



EMPLOYMENT TRIBUNALS

Claimants: Mr Anderson & others
Mr Nicholson & Others
Mr Bolam & Others
Mr Henderson & Others
Mr Smart
Mr Shilling & Others

Respondent: Tyne and Wear Passenger Transport Executive t/a Nexus ('Nexus')

Heard on: 11 March 2022

Before: Employment Judge Sweeney

Appearances

For the claimant: Madeline Stanley, counsel

For the respondent: David Reade QC, counsel

JUDGMENT ON COSTS

1. The Respondent's application for costs under rules 75 to 78 of the ETs (Constitution & Rules of Procedure) Regulations 2013 is well founded and succeeds.
2. The Claimants are ordered to pay the Respondent the sum of **£3,250 plus vat** in respect of costs.

REASONS

Background and facts

1. By email dated **18 June 2021**, the Claimants' solicitors made an application to amend six Claim Forms, namely:
 - 1.1. Anderson & 69 Others v Nexus (2500752/15) – presented on **19 June 2015**;
 - 1.2. Nicholson & 5 others v Nexus (2501650/15) – presented on **05 November 2015**;
 - 1.3. Bolam & 28 Others v Nexus (2501719/18) – presented on **10 September 2018**;
 - 1.4. Henderson & 1 Other v Nexus (2502236/19) – presented on **04 July 2019**;

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- 1.5. Smart v Nexus (2502696/19) – presented on **31 October 2019**;
- 1.6. Shilling & 3 Others v Nexus (2503709/19) – presented on **13 September 2019**;
2. The Respondent objected to the application.
3. By emails dated **14 and 22 July 2021**, the Claimants' solicitor, Mr Guss, agreed that matters should be stayed generally in respect of the listing of a remedy hearing but asked for the amendment application to be considered as a separate issue at this stage.
4. On **07 August 2021**, the Tribunal sent to the parties a notice of preliminary hearing to be held on **22 October 2021**, giving a time estimate of 2 hours. The hearing was to decide on the amendment application. At 18:53, on Monday **18 October 2021**, the Claimants' solicitors applied to extend the hearing on **22 October** to a 1 day hearing or, if that was not possible, to postpone it. They had first raised this issue with the Respondent's solicitors at 18.34 on Friday **15 October 2021**. Mr Reade QC had by then been instructed by the Respondent to represent it at the preliminary hearing. He was unavailable in the afternoon of **22 October**. The Respondent invited the Tribunal to note that, should the matter be moved to a later date, it would like the Tribunal to consider a costs application in respect of that element of counsel's brief fee. On **19 October 2021**, Employment Judge Martin postponed the hearing, and I shall refer to it as the 'postponed hearing'. The matter could not be relisted until **11 March 2022**. The Notice of Hearing dated **26 October 2021** stated that at the hearing, an Employment Judge will decide on the claimants' application to amend the claims and the respondent's application for costs.

Preliminary Hearing on 11 March 2022

5. The application came before me on **11 March** and took the best part of the day. I reserved my decision and set aside a date to determine the application. Very shortly before that date, I contracted Covid and was unwell. Upon returning to consider the matter on **11 April 2022**, I noted two points on which I invited further submissions from counsel. There was then a further delay through a combination of work and annual leave before I was able to return to the application. I apologised to the parties for the time it has taken to communicate my decision to them.

Relevant law

6. The tribunal's power is considered the 2013 rules of procedure and in particular within rules 75 to 84.
7. Under rule 76(1)(c) "a tribunal may make a costs order... And shall consider whether to do so where it considers that-

'a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins'

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8. Therefore, although in such circumstances the Tribunal has a duty to consider whether to make a costs order, the actual decision whether to make one or not is discretionary.
9. In the case of **Yerrakalva v Barnsley Metropolitan Council** [2012] I.C.R.420, the Court of Appeal emphasised that, when considering a costs application, it was important not to lose sight of the totality of the circumstances. The tribunal must look at the whole picture when exercising the discretion to award costs or not. It must ask whether there has been unreasonable conduct in the bringing, defending or conducting the proceedings or part thereof and, in doing so, identify the conduct, what was unreasonable about it and what was its effect. Reasonableness is a matter of fact for the tribunal which requires an exercise of judgement. **Yerrakalva** was a case under rule 40 of the ET Rules of Procedure 2004, which did not contain a direct equivalent to rule 76(1)(c) of the 2013 Rules.
10. Even if the threshold tests for an order for costs are met, the Tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances.
11. Rule 84 of the ET Rules expressly confers on the Tribunal a discretion to have regard to the paying party's means. It is not obliged to do so.

Respondent's submissions

12. The Respondent's costs application is made pursuant to Rule 76(1)(c) ET Rules 2013. It is based on what Mr Reade submitted was the unreasonable late application to extend the length of or postpone the preliminary hearing of **22 October 2021**. Mr Reade further submitted that, if I decided to defer all applications to amend, the Respondent may seek all of their costs in responding to that application. However, the only application before me was in relation to Mr Reade's brief fee in respect of the postponed hearing.
13. The application to postpone was prompted by the claimants. Mr Reade referred to the date and timing of the original correspondence, namely after close of business on Friday evening, when the issue regarding the length of hearing was first mooted. The Respondent replied on **18 October 2021**, page **299**, referring to the fact that it had incurred a brief fee. Mr Reade acknowledged the hearing of the application has taken longer than 2 hours but submitted that it was the Claimants' application and at the time the amendment application was made, the Respondent understood that it was on the basis that these were not 'new' causes of action. Based on the arguments which they in fact advanced at today's hearing, the Claimants' representatives ought to have realised long before **15 October 2021** that the hearing would take longer than two hours. As it is, they made application less than 7 days. Counsel's brief fee for the postponed hearing was £6,500 and the Respondent ought to be entitled to the costs of the late application for the adjournment. Mr Reade emphasised that there was no explanation for the lateness of the application and that, although the Respondent would have incurred that fee in any event, because of the delay in having the hearing relisted (**between 22 October 2021 and 11 March 2022**), no allowance should be made for that, and the Respondent should be reimbursed the full fee.

Claimants' submissions

14. Ms Stanley accepted that it would have been better if the application to extend the length of the hearing/alternatively postpone it, had been made sooner. However, she submitted that both parties have an obligation to consider if a listing appropriate; and that both were or ought to have been aware of the issues to be advanced. Ms Stanley referred me to **page 280**. The Respondent, she says, knew that there was a time limit issue; this was never going to have been a hearing that could be completed in two hours. She observed that, although I had read before substantially before the hearing began, that was fortuitous and not always possible. The listing did not allow for any pre-reading. She reminded me that she finished her submissions at about 11.40am; that Mr Reade spoke for about 50 minutes and she had a short reply. These timings should have been anticipated by the Respondent. It would, submitted Ms Stanley, have been unhelpful if the postponed hearing had started but gone part heard. The Claimants should not be penalised as it was they who took steps to combat this. Her instructing solicitors took appropriate steps and invited a joint application. She also referred me to pages **306, 308** and **311**. This is not an appropriate case for costs.
15. If I was not with her, then only a portion of the brief fee of £6,500 was wasted by the postponement. She further submitted that senior counsel was not required for this hearing, observing that there is also junior counsel who has appeared on behalf of the Respondent in the High Court. In short, it would have been reasonable to instruct junior counsel and not to allow a fee for senior counsel's attendance.

Discussion and conclusion

16. The application to postpone was made by the Claimants less than 7 days before postponed hearing. Therefore, pursuant to rule 76 I must consider whether to make a costs order.
17. In doing so, and in keeping with the guidance in **Yerrakalva**, I have asked myself has there been unreasonable conduct in the making of the application less than 7 days before the postponed hearing, what was it and what was the effect of it? I have then asked whether, having regard to all the circumstances of the litigation, I should exercise my discretion to award costs and if so, what amount.

Did the Claimants' solicitors act unreasonably in leaving it so late to make the application?

18. In my judgement, the Claimants' solicitors did act unreasonably in leaving it to 18 October 2021 before applying to extend the length of hearing/postpone the hearing. I note that in paragraph 4 of the notice of hearing sent to the parties on **07 August 2021**, it states: '*The hearing will last about 2 hours. If you think that is not long enough, you must write to the Tribunal as soon as possible.*' It was not until just over 10 weeks' after that notice of hearing that the Claimants' solicitors applied to extend the length or alternatively postpone the hearing. The first indication of the need for a longer hearing came in the Claimants' solicitor's email of **15 October 2021** [**page 296**] after normal business hours. The email says '*on reflection....2 hours....is going to be insufficient...*'. There was no explanation given, either in the application, or at

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this hearing, as to why it was only on **15 October 2021** that consideration was given to the issue. The Respondent had considered two hours to be sufficient. As far as they were concerned, the application was simply to be advanced on the basis that they were not new causes of action and were ongoing claims and that any submissions on time points would not take up significant time.

19. In the application to the Tribunal on **pages 306-307**, the three points which the Claimants' solicitors made in support of the application were, and ought to have been apparent to them and/or their counsel either at the time the application was made or soon after the application. To leave it until **15 October** to 'reflect' on the length of hearing was, in my judgement, unreasonable.

What was the effect of that conduct?

20. The effect is obvious in a case which is, to borrow the phrase 'heavily lawyered', and that is the incurrence of legal fees. In its email of **18 October 2021**, Mr Burns referred to having incurred counsel's brief fee, which will not be '*wasted in its entirety if we postpone....*'

The whole circumstances of the litigation

21. In considering the exercise of my discretion, I have considered carefully Ms Stanley's submissions about the complexity of the litigation (including the High Court litigation) as well as her submission that both parties bear responsibility for time estimates and that the Claimants could have proceeded to the hearing only for it to go part heard.
22. However, this was the Claimants' application and they were best placed to know what arguments they were to advance at the hearing. The litigation may be complex but the question of applying one's mind to the length of hearing and the need to do so at a fairly early stage is not complex. I have regard to the fact that attention was drawn to the need to alert the Tribunal to problems with the length of hearing as soon as possible. I also have regard to the fact that there has been no explanation as to why it took so long after the notice of hearing to reflect on matters and to realise that the hearing would require longer than two hours.
23. Given those matters and the effect on the Respondent, I considered it appropriate to exercise my discretion in favour of awarding costs in respect of the postponed hearing.

The amount of costs

24. I next consider what level of costs to award. I considered Ms Stanley's submission on the need for senior counsel. However, given the value of the sums involved in this litigation, and on the basis of Ms Stanley's submission that the litigation is complex, I did not consider it unreasonable for the Respondent to instruct senior counsel.
25. However, I did not agree with Mr Reade that the Respondent should recover his full fee. Even though there was a delay of almost 5 months between the date of the postponed hearing and **11 March 2022**, I consider that much of the preparation for

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the postponed hearing had not been wasted, as Mr Burns put it in his email. The passage of time would certainly have an effect on that, but not, in my judgement, to the extent submitted by Mr Reade.

26. I consider it appropriate, in all the circumstances, to award the Respondents' 50% of Mr Reade's brief fee, namely, £3,250 plus vat.

Employment Judge Sweeney

15 June 2022

Schedule	
Case Number	Claimant Name
2500752/2015	Mr Steven Anderson
2500753/2015	Mr Steven Anderson
2500754/2015	Mr Gordon Armstrong
2500755/2015	Mr Keith Armstrong
2500756/2015	Mr Michael Bates
2500757/2015	Mr Andrew Bell
2500758/2015	Mr Paul Bootle
2500759/2015	Mr Michael Broadley
2500760/2015	Mr Neil Burgon
2500761/2015	Mr Simon Butroid
2500762/2015	Mr Philip Carr
2500763/2015	Mr Brian Charlton
2500764/2015	Mr Jonathan Chisholm
2500765/2015	Mr Philip Clarkson
2500766/2015	Mr Daniel Collins
2500767/2015	Mr Daniel Convery
2500768/2015	Mr Michael Cooney
2500769/2015	Mr Simon Davison
2500770/2015	Mr Martin Delaney
2500771/2015	Mr Michael Devlin
2500772/2015	Mr James Douglass
2500773/2015	Mr Jeffrey Drape
2500774/2015	Mr John Fallon
2500775/2015	Mr Paul Fraser
2500776/2015	Mr John Gibson
2500777/2015	Mr Alan Goldie
2500778/2015	Mr John Goodwin
2500779/2015	Mr Len Hagelburg
2500780/2015	Mr Arron Hindmoor
2500781/2015	Mr Paul Hitch
2500782/2015	Mr Jason Howard
2500783/2015	Mr James Hynes
2500784/2015	Mr Peter Jackson
2500785/2015	Mr Nicholas Keenan
2500786/2015	Mr Peter Littlewood

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2500787/2015	Mr Graeme Loncon
2500788/2015	Mr Colin Lowery
2500789/2015	Mr James McCarthy
2500790/2015	Mr Stephen Menzies
2500791/2015	Mr John Murphy
2500792/2015	Mr Colin Owen
2500793/2015	Mr Alexander Perkins
2500794/2015	Mr Robert Potts
2500795/2015	Mr Neil Pringle
2500796/2015	Mr Michael Pugh
2500797/2015	Mr Philip Qualie
2500798/2015	Mr Anthony Reay
2500799/2015	Mr Mark Redhead
2500800/2015	Mr Lee Reynolds
2500801/2015	Mr Michael Ridley
2500802/2015	Mr Anthony Robison
2500803/2015	Mr Mark Rochester
2500804/2015	Mr Kristopher Ross
2500805/2015	Mr Clive Scott
2500806/2015	Mr Robin Shortt
2500807/2015	Mr Michael Slee
2500808/2015	Mr Ronald Spark
2500809/2015	Mr Kevin Stephen
2500810/2015	Mr Paul Strachan
2500811/2015	Mr Stefan Stuart
2500812/2015	Mr Trevor Symington
2500813/2015	Mr Ashley Temple
2500814/2015	Mr Robert Thompson
2500815/2015	Mr Daniel Watkins
2500816/2015	Mr Antoni Wegrzyn
2500817/2015	Mr Malcolm Weightman
2500818/2015	Mr Stephen White
2500819/2015	Mr Jon Whitehouse
2500820/2015	Mr Ralph Wilson
2500821/2015	Mr Colin Young
2501650/2015	Mr Peter Nicholson
2501651/2015	Mr Brian Snowball
2501652/2015	Mr Peter Cullen
2501653/2015	Mr Brian Lightfoot
2501654/2015	Mr Paul Dyson
2500150/2016	Mr Gary Crawford
2501719/2018	Mr Jonathan Bolam
2501720/2018	Mr Michael Davison
2501721/2018	Mr David Purvis
2501722/2018	Mr Nathan Mark Williamson
2501723/2018	Mr James Cotter
2501724/2018	Mr Paul Gibson
2501725/2018	Mr Kristopher Rutherford

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2501726/2018	Mr James Stephen Sykes
2501727/2018	Mr Kevin Kirton
2501728/2018	Mr Terence Richardson
2501729/2018	Mr Christopher Stephen
2501730/2018	Mr Paul Brown
2501731/2018	Mr Mark James Hallas
2501732/2018	Mr Andrew Moffat-Clayton
2501733/2018	Mr Ian James Williamson
2501734/2018	Mr Liam James Atkinson
2501735/2018	Mr Michael Mason
2501736/2018	Mr Bryan Nesbitt
2501737/2018	Mr Mark James Robson
2501738/2018	Mr Matthew Scott Warkcup
2501739/2018	Mr Mark William Watt
2501740/2018	Mr Daniel Appleby
2501741/2018	Mr Josiah Clark
2501742/2018	Mr Owen Pemberton
2501743/2018	Mr Christopher Bates
2501744/2018	Mr Kris Donnelly
2501745/2018	Mr Johnson Harrison
2501746/2018	Mr Paul Wilson
2501747/2018	Mr Simon Wood
2501748/2018	Mr Paciencia Madjus
2500264/2019	Mr Paul Hancock
2502236/2019	Mr Lee Henderson
2502237/2019	Mr John Drummond
2502696/2019	Mr Ben Shilling
2502697/2019	Mr Michael Symes
2502698/2019	Mr Jason Thompson
2502699/2019	Mr Conner Wilson
2503709/2019	Mr Daniel Smart
2500144/2021	Mr Trevor Errington