



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. D Heath

**Respondent:** Finesse Heating Ltd

## COSTS JUDGMENT

The Respondent is ordered to pay costs to the Claimant in the total sum of £960 inclusive of VAT.

## REASONS

### Background and basis of application

1. A case management preliminary hearing took place on 19 December 2022 before Employment Judge G Self. A final hearing had been listed to take place on 19 December 2022, but at the hearing Employment Judge Self postponed the final hearing and made case management directions.
2. A final merits hearing took place on 20 June 2023 before me. An oral decision was given to the parties at the hearing and the Judgment, sent to the parties on 1 August 2023, states:

*The Respondent has made an unauthorised deduction from the Claimant's wages by failing to pay the Claimant the full amount of wages due on 28 February 2022 and is ordered to pay to the Claimant the gross sum of £2,149.53 in respect of the amount unlawfully deducted. The Respondent is entitled to make any deductions which are due for tax and national insurance purposes.*

*The Respondent has made an unauthorised deduction from wages by failing to pay the Claimant in lieu of accrued but untaken annual leave of 5 days on termination of employment and is ordered to pay to the Claimant the gross sum of £496.02, in respect of the amount unlawfully deducted. The Respondent is entitled to make any deductions which are due for tax and national insurance purposes.*

3. No request for written reasons was made by either party.

4. On 7 August 2023, the Claimant made an application for costs. Attached to this email was an invoice from Setfords Solicitors for the sum of £960.00. The Claimant also stated that he had experienced loss of earnings whilst attending the tribunal hearings on 19 December 2022 and 20 June 2023. The Claimant says he spent 11 hours in total at the hearings and lost a sum of £181.50 (11 hours x £16.50). He attached a pay slip to evidence his hourly rate.
5. The Claimant sent a further email regarding his application on 21 August 2023. In this email he set out that costs were sought on the basis that the Respondent acted unreasonably by disputing that there were sums owed to him, that there was no reasonable prospect of the defence and the Respondent acted unreasonably in breach of the Tribunal's case management orders.
6. The Tribunal wrote to the parties and requested the Respondent's comments, in relation to the Claimant's application and its view on whether a costs hearing was required, in a letter dated 22 September 2023. The Respondent did not reply.
7. The Claimant followed up with emails to the Tribunal enquiring about progress regarding his application, but unfortunately the correspondence was not sent to me. On 30 April 2024 the Tribunal wrote to the parties again and requested any comments from the Respondent.
8. The Respondent replied on 5 May 2024, objecting to any costs being ordered. The Respondent, in short, submitted that it was the Claimant's choice to take legal advice and that the Respondent was experiencing financial difficulties. It said the Claimant owes the Respondent money. It states the Respondent is not financially able to pay costs incurred by the Claimant and if so ordered this would have a detrimental impact on the business. There was no supporting financial documentation provided.
9. The Claimant replied to the Respondent's email on 6 May 2024, stating the Respondent had not replied to the direction on 22 September 2023 and had failed to make payment on time, thus requiring the Claimant to instruct bailiffs.
10. Neither party made any specific comment regarding costs being considered at a hearing, and given the information provided, and considering the fact the final hearing took place on 30 June 2023, I decided it was in the Overriding Objective to determine on the papers.

### **Costs in the Employment Tribunal**

11. The general rule is that the Employment Tribunal is a 'costs neutral jurisdiction'. This means that the loser in proceedings does not automatically pay the winner's costs, which is a divergence from proceedings which run in most of the civil court jurisdictions.
12. The rules relating to costs are found in The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. Key extracts from the rules are set out below.

## **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.

(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.

## **Costs orders and preparation time orders**

**75.**—(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.*

***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, 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;*

*(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) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—*

*(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and*

*(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.*

*(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.*

*(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.*

***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 costs order**

**78.**—(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;*

*(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by the Tribunal applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019 or by the Tribunal applying the same principles;*

*(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;*

*(d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or*

*(e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.*

*(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).*

*(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.*

**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.*

13. It is, therefore, a multi-stage determination to awarding costs. First, at least one of the 'gateways' outlined by Rule 76(1) and Rule 76(2) needs to be found to have been opened. In other words, I must be satisfied in this case that I have the ability to award costs.

14. If one of the gateways to award costs is opened, then I *may* award costs. There is a discretion. The next stage, therefore, is to decide whether or not this is a case in which I exercise my discretion to award costs, having in mind the circumstances of the case and the nature of the conduct that has led to the ability to award costs if decided appropriate.
15. The final stage, if I decide to exercise discretion, is to decide the amount of the costs to award. Where evidence about means is provided, this should be taken into account so long as I am satisfied I have an honest and full picture of the financial position. I must also consider the amount of costs requested in the application and decide whether or not the amount is appropriate, before deciding what amount should be paid towards those costs, or ordering that the whole of the costs are paid.
16. The assessment of the amount of costs to pay is a broad brush exercise and does not take the form of any sort of detailed assessment of cost. The assessment is made broadly in all the circumstances using my judgment of what would be reasonable in this case. Generally, I am trying to consider the proportion of costs incurred because of the criticised conduct.

**Do I have the power to award costs?**

17. I am not able to award costs unless one of the 'gateways' set out at Rule 76 is engaged.
18. Here, two are so engaged. The Claimant's assertion that there was no reasonable prospect of the defence success succeeding and that the Respondent acted unreasonably in contesting the claim and breaching Tribunal Orders.
19. Consequently, Rule 76(1)(a) and Rule 76(1)(b) are engaged and I have the power to make a costs order if I choose to exercise my discretion.

**Do I exercise the discretion to award costs?**

20. The Claimant took legal advice in relation to this claim, before submission of the ET1, and that is a matter for him. There is no criticism of him at all in this respect and generally it will usually be sensible for parties to obtain legal advice. The Claimant engaged in ACAS Early Conciliation between 24 March and 4 May 2022. This was not successful in resolving the dispute. The ET1 sets out the basis of the complaint.
21. Although I have not seen the letter, the Claimant's legal representative wrote to the Respondent on 5 August 2022 setting out the view that deductions were not permitted. Indeed, the Respondent wrote to the Tribunal on 21 September 2022 referring to a letter dated 5 August 2022 and the sums set out within the letter.
22. The letter dated 5 August 2022 was sent shortly after the claim was submitted on 7 July 2022, and before the response was due on 31 August 2022.

23. The Respondent did not take legal advice, and that is a matter for them. However, if they had, this may have resulted in the parties resolving this matter without the need for any hearings in the Employment Tribunal, and compliance with directions such as submission of the response form would likely have been managed more effectively.
24. The Claimant's position has been consistent throughout his claim.
25. My decision at the final hearing was that there was no proper basis for deducting wages. As explained in my oral judgment, the sums deducted from the Claimant's wages were allocated to incidents whilst the Claimant was working and I found them to be arbitrary and without a proper basis. A proper consideration of the Claimant's position should have enabled the Respondent to form the view that there was no reasonable prospect of its defence succeeding.
26. I have reminded myself that costs are for exceptional instances. Litigants in person, on both sides, are common in the Employment Tribunal. Not understanding key aspects of complex legal claims and tests is equally common – as is an inability to make a judgment about the merits of a particular argument or case. However, this case did not involve complex allegations of discrimination or legal matters, it was about money owed to the Claimant. It is relevant that the Respondent had an internal human resources function.
27. The Respondent had not complied precisely with the case management directions regarding disclosure and production of a file of documents, and this led to some time being wasted at the start of the final hearing. However, the Respondent had provided the Claimant and the Tribunal with a large number of documents by way of a zip file. Non-compliance with the Judgment regarding payment took place after my decision.

**Do I exercise the discretion to award costs?**

28. In this instance, I consider that the Claimant has been put to cost as a result of the Respondent pursuing a response that had no reasonable prospect of success.
29. In my judgment, it is appropriate in relation to this issue to award the Claimant costs.

**What means do I take into account?**

30. The Respondent has, in its email dated 5 May 2024, referenced having financial difficulties but no specific financial information has been provided and no corroborative evidence. This response came from a second letter from the Tribunal.
31. I am not satisfied, on the information provided to me, that that making an award of costs would overly stretch the Respondent's means.
32. Consequently, I do not take means into account when considering the amount to be paid. The Respondent is a limited company, that is still active.

**What is the amount of the costs awarded?**

33. Deciding the amount of costs to be paid, having decided to exercise discretion to award costs and taken into account any means appropriate, is necessarily a broad brush assessment. Summary assessment of costs is not designed to be a detailed or forensic affair and is instead an approximation of costs which flow from the gateway identified.
34. In my judgment, that broad brush assessment leads me to make a costs award of £960. This must be paid by the Respondent to the Claimant.
35. I considered the sum of £960 relates to the fee for legal advice obtained by the Claimant and falls within rule 75(1)(a) *“in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative”*.
36. I have not made an award for the sum of £181.50 which relates to loss of earnings by the Claimant for attending the two Tribunal hearings.
37. As noted above, rule 76(5) states: *“(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.”*
38. However, rule 75(1)(c) states: *“(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.”*
39. There is explicit reference to expenses, not loss of earnings. Further, the Civil Procedure Rules 27.14(2) refers to expenses and loss of earnings separately.
40. Accordingly, I have not ordered any costs payable in relation to attendance at the hearings.

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Employment Judge Cawthray

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Date 17 May 2024