



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102684/2020

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**Case management Preliminary Hearing
Tuesday 15 December 2020**

Employment Judge: R McPherson

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Mr J Fennell

**Claimant
Represented by
**S Maclean
Solicitor****

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Arnold Clark Automobiles Ltd

**Respondent
Represented by
**S Jones
Solicitor****

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Employment Tribunal is that

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1. The respondent's Further and Better Particulars (headed Response to the Claimant's Amended Grounds of Claim) intimated by email to the Tribunal and the claimant's representative on Friday 11 December 2020 at 12:35pm is allowed.

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2. The respondent's application for expenses, intimated Friday 11 December 2020 at 12.52 pm is expressly reserved until the Final Hearing a

3. Separate Orders and Directions and

REASONS

Introduction

5 Preliminary Procedure

1. The claimant was represented by Ms Mclean. The respondent was represented by Mr Jones.
2. At the outset of today's hearing, for the claimant it was confirmed that the claimant did not oppose the responsive Further and Better particulars
10 intimated for the Respondent headed Response to the Claimant's Amended Grounds of Claim). Claimant's Amended Grounds of Claim) intimated by email to the Tribunal and the claimant's representative on Friday 11 December 2020 at 12:35pm.
- 15 3. Additional to those Further and Better Particulars, the respondent had intimated Friday 11 December 2020 12.52 pm application for expenses, in summary the expenses which the respondent assert arose from being required to investigate and respond to previously non asserted position of disparity of treatment based on allegations of previous treatment of 2
20 individuals; a Mr Clark who is said to have come into contact with the claimant shortly prior to the originally scheduled Final Hearing and who was identified as witness shortly before the Final Hearing, and a Mr Ross Buchanan to whom it is said reference had previously been made at the internal Appeal Hearing.
- 25 4. It is understood to be a matter of agreement that prior to the application to amend, the claimant who had been initially unrepresented had not given notice by pleading an argument on disparity of treatment. The claimant had since Tuesday 20 October 2020 been represented by the Ms Maclean.
- 30 5. For the respondent it was argued, that an award of expenses was appropriate at this stage reflecting the additional investigation which the

respondent had required to undertake in relation to Mr Clark and Mr Buchanan to “*respond to these new allegations of inconsistent treatment*”. (as described in the second paragraph of the respondent’s email of 11 December 2020 at 12.52 pm).

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6. While a prima facia explanation had been put forward in respect of the late application for amendment in relation to Mr Clark, there was no explanation in relation to the position of Mr Buchanan. Mr Buchanan was someone to whom, it was said, reference had been made at the Appeal Hearing as such an application could have been made at an earlier stage.

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7. It was argued that that in any event the respondent should be permitted to reserve it position with regards to making a **further** application should it transpire that the explanation offered for delay was “*misleading in any way*”. Further there was no explanation for the delay in the claimant making the application to amend in relation to the inconsistent treatment (comparison with Mr Buchanan) which had been raised at the appeal.

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8. For the respondent it was argued that the facts of the case do not give rise to any basis for inconsistent treatment, both having regard to the Joint Agreed Statement of Facts when compared with the statement offered by Mr Clark and the respondent’s position is more fully set out in their Further and Better Particulars.

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9. For the claimant, opposition to the expense application was intimated Monday 14 December 2020 15:56. It was further argued today for the claimant, that the claimant’s instructions, until the contact with Mr Clark, had been to proceed on the claim set out by the claimant in his ET1, that is without amendment to include a disparity of treatment. That instruction, it is said, altered around the time of the contact with Mr Clark.

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10. Further and on behalf of the claimant it is argued that the claimant has been on Universal Credit and he is said to be supported via Legal Advice and

Assistance by way of Representation and I am told that this in on the basis of a nil contribution.

5 11. The application for expenses was opposed and further it was argued that issues of fact should be reserved to the Final Hearing.

12. As previously noted, in my judgement 24 November 2020, allowing the claimant amendment and converting the Final Hearing to a case management Preliminary Hearing on Friday 20 November 2020 the
10 claimant's now representative had provided a List of witnesses for the claimant which included the claimant and one other person (Mr Clark) and not Mr Buchanan.

15 **Relevant Law**

The 2013 Rules

13. **Rule 2** of the 2013 Rules sets out that:

20 *“The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*

- (a) ensuring that the parties are on an equal footing;*
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
- (c) avoiding unnecessary formality and seeking flexibility in the*
25 *proceedings;*
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and*
- (e) saving expense.*

30 *A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.”*

14. **Rule 41** of the 2013 Rules provides

“41. The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The following rules do not restrict that general power. The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts.”

10 15. **Rule 76(1)** of the 2013 Rules provides

76.(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) any claim or response had no reasonable prospect of success.

20 **Relevant Case Law**
Expenses

25 16. As described above the respondent made an application for expenses against the claimant in terms of (Rule 76(1) (b)) on the basis, it is understood that the it argued that there was unreasonable conduct by the claimant, it being suggested that the claimant had acted unreasonably in the way that he had conducted the proceedings in making the late application for amendment (Rule 76(1)(a)).

30 17. While I was not directed to any authorities by the respondent in their submission I have reminded myself of Lord Justice Mummery’s words of caution at paragraph 39 of the Court of Appeal’s judgment in **Barnsley Metropolitan Borough Council v Yerrakalva** [2011] EWCA Civ 1255 reported at [2012] IRLR 78 (**Yerrakalva**), , where he stated as follows:—“/

begin with some words of caution, first about citation and value of authorities on costs questions and, secondly, about the dangers of adopting an over-analytical approach to the exercise of a broad discretion.”

5 18. Nevertheless I do consider it appropriate to take account of what is said in certain other often cited judgments of the Court of Appeal, these being **Gee v Shell UK Ltd [2003] IRLR 82 (Gee)**, **Lodwick v London Borough of Southwark [2004] IRLR 554 (Lodwick)**, and **McPherson v BNP Paribas [2004] (BNP) IRLR 558**, where it is recognised that expenses orders in the
10 Employment Tribunal remain the exception and not the rule, and that in the majority of Employment Tribunal cases, the unsuccessful party will not be ordered to pay the successful party’s costs, and that costs are compensatory, and not punitive.

15 19. **Yerrakalva** considered Rule **40** of the **Employment Tribunals Rules of Procedure 2004**. Notwithstanding the **Employment Tribunals Rules of Procedure 2013**, have been in force since 29 July 2013 this case law remains useful given the similarity in wording between the former and current Rules.

20 20. I recognise that expenses cases are very much fact dependent, as is made clear in **Dunedin Canmore Housing Association Limited v Donaldson [2009] UKEATS/0014/09 (Dunedin)**, which is consistent with the view of the Court of Appeal, in **Arrowsmith v Nottingham Trent University [2011] ICR 159 (Arrowsmith)**, at paragraph 33, that it is a fact-sensitive
25 exercise.

21. Guidance on the application of the legal test which applies is set out in **Abaya v Leeds Teaching Hospital NHS Trust [2017] UKEAT 0258/16 (Abaya)**
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24. I am reminded that is not a sufficient condition for an award of costs, as I must thereafter consider whether it is appropriate to exercise discretion to make an award of costs.

5 25. In the exercise of this discretion, I note that it is generally recognised by Tribunals that for conduct to be regarded as “*vexatious*”, there must be evidence of some spite or desire to harass the other side, or the existence of some other improper motive **ET Marler v Robertson** [1974] ICR 72 (**Marler**).

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26. Simply being misguided is not sufficient to establish vexatious conduct (**AQ Ltd v Holden** [2012] IRLR 648 (**Holden**)).

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27. The Court of Appeal, in **Scott v Russell** [2013] EWCA Civ 1432 (**Scott**), cited with approval, the definition of vexatious given by Lord Bingham in the Divisional Court in **Attorney General v Barker** [2000] 2 WLUK 602 (**Barker**), that the hallmark of a vexatious proceeding is that it has little or no basis in law (or at least no discernible basis), and that whatever the intention of the proceedings may be, its effect is to subject the other side to inconvenience, harassment and expense out of all proportion to any gain likely to accrue, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.

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28. More recently the EAT in **Brooks v Nottingham University NHS Trust** [2019] UKEAT/0246/18 (**Brooks**) confirmed that there was no rule of law that the Tribunal would only use its discretion to award costs where the claimant had been dishonest, as the test is not one of dishonest conduct but rather unreasonable conduct (in the bringing of proceedings) and that may include an unreasonably distorted perception of matters. Further in **Radia v Jefferies International** [2020] IRLR 431 (**Radia**) the EAT confirmed again that while costs do not follow the event in the Employment Tribunal the fact

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that an insurer (or third-party funder) granted support of a claim because, in essence, that the funders position would reflect what they had been told.

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Discussion and Decision.

29. In all the circumstance, this not being an evidential hearing I consider that it not appropriate to grant, as requested today the application for costs. Elements of the respondent's position are matters for evidence in my view which can be more properly considered at the Final Hearing, including when the claimant came into contact with Mr Clark.

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30. As noted above I am reminded that is not a sufficient condition for an award of costs, as I must thereafter consider whether it is appropriate to exercise discretion to make an award of costs. The claimant is said at this non evidential hearing to have been on Universal Credit and to be supported via Legal Advice and Assistance by way of Representation and I am told that this in on the basis of a nil contribution. Those are, however, matters of evidence which are more properly considered at the Final Hearing.

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31. In all the circumstances the respondent's application for expenses is expressly reserved to the Final Hearing.

32. In coming to this view the Tribunal have applied the relevant case law.

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33. Separate Directions for the Final Hearing were issued at this case management Preliminary Hearing.

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Employment Judge:
Date of Judgment:
Date sent to parties:

Mr R McPherson
15 December 2020
15 December 2020