EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8002160/2024

Hearing held in Dundee by CVP on 16 July 2026

Employment Judge R Mackay

Mr D McCue	**Claimant** **Represented by:** **Ms L McQuade,** **Counsel**
Coldside Medical Practice	**Respondent** **Represented by:** **Mr M Briggs,** **Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The respondent's application for expenses against the claimant succeeds and the claimant shall pay to the respondent the sum of £20,000.

REASONS

Background

1. The final hearing in this case took place over 6 days in Dundee in October 2025. In a written judgment the Tribunal dismissed both of the claims.

2. Following receipt of the judgment, the respondent made an application for expenses in accordance with Rule 73 of the Employment Tribunal Procedure Rules 2024 ("**the 2024 Rules**").

3. As part of that, an expenses warning letter dated 2 May 2025 to the claimant's then solicitors was disclosed. In that, the claimant was invited to withdraw his claims failing which the respondent might seek an award of expenses against him.

4. The claimant was asked to provide a written response to the application which he did through his newly appointed Counsel. Having considered the written

submissions, the Tribunal determined that it was appropriate to determine the matter following a hearing.

5. At the hearing, both parties were represented by Counsel. Evidence was taken from the claimant, principally on his ability to pay in the event that an award were to be made. Relevant findings as they relate to the application are set out in the ***Decision*** section below.

Submissions

6. The Tribunal considered both the written and oral submissions made.

7. In summary, Mr Briggs for the respondent submitted that the claimant had acted unreasonably in bringing the proceedings and that his claims had no reasonable prospect of success. Ultimately, his position was that the claimant had systematically lied in constructing his claim and in pursuing it before the Tribunal. He referred to the very clear conflicts in evidence, and pointed to 15 paragraphs of the Tribunal's judgment where the claimant's accounts were not accepted. The claimant's position had been that all of the respondent's witnesses had been dishonest but that was not the finding of the Tribunal.

8. He submitted that the claimant had resigned voluntarily and it was only after the withdrawal of an offer of employment from a third party that he sought to reconstruct a narrative to support his claims. As such he was both unreasonable and could not have had reasonable grounds for believing his claims had reasonable prospects of success.

9. He invited the Tribunal to make an award of the respondent's full expenses as taxed (in the order of £50,000).

10. Counsel for the claimant outlined the staged test required and submitted that the threshold criteria to justify an expenses order had not been satisfied and that even if it had been, she invited the Tribunal to exercise its discretion not to award expenses.

11. She submitted that the claimant did not know that his claims were without merit and that there was an absence of dishonesty on his part. She rejected the improper motivation suggested by the respondent. She submitted that credibility was not fundamental to the rejection of the claims and referred to authorities where the need for testing of evidence and cross examination is often required in order to determine the success or otherwise of a claim.

12. She highlighted the fact that the claimant was a litigant in person and that he should not, therefore, be judged by the standards of a professional representative. She pointed to the absence of an application for strikeout by

the respondent and the fact that the expenses warning letter came very late in the process.

13. She referred to the fact that the claimant had taken legal advice from two firms of solicitors who had attempted to agree a settlement with respondent in advance of the hearing.

14. In her written submissions, Counsel described the claimant as being in severe financial difficulty and being currently unemployed. By the time of this hearing, however, the claimant was in fact employed, and had been for most of the time since the end of his employment with the respondent. Counsel nonetheless maintained the submission that the claimant would have difficulty in paying expenses. For that reason, she asked that expenses should not be granted and, in the alternative, that the award should be no more than £20,000.

15. In response, Counsel for the respondent made submissions on the claimant's ability to pay. He referred to the claimant's current employment which has a salary of £47,000, the fact that he had a second property in Glasgow which he sold, and the absence of any dependent children.

Relevant Law

16. The relevant statutory provisions are set out in rules 72 to 76 of the 2024 Rules. References to costs are to expenses in Scotland.

17. Rule 74(2) provides:

The Tribunal must consider making a costs order […] 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 of it, or the way that the proceedings, or part of it, have been conducted,

(b) any claim, response or reply had no reasonable prospect of success […]

18. Rule 76 provides:

A costs order may order the paying party to pay—

(a) the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

(b) the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined—

(i) […]

(ii) 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(2), or by the Tribunal applying the same principles […]

19. A staged approach is required. It was emphasised in ***Abaya v Leeds Teaching Hospital NHS Trust*** UKEAT/0258/16 that there are three stages: (i) whether the precondition has been established; (ii) whether to exercise the discretion if so; and (iii) again if so, what quantum of award to make.

20. Rule 82 embodies the principle that when deciding whether to make an order for expenses the Tribunal may (not must) have regard to the paying party's ability to pay.

21. "Unreasonable" conduct is not defined and bears its ordinary everyday meaning. It is important to analyse (though not necessarily in separate compartments) the nature, gravity and effect of the unreasonable conduct (***Yerrakalva v Barnsley MBC*** [2012] ICR 420, CA).

22. It is not necessary for there to be a precise causal relationship between unreasonable conduct and the expenses incurred or claimed by the receiving party. It is not punitive or impermissible for a Tribunal to award expenses without confining them to those strictly proven to be attributable to the unreasonable conduct (***McPherson v BNP Paribas*** [2004] ICR 1398, CA). A "broad-brush" assessment at first instance will often be appropriate and an overly analytical approach should be avoided (***Sunava Ltd v Martin*** [2018] ICR 29, EAT).

23. One common type of unreasonable conduct is dishonesty, including lying to the Tribunal (***Daleside Nursing Home Ltd v Mathew*** UKEAT/0519/08).

24. In ***Kapoor v The Governing Body of Barnhill Community High School*** UKEAT/0352/13 the EAT found that the Tribunal had misdirected itself in its approach to the question of costs, because it considered that the simple fact that the claimant had lied meant that they had conducted the proceedings unreasonably. It should instead have considered all the circumstances of the case, including the procedural history and the extent to which the claimant's lies had made a material impact on its actual findings.

25. In considering the test in rule 74(2)(b) there is a three-stage process (***Radia v Jefferies*** [2020] IRLR 431) First, objectively analysed when the [claim] was submitted, did it have no reasonable prospects of success; or alternatively at some later stage as more evidence became available was a stage reached at which the [claim] ceased to have reasonable prospects of success? Second,

at the stage that the [claim] had no reasonable prospect of success did the [claimant] know that that was the case? Third, if not, should the [claimant] have known that the [claim] had no reasonable prospect of success.

Decision

26. The Tribunal first considered whether the threshold set out in Rule 74(2)(a) was met. At the heart of the case is an allegation of dishonesty on the part of the claimant. There were very clear conflicts in evidence concerning almost every aspect of both claims made by the claimant and it is impossible to conclude other than that there was dishonesty on one side or the other.

27. The claimant's position was that all of the respondent's witnesses had been dishonest including an independent third-party accountant and three medical practitioners (all of whom have professional memberships which focus on integrity). The claimant maintained that position before this hearing. In response to a suggestion in cross-examination that he had been dishonest, he referred to those in the respondent as "*the only bunch of liars here*". He repeated an allegation that the respondent has "*fabricated evidence*" against him. That position is contrary to the findings in the original judgment.

28. The Tribunal considered the evidential conflicts carefully in the original judgment and in all material respects found against the claimant. The reality, therefore, is that he is the one who had been dishonest.

29. It is also telling that in response to a question as to whether he would have brought the proceedings had his alternative job offer not fallen through, the claimant's initial response was to the effect "*of course not*". That response supports Mr Briggs' submission that the loss of the new position was the real grievance of the claimant and that he reconstructed a sequence of events so as to justify the claims brought thereafter – an account that was wholly at odds with his resignation letter.

30. The Tribunal considered the extent of the claimant's dishonesty and whether it had a material impact on the findings in the original judgment. Ultimately, it did, concluding that almost all of the components of the claimant's claims were ill-founded, in circumstances where issues of honesty arose.

31. In his constructive dismissal claim, four of the five allegations said to have led to his resignation were found to have no basis in fact. In the whistleblowing claim, four of the five disclosures were found to have no foundation in fact.

32. The claimant maintained his approach to the proceedings from the start, when he was legally represented, and throughout the hearing itself.

33. In assessing whether such conduct is "unreasonable", taking the everyday meaning, the Tribunal was satisfied that it was. The gravity of the dishonesty is significant, covering most of the substance of both claims, and the effect of that conduct required the respondent to incur time and expense in defending claims which were materially based on the claimant's dishonest account. The claimant maintained his position throughout even when the evidence was clearly against him and in order to explain his position, he accused others of dishonesty and fabrication of evidence.

34. The Tribunal went on to consider whether the claims had no reasonable prospects of success. In his evidence before this hearing, the claimant pointed to the fact that he had taken advice from two sets of solicitors and was told that his claims did have reasonable prospects of success. As Mr Briggs pointed out, had everything the claimant alleged been true, he might well have had reasonable prospects of success. Objectively, therefore, it was only after the evidence had been heard, and the conflicts resolved, that it became clear that the claims had no reasonable prospects of success.

35. As noted above, the claimant sought to argue that the reason for the conflicts in evidence was dishonesty and fabrication on the part of the respondent. The Tribunal concludes that whilst he knew, or ought to have known, that much of what he put forward was not true (which points to unreasonableness), it was not until the conclusion of the evidence that it was objectively clear, and ought then to have become clear to the claimant, that the claims had no reasonable prospects of success given the weight of evidence against him. As such, the Tribunal found that the threshold was met in respect of Rule 74(2)(a) only and not Rule 74(2)(b).

36. The Tribunal moved on to consider whether to exercise its discretion to make an award of expenses.

37. The Tribunal had regard to the fact that the claimant was a litigant in person. He did, however, have the benefit of legal advice from two firms of solicitors. At the hearing itself, he was well prepared and appeared confident in the conduct of the proceedings.

38. The Tribunal was not persuaded by Ms McQuade's submission that the respondent, or the Tribunal, ought to have considered a strike-out of the claims. Both claims were very fact sensitive and in the absence of evidence, strike-out would not have been the appropriate course of action. It had more sympathy with her submission that the expenses warning came late in the process. It was submitted shortly in advance of earlier hearing dates (which were ultimately postponed due to lack of judicial availability). It is nonetheless clear that the claimant, who was at that time legally represented, was made

aware of the possibility of expenses being sought in the event that he continued with his claim.

39. This is not a case where the true position only became clear after cross-examination. In both of the claims, the claimant had the burden of proof and in both he advanced a factual account which in some respects he knew was false. In relation to the suggestion that the claimant sought to resolve the claim extra-judicially, the Tribunal does not criticise the respondent for not engaging in settlement discussions in a case which they considered to be without factual basis.

40. Considering the circumstances as a whole, the gravity of the unreasonableness, the fact that it affected most (but not all) of the components of the claims, the Tribunal considered that a substantial award should be made. It considered it relevant, however, that the expenses warning letter was only issued after most of the fees had been incurred.

41. The Tribunal went on to consider the claimant's ability to pay. As noted above, evidence was led from him on this point. He has a well-paid job. He has a property on which there is a mortgage, and he has savings of approximately £8,000. He has no dependent children. He described his wife as being dependent on him although she is employed and runs a business. He previously partly owned a second property which he sold last year. During the original hearing, he gave evidence that he was required to sell that property in order to raise funds to pay for legal fees. At this hearing, his evidence was that he benefited from the sale only to the tune of approximately £1,000. He also stated that his wife's income from her business was approximately £1,000 per annum. The Tribunal concluded that he had a tendency to minimise his financial position with a view to avoiding an award.

42. The tribunal nonetheless had some concern that the claimant would struggle to meet the expenses as taxed given their scale. He gave evidence of having received loans from his family to pay for legal fees. Having regard to his financial means, and the overall assessment, the Tribunal decided to award £20,000 being the maximum amount available under rule 76(a).

Date sent to parties **19 August 2026**