



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110559/2019

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Expenses Hearing held in Glasgow in chambers on 12 September 2022

Employment Judge Ian McPherson

10 Ms Margaret Macfarlane
(formerly Mrs M Easton)

Claimant
Written Representations

15 Graeme B Easton
Trading as Alexander Easton Funeral Directors

Respondent
No Written
Representations

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The further Judgment of the Employment Tribunal is that, having further considered
the claimant's application, made at the Reconsideration Hearing held on 10 August
2022, for an order for expenses against the respondent, and having considered the
Tribunal's powers to award costs, etc under **Rules 74 to 84 of the Employment
Tribunal Rules of Procedure 2013**, the respondent having failed to make any
written representations, by 7 September 2022, as ordered, or at all, further to the
25 Tribunal's Reconsideration Judgment issued on 31 August 2022, the Tribunal
orders that the respondent shall make payments, **within 7 days of issue of this
Judgment**, to the claimant of :

30 (a) the sum of **ONE HUNDRED POUNDS (£100)** by way of an expenses
award under **Rule 75(1)(c)** , in respect of the claimant's expenses
incurred in connection with her attendance as a witness at the
Reconsideration Hearing held on 10 August 2022; and

(b) the further sum of **ONE HUNDRED and TWENTY-SIX POUNDS
(£126)** by way of a Preparation Time Order under **Rule 75(2)**, in
respect of preparation time spent by the claimant in working on the

case, post issue of the Tribunal's **Rule 64** Consent Judgment dated 20 October 2021, while not legally represented, and prior to the start of the Reconsideration Hearing held on 10 August 2022.

REASONS

5 Introduction

1. This case called again before me, as an Employment Judge sitting alone, in chambers, on Monday, 12 September 2022, for an in chambers Expenses Hearing.
2. It follows upon a Reconsideration Hearing, which I heard in person on 10
10 August 2022, with the claimant only attending, the respondent not appearing or being represented to participate in that Hearing, and my written Judgment and Reasons dated 30, and issued to parties on 31, August 2022.
3. In that earlier Judgment, where I proceeded in the absence of the respondent, in terms of **Rule 47**, I confirmed the **Rule 64** Consent Judgment of 20 October
15 2021, and, at paragraphs 4 and 5 of that Reconsideration Judgment, I ordered that:
 - (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
20 costs, 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
25 claimant, and 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
30 respondent.*

5 (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 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.

15 4. No written representations were received by the Tribunal from the respondent within that 7 day period, or at all, as at the date of writing this Judgment, and, in those circumstances, having returned from a week's annual leave away from the office last week, I have today decided that I should proceed, without any further delay, to prepare this further Judgment, without the need for any attended Hearing.

20 5. While the respondent has not communicated with the Tribunal since issue of that Reconsideration Judgment, it is appropriate that I note and record here that the claimant has further updated the Tribunal.

25 6. By email from the claimant, sent on 5 September 2022, at 11:21, to the Glasgow ET, and copied to the respondent, Graeme Easton, she advised as follows : "**Regarding the above case I wish to inform the court that the respondent Graeme B. Easton has yet again further defaulted on the agreed payment of £1083.00p on 4th September 2022. This adds to previous defaults on April, May, August. This totals £4332.00 on defaulted payments.**"

Issue for the Tribunal

7. The only issue before me at this Expenses Hearing was whether or not or not to make any expenses and / or preparation time order in favour of the claimant and, if so, in what sum, for payment to her by the respondent.

5 8. Conscious of the fact that both parties are not legally represented, in drafting my Reconsideration Judgment issued on 31 August 2022, I gave myself a self-direction on the relevant law, as regards expenses, etc, as set forth at **Rules 74 to 84 of the Employment Tribunals Rules of Procedure 2013**. I reproduced the material and applicable parts of those Rules at paragraph 79 of the Reasons to that Reconsideration Judgment, to which I refer back for
10 reference.

9. Having now carefully considered this matter at today's in chambers Expenses Hearing, I have decided that, while Mr Easton, the respondent, has not submitted any written representations, nor sought a Hearing, my Reconsideration Judgment of 31 August 2022 gave him, as the potential
15 "***paying party***", a reasonable opportunity to make representations, within 7 days, in response to the claimant's application, given it was made at the Reconsideration Hearing on 10 August 2022 , and not intimated in advance, with notice to him to comment / object.

10. Mr Easton, the respondent, has thus had the opportunity to reply but, for
20 whatever reason, he has chosen not to do so. He has not sought to be heard on this expenses application made by the claimant, nor has he intimated any written comment / objection, nor has he submitted any information about his means and assets to suggest that he is unable to pay any award if made by me at this further Hearing.

25 **Discussion and Deliberation**

11. I have had cause to reflect, in private deliberation, in writing up this further Judgment, whether or not this is an appropriate case to consider making any expenses and / or preparation time order against the respondent.

12. Despite opportunities previously afforded to the respondent, in earlier case management orders made earlier in these Tribunal proceedings, specifically on 31 May, and 17 and 23 June 2022, the Tribunal still has no information as to the respondent's current financial status, nor any documented, or vouched
5 information, about his current financial circumstances, his means and assets, and so his ability to pay, or not.
13. **Rule 76(1)** provides that 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
10 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.
14. In Employment Tribunal litigation costs / expenses awards are usually
15 regarded as the exception rather than the rule. Costs / expenses do not follow the event, as in the civil courts, but are only made if one or more of the grounds in **Rule 76** are satisfied. Even then, the grounds for making a costs / expenses order are discretionary.
15. The Tribunal "***may***" make a costs / expenses order if a ground is made out,
20 but it is not obliged to do so. Nevertheless, so far as grounds (a) and (b) are concerned, the Tribunal "***shall***" consider whether to make a costs / expenses order. In other words, **Rule 76(1)** imposes a two-stage test: first, a Tribunal must ask itself whether a party's conduct falls within **Rule 76(1)(a) or (b)**. If so, it must go on to ask itself whether it is appropriate to exercise its discretion
25 in favour of awarding costs / expenses against that party.
16. In this case, neither party is professionally legally represented. As such, both parties are in the same situation, being unrepresented, party litigants, and while neither party is immune to the risk of costs / expenses, some account must be given for the fact that neither party is professionally represented. This
30 is relevant to both the threshold test for considering making a costs / expenses award and the exercise of discretion whether to do so.

17. Costs / expenses in the Employment Tribunal are designed to be compensatory rather than punitive. **Rule 84** also makes it clear that in deciding whether to make a costs / expenses order, and if so, in what amount, the Tribunal may have regard to the paying party's ability to pay. There is no
5 obligation to have regard to ability to pay.
18. In the present case, the Tribunal has raised the respondent's ability to pay of its own initiative. I have taken this into account, by noting that he has again refused / delayed in giving an "**open book**" accounting of his current financial circumstances. The procedural requirements of **Rule 77** have been complied
10 with by the Tribunal, by giving the respondent a reasonable opportunity to reply, within 7 days of issue of the Reconsideration Judgment.
19. The Tribunal is satisfied that the initial threshold for making an expenses order against the respondent has been met, subject to the Tribunal's discretion in the matter and its consideration of his ability to pay an award.
15 **Rule 76(1)(a)** is satisfied.
20. I consider that the respondent has acted unreasonably. His behaviour, post the **Rule 64** Consent Judgment, has also certainly been disruptive. The respondent's conduct falls within **Rule 76(1)(a)**. The Tribunal then asks itself whether it is appropriate to exercise its discretion in favour of awarding costs
20 / expenses against the respondent.
21. The Tribunal acknowledges that the respondent is not professionally represented. He is not a lawyer nor is he a professional tribunal advocate. He is a party litigant, whose occupation is a funeral director. His lay status does not, however, afford Mr Easton automatic immunity from an award of
25 expenses against him.
22. The conduct of the respondent is also a relevant factor, as at each stage of the proceedings, after his default in paying the agreed instalments was first brought to light by the claimant in her email to the Tribunal on 17 May 2022, the respondent has been given an opportunity to reconsider his position, and
30 take remedial steps to catch up on his defaulted payments.

23. This is self-evidently unreasonable and it has put the claimant to wholly unnecessary wasted time and expenses, together with inappropriate use of judicial resources.
24. The Tribunal reminds itself that costs / expenses are designed to be compensatory rather than punitive. Nevertheless, subject only to consideration of the respondent's ability to pay, the threshold for an award of costs / expenses has been passed in the present case by some margin.
25. **Rule 84** makes it clear that in deciding whether to make a costs / expenses order, and if so, in what amount, the Tribunal may have regard to the paying party's ability to pay. The respondent has been given a generous and repeated opportunity to provide evidence as to his means and assets, and as to his ability to pay, but no evidence or confirmation of any inability to pay has been provided to the Tribunal. Put bluntly, Mr Easton has simply refused or neglected to engage with this question, despite being given ample opportunity to do so.
26. In these circumstances, the Tribunal is left with no evidence at all as to his ability to pay and so cannot take this matter into account. It is not for the Tribunal to speculate as to the respondent's means or his ability to pay. The Tribunal thus proceeds to consider the amount of an award of expenses on the basis under **Rule 78(1)(a)**.
27. This does not mean that the Tribunal can award an arbitrary figure (provided it is less than £20,000). Regard must be had to the guiding principles for costs / expenses awards, and to the actual sum of costs / expenses incurred. The order must be in respect of costs / expenses incurred by the claimant as the potential "**receiving party.**" That is, as per **Rule 74(1)**, fees, charges, disbursements and expenses incurred by or on behalf of that party. The amount of the Tribunal's order must reflect this.
28. The amount being fixed by the Tribunal has not simply been plucked out of the air. The expenses incurred are rational and reasonable sums to have been incurred by the claimant, in attending the Reconsideration Hearing in person at Glasgow ET, and they were set out clearly in her written application for

expenses made at the Reconsideration Hearing held on 10 August 2022, as reproduced at paragraph 44 of the Reasons to my Reconsideration Judgment, where it was stated thus: ***“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.”***

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29. As I recorded at paragraph 50 of those Reasons, there are 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).
- 10 30. Further, and as I recorded at paragraph 51 of those Reasons, the claimant provided some breakdown of her claimed expenses of £100, informing 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
- 15 ***“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.
- 20 31. While no supporting vouchers were produced by the claimant at the Reconsideration Hearing, and none have been called for by the respondent, who has not submitted any written representations in reply to the claimant’s application for expenses, I have treated her application as not being opposed by him and, in any event, a well-founded application for her to make to this Tribunal.
- 25 32. Although a detailed assessment is not being undertaken here, the expenses incurred by the claimant have been subjected to my judicial scrutiny and a summary assessment, and I find the amount of **£100** claimed is a reasonable sum in all the circumstances. As such, I have awarded that sum to the claimant by way of an expenses award under **Rule 75(1)(c)** , in respect of the
- 30 claimant’s expenses incurred in connection with her attendance as a witness at the Reconsideration Hearing held on 10 August 2022.

33. Finally, I turn to the matter of a Preparation Time Order. I raised this with the claimant at the Reconsideration Hearing, and I gave the respondent the opportunity to submit any written representations, via my Reconsideration Judgment at paragraphs (4) and (5), as reproduced above earlier in these
5 Reasons.
34. The respondent, Mr Easton, has failed to do so and, as he has not submitted any written representations in reply, I have treated the possibility of a preparation time order being made against him as not being opposed by him and, in any event, a matter where there are good grounds for the Tribunal
10 making such an order against the respondent.
35. In all these circumstances, I have decided to award the claimant a further sum by way of a Preparation Time Order under **Rule 75(2)**, in respect of preparation time spent by the claimant in working on the case, post issue of the Tribunal's **Rule 64** Consent Judgment dated 20 October 2021, while not
15 legally represented, and prior to the start of the Reconsideration Hearing held on 10 August 2022.
36. Specifically, I have assessed that the claimant will reasonably and necessarily have spent at least 3 hours in preparing, over the period from 17 May 2022 to 9 August 2022, and at the applicable hourly rate of **£42**, in force since 6 April
20 2022, that computes as the further sum awarded by me at **£126**.

Disposal

37. Taking account of my two orders, at paragraphs (a) and (b) of my above Judgment, the respondent shall pay to the claimant, **within 7 days of issue of this further Judgment**, the total amount of **£226**.
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38. **This further Judgment is without prejudice to the respondent's continuing liability to pay to the claimant, in full, the total sum of £18,000, as per the Rule 64 Consent Judgment issued on 20 October 2021.**

5 Employment Judge: Ian McPherson
Date of Judgment: 12 September 2022
Entered in register: 13 September 2022
and copied to parties

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