EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000503/2026

Consideration of Written Submissions in Edinburgh on 31 August 2026

Employment Judge Sangster

Mr S Donaldson **Claimant**

Bosch Rexroth Limited **Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant is ordered to pay the respondent the sum of Six Hundred Pounds (£600) in respect of expenses.

REASONS

Introduction

1. This judgment is issued following consideration of the respondent's application for expenses, made after the Tribunal determined, at a preliminary hearing on 15 July 2026, that it did not have jurisdiction to hear the claimant's claim.

2. The claimant's claim included a complaint of breach of contract only. He confirmed that at the commencement of the preliminary hearing on 15 July 2026, and had previously done so in correspondence dated 2 April 2026. The breach asserted was of the implied duty of trust and confidence. The claimant remains employed by the respondent.

The Application & Response

3. The respondent's application for expenses, dated 17 July 2026, was made under rule 74(2)(a) and (b) of the Employment Tribunal Procedure Rules 2024

(the **Rules**). They set out the basis for the application in their written application, which extended to 3 typed pages, plus a 4 page appendix. They sought the sum of £1,777.80 as expenses. They asserted, in summary, that:

3.1. The claimant acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing/conducting the proceedings; and

3.2. The claim had no reasonable prospects of success.

4. The claimant objected to the respondent's application in correspondence dated 21 July 2026.

Relevant Law

5. Rule 73(1) states that an expenses order is an order that a party make a payment to the other party in respect of expenses incurred while legally represented. Expenses are defined, in Rule 2, as being fees, charges, disbursements or expenses incurred by or on behalf of a party.

6. As the Court of Appeal reiterated in ***Yerrakalva v Barnsley Metropolitan Borough Council*** 2012 ICR 420, CA, costs (referred to as expenses in Scotland) in the Employment Tribunal are still the exception rather than the rule. It commented that the Tribunal's power to order costs is more sparingly exercised and is more circumscribed than that of the ordinary courts. In most cases the Employment Tribunal does not make any order for costs against the unsuccessful party. In ***Salinas v Bear Stearns International Holdings Inc*** 2005 ICR 1117, EAT, Mr Justice Burton, then President of the EAT, expressed the view that the reason why costs orders are not made in the substantial majority of Tribunal cases is that the Rules contain a high hurdle to be surmounted before such an order will be considered.

7. Under Rule 74(2), a Tribunal must consider whether to make an expenses order where it considers that (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing or conducting of proceedings (or part thereof), or where any claim, response or reply had no reasonable prospect of success.

8. The Rules accordingly impose a three-stage test:

8.1. The Tribunal must ask itself whether a party's conduct falls within Rule 74(2)— in other words, is the expenses jurisdiction engaged;

8.2. If so, it must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding expenses against that party; and

8.3. If so, the Tribunal must make a determination of the amount of any award.

Stage 1. Is the ground established?

9. First the Tribunal must consider whether the ground asserted is established, for example unreasonable conduct.

10. In determining whether a party has acted unreasonably in the bringing or conducting of proceedings (or part thereof), allowance should be made for the lack of experience and objectivity of a litigant in person. In assessing whether there has been unreasonable conduct the Tribunal should take into account the nature, gravity and effect of the conduct (***McPherson v BNP Paribas (London Branch)*** 2004 ICR 1398, Court of Appeal).

Stage 2 – Should the discretion be exercised?

11. If the Tribunal considers that one of the grounds is established, it must then consider whether it is appropriate to exercise its discretion in favour of making an expenses or preparation time order. That discretion should be exercised having regard to all the circumstances.

12. The following factors may be relevant to, but not solely determinative of, that exercise of discretion: the awards are exceptional – expenses and preparation time orders do not automatically follow the outcome, and are not made in the substantial majority of Tribunal cases; their purpose is to compensate the party who incurred the costs and not to punish the paying party; whether or not a party had professional representation; and ability to pay.

13. The vital point in exercising the discretion is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct, to identify the conduct, what was unreasonable about it, and what effects it had. (***Yerrakalva***).

Stage 3 - The amount of the expenses order?

14. If one of the grounds is established, and if the Tribunal consider it is appropriate to exercise its discretion in favour of making an expenses order, the Tribunal must consider the amount of that order. Under Rule 76, a Tribunal may order payment of unassessed expenses of up to £20,000; taxed (i.e. assessed) expenses; or agreed expenses.

15. Under Rule 82 in deciding whether to make an expenses order, and if so, in what amount, the Tribunal may have regard to the paying party's ability to pay.

16. Expenses should not exceed those reasonably and necessarily incurred, having regard to the effect of the unreasonable conduct and the expenses attributable to the unreasonable conduct identified (***Yerrakalva***).

Discussion and Decision

17. The respondent asserted that the claimant's claim had no reasonable prospects of success, and the claimant accordingly acted unreasonably in bringing the claim and continuing with his claim after correspondence from the respondent, highlighting jurisdictional defects in the claim.

18. The Tribunal noted that, in ***Opalkova v Acquire Care Ltd*** [2021] 8 WLUK 265, HHJ Tayler noted (with reference to ***Radia v Jefferies International*** [2020] IRLR 431) that there was an overlap between a claim or response having no reasonable prospect of success and unreasonable conduct in the conduct of proceedings and concluded, at paragraphs 24-25, that there are 3 key questions to be asked in such cases:

> *'First, objectively analysed when the response 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 response ceased to have reasonable prospects of success? Second, at the stage that the response had no reasonable prospects of success did the respondent know that was the case? Third, if not, should the respondent have known that the response had no reasonable prospect of success?*
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> *These questions are relevant whether the matter is analysed on the basis that the response had no reasonable prospects of success or that the respondent was guilty of unreasonable conduct in defending or maintaining the defence to the claims.'*

19. The Tribunal considered whether, objectively analysed, when the claim was submitted, or at a later stage in proceedings, the claim had no reasonable prospects of success. The Tribunal concluded that the claim had no reasonable prospects of success when the claim was submitted on 3 March 2026. The Tribunal concluded however that the claimant did not know that was the case at that time: he is a litigant in person who felt aggrieved and understood that a claim to the Employment Tribunal was the appropriate route to address this. On 15 April 2026 however the respondent wrote to the claimant. In their correspondence, they set out why they believed the claimant's claim had no reasonable prospects. Within their correspondence, which extends to a full page when printed, they stated in terms *'A breach of contract claim can only be raised by an employee after the termination of the employee's employment, as per Art. 3 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 and s.3 of the Employment Tribunals Act 1996. Your claim for breach of contract while you are still employed is not therefore legally competent*.' The respondent went on to refer to previous correspondence of 2 April 2026 where they had previously indicated this to

the claimant, stating that he had responded 14 minutes later indicating that he felt his claim was competent. They highlighted that the claimant appeared to be using AI to draft his correspondence, but '*appear not to be understanding the legal principles underpinning your claim.*' They urged him to consider his position and what they had stated, and invited him to withdraw his claim, indicating that they would not seek expenses against him if he did so on or before 20 April 2026. The claimant responded the following day stating that he did not intend to withdraw his claim. He reiterated the factual circumstances he relied on in his claim for breach of contract, stating that *'whether those facts give rise to a competent breach of contract claim within the Tribunal's jurisdiction under the 1994 Order is a matter for the Employment Judge to determine at the Open Preliminary Hearing on 15 July 2026, having heard from both parties.'* The Tribunal concluded that, as at 16 April 2026, the claimant should have known that his claim had no prospects of success. The respondent had clearly set out their position. Had the claimant engaged with that, or investigated the position as set out by the respondent, it would have been clear to him, at that stage, that his complaint of breach of contract did not have reasonable prospects of success. It was unreasonable for him to continue with his claim thereafter.

20. The Tribunal then considered whether it was appropriate to exercise its discretion in favour of making an expenses order. The Tribunal noted that the claimant did not have the benefit of professional representation. Notwithstanding this, the Tribunal concluded that it was appropriate to exercise its discretion in this case, given all the circumstances of the case. In relation to the claimant's ability to pay, he was asked to ensure that his submissions addressed this. His submission simply stated that he has *'no disposable income and I am currently in a Debt Arrangement Scheme. Any expenses order would cause serious financial hardship.'* No further details of the debt arrangement scheme, or of income/ expenditure, were provided. The Tribunal noted from the ET1 & ET3 forms that it was agreed that the claimant, who remains employed by the respondent, earns £703 gross per week.

21. The respondent sought an award of expenses in the sum of £1,777.80. This was not reflective of time spent, as they pay an annual membership fee for member services to Scottish Engineering only. Their membership services include employment law support. The sum sought was 10% of the annual fee, and was estimated based on the costs which would have been incurred by the respondent in a private arrangement. The Tribunal accepts however the principles laid down in ***Mardner v Gardner and another*** UKEAT/0483/13, namely the fact that a receiving party has the benefit of legal expenses insurance is an irrelevant consideration. It has accordingly been discounted.

22. On balance, taking into account all the circumstances including the claimant's statements about his financial position, it is considered appropriate to make an expenses order in sum of £600. This is based on time spent since 16 April 2026, estimated to be an hour of preparation and an hour for attending the hearing, at £300 per hour. If the claimant considers that he is unable to pay this sum, he can apply for reconsideration of this judgment, providing full details of his income and expenditure and assets, to enable the Tribunal to fully and properly assess his ability to pay.

Date sent to parties **01 October 2026**