and reasonable throughout. While the position is perhaps best expressed as costs are the exception to the rule in Tribunal cases, it is clear that, in appropriate cases, costs can be awarded against unrepresented, party litigants. However, costs awarded must be compensatory, and not punitive. Tribunal litigation costs tend to be front-loaded, and as such the respondents had incurred significant legal expenses prior to the claimant's withdrawal of his claim against them.

130 Having decided that an award of expenses against the claimant is appropriate, the next issue for the Tribunal is to consider the amount being claimed by the respondents, restricted to £20,000, from a much higher figure at £34,123.62, and what amount the Tribunal considers it appropriate to award against the claimant, having regard to his ability to pay, and his comments / objections about the amount sought by the respondents.

131 Other than a bald assertion that the total sum sought is "extort/onate", no specific point has been taken by the claimant that the rates charged by the respondents' solicitors and / or Counsel are unreasonable. Likewise, the

claimant has made no specific comment on the travelling and accommodation charges sought by the respondents.

132 Compared to other solicitors* and Counsel's fees in other cases before the Tribunal, I observe that they both seem generally to be fair and reasonable in all the circumstances. No point was taken by the claimant that the respondents' instruction of Counsel was inappropriate, or unnecessary. Had such a point been taken, I have to say that I can well see why the instruction of Counsel was considered appropriate given the type of discrimination claim being pursued against them by the claimant, and the total award of compensation of £20,156.91 being sought as per the claimant's intimated Schedule of Loss.

133 It is also clear, from section 6 of the respondents' expenses application, that the expenses totalling £332.82, for flights and hotel, are limited, and much less than might otherwise have been the case, because the respondents have managed to transfer the other flight costs, and the other accommodation costs were refundable.

Claimant's Ability to Pay

134 The Tribunal is not required to assess the claimant's ability to pay under Rule 84. Although in the case of Jilley v Birmingham and Solihull Mental Health NHS Trust [2007] UKEAT/0584/06, His Honour Judge Richardson confirmed that there is no 'absolute duty' on a Tribunal to take ability to pay into account, he commented that it would in many cases be desirable to take means into account before making an Order, as the ability of a party to pay may affect the exercise of an overall discretion.

135 Insofar as it does have regard to the claimant's ability to pay, the Tribunal should have regard to the *"whole means"* of the potential *"paying party"* - per the Employment Appeal Tribunal's judgment in Shields Automotive Ltd -V" Greig UK EATS/0024/10.

136 This includes considering capital within a person's means, which will often be represented by property or other investments which are not as accessible as cash, but which should not be ignored. Affordability is not the only criterion for the exercise of the discretion and the Tribunal is not required to make a precise estimate of what the claimant can afford.

137 What Lady Smith, the then Scottish EAT Judge, stated, at paragraph 47 in Shields, was as follows:-

> *"Assessing a person's ability to pay involves considering their whole means. Capital is a highly relevant aspect of anyone's means. To look only at income where a person also has capital is to ignore a relevant factor. We would add that we reject Mr Woolfson's submission to the effect that capital is not relevant if it is not in immediately accessible form; a person's capital will often be represented by property or other investments which are not as accessible as cash but that is not to say that it should be ignored. In any event, no case was made to the Tribunal that the Claimant would have difficulty in realising his interest in the house or using its value in some other way so as to meet his liability for expenses. We, accordingly, uphold the appeal on this ground also."*

138 The claimant here has provided the Tribunal, through his email correspondence to the Tribunal, on 19 July 2018, as detailed earlier in these Reasons, at paragraph 53 above, with very, very limited information as to his whole means. This is all information before the Tribunal and available to it in assessing the claimant's whole means.

139 In his earlier email, of 17 July 2018, as detailed earlier in these Reasons, at paragraph 50 above, the claimant prays in aid some logistical difficulty in getting the required information, due to not having continuous access to the internet due to his location, but he ignores the fact that this information has been sought by the Tribunal since the earlier Judgment was issued on 25

April 2018, and he has been reminded about his failure to provide it, by both the Tribunal, and the respondents, in correspondence to him.

140 In his later email of 19 July 2018, the claimant seems to be writing from somewhere outwith Shetland, but it is not clear where he is actually is communicating from, and he gives no clear information as to his then financial and employment circumstances. He gives some information about his position as at 10 May 2018, being the date of the respondents' application for expenses, but says nothing definitive about his apparent new employment, when it started, or what his current earnings are. All he says is that it is on a probationary period of 6 months, and it is not permanent, but for a trial period.

141 None of his assertions, as at 10 May 2018, are vouched by, e.g. the production of current, up-to-date bank statements, letter from DWP vouching his receipt of State benefits, etc. The extent, if any, of his capital assets are unknown. He refers to two accommodations, one in Shetland, and one outwith Shetland, but no detail is provided as to whether they are owned by him , and, if so, mortgaged, or leased by him from a landlord. No up-to-date information is given as to the extent of his savings, or any other assets. This is the type of vouching information that other claimants in other Tribunal proceedings, when the subject of costs / expenses applications, are usually able to readily produce to the Tribunal, in some form or another, when called upon to do so.

142 Here, of course, despite the Tribunal's earlier Order issued on 25 April 2018, and two extensions of time granted to him by the Tribunal, no statement of his whole means and assets has yet been produced by the claimant. While, in his ET1 claim form, presented with legal advice from Thompsons, there is a section for earnings and benefits to be provided, as also details of any new employment, those sections were not completed by the claimant's solicitor at that early stage in these Tribunal proceedings.

143 Similarly, while the respondents' ET3 response form, defending the claim, includes a section for them to confirm, or not, details provided by the claimant, and if not supplied, to provide such details, the ET3 too is silent. Fortunately, from my perusal of the large A4, Joint Bundle of Documents presented to the Tribunal, at the Final Hearing on 17 April 2018, I see that the claimant's Schedule of Loss, at document A7Z1-3, provides some information as at its calculation date of 17 February 2018.

144 That Schedule of Loss shows the claimant as aged 53, with 3 years' continuous service with the respondents, as at the effective date of termination of employment, on 5 July 2017, and it is stated that his gross weekly pay from the respondents at that time was £769.23, with net weekly pay of £586.15.

145 It is also stated, in that Schedule of Loss, that the claimant sought a compensatory award of compensation for past losses of earnings from the respondents from 6 July 2017 to 17 February 2018, from which fell to be deducted credit to be given for income from new employment, stated to be payments from Eastern Airways, between 21 September 2017 and 26 January 2018, producing a total amount of £8,401.60 received, based on £1,680.32 per month. This may relate to the baggage handler's job at Sumburgh Airport referred to in Ms Sharp's email to the Tribunal on 23 July 2018 but, as the claimant has not commented on that, I cannot be certain in that regard.

146 It is not stated if that figure of £1,680.32 per month is gross, or net, but I assume it to be net earnings. On that basis, I compute (multiplied by 12, and then divided by 52) that to be that the claimant was then earning £387.76 per week net in that new employment, so being £198.39 per week less net weekly earnings than when he was employed by the respondents, and earning £586.15 net per week.

147 The claimant has provided the Tribunal with no financial information, or vouching documents, whatsoever as regards his current earnings and

benefits from whatever might be his new employment outwith Shetland. His email of 17 July 2018 referred to a logistical difficulty, but I do not know if that is true or not, and another explanation could well be that the claimant is simply concealing information from the Tribunal.

148 What is certain is that with the passage of time from 25 April 2018 to date of this Expenses Hearing, the Tribunal can note and record that the claimant has delayed, if not refused, to comply with the Tribunal's earlier Order for disclosure of such information.

149 On the basis of the limited information available to me, I cannot say that this is a case where, as sometimes is proved to a Tribunal's satisfaction, a person's income and expenditure shows them to be living in difficult, if not nearly impecunious, financial circumstances, with outgoings exceeding income, and no capital or savings readily available.

150 As such, on the fairly limited information available, as to the claimant's financial circumstances, it is not possible for me to say whether or not they are likely to improve, or there is a realistic prospect that he will be able to pay any significant amount of expenses in the future.

151 Although not cited by Mr O'Carroll, for the respondents, Vaughan v London Borough of Lewisham and Others [2013] IRLR 713, EAT, applying Arrowsmith v Nottingham Trent University [2012] ICR 159, CA, held that there was no error of law in the Tribunal's approach, and, in particular, it was not wrong in principle to make an award which the employee could not in their present financial circumstances afford to pay where the Tribunal had formed the view that the claimant might be able to meet it in due course.

152 Having re-read that Vaughan judgment, again, for the purposes of writing up this decision, and noting that it is referred to in Oni, it is appropriate that I refer to what Mr Justice Underhill said there at paragraphs 26 to 29, as follows:-

26. We come finally to the question of the Appellant's means. The Tribunal was not in fact obliged as a matter of law to have regard to her ability to pay at all: rule 41 (2) gave it a discretion. However, it chose to do so (no doubt mindful of the decision in Jilley v Birmingham and Solihull Mental Health NHS Trust (UKEAT/0584/06)); and it has not been suggested that it was wrong in that regard. As appears from paras. 12-13 of the Reasons, the Tribunal accepted that the Appellant was not at present in a position to make any substantial payment, but it took the view that there was a realistic prospect that she might be able to do so in due course, when her health improved and she was able to resume employment. It referred to the judgment of Rimer LJ in Arrowsmith v Nottingham Trent University [2012] ICR 159, where he upheld an award of costs against a claimant who on the evidence was unable to pay them on the basis - in part at least - that "her circumstances may well improve": see para. 37 (pp. 169-170). The Appellant does not say that that approach was wrong; but she says that its application in the circumstances of the present was perverse. She says that there is no realistic chance that she will ever be in a position to pay anything like the (say) £60,000 which the Tribunal's order represents. She referred in her written and oral submissions to her continuing mental ill-health; to the obstacle which the stigma of dismissal presents to her finding other employment; to her inevitable de-skilling the longer she is away from work; and to the present climate of cuts in the public sector. She said that she told the Tribunal in evidence that even if she were eventually to get back into employment she could not expect to earn at the level that she was at the time of her dismissal, i.e. around £30, 000 p.a.

27. *This part of the Appellant's submissions has given us some pause. It is not hard to accept that she may face real difficulties getting back into employment in the foreseeable future, let alone at her pre-dismissal salary levels. And even if she were in fact able to do so a liability of this size - representing, on our assumed figures, twice her pre-tax earnings at the date of her dismissal - would take very many years to pay off. It is a serious matter to saddle an unsuccessful claimant with a liability of this kind. In the end, however, we can see no error of law in the Tribunal's decision. Our reasons are as follows.*

28. *The starting-point is that even though the Tribunal thought it right to "have regard to" the Appellant's means that did not require it to make a firm finding as to the maximum that it believed she could pay, either forthwith or within some specified timescale, and to limit the award to that amount. That is not what the rule says (and it would be particularly surprising if it were the case, given that there is no absolute obligation to have regard to means at all). If there was a realistic prospect that the Appellant might at some point in the future be able to afford to pay a substantial amount it was legitimate to make a costs order in that amount so that the Respondents would be able to make some recovery when and if that occurred. That seems to us right in principle: there is no reason why the question of affordability has to be decided once and for all by reference to the party's means as at the moment the order falls to be made. And it is in any event the basis on which the Court of Appeal proceeded in Arrowsmith, albeit that the relevant reasoning is extremely shortly expressed. It is necessary to remember that whatever order was made would have to be enforced through the County Court, which would itself take into account the Appellant's*

means from time to time in deciding whether to require payment by instalments, and if so in what amount.

29. On that basis the question for the Tribunal - given, we repeat, that it thought it right to have regard to the Appellant's means - was *essentially whether there was indeed a reasonable prospect of her being able in due course to return to well-paid employment and thus to be in a position to make a payment of costs; and, if so, what limit ought nevertheless be placed on her liability to take account of her means in that scenario and, more generally, to take account of proportionality. As to the former question, views might legitimately differ as to the probabilities, but the Tribunal was well-placed - better than we are - to form a view that there was indeed a realistic prospect, and we see no basis on which that judgment can be said to be perverse. As to the latter, we see the force of the argument that it would be pointless, and therefore not a proper exercise of discretion, to require the Appellant to pay more, even in the optimistic scenario envisaged, than she could realistically pay over a reasonable period; and we have been concerned whether the cap was simply set too high. But those questions of what is realistic or reasonable are very open-ended, and we see nothing wrong in principle in the Tribunal setting the cap at a level which gives the Respondents the benefit of any doubt, even to a generous extent. It must be recalled that affordability is not, as such, the sole criterion for the exercise of the discretion: accordingly a nice estimate of what can be afforded is not essential. Approached in that way, we cannot in the end say that the limit of one-third of the Respondents' costs - whether that comes to £60,000 or some other figure in the range - was perverse. It was of course rough-and-ready, but there is in truth no means of arriving at a more precise figure. We cannot conscientiously say that a proportion of,*

say, a quarter would have been right while a third was wrong. The Respondents are the injured parties, and even if the order does indeed turn out to be recoverable in full at some point in the future, they will be out-of-pocket to the tune of two-thirds of their assessed costs: it is difficult to say in those circumstances that the award is disproportionate. It is also worth bearing in mind that until the introduction of the current Rules in 2004 tribunals were positively prohibited from taking into account the means of the paying party (as is the case in ordinary civil litigation) - see Kovacs v Queen Mary & Westfield College [2002] ICR 919, esp. per Simon Brown LJ at para. 16; so there is nothing axiomatically unjust in such a state of affairs. (We have considered whether it might not have been preferable for the Tribunal to express its cap as a specific sum rather than as a proportion of the costs, but the point was not argued before us; and we can in any event see nothing wrong in principle in the Tribunal taking the course it did even if the alternative of identifying a specific sum might have had advantages.)

153 Having carefully reflected upon this matter, I have decided that it would be disproportionate to order the claimant to pay the respondents the full sum sought of expenses of £20,000, when, having regard to the information available about the claimant's whole means and assets, the sum sought by the respondents is at such a high level that the claimant likely cannot afford to pay that full amount, having regard to his current financial circumstances.

Claimants status as an unrepresented, Party Litigant

154 In coming to my decision on this opposed expenses application, I have taken into account that, since 23 March 2018, the claimant has been an unrepresented, party litigant. In A Q Ltd v Holden [2012] IRLR 648, EAT, His Honour Judge Richardson, the EAT Judge, held that that justice requires that Tribunals do not apply professional standards to lay people, who may

be involved in legal proceedings for the only time in their life, and that lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser.

155 In particular, I wish to refer here to what Judge Richardson stated in his judgment in A Q Ltd, because he was specifically dealing in that particular case with a challenge on various grounds to an Employment Tribunal's decision to refuse the successful employer's application for costs at the end of a full Hearing, and, at paragraphs 32 and 33 of his judgment, he had to address the relevant statutory provisions on awarding costs found in what was then Rule 40 of the 2004 Rules of Procedure, as follows:-

> "32. *The threshold tests in rule 40(3) are the same whether a litigant is or is not professionally represented. The application of those tests should, however, take into account whether a litigant is professionally represented. A tribunal cannot and should not Judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As Mr Davies submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. Tribunals must bear this in mind when assessing the threshold tests in rule 40(3). Further, even if the threshold tests for an order for costs are met, the Tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice.*

> *33. This is not to say that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity. But the Tribunal was entitled to take into account that Mr Holden represented himself; we see no error in its doing so; and we do not accept that it misdirected itself in any way."*

156 While Mr O'Carroll's written submissions in this expenses application made reference to the recent Supreme Court judgment in Barton v Wright Hassall LLP, I am aware of Mrs Justice Simler's judgment of 28 June 2016 in Liddington v 2Gether NHS Foundation Trust [2016] UKEAT 0065/16, and how the EAT there confirmed that costs can be awarded against an unrepresented claimant, and that resonates well with what His Honour Judge Richardson stated, at paragraph 33 in AQ Ltd v Holden, that lay people are not immune from orders for costs: far from it, as the cases make clear.

157 Having re-read the now EAT President's judgment in Liddington, I note, with surprise, that it does not refer to the earlier EAT judgment in A Q Ltd v Holden, albeit it is reported, and it is discussed at paragraph 20.53 (Litigants in person) in Chapter 20 (Costs and penalties) in the current (May 2014) edition of the IDS Employment Law Handbook on Employment Tribunal Practice and Procedure.

158 I also note that, in the EAT Judgment by Mr Justice Underhill, a former EAT President, in Vaughan v London Borough of Lewisham [2013] IRLR 713, the EAT states, at paragraph 25, that it is established that the fact that a party is unrepresented is a relevant consideration, in the exercise of discretion. After reproducing the full text of Judge Richardson's paragraphs 32 and 33 in A Q Ltd v Holden, which I have just reproduced above, Mr Justice Underhill states that the EAT agrees with what is said in both paragraphs.

159 In the present case, I have taken into account that the claimant is representing himself, but that factor does not in any way make him immune from any liability for expenses being awarded to the respondents where the Tribunal decides, as I have done, that it is appropriate to make such an order against the claimant.

Fixed Sum of Expenses awarded to the Respondents

160 As I have decided to make an award of expenses against the claimant, I then have had to consider the amount to award, and to consider the options under Rule 78.

161 The Tribunal may specify the sum sought by the respondents, provided that sum does not exceed £20,000, per Rule 78(1) (a). That is the situation here - expenses were restricted by the respondents to £20,000.

162 The sum sought by the respondents was resisted by the claimant on the principal basis, not that any award of expenses was not appropriate in the first place, even if the Tribunal were to find expenses should be awarded, but on the basis of his assertion was that the sum sought was "extortionate", by which I have interpreted that to mean an excessive sum, and so should not be granted on that basis.

163 As parties had not agreed a specific sum, so I could not have ordered that under Rule 78 (1)(e).

164 In his objection of 28 May 2018, the claimant stated that he would like *"the Law Society to look into the total cost of the bill."*

165 While, under Rule 78(1)(b), I might have ordered expenses "as taxed" according to the Sheriff Court Table of Fees, I wish to record here that I

would not have considered it appropriate to remit to the local Auditor of Court for taxation.

166 As I recorded earlier in these Reasons, at paragraph 29 above, when Mr O'Carroll addressed me, at the previous Hearing held on 17 April 2018, he initially suggested that he would be inviting the Tribunal to award expenses against the claimant, as taxed by the Auditor of Court, but following enquiry by me, at that stage, he advised that the amount of expenses to be sought would be likely less than £20,000, i.e. less than the amount that need be referred for taxation.

167 In the event, from the respondents' application for expenses, intimated on 10 May 2018, the total amount incurred by the respondents totals £34,123.62, but they have restricted their claim for expenses to £20,000, so that taxation by the Auditor is not required.

168 Further, I also wish to record here that, albeit I was not asked to do so, I would not have considered it appropriate for me, as the presiding Employment Judge, to have myself taxed the respondents' expenses, in the event that the Tribunal was to have decided to award taxed expenses against the claimant.

169 While that is permitted, under Rule 78 (1)(b), that requires an Employment Judge *"applying the same principles"* as the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993.

170 That option presupposes that an Employment Judge fully understands, and can in effect replicate, the principles by which an Auditor of Court operates. In my view, the Auditor of Court is best placed, by skills and experience, to conduct taxation, if taxation is required. As I have stated above, however, I do not consider taxation appropriate in any event.

171 Having regard to the Tribunal's overriding objective to deal with the case fairly and justly, in terms of Rule 2 in the Employment Tribunals Rules of Procedure 2013, which includes, so far as practicable, dealing with the case in ways which are proportionate to the issues, and seeking to avoid delay and ensure saving of expense, my own view is that taxation would lead to further delay, and further expense, occasioned by a remit to the local Auditor of Court.

172 As such, a summary assessment by me as the presiding Employment Judge seems not only appropriate under Rule 78(1) fa), but also proportionate, and I pay respect to the view previously stated by the Employment Appeal Tribunal that it is preferable for a Tribunal, when making an award of expenses, to award a fixed sum. I refer, in this respect, to Lothian Health Board v Johnstone [1981] IRLR 321.

173 In section 3 of the respondents' application, Mr O'Carroll stated specifically that:-

> *"... the Respondent is content for the Tribunal to make an order of such lesser amount as appears to the Tribunal to be appropriate once it has assessed the Claimant's means and assets. The Respondent has no wish to cause the Claimant undue financial hardship beyond what he may reasonably be expected to pay. It simply seeks reasonable compensation from the Claimant to mark the unnecessary expense incurred by the Respondent as a result of the Claimant's unreasonable behaviour in the conduct of these proceedings.*

174 Accordingly, having regard to the albeit limited information I have to hand as regards the claimant's ability to pay, in terms of Rule 84, I have decided, after careful consideration, that I should order the claimant to pay to the respondents the sum of £1,500 in respect of a contribution towards the

respondents' expenses reasonably and necessarily incurred in defending these Tribunal proceedings raised against them by the claimant.

175 It seems to me that by making an order in this reduced amount, I am taking account of the claimant's ability to pay, and ordering him to pay what amounts to a capped amount of expenses as opposed to the whole amount of £20,000 sought by the respondents.

176 Not only does such an award give the respondents some reimbursement of their expenses incurred, it also takes account of the respondents' stated position that : *"The Respondent has no wish to cause the Claimant undue financial hardship beyond what he may reasonably be expected to pay."*

177 I leave it to the claimant and the respondents' solicitor to enter into discussions between themselves about how and when that award of £1,500 will be paid by the claimant to the respondents.

178 The Tribunal has no statutory power to make an order for payment by instalments, unless both parties agree to something specific, in which case they can jointly invite the Tribunal to vary this Expenses Judgment, and make a Consent Judgment under Rule 64 of the Employment Tribunals Rules of Procedure 2013 to reflect any agreed, and timetabled, instalments repayment plan.

Employment Judge: I McPherson
Date of Judgment: 14 August 2018
Entered in register: 21 August 2018
and copied to parties