

## SCHEDULE 1

### THE INDUSTRIAL TRIBUNALS AND FAIR EMPLOYMENT TRIBUNAL RULES OF PROCEDURE 2020

## PART 13

### COSTS, PREPARATION TIME AND WASTED COSTS ORDERS

#### **Definitions**

71.—(1) “Costs” means fees, charges, disbursements or expenses (other than expenses that witnesses incur for the purpose of, or in connection with, attendance at a tribunal hearing) incurred by or on behalf of a party (“the receiving party”).

(2) “Legally represented” means having the assistance of a person (including where that person is the receiving party’s employee) who—

- (a) is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland;
- (b) 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; or
- (c) is an advocate or solicitor in Scotland.

(3) “Preparation time” means time spent by a party (“the receiving party”) (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

(4) “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**

72.—(1) A costs order is an order that a party (“the paying party”) make a payment to the receiving party in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative.

(2) A preparation time order is an order that a party (“the paying party”) make a payment to the receiving party in respect of the receiving party’s preparation time while not legally represented or while not represented by a lay representative.

(3) A costs order 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**

73.—(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) all or part of any claim or response had no reasonable prospect of success.

(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.

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(3) A tribunal may make such an order against a respondent who has not had a response accepted in the proceedings in relation to the conduct of any part which the respondent has taken in the proceedings.

(4) 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.

### **Procedure**

74. 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**

75.—(1) A costs order may—

- (a) order the paying party to pay the receiving party a specified amount, not exceeding £10,000, 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 accordance with such of the scales prescribed by county court rules for proceedings in the county court as shall be directed by the order; or
- (c) 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 76(2).

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

### **The amount of a preparation time order**

76.—(1) The tribunal shall decide the number of hours in respect of which a preparation time order should be made, on the basis of—

- (a) information provided by the receiving party on time spent falling within rule 72(2); and
- (b) the tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required.

(2) The hourly rate is £39 and increases on 6 April each year by £1.

(3) The amount of a preparation time order shall be the product of the number of hours assessed under paragraph (1) and the rate under paragraph (2).

### **When a wasted costs order may be made**

77.—(1) A tribunal may make a wasted costs order against a representative in favour of any party (“the receiving party”) where that party has incurred costs (“wasted costs”)—

- (a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or
- (b) which, in the light of any such act or omission occurring after they were incurred, the tribunal considers it unreasonable to expect the receiving party to pay.

(2) “Representative” means a party’s legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings.

(3) A wasted costs order—

- (a) may be made in favour of a party whether or not that party is legally represented;
- (b) may be made in favour of a representative’s own client;
- (c) may not be made against a representative where that representative is representing a party in his or her capacity as an employee of that party.

### **Effect of a wasted costs order**

78. A wasted costs order may—

- (a) order the representative to pay the whole or part of any wasted costs of the receiving party;
- (b) disallow any wasted costs that, but for the order, would be payable to the representative;
- (c) order that the representative repay to its client any costs which have already been paid;

and the amount to be paid, disallowed or repaid must in each case be specified in the order.

### **Procedure for making a wasted costs order**

79.—(1) A wasted costs order may be made by the tribunal on its own initiative or on the application of any party.

(2) A party may apply for a wasted costs order at any stage up to 28 days after the date on which the judgment finally determining the proceedings as against that party was sent to the parties.

(3) No such order shall be made unless the representative has had a reasonable opportunity to make representations (in writing or at a hearing, as the tribunal may order) in response to the application or proposal.

(4) The Secretary shall inform the representative’s client in writing of any proceedings under this rule and of any order made against the representative.

### **Allowances**

80. Where the tribunal makes a costs, preparation time, or wasted costs order, it may also make an order that the paying party (or, where a wasted costs order is made, the representative) pay to the Department, in whole or in part, any allowances (other than allowances paid to members of the tribunal) paid by the Department under Article 7(2) or (3) of the Industrial Tribunals Order or Article 83 of the Fair Employment and Treatment Order to any person for the purposes of, or in connection with, that person’s attendance at the tribunal.

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### **Ability to pay**

81. 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.