EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr M Dhliwayo	**v**	Slater Gordon Solutions Legal Ltd

PRELIMINARY HEARING

Heard at: Reading **On:** 11 September 2017

Before: Employment Judge S Jenkins

Appearances
For the Claimant: In person
For the Respondent: Miss M Tutin (Counsel)

JUDGMENT

1. The Claimant's complaint of unfair dismissal is struck out pursuant to rule 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 on the basis that it has no reasonable prospect of success.

REASONS

Background

1. The case before me was listed as a full merits hearing, notice of hearing having been sent to the parties on 16 June 2017, such notice setting out various case management orders to be complied with during July, August and September. However, shortly after submitting its ET3 response, on 28 July 2017, the Respondent wrote to the tribunal making an application to strike out the claim, pursuant to rule 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"), on the basis that it was asserted to be scandalous or vexatious or had no reasonable prospect of success. In the alternative, the Respondent applied for the issue of a deposit order, on the basis of its assertion that the Claimant's claim had little reasonable prospect of success. The Respondent applied for a preliminary hearing to be held to consider those matters.

2. The Claimant then himself made an application to strike out the Respondent's response, by letter dated 30 August 2017, pursuant to rule 37(1)(c), on the basis that the Respondent had not complied with the Tribunal's case management order that witness statements be exchanged by no later than 25 August 2017. There was also some subsequent correspondence, between the parties and the tribunal, culminating in an email from the Respondent on 4

September 2017 seeking clarification as to whether the hearing would go ahead as a full merits hearing or instead take place as a preliminary hearing.

3. Regrettably, the file has not been well managed at the Tribunal with no response having been provided to the parties' correspondence until a letter of 7 September 2017, i.e. with only one clear working day to the hearing, noting that any application could be considered at the hearing on 11 September 2017. I repeat the apology I gave orally to the parties at the start of the hearing for any inconvenience that may have been caused to them as a result of the Tribunal's deficiencies.

4. Having reviewed the file before commencing the hearing, I indicated to the parties that it appeared to me that there were four options for the disposal of the case. The first was to continue with the full merits hearing as originally listed; the second was to consider as a preliminary issue the two applications to strike out; the third, although likely to be run in conjunction with the second, was to consider the Respondent's application for a deposit order; and the fourth was to postpone the hearing in its entirety and to re-list it for a preliminary hearing. I indicated to the parties that I felt there were some potential issues with regard to the third possible approach as the Rules in relation to deposit orders at Rule 39 indicated that consideration of an application for a deposit order would need to be made at a preliminary hearing, and Rule 54 noted that

> "The tribunal shall give the parties reasonable notice of the date of the hearing and in the case of a hearing involving any preliminary issues at least 14 days [*sic*] notice shall be given and the notice shall specify the preliminary issues that are to be, or may be, decided at the hearing."

5. I indicated that it could be therefore that there was no power for me to consider an application for a deposit order as a preliminary issue, bearing in mind that the required 14 days' notice from the Tribunal had not been provided.

6. The Claimant indicated that his preference was to proceed with the first option, i.e. to continue with the case as originally planned with a full hearing taking place. He did not consider that the preliminary issues should be addressed as he felt that he would be prejudiced if either a strike out or deposit order was made at the hearing, although he could not articulate the prejudice he felt would arise.

7. The Respondent contended that it did not consider that it would be appropriate to continue with a full hearing as it was not prepared for such a hearing, contending that the way the Claimant had put his case was not clear and therefore needed further clarification, that the witness statements that had been prepared and exchanged did not therefore fully address the issues, and also that it was likely that a full hearing would take two days rather than the scheduled one. The Respondent's preference was to proceed with a combination of the second and third options and Miss Tutin urged me to apply the overriding objective in relation to my management of the case and to consider the application for a deposit order as a preliminary issue notwithstanding the terms of rule 54. She observed that although formal notice had not been issued to the parties by the Tribunal, the Claimant had been on

notice of the Respondent's application for some six weeks and had indeed submitted a letter to the tribunal in response stating why he did not think a strike out or deposit order would be appropriate.

8. For completeness, I observed that there is in fact no notice requirement in relation to strike out applications under Rule 37, apart from the requirement set out at rule 37(2) that a claim or response should not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing. I was satisfied that the parties would have such an opportunity at the hearing.

9. I adjourned the hearing at that point to consider how best to proceed, and during my deliberations I reminded myself of the terms of Rule 48 which provide that a tribunal conducting a final hearing may order that it be treated as a preliminary hearing if the tribunal is properly constituted for the purpose and if it is satisfied that neither party shall be materially prejudiced by the change.

10. As I was sitting alone, the Tribunal was properly constituted for the purposes of a preliminary hearing, and I was satisfied that neither party would be materially prejudiced by the conversion of the hearing to a preliminary one. The parties were clearly aware of each other's applications and, in particular, the Claimant was aware of the Respondent's application for a deposit order. There had been more than the 14-day period that might have been available as a minimum if a formal notice of a preliminary hearing had been issued to the parties. I therefore felt, applying the overriding objective to deal with matters proportionately and flexibly, that it would be appropriate to proceed to consider the various applications in the form of a preliminary hearing. I then proceeded to reconvene the hearing and hear submissions from the parties in relation to their applications.

Background circumstances

11. Before proceeding to recite the parties' submissions, it should hopefully assist consideration of this Judgment if I set out something of the factual background to the case. I did not hear any evidence so these do not constitute any formal findings of fact, but will hopefully nevertheless be of assistance.

12. The Claimant was employed by the Respondent as a legal adviser at its Feltham office from 22 September 2014, handling Road Traffic Act personal injury cases. His employment ended on 24 March 2017 by reason of redundancy. That redundancy arose because of the proposed closure by the Respondent of its Feltham office, the landlord of the building having applied for planning permission to convert the office space into private apartments and, as a consequence, having asked the Respondent to vacate the building. The Respondent then proposed to move the work that had been carried out at its Feltham office to other offices in Aldershot and Fareham. Due to the number of employees affected, a collective consultation process commenced in January 2017 with meetings taking place in January and February. Individual consultation meetings then took place in February and March.

13. Prior to the announcement of the redundancy proposal on 23 January 2017, the Claimant had, in a grievance dated 30 December 2016 but which he submitted to the Respondent in early January 2017, raised a number of issues about his treatment in the workplace, including assertions of nepotism, abusive/disrespectful emails, inappropriate placing of him on a performance plan, excessive workload, unfair treatment when applying for flexitime, being lied to by management about a restructure, a breakdown in communication, and unreasonable/unfair case allocation. That grievance was then considered and was, in part, upheld. The outcome of that was confirmed to the Claimant by letter dated 6 February 2017. The Claimant appealed the grievance outcome and an appeal meeting was then held in March 2017 with the outcome being provided to him by letter dated 14 March 2017.

14. During the consultation process, the Claimant confirmed that he did not want to relocate to Aldershot or Fareham because those offices were located too far away. The Claimant, during his submissions to me, indicated that the geographical distance had not been the only issue, and he had also been concerned that it would be difficult for him to continue in employment with the Respondent bearing in mind the issues that gave rise to his grievance. He indicated that he had passed this concern on to a representative of the Respondent in a telephone conversation at the time. As, in light of the Claimant's indication that he did not wish to relocate to Aldershot or Fareham, there were no alternative roles available, the Claimant was notified on 8 March that his employment would end by reason of redundancy on 24 March 2017. He received a payment in lieu of notice, outstanding holiday pay and a statutory redundancy payment. The Claimant did not appeal the redundancy decision.

Submissions

15. The Respondent contended that the Claimant's concerns, as set out in his ET1, focused entirely on the issue of his grievance and that he did not take any issue with the redundancy situation or the redundancy process. The Respondent noted that the ET1 was expressed as a claim for "constructive dismissal" whereas there had in fact been an actual dismissal by reason of redundancy.

16. The Respondent noted that the entire content of the Claimant's ET1 form dealt with the issue of his grievance and, even taking the assertions raised in the grievance at their highest, they had no bearing on his claim of unfair dismissal in the circumstances that arose. The only reference within the ET1 form to redundancy related to the Claimant asserting that he had been forced to take voluntary redundancy because he felt that his position had been made untenable as a result of acts performed by middle management. However, the Claimant had been made compulsorily redundant and there had been no question of any employee volunteering for redundancy. The Respondent also observed that the Claimant had also accepted, during the discussions at this hearing, that he had had no issue with the process followed by the Respondent in managing the redundancies.

17. The Respondent also contended that the Claimant's document disclosure and witness statements (he had prepared one for himself and two of his former

colleagues) again focused almost exclusively on the grievance issues, with the only document included in the Claimant's disclosure relating to redundancy being his termination letter dated 8 March 2017.

18. The Respondent therefore contended that, even taking the Claimant's assertions in relation to the grievance and the matters relating to the grievance at their highest, there was no discernible cause of action and there was no connection between the circumstances of his grievance and the redundancy, involving as it did, a site closure and the redundancy, or at least potential redundancy subject to alternative employment options, of 22 people overall.

19. The Respondent contended that this therefore meant that the claim was scandalous, in the form of it being irrelevant or, in the alternative, was vexatious, in that it was not being pursued with any expectation of success. In the alternative, the Respondent contended that the claim had no reasonable prospect of success in that the Claimant had accepted that he had not resigned and that the issues about which he complained in his ET1 manifestly related only to his grievance. In the further alternative, the Respondent contended that the case had little reasonable prospect of success for similar reasons and therefore that a deposit should be ordered.

20. The Claimant in response contended that the issues raised by his grievance were relevant as background to his claim and would explain the real reason why he thought he was dismissed and why he turned down offers of alternative employment. He contended that there were ulterior motives in the form of the Respondent taking exception to the matters raised in his grievance and appeal, and that the redundancy had been a sham. He felt that although he had expressed in his claim form that he had been constructively dismissed, he had ticked the "unfair dismissal" box in the claim form and therefore that an ordinary unfair dismissal claim should be considered. He contended that it was appropriate for that to be dealt with at a full hearing. He further contended that his case was neither scandalous nor vexatious, and nor was it a case that had had no, or even little, reasonable prospect of success.

21. With regard to the Claimant's application to strike out, he noted that it was based on the Respondent's failure to comply with the directions set out in the notice of hearing of 16 June 2017 with which he had complied but with which the Respondent had not. He contended that, notwithstanding that an application for a preliminary hearing to be held had been made, that was not an excuse for the Respondent then to take no action in relation to the various case management issues on which orders had been made. He observed that the Respondent could have made applications to extend time or to vary or even revoke the orders made.

22. In response to that, the Respondent noted that there had been several attempts to contact the tribunal in relation to the application for a strike out or deposit order to be considered and that indeed the Respondent had been told by tribunal staff that the case was to be listed for a preliminary hearing. It was only as time was moving on, and as the Respondent was conscious that witness statements needed to be exchanged, that two brief witness statements were prepared and served on the Claimant, albeit it was accepted that these were late. The Respondent also contended that, as the initial

application for a preliminary hearing had not been responded to, there would seem to have been little point in making a further application to extend time or to vary orders. However, the Respondent did concede that an application could have been made and was not made in the circumstances. The Respondent contended however that the failure in relation to compliance with the order to exchange witness statements should be dealt with with leniency.

Conclusions

23. I first considered the Claimant's application to strike out pursuant to rule 37(1)(c). In this regard, as a matter of fact, it was clear that there had been a failure to comply with the Tribunal's orders in that the witness statements had not been exchanged on time. However, I was conscious of my need to consider this application by way of application of the overriding objective to deal with cases fairly and justly, and I was also conscious of the direction provided by the Employment Appeal Tribunal in the case of Weirs Valves and Controls (UK) Ltd v Armitage [2004] ICR 371 that I should consider all relevant factors which would include whether a fair hearing would still be possible.

24. In relation to this case, whilst there was an accepted failure on the behalf of the Respondent, and I would certainly recommend that representatives when making applications for preliminary hearings should also include within those applications an application to address the full ramifications of that application, i.e. by applying for a variation or stay of case management orders, I was satisfied that there was a reasonable excuse for the Respondent's failures.

25. The Respondent had made a timeous application to the tribunal for a preliminary hearing and no formal response had been provided over a period of approximately a month before the time for compliance with the witness statement exchange order expired. The Respondent had however contacted the tribunal on several occasions to pursue the application and to clarify where it stood and, regrettably, did not get a satisfactory explanation. On that basis, I was satisfied that it would not be appropriate to strike out the Respondent's response for failure to comply with the order relating to the exchange of witness statements. I would also, in any event, have concluded that such an order would not be appropriate as there was no reason why a fair trial of the matter could not take place at a future time.

26. Turning to the Respondent's application, I first considered whether the claim was scandalous or vexatious. I was conscious that scandalous in this instance does not carry its normal meaning of something that is "shocking" but is to be considered as something which is irrelevant and abusive of the other side. In that regard, whilst I had concerns about the relevance of the Claimant's claims, as I comment on in more detail below, I did not consider that that was sufficient to lead to a strike out. I was also not satisfied that the case was being pursued by the Claimant vexatiously, i.e. with any form of desire to harass or inconvenience the Respondent, or for an otherwise improper motive.

27. I turned then to consider whether the case should be struck out on the basis that it had no reasonable prospect of success. I considered carefully the directions provided by the House of Lords in the case of Anyanwu v South Bank Students' Union [2001] ICR 391, by the Court of Appeal in Ezsias v

North Glamorgan NHS Trust [2007] ICR 1126, and by Lady Smith in the Employment Appeal Tribunal in Balls v Downham Market High School and College [2011] IRLR 217. The former two cases made the point, albeit in the specific contexts of discrimination and whistleblowing claims respectively, that a strike out on the basis of no reasonable prospect of success should only arise in an exceptional case when central facts are not in dispute. Lady Smith in the Downham Market High School case noted that it was not a question of assessing whether a claim was likely to fail or whether its failure was a possibility but that the claim had no reasonable prospect of success and that the tribunal should assess this from a careful consideration of all the available material.

28. In this case, I noted the Respondent's submission that, even taking the Claimant's contentions at their highest in relation to the Claimant's assertions regarding his treatment by the Respondent which gave rise to his grievance, that did not amount to the basis of any claim for unfair dismissal in relation to the redundancy which took place in March, and where the Claimant had accepted that he took no issue with the process followed in relation to redundancy.

29. Whilst the Claimant contended that the reason for his dismissal was a sham, that was clearly at odds with his acceptance that there was nothing untoward with the redundancy process. At its highest, the Claimant appeared to contend that the issues which led to his grievance formed part of his decision-making process in relation to his decision not to take an alternative position with the Respondent in either its Fareham or Aldershot offices. Whilst there was no evidence before me on that point, although the Respondent contended that it had had no notification of anything other than the Claimant's unwillingness to move due to the distance involved, I took this assertion by the Claimant at its highest or the purposes of this hearing, i.e. on the basis that part of his rationale for rejecting the offer of alternative employment was due to his concerns over the way he had been treated.

30. However, even proceeding on that presumption, it seemed to me that the Claimant did not have any basis for the claim of unfair dismissal he was pursuing. The fact that the Claimant's concerns about the way he had been treated formed part of his decision not to accept an alternative employment would only, in the circumstances relating to redundancy, have meant that his rejection of that alternative job was a reasonable one, such that he would be retain his entitlement to a redundancy payment. It would not have had any bearing on the fairness of the underlying redundancy situation or process.

31. Of course, on the facts of this case, the Respondent, quite correctly, did not take any issue with the Claimant's decision not to take up the job purely on geographical reasons and paid the Claimant his redundancy payment. However, even if an alternative position had been available in very close geographical proximity to the initial office, a desire to refuse the job because of the issues that had arisen in the workplace could well then have justified the Claimant in refusing the alternative job and he would still then have been entitled to a redundancy payment.

32. That justification however would have had no bearing on the fairness or otherwise of the initial redundancy decision. Bearing in mind that the Claimant, by his own admission, took no issue with the redundancy process, and it did not seem that any issue could realistically have been taken, bearing in mind that the redundancy involved the closure of the entire office, it seemed to me that there was no basis for any claim of unfair dismissal by the Claimant and that it should therefore be struck out on the basis that it had no reasonable prospect of success.

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Employment Judge S Jenkins

Date: 18 September 2017……

Sent to the parties on: .....