

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No S/4100158/2016

Held at Glasgow on 30 March 2017

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Employment Judge: Robert Gall

Mr C Marshall

**Claimant
Represented by:
Mr E Mowat –
Solicitor**

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Brocklebank The Builders (Troon) Limited

**First Respondent
Not Present &
Not Represented**

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Brocklebank Limited

**Second Respondent
Not Present &
Not Represented**

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Mr Frank Hill

**Third Respondent
Not Present &
Not Represented**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The Judgment of the Tribunal is that the Hearing set down for 30 and 31 March 2017 is, on application by the claimant, postponed. Fresh dates for Hearing are set down for 30 and 31 May 2017.

REASONS

35 1. This case called for Hearing on 30 March 2017. Mr Mowat appeared for the claimant.

2. The First Respondent is a Company which is no longer in existence. There was no appearance for the Second Respondents. There was no appearance by the Third Respondent.
3. The case has an unfortunate history. There has been substantial
5 correspondence on the file.
4. A Hearing was set to proceed on 22 December 2016. That Hearing did not proceed due to absence of information and documentation and indeed due to there being no appearance by witnesses who had been issued with Witness Orders.
- 10 5. Since the Hearing set for 22 December, attempts have been made to obtain information from HMRC. A Documents Order was issued. Receipt of the Documents Order was acknowledged in a standard format. The Documents Order was not however met in that documents were not produced in response to the Order either by the time required in terms of the Order or by
15 30 March 2017.
6. In light of the failure by HMRC to meet the terms of the Tribunal Order by production of documents, a Witness Order was issued requiring attendance of the relevant manager of the section which had received the Documents Order. It was highlighted that criminal sanctions exist for failure to attend
20 the Tribunal in response to a Witness Order.
7. Mr Hill was also issued with a Witness Order as was Mr White, former Director of the First Respondents. There had been correspondence with Mr Hill. In short Mr Hill's position was that he ought not to be a respondent. He provided information and documentation which in his view supported the
25 position as being that he could not be liable for the outstanding wages which the claimant sought in terms of the claim. It was explained to Mr Hill that the Tribunal could not, on the paperwork produced, take the view that there was no prospect of him being liable and therefore "release" him from the proceedings. His attendance as a witness in terms of the Witness Order
30 was therefore required.

8. On 30 March 2017 Mr White appeared as a witness. There was however no attendance by Mr Hill as a witness. There was no attendance by any person on behalf of HMRC. Both Mr Hill and the manager of the section involved within HMRC are therefore in breach of the Witness Orders issued and are open to potential prosecution and criminal sanctions. A report has already been made to the Procurator Fiscal in the case of Mr Hill. This is as he did not appear at the earlier diet in December of 2016 despite there being a Witness Order issued.
9. Mr Mowat said that he had been in touch with HMRC and had ultimately managed to track down someone within the Advocate General's Office who appeared prepared to take responsibility and to try to ensure that papers were passed to the Tribunal. Without however those papers and without Mr Hill's attendance as a witness, Mr Mowat did not see that it was possible to proceed with the Hearing. He therefore sought postponement with a fresh diet being set down. Mr White presented on behalf of Mr Hill a statement with supporting documentation. It was explained to Mr White that a statement did not assist with the resolution of the question of whether Mr Hill was potentially liable or not in that it had not been accepted by the claimant that the information provided sufficiently clarified the situation. In fact some of the information provided conflicted with information provided at an earlier stage as to the trading or cessation thereof by the First Respondents. It is necessary for a witness to appear to give evidence, particularly when the person involved is a party. That allows the Tribunal to assess the evidence as it is given and to assess the evidence given in including any cross-examination. That applies in relation to evidence from Mr Hill as well as evidence from any other witness, including the claimant.
10. Mr White said that he was able to give evidence on certain matters relating to the First Respondent.
11. The Tribunal did not proceed to hear evidence given that this would have involved the case being part heard. It would also have been difficult to deal

with the case in this fashion given the absence of information both from Mr Hill and from HMRC.

12. It was agreed therefore that the case would be set down for 30 and 31 May 2017. Although no evidence has been heard, it would be preferable if the case was set down before me given that I have familiarity with the case and its history. It is not essential however that I hear the case if any other case which I am hearing conflicts with the dates set for this case.
13. The Clerk to the Tribunals is requested to issue Hearing Notices to parties confirming 30 and 31 May 2017 as being the date for the Hearing in the case. It was explained to Mr White that he will not receive such a Hearing Notice as he is a witness rather than a party. He noted however the two dates involved and confirmed that he was free to attend on those dates. It would be hoped that the case can be concluded in one day, although it is felt safer to provide two days for the Hearing.
14. It was recognised that the information may not be to hand from HMRC. In order to try to avoid unnecessary attendance of parties, the Clerk to the Tribunals is requested to bring the file before me on 18 or 19 May 2017 in order to assess whether information has come to hand from HMRC and whether therefore the case is ready to proceed.
15. I confirmed that I would ask the Clerk to the Tribunals to write to Mr Hill underlining the need for him to be present in response to the Witness Order. I would similarly ask the Clerk to take up this point with HMRC underlining the need for documents to appear to meet the Documents Order and, potentially, for someone to appear as a witness in the case given the issue of the Witness Order. Mr Mowat helpfully provided the e-mail address for someone within the Advocate General's Office with whom he has been corresponding. That person is Eric Brown.
16. I appreciate that it is frustrating from the point of view of Mr Marshall that the case has not proceeded. Equally I understand Mr Hill's frustration at the requirement to be present. He has not yet been present. I trust that he will

see the benefit of attending in response to the Witness Order. That benefit is both avoiding potential criminal sanctions for non-appearance and is also in being able to set out his position to the Tribunal with a view to supporting the submissions which he has made and leading, potentially from his point of view, to it being accepted by the Tribunal that he has no personal liability to the claimant. As I described it at the Hearing on 30 March, the Tribunal requires to assemble the jigsaw. Without Mr Hill and HMRC, there are potentially critical pieces of the jigsaw missing.

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Employment Judge: Robert Gall
Date of Judgment: 31 March 2017
Entered in register: 31 March 2017
and copied to parties

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