EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000044/2022

Held in Glasgow on 1 and 2 March 2023
(Expenses / Preliminary Hearing held in chambers by way of written representations from both parties)

Employment Judge Ian McPherson

Mr Hassan Hassan	**Claimant per his Written Representations**
Department for Work and Pensions	**Respondents per Written Representations by: Ms Emily Campbell Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal, having considered both parties' written representations at this in chambers Expenses / Preliminary Hearing, is that: -

(1) Having considered the claimant's application for a preparation time order against the respondents, in terms of **Rules 75(2) and 79 of the Employment Tribunal Rules of Procedure 2013**, and the respondents' objection to that application, the Tribunal **refuses** the claimant's application for the reasons given in the undernoted Reasons, at paragraphs 31 to 44 below; and

(2) Having considered the claimant's application for an anonymisation / privacy order by the Tribunal, in terms of **Rule 50 of the Employment Tribunal Rules of Procedure 2013,** and the respondents' objection to that application, the Tribunal continued consideration of that application to a date to be hereinafter assigned by the Tribunal, to allow the respondents' solicitor a reasonable opportunity of 7 days to respond to the

claimant's further written representations emailed to the Tribunal, during this Expenses / Preliminary Hearing, by way of a right of reply to the claimant's further written representations, which he sent unsolicited direct to the Glasgow Employment Tribunal, and the respondents' solicitor, by emails of 08:45 and 10:03 on 1 March 2023.

REASONS

Introduction

1. This case called again before me on the morning of Wednesday, 1 March 2023, for a one-day Expenses / Preliminary Hearing in chambers, as previously intimated to both parties by the Tribunal, on 31 January 2023, by amended Notice of Hearing, to determine the following issues, namely : (1) the claimant's opposed application for a preparation time order under **Rule 79** against the respondents, and (2) the claimant's opposed **Rule 50** application for an anonymisation / privacy order by the Tribunal.

2. Both parties had, in email correspondence with the Tribunal, agreed to this being an in chambers Hearing, on the papers only, and without the need for an attended Hearing. I have dealt with it on the basis of considering their respective written representations to the Tribunal.

Background

3. By ET1 claim presented on 26 August 2022, the claimant complains of unlawful discrimination on the grounds of race, and religion or belief. His claim is denied by the respondents, by ET3 response presented on 26 September 2022.

4. I heard both parties at a first telephone conference call Case Management Preliminary Hearing on 25 October 2022, and my written Note and Orders, dated 26 October 2022, was issued to both parties under cover of a letter from the Tribunal dated 27 October 2022.

5. Since that date, there has been ongoing correspondence between the parties and the Tribunal, and various interlocutory orders and directions have been

made by me as the allocated Employment Judge case managing this claim and response.

6. As I ordered on 25 October 2022, a one-day open Preliminary Hearing by CVP was listed, on 4 November 2022, to be heard on 1 December 2022, to determine the respondents' application that the claim should be rejected and returned to the claimant with a notice of rejection under **Rule 10(2)**, because the respondents' ET3 response asserted that the claimant's ET1 claim form had failed to supply the minimum information required as it is brought in the name of "***Mr H Hassan***" and it did not clarify his full first name.

7. On 15 November 2022, the respondents' solicitor wrote to the Glasgow ET, with copy to the claimant, to withdraw the respondents' application for the claim to be rejected under **Rule 10(2)**, and requesting that the Preliminary Hearing on 1 December 2022 be discharged.

8. I granted that discharge, on 18 November 2022, noting that the orders I had made on 25 October 2022 otherwise remained in place, and should be complied with, and stating that the respondents' opposed application under **Rule 99** for a transfer to England & Wales (and Leeds ET in particular) would be referred to the Vice-President, Employment Judge Eccles, for her consideration.

Claimant's application for preparation time order / wasted costs order against the Respondents

9. On 23 November 2022, the claimant emailed the Glasgow ET, with copy to Ms Campbell for the respondents, with a PDF document. Included with that document, at his paragraph 6, was an application under **Rule 79** for an *interim* preparation time order / wasted costs order against the respondents in the total sum of **£318.85**, reading as follows:

6. Rule 79 application for Preparation Time Order / Wasted Costs Order:

"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— (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. (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)."

Claimant's application for an interim Preparation Time / Wasted Costs Order:

Pro-rata full day of Claimant's salary: £108.85 approx.

Preparing evidence/response for Respondent's Rule 10 application for rejection of entire claim; and preparing for full-day video PH Approx. 5 hours x £42.00 = £210.00

Total: £ 318.85 (subject to court approval)

Respondents' objections

10. On 24 November 2022, I ordered the respondents' solicitor to provide her written comments / objections (if any) to the claimant's application for a preparation time / wasted costs order against the respondents, by no later than 4pm on 30 November 2022.

11. Thereafter, at 15:35, on 30 November 2022, Ms Campbell gave notice to the Tribunal that she was providing a response, but it might be "***shortly after 4pm.***" Her response was sent by email to Glasgow ET, with copy to the claimant, at 22:13 that evening.

12. At her paragraphs 4 to 16, Ms Campbell, the respondents' solicitor, replied specifically to the claimant's **Rule 79** application for a preparation time order, as follows:

Response to Rule 79 Application by Claimant

4. The Claimant's application appears to be for an order for preparation time, as opposed to wasted costs. The Respondent's position is that none of the required grounds for a preparation time order (under Rule 76) are fulfilled. Whilst it is not entirely clear what the basis for his application is, it is understood to be in relation to the now withdrawn application from the Respondent for the claim to be rejected under Rule 10. (This application was made in the ET3 response of 26 September 2022).

5. The Preliminary Hearing which was scheduled for 1 December 2022 was to determine one narrow issue, namely whether the Claimant's claim ought to be rejected on the basis he failed to provide his name under Rule 10. The Respondent had applied for this Preliminary Hearing in the ET3 response of 26 September 2022, having considered the Claimant's claim at the initial stages and noting that his claim form stated his first name to simply be "H". Assuming that this was not, in fact, the Claimant's first name and noting that the requirement to submit a name is an essential requirement on an ET1 form under Rule 10(1)(b) (in the sense that, if the name is not provided, the claim form should be rejected by the Tribunal), the Respondent raised this as a preliminary point. It was entirely appropriate for the Respondent to do so, as it was a matter relating to the extent of the Tribunal's jurisdiction to hear the claim. The Respondent is entitled to identify, and request that the Tribunal gives consideration to, any preliminary issue (indeed, for the Respondent's representative to fail to identify a preliminary issue and to fail to raise that preliminary issue with the Tribunal would not be in her client's

best interests and could, of itself, be criticised not only by the Respondent but also by the Tribunal).

6. It is not at all uncommon for parties, having considered such preliminary matters as the case progresses, including considering relevant case law and legislation, to subsequently withdraw applications. Indeed, it is not at all uncommon for withdrawal of an application to occur at any stage in the progress of a case and not only at the very initial stages (as in this present case). In this case, the Respondent's representative considered matters further and, having taken instructions, determined that the prospects of the application succeeding were lower than initially thought. As a result, she communicated to the Tribunal and the Claimant on 15 November 2022 that the Respondent wished to withdraw this application and asked for the preliminary hearing of 1 December 2022 to be discharged. This was an entirely appropriate action. The application was made at an early stage, several weeks in advance of the proposed preliminary hearing date.

7. This is not a case where the application had "no reasonable prospects of success". It is not believed to be a fact in dispute that the Claimant did not include his name (his name being Hassan Hassan) in the ET1 and therefore there is a clear basis for the Respondent's Rule 10 application. The Respondent chose to withdraw the application prior to the hearing, however it is disputed that the application had no reasonable prospect of success. There is no general rule that withdrawing a claim is tantamount to an admission that it is misconceived (Yerrakalva v Barnsley Metropolitan Borough Council UKEAT 0231/10 (obiter)).

8. The Respondent informed the Tribunal and the Claimant that the hearing could be discharged over 2 weeks' prior to the date of the hearing. It would be contrary to the overriding objective to

penalise the Respondent for providing fair notice that they did not wish to proceed with a preliminary application.

9. This is not a case where the Respondent has behaved unreasonably, abusively, disruptively or vexatiously. There is no evidence of this. The Respondent has responded to all of the correspondence sent to the Tribunal by the Claimant within the appropriate deadline. The Respondent denies misleading the Tribunal. In addition, the Respondent denies that "their Rule 10 application for rejection of the entire claim painfully targets the Claimant's Muslim/Arabic name" as the origins of his name are entirely irrelevant. Rather it was the fact that he had not written his full name that was the basis for the application.

10. In respect of Rule 76(2), the Respondent has not been in breach of any order or practice direction. A hearing has not been postponed or adjourned on the application of the Respondent, but rather discharged.

11. It is highlighted that the Claimant did not provide a costs or expenses warning letter or indeed give any notice that any such application would be made.

12. In all the circumstances, the Respondent submits that there is no basis upon which the Tribunal should order a preparation time order and that to do so would be contrary to the overriding objective.

<u>Value of Preparation Time Order</u>

13. ESTO, the Tribunal is minded to award a preparation time order, then the Respondent disputes the Claimant's figures. Under Rule 79, it is noted that in establishing a preparation time order, the Tribunal must firstly consider the number of hours in respect of which a payment should be made. The Tribunal will be aware it must make: "an 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."

14. ***The Respondent's position is that the proceedings were to determine a simple issue. The Claimant was to be the only witness in attendance. The point in dispute is a legal point (rather than factual) and therefore the legal submissions from each party are the relevant documents for preparation purposes. The Tribunal ordered the Respondent's solicitor to provide a skeleton written argument by no later than 24 November 2022 (one week prior to the final hearing), to the Claimant. The application was withdrawn on 15 November therefore the submissions were not sent to the Claimant. Accordingly, it is disputed that the Claimant spent 5 hours preparing a response to the Rule 10 application, prior to 15 November 2022, in circumstances in which he had not even received the Respondent's argument. This is a disproportionate amount of time to spend at that stage.***

15. ***In any event, the Claimant appears to be claiming for 5 hours of his salary. He has not however explained why he considers that he ought to be paid in respect of 5 hours of his salary. He has not indicated in his application, for example, that he required to take unpaid leave from work in order to prepare and, if this is the case, he has not explained why he considered it appropriate to take unpaid leave. Given that he apparently spent 5 hours preparing the case, those 5 hours could have been carried out at any time outwith working time. He has provided no evidence that he has, in fact, "lost" 5 hours of salary.***

16. ***It is an established principle of law that a preparation time order cannot be made in relation to time spent attending the hearing (Rule 75(2) and Andrew v Eden College and others UKEAT/0438/10). Therefore it is submitted that it would not be***

> ***appropriate to grant a pro-rata full day of the Claimant's salary. In any event the Claimant had 2 weeks' notice to apply for his day of annual leave to be cancelled. As outlined above, he has presented no evidence to indicate that he has lost any salary, or indeed any leave, as a result of the Respondent withdrawing its application. In those circumstances, to award him in respect of 5 hours'*** *[sic]* ***of lost salary would be disproportionate.***

13. These were parties' written representations before me at this in chambers Hearing on the claimant's opposed application for a preparation of time order against the respondents. I agree with Ms Campbell, as per her paragraph 4, that the claimant's application is for a preparation time order, and not a Wasted Costs order under **Rules 80 to 82**. Indeed, his reference to **Rule 79** supports that view.

Claimant's application for an anonymity/privacy order

14. There is also pending before me, for judicial determination, this further matter.

15. In issuing this written Note and Orders, dealing only with my decision on the claimant's opposed application for a preparation time order against the respondents, I have left open, for further consideration, at a later date, the claimant's opposed application for an anonymity / privacy order under **Rule 50**.

16. That is because, in the course of this Expenses / Preliminary Hearing, on 1 March 2023, a further emailed correspondence from the claimant was received by the Tribunal, which required me to defer that matter for final decision at a later date.

17. That has happened because while I did not ask for any further written representations, as made clear in the Tribunal's letter to both parties on 23 February 2023, given the fact the claimant had done so, I considered that it was in interests of justice that the respondents' solicitor be given the opportunity to reply, ASAP, and certainly by no later than 4pm on Wednesday, 8 March 2023.

18. I noted the claimant's reference to the recent England & Wales High Court of Justice (KBD) judgment by Mrs Justice Steyn, in **K v SSWP [2023] EWHC 233 (Admin),** and the full copy of it provided by the claimant, as also his hyperlinks to commentaries by Doughty Street chambers, and the Public Law Project.

19. As such, I did not regard that as "***evidence",*** as the claimant's email had described it, as I was engaged in an in chambers Hearing, without parties attending, but I did regard it as right and proper that, the claimant having sent it unsolicited direct to Glasgow ET, and the respondents' solicitor, then the respondents' solicitor should be afforded a right of reply.

20. Meantime, both parties were advised, by email from the Tribunal clerk sent that afternoon, that I was continuing with this in chambers Hearing, and deliberation on 2 March 2023, but I have done so only in respect of the opposed application for a preparation time order against the respondents.

Relevant Law : Preparation Time Order

21. The relevant law is to be found within **Rules 74 to 84**. Specifically, for the purposes of the present case, I have had regard to the following statutory provisions, so far as material for present purposes, from the **ET Rules of Procedure 2013**, as follows:

COSTS ORDERS, PREPARATION TIME ORDERS AND WASTED COSTS ORDERS

Definitions

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

Costs orders and preparation time orders

75.—(1) …

(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 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

76.—

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

(a) a party (or that party's representative) has acted vexatiously, abusively, 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; or

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

(3) …

(4) …

(5) …

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.

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—

(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.

(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 by Tribunal: The hourly rate, as of 6 April 2022, is **£42.**]*

Ability to pay

> *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.*

22. The claimant, as an unrepresented, party litigant, has perhaps, unsurprisingly, not made any reference to case law on this subject. However, Ms Campbell, the respondents' solicitor, has referred me to some case law, and I have considered the two EAT case law authorities cited by her, **Yerrakalva** and **Andrew,** and I comment upon them both later, in the discussion and deliberation section of these Reasons.

23. Ms Campbell did not provide the claimant, or the Tribunal, with a copy of either judgment, or an accessible hyperlink to a free to access legal resource website, for either case cited by her. **Yerrakalva** is, however, a well-known, and familiar authority, and I have accessed the judgment in **Andrew** through using the ***Bailli*** website. It is my responsibility to apply the relevant law, and I do not believe that the claimant has been prejudiced by me not inviting him to make comment on the cases cited by Ms Campbell, especially in circumstances where, given the date of her written objections, he has had plenty of time to make his own submissions on the relevant law, had he felt it appropriate to do so.

24. Moreover, I have also had regard to the further, frequently cited case law authorities, on costs / expenses in the Employment Tribunal, which I am aware of from my own judicial experience in many other cases heard before me, namely:

(a) **Gee v Shell UK Ltd** [2002] EWCA Civ 1479; [2003] IRLR 82; [2005] ICR 1117, Court of Appeal, per Simon Brown, Sedley and Scott Baker LLJ);

(b) **Lodwick v London Borough of Southwark** [2004] EWCA Civ 306; [2004] ICR 884; [2004] IRLR 554, Court of Appeal, per Pill LJ;

(c) **McPherson v BNP Paribas SA (London Branch)** [2004] EWCA Civ 569 & 616; [2004] ICR 1398; and [2004] IRLR 558, Court of Appeal, per Mummery LJ;

(d) **Barnsley MBC v Yerrakalva** [2011] EWCA Civ 1255 ; [2012] ICR 420 / [2012] IRLR 78 (Court of Appeal, per Mummery LJ, on appeal from EAT, Underhill J(P) [2010] UKEAT/0231/10, [2011] ICR D6);

(e) **Vaughan v London Borough of Lewisham** [2013] UKEAT/0533/ 12; [20I3] IRLR 713, per Underhill J (EAT);

(f) **Oni v Unison** [20I5] UKEAT/0370/14; [2004] ICR D17, EAT, per Simler J;

(g) **Daly v Newcastle upon Tyne Hospitals NHS Foundation Trust** [20I9] UKEAT/0I07/I8, per HHJ Eady QC, at para 42, and the 3 cases cited there: ***"It is common ground that there are three stages involved in the determination of a costs application. First, the ET needs to determine whether or not its jurisdiction to make a costs award is engaged - here, whether the circumstances provided by Rule 76(1) existed. If so, second, it must consider the discretion afforded to it by the use of the word "may" at the start of that rule, and determine whether or not it considers it appropriate to make an award of costs in that case. Only then would it turn to the third stage, which is to determine how much it should award. See Abaya v Leeds Teaching Hospital NHS Trusts UKEAT/0258/16, paragraphs 14-18; Haydar v Pennine Acute Hospitals NHS Trust UKEAT/0023/18, paragraphs 25 and 37; Ayoola v St. Christophers Fellowship UKEAT/0508/13 at paragraph 17."***

25. While each case should be dealt with according to its own specific facts and circumstances, and reference to case law authorities should be cautiously approached, as identified in the Court of Appeal's judgment in **Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ.1255,** reported at **[2012] IRLR 78,** where Lord Justice Mummery, former President

of the Employment Appeal Tribunal, at paragraph 39 of his judgment, stated as follows:

"***I begin with some words of caution, first about citation and value of authorities on costs questions and, secondly, about the dangers of adopting an over-analytical approach to the exercise of a broad discretion."***

26. The Court of Appeal, in **McPherson v BNP Paribas (London Branch),** held that it is not unreasonable conduct, per se, for a claimant to withdraw a claim. Further, the Court observed (per Lord Justice Mummery, at paragraph 28) that it would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs on withdrawal in circumstances where such an order might well not be made against them if they fought on to a full Hearing and failed.

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

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

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

30. In my view, while the circumstances of the present case, and the opposed preparation time order application before me, clearly do not arise from the

claimant withdrawing his claim, but from the respondents withdrawing their **Rule 10** application, to have the claimant's ET1 claim form rejected, while still defending the claim, analogous considerations come into play, when looking at the background to, and reasons for, that withdrawal by the respondents, at that earlier stage of these Tribunal proceedings.

Discussion and Deliberation

31. From the case law authorities, it is trite to say that expenses orders in the Employment Tribunal remain the exception and not the rule, and that, in the majority of Employment Tribunal cases, the unsuccessful party will not be ordered to pay the successful party's costs, and that costs are compensatory, and not punitive.

32. Here, of course, the matter before me is not an opposed application after the Tribunal has issued a final Judgment following upon a Final Hearing. To date, no evidence has been led in this case, and so the Tribunal has made no findings in fact. The case is still in early stages of case management, despite the passage of more than 6 months since the claimant's ET1 was first presented on 26 August 2022.

33. While last minute settlements, withdrawals, and postponement applications, are still very much a regular feature of litigation before the Employment Tribunals, the important feature to note in the present case is that in opposing the claimant's application for a preparation time order, the respondents, through Ms Campbell's objections, have made it clear that that application is being opposed, for the various grounds stated by their solicitor, and that the Tribunal should refuse the claimant's application.

34. As per **Rule 77**, the claimant's written application for a preparation time order was made in time, and the respondents have been provided with a reasonable opportunity to make their own written representations in reply. Further, as per **Rule 75(2)**, it is clear that the claimant is an unrepresented, party litigant, and that he is therefore entitled to seek a preparation time order against the respondents, as the potential "***paying party***", and, in the event of success with his application, the claimant would be the "***receiving party.***"

35. Having carefully considered the claimant's application, and Ms Campbell's objections, I agree with her observation that it seems to arise from the respondents' decision to abandon their application for the claim to be rejected under **Rule 10**.

36. Their application was on a legal point that they were entitled to take, even though the claim had been accepted by the Tribunal administration, and not referred by the Tribunal vetting clerk to a Judge for consideration, and that is why I fixed an open Preliminary Hearing for 1 December 2022. However, as the respondents withdrew their application, so that listed Preliminary Hearing was cancelled by the Tribunal.

37. I do not know exactly why the respondents decided to withdraw that particular point, but it was clearly done with the benefit of some legal advice, where they determined that their prospects were lower than they had initially thought (see Ms Campbell's paragraph 6) and it may well have been so decided simply because, even if they had been successful, and I had decided to reject the claim, the claimant would then have been issued with a notice under **Rule 10**, and he could then have applied for reconsideration of that rejection under **Rule 13,** and sought to remedy the defect.

38. In essence, looking in on matters from my position as the independent and objective judicial decision maker, such a move may have been equivalent to one step forward, one step back, and not really progressed the litigation between the parties in any meaningful way, and simply have occasioned delay and additional cost to both parties, and to the public purse which funds the Tribunal. Viewed in that way, the respondents' decision to withdraw might best be regarded as a "***sensible litigation decision"***, to use the wording from the Court of Appeal in **McPherson**.

39. I also agree with Ms Campbell that, as per her paragraph 6, it is not at all uncommon for parties, having considered such preliminary matters as the case progresses, including considering relevant case law and legislation, to subsequently withdraw applications; and it is not at all uncommon for

withdrawal of an application to occur at any stage in the progress of a case and not only at the very initial stages.

40. The fact that the respondents withdrew their **Rule 10** application does not, of itself, indicate that their application had no reasonable prospects of success. Further, in this case, the claimant suffered no prejudice by that withdrawal.

41. While, on 25 October 2022, I had ordered the respondents' solicitor to provide a skeleton written argument to the claimant by no later than 24 November 2022 (one week prior to the listed Preliminary Hearing, and not a Final Hearing as wrongly referred to in Ms Campbell's objections), as that application was withdrawn on 15 November therefore Ms Campbell's submissions were not sent to the claimant, nor to the Tribunal.

42. Further, as that listed Preliminary Hearing, scheduled for 1 December 2022, was discharged by the Tribunal, with more than two weeks prior notice to the claimant, it cannot be held by me at this in chambers Hearing that the respondents have acted unreasonably, abusively, disruptively or vexatiously. That discharge of that Preliminary Hearing was a judicial order made by me in light of the changed circumstances.

43. As such, I agree with Ms Campbell, at her paragraph 12, that to grant a preparation time order against the respondents, in the circumstances of this case and the respondents' withdrawal of their **Rule 10** application, would run contrary to the Tribunal's overriding objective, under **Rule 2**, to deal with the case fairly and justly. Accordingly, I have decided to refuse the claimant's application.

44. That said, I think it would be helpful for me to make a few additional points for the assistance of both parties:

    (a) I agree with Ms Campbell that a claim for 5 hours preparation time is wholly disproportionate, even if I had been minded to grant to claimant's application for a preparation time order against the respondents.

(b) The **Rule 10** point was a relatively simple matter – was there a failure to provide minimum information on the ET1 claim form? As the respondents' solicitor did not submit a written skeleton argument, due one week before the start of the listed Preliminary Hearing, the claimant cannot have spent any time in reviewing that. Looking up the relevant law, in **Rules 8 to 13**, would not have taken anything like that period of time.

(c) The claimant's application refers to "***Preparing evidence/response for Respondent's Rule 10 application for rejection of entire claim; and preparing for full-day video PH Approx. 5 hours x £42.00 = £210.00"***

(d) No breakdown is given by him of what actually he did in this preparation time of 5 hours. His application refers to both the **Rule 10** application and preparing evidence. The **Rule 10** point was a discreet, and short legal point, and it did not require any evidence other than in the briefest of terms from the claimant, if at all.

(e) Even if I had been minded to grant to claimant's application for a preparation time order against the respondents, I could not have awarded 5 hours, based on to lack of any clear and cogent explanation of what he was doing over 5 hours. Further, as Ms Campbell says, in her paragraph 15, the claimant has provided no evidence that he has, in fact, lost 5 hours salary.

(f) Where I depart from Ms Campbell's submission is where, at her paragraph 16, she states: ***"It is an established principle of law that a preparation time order cannot be made in relation to time spent attending the hearing (Rule 75(2) and Andrew v Eden College and others UKEAT/0438/10). Therefore it is submitted that it would not be appropriate to grant a pro-rata full day of the Claimant's salary."***

(g) I have located and read the **Andrew** judgment by Mr Recorder Luba QC at **[2011] UKEAT/0438/10**. Having done so, I see that it relates to

the wording of the former **ET Rules of Procedure 2004**, and not the current **2013 Rules**. The current **Rule 75(2)** refers to "***except for any time spent at any final hearing"***. I lay emphasis on the current word "***final***" – the Hearing listed for I December 2022 was not a Final Hearing, but a Preliminary Hearing. In any event, that Preliminary Hearing was discharged, and so nobody attended it.

(h) Had I been minded to grant to claimant's application for a preparation time order against the respondents, and had I been able to ascertain an appropriate period for him working on the case, which was reasonable and proportionate amount of time for preparatory work, the respondents put no information before the Tribunal about their inability to pay, as per **Rule 84**.

(i) Given the respondents are an emanation of the State, that is perhaps unsurprising, so had I found grounds to make a preparation time order in the claimant's favour, then I would have done so, and ordered the respondents to pay the claimant whatever sum I had determined.

Disposal

45. Having considered the claimant's opposed application for a preparation time order against the respondents, I have refused it for the foregoing reasons.

46. When I resume consideration of the claimant's opposed application for an anonymity / privacy order, I will do so again, on a date to be hereinafter intimated to both parties for information only, as again it will be dealt with on the papers, and without the need for parties to attend.

47. A further written Note and Order, or Judgment as the case may be, will be issued as soon as possible thereafter, following upon my further in chambers private deliberation on that opposed application.

Employment Judge: **I McPherson**
Date of Judgment: **20 March 2023**
Entered in register: **21 March 2023**
and copied to parties