



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110559/2019

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Reconsideration Hearing held in Glasgow in person on 10 August 2022

Employment Judge Ian McPherson

10 **Ms Margaret Macfarlane
(formerly Mrs M Easton)**

**Claimant
In Person**

15 **Graeme B Easton
t/a Alexander Easton Funeral Directors**

**Respondent
Not present and
Not represented**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The **Reserved Judgment** of the Employment Tribunal is that: -

20 (1) The Tribunal notes and records that, having heard from the claimant in person at this Reconsideration Hearing, the respondent not being present, nor represented, despite Notice of Reconsideration Hearing having been issued to him, on 27 June 2022, and an email from the respondent, on 8 August 2022, seeking a postponement having been refused by the Judge on that date, and reasons for that refusal having been sent to both parties by the Tribunal on 8 August 2022, confirming that the Reconsideration Hearing listed for 2 hours would proceed on 10 August 2022, and the Tribunal having again confirmed that in an email to the Tribunal sent to the respondent on 10 August 2022 prior to the start of this Hearing, the Tribunal, in exercise of its powers under **Rule 47 of the Employment Tribunals Rules of Procedure 2013**, having heard from the claimant, in light of a further email from the respondent sent on 9 August 2022, decided to proceed with the listed Reconsideration Hearing in the absence of the respondent, having considered the information available to the Tribunal about the reasons for the respondent's failure to appear or be represented, and it being in the interests of justice to proceed, the claimant

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being present, ready and able to proceed, as also the Tribunal assembled for that purpose, and any further delay would be contrary to the Tribunal's overriding objective under **Rule 2** to deal with the case fairly and justly, including avoiding unnecessary further delay, and saving of expense.

5 (2) Having considered, in terms of the Tribunal's powers for strike out under **Rule 37 of the Employment Tribunal Rules of Procedure 2013**, whether or not to strike out the respondent's ET3 response, for his failure to comply with previous Orders of the Tribunal, and / or unreasonable conduct, the Tribunal declines to do so, for the reasons given in the
10 following Reasons.

(3) Further, having then considered the claimant's opposed application to reconsider the Tribunal's **Rule 64** Consent Judgment of 20 October 2021, in terms of the Tribunal's powers for reconsideration under **Rule 70 of the Employment Tribunal Rules of Procedure 2013**, the Tribunal confirms
15 that previous Judgment, for the reasons given in the following Reasons, and declines to vary it as requested by the claimant.

(4) Finally, having considered the claimant's application, made at this Reconsideration Hearing, for an order for expenses against the respondent, and having considered the Tribunal's powers to award costs,
20 etc under **Rules 74 to 84 of the Employment Tribunal Rules of Procedure 2013**, the Tribunal continues that application for its determination at a later date, on the papers, for the reasons given in the following Reasons, to allow the respondent an opportunity to make written representations to the Tribunal, by email, with copy to the claimant, and
25 that **within no more than 7 days of issue of this Judgment**. If the respondent makes any such written representations, then the Tribunal allows the claimant a period of **no more than 7 days after intimation of those representations** to make any written comment / objection to the Tribunal, in reply, by email, with copy to the respondent.

30 (5) Accordingly, the Tribunal **reserves**, for its determination at a later date, and in a further Judgment to follow, whether or not to make any expenses

or preparation time order against the respondent and, if so, in what sum, and allows the respondent, in making any written representations in terms of paragraph (4) of this Judgment, to state any comment / objection to the claimant's application, and detail his ability to pay, as per **Rule 84**, and, if
5 the respondent fails to make any written representations, within the 7 day period allowed, the Tribunal will make a further reserved Judgment on that application without any further delay, and without the need for an attended Hearing, unless the respondent requests to be heard, in which event an Expenses Hearing will be convened.

10 REASONS

Introduction

1. This case called again before me as an Employment Judge sitting alone on the morning of Wednesday, 10 August 2022, at 10:00am, for a 2-hour Reconsideration Hearing in person, as per Notice of Reconsideration Hearing
15 issued to both parties by the Tribunal on 27 June 2022. In terms of that Notice, parties were advised that, at this Reconsideration Hearing, the previous Judgment dated 20 October 2021 might be confirmed, varied or revoked. If revoked, they were advised that the case would be re-listed for a Hearing at a future date.
- 20 2. By subsequent letter from the Tribunal, dated 2 August 2022, both parties were informed that, at this Hearing, the Tribunal would also consider the Tribunal's proposal to consider Strike Out of the response on the basis of the respondent's failure to comply with Tribunal Orders, and / or unreasonable conduct.

Background

3. This case had previously called before me, as an Employment Judge sitting alone, for a 2-day Final Hearing, on 20 October 2021, when both parties were in attendance, as unrepresented, party litigants.
- 5 4. That Final Hearing followed upon sundry procedure by many Judges at several Preliminary Hearings over the period from presentation of the claim on 2 September 2019, and it being defended as from 29 October 2019. The case was listed for that Final Hearing as an earlier attempt at settlement via ACAS had not been successful, and Employment Judge Robison had directed
10 that the case proceed to a 2-day Final Hearing in person.
5. At that Final Hearing, before me, having clarified the issues before the Tribunal, and after an adjournment allowed for the parties to confer in confidential discussions as to settlement, it was agreed that, rather than
15 continue the matter to allow parties to implement settlement on terms to be agreed through a COT 3 settlement via ACAS, they would invite me to consider making a Consent Judgment, under **Rule 64 of the Employment Tribunal Rules of Procedure 2013**, if I thought it fit to do so, on terms agreed between them in writing.
6. No evidence was heard at that Final Hearing, and so no findings in fact were
20 made. After a period of adjournment, at that Final Hearing, when the parties drafted their written agreement, it was handed to me, and it was placed on the Tribunal's casefile, and having heard from them further, and having discussed and agreed with them the terms thereof, I confirmed that I was prepared to issue a **Rule 64** Consent Judgment on the agreed terms, of consent of both
25 parties appearing, as well as a **Rule 52** dismissal judgment, in due course, thus bringing these Tribunal proceedings to an end as regards both parties.
7. The terms of that **Rule 64** Consent Judgment were as follows:
 - (1) *Having heard both parties at this Final Hearing, and clarified and agreed the identity and designation of both parties, and amending
30 the Tribunal's records accordingly, and having clarified the issues*

before the Tribunal for determination, being a complaint of unfair dismissal, contrary to **Section 98 of the Employment Rights Act 1996** ; a complaint of unlawful deduction from wages, contrary to **Section 13 of the Employment Rights Act 1996** ; and a failure by the respondent to provide the claimant with written particulars of employment, contrary to **Section 1 of the Employment Rights Act 1996**, of consent of both parties, and in terms of **Rule 64 of the Employment Tribunals Rules of Procedure 2013**, it is noted and recorded that the parties have mutually agreed in writing at this Final Hearing that the whole claim against respondent shall be dismissed, without admission of liability, with the payment of the sum of **EIGHTEEN THOUSAND POUNDS (£18,000)** by the respondent to the claimant, in full and final settlement, and without admission of liability, payment to take effect in accordance with an agreed schedule of instalment payments, starting with an initial lump sum payment by BACS transfer of **£,5000** by no later than **5 November 2021**, followed by 11 monthly payments by BACS of **£1,083 per month**, and a final payment of **£1,087**, over one year, the first such payment to be made no later than **5 December 2021**, and subsequent payments by no later than the fifth day of each succeeding month.

- (2) Settlement terms having been agreed between the parties, the claimant consents to withdrawal of her whole claim, in terms of **Rule 51 of the Employment Tribunals Rules of Procedure 2013**, and dismissal of that claim, in terms of **Rule 52**, once the full amount of **£18,000** has been paid to her by the respondent.
- (3) The respondent shall confirm to the Tribunal, in writing, when the full £18,000 has been paid to the claimant, so that a **Rule 52** dismissal judgment may be issued at that time.
- (4) The Tribunal discharges the Final Hearing fixed for 21 October 2021 as being unnecessary.

8. In the event, matters did not thereafter proceed as parties had intended, and there has been much interlocutory skirmishing, and correspondence from and with the parties, in the lead up to this Reconsideration Hearing.
9. On 20 April 2022, the claimant emailed the Glasgow ET to advise that the
5 respondent had failed to make payment of the sum of £1083 on 5 April 2022, being the agreed monthly instalment in terms of the Consent Judgment. She asked for advice. She did not copy her email to the respondent.
10. On instructions from Employment Judge Doherty, on 5 May 2022, the Tribunal
10 wrote to both parties, stating that the Tribunal is an independent judicial body, and it cannot provide advice to either party as to the merits of the case or how to proceed in relation to it. The Judge asked for the respondent's comments, within 7 days, on the claimant's email of 20 April 2022, a copy of which was enclosed for the respondent.
11. On 5 May 2022, the claimant emailed the Glasgow ET, with copy to the
15 respondent, to advise that the respondent had defaulted on a further monthly payment of the sum of £1083, making it now two defaulted payments of £1083.
12. Thereafter, on 13 May 2022, the claimant again emailed the Glasgow ET, but
20 without copy to the respondent, to advise that the respondent had failed to make payments of the monthly sum of £1083 for April and May 2022, despite the passage of 7 days, and again asking for advice, as the respondent had failed to respond to her or the Tribunal.
13. On my instructions, on 17 May 2022, the Tribunal wrote again to both parties,
25 stating that the Tribunal noted the respondent was £2166 in arrears, and stating that it was for the claimant to take her own legal advice from a solicitor, or CAB, as to her next steps – whether to instruct a Sheriff Officer to effect recovery of the instalments due and unpaid, or seek variation of the existing Judgment.
14. It was noted, with disappointment, that the respondent had not commented
30 upon the claimant's email of 20 April 2022, as per Judge Doherty's

instructions, by 12 May 2022, or at all. The respondent was informed that failure to comply with Tribunal orders or directions can have legal consequences, and it was suggested that the respondent should take his own legal or other independent advice, and reply to the Tribunal, without any further, undue delay, within 7 days, with copy to be sent to the claimant at the same time, as per **Rule 92**.

Reconsideration Application

15. On 17 May 2022, the claimant again emailed the Glasgow ET, with copy to the respondent. She stated that she had received one payment of £5000 from the respondent in November 2021, and then 4 payments, each of £1083, for December 2021, and January, February and March 2022, and she sought a variation in the Tribunal's Judgment permitting the remainder to be paid in full.

16. On my instructions, on 20 May 2022, the Tribunal wrote again to both parties, stating that the respondent should make comments on the claimant's email of 17 May 2022 by 27 May 2022. The respondent replied to the Tribunal, with copy to the claimant, by email sent at 14:43 on 27 May 2022, stating as follows:

"The claimant has submitted payments received which I agree with, two payments are in arrears for which I am truly sorry, the reason the payments have been missed is first of all a shortage of work, funeral numbers are down, and I could have possibly managed if I had not had to pay the claimant £28,000 pounds plus her court ordered £2952 making a total of £30952 paid to her in the last month.

She has applied to vary the ET agreement to have the remainder paid in full immediately should that be granted, it would not be feasible to keep trading, as due to this person the company is running at a loss. And four people as well as myself would be unemployed I wish to make it clear these arrears are not wilful but the money can only go so far As I wish this person out of my life as soon as practicality possible I would propose to catch up with the payments as soon as possible work permitting, and if at all possible as I said to Judge MacPherson pay early in order to bring this matter to an end."

17. The claimant also replied to the Tribunal by her email to Glasgow ET sent on 27 May 2022 at 16:36. She did not copy it to the respondent. It was in the following terms:

5 *“Firstly I feel that any other matters not relating to this case that have been brought up by the respondent are a matter for our respective solicitors.*

But to clarify, as he will get a copy of this is..the £28000 relating to a boat that we jointly owned and the proceeds of this had to pay the solicitor.

The £2959.00 per month is court ordered aliment as I was left in debt by the respondent as well as out of work.

- 10 *As for running the business at a loss, the respondent has failed many times over the last 3 years to produce accounts for the Falkirk sheriff Court or solicitors regarding this.*

Getting back from deviating from the matter in hand.... at present there are 2 outstanding payments of agreed sums before the Judge last October.

- 15 *I ask that the Judge grants that the remainder of the awarded amount be paid in full so that the respondent as in his mind will not have to deal with me further on this matter.*

20 *I can assume correctly it has taken Mr Easton all this time to actually respond due to the fact that he has enjoyed yet another luxury getaway in his new expensive caravan more than a week ago.*

I have no wish for this stress to be ongoing as I believe the respondent is just trying to make a fool of everyone.”

- 25 18. Thereafter, on my instructions, on 31 May 2022, the Tribunal wrote to both parties. A copy of the claimant’s email of 27 May 2022 was enclosed for the respondent, and both parties were again reminded of the need for **Rule 92** compliance when writing to the Tribunal, and showing that by use of “**cc**” to the other party in the email sent to the Tribunal.

19. For the purposes of this Judgment, I note and record that the Tribunal's letter to both parties, on 31 May 2022, so far as material for present purposes, included the following:

5 *“Judge McPherson has noted both parties’ correspondence of 27 May, and he is disappointed that parties have referred to extraneous matters outwith the jurisdiction of the Employment Tribunal. Civil proceedings between the parties in the Sheriff Court are best addressed by parties and their solicitors in that forum, and should not be introduced to correspondence with this Tribunal. Nor should correspondence with the Tribunal be used by either party*
10 *as an opportunity to snipe at the other party. Correspondence with the Tribunal should focus on the matter in hand, being the claimant’s complaint about the respondent failing to make 2 instalments, and her application to vary the Tribunal’s Judgment of 20 October 2021.*

15 *Having carefully considered both parties’ correspondence, the Judge gives notice to both parties that, in terms of the Tribunal’s powers under Rule 70 of the Employment Tribunal Rules of Procedure 2013, he proposes to reconsider that earlier Judgment, on the claimant’s application, and accordingly I write to inform both parties of the Judge’s reasons why he proposes to reconsider that Judgment and, on reconsideration, in the interests of justice, vary that*
20 *Judgment, rather than confirm it, or revoke it.*

The Judge’s reasons are as follows:

- (1) *On the information from the claimant, and the respondent now having confirmed it, it appears to the Judge that there has been a material change of circumstances since both parties agreed to the Consent Judgment on 20 October 2021. In particular, there has been repeated*
25 *failure, by the respondent, on 2 occasions to date, to comply with his previous agreement to pay the claimant by regular instalments. The respondent, in his email of 27 May, states that this failure to pay instalments is not wilful, but due to his current financial circumstances.*
30 *As the claimant seems to see matters, the respondent’s failure to pay*

those instalments is deliberate and unreasonable conduct on the respondent's part.

- 5 (2) *In these circumstances, given that the existing Judgment requires payment by instalments, before the respondent pays off the total agreed sum of £18,000, in full, the Judge takes the view that it may be in the interests of justice to vary the Judgment to insert a new provision that, in the event of any failure to pay an instalment, the remaining sum then due and owing would become payable immediately.*

10 *In these circumstances, the Judge orders the respondent to provide a revised instalment plan for consideration by the Judge, and comment by the claimant, and he invites both parties to give written notice of their agreement, or objection, as the case may be, to the proposed reconsideration and variation, and to do so by no later than 4.00pm on Friday, 10 June 2022.*

15 *If the respondent intends to found upon his current financial circumstances, then he shall provide, by no later than 4.00pm on Friday, 10 June 2022, a detailed account of his whole assets, including capital and savings, and his monthly income & expenditure.*

20 *You should provide any response to the proposal by no later than 4.00pm on Friday, 10 June 2022, and confirm that your response has been copied to the other party. By that date, both parties are invited to express a view as to whether the reconsideration can take place without a Hearing.*

25 *The Judge would propose to deal with this reconsideration, on the papers only, but if either party seeks an in-person Hearing, then they should provide a note of their availability to attend a Reconsideration Hearing, in Person, on a date to be hereinafter fixed in the proposed listing period of the months of August / September 2022.*

30 *If the Employment Judge decides that the reconsideration should take place at a Hearing, this will take place during August or September*

2022. An earlier date is not possible as the Judge will be on extended, annual leave, between 27 June and 22 July 2022.

If there are any dates within this period of August / September 2022 which you wish to avoid, you should advise me by no later than 4.00pm on Friday, 10 June 2022, and explain why those dates should be avoided. So far as listing arrangements permit, those dates will be avoided.

If the Employment Judge decides that the reconsideration should take place without a Hearing, you will be notified and be given an opportunity to provide written representations.”

Correspondence with the Parties

20. The respondent replied to the Tribunal, with copy to the claimant, by email on 10 June 2022, sent at 15:38, stating as follows:

“I confirm the claimant has been paid this months instalment as agreed ... i again confirm the reason two instalments were missed was because of insufficient funds being available at the time as the claimant is well aware nothing is guaranteed in this line of work funerals numbers fluctuate and at the time concerned we had no work for a few weeks and it takes time for people to settle their accounts I find the claimants allegation it was intentional totally offensive if it had been intentional I would have made no payments at all

It is my intention to catch up with missed payments and settle this matter in the timescale agreed with Judge McPherson Should the claimant not agree to this I would seek a recall of the hearing in person

Respectfully Submitted

Graeme Easton”

21. The claimant replied to the Tribunal, with copy sent to the respondent, by email on 10 June 2022, sent at 16:31, stating as follows:

“In response to the respondent's 11th hour response. Mr Easton was instructed by the Judge to submit the evidence required. This has not been forthcoming.

He has not been found wanting of work as the business is very buoyant.

5 *Another delaying tactic to stall this case all the longer.*

I would appeal to the court to find the respondent uncooperative and allow the remainder of the amount and what is owed to an order to be paid forthwith.

My health due to this case has suffered profusely and since it has been ongoing since 2019 I feel the time has come to conclude the matter.

10 *Mr Easton has drawn things out quite long enough now.*

Yours sincerely

Margaret Macfarlane

(claimant).”

22. Thereafter, on my instructions, on 17 June 2022, the Tribunal wrote again to
15 both parties. So far as relevant, for present purposes, the Tribunal's letter was in the following terms:

“Following referral to Employment Judge Ian McPherson, the Judge has instructed that I advise both parties, as follows:

- (1) *Parties' correspondence is noted.*
- 20 (2) *It is disappointing that, despite the Tribunal's previous letter of 31 May, at paragraph 6, both parties have again used the exchange of emails as an opportunity to snipe at the other party. As the Judge has previously instructed, parties should focus on the matter in hand, being the claimant's opposed reconsideration application.*
- 25 (3) *The Judge notes that Mr Easton, the respondent, has failed to fully comply with the Judge's orders as set forth in the Tribunal's letter of 31 May.*

- (4) *In these circumstances, the Judge orders of new that the respondent shall provide a revised instalment plan for consideration by the Judge, and comment by the claimant, and to do so by no later than 4.00pm on Monday, 20 June 2022.*
- 5 (5) *If the respondent intends to found upon his current financial circumstances, as alluded to in his email of 10 June, then he shall provide, by no later than 4.00pm on Monday, 20 June 2022, a detailed account of his whole assets, including capital and savings, and his monthly income & expenditure.*
- 10 (6) *As regards the reconsideration application, while both parties were invited in the Tribunal's letter of 31 May to express a view as to whether it can take place without a Hearing, i.e. on the papers only, neither party has made any representations on that matter.*
- 15 (7) *As such, given the nature of the reconsideration application, the Judge has decided that it is in the interests of justice that both parties attend an in person 2-hour Reconsideration Hearing before Employment Judge Ian McPherson.*
- 20 (8) *As neither party has advised the Tribunal of their unavailable dates within August / September 2022, as requested in our letter of 31 May 2022, the Judge has given instructions to the Listing section to fix a date in that period having regard to the Judge's availability only, unless, by no later than 4.00pm on Monday, 20 June 2022, parties advise if there are any dates within that two month period which they wish to avoid, and explain why those dates should be avoided.*
- 25 (9) *Formal Notice of Reconsideration Hearing in person will follow in due course under separate cover."*

23. The claimant emailed the Glasgow ET on 20 June at 11:06, with copy sent to the respondent, in the following terms:

"In response to your email dated 17th June 2022 of the above case.

I have no objection to a 2 hour in person hearing at Judge Mcpherson's convenience.

It is disappointing to note that this case which I presumed concluded after the parties came to an agreement after such a long time, in front of Judge Mcpherson, has had to be resurrected.

I would have preferred that the Respondent would have been able to comply timeously with what the court had asked of him to avoid having to go back to court.

I would like it noted that my mental health has been impacted further by this continuance.

Margaret Macfarlane (Easton) Claimant.”

24. The respondent, in his email to the Tribunal, sent at 15:02 on 20 June 2022, stated that:

“I also would have no objection to a hearing in person at a day and time of your choosing I will in the meantime keep up with payments as agreed and if possible catch up on missed payments for the sake of my physical and mental health I need this resolved as soon as possible to concentrate on matters the claimant is pursuing in other courts and to get this person out of my life once and for all I know this case is unusual and after asking other business owners I found I am not alone on not providing a written contract for their wives hopefully they will remedy that rapidly so perhaps some good will come out of this case many thanks for your assistance in this matter

Respectfully submitted

Graeme Easton”

25. Thereafter, the claimant again emailed the Glasgow ET on 20 June at 15:56, with copy sent to the respondent, stating that:

"I have today 20th June 2022 after 3pm been sent the response of the respondent Graeme B. Easton to the court and copied to myself Margaret Macfarlane (claimant)

5 *I can note from the email that the respondent has again taken the opportunity to be derisory with his words which I find accusatory and disturbing.*

This has to stop as I am very intimidated by his response.

Yours sincerely

Margaret Macfarlane."

10 26. In reply, the respondent again emailed the Glasgow ET on 21 June at 09:18, with copy sent to the claimant, in the following terms:

15 *"I note with dismay the scurrilous allegations the claimant has made against me .. I find her statements I completely unacceptable I wish to stick to matters that the employment tribunal has power over and not to bring personal matters into the case how she finds my response intimidatory is a mystery to me I was merely trying to explain that I discussed with other business owners the need to have a written contact for their wives / husbands so they don't fall foul of employment law as I did*

Respectfully submitted

Graeme Easton"

20 27. Thereafter, on my further instructions, on 23 June 2022, the Tribunal wrote again to both parties, in reply to those 4 emails of 20 and 21 June 2022. So far as relevant, for present purposes, the Tribunal's letter was in the following terms:

25 *"All 4 emails have been placed on the Tribunal's casefile, and referred to the allocated Judge, Employment Judge Ian McPherson, who has instructed that I reply to both parties, as below:*

(1) Parties' correspondence is noted.

- (2) *As regards dates for the Reconsideration Hearing in person, the Judge has instructed that the case now be listed for a 2 hour Hearing on a date to be fixed having regard to the Judge's availability.*
- (3) *Formal Notice of that Reconsideration Hearing will be issued, under separate cover, by our Listing team in early course.*
- (4) *The Judge notes the claimant's concern about "this continuance". The Reconsideration Hearing has to be conducted by EJ McPherson, as it is reconsideration of his earlier Judgment. The Listing team will seek to list it for him in August / September 2022.*
- (5) *The Judge repeats his previous comments about the ongoing, intemperate nature of parties' correspondence. Parties should correspond courteously, and not as they have continued to do.*
- (6) *Unreasonable conduct in proceedings by either party can be grounds for strike out of a claim and / or response in terms of Rule 37.*
- (7) *Both parties should seek independent, professional advice, from a solicitor, CAB, or pro bono agency, e.g. Strathclyde University Law Clinic.*
- (8) *If the respondent does not provide the evidence of his assets, capital and savings, as also his monthly income & expenditure, and instalments plan, as previously ordered by the Judge, then the Judge will consider whether that is grounds for strike out of the response, on the basis of failure to comply with Tribunal orders, and / or unreasonable conduct.*
- (9) *The Judge grants the respondent a further 14 days to do so, and he will review the casefile again thereafter."*

28. Notice of Reconsideration Hearing was issued by the Tribunal to both parties, on 27 June 2022, as detailed earlier in these Reasons at paragraph 1 above. On 5 July 2022, the claimant emailed the Glasgow ET, at 12:52, with copy to the respondent, stating that she wished to inform "the Court of a further default

for 4th July 2022 for £1083.00. This brings at today's date a 3rd default of agreed payments." Later that day, by further email sent at 17:40, she advised that the claimant had paid £1083, after receiving her email to the Tribunal, so she updated her information to state that two months outstanding payments were now due.

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29. As I was then out of the office, on annual leave, the claimant's correspondence was referred to Employment Judge Robison, on 8 July 2022, and she instructed that it be placed on the casefile, and brought to my attention on my return to the Glasgow ET. Following my return, and on my instructions, a letter from the Tribunal was sent to both parties, in the following terms, by email sent by the Tribunal to both parties at 12:09 on 2 August 2022:

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"I refer again to the above case, listed for Reconsideration Hearing before Employment Judge Ian McPherson on Wednesday, 10 August 2022 at 10am for 2 hours, in person, as per Notices of Hearing issued to parties on 27 June 2022.

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Following his return earlier this week from annual leave, Employment Judge McPherson has reviewed the casefile, and considered parties' emails of 5 July which have been placed on the case file. He notes their terms, but he is disappointed that all of the matters addressed in the Tribunal's letter of 23 June 2022 do not appear to have been addressed.

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*In particular, the Judge notes that the respondent has not provided the Tribunal (with copy to the claimant) with evidence of his assets, capital and savings, as also his monthly income & expenditure, and instalments plan, as previously ordered by the Judge, originally on 31st May, and then again on 25
17th June, and finally, on 23 June, when a further 14 days was allowed for that purpose. The extended period for compliance therefore expired on 7 July 2022, with non-compliance, and no application for an extension of time, for good cause shown.*

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In these circumstances, given the respondents' repeated failure to comply to date, the Judge gives formal notice that, at the Reconsideration Hearing, he will also give consideration to whether, in terms of Rule 37 of the Employment

Tribunals Rules of Procedure 2013 (copy below, for ease of reference), there are grounds for strike out of the response, on the basis of failure to comply with Tribunal orders, and / or unreasonable conduct.

Rule 37 provides that:

5 Striking out

37.—

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, the Tribunal may strike out all or part of a claim or response on any of the following grounds—

10 (a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

15 (c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

20 (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

25 (3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

Judge McPherson confirms that the opposed reconsideration application by the claimant will proceed to the listed Reconsideration Hearing on 10 August, when he will expect to be addressed by both parties, on that, and on the Tribunal's proposal to consider strike out of the response. In particular, the Judge will wish to be addressed on the extent of unpaid instalments, and the respondent's plans to address the arrears outstanding.

As the Tribunal has not been contacted by any representative on behalf of either party, it is assumed that both claimant and respondent will be in attendance on 10 August as unrepresented, party litigants. Please confirm.

30. The claimant confirmed her attendance on 10 August 2022 by email to the Glasgow ET on 2 August 2022, at 15:19, copied to the respondent, as per **Rule 92**. The respondent did not do so, instead he submitted a postponement application on 8 August 2022, as detailed below, in paragraph 31 of these Reasons.

Respondent's Application to Postpone the Reconsideration Hearing refused by the Tribunal

31. On Monday, 8 August 2022, the respondent emailed the Glasgow ET seeking a postponement of the listed Reconsideration Hearing. His application, by email sent at 14:55, but not copied to the claimant, as it should have been per **Rule 92**, was in the following terms:

"This case is due to be heard before Judge McPherson on the 10th August @ 10.00 am I ask for it to be adjourned to a later date Recently the claimant presented herself at our office and launched a diatribe of abuse to our staff putting them in a state of fear and alarm resulting in a complaint being made to police Scotland and as a result the claimant is the subject of a repo to the procurator fiscal ... events have since escalated and I believe the claimant is under further investigation by police Scotland My legal people have instructed me to have No contact with this person under any circumstances until matters are resolved in the criminal court system this of course would make it

impossible to be in the same room as the claimant I will however keep paying the claimant as agreed monthly with Judge McPherson I am in a difficult position indeed and look for your guidance on this matter I have not copied the claimant in this message as the legal people clearly said no contact can you assist me please

Regards

Graeme Easton”

32. Following reference to me, his application was refused by me, for the reasons given in the Tribunal’s letter of 8 August 2022, emailed to both parties at 16:15. Included in that letter, on my instruction, for the claimant’s information, was the text of the respondent’s application to postpone. The Tribunal’s letter, so far as material for present purposes, stated as follows:

Following referral to Employment Judge Ian McPherson, I write to advise that, on the basis of the very limited information provided so far by the respondent, the Judge has refused his postponement application, and he confirms that the Reconsideration Hearing will proceed, as previously listed.

*It is not appropriate for his postponement application not to have been copied to the claimant, as required by **Rule 92**. Given the proximity of the listed Hearing, the Judge has instructed that I copy its terms to the claimant, as below, but the Judge does not seek the claimant’s comments, or objections, at this stage.*

*The respondent’s reply to this email must be copied to the claimant, as per **Rule 92**, and she can then submit her written comments / objections, if any, as the case may be, having considered the respondent’s fuller information, in answer to the Judge’s requests for clarification, as set out below. Likewise, she must copy any reply from her to the respondent, as per **Rule 92**, at the same time as emailing the Tribunal.*

For the claimant’s information, Mr Easton’s email to the Tribunal reads as follows:…[not reproduced in these Reasons, as already reproduced at paragraph 31 above]

Judge McPherson states that Mr Easton should arrange to be in attendance, and / or to be represented by a solicitor, at the Reconsideration Hearing.

The Judge has **refused** his application, as it is made less than 7 days before the listed Hearing and, in terms of **Rule 30A**, the Judge is not satisfied, on the limited information to hand, that it is in the interests of justice to postpone the Hearing to a later date.

No specification is given of the alleged incident, or recent escalation, involving the claimant, as regards date, and time, nor has any information been provided as to it being reported to Police Scotland.

Please specify the police office dealing with the matter, the police officer to whom it was reported, and give the Police Scotland crime / incident number, so that the Tribunal can, if required, make enquiry direct to the Police.

As reference is made to the PF, please provide detail of the PF office, with PF reference, so that , if required, the Tribunal can make enquiry there.

Please provide all this information by return.

While the respondent refers to his "**legal people**", the Tribunal has no note of any solicitor on record at Glasgow ET acting on his behalf. If he is to be represented in these ET proceedings, please provide contact details for that legal representative **by return**.

If the respondent fails to attend and / or be represented on Wednesday morning , then, as previously advised, the Judge may decide to proceed in his absence, as per **Rule 47**.

While the respondent seeks guidance from the Tribunal, the Tribunal does not advise either party, each of whom must seek their own independent advice, and / or representation."

33. The respondent replied to the Glasgow ET by email on Tuesday, 9 August 2022, sent at 16:25, but not copied to the claimant, as it should have been per **Rule 92**. He stated as follows:

5 *"I acknowledge receipt of your correspondence regarding the case and will provide the following information the first complaint regarding the claimant is being handled by police Scotland constable G Delaney who has taken initial details and passed it to Dunoon police officers they have on the evidence provides made the claimant subject of a report to the procurator fiscal as the offence occurred in Falkirk district I presume the case will be heard in Falkirk Sheriff court if the procurator fiscal decides to prosecute at this stage I cannot give a reference number on that one The second offence occurred on the 22nd of July involving theft of a person's cctv equipment again the investigation is being carried out by police Scotland officers based in Dunoon we are currently waiting on the results of that investigation my the police and my solicitor says it is in my best interest not to have any contact whatsoever with the claimant as previously you will see from case notes she has made completely false allegations against me resulting in causing to be arrested and after investigation there being no case to answer we saw last month when she claimed I defaulted on payment only to change the story a day later In court there would be no problem but outside would be perhaps another matter I cannot be in the same room or near the claimant for my own protection and as I am unfamiliar with ET rules have not had time to appoint a solicitor the case will proceed without me I would point out my non attendance is not wilful and will continue to pay the claimant as agreed I accept and fully understand this court deals only with employment issues not personal ones but I am sure I am not alone when it comes to business owners not providing their wives with contracts of employment and accept it was my fault for not issuing one Respectfully submitted*

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Graeme Easton"

34. When his email of 9 August 2022 was referred to me by the Tribunal clerk, on the morning of Wednesday, 10 August 2022, in advance of the listed Reconsideration Hearing, scheduled to start at 10:00am, I gave instructions for a further reply to be sent to him. The Tribunal emailed him, at 09:15, in the following terms:

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“Following referral to Employment Judge Ian McPherson this morning, I write to advise that the Reconsideration Hearing in person will proceed, as listed at 10:00am, and the Judge will hear what the claimant, Mrs Easton, has to say, before deciding on the available information, whether or not to proceed in the respondent’s absence, as per **Rule 47**, or proceed to determine the strike out of the response, under **Rule 37**, and / or the claimant’s opposed reconsideration application, under **Rule 70**.

As the respondent refers to being unfamiliar with the ET rules, I provide a hyperlink for his, and the claimant’s, information:
<https://www.gov.uk/government/publications/employment-tribunal-procedure-rules>

As the respondent has not copied his email to the respondent, as required by **Rule 92**, the Judge will arrange with the clerk to give her a copy on her arrival at the Hearing. The respondent is again reminded that he **must** copy his correspondence to the claimant, at the same time as emailing the Tribunal, and confirm that he has done so, by inserting her email address as a cc.

Judge McPherson notes the further information provided by the respondent, but states that it does not provide any Police Scotland crime / incident report number, nor any PF reference, as requested in the Tribunal’s letter of 8 August 2022 refusing his postponement application.

Please provide this requested information **by return, and, preferably, before the 10:00am start of the Hearing this morning, and copied to the claimant, per Rule 92.**”

35. Although the respondent was asked to respond to the Tribunal, in advance of the start of this Reconsideration Hearing, he failed to do so, and no contact was made by him, or anybody on his behalf, to the Tribunal, and so the further information requested by the Tribunal was not provided by him then, or at all, as at the date of this Judgment.

Reconsideration Hearing before this Tribunal

36. When the case called before me, on Wednesday, 10 August 2022, the claimant was in attendance, unaccompanied, and acting on her own behalf, as an unrepresented, party litigant, but the respondent was not present. Nor was he represented by anybody, and he had not replied to the Tribunal's email sent earlier that morning, as detailed at paragraph 34 above.

37. In those circumstances, having waited until 10:05am, lest he, or any representative on his behalf, should be running late in attending for the 10:00am start, and there being no contact by him, or anybody on his behalf, with the Tribunal, I started the listed Hearing, with only the claimant in attendance.

38. The claimant, who wished to be addressed as Ms Macfarlane, stated that she was not aware that Mr Easton was not going to turn up. In light of his non-attendance, I informed her that, given the respondent was not in attendance, nor represented, I had to consider first whether or not to proceed in his absence, having regard to the terms of **Rule 47 of the Employment Tribunals Rules of Procedure 2013.**

39. **Rule 47** provides as follows:

Non-attendance

“47. *If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence.*”

40. I considered the information available to the Tribunal, being the ET1 claim form, ET3 response, the previous Judgment of 20 October 2021, and the email traffic between 20 April and 8 August 2022, as detailed above, earlier in these Reasons, at paragraphs 9 to 34 above.

41. Having heard from the claimant, and without the need to adjourn for private deliberation in chambers, I gave an oral ruling from the bench that I had decided to proceed in the respondent's absence. I decided that it was in the interests of justice to proceed, the claimant being present, ready and able to proceed, as also the Tribunal assembled for that purpose, and any further delay would be contrary to the Tribunal's overriding objective under **Rule 2** to deal with the case fairly and justly, including avoiding unnecessary further delay, and saving of expense.

Claimant's Statement and Productions

42. The claimant had provided me, at the start of this Reconsideration Hearing, with an orange, A4 sized ring-binder folder, with papers from her for my consideration at this Hearing. She had brought along her own copy, as well as a further copy for the absent respondent.

43. In her folder, the claimant provided me with a hand written statement; a list of the respondent's payments and defaults ; a copy of his previous contempt of court and fine at Falkirk Sheriff Court, along with 2 other written decisions by the Sheriff ; and a copy of the Tribunal's letters to her (and copied to the respondent) dated 2 and 8 August 2022, being 13 pages in total.

44. The claimant's statement, which I reproduce here, in full, as the respondent was not present at this Hearing to receive his copy, reads as follows:

"ET Glasgow Case Ref 4110559-2019 Date 10th August 2022

Claimant Margaret Macfarlane

My statement is simple.

At our previous Hearing on 20th Oct 2021 the respondent GRAEME B.EASTON agreed to pay me the sum of £18,000 (Eighteen thousand pounds).

An Initial sum of £5,000 followed by monthly payments of £1083 till finally paid.

He has defaulted on 3 payments totalling £3,249-00p so far.

He has on three separate occasions failed to produce what the Judge has asked for in terms of finance and assets.

5 *He has accused me of being subject to Police Scotland & Procurator Fiscal investigations without any evidence.*

He said he will keep paying in his last email dated 8th Aug to the Court but to date has defaulted three times!

I ask the Court today to consider to vary the previous Order to paying the remainder of the amount outstanding of £6,502-00p.

10 *Plus expenses of ferry costs, car parking, fuel, sustenance & photocopying of total £100 in view of the defaults and having to recall the case, plus any judicial costs.*

Yours faithfully

Margaret Macfarlane (Claimant)

15 45. In her list of payments & defaults by the respondent, which I reproduce here, in full, as the respondent was not present at this Hearing to receive his copy, the claimant stated as follows:

46. *“List of Payments & Defaults by Respondent GRAEME B.EASTON*

	<u>Date</u>	<u>Paid</u>	<u>Defaults</u>
20	5 th Nov 2021	£5,000	
	6 th Dec 2021	£1083	
	4 th Jan 2022	£1083	
	7 th Feb 2022	£1083	
	4 th March 2022	£1083	
25	4 th April 2022	£	Defaulted

4 May 2022 £ Defaulted

Note- (Respondent on Holiday)

6th June 2022 £1083

5th July 2022 £1083

5 4th Aug 2022 £ Defaulted

Total Paid So Far £11,498-00p Defaulted £3,249.00p

I am asking Court for full remaining payment to end case of ref 4110559/2019

Total £6,502-00p plus expenses of £100 and respondent to pay any judicial costs.

10 Margaret Macfarlane (Claimant)”

48. From Falkirk Sheriff Court (ref:FAL-F240-19), the claimant produced (i) interlocutor by Sheriff Shead dated 28 August 2019 ; (ii) interlocutor and Note by Sheriff S Livingston dated 30 October 2020 ; and (iii) interlocutor and Note by Sheriff S Livingston dated 8 March 2021. In the latter, the learned Sheriff
15 noted that the defender (Mr Easton) had admitted contempt of court, having failed to make payments to the pursuer (Mrs Easton) in breach of undertakings given to the Court.

49. The Sheriff describes it as “**a fairly flagrant contempt**”, and fined him £2,000. The Sheriff’s Note records that : “**The defender’s admission of contempt
20 along with his conduct throughout including defending what, as the facts came out, seemed a clear prima facie contempt which should have been admitted early on. Instead the defender took matters to proof, instructed counsel and appeared to maintain until today a position he could not pay when it was palpably obvious he could do so and indeed
25 his eventual admission of contempt confirms his non-payment as wilful.**”

50. I informed the claimant that there were no “**judicial costs**” within the Employment Tribunal (Tribunal fees having been abolished some years ago,

following a landmark decision by the Supreme Court in the Unison Judicial Review against the Lord Chancellor), and that, as regards her application, at this Hearing, for expenses of £100 against the respondent, this Tribunal had certain powers under the ET Rules of Procedure, but she needed to detail the breakdown of her claimed expenses of £100.

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51. In response, the claimant informed me that she had come over to the Glasgow ET by using the Dunoon / Gourock ferry to Hunter's Quay (at cost of £20), plus car parking at Oswald Street, Glasgow, with fuel for her mileage (which she did not quantify), and "**sustenance**" was for refreshments while on the journey both ways, while photocopying was for what was in her Productions Bundle, and she had also copied some bank statements to produce, if necessary, had the respondent been here, and had any dispute arisen as to what he had paid to her.

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Strike Out of the Response

52. I dealt next with whether or not to Strike Out the respondent's response. This had been raised by me in the Tribunal's letter to both parties, on 2 August 2022, extending the scope of this Hearing to address this further issue too. Its full terms are reproduced earlier in these Reasons, at paragraph 29 above, to which I refer for ease of reference. The full terms of **Rule 37** were there reproduced for the assistance of both parties, so I need not reproduce them again here.

20

53. The claimant highlighted how, in his email to the Tribunal on 9 August 2022, the respondent had stated that he would continue to pay the claimant, as agreed, but he had not provided the Judge with what he had asked for by way of an instalments plan, and details of his finance and assets.

25

54. She did not know whether the respondent opposed Strike Out of his ET3 response to the claim, as his emails of 8 and 9 August 2022 to the Tribunal did not say anything about that proposal, and so she did not know if he opposed Strike Out, or not. I pause here to note and record that that is a difficulty shared by the Tribunal: the respondent has not clearly and

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unequivocally clarified his position, and, as such, it is just not clear whether or not he does oppose Strike Out.

55. In further explanation of her position, the claimant advised me that the civil proceedings between the parties at Falkirk Sheriff Court were still ongoing, as far as she was aware, and that Mr Easton had only cleared mortgage arrears on 8 August 2022 (the same day that he had emailed the Tribunal seeking a postponement of this Hearing) after Aberdein Considine, solicitors for the Halifax, has instituted legal proceedings in the Sheriff Court. She stated that she and the respondent have separate solicitors in the Sheriff Court proceedings, and that both parties there are legally represented there, but acting on their own behalf here at the Employment Tribunal.

Reconsideration of the Rule 64 Consent Judgment

56. Next, I sought to clarify the claimant's position about her reconsideration application. She confirmed that she insisted upon that application, notwithstanding the respondent's opposition to it. She reminded me that the respondent had said, at the time, when the Tribunal consented to parties' agreement, on 20 October 2021, that the respondent might even pay off the total sum before December 2022, and he had agreed to pay her £18,000 in total.

57. Further, the claimant informed me that she believed the respondent had "**chosen**" not to be here at this Reconsideration Hearing. As regards the two matters raised by the respondent, in his recent emails, she stated that he had produced no evidence to reply to the Tribunal's requests for further detail. She submitted that these were civil matters, and even if the Police or Procurator Fiscal were to take it further to criminal proceedings, they were not matters for the Glasgow ET.

58. The claimant stated that she would like an Order from this Tribunal for the respondent to pay her now the remainder of the £18,000 due, as he had not, to date, done what he had said he would do, and so there should be no further defaults, or sporadic payments, and that would allow them not to have to deal with each other on these matters.

59. She further stated that she thought the respondent just does not want to come and see the Judge at this Tribunal, and explain things that he cannot explain. She added that she just wants to put an end to this Tribunal case, which has been running now for about 3 years.

5 60. Having heard the claimant, I stated, by way of observation, and not a criticism, that as neither party was legally represented, and the respondent was not present, nor represented, I would require to look carefully at my powers to reconsider a Consent Judgment, and direct myself on the relevant law on that matter, as well as Strike Out of the response, and her expenses application
10 made at this Hearing.

61. While parties are entitled to address the Tribunal on the relevant law, I stated to the claimant that I did not expect her (nor, had he been here, the respondent) to do so, as, generally speaking, unrepresented parties tend to leave the identification and application of the relevant law to the Tribunal.

15 62. As such, I advised the claimant that I would reserve judgment, for private deliberation in chambers, and a written Judgement & Reasons would follow as soon as possible, and that within the Tribunal administration's target of 4 weeks from date of this Hearing.

Claimant's Application for Expenses

20 63. Finally, I turned to ask the claimant about her request for £100 expenses against the claimant. She stated that she had been inconvenienced, and suffered further outlays because the respondent had "**renege**d" on the terms of the agreed Consent Judgment, and defaulted, and so he had forced her to this position.

25 64. I referred the claimant, very briefly, to the fact that I would require to consider her request for expenses against the background of the Tribunal's powers under **Rules 74 to 84**, and that these included a power to make what is known as a "**Preparation Time Order**" under **Rule 79**. Again, I said to her that I would deal with this matter, in chambers, when privately deliberating, and
30 writing up this my Judgment & Reasons.

65. I did, however, indicate to her that, in terms of **Rule 76(1)(a)**, a Tribunal may make a costs / expenses 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”**.
5
66. I then invited the claimant to address me on what parts of that test in that **Rule 76** she would like me to consider in deciding upon her application for expenses against the respondent.
- 10 67. The claimant focused particularly on the word **“vexatious”**, and she submitted that the respondent is doing this out of spite, as she has pursued him on his defaults in payment under the Consent Judgment, and that he has thought it will go away, but she had had to prepare for this Hearing of the case, come up to Glasgow from Dunoon, and **“try to get a Judgment to end this nonsense.”**
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68. Further, the claimant stated that, as she sees things, the respondent does not want to come and face the Judge, and tell me why he has defaulted in payment, and that was, she submitted, **“quite a deliberate act on his part”**. While, in his email to the Tribunal on 9 August 2022, the respondent had stated **“my non-attendance is not wilful”**, the claimant stated to me that she did not believe that statement by Mr Easton, as she felt that he was trying to make out he could not be in the same court room as her, although he had been last October 2021 at this Tribunal in person.
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69. She added that the respondent had provided no proof that she was under investigation by the Police or Fiscal, and that the respondent knows that he cannot provide that information, and so he knows that he would **“look like a fool”** if he attended this Tribunal. While Mr Easton had also stated that he has not had time to appoint a solicitor, the claimant stated that he had been legally represented in these Tribunal proceedings at an earlier stage, but that solicitor had been **“sacked”** by the respondent, and, anyway, he had solicitors in the Sheriff Court action.
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70. The claimant described Mr Easton as “**someone you cannot get through to**”, and that he will not, under any circumstances, give the Court any information on his own finances, as referred to by Sheriff Livingston in his Note of 8 March 2021, produced to me by the claimant, as part of her productions at this Hearing. This, she submitted, mirrored his conduct in this Tribunal case, where he had ignored the Tribunal’s orders to provide an instalments plan, and to provide details of his finances and assets.
71. At this stage, the claimant invited me to act like the Sheriff had done, and find the respondent in contempt of Court. I explained to her that the Employment Tribunal is a creature of statute, and only has the powers conferred on it by Parliament through statute, and that being so that I did not have the same powers as the Sheriff to deal with what might be regarded as contempt of the Tribunal by failure to comply with its Orders. Instead, I explained to her, I had available to me, in appropriate cases, use of the ET Rules of Procedure relating to Strike Out (**Rule 37**) and Costs / Expenses Orders etc (**Rules 74 to 84**).
72. Further, added the claimant, she was grateful that she had had the opportunity to put her case to me, and she submitted that the respondent has got “**absolutely nothing to back up his case**”, and he had no reasonable safety concern, as he was coming to a Court, and the reason he was not here was, she stated, that he would be unable to answer awkward questions.
73. In concluding her submissions to me, the claimant then informed me that Mr Easton has a saying : “**If an object can no longer be seen, it no longer exists.**” She advised me that the respondent says that frequently, especially when there is a problem for him to address.
74. There being nothing further to add from the claimant, I brought the Hearing to a close, at 10:53am, thanking the claimant for her attendance and contribution, and I advised her that I was reserving Judgment, which would be issued in writing as soon as possible, with Reasons.

Relevant Law

75. I was not addressed on the relevant law by either party, and, indeed, I had no expectation that I would be, given both parties are unrepresented, party litigants. As such, I have given myself a self-direction on the relevant law, which I now identify and summarise concisely, as I am required to do by **Rule 62**.
76. The principal application before me at this Hearing was the claimant's application for reconsideration. **Rule 70** provides that:
- "A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again."*
77. At my initiative, I added in to the agenda for this Hearing, whether or not to Strike Out the respondent's' response. The terms of **Rule 37** were set out for both parties in the Tribunal's letter of 2 August 2022, so I do not repeat them again here, as they have already been reproduced earlier in these Reasons at paragraph 29 above.
78. In terms of **Rule 37(2)**, a claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a Hearing. Despite being given a reasonable opportunity to make representations, the respondent has not done so, on this particular matter, as his emails of 8 and 9 August 2022 are silent on whether or not he opposes Strike Out and, if so, why, and he failed to attend this Hearing, or be represented at it, or send in any written representations on this particular matter.
79. Finally, at this Hearing, the claimant made an application for expenses against the respondent. The relevant Rules are set forth at **Rules 74 to 84** but, for present purposes, the material and applicable parts of those Rules are as follows:

Definitions

74.—

- 5 (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.*

Costs orders and preparation time orders

10 75.—

- 15 (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 or while represented by a lay representative;*
 - (b) *...; or*
 - (c) *another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual’s attendance as a witness at the Tribunal.*
- 20 (2) *A preparation time order is an order that a party (“the paying party”) make a payment to another party (“the receiving party”) in respect of the receiving party’s preparation time while not legally represented. “Preparation time” means time spent by the receiving party (including by any employees or advisers) in*
- 25 *working on the case, except for time spent at any final hearing.*
- (3) *A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the*

course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

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

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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—*

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(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; ...*

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Procedure

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.*

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The amount of a costs order

78.—

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(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;*

- 5 (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;*
- 10
- (c) *...;*
- 15 (d) *order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or*
- (e) *if the paying party and the receiving party agree as to the amount payable, be made in that amount.*

20 ***The amount of a preparation time order***

79.—

- (1) *The Tribunal shall decide the number of hours in respect of which a preparation time order should be made, on the basis of—*
- 25 (a) *information provided by the receiving party on time spent falling within rule 75(2) above; and*
- (b) *the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters*

as the complexity of the proceedings, the number of witnesses and documentation required.

(2) *The hourly rate is £33 and increases on 6 April each year by £1.*

5 (3) *The amount of a preparation time order shall be the product of the number of hours assessed under paragraph (1) and the rate under paragraph (2).*

[Note: The current hourly rate, since 6 April 2022, is **£42**.]

Ability to pay

10 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.*

Discussion and Deliberation

15 80. In carefully considering the submissions made to me at this Hearing by the claimant, the respondent having chosen not to attend, or be represented, I have had to address each of the three matters before the Tribunal for my judicial determination. In doing so, I have had regard to the relevant law, as also to the Tribunal's overriding objective, under **Rule 2**, to deal with the case
20 fairly and justly.

81. I deal with each of them now, in turn:

Strike Out of the Response

82. Having carefully considered matters, I have declined to Strike Out the respondent's ET3 response, as recorded at paragraph (2) of my Judgment
25 above, and that for the following reasons:

83. At this Hearing, the main plank of the claimant's oral submissions to me was to refer me to the respondent's repeated breach of the instalments plan, as included in the Consent Judgment.

84. There is no doubt that the respondent is in breach, he has defaulted, and he is in arrears. In his email of 27 May 2022, as reproduced above at paragraph 16 of these Reasons, the respondent referred to his proposal to “**catch up**”, and to “**bring this matter to an end.**” He did not do so – as such, his words then now appear shallow, and insincere. He repeated his position in his subsequent email of 10 June 2022 (reproduced at paragraph 20 of these Reasons). Again, he has not done so.
85. In the absence of him providing details of his finances and assets (as ordered by me), I am drawn to the inevitable conclusion that his failure to pay the claimant, as per the agreed instalments plan, is wilful and deliberate – he has provided no evidence to the Tribunal to suggest otherwise. His bold assertions that his failures are not wilful are of no weight whatsoever in the absence of supporting documentation produced to the Tribunal to vouch safe his assertions.
86. I gave the respondent several opportunities to provide details of his finances and assets, and a revised / updated instalment plan. He has failed to do so repeatedly, and I regard that failure as wilful and deliberate.
87. On 31 May 2022, I ordered him to do so by 10 June, but he did not do so. Of new, on 17 June, I ordered him to do so by 20 June and, again, he did not do so. Finally, on 23 June, he was ordered to do so by 7 July. Yet again, he failed to do so, and that is why I added Strike Out of the response as a matter to be discussed at this Hearing, as per the Tribunal’s letter of 2 August 2022.
88. However, **Rule 37(1)(b)** refers to “**the manner in which the proceedings have been conducted.**” As such, given the Consent Judgment was designed to record parties’ consensual agreement to resolve / compromise the claim brought against the respondent, and I agreed to it under **Rule 64**, I am not satisfied that his failure to pay, as per the instalments plan, can be regarded as unreasonable conduct of the Tribunal proceedings, justifying a Strike Out of his response. Strike Out should not be draconian, where another sanction might be better suited.

89. Further, as the claimant properly recognised, and drew to my attention in her oral submissions, the respondent has failed to comply with my orders that he provide an instalments plan, and details of his finances and assets. As such, that failure to comply with those orders falls within **Rule 37(1)(c)**, as being non-compliance with an order of the Tribunal, and so could be used to Strike Out the response.
90. The respondent, by his repeated failure to comply with the Tribunal's orders to provide details of his financial position has shown disrespect to the Tribunal, and to its orders. However, I am not satisfied that his failure to comply with those orders for information about his ability to pay the outstanding sums can properly be regarded as unreasonable conduct of the Tribunal proceedings, justifying a Strike Out of his response.
91. As I have already noted, Strike Out should not be draconian, where another sanction might be better suited. In the circumstances of this case, I have declined to Strike Out the response, because, with the exception of the claim about failure to provide the claimant with written particulars of employment (which the respondent accepted he had failed to do, as recorded by Employment Judge Sutherland in her PH Note of 14 April 2020), his ET3 response resists the claims of unfair dismissal, and unlawful deduction from wages, and he has not conceded those points. The Consent Judgement was expressly "***without admission of liability.***"
92. To Strike Out his response now, at this stage, would mean that, as per **Rule 37(3)**, the effect shall be as if no response has been presented, as set out in **Rule 21**. While an Employment Judge, in terms of **Rule 21(2)**, would then require to decide, on the available material, whether a determination of the claim can properly be made on the available material, and, if so, a Default Judgment issued, or the case listed for Final Hearing before a Judge sitting alone, the list of issues identified by Judge Sutherland, on 14 April 2020, are such that the case would require to be listed (for the third time) for Final Hearing.

Reconsideration of the Rule 64 Consent Judgment

93. In dealing with this matter, I firstly note and record that reconsideration has been sought by the claimant more than 14 days after issue of the **Rule 64** Consent Judgment on 20 October 2021, that 14-day period being the time limit specified by **Rule 71**.
94. Acting on my own initiative, under **Rule 5**, I have granted the claimant an extension of time to seek reconsideration, as it is in the interests of justice to do so, and **Rule 5** allows me to do so, whether or not the time limit has expired.
95. Having carefully considered matters, I have decided to confirm the previous **Rule 64** Consent Judgment of 20 October 2021, as recorded at paragraph (3) of my Judgment above, and declined to vary it, as requested by the claimant, and that for the following reasons:
96. Consent orders are orders made by the Tribunal further to an explicit agreement by both parties that the Tribunal should make such an order. Generally speaking, it will not be appropriate to revisit such orders once they are made, and hence the reconsideration of judgments procedure will rarely be used in relation to them.
97. However, a Tribunal may, in suitable circumstances, clarify the terms of an existing consent order on a reconsideration, even if it is not appropriate to set aside a consent order, e.g. **Obonyo v Wandsworth Primary Care Trust [2007] UKEAT/0237/07**, where the EAT set aside the ET's decision on a consent order, which did not specify whether the sum awarded was net or gross, and substituted a decision that the consent order was on the same terms as the original award, namely net and without deduction of tax by the respondent; or set aside a consent order, but the circumstances in which this might be appropriate are unusual: there is EAT case law authority (namely **Times Newspapers Ltd v Fitt [1981] ICR 637**) that a consent order settlement can be set aside where it was reached through fraud, or misrepresentation.

98. When both parties came to agree and sign off on the terms of their agreement, on 20 October 2021, they did so specifically to resolve / compromise the claim, and that after private discussion between them, during an adjournment of the Final Hearing, and I agreed, having regard to their joint agreement about how the agreed sum of £18,000 was to be paid, by instalments, to give my judicial approval to the terms of their agreement, there and then, using **Rule 64**, rather than them seeking to conclude a COT3 settlement via ACAS.
99. An earlier attempt to do that, via ACAS, had not borne fruit, which is why after an earlier Final Hearing in February 2021 was postponed to allow settlement via ACAS, and subsequent failure to agree settlement terms between the parties led to relisting of the Final Hearing for 2-days in October 2021.
100. The **ET Rules of Procedure 2013** contain no express power on an Employment Judge to grant payment by instalments, so parties' agreement to do so, by an agreed instalment plan of dates and amounts, can be accommodated by a Judge, if they think fit, making a **Rule 64** Consent Judgment which reflects parties' agreement of consent. It was on that basis that I issued the Consent Judgment.
101. Parties reached a joint agreement, on 20 October 2020, and there was nothing before me, on that date, to suggest that it was anything other than a mutually agreed resolution, acceptable to both parties, with no suggestion that its terms had been reached by misrepresentation, or undue influence, or duress, or bad faith, by either party. Indeed, Mr Easton, the respondent, indicated that it may well be that the agreed total sum of £18,000 could be paid off within the 12 months period.
102. When a Judgment is issued by the Tribunal, **Rule 66** refers. It provides as follows:

Time for compliance

66. *A party shall comply with a judgment or order for the payment of an amount of money within 14 days of the date of the judgment or order, unless—*

(a) *the judgment, order, or any of these Rules, specifies a different date for compliance; or*

(b) *the Tribunal has stayed (or in Scotland sisted) the proceedings or judgment.*

5 103. The **Rule 64** Consent Judgment makes clear provision about how and when the agreed instalments are to be paid. The difficulty for the claimant occurs because (a) the respondent has defaulted in some instalment payments, and (b) parties' joint agreement on 20 October 2021 failed to consider, and thus failed to provide for, what was to happen in the event of a breach of the agreed
10 instalment plan.

104. In these circumstances, it seems to me that the claimant's remedy is not to seek a variation of the Judgment, for she is inviting the Tribunal to redefine the parties' previous agreement, in circumstances where they did not contemplate such a situation as has arisen would arise. Her remedy, it seems
15 to me, is for her to seek to enforce her rights to payment in terms of the Consent Judgment by other legal means, namely through instructing Sheriff Officers to effect recovery of the amount due and owing to her.

105. The Tribunal can only grant a reconsideration if it is in the interests of justice to do so. The claimant, in her email of 27 May 2022, referred to her belief that
20 ***"the respondent is just trying to make a fool of everyone."*** Given the circumstances of the agreed consent order, then failure to make instalments, allied to failure to pay arrears and get the instalments plan back on track, I can well understand why the claimant feels as she does.

106. In her later correspondence to the Tribunal, specifically on 10 and 20 June
25 2022, the claimant has referred to her mental health suffering as a result of the respondent's failure to keep to the agreed instalments plan. While no medical evidence has been provided by her to the Tribunal to vouch the extent and nature of the impact upon her health, I have no reason to disbelieve what she told me about that at this Hearing.

107. However, after careful and anxious consideration, I have come to the decision that I must decline to vary the Consent Judgment, as the claimant has invited me to do, because that would be for me to re-write an agreement they reached. I must consider the interests of both parties, and not just of the claimant.
108. While, in earlier correspondence with both parties, on 31 May 2022, I referred to there perhaps being a material change of circumstances, with the respondent breaching the terms of the Consent Judgment, and it might be possible to insert a new provision in the agreement that, in the event of a failure to pay an instalment, the remaining sum would become payable immediately, on reflection, I do not consider the fact that the respondent has defaulted in some payments means of itself that it is in the interests of justice that I should vary the Consent Judgment, and issue Judgment now for the remaining balance to be payable by him immediately. That involves a re-writing of parties' earlier written agreement, and the respondent has not agreed to that.
109. Mr Easton, as the respondent, has opposed the reconsideration application, and stated he will catch up and pay, albeit he still remains in arrears. As recorded earlier in these Reasons, at paragraph 20 above, in his email of 10 June 2022 the respondent stated that : ***"It is my intention to catch up with missed payments and settle this matter in the timescale agreed with Judge McPherson Should the claimant not agree to this I would seek a recall of the hearing in person."***
110. I am not sure that Mr Easton has properly thought through the implications of that last part of that email. In effect, he appears to be inviting the Tribunal to revoke the Consent Judgment, and relist the case for a Final Hearing (for the third time in the history of this litigation). Also, in that event, what would be the status of the various payments already made to the claimant ?
111. These matters are perhaps academic, given there is no application before the Tribunal, from either party, for the Consent Judgment to be revoked, but they

show that there are practical implications that need to be properly thought thorough by both parties.

112. If the respondent fails to pay the arrears to date, and / or fails to pay the remaining instalments due and owing to the claimant, in terms of the Consent Judgment, then the claimant may wish to take independent and objective advice from a solicitor, CAB, or other voluntary agency, as regards her rights to enforce the Consent Judgment, and seek to recover the outstanding amounts from the respondent, by instructing Sheriff Officers to effect diligence against the respondent.
113. In that event, the claimant can request from the Tribunal administration an Extract of the Consent Judgment. If a Sheriff Officer is instructed by the claimant, while there will be fees and outlays to be paid by her, in the first instance, they will be recoverable from the respondent as part of the debt owed.
114. Such further legal action to enforce the Consent Judgment will therefore increase the sums that the respondent will require to bear ; even now, at this late stage, he may wish to re-assess his position, honour the agreed settlement, and make payment of the outstanding arrears, and return to timeous monthly compliance with the instalments plan, until the whole amount of £18,000 has been paid over to the claimant.

Claimant's application for Expenses against the Respondent

115. Having carefully considered this matter, I have decided that, before I can come to any final decision, I must, in terms of **Rule 77**, give Mr Easton, as the respondent, and thus as the potential "**paying party**" a reasonable opportunity to make representations in response to the claimant's application. It was made at this Hearing, and not intimated in advance, with notice to him to comment / object.
116. As such, I have made the orders detailed above at paragraphs (4) and (5) of this Judgment. In terms thereof, the respondent has been allowed **no more than 7 days from issue of this Judgment** to him, to make written

representations and, if he does so, then I have allowed the claimant the same period of 7 days, after intimation of any representations from the respondents, to reply to the Tribunal. Thereafter, I will determine any necessary further procedure, and issue a further Judgment in due course.

5 **Closing Remarks**

117. I hope that both parties will carefully reflect on the current situation, and on the obvious benefits to both parties of looking for a practical and dignified settlement of the outstanding arrears in instalment payments, and the respondent clearing the agreed final amount in early course, through dialogue
10 – either privately or perhaps through ACAS.

Employment Judge: Ian McPherson
Date of Judgment: 30 August 2022
Entered in register: 31 August 2022
and copied to parties

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