EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr G Nicolaou	v	**Farringdon (T) Hairdressers Ltd**

PRELIMINARY HEARING

Heard at: London South **On: 24 March 2017**

Before: Employment Judge Elliott

Appearances:

For the Claimant: **Mr T Gillie, counsel**

For the Respondent: **Mr P Holmes, consultant**

JUDGMENT

1. The application for strike out of the claim is refused.
2. No order for costs.

REASONS

1. This decision was delivered orally on 24 March 2017.

2. By a claim form presented on 2 December 2016 the claimant Mr Gregory Nicolaou, claims constructive unfair dismissal. The claimant worked for the respondent as a hairstylist from 1 January 2005 to the date of his resignation on 13 July 2016. The respondent defended the claim.

3. The case was originally listed for a full merits hearing to take place today and standard directions were given, sent to the parties on 14 December 2016.

4. By letter dated 23 February 2017 the respondent made an application to strike out the claim. This was brought under Rule 37(1)(a) and (1)(b), firstly on grounds that the claim is scandalous, vexatious or has no reasonable prospect of success and secondly that the manner in which the proceedings have been conducted by or on the half of the claimant has been scandalous unreasonable or vexatious. The respondent also makes an application for its costs under Rule 76. The amount claimed is £969.45 plus VAT.

5. With the application the respondent submitted a bundle of documents which predominantly contained photographs of the claimant at work.

6. The claimant resisted the application by letter dated 2 March 2017.

The issues

7. The application and response were considered by Employment Judge Baron who ordered that the full merits hearing be converted to an open preliminary hearing to consider the respondent's strike out application and costs application.

8. The issues for consideration today were therefore whether to strike out the claim under rule 37 one a on grounds that it is scandalous or back vexatious or has no reasonable prospect of success; or under rule 37 one be that the manner in which the proceedings have been conducted by or under half of the claimant all the respondent (as the case may be) has been scandalous, unreasonable or vexatious.

9. There is no application under rule 39 for payment of the deposit if the claim has little reasonable prospect of success.

10. The respondent's costs application is also in issue before the tribunal.

11. The claimant made a costs application at this hearing and said that he was prepared to reserve his position on costs.

Witnesses and documents

12. There was a bundle from the respondent being that which was submitted with the application of 23 February 2017. It had 67 pages the majority of which were photographs of the claimant.

13. I had a bundle from the claimant containing written submissions and authorities. I also had written submission from the respondent and authorities. The submissions were fully considered along with the authorities referred to, even if not expressly referred to below.

14. The tribunal heard from Mr Massimo Lipizzi, the sole director of the respondent and from Mr Habtom Tesfay, the claimant's solicitor.

The strike out application

15. The constructive dismissal claim relies on the principle of "a last straw". The claimant submits that the last straw took place on 13 July 2016 as per paragraph 24 of the Grounds of Complaint which says "on 13th July the claimant was a gown and cutting collar on the back of a chair ready for a client. He did not see that Ms Marsh had left her jacket on the chair. When she saw the

claimant had put the gown on top of her jacket Ms Marsh threw it onto another chair and grabbed her jacket saying "Really?" in an aggressive tone."

16. The respondent submits that incident occurred 7 to 8 months earlier than alleged. There is apparently no CCTV footage of the incident. If the respondent is right on the issue of timing then the respondent relies on affirmation of breach. The respondent also states that Ms Marsh referred to in paragraph 24 of the Grounds of Complaint (as set out above) is not an employee of the respondent but part of a separate business.

17. In the letter of application of 23 February 2017 the respondent sets out its submissions as to why this cannot amount to constructive dismissal following the test in ***Malik v Bank of Credit and Commerce International SA 1997 IRLR 462.***

18. The respondent also submits that the act upon which the claimant seeks to rely is "utterly trivial". The respondent therefore seeks a strike out on grounds that the claim has no reasonable prospect of success.

19. The respondent also complains that the manner in which the proceedings have been conducted on behalf of the claimant. They rely on an issue of dispute that the claimant contends that he has not worked since his resignation and the respondent's contention that he has. The respondent submits that both the claimant and his solicitor have been untruthful on this issue. The reliance on this issue is on dishonesty in relation to mitigation/earnings since dismissal.

The costs application

20. The costs application mirrors the strike out application. It is made under Rule 76(1)(a) and Rule 76(1)(b), firstly that a party or a party's representative has acted vexatiously abusively disruptively or otherwise unreasonably in the bringing of the proceedings or the way in which the proceedings have been conducted; or that the claim has no reasonable prospect of success.

21. The respondent relies on their contention that the claimant and or his representatives have been dishonest throughout the proceedings in relation to the claimant's post termination earnings. The reliance on the photographs most of which bear a date go to the issue of whether the claimant has been working since the termination of his employment; a matter which only becomes relevant if the claim succeeds.

22. In response to the application the claimant representative in the letter of 2 March 2017 sets out the claimant's position in relation to the photographs. It is said in the letter that in the third week of October 2016 the claimant heard that a hairstylist at a salon called McCarthy was leaving and he called the owner of the salon who offered him a one-week unpaid trial. The stylist then decided not to leave and there was no vacancy for the claimant.

23. The claimant says via this letter that he agreed to help that business during its busy period between November 2016 and January 2017 for which he did not

receive any remuneration. It is also said for the claimant that he obtained permission to cut his friends hair at this salon and that he has also socialised with friends there. He admits to receiving a gift in the sum of £100.

24. There is a factual dispute as to when the last straw incident relied upon by the claimant took place and whether or not it was trivial. The claimant says that even if Ms Marsh was not employed by the respondent, the respondent failed to protect the claimant from her actions and this amounted to a breach of the implied term.

25. The dishonesty allegation is also denied.

26. The claimant says that the photographic evidence in the respondent's bundle was not previously disclosed to them prior to the making of this application. They have also not seen any CCTV evidence which they understand exists.

The relevant law

27. Rule 37 provides that:

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

28. Strike out is a draconian power – ***Blockbuster Entertainment Ltd v James 2006 IRLR 630 CA.*** Unreasonable conduct must take the form of deliberate and persistent disregard for procedural steps or that it has made a fair trial impossible Even then, the proportionality of a strike out needs to be considered.

29. On constructive dismissal the parties took me to the decision of Lady Smith in the EAT in ***Yorke and Yorke v Moonlight EAT/0025/06*** which says that the focus is on the employer's conduct and it must first be established that the conduct complained of is the conduct of the employer. The EAT said that the claimant could not claim constructive dismissal based on the conduct of a third party. The EAT went on to say (paragraph 19 of the judgment) that the conduct of a third party could be relevant, if for instance an employer failed to take reasonable steps to control the behaviour of a third party.

30. The power to award costs is contained in Rule 76 of the Employment Tribunal Rules of Procedure 2013 which provides that:

(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

31. Costs do not follow the event in employment tribunal proceedings and an award of costs is the exception and not the rule (Lord Justice Mummery in ***Barnsley Metropolitan Borough Council v Yerrakalva 2012 IRLR 78***).

Findings and conclusions

32. On prospects of success, it is clear that there is a factual dispute on the question of when the incident of 13 July 2016 relied upon in paragraph 24 of the Grounds of Complaint took place. The parties have not yet given evidence on this, and there may be other witness evidence from those who were involved in this incident.

33. On triviality, this will need to be considered against the whole picture as to whether or not it was a last straw.

34. If it is the case that Ms Marsh is not employed by the respondent and I make no determination on this today, the tribunal will need to hear evidence and submissions as to whether the respondent had a duty to protect the claimant from her actions. The claimant clearly pleads this at paragraph 27 of his Grounds of Complaint.

35. The respondent may wish to call Ms Marsh to give evidence. I heard evidence from Mr Lipizzi to the effect that Ms Marsh is not employed by the respondent but that the respondent rents space to her. This is said to be an entirely undocumented arrangement save that payment is made via their banking arrangements. It may be that documentary evidence can be disclosed in relation to these payments if there is nothing else. It may be that Ms Marsh will give evidence to corroborate Mr Lipizzi's evidence.

36. On the ***Yorke*** case, I find that even if Ms Marsh is properly categorised as a third party, the claimant relies on failures by the respondent to protect him from her actions. That alleged failure is on the part of the respondent and not on the part of a third party.

37. This is not suitable for a strike out. It requires a proper consideration and testing of the evidence, with witness statements, cross-examination and submissions.

38. Mr Tesfay was cross-examined on the content of the response to the respondent's application and it was put to him that the responses in relation to the claimant's work status were not correct. Mr Tesfay rightly said that he could not give evidence on these matters because he was basing what he said on his client's instructions. The photographs (covertly taken) which show the claimant in another salon, were not seen by Mr Tesfay when he wrote the response to the application on 2 March 2017. They were not sent to the claimant's representative until 6 March 2017.

39. The respondent took Mr Tesfay to a letter at page 88 of the respondent's bundle, a letter from MacCarthy London which is the salon at which the claimant is alleged to have been working and being paid wages, post termination of employment. The letter was disclosed to the respondent by the claimant. It says "*We are extremely fortunate that this is done out of complete kindness which is always awarded with a night out with the team or me personally giving cash out of my own pocket*". The respondent says that this is evidence of the claimant's solicitor being dishonest.

40. I find based on his evidence, that Mr Tesfay asked the claimant if he had any job, the claimant told Mr Tesfay that he did not and Mr Tesfay accepted that instruction at face value and prepared the schedule of loss. I find that Mr Tesfay has acted entirely appropriately. He is acting on the instructions of his client. If his client tells him he has earned no income from employment, Mr Tesfay may accept those instructions. These are not matters within Mr Tesfay's first-hand knowledge. It then remains open to the respondent to cross examine the claimant on the status of these sums of money that are referenced in the documents.

41. The allegation of dishonesty against Mr Tesfay is an extremely serious allegation to make against a practising solicitor who is bound by rules of professional conduct. In oral submissions the respondent said that it had "no reason to contest the evidence" of Mr Tesfay but there was a failure to notice the contradictions in place in the documents. I find that Mr Tesfay has not been dishonest at all. He has acted on instructions. This is his job. This was a very serious allegation to make against Mr Tesfay and I find it was unjustified.

42. This matter goes to the <u>claimant's</u> honesty not the honesty of Mr Tesfay. It is a matter that should be explored in evidence and be the subject of a determination by the tribunal and <u>only</u> becomes relevant if the claim succeeds. If the claimant and /or his solicitor have been untruthful, then it remains open to the respondent to present a costs application in relation to this. I have heard no evidence from the claimant and I am not in a position to assess his truthfulness or otherwise.

43. I stress that the dishonesty allegation relates to the issue of potential <u>remedy</u>. It may not arise for the tribunal's consideration. There has been no sworn witness evidence from the claimant. There is a factual dispute as to what the claimant was doing in a salon in late 2016 and early 2017. This needs to be dealt with in witness evidence which can then be tested <u>if</u> the claimant succeeds.

44. I am asked to draw inferences from photographs of the claimant and I am asked to draw inferences from the fact that the claimant did not give evidence today. I find that in answering the application today, the claimant was not obliged to give evidence. I draw no adverse inference from this or the photographs today. The claimant will doubtless give evidence at the full merits hearing when he will need to prove the dismissal.

45. If the respondent is right and the tribunal ultimately finds that the has been dishonesty then it is open to the respondent to make a costs application in the light of the tribunal's findings.

46. I find that in relation to the claimant, the respondent has "jumped the gun" on the dishonesty allegation. The appropriate place for this is if and when there is a finding that there has been dishonesty once the evidence has been properly tested. In relation to Mr Tesfay the allegation was unjustified.

47. Costs are not the norm in the employment tribunal. This is a very early stage at which to be making a costs application on prospects of success. I have found that the pleaded case is that the claimant relies on the respondent's failure to protect him from the actions of Ms Marsh in the event that she is not employed by the respondent.

48. This is not a clear-cut case on the paperwork and the very limited evidence before me today. I find that the evidence needs to be heard and considered before such a determination can be made.

49. The issue of costs may be revisited by either side at the full merits hearing. I make no order for costs today. I record that the claimant reserves its position in relation to the costs of today.

50. The application for strike out is refused and no order for costs is made.

CASE MANAGEMENT SUMMARY

Listing the hearing

1. After all the matters set out below had been discussed, we agreed that the hearing in this claim would be completed within **two days**. It has been listed at London South Employment Tribunal, Croydon to start at 10am or so soon thereafter as possible on **12 July 2017**. The parties are to attend by 9.30 am. The hearing may go short, but this allocation is based on the on the claimant's intention to give evidence and call possibly one further witnesses and the respondent's intention to call three witnesses. The time will be used to deal with remedy, if applicable, as well as liability.

The issues

2. I now record that the issues between the parties which will fall to be determined by the Tribunal are as follows:

3. **Constructive unfair dismissal claim**

   3.1. This is a claim for constructive unfair dismissal. The term of the contract relied upon is the implied term of trust and confidence. The claimant is ordered to set out a list of the breaches of contract relied upon, by reference to the matters already pleaded in the ET1.

3.2. In relation to the incident on 13 July 2016 it is in issue for the tribunal as to whether Ms Marsh was an employee of the respondent or someone in respect of whom the respondent has control of her actions.

3.3. Was there a fundamental breach of the contract of employment.

3.4. Did the claimant resign in response to any proven breach?

3.5. Did the claimant affirm the breach?

3.6. If there was a dismissal, was the decision to dismiss a fair sanction and within the range of reasonable responses?

3.7. Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. **A list of the breaches of contract relied upon**

1.1. On or before **7 April 2017** the claimant is ordered to set out and send to the respondent a numbered list of the breaches of contract relied upon, by reference to the ET1 and this is to be placed in the hearing bundle.

2. **Bundle of documents**

2.1. It is ordered that the respondent has primary responsibility for the creation of the single joint bundle of documents required for the hearing.

2.2. The respondent is ordered to provide to the claimant a full, indexed, page numbered bundle to arrive on or before **28 April 2017.**

2.3. The respondent is ordered to bring sufficient copies (at least three) to the Tribunal for use at the hearing, by 9.30 am on the morning of the hearing.

3. **Witness statements**

3.1. It is ordered that oral evidence in chief will be given by reference to typed witness statements from parties and witnesses.

3.2. The witness statements must be full, but not repetitive. They must set out all the facts about which a witness intends to tell the Tribunal, relevant to the issues as identified above. They must not include generalisations, argument, hypothesis or irrelevant material.

3.3. The facts must be set out in numbered paragraphs on numbered pages, in chronological order.

3.4. If a witness intends to refer to a document, the page number in the bundle must be set out by the reference.

3.5. It is ordered that witness statements are exchanged so as to arrive on or before **28 June 2017.**

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

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Employment Judge Elliott

24 March 2017