

SCHEDULE 1

THE EMPLOYMENT TRIBUNALS RULES OF PROCEDURE

COSTS ORDERS AND ORDERS FOR EXPENSES

General power to make costs and expenses orders

38.—(1) Subject to paragraph (2) and in the circumstances listed in rules 39, 40 and 47 a tribunal or chairman may make an order (“a costs order”) that —

- (a) a party (“the paying party”) make a payment in respect of the costs incurred by another party (“the receiving party”);
- (b) the paying party pay to the Secretary of State, in whole or in part, any allowances (other than allowances paid to members of tribunals) paid by the Secretary of State under section 5(2) or (3) of the Employment Tribunals Act to any person for the purposes of, or in connection with, that person’s attendance at the tribunal.

(2) A costs order may be made under rules 39, 40 and 47 only where the receiving party has been legally represented at the Hearing or, in proceedings which are determined without a Hearing, if the receiving party is legally represented when the proceedings are determined. If the receiving party has not been so legally represented a tribunal may make a preparation time order (subject to rules 42 to 45). (See rule 46 on the restriction on making a costs order and a preparation time order in the same proceedings.)

(3) For the purposes of these rules “costs” shall mean fees, charges, disbursements or expenses incurred by or on behalf of a party, in relation to the proceedings. In Scotland all references to costs (except when used in the expression “wasted costs”) or costs orders shall be read as references to expenses or orders for expenses.

(4) A costs order may be made against or in favour of a respondent who has not had a response accepted in the proceedings in relation to the conduct of any part which he has taken in the proceedings.

(5) In these rules legally represented means having the assistance of a person (including where that person is the receiving party’s employee) who —

- (a) has a general qualification within the meaning of section 71 of the Courts and Legal Services Act 1990⁽¹⁾;
- (b) is an advocate or solicitor in Scotland; or
- (c) is a member of the Bar of Northern Ireland or a solicitor of the Supreme Court of Northern Ireland.

(6) Any costs order made under rules 39, 40 or 47 shall be payable by the paying party and not his representative.

(7) A party may apply for a costs order to be made at any time during the proceedings. An application may be made at the end of a hearing, or in writing to the Employment Tribunal Office. An application for costs which is received by the Employment Tribunal Office later than 28 days from the issuing of the judgment determining the claim shall not be accepted or considered by a tribunal or chairman unless it or he considers that it is in the interests of justice to do so.

(8) In paragraph (7), the date of issuing of the judgment determining the claim shall be either —

- (a) the date of the Hearing if the judgment was issued orally; or

(1) 1990 c. 41.

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(b) if the judgment was reserved, the date on which the written judgment was sent to the parties.

(9) No costs order shall be made unless the Secretary has sent notice to the party against whom the order may be made giving him the opportunity to give reasons why the order should not be made. This paragraph shall not be taken to require the Secretary to send notice to that party if the party has been given an opportunity to give reasons orally to the chairman or tribunal as to why the order should not be made.

(10) Where a tribunal or chairman makes a costs order it or he shall provide written reasons for doing so if a request for written reasons is made within 14 days of the date of the costs order. The Secretary shall send a copy of the written reasons to all parties to the proceedings.

When a costs or expenses order must be made

39.—(1) Subject to rule 38(2), a tribunal must make a costs order against a respondent where in proceedings for unfair dismissal a Hearing has been postponed or adjourned and —

- (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.

(2) A costs order made under paragraph (1) shall relate to any costs incurred as a result of the postponement or adjournment of the Hearing.

When a costs or expenses order may be made

40.—(1) A tribunal or chairman may make a costs order when on the application of a party it has postponed the day or time fixed for or adjourned a Hearing or pre-hearing review. The costs order may be against or, as the case may require, in favour of that party as respects any costs incurred or any allowances paid as a result of the postponement or adjournment.

(2) A tribunal or chairman shall consider making a costs order against a paying party where, in the opinion of the tribunal or chairman (as the case may be), any of the circumstances in paragraph (3) apply. Having so considered, the tribunal or chairman may make a costs order against the paying party if it or he considers it appropriate to do so.

(3) The circumstances referred to in paragraph (2) are where the paying party has in bringing the proceedings, or he or his representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by the paying party has been misconceived.

(4) A tribunal or chairman may make a costs order against a party who has not complied with an order or practice direction.

The amount of a costs or expenses order

41.—(1) The amount of a costs order against the paying party shall be determined in any of the following ways —

- (a) the tribunal may specify the sum which the paying party must pay to the receiving party, provided that sum does not exceed £10,000;
- (b) the parties may agree on a sum to be paid by the paying party to the receiving party and if they do so the costs order shall be for the sum so agreed;
- (c) the tribunal may 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 by way

of detailed assessment in a County Court in accordance with the Civil Procedure Rules 1998(2) or, in Scotland, as taxed according to such part of the table of fees prescribed for proceedings in the sheriff court as shall be directed by the order.

(2) The tribunal or chairman may have regard to the paying party's ability to pay when considering whether it or he shall make a costs order or how much that order should be.

(3) For the avoidance of doubt, the amount of a costs order made under paragraphs (1)(b) or (c) may exceed £10,000.