



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4103523/2022 (P)

Held at Aberdeen on 9 May 2023

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Employment Judge J M Hendry

Mr M MacDonald

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**Claimant
Represented by
Mrs J Coutts-MacDonald,
Wife**

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IKM Testing UK Ltd

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**Respondent
Represented by
Mr M Wishart,
PBS Ltd**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant is ordered to pay the respondent the sum of Six Hundred Pounds (£600) as expenses.

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REASONS

E.T. Z4 (WR)

1. The claimant raised proceedings against his former employers for unfair dismissal and disability discrimination. The case was subject to case management in the usual way. On 7 November 2022 there was a preliminary hearing (PH) for case management purposes specifically to check if medical records were available for a hearing on disability status due to take place on 20 and 21 December.
2. In that Judgment I narrate that at the preliminary hearing on 7 November it became apparent that the claimant was not going to be available for the hearing having to agreed to work abroad. The claimant was asked to explain his position and attempted to do so. The respondents sought strike out of the claim on the basis that the claimant and or his representative, his wife Mrs Coutts-MacDonald had acted unreasonably.
3. I don't intend rehearsing the detailed background but in the Judgment I wrote:

"13. This was an unfortunate case in which the respondents and their agents are entirely blameless. I can fully accept that the claimant's representative, his wife, appears to have been suffering from stress, and indeed found that the whole exercise for applying to the Tribunal was stressful, it must have been clear to both the claimant and his wife that he would have to attend the hearing to give evidence about his disability..."

14. I therefore, find it difficult to accept there is any dubiety about the matter. Nevertheless the background circumstances appear unfortunate to say the least with the claimant and his wife apparently having health problems and given the loss of his job money worries in addition. I noted that the claimant's wife had asked for a postponement shortly before the PH in December. It is unfortunate that she had not explained that the claimant would be away working nor did she tell the Tribunal that he was unable to attend until the telephone PH.

15. I can understand that the prospect of obtaining work especially just before Christmas was one that the claimant felt that he could not refuse. However, he should have been candid with the Tribunal and sought a postponement. To take work knowing that he would not be back until the second day of the hearing was an extraordinary thing to do. I am afraid that I do not accept the explanation that he thought a solicitor could appear for him. He was clearly warned in the September Note that he would have to give evidence about his disability if the respondent did not accept the medical evidence. I suspect that he may have taken the risk of going while perhaps hoping that the

medical records would not appear in time forcing the postponement or if they did they would be accepted as sufficient evidence of his disability by the respondent and the hearing could go off.”

- 5 4. Although I refused the strike-out application I made the following observations:

10 *“22. This was not a case where the claimant has been guilty of what properly could be described as a course of unreasonable conduct. Neither he nor his wife had acted unreasonably in the conduct of the case until his failure to make himself available at the arranged hearing was discovered. This was, however, a serious matter. Although there was, as the respondents point out, three preliminary hearings this was no more than the usual number of what could be described as standard case management preliminary hearings where one party is not legally represented that I would anticipate. The final*
15 *case management hearing was expected to be short. It again was not required through any fault of the claimant or his representative and related to the recovery of medical records and to ensure that as a party litigant he was aware of what would happen at the evidential hearing. This was not an unusual process or set of circumstances. The hearing was to find out if the records had been recovered and also, if they had been, whether they had been considered by the respondent.*

25 *24.....the expenses are less that would have been occasioned if the hearing in December had been prepared for and then discharged. That at least has been avoided. Although the respondents have been put to inconvenience and no doubt expense there is no compelling reason why a fair trial on the issue of disability status/strike-out cannot take place. I also do not consider that such a drastic remedy appropriate in this case when there is a lesser sanction that is proportionate. In my view the lesser sanction here is for the respondents to make an application for expenses and for that to be considered under the appropriate rules: accordingly, I invite them to do so.”*

- 35 5. Following the issue of the Judgment the respondent’s solicitor’s wrote to the Tribunal on 9 March applying for expenses in the amount of £1,394 (£43 per hour x 34 hours). They did not allocate the hours claimed to particular items of work. Nevertheless, the sum does not appear wholly untoward. On receipt of the application I arranged for a letter to be sent to the claimant asking the following questions:

- 40 *“1) If the amount of the expenses is apposed*
2) If the application apposed in principal and if so why

3) *The claimant may provide the tribunal with his financial position and if he does the tribunal can take this into account when considering the level of any award.*" (My apologies for the misspelling of oppose)

5 6. The letter prompted a response from the claimant's wife on 20 March indicating that they opposed the application for expenses explaining that they were not knowledgeable of the proceedings and were not aware that costs could be imposed. They indicated that they were in a large amount of debt due to not having any income because of the loss of the claimant's job with
10 the respondents.

7. In response on 21 March I advised that a letter be sent to the claimant's wife asking her to provide vouching or evidence of her income and monthly outgoings. There was some delay and this was eventually sent to the
15 Tribunal on 11 April. The claimant and his wife have a modest income which supports a family of four. They have the usual expenses and it is also clear that they have some debts.

8. The award of any expenses is a matter wholly for the discretion of the
20 Tribunal. I suspect that some of the preparation for the hearing in December that was carried out will not be wasted. Matters such as the collation of documents for the abortive hearing has no doubt already been carried out and will not need to occur on a second occasion when the hearing on disability status finally takes place. Tribunals by and large have been an
25 expenses free jurisdiction with the award of expenses being the exception not the rule.

9. Nevertheless, in this case the respondents were wholly blameless for the discharge of the hearing in December. It must have been readily apparent
30 even to a lay person like the claimant that he would have to attend the hearing and give evidence about his disability. In all the circumstances, I am of the view the sum of £600 represents a fair reflection of the actual cost attributable to the discharge in wasted work. I have also taken into account the claimant's

modest finances in setting this sum. The claimant will pay this sum to the respondents at the rate of £50 per month starting on 31 May April of this year. The payment of expenses is not a condition precedent of the claimant proceeding with the current claims.

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10 **Employment Judge: J M Hendry**
Date of Judgement: 10 May 2023
Date sent to Parties: 10 May 2023