Appeal No. UKEATS/0039/13/SM
UKEATS/0027/14/SM

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 18 March 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MS JENNIFER BRADBURN & 5 OTHERS — APPELLANTS

STRATHCLYDE JOINT POLICE BOARD SUB NOM SCOTTISH POLICE AUTHORITY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR R BRADLEY (of Counsel) Instructed by: Fox and Partners 15 – 19 York Place Edinburgh EH1 3EB
For the Respondent	MS L MARSH (Advocate) Instructed by: Scottish Police Authority Legal Services Department Nelson Street Aberdeen AB24 5EQ

SUMMARY

PRACTICE AND PROCEDURE

PRACTICE AND PROCEDURE - Preliminary issues

Jurisdiction - Dispute resolution procedures

The six Claimants worked in a unionised office. In 2008, several of their colleagues raised a grievance which included complaints about not having being paid night-shift premium, a failure which had been ongoing since the office opened in 2005. A claim was not made until 2011, after continuation of the same series of deductions. If one had been made before 5 April 2009, the dispute resolution procedures under the **Employment Act 2002** would have been mandatory. As it was, the transitional provisions applied. At a first hearing it was accordingly held that because none of the six were named in their colleagues' collective grievance, the Employment Tribunal had no jurisdiction to hear any part of the claim. After appeal to the Employment Appeal Tribunal, the matter was remitted to the Employment Tribunal to decide if the Claimants had been party to the grievance within the meaning of the transitional provisions and dispute procedure regulations. At that, the Employment Tribunal decided that the grievance had been one presented by a trade union representative on behalf of those making it, and that the Claimants were party to it. He held that the collective grievance fell within the regulations, and that to suggest that the Claimants were not party to it was to take an unduly technical approach. Since it was common ground that no Claimant had been named or identified in the grievance, nor had any signed it, there was no adequate basis to hold that any was a party to it. Since the dispute resolution procedures had been abolished, and the transactional provisions did not apply to render them applicable to the Claimants' cases (since the Claimants had not been a party to any grievance which fell within the regulations prior to 5 April 2009), the post April 2009 law applied, and there was no jurisdictional bar to the claims proceeding. The appeals were allowed, though it was accepted that it remained open to the Respondent to argue that insofar as the claims related to underpayments prior to 5 April 2009, they might be barred for failure then to comply with the dispute resolution procedures.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. Customer service centres were established by the Respondent, then the Strathclyde Joint Police Board, in May 2005. In 2008 the Customer Services Representatives in Govan and in Motherwell working in those centres were unhappy that other employees of whom they knew, who worked unsocial hours, as they did, had not been paid extra for doing this. Many of them joined together in complaining in writing about it. They still were not paid. So they started proceedings at an Employment Tribunal in Glasgow. That was on 11 February 2011. Their claims covered the period going right back to the start of the Customer Service Centres. In some cases employees had worked the whole six years. Others had worked for shorter periods. Their claims were not out of time because the deductions of which they complained under section 23 of the **Employment Rights Act 1996** formed part of a series of similar deductions, but the dates are important.

2. For claims brought while the dispute resolution procedures under the notorious **Employment Act 2002** were in force, a claim had first to comply with the provisions that Act contained. They were set out in section 32 and Schedule 2 of the Act: so far as grievances are concerned, before a Tribunal could have jurisdiction to hear the claim, the employee "must set out the grievance in writing and send the statement or a copy of it to the employer". That was known as the standard procedure: it was followed by a meeting which the employer was obliged to arrange and an appeal if the employee thereafter wished to appeal any decision reached by the employer.

3. The modified procedure did not apply in the circumstances of this case, though it was provided for as an alternative under paragraph 9 of Schedule 2.

4. Section 32 of the **Employment Act 2002** did not allow an Employment Tribunal to hear any complaint in respect of unfair deduction from wages unless there had first been a complaint falling within either paragraph 6 or paragraph 9 of Schedule 2. It also provided for regulations to make further provisions. Those regulations were the **Employment Act 2002 (Dispute Resolution) Regulations 2004**. By Regulation 6, in the circumstances of this case, the standard grievance procedure was applicable. Regulation 9 provided for circumstances in which, though a complaint had not been made by an individual within paragraphs 6 or 9, there was deemed to be compliance with those paragraphs. It provided:

> **"(1) Where either of the grievance procedures is the applicable statutory procedure, the parties shall be treated as having complied with the requirements of the procedure if a person who is an appropriate representative of the employee having the grievance has -**
>
> **(a) written to the employer setting out the grievance; and**
>
> **(b) specified in writing to the employer (whether in setting out the grievance or otherwise) the names of at least two employees, of whom one is the employee having the grievance, as being the employees on behalf of whom he is raising the grievance."**

5. The appropriate representative is either the official of an independent trade union, as was applicable in this case, it was said, or an elected representative under provisions providing for that. The procedure for which Regulation 9 provides is known as the collective grievance procedure. The word "collective", however, does not appear in the Regulations. It is plain from 9(1)(b) that the grievance cannot be made just on behalf of one person. It must be at least two, no doubt because any claim made to an Employment Tribunal, even if made as part of a multiple, is technically a separate and individual claim. The Claimant in any claim has to be somebody, according to this provision, whose name has been supplied as making the grievance. That, it seems to me, is the purpose of this provision, though I share the view expressed earlier by Elias J that the wording is tortuous.

6. If a grievance were made, the effect was to extend time for making a claim under the applicable provisions relating to limitation of time for either three months or six months depending on the nature of the claim for the making of that grievance. The dispute resolution procedures provided for by the **2002 Act** and **2004 Regulations** were repealed by the **Employment Act 2008**. Section 1 provided for that repeal. But it was not to come into force without the Secretary of State making further provision. That provision was made by the **Employment Act 2008 (Commencement No 1, Transitional Provisions and Savings) Order 2008**. By Article 3 the Order provided that transitional provisions set out in the Schedule to the Order would have effect.

7. I have little doubt that the purpose of the transitional provisions was to preserve the rights of those who had made a grievance after the event had occurred in respect of which they later wished to claim before an Employment Tribunal, so that they still could bring their claim within the three-month or six-month extension to the time limit, whichever was applicable. If the provisions had not been made, those employees who had been faithfully attempting to resolve their grievance could have found that the time they were left within which to lodge a claim had suddenly shortened, purely as a result of the repeal of all the dispute resolution procedures with effect from 5 April 2009. Accordingly the provisions ensured that those claims, in effect, could be made until either 4 July or 4 October 2009. The terms in which it did so were these. Schedule, Part 1, paragraph 1 provided that the repeals would have effect subject to the provisions of paragraph 3. Paragraph 3, paragraph 2 having related to disciplinary procedures not relevant here, provided:

> **"3. - (1) The amendments and repeals referred to in paragraph 1 shall not have effect where the standard grievance procedure or the modified grievance procedure applies by virtue of regulation 6 of the Regulations, and the action about which the employee complains (by complying with paragraph 6 or 9 of Schedule 2 to the 2002 Act, or presenting a complaint to an employment tribunal) occurs wholly before 6th April 2009.**

> **(2) The amendments and repeals referred to in paragraph 1 shall not have effect where the standard grievance procedure or the modified grievance procedure applies by virtue of regulation 6 of the Regulations and -**
>
> > **(a) the action which forms the basis of a grievance begins on or before 5th April 2009 and continues beyond that date; and**
> >
> > **(b) the employee presents a complaint to the employment tribunal or complies with paragraph 6 or 9 of Schedule 2 to the 2002 Act in relation to the grievance -**
> >
> > > **(i) on or before 4th July 2009 under a jurisdiction listed in Part 2 of this Schedule and section 238 of the Trade Union and Labour Relations (Consolidation) Act 1992 does not apply;**
> > >
> > > **…"**

The remainder providing for the date of 4 October 2009 in certain circumstances is not material to these proceedings.

8. The claims of ten Customer Services Representatives who had been employed at Govan came before an Employment Tribunal in Glasgow before Employment Judge Walter Muir, against whose Decisions this appeal is brought. He held, in a Judgment of 8 May 2013 ("the 2013 Judgment") that six of those ten had not complied with the grievance procedures. The issue between the parties, as it appeared to him (page 23 of his Judgment, between lines 6 and 10) was whether they had complied with the provisions of Regulation 9(1)(b). Their contention was that they did not require to be named in the grievance. That being the case, there was no jurisdictional bar to them proceeding further with their claims.

9. Implicitly, in saying that, the Judge was recognising that the parties appeared to be suggesting to him that there would have been no jurisdictional bar if the parties had no need to be named in the grievance, but if they did need to be named, then they would be barred from further proceedings. It may not, therefore, be surprising that in the penultimate paragraph of his Judgment he said this:

> **"… I conclude that these six claims are caught by the transitional provisions under the order and that the failure of the Claimant's trade union to specify them in the grievance is fatal to**

them proceeding any further with their claims. The claims brought by the six Claimant, therefore, have to be dismissed by want of jurisdiction by reason of their failure to comply with the provisions of Regulation 9(1)(b) of the Regulations and Paragraph 3(2)(b) of the order."

10. At this stage it is necessary to observe that there have been more twists and turns in the reasoning and arguments and decisions in this Judgment than there are in many murder plots dramatised in detective films. At this stage, it seems, the Claimants were arguing that they had made a grievance. As will be seen, later they were arguing that they had not. At this stage the Judge appeared to be accepting that the names of the six had not been included in any relevant material part of the grievance. In the second Judgment, to which I shall come, he was saying almost exactly the opposite, on the face of the Judgment.

11. The Claimants appealed. They argued, now, that if they had not, as the Judge had held they had not, been party to a grievance, then he was wrong to hold that the transitional provisions had the effect that they should be treated as having been subject to the 2002 dispute resolution requirements. That "old law" no longer applied the moment that the Act and Regulations made under it were repealed on 5 April 2009. The new law which followed did apply. Because the complaint of the Claimants was that they had not been paid a night-shift premium and they continued to remain in work, still not being paid that premium, and that the premium was due on every occasion that they worked nights, it came within the terms of section 23 of the **Employment Rights Act**. Though if the claim had been in respect of one unlawful deduction from pay it would normally have to be brought within three months, that section provided for the extension of that period where there is not one, but a series of, deductions:

"23(2) … an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with –

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from the deduction was made,

…

(3) Where a complaint is brought under this section in respect of --

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received."

12. It is worth noting for future reference that this envisages one complaint covering many separate deductions. But it means that whether the claims had applicable to them the provisions of the dispute resolution procedures or whether the post-2009 law alone applied to their resolution, on the face of it the Claimants would appear entitled to bring a claim. The Appellants argued that, if the Claimants had not brought a grievance, they could not fall within 3(2)(b). 3(2)(b) only applied the transitional provisions in one of two circumstances. Either the employee had complained to the Employment Tribunal before 4 July 2009 (these Claimants had not) or the Claimant concerned had complied with paragraph 6 or 9 of Schedule 2 of the **2002 Act**. If the conclusion of the Tribunal Judge was that they had not, then it would follow that the transitional provisions did not apply. Accordingly the Tribunal would have jurisdiction only if the claim was brought within the time limits applicable to a section 23 claim. As I have observed, these claims plainly were. So there was jurisdiction after all.

13. It was on that basis that the Claimants sought to appeal. On 19 July 2013 the appeal was set down by Lady Stacey for a Full Hearing. But over six months later, just before that hearing was due to take place on 31 January, an application was made by the Claimants to amend the Notice of Appeal. That was made on the 28th. The basis for it was that all the parties, and the Judge, had assumed collectively that the requirements of Regulation 9 had been fulfilled save, it is plain, in respect of the reason the Judge had for thinking they had not been complied with by

these Claimants because they had not been identified by name in, or concerned with, the grievance.

14. Mr Bradley, now instructed to appear for the Claimants, argued that there was another reason why Regulation 9 had not been fulfilled. That was that there had been no authorised person who had submitted the grievance. There was no evidence that it had been submitted by the trade union.

15. In the light of that, Lady Stacey postponed the appeal, with costs to the Respondent occasioned by the adjournment and amendment, and allowed the matter to be remitted to the Tribunal. The remission was not under a **Burns/Barke** order as such. It did not require the Judge to explain by additional words the reasons he already indicated he had. It required him, in the light of the new submissions made by Mr Bradley, to ask if what had happened in 2008 had, so far as the Claimants were concerned, fulfilled the requirements of Regulation 9. That matter was heard on 11 April 2014, again before Employment Judge Muir. On 2 May 2014 he gave reasons for concluding that the collective grievance, as he called it, had indeed been compliant with Regulation 9. This might, on the face of it, appear to be directly contradictory of his 2013 Decision, which was to the effect that the Claimants had not made a grievance because they had not been named in it.

16. His reasoning, at internal page 12, line 45, proceeds as follows:

> **"It is common ground between the parties that Production 53 [that was the production which amounted to the grievance procedure in writing] can properly be characterised as a collective grievance. There is also common ground between the parties that the collective grievance was sent to the respondent by an "appropriate representative" of Unison. It is also common ground between the parties that the collective grievance identified all of the employees on behalf of whom Unison were raising the grievance and that the claimants were parties to the grievance. In *Alitalia Airport SPA v Akhrif* [2008] ICR 813 Elias J (as he then was) makes it clear that it is the representative who must identify the employees. In the instant case, the employees identify themselves as being parties to the grievance by adhibiting their signatures and providing relevant information to the respondent. …"**

17. The Judge went on to dispose of Mr Bradley's argument that the regulation required the representative, him or herself, specifically to identify and name the individuals who were making the same grievance together to the employer and on whose behalf he was raising it, as being unduly technical, bearing in mind the purpose of these provisions, which was to ensure that the employer knew who was making the grievance. Thus he said, picking up the same paragraph at line 25 on internal page 13:

> **"… In my view the fact that the collective grievance did not spell out in terms to the respondent that the union representative acting on behalf of these claimants was setting out the written specification required under Regulation 9(1)(b) was nothing other than a technicality. At the end of the day the interests of both parties had been served in the way in which the grievance had been intimated to the respondent. The underlying purpose and spirit of the legislation had been served in that the substance of the grievance and the identity of the grievers were brought to the attention of the respondent. I therefore find that the grievance is Regulation 9 compliant."**

18. It is clear from the repeated references that the Judge understood, so far as his words show, that the Claimants had been identified in the grievance. At the outset of these proceedings, however, I was told by Mr Bradley without any dissent from Miss Marsh, who appears for the Police Authority, that in fact the Claimants concerned in this appeal had not been named in the grievance, nor had they been signatories to the agreement, as many others had. There was nothing in the grievance to identify them as being parties to it. For some reason which is unexplained, and in apparent contradiction of his earlier decision, the Judge was setting out as common ground that which, it would appear from what I have been told today, was not. He proceeded to conclude that he entirely agreed with Miss Marsh when she said in her written submissions that the status of the collective grievance was never controversial, that those representing the Claimants could, had they applied their mind to it, have raised the issue of the status of the document at an earlier hearing and resolved the matter.

19. That left the appeal against the 2013 Judgment, which at that stage was the only outstanding appeal, in a very different position from that which might have appeared at its conclusion and before the Judgment on the remission. It was not until just before 19 September 2014, when the appeal was due next to be heard, that the Claimants raised, in their Skeleton Argument, grounds which contested the conclusion of the Tribunal Judgment of 2 May.

20. The Respondent understandably objected to that within three days. It was to be determined, by a direction of the Judge, as a preliminary issue at the hearing of the appeal. Both parties therefore came to the hearing prepared to deal with it as the full appeal. But, on the preliminary issue having been raised, Lady Stacey determined that the Appellants could not advance a criticism of the Decision on remission without a ground of appeal to cover the point. It should be noted that no appeal had been raised against that Decision until that time, nor had it been intimated that one might be. The Appellants were allowed to issue a second Notice of Appeal covering their complaints about the Judgment of 2014. It was on that footing that the hearing in September was postponed. The Claimants then duly drafted a further ground. That was out of time.

21. They applied for extension of time. Time was extended by the Registrar, against whose decision there has been no appeal. She determined that there had been an exceptional reason shown why the appeal could not be presented within the time limit, but considered that the Appellant's behaviour in failing to indicate their position on the appeal to the Respondents significantly in advance of the time they did, and their complete failure to address the new findings until the exchange of legal argument, had led to that position. The last sentence of her decision reads:

> **"… As the issue of expenses for previous hearings is an issue before the judge I direct that the appellants should show cause why they should not pay the respondents' expenses of this application and that this should be decided by the learned judge with the other applications."**

22. What I have to determine, therefore, are the consolidated appeals and the application by the Respondent in any event as to costs.

The Appeals

The 2013 Judgment

23. In my view the Judgment which Judge Muir reached cannot stand on the reasoning which he gave. The consequence which he identified - that the claims had to be dismissed by want of jurisdiction - did not follow from his conclusion that the Claimants had failed to make a proper grievance. The reasoning for that is clear. At the time the Claimants brought their claim they could do so without it being held outside the jurisdiction of the Tribunal on grounds of time. If their claims were upheld on the facts, there had been a series of acts of the same or similar character amounting on each occasion to a deduction against them, and under section 23 of the **1996 Act** time would extend to permit a claim for repayment of all deductions in the series.

24. The Schedule to the **2008 Order** provides, by paragraphs 3(2)(a) and (b) that the repeal of the 2002 dispute resolution procedures would not apply in the circumstances identified in 2(a) and (b). If, therefore, the Claimants had complained to the Employment Tribunal before 4 July 2009, then the standard procedure would have applied. If they had complied with paragraph 6 of Schedule 2 to the **2002 Act**, the Order would have applied. In each case this was on the basis that the "action" of which they were complaining began "on or before 5 April and continued beyond that date" (paragraph 3(2)(a) of the Order).

25. I see no reason to think that in this context those words were not applicable to complaint about a series of deductions made on the same footing, as being the "action" which formed the basis of the grievance. An "action" is not necessarily the same as an act about a specific complaint is made under statute. It is what underlies the grievance. It is described as an action not an act. It is not sensible to think, in this context, of a series of separate actions. Accordingly the essential point made in the original Notice of Appeal over the name of Stefan Cross QC and adopted in large part by Mr Bradley seems to me to be unanswerable. The amendments and repeals did have effect. Accordingly the post-2009 procedures were applicable. They would be unless the Claimants had been party to the complaint. The Judge thought they had not been, because they had not been specified in the grievance.

26. That Judgment on the footing that they were barred for failure to comply with the dispute resolution procedures therefore cannot stand. That is unless the conclusion to which the Judge came, on the facts, was plainly and unarguably correct.

The 2014 Judgment

27. That brings me to the question of the second Judgment, that of 2014. The Judge here came to the conclusion that the Claimants had been specified in the grievance. If this were so, then, applying 3(2)(a) and (b) the Appellants would have complied with paragraph 6 of Schedule 2. If so, they could not be debarred from claiming in respect of anything to which those Regulations applied, and on the footing of the transitional provisions, if they continued to apply, they would have raised a grievance appropriately. On either footing, therefore, the Claimants appear to have a claim which could be heard by the Tribunal.

28. As to the point whether the Claimants were, however, party to a grievance, I note that the Judge assumed, so it appears from his Judgment, that matters had been agreed between the parties which simply had not been. He set out facts which I have mentioned, which simply were not so. If one approaches the case here as being one in which there was a collective grievance made on behalf of those whose names appeared at the end of it, and were therefore identified in the body of the grievance and sufficiently identified by the representative who, it appears to have been common ground between the parties according to the Judge on the 2014 Judgment, had sent the grievance to the employer, they were identified as being people who were raising that grievance. That seems to me to be the essential point of the grievance procedures insofar as they relate to bringing a claim. It would be difficult to contemplate that Parliament should have required a party to raise a grievance and have provided that they could do so without them being able to show to a Tribunal later or to their employer at any stage before making a claim that they actually had raised a grievance. The point about the grievance procedures is that both parties should know, one that she is making a grievance, the other that it is being made and who is making it. It is only then that sensible measures can be taken to resolve it. The very wording of Regulation 9 of the **2004 Regulations** requires the names of those who have the grievance and identifies that one must be the employee having the grievance: that is, the one who needs to show that they have had the grievance if they are to make a claim which was valid under the dispute resolution procedures as they applied.

29. This interpretation is appropriate, bearing in mind the repeated requests of the courts in a number of authorities to take a practical, sensible, facilitative and not an over-technical approach to the dispute resolution proceedings: see **Canary Wharf Management v Edebi** [2006] ICR 719 (citing **Shergold v Fieldway Medical Centre** [2006] ICR 304, **Galaxy Showers Ltd v Wilson** [2006] IRLR 83, **Mark Warner Ltd v Aspland** [2006] IRLR 87 and

Thorpe, Soleil Investments Ltd v Poat and Lake unreported, Recent Points [2006] ICR Part 2, 18 October 2005) and summarised at paragraph 24 by saying:

> **"… It would be quite wrong to require the grievance to be made in any unduly legalistic or technical manner. …"**

30. It is plain that a purposive approach should be taken. But that does not mean that the requirement of identification of a "grieving" employee can be ignored (see paragraphs 40 and 41 of **Alitalia Airport**). That approach was endorsed by the Inner House of the Court of Session in the case of **Aitchinson**. I therefore can see no legitimate basis, upon the facts as I am told by both parties they are in respect of the grievance, for supposing that there was anything about the way in which the grievance was presented which sufficiently identified these Claimants as being party to it. That they knew of it is almost undoubtedly the case. Many people in the workplace know of complaints made by fellow workmen. They may share them. That does not mean to say that they join in making them: they may make them later or they may choose not to do so.

31. What they could not do at the time at which the dispute resolution procedure regulations applied was make a claim without themselves having made a grievance of their own to which paragraph 6 would apply or be deemed to have done so by the application of Regulation 9.

32. It follows that I would have considered that neither Judgment reached by the Judge was capable of standing upon the grounds on which it was reached. I have a suspicion that this may be because of the way in which the parties have shifted their respective positions. Thus it was argued by Miss Marsh at the conclusion of the case that in fact, insofar as the claim brought by these Claimants related to non-payments which might have been due, if they are correct, during the period before 5 April 2009, the procedures would apply. This argument is based upon the

following. Each claim for unlawful deductions is to be treated as a separate claim. Authority for this comes from **Murray v Strathclyde Regional Council** [1992] IRLR 396, a decision of Lord Coulsfield in the Employment Appeal Tribunal, in which by reference to what was section 8(3) of the **Wages Act 1986**, a forerunner of section 13(3) of the **Employment Rights Act**, he said:

> **"… Section 8(3) provides that where the amount of wages paid *on any occasion* is less than the amount properly payable *on that occasion,* the deficiency is to be treated as a deduction. That wording implies, in our opinion, that, in a case like this where a salary is payable by regular monthly instalments, each occasion on which wages are due to be paid in terms of the contract has to be considered separately and the amount properly due on that occasion has to be ascertained and compared with the amount actually paid on that occasion. …" (Judge's own emphasis) (paragraph 8)**

In **Group 4 Nightspeed Ltd v Gilbert** [1997] IRLR 398 at paragraph 15, it was said that:

> **"… as a matter of contract, the obligation on the part of the appellants was to make payment in respect of commission payments *during the month of January 1995* … In our judgment, it was only once that time had passed that, as a matter of law, the appellants were refusing to pay commission … In our judgment, it is only when an employer fails to pay a sum due by way of remuneration at the appropriate time … that a claim for unlawful deduction can arise. …" (Judge's own emphasis)**

33. She submits, therefore, that if one takes the approach that each act of underpayment, if sued for, represents a separate claim, then insofar as each of those acts occurred before 5 April 2009, it would be caught by the dispute resolution requirements and the Tribunal would have no jurisdiction unless there had been a relevant complaint under, in this case, either paragraph 6 or deemed to be under paragraph 6 by Regulation 9.

34. As to this argument I can see no trace in the Judgment. It seems to me it is not for me to resolve here and now. Ultimately, if the argument is to be pursued, it will be for the Employment Tribunal to determine it, at least insofar as the claim concerns those particular payments.

35. I would, however, observe that the wording in respect of the time provisions in section 23 and the complaint provisions in paragraph 3(2)(b) of the Schedule to the 2008 Order appear to contemplate a complaint or an action as being something which, in the respects to which those paragraphs related, could well include a number of separate instances which could be grouped and dealt with together. I should not, as I say, determine this here and now. It will be for a Tribunal ultimately to decide on further argument and consideration whether that view is correct. I merely have to ask whether, in respect of the Judgments which I have to consider, there has been an error of law which has been identified to me. For the reasons I have expressed there have been errors of law.

36. The consequence is, as it seems to me, that I have to declare that, subject only insofar as the period prior to 5 April 2009 is concerned, and that only in respect of the argument which I have just identified but have not resolved, the Tribunal has jurisdiction to consider the claims of these Claimants. There may be, I should note, a separate argument in respect of the Claimant Miss Bradburn, of whom it is said that she did no night-shift work after a time in 2007. If that is so, then in her case she may find that there is a time problem which would prevent her claiming further and, if not a time problem, there might be a problem of jurisdiction if in her case there was no action within 3(2)(a) covering the period further. However, as was pointed out to me by Mr Bradley, the Judgment was based not on any application or decision in respect of 3(2)(a) but in respect of the argument which the Judge understood to have been addressed under 3(2)(b), and so I say no more about it.

Expenses

37. The provision of the **Employment Appeal Tribunal Rules** at Rule 34A(2C) provides that the Appeal Tribunal may in particular make an expenses (costs) order against the paying

party when he has caused an adjournment of proceedings. There are two steps in such a determination before one comes to the question of quantum if it is applicable. The first is whether the paying party has "caused an adjournment of proceedings". That is a factual question. The second is whether the Tribunal exercises its discretion since, if it finds that the paying party has caused an adjournment, it does not have to make an award of expenses.

38. Here, Mr Bradley argues that the Claimants did not cause the adjournment, that what had happened was that he had argued that no amendment of the Notice of Appeal was required, that it would not normally be required for there to be any adjournment if, for instance, the Tribunal had been asked to give further reasons under the well-known **Burns/Barke** procedure. It was the assumption of the Respondent that there was no issue in respect of the 2014 Judgment which was the problem, but that was not caused by the Claimants. Essentially there had been an agreement in the event that the matter should go back to the Tribunal for the further resolution which occurred. If I were against the Claimants, as a matter of applying the causation test, I should exercise my discretion in the overall circumstances of this case not to award expenses.

39. For her part, Miss Marsh reminded me that, on the occasion when the hearing of this appeal had been adjourned on short notice earlier, the expenses incurred on 31 January 2014 and of and related to the amendment were ordered to be paid by the Claimants to the Respondent. She argued that the whole fault for the adjournment was that of the Claimants.

40. In my view if the Judgment of 2014 was to be put in issue, it required a clear notification to that effect, well in advance so that the arguments could proceed on that footing.

41. So far as I know, there has been no appeal against the decision of Lady Stacey ordering the postponement of the hearing before her in September. She thought that an amendment was needed. I can see why, and insofar as it is necessary to do so I would agree. This was not a **Burns/Barke** procedure. As I have indicated, it amounted to a fresh resolution of important fact. In any event the conclusion was so obviously different to that reached on the first occasion that, if any question had arisen over its correctness, it should have been recognised and dealt with and raised earlier. I have no doubt that it was the late raising of the argument about the 2014 Decision that caused an adjournment of the appeal in September.

42. I then turn to the question of discretion. It seems to me that the point raised was, in the event, not a point which was of great significance to the appeal. I see no particular reason not to grant repayment of the expenses to which the Police Authority were then exposed. Nothing has been said to me to make me think that the Claimants are not capable between them of meeting the claim which had been made. Accordingly I have little hesitation in thinking that the claim for expenses is a proper one and should be allowed. Having reached that stage, I note that Mr Bradley does not take issue with the total claimed, and I make an award of expenses to be paid by the Claimants to the Respondents in that sum.

43. Accordingly, in summary, the appeal is allowed to the extent I have identified, with the consequence that I substitute a decision to the effect that I have specified in accord with this Judgment. I award the expenses in respect of the adjournment under Rule 34A(2) in the sum in which they have been claimed.