EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101680/2022

Consideration of Application for Expenses on 2 November 2022

Employment Judge W A Meiklejohn

Mrs Helen McKenna	**Claimant** **In Person**
Drivercheck Ltd	**Respondent** **Represented by:** **Ms S Healy - Barrister**

ORDER OF THE EMPLOYMENT TRIBUNAL

The Employment Tribunal orders the claimant to pay to the respondent the sum of **EIGHT HUNDRED POUNDS (£800.00)** by way of expenses, and to do so not later than 31 December 2023.

REASONS

1. This case was listed for a final hearing in Glasgow on 14, 15, 16, 19 and 20 September 2022. The date of 19 September 2022 was cancelled following the death of HM Queen Elizabeth II. The claimant did not attend on 14 and 15 September 2022. On 15 September 2022 I dismissed the claim under Rule 47 of the Employment Tribunal Rules of Procedure 2013. My reasons for doing so were set out in my Judgment dated 26 September 2022 (the "Judgment"), which was sent to the parties on 5 October 2022.

2. I detailed what occurred tip to 15 September 2022 in the Judgment, and I will not repeat that here. However, what I say below requires to be read in conjunction with the Judgment.

Application for expenses

3. I referred to this at paragraphs 25 and 26 of the Judgment, recording that Mr Healy had made an application under Rule 76 seeking expense in the sum of £3300 on the basis that the claimant had acted unreasonably. The claimant was advised of this application in the Tribunal's letter of 15 September 2022. The claimant sent an email to the Tribunal on the same date opposing the application.

4. In that email the claimant said the following -

"Under no circumstances do I feel that I should pay expenses. I knew nothing of the hearing date until 48hrs beforehand. I had received no correspondence from the tribunal or the representatives for Drivercheck. "

5. The parties were asked by the Tribunal on 21 September 2022 for their views on whether the application for expenses should be dealt with by way of written submissions. Thereafter I decided that the application for expenses should be dealt with by written submissions. The Tribunal's letter dated 5 October 2022 advised the parties of my direction that they should provide their written submissions within 14 days.

Submissions by claimant

6. The claimant provided her written submissions on 10 October 2022. Her main points were expressed in these terms -

"I had never received any notification of new date for the Tribunal. The first I knew of it was when I received a phone call, I believe on the 14th Sept, informing me that the Courts would be closed on Monday, 19th Sept due to her Majesty's funeral.

I informed the caller that it would be impossible for me to attend with less than 48hours notice for the following reasons.

1) I would need to take time of(f) work, unpaid and at extremely short notice (somewhere that I am hoping to gain fulltime at the end of October).

2) My witness was down in Preston.

3) I had received NOTHING from the defendant. (Evidence that they had stated they were required to present to me 28days prior to the court date).

4) I was suffering from a chest infection and was on steroids and antibiotics.

I informed the caller of this, and she stated that she would inform the Judge.

The next day I received another call to ask if I could attend the next day or possibly next week. I replied I couldn't, as I was unwell, also due to fly out to Portugal the following week."

7. At the end of her written submissions, the claimant said this -

"Can I also ask that any further correspondence be sent by post? I have no personal lap-top and the only means I have of accessing emails is via my mobile. I receive anywhere in the region of 50-100 emails per day (99 percent junk)."

Submissions by respondent

8. In his written submissions Mr Healy contended that the claimant had behaved unreasonably in her conduct of the proceedings by not attending the final hearing on 14 and/or 15 September 2022. She had known about the final hearing dates since the Notice of Hearing was sent to parties on 22 June 2022. She had stated on 16 June 2022 that she had no dates to avoid. She had ample opportunity to book time off work or annual leave, or to apply for the final hearing to be re-listed.

9. The claimant had used the same email address throughout, without apparent difficulty. The Tribunal had noted in the letter emailed to parties on 14 September 2022 the effect of Rule 90. Email correspondence was presumed to be received unless the contrary was shown. The claimant had provided nothing to suggest she did not receive correspondence sent to her email address.

10. Mr Healy contended that the claimant's assertions, that she know nothing of the final hearing until 48 hours beforehand and had never received any correspondence from the respondent, were demonstrably false. She had received correspondence from the Tribunal and had been reminded of the hearing on several occasions. It was implausible that she did not receive all the correspondence sent to her. If the claimant had secured work which affected her ability to attend the hearing, it was incumbent on her to tell the respondent and the Tribunal, and manifestly unreasonable not to do so.

11. Mr Healy pointed out that the claimant had not previously mentioned two of the reasons she now advanced for her inability to attend the hearing. These were that her witness was in Preston and that she was suffering from a chest infection. Neither of these had been mentioned by the claimant when she applied to postpone the final hearing on 13 September 2022.

12. Mr Healy intimated that the respondent now sought expenses in the sum of £3675, the additional £375 representing his fee for preparing the written representations for the respondent.

13. With his written submissions Mr Healy provided a bundle of documents and I refer to some of these below (by page number).

Applicable Tribunal rules

14. Rule 74 **(Definitions)** provides, so far as relevant, as follows -

> *(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party.…In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.…*

15. Rule 75 **(Costs orders and preparation time orders)** provides, so far as relevant, as follows -

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

(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented. …

16. Rule 76 **(When a costs order or a preparation time order may or shall be made)** provides, so far as relevant, as follows -

(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that -

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted….

17. Rule 78 **(The amount of a costs order)** provides, so far as relevant, as follows -

(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….

18. Rule 84 **(Ability to pay)** provides as follows -

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.

19. Rule 90 **(Date of delivery)** provides, so far as relevant, as follows -

Where a document has been delivered in accordance with rule 85 or 86, it shall, unless the contrary is proved, be taken to have been received by the addressee -

(a) ….

(b) if sent by means of electronic communication, on the day of transmission….

20. I set out the relevant parts of Rules 85 and 86 in the Judgment and so I will not repeat them here.

Claimant's ability to pay

21. The claimant provided information which indicated that she was currently working 37 hours per week, through an agency, and was being paid £10.54 per hour. She produced a payslip which disclosed weekly earnings of £456.74 gross and £375.11 net. These figures included an element for holiday pay (£66.76 gross). She indicated that her current contract (which was not reduced to writing) ran until March 2023. The claimant stated that she had no savings, no other income and had some family debt which she was currently not able to repay.

Applicable law

22. I derived assistance from the decision of the Court of Appeal in England in ***Barnsley Metropolitan Borough Council v Yerrakalva [2012] ICR 420.*** In that case Mummery LJ, said this (at paragraph 41) -

"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had…."

Discussion

23. I approached matters on the basis set out by Mummery LJ in ***Yerrakalva -***

a. What was the conduct of the claimant said by the respondent to have been unreasonable?

b. What was unreasonable about it?

c. What effects did it have?

What was the conduct?

24. The conduct of the claimant which was in issue here was her failure to attend the final hearing on 14 and 15 September 2022. It was not in dispute that this conduct had occurred, and so I need say no more about the nature of the conduct.

What was unreasonable about it?

25. At the heart of this question was whether the claimant knew about the final hearing dates. This brought Rule 90 into play. In the Judgment I said this -

> *"47. I considered the claimant's assertion, made in her email of 13 September 2022 (see paragraph 12 above) that she had been unaware of the hearing dates. I was wary about making any finding on this in the absence of representations from the claimant. However, in terms of Rule 90, emails sent to the claimant by the Tribunal and the respondent at the email address - being an address given in the claim form per Rule 86(2) - were "taken to have been received" by the claimant on the day of transmission unless the contrary was proved.*
>
> *48. I therefore came to the view that I was required to proceed on the basis that the claimant had received (a) emails sent to her at the email address by the Tribunal, including the one attaching the Notice of Hearing and (b) emails sent to her at the email address by the respondent including the email of 7 September 2022. If the claimant believes she can prove the contrary, she may wish to consider an application for reconsideration of the Judgment under Rules 70-72* ***(Reconsideration of Judgments)."***

26. The claimant had not made an application under Rule 71 for reconsideration of the Judgment. This meant that Rule 90 continued to have effect and so, the contrary not having been proved, I still required to proceed on the basis that the claimant did receive emails sent to her by the Tribunal and the respondent. Those included -

a. the email sent by the Tribunal on 22 June 2022 attaching the Notice of Hearing;

b. the email sent by the Tribunal on 13 September 2022 attaching the letter of the same date refusing her application to postpone the hearing; and

c. the emails sent by the respondent (or, to be precise, the respondent's representative) on 14 July 2022 (31), 11 August 2022 (33) and 7 September 2022 (38) each of which referred to the hearing dates.

27. I noted what the claimant said in her written submissions about the volume of emails she received, and that she could access these only on her mobile phone. It seemed to me more likely than not that, despite the claimant's assertions that (a) she did not receive notification of the new hearing dates and (b) she received nothing from the respondent, she had in fact received all of the emails listed above. I noted that the claimant's email to the Tribunal of 13 September 2022 was sent in reply to the Tribunal's email to her of the same date. It was simply not credible that she had received this email from the Tribunal but not others.

28. The claimant referred in her written submissions to the respondent being required to present evidence to her 28 days before the hearing date - the implication being that they had failed to do so. However, I noted that the email sent by the respondent's representative to the claimant on 11 August 2022 contained a link to the respondent's list of documents. Accordingly the respondent had done what the claimant was in effect accusing them of having failed to do.

29. While I was satisfied that the claimant had received the emails attaching the Notice of Hearing and those from the respondent's representative making reference to the hearing dates, I considered it more probable than not that she had not read these. I believed that the explanation for this lay in the claimant's reference to the volume of emails she received, which she described as *"99 percent junk".*

30. I noted from the case file that email appeared to be the claimant's communication method of choice in her dealings with the Tribunal and the respondent. That being the case, it was not unreasonable to expect that she would check her email inbox with a degree of care while her Tribunal claim was ongoing. While I could accept that the claimant had not read the emails referred to in the preceding paragraph, I considered this was more likely than not due to a lack of care on her part. This led me to the conclusion that the claimant was until 13 September 2022 ignorant of the fact that the final hearing was scheduled to start on 14 September 2022, but her ignorance was unreasonable.

31. I could understand that the claimant would have found it difficult to attend the Tribunal on 14 September 2022. The Tribunal's email refusing her application for a postponement was sent at 17.26 on 13 September 2022. That was probably too late in the day for her to arrange to take time off work the following day. It was consistent with what she told the Tribunal clerk when she was contacted on 14 September 2022 - see paragraph 16 of the Judgment.

32. However, the claimant could have been in no doubt that her attendance at the Tribunal was required on 15 September 2022. My direction to that effect was in bold print in the letter sent to her by email on 14 September 2022 - see paragraph 20 of the Judgment. When contacted by the Tribunal clerk on 15 September 2022, the claimant simply said that she would not be attending - see paragraph 23 of the Judgment. She made no reference to being unwell, nor to her forthcoming holiday in Portugal.

33. I considered that the claimant's failure to attend the final hearing -

    a. On 14 September 2022 was unreasonable conduct because of her lack of care in monitoring her incoming emails, but mitigated to a small extent by the fact that her ignorance (until 13 September 2022) of the start date of the final hearing was genuine.

    b. On 15 September 2022 was unreasonable conduct without mitigation.

What effects did it have?

34. Here I need to return to what Mummery LJ said in Yerrakalva. The passage quoted above in paragraph 22 continues as follows -

"The main thrust of the passages cited above from my judgment in McPherson was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances."

35. This was a reference to the earlier case of ***McPherson v BNP Paribas (London Branch) 2004 IRLR 558*** in which Mummery LJ delivered the leading judgment. At paragraph 40 of that judgment, he said this -

"In my judgment, Rule 14(1) does not impose any such causal requirement in the exercise of the discretion. The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring BNP Paribas [the respondent] to prove that specific unreasonable conduct by Mr Macpherson caused particular costs to be incurred. "

36. In ***Yerrakalva*** Mummery LJ makes it clear that a Tribunal should neither disregard questions of causation nor dissect a case in detail and compartmentalise the relevant conduct under separate headings, such as *"nature", "gravity"* and *"effect".* The correct approach is as set out in the passage quoted above at paragraph 22.

37. I considered that the respondent would have required to incur the cost of preparing for and attending the Tribunal on 14 September 2022, whether or not the claimant attended on that date. The Tribunal would have expected no

less of a represented party. The respondent had no choice but to *be "ready to go" when* the final hearing commenced.

38. It could be argued from the claimant's side that the respondent was equally required to incur the cost of attending the Tribunal on 15 September 2022 because I had decided on 14 September 2022 not to dismiss the claim under Rule 47, but to adjourn the hearing (see paragraph 37 of the Judgment). However, the respondent was entitled to expect that the claimant would comply with my direction that she should attend on 15 September 2022. The effect of the claimant's failure to attend was that I did what the Tribunal's letter to the claimant of 14 September 2022 had stated I would do, namely *"consider matters under Rule 47".*

Rule 76(1)

39. That takes me back to the applicable Rule - see paragraph 16 above. Where, as here, I have found that the claimant acted unreasonably, the Rule requires a two stage approach -

    a. Firstly I am required to consider whether to make a costs (expenses) order. That is the effect of the words *"shall consider".*

    b. Secondly, I am required to exercise my discretion in deciding whether or not to make such an order. That is the effect of the words *"A Tribunal may make".*

Whether to make an order

40. In considering whether or not to make an order, I came to the view that it would not be appropriate to do so in respect of the claimant's failure to attend the hearing on 14 September 2022, but it would be appropriate to do so in respect of her failure to attend on 15 September 2022. My reasons for so deciding are as follows -

    a. The fact that the claimant became aware only on 13 September 2022 that the hearing was set down to start on 14 September 2022 was due to her own lack of care in monitoring her incoming emails. However

her ignorance, although unreasonable, was genuine and discovering that the hearing was due to start the next day created a conflict between her attendance at work and her attendance at the Tribunal, at a time of day when it was probably too late for her to contact her employer.

b. In contrast, the claimant knew on 14 September 2022 that her attendance at the Tribunal was required on 15 September 2022. I directed her to attend. She had time to make arrangements with her employer to do so. The reasons she has now advanced for not attending were not given at the time.

41. In deciding that it would be appropriate to make an order, I also took into account the claimant's ability to pay. I reminded myself that I was not obliged to do so - Rule 84 (see paragraph 18 above) provides that the Tribunal may have regard to the paying party's ability to pay. I also reminded myself that if I took account of the claimant's ability to pay, I should explain how I did so - ***Benjamin v Interlacing Ribbon Ltd EAT 0363/05.*** I should also explain what impact the claimant's ability to pay had on the decision to make an award or on the amount of that award - ***Jilley v Birmingham and Solihull Mental Health NHS Trust EAT/0 584/06.***

42. The claimant had a regular, if modest, income and this was likely to continue until at least March 2023. That gave the claimant a reasonable opportunity to seek fresh employment beyond that date if an extension of the contract under which she currently worked was not available. I considered that it was reasonable to proceed on the basis that (a) the claimant would continue for the foreseeable future to enjoy an income of not less than the amount disclosed in the payslip she provided, ie £375.11 net per week but (b) it was unlikely that her income would increase significantly. I came to this view because I had no evidence to suggest that the claimant was qualified for and/or competent to undertake better paid employment.

In what terms?

43. Having decided that it would be appropriate to make an order in respect of the claimant's unreasonable conduct in failing to attend the hearing on 15 September 2022, I next considered in what terms that order should be made.

44. I reminded myself that the purpose of an award of expenses is to compensate the party in whose favour the order is made, not to punish the paying party - ***Lodwick v Southwark London Borough Council 2004 ICR 884.*** I also reminded myself that expenses should be limited to those reasonably and necessarily incurred, per ***Yerrakalva.*** I should also take account of the claimant's ability to pay (or explain why I did not do so).

45. Given my determination that it would not be appropriate to make an award of expenses in respect of the claimant's failure to attend the hearing on 14 September 2022, I considered that the expenses incurred by the respondent which remained in scope (for the purpose of an award) were those incurred by the respondent on and after 15 September 2022. These comprised -

    a. Counsel's refresher fee of £800.

    b. Counsel's fee of £375 for preparing the respondent's written submissions.

46. I decided that it would not be appropriate to order the claimant to pay any part of the expenses sought in relation to the provision of written submissions. I am grateful to Mr Healy for the evident care taken by him in the preparation of those submissions. However, they were not in my view reasonably and necessarily incurred. It was within my judicial knowledge that the respondent's representative had the ability and resources to deal with the matter without instructing counsel.

47. That left the fee of £800 incurred by the respondent in being represented at the hearing on 15 September 2022. I considered whether I should award all of this amount or part only and, if the latter, upon what basis.

48. I found that the fee of £800 had been reasonably and necessarily incurred. Mr Healy had to attend the Tribunal on 15 September 2022 and his attendance was only rendered unproductive (in terms of progressing the case) by the claimant's non-attendance. The only factor mitigating against awarding the full amount was the claimant's ability to pay.

49. I decided that it would be appropriate to award the full amount of £800 provided the claimant was allowed a period of time within which to make payment. The claimant enjoyed a net monthly income in excess of £1500 and it seemed to me that it would not be unreasonable to expect her to set aside in the region of £75/100 per month towards payment of the expenses of £800. I appreciated that it might take the claimant a little time to organise her affairs in such a way as to cope with the expenses liability she had incurred. She might also face unforeseen outgoings from time to time. Accordingly I decided that she should be required to make payment by 31 December 2023.

Decision

50. My decision is that the claimant should be ordered to pay expenses to the respondent in the sum of £800, and that she must do so no later than 31 December 2023. My Order above reflects this.

Employment Judge: **S Meiklejohn**
Date of Judgment: **30 November 2022**
Entered in register: **2 December 2022**
and copied to parties