Case Number: 1600471/2019

EMPLOYMENT TRIBUNALS

Claimant: **Dr I Nicholas**

Respondent: **Three Nations Dispense Limited**

Heard at: **Cardiff** **On: 31 March 2022**

Before: **Employment Judge R Harfield**

Representation:
Claimant: Dr Nicholas
Respondent: Mr Whitcutt (Solicitor)

RESERVED COSTS JUDGMENT

It is the decision of the Employment Judge sitting alone that the respondent's application for a costs order does not succeed. The application is dismissed.

REASONS

Background

1. The claimant was dismissed by the respondent on 1 March 2019. He presented his ET1 claim form on 13 April 2019 bringing complaints of unfair dismissal, failure to pay a redundancy payment, notice pay, holiday pay, pension contributions and a failure to inform and consult under TUPE. The box, on the claim form, for a complaint of sexual orientation discrimination was not ticked. The wording on the claim form also does not indicate the claimant was bringing a sexual orientation discrimination complaint. The respondent filed an ET3 response form denying the claims and asserting there was no TUPE transfer to the respondent. The respondent also asserted the claimant was himself in fundamental breach of contract.

2. The case came before EJ Sharp on 25 October 2019, ostensibly for final hearing. EJ Sharp considered the issues to be decided were not sufficiently clear. By consent, the hearing progressed to decide a preliminary issue of whether a TUPE transfer had taken place and, if so, when. EJ Sharp determined there had been a TUPE transfer to the respondent on 8 January 2019. EJ Sharp also permitted an amendment to the claimant's claim to allow him to bring a complaint of automatic unfair dismissal connected to a TUPE transfer. EJ Sharp directed the claimant to provide a statement of case setting out his claims for unpaid pension, notice pay, holiday pay, redundancy pay, ordinary unfair dismissal, failure to consult about a TUPE transfer, and automatic unfair dismissal connected to a TUPE transfer, and for the respondent to provide an amended response. The claimant was represented by Mr Garrett, of counsel, at that hearing before EJ Sharp.

3. On 1 November 2019 Bevan-Evans & Capehorn Solicitors went on the record as acting for the claimant. On 15 November 2019 those solicitors filed the claimant's statement of case. The statement of case does address the complaints identified by EJ Sharp.

4. On 9 January 2020 the claimant's then solicitors provided the claimant's second witness statement. In this witness statement the claimant said he was making the statement in respect of his claim for "*Automatic unfair dismissal relating to unlawful discrimination under the Equality Act 2010 (Sexual Orientation)"* (amongst other things). The witness statement went on, at paragraphs 21 to 36, to set out what the claimant wanted to say about that purported claim. In short form, he was saying that was the only senior member of the management team to be dismissed and he considered that his claim was linked to 5 other claims that were separately proceeding against the respondent and other respondents. Those other claims were brought by former female employees for sex discrimination, sexual harassment and pregnancy and maternity discrimination. The claimant said in this witness statement, that his claim arose from similar circumstances to theirs. He said he considered there was an endemic culture of discrimination within the company and that there were 6 employment tribunal claims brought by 5 women alleging sex discrimination and one from himself as a gay man. (The claimant's claim was in fact never consolidated with those 5 other cases which proceeded separately to a hearing).

5. There was therefore a disjunct between the claimant's statement of case and his witness statement. His witness statement mentioned a complaint of sexual orientation discrimination that the claimant had never brought and in respect of which there had been no application to amend.

6. On 23 January 2020 the respondent filed their response to the claimant's revised statement of case.

7. The case was awaiting relisting and the pandemic then struck. The case was therefore listed for a case management hearing to discuss how the final hearing could proceed. On 15 July 2020 the parties were sent notification of the case management hearing on 30 July 2020.

8. On 29 July 2020 the claimant emailed the Tribunal and the respondent saying he was now acting in person. The claimant sent a document that raised 6 issues about preparation for the final hearing. Issues 5 and 6 were said to be the addition of Mr James Moss and Mr Daryl Moss as named respondents. The claimant said their conduct towards him had been "unlawful, unfair and discriminatory." The claimant's document spoke of allegations against the two individuals in relation to how they had handled the transfer and alleged breach of fiduciary duties. It spoke of the other 5 claimants and said it was necessary to identify further co-respondents as a result of the decision by EJ Sharp that the transfer had occurred on 8 January 2019. It spoke of direct and indirect discrimination towards the claimant (without particularising such complaints). The attachments did not actually make an application to amend to add a complaint of sexual orientation discrimination.

9. The case management hearing came before EJ Brace on 30 July 2020. EJ Brace recorded that the claimant wanted to amend his claim to add two new respondents and to bring a claim of sexual orientation discrimination. EJ Brace recorded that the claimant had initially believed he had brought a claim of sexual orientation discrimination, but that they had looked at the claim form where it could not be found. The claimant was directed to make his amendment application in writing by 12 August 2020 and was referred Presidential Guidance about amendment applications. The respondent was given until 26 August 2020 to "provide any written comments they wish to make on the application." Directions were made to otherwise get the case ready for a final hearing.

10. On 12 August 2020 the claimant made his amendment application. He said he was making an application to amend the claim to include two respondents and to bring a claim of sexual orientation discrimination. The application again talked about Mr Daryl Moss and Mr James Moss and their alleged involvement in the TUPE transfer, alleged breach of fiduciary duties and alleged cherry picking of employees who would transfer. The claimant referred to his witness statement of 9 January 2020, and said that was notification of an automatic unfair dismissal related to unlawful discrimination under the Equality Act. The claimant then sought to argue his sexual orientation discrimination claim was not a new cause of action as it was a relabeling exercise of material relied on in the original claim and referred to events already pleaded.

11. On 28 August 2020 the respondent submitted their reply to the amendment application on behalf of the respondent and Mr Daryl Moss. It is this activity which is the subject of the costs application before me. The respondent's reply argued that the complaint of discrimination on grounds of sexual orientation was time barred and it was not just and equitable to extend time. The respondent argued this was not a relabeling exercise but a substantial amendment to the claimant's claim that, if permitted, would require extensive case preparation and delay to the proceedings. The respondent observed that the claimant's mention of sexual orientation discrimination in his witness statement was not sufficient to have amended the claimant's claim, and a respondent is not required to answer a witness statement, but only the claims set out in a statement of case (Chandhok v Tirkey [2015] ICR 527).

12. The respondent argued the claimant had delayed in making his amendment application and that the claimant had had the benefit of legal representation at the time. The respondent noted that the claimant had not identified whether he was seeking to bring a direct or an indirect discrimination claim. The respondent, however, also noted, they understood the claimant was saying his dismissal was an act of sexual orientation discrimination. The respondent pointed out the claimant had not set out the amended wording to his statement of case that he was seeking to add. The reply then set out the objections to adding Mr Daryl Moss as a named respondent. It was observed that the claimant had had the opportunity from the outset to name Mr Moss as a respondent but had chosen not to do so. It pointed out that in respect of the original unamended claim there was no claim Mr Moss could be added to as a named respondent as he had not directly employed the claimant. It was argued it would be inappropriate to add Mr Moss as a named respondent to any permitted discrimination amendment. It was submitted the amendment application needed to be heard at a preliminary hearing.

13. On 24 September 2020 Regional Employment Judge S Davies directed that the application be listed for a video preliminary hearing on 15 October 2020. At that time the substantive final hearing was still awaiting listing following case management by EJ Brace. On 28 September 2020 Hugh James Solicitors went on the record for the claimant. That same day Hugh James Solicitors wrote to say, "*We write to confirm that after reviewing his position and after receiving legal advice, the Claimant would like to withdraw his application to amend his claim of 12 August 2020.*" Hugh James Solicitors requested that the preliminary hearing be vacated. EJ Moore sought confirmation, on 5 October 2020, that the application to add two named respondents was part of the withdrawal. Hugh James Solicitors confirmed this on 5 October 2020.

14. On 25 October 2020 the parties were sent notification that the final hearing had been relisted for 6 to 9 September 2021.

15. On 26 July 2021 Hugh James Solicitors came off the record saying they had not received contact from the claimant since the Autumn.

16. On 4 September 2021 the respondent made an application for costs in relation to the claimant's application to amend his claim, asking that the application be considered at the conclusion of the proceedings.

17. The final hearing came before me. In my reserved judgment the claimant succeeded in his complaints of wrongful dismissal, unfair dismissal, and a failure to inform and consult under TUPE. The holiday pay claim did not succeed. The claimant was awarded in total £24,610.51. I directed that within 14 days the respondent should confirm whether they were still pursuing their costs application. The respondent did so on 24 December 2021. I made directions for the claimant to file a reply and thereafter for the cost application to be listed before me. Mr Whitcutt provided a costs hearing bundle and a further bundle of legal authorities. Both parties made oral submissions. I reserved my decision.

The legal principles

18. Under Rule 76(1) of the Employment Tribunal Rules of Procedure the Tribunal may make a costs 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.

19. Consideration under Rule 76 is a two stage test. The Tribunal must ask itself whether a party's conduct falls within Rule 76(1)(a) and if so go on to consider whether it is appropriate to exercise its discretion in favour of awarding costs.

20. "Vexatious" has been said to mean "If *an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive*" (ET Marker Ltd v Robertson [1974] ICR 72, NIRC). Being misguided is not sufficient to establish vexatious conduct (AQ Ltd v Holden [2012] IRLR 648). In Attorney General v Barker [2000] 1 FLR 759 it was also said that the hallmark of a vexatious proceedings is that it has little or no basis in law (or at least no discernible basis), and whatever the intention of the proceedings may be, its effect is to subject the

defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and it involves an abuse of the process of the court.

21. "Unreasonable" is to be given its ordinary English meaning and is not to be interpreted as if it meant something similar to vexatious (Dyer v Secretary of State for employment EAT 183/83). It may be appropriate to consider factors such as the nature, gravity and effect of a party's conduct, albeit it is also important to look at the whole picture and identify the conduct in question, what was unreasonable about it and what effect it had. Costs in the employment tribunal are still the exception rather than the rule (Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420).

The respondent's cost application

22. The respondent's application was presented on the basis that:

"1. In making the application the Claimant's conduct was vexatious, abusive, disruptive or otherwise unreasonable both in terms of the delay in doing so and in terms of the application itself; ETR r76(1)(a);

2. The Application for Amendment from the outset had no reasonable prospect of success and the Claimant in any event failed to withdraw it expeditiously, when it became clear to him that there was no reasonable prospect of success following the submission of the Reply on behalf of the Respondent: ETR r76(1)(b)."

23. However, I clarified with Mr Whitcutt at the outset of the hearing that this was not in fact an application made under Rule 76(1)(b). Rule 76(1)(b) only covers "claims" (or responses) that had no reasonable prospect of success (and thereafter the costs discretion must still be exercised). It does not cover an application to amend to bring an additional claim (that does not progress to the amendment being granted). A complaint about an application to amend that it is said was improperly brought is instead a complaint about the conduct of the proceedings under Rule 76(1)(a).

24. My understanding of the essence of the respondent's cost application under Rule 76(1)(a) is as follows:

    (a) Much of the claimant's amendment application was not about discrimination and was unparticularised. He did not set out his draft particulars for amendment which calls into question how seriously the claimant really took the amendment application. The amendment was

not properly set out because the claimant was simply intending to cause a nuisance, inconvenience and make the respondent incur costs;

(b) The claimant's assertion in his amendment application that the sexual orientation discrimination claim was simply relabeling was wholly incorrect. The complaint had clearly never been pleaded. The claimant would have been aware of that as he had solicitors on the record for him who both submitted his amended statement of case and the second witness statement that referred to sexual orientation discrimination;

(c) The claimant made the application to amend 17 months after the cause of action accrued and 16 months after he presented his ET1, and no justification had ever been given as to why it was so long out of time;

(d) The claimant knew of the possibility of the sexual orientation discrimination complaint when he signed his statement on 9 January and yet waited until July before raising it. There can be no good reason for not having raised it at the time as he had solicitors acting for him;

(e) The claimant's amendment application was doomed from the outset given it was not a relabeling exercise and given the time limit difficulties. The claimant would have known this. His assertion that the application to amend had a reasonable prospect of success is disingenuous;

(f) The claimant had the benefit of legal advice and representation right up until he gave notice, he was now representing himself on the day before the case management hearing before EJ Brace;

(g) Given the claimant had solicitors acting for him and counsel previously acted for the claimant at the hearing before EJ Sharp, it is likely that the claimant had received legal advice that the sexual orientation discrimination claim should not be pursued. It is likely that the claimant deliberately and knowingly decided to later, when acting as a litigant in person, go against that advice and pursue the amendment application;

(h) By the time the claimant made the amendment application the proceedings were well advanced, with statements exchanged and the pleadings already amended. The amendment would have caused substantial prejudice to the respondent. The application was not made in good faith but was designed to cause disruption and had no prospects of success;

(i) The claimant withdrew the application in the face of a hearing where the weaknesses in his application would be exposed and which he would

have known all along. That in turn exposed the respondent and the prospective respondents to legal costs;

(j) The application was vexatious at the claimant knew it was bound to fail or at its best it was manifestly misconceived.

Discussion and decision

25. The claimant's discrimination complaint was not present on the face of, or even foreshadowed, in his ET1 claim form. It was also not in his statement of case filed in accordance with EJ Sharp's directions. The claimant told me that this statement of case had been drafted by Mr Garrett after the hearing before EJ Sharp, and was addressing the issues summarised by EJ Sharp and as directed by her. I accept that is probably the case. The statement of case does not have Mr Garrett's name on it, but the style and content of the particulars very much suggests it was drafted by counsel. I accept the claimant had not suggested to Mr Garrett that he was seeking to bring a sexual orientation discrimination claim.

26. A sexual orientation discrimination claim is then referenced in the claimant's second witness statement of January 2020. It is at odds with the statement of case. The claimant told me that he did not receive any legal advice about bringing a sexual orientation discrimination claim at that time. He said that Bevan-Evans and Capehorn Solicitors were not employment law specialists and were, in effect, simply acting as a post box for him because the owner of the firm was a friend of his. He said he drafted his witness statement himself and it was not reviewed by a lawyer, and he was not given advice about it.

27. The claimant said when he brought his tribunal claim he did not have a discrimination claim in mind. He said he had always been confused about what Three Nations Limited, Three Nations Dispense Limited, Mr Daryl Moss and Mr James Moss were up to, but had just filed in his ET1 claim form the best he could at the time. He said at that time he did not know about the discrimination claims brought by the group of 5 female claimants. He said EJ Sharp then decided that there had been a TUPE transfer to the respondent and had also commented that she found the evidence of Mr D Moss to be confused, evasive and contradicted by contemporaneous documents. The claimant said that resonated with him and also what he felt to be increasing disproportionate resistance to the claim he was bringing by the respondent. He said he then questioned whether his dismissal, which he still felt was unexplained when other staff were not dismissed, was for a discriminatory reason. He had also learned about the other set of discrimination cases.

28. The claimant said he therefore included the sexual orientation discrimination complaint in his second witness statement. He said he did not take legal advice

about it at the time and thought he could, in effect, amend his case by including it in his witness statement. He did not understand the difference between the two. He said the problem was not pointed out to him at the time by the respondent's solicitors and they did not warn him he was under threat of costs in pursuing it. The claimant said he did not understand that he needed to make a formal application to amend in writing until EJ Brace explained it to him and then made a direction for him to set out his amendment application. He said he did not understand at the time that course of action would leave him at risk of costs as he was then following the tribunal orders. The claimant said he wrote his note about issues he wanted to raise
at the preliminary hearing before EJ Brace because he thought that was the right time to raise them, including the addition of the named respondents.

29. The claimant said that when he made his application to amend, he thought the application was about bringing the sexual orientation discrimination claim, and then adding Mr D Moss and Mr J Moss as named respondents to discrimination complaint. He said the references to what had gone on with the TUPE transfer and concerns about fiduciary duties were there as background because it seemed to him that people who would, in his view, break the law in that way would also be more susceptible to being discriminatory.

30. The claimant said when he later took advice from Hugh James they said he could continue with the application and ask the tribunal for permission for the amendments. He said their advice was, however, that it would not be worth the additional cost involved in activities such as drafting witness statements. He said their advice was that the difference an injury to feelings award might make was disproportionate to the additional costs. He said he therefore made a pragmatic decision not to continue with the application.

31. I do not think it likely that the claimant received legal advice about bringing a sexual orientation discrimination claim at the time his second witness statement was prepared and served. I accept it is likely that the claimant's then solicitors were acting as a "post box." The firm in question are not a firm that routinely represents parties in employment disputes in this tribunal. Furthermore, the style of the witness statement presents very much as having been drafted by Dr Nicholas. I do of course have the benefit of having heard the substantive case, when saying this.

32. I also accept it is likely that the claimant did not understand, and did not seek advice about, the need to and how to make a formal amendment application. I do not think he understood at the time the clear delineation between a statement of case and a witness statement. The claimant criticises the respondent for not having pointed that out to him. I do not consider that criticism a fair one. It is not a respondent's responsibility to advise a claimant that they need to make an application to amend, and even less so when that claimant

has a lawyer on the record. There was also no way for the respondent to know limited nature of the retainer between the claimant and his then solicitors. But the point is that I accept it is likely the claimant thought, through his witness statement, he was adding in a complaint that his dismissal was less favourable treatment because of sexual orientation.

33. I also do not consider it likely that the claimant had had legal advice at that time to say that the purported discrimination claim had no reasonable prospect of success. I do not consider that the claimant had an improper motive when he wrote his witness statement in that way. I consider he was, in his own mind, genuinely questioning whether he had been the victim of discrimination.

34. I do not consider that the claimant then deliberately delayed in making an amendment application until it was raised the day before, and then at, the preliminary hearing in front of EJ Brace. I think it is likely that the claimant thought he had by then brought a sexual orientation discrimination claim, hence his discussion with EJ Brace where she took him back to his claim form. I think it is likely the claimant thought he wanted to make a further amendment application to add in Mr D Moss and Mr J Moss as named respondents, hence the document he filed in advance of the hearing before EJ Brace. It was then that EJ Brace explained the amendment process to the claimant.

35. I consider it likely that the claimant then drafted his formal amendment application as a litigant in person and without having taken legal advice. Quite what it was seeking to achieve could have been more clearly drafted. But I consider that to be symptomatic of the claimant not having legal advice, as opposed to it being an application that he knew was hopeless and designed to harass the respondent. Read in conjunction with his witness statement, and what was said to EJ Brace at the hearing before her, a reasonable reader would have been able to discern it was likely the claimant was seeking to add a complaint of direct sexual orientation discrimination on the basis that his dismissal was an alleged act of less favourable treatment on that prohibited ground, and to then add two named individual respondents.

36. I should add that it is not unusual for litigants in person to set out an amendment application in that way, even when they have been given some guidance by a Judge and when they have been referred to the Presidential Guidance on amendments. It is often the case that a further case management hearing is required to further clarify the nature of the amendment sought, the arguments in favour of and against the amendment, and to then make a decision whether the amendment is permitted or not. Those kinds of case management hearings to decide amendments are part of the "bread and butter" of the employment tribunal process at the interlocutory stages. The vast majority do not result in application for costs, whether the application is successful or not. Albeit that of

course does not mean it is not possible for a party to make such a costs application, and it has to be considered on its own individual merits.

37. In summary, I do not consider that the claimant constructed his application to amend to allege a discriminatory dismissal (and to add two named respondents) out of any kind of improper motive, or to harass the respondent, or to abuse the tribunal process. I consider he genuinely believed it was a legitimate complaint that he was seeking the exercise of the tribunal's discretion to be permitted to bring.

38. I also do not consider that the claimant's application to amend was, in context, in itself unreasonable conduct of the proceedings. I do not find the claimant had received legal advice from Mr Garrett or Bevan-Evans & Capehorn Solicitors to advise him that any such application was hopeless. There is no obligation on a litigant in person to seek legal advice and the conduct of a litigant in person cannot be judged in the same way as those with the benefit of legal advice and representation. I do not consider that the fact the claimant initially placed the complaint in a witness statement and not the statement of case indicates that he knew it was hopeless. I consider that is explained by the fact Mr Garrett drafted the statement of case to comply with EJ Sharp's order, and that the claimant separately drafted his witness statement without legal advice. I do not consider that the fact the claimant did not bring the complaint at the outset of the proceedings indicates that he knew it was hopeless or he was acting improperly. I consider that the timing of it being raised in the witness statement was down to the fact, as the proceedings developed and more information came to light, the claimant started questioning more and more the reasoning behind what was happening. That is not unusual in employment tribunal proceedings, and it is not unusual for parties to make amendment applications (even those who are legally represented) as a case progresses and indeed sometimes at the final hearing itself. It does not mean such applications are granted; but they are considered on their merits.

39. I do accept that the amendment the claimant was seeking to make was a substantial one. It was seeking to add a whole new head of claim and would have resulted in new factual matters having to be explored. It could not have been considered to be a relabeling exercise. But I do not consider that the claimant's attempts to call it a relabeling exercise means that the application was improper or that he knew it was hopeless. I consider it comes down to the claimant acting as a litigant in person and not fully understanding the principles, in part due to his misunderstanding about the different status of a pleaded case and a witness statement.

40. I do also accept that it is likely that the claimant would have had an uphill struggle to get the amendment permitted, bearing in mind the substantial nature of the amendment and the time that had passed since the cause of action

accrued. The more he delayed in that application the harder it would have become because of the increasingly likelihood of prejudice in terms of time limits and also the practical impact upon case preparation. However, again I do not consider that means that the application was improperly motivated or that the claimant knew it was hopeless such that it was unreasonably brought. Looking at it in the round, I do not consider that the basis of, or the background to, the amendment application was any different to the type of amendment application that the Tribunal considers from both claimants and respondents day in day out, and would not ordinarily lead to a costs application, in what is ordinarily a no costs forum. It is part and parcel of the normal ebbs and flows of tribunal litigation.

41. I do not consider that the fact the claimant did not, in his formal amendment application, set out the precise amendment he was seeking, as clearly as he could have done, means that the application was brought for an improper reason or unreasonably. As stated, I consider this was due to the fact he was acting as a litigant in person and such a position in an amendment application for a litigant is not unusual and is normally then addressed by a judge at a case management hearing.

42. Turning to the delay in making the application between January and July, again I do not consider that this was the claimant acting improperly to try to harass the respondent, or deliberately to cause the respondent to incur legal costs, or to disrupt the proceedings or that it amounts to unreasonable conduct of the litigation. I consider, as stated, it came down to the claimant considering his witness statement covered the sexual orientation complaint, and the claimant, before the hearing before EJ Brace, then genuinely deciding he thought he should raise the question of the addition of two named respondents too. As stated, the delay would not have helped his amendment application if it had proceeded to a preliminary hearing for a judge to decide, but that does not of itself mean it was improper or unreasonable. If it had proceeded to a preliminary hearing the respondent could have used their arguments about prejudice in terms of case preparation and costs to oppose the application to amend. That is the purpose of having such a preliminary hearing and it is the standard course of action in this kind of situation, and the legitimate arguments a respondent can raise to oppose an amendment application (and does not ordinarily result in a costs application or award).

43. For the reasons already given, I do not consider that the claimant withdrew his amendment application because he knew all along that the weakness would be exposed and that he was stringing out the amendment application to try to cause maximum trouble for the respondent. The background to the application and its timing is as set out above. I do not consider that the claimant's failure to withdraw the application straight away when the respondent filed their reply means that it was improperly or unreasonably brought or maintained. The

claimant was a litigant in person, who did not fully understand the legal position. He was following the directions that EJ Brace had set out in relation to the application to amend, with no suggestion at that stage he was at risk of incurring costs. He then went on to obtain legal advice from Hugh James and then withdrew the application. That latter conduct was not unreasonable but a sensible course of action. Moreover, even if unreasonable or other qualifying conduct could be established, when it comes to considering the costs discretion, the costs claimed by the respondent are in the preparation of the reply, which had already been incurred by that point of time in any event. The costs claimed therefore do not flow from any alleged delay in withdrawing the application after the respondent's reply.

44. Mr Whitcutt also said that Hugh James' email did not refer to costs but to legal advice and therefore the advice from Hugh James must have been that the application was doomed. I would observe that "legal advice" would cover cost/benefit advice that lawyers regularly give to their clients. But in any event, even if Mr Whitcutt is right, then the claimant would have been acting properly to withdraw his application once had had advice. It does not of itself mean that the claimant, for example, knew all along that his application was without merit.

45. I therefore do not consider that the claimant acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of or the timing or his amendment application. I would add that in any event I would not have exercised my discretion in favour of awarding costs. I have the benefit of knowing the wider case and its procedural history. I also have the benefit of knowing how in general applications to amend are dealt with in other cases as part of the everyday work of the tribunal. I do not consider that the conduct of the claimant complained about was materially different to those kinds of cases where costs awards are not routinely applied for or granted. As I remarked at the cost hearings, I would also bear in mind that these proceedings were marked by "mudslinging" from both directions (to take one example, the allegations of misconduct levelled against the claimant which the respondent did not succeed in establishing). I do not consider the amendment application was improperly motivated, but the amendment application was also no different to the general cut and thrust between the parties in this hard fought litigation which has all concluded on a no costs basis and in respect of which the claimant was largely successful. Set in that wider context I therefore would not have exercised my costs discretion in any event.

46. Finally, even if the two stage test had been met, I would not have awarded costs anywhere in the region of the amount claimed. I appreciate the issues raised in the amendment application, and its implications, were of importance to the respondent, and Mr D Moss and I do not doubt that the work was done. But dealing with such amendment applications is routine work and the time

spent and charged needs to be proportionate. Extensive legal research on such a matter would not normally be charged to a party.

47. The costs application is therefore unsuccessful and is dismissed.

Employment Judge R Harfield
Dated: 8 April 2022

JUDGMENT SENT TO THE PARTIES ON 12 April 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche