**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No. 4100709/2025 in chambers at Glasgow on 28 August 2026**

**Employment Judge Campbell**

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| **Mr P Sarkar** | **Claimant**<br>**In Person** |
| **Advice Direct Scotland Limited** | **Respondent**<br>**Represented by**<br>**Ms J Armstrong,**<br>**Solicitor** |

**DECISION OF THE EMPLOYMENT TRIBUNAL**

1. The claimant acted unreasonably by failing to comply with an order of the tribunal as described in the reasons below;
2. As a consequence he is ordered to pay the respondent the sum of £500.00 in compensation for the expenses it incurred.

**WRITTEN REASONS**

**Relevant law**

1. The rules regarding awarding costs or expenses (the terms are interchangeable, the former is used in England and Wales and the latter in

Scotland) are found in Part 13, rules 72 to 82 of the Employment Tribunal Procedure Rules 2024 (the 'Rules'). The terms both indicate amounts charged to a party by their legal representatives – solicitors, advocates or barristers - in connection with the proceedings.

2. Reference to below to 'an order' are to an order for costs or expenses in this way.

3. Unlike in civil litigation generally, a party succeeding in relation to an aspect of an employment tribunal claim, or overall, will not receive an order by default. The tribunal may consider making an order or a party may apply for an order in a number of circumstances.

4. The tribunal must consider whether to make an award if it believes that:
    a. A party or their 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. A claim, response or reply has '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 when the hearing was listed to begin (rule 74(2)).

5. Even in those circumstances, the tribunal is only obliged to consider making an award, not to make an award.

6. A tribunal must however make an award when a final hearing in a claim of unfair dismissal is postponed or adjourned if the claimant indicated that they wished to be reinstated or re-engaged, and the respondent has failed 'without a special reason' to provide evidence about the feasibility of the request.

7. The tribunal cannot make an order until the party claimed against has had a reasonable opportunity to make representations. This may be in writing or at a hearing, as the tribunal considers appropriate.

8. Rule 76 deals with the amount of costs or expenses which can be ordered. In short, the tribunal has power to order up to £20,000 on its own initiative, or that the matter be referred (in Scotland) to taxation, a process undertaken by the auditor of court, normally the Sheriff Court, if a higher figure is sought.

9. The tribunal may consider the ability of a party to pay when deciding either whether to make an order against them or in relation to its amount – rule 82.

10. A body of case law had developed which provides guidance as to when an order may appropriately be made and how the tribunal should approach the exercise.

11. The following principles have emerged in that way:

    a. Orders for costs or expenses are still the exception rather than the rule in employment tribunals. There are good reasons for this, such as to encourage access to justice by those with limited means and to remove any unfair deterrent to those whose employment rights have genuinely been infringed - ***Gee v Shell UK Ltd [2002] EWCA Civ 1479***;
    b. Consideration of whether an order should be made under rule 74(2) involves a two-stage process – first the tribunal should assess whether any of the applicable circumstances arose and then, if so, it should decide whether to exercise its discretion in making an order - ***Robinson v Hall Gregory Recruitment Ltd [2014] IRLR 76***;
    c. Considering that process more closely, the first stage is tested objectively. The second involves a more subjective assessment of the facts and other circumstances which are relevant. Those may differ depending on which type of scenario within rule 74(2) is said to have arisen - ***Radia v Jefferies International Ltd UKEAT/0007/18***;
    d. The onus does not fall on the party against whom an order is sought to justify why it should not be granted – see for example ***Haydar v Pennine Acute NHS Trust UKEAT/0141/17***. If a party applying for an order can satisfy the tribunal that the requirements of the first stage are met, the tribunal should itself consider whether its discretion should be exercised at the second stage;
    e. Those seeking an order have been counselled against relying too heavily on decisions in other cases, as the key provisions are in the tribunal's own rules and the power is highly discretionary - ***FDA v Bhardwaj [2022] EAT 97***;
    f. The fact that a party has been unsuccessful on a point or complaint will not in itself amount to conduct within rule 70(2). Tribunals by their nature resolve disputes of fact or view and often each party will be justified in pursuing its claim or defence given its perspective and other circumstances. Each party's knowledge at the time of acting, and what they ought to have known, will be relevant and this may be different from what can be appreciated at the time of an application for costs with the benefit of hindsight - ***Radia***;
    g. This may particularly apply to claimants pursuing discrimination complaints, as it is recognised that there is often a lack of tangible evidence of unlawful behaviour and claims may need to be brought on

the basis of inferences that are to be drawn - ***Saka v Fitzroy Robinson Ltd UKEAT/0241/00***.

**The respondent's application**

12. The respondent made its application by email dated 15 January 2026 (referred to below as 'the application'). The application was held in abeyance because at the same time the claimant appealed against the tribunal's judgment disposing of his claim to the Employment Appeal Tribunal and it was decided that the appeal should run its course first. By letter dated 24 July 2026 the EAT confirmed that the appeal would not be actioned further.

13. Following that, the claimant explained his position in opposition to the application by email dated 6 August 2026 which had attached to it a three-page note of more detailed grounds (referred to below as his 'response' to the application). Both parties' documents were considered carefully.

14. The application was made under rule 74 of the Rules. It was put forward on two bases – that the claimant had conducted his case 'unreasonably' and/or 'vexatiously' under rule 74(2)(a) and that it had 'no reasonable prospect of success' under rule 74(2)(b). Each is considered in turn below.

*Rule 74(2)(a)*

15. The respondent argued that the claimant acted vexatiously or otherwise unreasonably when he made nine separate applications for disclosure of documents, many of which were said to have been ill-conceived, repetitive and spanning numerous pages. The respondent had to reply to each, even though that involved at times restating points previously made clear.

16. The respondent also referred to the claimant seeking to lodge new documents on the first day of the preliminary hearing to determine whether he had made protected disclosures, despite a case management order which required him to send documents he wished to rely on to the respondent no later than three weeks before. The claimant said that he had hoped the respondent would produce those documents voluntarily as he had requested them as part of his disclosure order applications. The respondent therefore concluded that the claimant had wasted its time and money in first seeking an order for disclosure at least in part to cover documents which he already had, and then by seemingly withholding documents of his own until the first day of the hearing. The respondent raised that the start of the hearing was delayed until the following day in order that the respondent could consider the new documents he wished to introduce. It was claimed that the respondent

had to incur costs directly as a result, as the issues could not be determined within that listing and new dates had to be allocated. Two days were added to the original three.

17. From the tribunal's case file it could be seen that the claimant first made an application for disclosure of documents on 26 May 2025 and that it was also referred to in his case management agenda lodged around 30 May 2025. At the case management hearing on 13 June 2025 it was raised and the judge noted that the respondent's solicitor could and would send him an email chain, which she had on file, and that the claimant would send her a list of other documents he sought. It is presumed those were as contained in his original application of 26 May 2025, given the proximity in time. The judge said he could make an application for a disclosure order if he did not receive the documents he sought voluntarily.

18. The claimant made a further disclosure order application on 4 July 2025. It appeared to overlap substantially with the original application. The respondent's solicitors replied on 15 July 2025. They argued that documents requested were irrelevant in terms of their content, for example because they were evidence of agreed matters, or were irrelevant to the question of whether any protected disclosures had been made. They also said some other documents requested had already been disclosed and others still did not exist. As requested by the tribunal the claimant provided comments on this by email dated 21 July 2025.

19. The above exchanges led to a preliminary hearing being scheduled for 18 August 2025 to determine whether a documents order should be issued. Judge Eccles decided that the application should be granted in part, namely in respect of the first two of four categories of documents sought, and on certain conditions, for example that documents genuinely existed and had not been deleted or otherwise rendered beyond recovery. The respondent provided documents under the order on 4 September 2025.

20. On 1 and again on 11 September 2025 the claimant emailed the respondent's solicitors further, copying in the tribunal, to acknowledge receipt of the documents disclosed but also to request further documents. In between the respondent's solicitors explained the approach they took to complying with the orders of Judge Eccles. They said why they had confirmed some requested documents did not exist or were irrecoverable. They signed off by asking the claimant to consider the 'significant expense' the respondent had incurred 'as a result of this dialogue'. It was added that the claimant's refusal to accept the respondent's position as well as that of the tribunal was causing the respondent to incur further costs.

21. The second of the claimant's emails is not easy to follow. It appears to ask also for some documents previously requested but in a different format. It states that the claimant did not believe that some documents had been deleted as the respondent had said. His position appeared to be that a search had not been conducted in the correct way, rather than to suggest the respondent was being dishonest. The claimant sought further direction from the tribunal, particularly an order that the respondent preserve and not further destroy any documents.

22. In response to a request from the tribunal the respondent's solicitors provided further comments on 16 September 2025. They said the claimant was asking for additional documents in new areas and appeared to be 'undertaking a fishing expedition' to expand his claim. They made an additional point that given the claimant had been employed in a senior IT role he should appreciate why the respondent was saying certain documents did not exist or were now beyond retrieval. They added that some of the new items requested could self-evidently not support his originally claimed disclosures. They finished by saying that the respondent had accrued and was continuing to accrue costs, and that it reserved its position on expenses on account of the claimant's continued correspondence.

23. The next day the claimant emailed further to say that he was narrowing down his earlier request for a documents order. The respondent's solicitors said on 25 September 2025 that documents could not be found when following the instructions the claimant had provided for locating them, and that there were no further comments to provide. Here the correspondence appeared to cease and the preliminary hearing commenced on 20 October 2025.

24. As detailed in the judgment which followed, the claimant provided a supplementary bundle of documents on the morning of the first day of a three-day hearing and that required the start of the hearing to be postponed to the following day to allow the respondent to provide instructions and its advisors to review the documents and their defence in light of them. The hearing could not be completed in the remaining two days (21 and 22 October) and two further days were listed.

25. Returning to the specifics of the application, the respondent's frustration at the claimant seemingly repeatedly asking for documents is both clear and to a degree understandable. The situation however is not as clear-cut as to say that the claimant ignored altogether what he had been told. There is a degree of identifiable concern on the claimant's part that documents helpful to his case were not being provided or could be lost. This appears to at least partly

account for his vigour in sending multiple emails on the subject. He appeared – genuinely – to think that some items which the respondent found to be irrecoverable were capable of being located should the right process be followed. He was not disingenuous, albeit he may have been mistaken, when he maintained that documents which were hyperlinked to his emails could be retrieved from somewhere in the respondent's IT system.

26. The claimant's conduct in this sense was not vexatious. There was no evidence of an improper motive and the claimant's correspondence, whilst repetitive, did not cross over to become entirely unreasonable in the context of his claim, what he was seeking and the fact that he was an unrepresented claimant.

27. The test of what is unreasonable tends to involve a lower standard. Some, but not all of the claimant's conduct as complained about could be categorised as unreasonable in the sense that it was not sensible or indicative of good judgment for him to repeatedly ask for some of the documents which were plainly described as not capable of being produced, nor to expand his request for documents into other areas that had no clear bearing on his legal complaint. In saying this, equally it is recognised that the claimant attempted to narrow the scope of his request upon the respondent's objection to his doing so.

28. If, then, those actions could be considered unreasonable it had to be decided, as the second stage of the exercise, whether it was appropriate for the tribunal to exercise its discretion and declare that an award of expenses should be made. In this case, that is not deemed appropriate to do. This is particularly because the claimant was unrepresented, that he genuinely (however mistakenly) believed that he knew how to retrieve documents where others had been unable to, and that he feared that those documents would therefore not be produced or even be deleted with the passing of time. He made all these points in his response to the application. From the respondent's perspective those might have seemed untenable beliefs, but the claimant's own state of knowledge, as well as level (or lack) of experience of litigation are also relevant and count against an award being equitable.

29. Considering the **second aspect** of the application under rule 74(2)(a), namely the claimant's late production of documents and the consequences for the originally listed hearing, the respondent's argument merits more sympathy. The claimant was ordered in clear terms to provide all documents he wished to rely on to the respondent in good time before the hearing. He did not do so. He explained in his response that he obtained the documents from the Scottish Government after the deadline for disclosure had passed,

that he had asked the respondent generally what he should do with documents whose inclusion in the joint bundle was 'disputed' and that he was told he should just bring them separately to the hearing.

30. Despite this the claimant gave no warning at all that he had further documents to produce. The new items he had received from the Scottish Government were not 'disputed' documents – i.e. documents the respondent already knew about but did not agree should belong in the bundle. These were completely new documents and ones which the claimant clearly believed were central to his case. Yet he did not even tell the respondent he had received them. That alone was an inexplicable default, but to compound the issue, the late production of those documents caused a hearing day to be lost.

31. In the event two further hearing days were required to determine the preliminary issue in question. The claimant was correct to say that he was not responsible for all of that additional time being needed, as it was caused overall by a number of other factors as well, such as the time taken – by choice – in cross-examining the claimant by the respondent's counsel and the time which reasonably would have been taken in any event to hear from the respondent's two witnesses –leading them also being a choice made by the respondent. However, one hearing day was immediately lost as a direct consequence of the claimant's failure to comply with a case management order. This was unreasonable conduct and unlike his position in relation to seeking recovery of documents, it was not understandable nor was it excusable that he should act as he did. At the end of the day, a claimant has to carry out the minimum steps required to allow the tribunal to determine their claim. Part of that is following simple case management orders issued by the tribunal. Those are not merely suggestions, but carefully considered directions to the parties to best ensure the efficient and fair determination of the claim. The order was designed to avoid precisely the situation which arose. In relation to a hearing on whether protected disclosures were made the onus was squarely on the claimant to provide to the respondent the documents which were in his possession and which he wished to rely on in relation to that question.

32. It is therefore found that the claimant acted unreasonably in not disclosing or even referring to documents which he intended to rely on, at the same time as asking or expecting the respondent to provide them, on an issue where he bore the onus of proving the state of affairs which the documents were intended to support. Considering that part of the hearing was lost and expense was needlessly incurred – by the respondent and also by the tribunal in terms of the knock-on effect for other claims awaiting listing - this is deemed

the measure of the default in terms of an award of expenses which it is appropriate to make.

33. The respondent does not itemise the costs said to have been incurred by the claimant's conduct complained of. Only a global figure was provided. That may be the overall cost of defending the claim to the point of the preliminary hearing, all of which if so would clearly not have been occasioned by the claimant's unreasonable conduct. It is difficult to say what would have alternatively happened had the claimant disclosed his new documents when he received them. The hearing would have begun on the first day as planned, but it would have been extended for other reasons in any event. Given the relatively self-contained nature of the culpable element and its consequences, as best can be evaluated this resulted in the loss of half of a hearing day. An award of £500 is made in respect of the legal costs deemed to correspond to this.

*Rule 74(2)(b)*

34. The second strand to the respondent's application was that the claim was pursued despite having no reasonable prospect of success.

35. This part can be dealt with more concisely. It was not the case that the claim had no reasonable prospect of success. Although it was ultimately unsuccessful, that was not so obvious before the tribunal's decision that the claimant should have been aware and refrained from pursuing it, or ceased with it once it was underway. The tribunal found that in at least some respect he had a genuine belief that what he was communicating was wrongful in some way. The test of what is protected is technical, evidenced by the body of case law which has grown around the statutory provisions, involving applying a sequence of tests or questions in the correct order. The IT- and industry-specific nature of the alleged disclosures and their surrounding circumstances also added a layer of complexity to the claim.

36. The claim, certainly some parts of it, may have had low prospects of success but the test is whether there was no reasonable prospect at all. The claimant did not have the benefit of hindsight. Based on what he knew, this fairly demanding test was not met.

*Conclusion*

37. The first element of the application is successful in part as described above. The second is not. An appropriate sum is awarded which the claimant is ordered to pay to the respondent.

**Date sent to Parties** 09 September 2026