



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Simon Butler

**Respondent:** Driver and Vehicle Standards Agency

## PRELIMINARY HEARING

**Heard at:** Nottingham (in public)

**On:** 5 June 2018

**Before:** Employment Judge Camp (sitting alone)

### Appearances

For the claimant: in person

For the respondent: Mr R Adkinson, counsel

## JUDGMENT & ORDER

- (1) The claimant's application for the response to be struck out is rejected.
- (2) The claimant's application for specific disclosure of particular performance figures and statistics and for an "*Enforcement Sanction Policy*", all referred to in bullet points in the top half of the third page of a letter from him to the tribunal dated 9 March 2018, is rejected.
- (3) To the extent they have not already been complied with, the case management orders set out in the "*Notice of a Claim*" dated 5 January 2018 are set aside.
- (4) Subject to specific documents issues dealt with above:
  - (i) by **12 June 2018**:
    - a. the claimant must provide to the respondent copies of any documents he has within his power, possession or control that are not included in the draft bundle and that are relevant to any issue

- in the case, including the issue of remedy (“documents” includes video and other recordings);
- b. the claimant must provide to the respondent a list of the documents, including full details of the documents sought, not already included in the draft bundle that he wants included in it and that he does not already have in unredacted form in his possession or control.
- (ii) by **26 June 2018**, the respondent must provide to the claimant any copies it has within its possession or control of the documents on the claimant’s list, subject to the respondent’s right to object to disclosure on all the usual bases other than on the basis of relevance.
- (5) By **19 June 2018** the parties must submit to the tribunal their proposals, agreed if possible, for case management orders for the future conduct of this case, together with a realistic time estimate for the final hearing (4 or 5 days is suggested) and their dates of unavailability from January 2019 onwards.
- (6) The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which can be found at:  
[www.judiciary.gov.uk/publications/employment-rules-and-legislation-practicedirections/](http://www.judiciary.gov.uk/publications/employment-rules-and-legislation-practicedirections/)
- (7) The parties are reminded of rule 92: “*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of “cc” or otherwise)...*”. **If, when writing to the tribunal, the parties don’t comply with this rule, the tribunal may decide not to consider what they have written.**
- (8) The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the Tribunal.
- (9) Anyone affected by any case management order may apply for it to be varied, suspended or set aside. Any application should be made as soon as possible. All applications must be copied to all other parties together with notification that any objections to an application must be sent to the Tribunal as soon as possible.
- (10) The parties may by agreement vary the dates specified in any order by up to 14 days without the tribunal’s permission except that no variation may be agreed where that might affect a hearing date. The tribunal must be told about any agreed variation before it comes into effect.
- (11) **Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the parties in a case.**

- (12) **Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.**
- (13) **Under rule 6, if any case management order is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.**

## EXPLANATORY

1. This is being written to highlight a couple of matters that cropped up during the hearing. It is not formal written reasons. Reasons for (1) and (2) above were provided orally at the hearing and written reasons will only be provided if asked for by a written request presented by any party within 14 days of the sending of the written record of the decision.
2. Two witnesses attended this hearing under witness orders issued at the claimant's request, both of them being the respondent's employees. One of them – a Mr Raynor – gave evidence to the effect that he believed he would be victimised by the respondent for giving the evidence he gave and, if he did so, for giving evidence for the claimant at any future hearing in this case. His evidence was relevant and helpful and, I believe, genuine and honest. I should like to reassure him and to make clear to him and to the parties in this case that the tribunal would take the dimmest possible view of any witness or potential witness being threatened or punished for giving evidence or proposing to do so. I would expect the criminal and civil courts to share that view. If any detrimental action were taken against Mr Raynor on the respondent's behalf and/or with its approval or connivance, it is likely that, amongst other things, the respondent's response in this case would be struck out.
3. This was a lengthy hearing that finished after 5 pm and there was insufficient time to deal fully with making case management orders, hence (5) above. Two things relevant to case management orders that were briefly discussed and that I think ought to be mentioned – in a little more detail – here are:
  - 3.1 a related tribunal case was brought by another individual in Scotland and was unsuccessful. During the course of the trial, a witness apparently said something that the claimant [in these proceedings – Mr Butler] considers to be a waiver of legal professional privilege. In my view, whatever may have happened during the course of the Scottish trial is unlikely to be relevant to his case. It is, anyway, almost inconceivable that privilege relevant to these proceedings could have waived from the witness box in Scotland in another case. If this tribunal needs to look at the decision in the Scottish case then we can be provided with a copy of the Judgment and Reasons and read it for

ourselves. The proper way to explore any issue to do with privilege in these proceedings would be if and when it crops up in the course of witness evidence at trial;

- 3.2 it is premature to ask for witness orders for individuals for the trial in these proceedings. The first step was for the claimant to ask them whether they were willing voluntarily to give evidence for him. He took that step and found that no one was.

The second step – and it might with hindsight have been better for him to have thought about this a little more before taking the first step – is for him to decide whether it is tactically really in his best interests to obtain witness orders in relation to each of those individuals, given their apparent reluctance to give evidence, and bearing in mind that if he calls them as witnesses, he cannot (ordinarily) cross-examine them and the respondent's representative can. He needs to ask himself the question: is calling this person as my witness likely to help my case?

If he thinks the answer to that question is "yes" in relation to any particular person, the third step is for him is to obtain or put together a statement or draft statement from them containing all of the evidence he believes that person will give at trial.

Once he has a statement or draft statement, the fourth step, if he didn't obtain it from that person in the first place, is to send it to them for their amendments, approval and signature.

If he has sent someone a draft statement and they don't get back to him positively, he then has a potentially difficult decision to make: should he seek a witness order for that person or not? The obvious danger is that they could disown the statement and give completely different evidence from the 'witness stand' [witness table in practice]. But if he still wants to call that person as his witness, the fifth is to exchange the draft statement with the respondent at the time and date agreed / ordered for exchange of witness statements. If it is a draft and unapproved statement, he should tell the respondent this when he exchanges it.

The final step would be to apply to the tribunal for a witness order, and include within his application an explanation of the steps he has taken up to that point.

4. In my view (and I should make clear not every Employment Judge would take the same view), what the claimant cannot do is to fail to exchange with the respondent a written statement or, at the very least, some other document setting out the gist of the evidence he thinks a potential witness will give if he wants that person to be his witness at trial. Case management orders for the exchange of witness statements don't cease to apply just because a witness order is going to be obtained in relation to a potential witness. And I would be very unlikely to grant any application for a witness order in this case in relation to someone in relation to whom no statement or draft statement had been exchanged.

Case no:2602105/2017

Employment Judge Camp

Dated: 8 June 2018

Sent to the parties on:

12 June 2018

For the Tribunal: