



TC04190

Appeal number: TC/2013/06299

*PROCEDURE – Tribunal Procedure (First-tier Tribunal) (Tax Chamber)
Rules 2009, rule 16(2)(b) – witness summons - guidance on “necessary
expenses of attendance”*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**ABBAY FORWARDING LTD
(in liquidation)**

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE & CUSTOMS**

TRIBUNAL: JUDGE ROGER BERNER

**Sitting in chambers at The Royal Courts of Justice, Strand, London WC2 on 15
December 2014**

NOTE

1. I am asked to give guidance on the appropriate level of provision to be made for
5 the necessary expenses of the witness, Ms Louise Brittain, in respect of whom I
directed, by my decision released on 30 October 2014 [2014] UKFTT 998 (TC), that a
witness summons be issued.

2. Although this is a somewhat unusual request, it is one that I am prepared to deal
with. It is made in the context of existing proceedings, and the determination that I
10 made that a witness summons be issued, and that the appellant should secure the
necessary expenses of the witness in a manner approved by the tribunal. I therefore
regard the giving of guidance in this respect as within the scope of the tribunal's
normal case management powers.

3. Under rule 16(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber)
15 Rules 2009 ("the Tribunal Rules"), it is a requirement that a witness summons make
provision for the proposed witness' "necessary expenses of attendance" to be paid,
and state who is to pay them. The Tribunal Rules are silent as to the ascertainment of
what are "necessary expenses of attendance". There is no practice direction or
practice statement of the tribunal dealing with the question.

20 4. Assistance may be derived, however, from the practice in other courts. As is
apparent from such practice, there is benefit in a certain uniformity of practice in this
area, and there would need to be a good reason for this tribunal to depart from what is
the norm in other courts.

5. In the High Court, the position is governed by rule 34.7 of the Civil Procedure
25 Rules 1998 ("CPR"). The rule provides that at the time of service of a witness
summons the witness must be offered or paid (a) a sum reasonably sufficient to cover
his expenses in travelling to and from the court; and (b) such sum by way of
compensation for loss of time as may be specified in the relevant practice direction.

6. Rule 34.7 CPR is, of course, expressed differently to the provision in rule 16(2)
30 of the Tribunal Rules. The relevant expenses to be provided are in the latter case not
specified in the two separate ways set out in rule 34.7. Nor, on the other hand, is there
in rule 16(2) any reference to specific expenses, such as travelling expenses and
compensation for loss of time.

7. Although it would be possible for a narrow construction to be given to the word
35 "expenses", so as to cover only out-of-pocket disbursements, that would not in my
view be a proper approach in the context of a witness summons. It is well-recognised,
in other courts where a witness summons may be issued, that an individual subject to
such a summons may be put to financial loss or expense apart from out-of-pocket
costs. Too narrow a construction of "expenses" in this context would result in the
40 tribunal taking an approach inconsistent with that generally adopted in the judicial
system. That cannot have been the purpose of the drafters of the Tribunal Rules.

8. Adopting a purposive construction, therefore, I take the view that an expense in this context is not confined to out-of pocket expenses. An expense may equally be incurred if a person suffers financial loss as a direct consequence of appearing, by summons, as a witness. If such a loss is necessarily incurred, it will in my view (and
5 subject to the limitations I will discuss below) properly fall within the meaning of the term “necessary expenses of attendance”.

9. On the other hand, there are limitations to the extent such a financial loss may be required to be provided for. The first is that the loss, or expense, can only be that incurred by the witness himself or herself. It does not encompass loss to any other
10 person, including an employer or the business partners of the witness. Accordingly, it is not appropriate for such losses or expenses to be calculated by reference to the hourly charging rates of a witness whose billings will be reflected in company or partnership accounts, except to the extent that loss or expense in that respect falls directly on the witness. It is only actual financial loss of the witness individually that
15 can fall within the term “necessary expenses of attendance”.

10. Secondly, that term cannot be purposively construed so as to result in any element of expense that is attributable to compensate for loss of time to exceed in the tribunal what would be required to be provided in the case of a witness summons in the High Court. Rule 34.7 CPR in this regard refers to Practice Direction 34A PD.1,
20 para 3.3, by virtue of which the relevant sums to be provided in the High Court for loss of earnings or benefit is based on the sums payable to witnesses in the Crown Court (an example of the uniform approach I referred to earlier). It is, accordingly, only those sums that can be regarded as “necessary” expenses for the purpose of rule 16(2) of the Tribunal Rules.

11. It appears that the current position in this regard is governed by the Guide to Allowances under Part V of the Costs in Criminal Cases (General) Regulations 1986 (“the Guide”) published by the Ministry of Justice, Criminal Remuneration Branch in June 2007. According to that guidance, in the case of a professional witness (which is the case for Ms Brittain), unless the witness necessarily incurs expense in the
30 provision of a professional person (a locum) to take care of a practice during a period of absence, for which a different scale applies (see paras 3.3 and 3.4 of the Guide), the maximum amounts of allowance depend on the period of absence and are set out in Appendix 1 to the Guide, at para (a) under the heading “Regulation 19”.

12. On the basis of the Guide, and assuming (in accordance with the assumption in the letter from Pinsent Masons – acting for Ms Brittain – to Banks Kelly – for the appellant – of 12 November 2014) that Ms Brittain is engaged for five hours, the maximum amount of allowance in respect of loss of time is £174. To that would need to be added travelling expenses, in which regard I note that Pinsent Masons have confirmed, in their letter of 12 November 2014, that £100 would be sufficient to cover
40 such costs.

13. Accordingly, the guidance I give to the parties is that rule 16(2)(b) of the Tribunal Rules will be satisfied if provision is made by the appellant for the necessary expenses of attendance of Ms Brittain as a witness in the sum of £274.

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**ROGER BERNER
TRIBUNAL JUDGE**

RELEASE DATE: 16 December 2014

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