



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4114986/19 (P)

Held on 18 August 2020

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Employment Judge N M Hosie

Mr I Dyjas

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**Claimant
Represented by
Mr L Werenowski,
Solicitor**

Arnold Clark Automobiles Limited

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**1st Respondent
Represented by
Mr S Jones,
Solicitor**

William MacKenzie

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**2nd Respondent
Represented by
Mr S Jones,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

35 The Judgment of the Tribunal is that the claimant's application for an Order to disclose documents or information is refused.

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REASONS

E.T. Z4 (WR)

1. I conducted a preliminary hearing on 20 July 2020 to hear submissions by the parties' solicitors in relation to an application to amend by the claimant's solicitor.
- 5 2. On 12 August 2020, the claimant's solicitor sent an e-mail to the respondent's solicitor in which he requested disclosure, "*of whether the second respondent had been subjected to internal disciplinary procedures*".
- 10 3. On 13 August 2020, the respondent's solicitor responded by way of an e-mail to the claimant's solicitor to advise that he was not prepared to disclose the information sought as it was, "*wholly irrelevant*".
- 15 4. Prior to these e-mail exchanges, I had considered the representation by the parties' solicitors, both oral and in writing, in relation to the claimant's application to amend. I had decided to refuse the claimant's application. I had already sent my Judgment for typing.
- 20 5. On 17 August 2020 at 8:03, the claimant's solicitor sent an e-mail to the Tribunal, copied to the respondent's solicitor, with a formal request for an Order in terms of Rule 29 in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules of Procedure").
- 25 6. On 17 August 2020 at 10:43, the respondent's solicitor sent an e-mail to the Tribunal, copied to the claimant's solicitor objecting to the application.

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Discussion and decision

7. Rule 31 in the Rules of Procedure, provides as follows: -

“31. Disclosure of documents and information

5 *The Tribunal may order any person in Great Britain to disclose documents or information to a party (by providing copies or otherwise), or to allow a party to inspect such material as might be ordered by a County Court or in Scotland by a Sheriff.”*

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8. The proper test for whether such an Order should be made is that set out by the Court of Appeal in **Canadian Imperial Bank of Commerce v. Beck** [2009] IRLR 740 – namely, that the documents or additional information will be disclosable if they are relevant and “*necessary for fairly disposing of the*
- 15 *proceedings*”.

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9. In considering this issue, I remained mindful that particular problems concerning disclosure can arise in the context of discrimination complaints due to the difficulties inherent in proving discrimination. There is rarely direct
- 20 evidence of discrimination. Proving a discrimination claim is often nuanced and accomplished through the use of circumstantial evidence. However, I still had no difficulty in deciding that what was being sought by the claimant’s solicitor here, as the respondent’s solicitor submitted, had no relevance to the previous application to amend and, in particular, the test as set out in **Selkent**
- 25 **Bus Co. Ltd v. Moore** [1996] ICR 836.

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10. Further, in my view the application is entirely speculative. As I understand it, it is based on a suspicion that the second respondent had been disciplined and demoted. There was no information in the claimant’s application which
- 30 persuaded me that what was being sought (whatever that was) had any relevance to the issues in the case.

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11. The application did indeed have all the hallmarks of a so-called “fishing expedition”, as the respondents’ solicitor submitted. That is why, I suspect, the application is wholly lacking in specification as to what exactly the
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claimant's solicitor wishes to recover. All that is requested, in the most general terms, is "*specific disclosure and inspection of the documents held by the first respondent concerning such demotion as they are relevant to the application to amend the claim to add additional health and safety legislation references*".

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12. As I recorded above, I decided to refuse the claimant's application to amend. In any event with an application of this nature, it is for the claimant to satisfy the Employment Judge that the documents are relevant to the claim. He has not done so. There are insufficient factual averments to provide a platform, a basis, for any disclosure. All that is alleged is a belief that the second respondent was demoted.

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13. I arrived at the view, therefore, and I am bound to say that without a great deal of difficulty, that the claimant's application should be refused.

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Employment Judge

Nick Hosie

20 **Date of Judgement**

27 August 2020

Date sent to parties

28 August 2020