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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000056/2022

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Members' meeting held by CVP in Edinburgh on Monday 14 August 2023 at  
10.00am

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Employment Judge: Russell Bradley  
Tribunal Member: Ms Z van Zwanenberg  
Tribunal Member: Ms C Russell

Mr C Thacker

Claimant  
Attendance not required

Bridgend Farmhouse

Respondent  
Attendance not required

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The unanimous Judgment of the Tribunal is that the respondent's application dated  
1 July 2023 for expenses (treated as for a preparation time order) is refused.

**REASONS****Introduction**

1. On 17 February 2023 notice of a final hearing was issued to the parties. That hearing was fixed for the five consecutive days starting on Monday 19 June. It  
5 duly began that day.
2. At that hearing the claimant represented himself. He had previously been represented by David Stevenson, Employment Adviser of the Haddington Citizens' Advice Bureau. The respondent is a Community Benefit Society registered with OSCR (Charity No: SC048396) and with the FCA (Mutual No:  
10 7683). It is a community centre on the south side of Edinburgh. It is funded by several public and private bodies. At this hearing it was represented by John Knox, the chair of trustees of the respondent and by Oliver Dickson, a fellow trustee. At previous preliminary hearings, Mr Knox represented the respondent.
- 15 3. After a delay caused principally by the need for the respondent to produce an additional copy of the hearing bundle, the claimant began his evidence at about 12.30pm on 19 June. The hearing continued that day and on 20 June. By the end of that day the claimant's evidence had not concluded. By email on 21 June at 07:59am to the tribunal and copied to the respondent the claimant  
20 intimated his wish to withdraw his claim. Neither of the representing trustees had seen the email prior to 10.00am on 21 June. We directed the clerk to provide a paper copy to them. In the circumstances which included the fact that the claimant had not appeared at the tribunal office on 21 June we also directed the clerk to telephone the claimant so that he could participate in the  
25 hearing that way. We had in mind Rule 46 of the Employment Tribunal Rules of Procedure 2013. That Rule provides that "*A hearing may be conducted, in whole or in part, by use of electronic communication (including by telephone) provided that the Tribunal considers that it would be just and equitable to do so and provided that the parties and members of the public attending the*  
30 *hearing are able to hear what the Tribunal hears and see any witness as seen by the Tribunal.*" We considered that it was just and equitable to conduct the

hearing on 21 June with the claimant by telephone because we were of the view that it was necessary for us to explain that; on withdrawal of the claim it would be dismissed under Rule 52; and that on dismissal the claimant would be unable to revisit the issues raised in it. We explained the implications of withdrawal to the claimant. He said that he understood them. The respondent had no issue with that course of action. On 23 June a judgment dismissing the claim was duly signed, promulgated and copied to the parties.

### **The application for expenses**

4. By email on 1 July the respondent made an “*expenses claim*”. It sought £797.00 being “*purely the expenses of the two trustees who represented*” the respondent. It noted that the claimant had suddenly withdrawn his claim in the course of the hearing. It attached a document which for ease is replicated in the appendix to these reasons.

5. Given that the email had not been copied to the claimant we directed the clerk to forward the expenses claim to him asking him for his comments on the application within 14 days, so by 25 July.

6. On 25 July the claimant emailed the tribunal copied to Mr Knox. In it he said, “*One day Bridgend farmhouse will act in congruence with its sated [sic] values, and stop harassing me. Self evidently, today is not that day. In the same way they dismissed my disability, I don’t recognise this claim as anything other than yet more evidence of harassment toward me.*” We have taken this to be opposition to the application.

### **The law**

7. Rule 74 of the 2013 Rules provides definitions and says “(1) “*Costs*” means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression “wasted costs”) shall be read as references to expenses. (2) “*Legally represented*” means having the assistance of a person (including where that person is the receiving party’s

employee) who—(a) has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts; (b) is an advocate or solicitor in Scotland; or (c) is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland. (3) “Represented by a lay representative” means having the assistance of a person who does not satisfy any of the criteria in paragraph (2) and who charges for representation in the proceedings.”

8. Rule 75 provides “(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) the receiving party in respect of a Tribunal fee paid by the receiving party; 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. (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.”

9. Rule 76(1)(a) and (b) read short for present purposes provides, “A Tribunal may make an 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, (b) any claim or response had no reasonable prospect of success.”

10. *"The employment tribunal's power to order costs is more sparingly exercised and is more circumscribed by the employment tribunal's rules than that of the ordinary courts. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the employment tribunal costs orders are the exception rather than the rule. In most cases the employment tribunal does not make any order for costs. If it does, it must act within rules that expressly confine the employment tribunal's power to specified circumstances ..."* ***Yerrakalva v Barnsley Metropolitan Borough Council and another*** [2012] LC.R. 420, paragraph 7 of the report of Mummery LJ's judgment in the Court of Appeal.
11. In ***Hossaini v EDS Recruitment Ltd (trading as J & C Recruitment) and another*** [2020] LC.R. 491 Judge Eady QC said (at paragraph 64), *"It is common ground that there are three stages involved in the determination of a costs application: (1) the tribunal 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, (2) 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 question (3), that is to determine how much it should award."* In Scotland reference to "costs" is to be read as a reference to "expenses."

### **Discussion and decision**

12. We must act within the rules which expressly confine our powers to specified circumstances (***Yerrakalva***, above).
13. The application sets out that it is for "expenses." To make that claim in the circumstance here, the respondent requires to satisfy Rule 75(1)(a). In our view it does not. Self-evidently, as trustees of the respondent neither Mr Knox nor Mr Dickson is a legal representative. Nor are they lay representatives within the meaning of that expression in Rule 74(3). This is for two reasons. First, they are office holders of the respondent charity and appeared as such. They did not appear as separate lay representatives. This is clear from the email of

1 July in which they say what is sought is payment for “*the expenses of the two trustees who represented*” the respondent. Second, they have not charged the respondent a fee for representation in the proceedings. The application can therefore only be considered as a preparation time order in terms of Rule 75(2).

5 14. A preparation time order is an order that a party makes a payment to another party in respect of its 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. Our first observation is that the respondent does not set out the basis on which it seeks an order for payment under Rule 76. As noted above from ***Yerrakalva***, expenses orders are the exception rather than the rule. That principle applies equally to a preparation time order. This is because it is only in circumstances which fall within Rule 76 that such an order can be made. The respondent does not assert any basis to support a conclusion that the claimant 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. Indeed, the respondent does not criticise the claimant’s actings at all in its application. It simply notes that he “*suddenly withdrew*” the claim. It is not suggested that that withdrawal was vexatious, abusive, disruptive or otherwise unreasonable. In our view the withdrawal was none of them. Nor does the respondent suggest that the claim had no reasonable prospect of success. In our view there would have been no basis to say so. In short therefore we are not satisfied that the preparation time order application meets any of the requirements of Rule 76. The first stage anticipated in the case of ***Hossaini*** has not been met. On that basis the application is refused.

15. Separately, we make the following points. First, the claim for £160 for Mr Dickson’s time in the tribunal hearing would have been disallowed because Rule 75(2) expressly excludes time spent at any final hearing. Second, the respondent sought £500 (at £20 per hour) for time preparing papers. That equates with 25 hours. In our view given the material ultimately lodged, that amount of time is excessive. No justification for or detail of that time was

provided as to how it came to be spent. Third, the respondent says it has spent £88.00 on photocopying. There is no vouching for this activity. A receipted invoice would have been usual. Finally, there is a charge of £21.00 for ink. Again, there is no vouching or justification for this cost. As an aside, it occurs  
5 to us that if £88.00 was indeed incurred as copying costs there is a question over what ink was necessary in addition.

16. In the circumstances we have refused the application for a preparation time order.

10 **Employment Judge: R Bradley**  
**Date of Judgment: 15 August 2023**  
**Entered in register: 16 August 2023**  
**and copied to parties**

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**APPENDIX TO REASONS**

We wish to claim the following expenses for the case which ended on June 21<sup>st</sup> when the Claimant Cris Thacker withdrew his claim.

5 **John Knox's expenses**

	Paper	£28.00	
	Ink	21.00	
	Photocopying	63.00	
	Time preparing papers	200.00	(at £20/hr)
10	Total		£312.00

**Oliver Dickson's expenses**

	Time preparing papers	£300.00 (at £20/hr)	
	Photocopying	25.00	
15	Time in court	160.00 ( 8hr earnings foregone)	
	Total		£485.00

**Total due to Bridgend Farmhouse**

**£797**