

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100755/2016

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Held in Glasgow on 7 July 2017

Employment Judge: Ms R Sorrell

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Mr David Morrison

**Claimant
In Person**

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Glasgow Life

**Respondent
Represented by:
Mr M Wallace
Solicitor**

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PRELIMINARY HEARING

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the judgment of the Tribunal that the claimant's application for strike out of the
30 response is dismissed.

ORDER OF THE EMPLOYMENT TRIBUNAL

The following Orders have been made:-

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1. Within 28 days of the date of this judgment, the claimant shall provide to the respondent and to the Tribunal written further particulars in relation to his complaint of constructive dismissal containing:

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(i) Each and every specific act/omission or event including the "final straw" that he alleges amounted to a breach of contract that entitled him to resign and claim constructive dismissal detailing the facts he

E.T. Z4 (WR)

seeks to establish for each and every specific act. This should be set out chronologically and include the date of the act/omission or event, the person said to be responsible, where it occurred and identifying any persons witnessing the act/omission or event;

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(ii) The express or implied term(s) of his contract which he alleges to have been breached;

10 2. Within 28 days of the date of receipt of the claimant's further particulars set out in (1) above, the respondent shall provide to the claimant and the Tribunal a response to these further particulars, including any proposed amendment to the Grounds of Resistance.

15 In addition, parties agreed to make the following voluntary disclosures:-

(i) The claimant will voluntarily provide evidence of his income since the termination of his employment to the respondent within 28 days of the date of this 'PH.'

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(ii) The respondent agreed to voluntarily provide the minutes of the claimant's grievance meetings held on 27 May 2015 and 21 August 2015 within 14 days of the date of this 'PH.'

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REASONS

Introduction

30 1. The claimant has lodged a complaint of constructive dismissal.

2. Upon application by the claimant, this Preliminary Hearing ('PH') has been scheduled to determine whether the response should be struck out on the grounds that the manner in which the proceedings have been conducted by

the respondent has been unreasonable and due to the failure of the respondent to comply with an Order.

3. Two documents were lodged and referred to as D1 and D2.
4. As the claimant is a party litigant, the procedure for this 'PH' was explained to him at the outset of proceedings.

Claimant Submissions

5. The claimant submitted that the aim of the Tribunal is to provide a fair process so that parties can be on an equal footing. But this has become an extended process. The respondent has not acted reasonably in the manner in which they have conducted proceedings or in terms of the Overriding Objective. The respondent has not kept to timescales and has not provided documents such as the minutes of the grievance hearings. They are now saying the format of his responses are incorrect.
6. He has met the timescales, but the respondent has not. The respondent did not correspond with him after the 'PH' in January 2017 until 4 April 2017. In the respondent's email of 6 April 2017 there is no mention of any problem with the format of his further specification. They only sent an email yesterday questioning the format of his response. This response is not reasonable as the respondent has not specified what is needed in accordance with what was discussed at the previous 'PH' in January 2017. The respondent continues to make the same points sending the same reply over and over again. There doesn't seem to be any intention to move this process forward to hear the actual evidence and it is well past the point where that is fair.
7. For example, the "last straw" incident was noted at the 'PH' on 7 July 2016. The respondent has still not provided the minutes of the grievance meetings he has requested a number of times and he has told the respondent three times that he does not have any witnesses'. He has incurred significant costs in preparing materials for this case and the respondent is not acting in the

spirit of fairness. Mr Wallace is the third lawyer for the respondent in this case as the respondent is short staffed. The respondent had the opportunity to meet with him before he left, but didn't and nor did they engage with ACAS or the mediation process.

5 **Respondent Submissions**

8. The claimant's application for strike out of the response is based upon the respondent's failure to comply with the 'PH' Order of 12 January 2017. The respondent provided an explanation for the non-compliance in their correspondence to the Tribunal of 4 and 6 April 2017. It accepts there was a failure on the part of the respondent's representatives to inform the Tribunal that the solicitor dealing with the matter had left the respondent and that due to the solicitor's email account being closed, the note following the 'PH' on 12 January 2017 was misplaced and the deadline for compliance with the Order was overlooked as it had not been diarised. As a result, the claimant's further specification had also not been received which was needed to respond to the Order.
9. As soon as the respondent realised their mistake, it sought the claimant's further specification. On 6 April 2017 the respondent applied to the Tribunal for an extension of time to respond to the claimant's further specification. On 21 April 2017 EJ Wiseman granted the respondent an extension of time to respond by 5 May 2017.
10. It is denied that the manner in which the proceedings are being conducted by the respondent is unreasonable or vexatious. It was an administrative oversight which caused a delay of about six weeks, but this does not mean there cannot still be a fair hearing and it would be disproportionate to strike out the response.
11. In its response of 27 April 2017 to the claimant's further specification, the respondent stated that the claimant had not complied with Paragraph 1 of the Order. The claimant had not set out matters chronologically within each of

the five headings and has instead set out all of the matters complained of which only some were in chronological order. In addition, in many of the paragraphs more than one allegation is made and they are not precise in their description of the act, omission or events. (D1)

5 12. The claimant then responded by summarising his pleadings again. (D2) However, no documents are referred to and only point 9 at p.5 gives an indication of any document. Furthermore, it is unclear how point 2 relates to breach of contract and at point 9 the claimant does not specify when he was instructed to purchase the books.

10 13. This is a constructive dismissal claim and the allegations need to be clear and specific in order to be answered. There are thirty pages of pleadings made, many of which are incomprehensible, lack specification and bear no relevant to such a claim. Neither of the two documents narrow the issues and do not always refer to the same allegations. Furthermore, the dates in
15 Document 1 go back to 2010, yet page 1, paragraph 2 of the 'PH' Note states that the claimant accepts there is no relevant matter before 2010, so the claimant is providing irrelevant information.

14. The claimant should be given 28 days to focus his claim and thereafter, the respondent given the same time to respond to that specification.

20 15. In reply to the respondent's submissions, the claimant stated that his specification is chronological up to a point and the respondent has only given a couple of examples of the issues it has with his specification. He has responded regarding the issue of misuse of funds in his email of 7 July 2017. He submits that information has been withheld from him which prevents him
25 from giving the detail required.

16. In terms of allegations being made prior to 2010, the claimant responded that these indicate a pattern of behaviour, one of which relates to his contracted duties which then permeates through to the later bullying actions. These historical allegations provide a backdrop to the bullying which led to his

forced resignation after raising a number of grievances which were not properly dealt with in accordance with the grievance process. Regarding point 9 of D2, he submits that he may not have been instructed to purchase these books, but they were left in his possession. The claimant believes he has complied with the Order as far as he can.

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17. In response, the respondent submitted that D2 is very hard to follow and gives an example that point 12 at page 7 is like a stream of consciousness. This document as a whole is more like a general criticism of the respondent rather than a disclosure of a case. The allegation made regarding misuse of funds is a serious one and in the absence of any evidence in support of that, the respondent may require to consider making its own application for strike out of the claim. It would not be appropriate to list this case for a Final Hearing as the respondent does still not have a clear understanding of the claimant's case and the number of witnesses' to be called remains an issue.
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18. After some discussion with parties regarding additional case management issues, the claimant agreed to voluntarily provide evidence of his income since the termination of his employment to the respondent within 28 days of the date of this 'PH.' In turn, the respondent agreed to voluntarily provide the minutes of the claimant's grievance meetings held on 27 May 2015 and 21 August 2015 within 14 days of the date of this 'PH.'
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Relevant Law

Constructive Dismissal

19. The law relating to constructive dismissal is contained in Section 95(1)(c) of the Employment Rights Act 1996 (the "ERA"). In order to prove that he was constructively dismissed, the claimant must show that he terminated his contract with or without notice in circumstances in which he was entitled to terminate it by reason of the employer's conduct and that the conduct was the reason for his terminating the contract.
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20. In order to claim constructive dismissal, the employee must establish that there was a fundamental breach of contract on the part of the employer, that the employer's breach caused the employee to resign and that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.
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21. The leading case relating to constructive dismissal is **Western Excavating (ECC) Limited v Sharp [1978] ICR 221**, which states if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct and he is constructively dismissed.
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22. The authority of **Lewis v Motorworld Garages Ltd 1986 ICR 157, CA** held that a course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident, even though the 'last straw' by itself does not amount to a breach of contract.
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20 **Striking out a claim or response**

23. Rule 37 (1) (b) of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 ('ET Regs 2013') provides that a Tribunal may strike out all or part of a claim or response if the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent has been scandalous, unreasonable or vexatious.
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24. The authority of **Blockbuster Entertainment Ltd v James 2006 IRLR 630, CA** held that for a Tribunal to strike out a claim or response or part of for unreasonable conduct, it has to be satisfied that the conduct involved deliberate and persistent disregard of required procedural steps or that it has
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made a fair trial impossible. In either case, the striking out must be a proportionate response.

25. Rule 37 (1) (c) of the 'ET Regs 2013 provides that a Tribunal may strike out all or part of a claim or response for non-compliance with any of these Rules or with an order of the Tribunal.
26. **White – v – University of Manchester 1976 ICR 419 EAT** provides that the general purpose of further particulars is to enable parties to adequately prepare for the hearing by being given sufficient notice of the case before them. This principle was developed in the case of **Byrne and others –v- Financial Times Ltd 1991 IRLR 417 EAT** which states that particulars are for the purpose of identifying the issues. Further, in **Nunez - v – Veritas Software Ltd EAT 0020/04**, the EAT held that the individual bringing a claim must take the responsibility of formulating it in order for the respondent to be fully aware of the case against it.
27. **Weirs Valves and Controls (UK) Ltd –v- Armitage 2004 ICR 371, EAT** provides authority that in deciding whether to strike out a party's case for non-compliance with an Order, a tribunal will have regard to the Overriding Objective set out in Rule 2 of the 'ET Regs 2013' of seeking to deal with cases justly. This requires consideration of a number of relevant factors, including the magnitude of the non-compliance, whether the default was the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused, whether a fair hearing would still be possible and whether striking out or some lesser remedy would be an appropriate response. It must also consider whether a striking out order is a proportionate response to the non-compliance; **Ridsdill and ors –v- Smith and Nephew Medical and ors EAT 0704/05**.
28. In determining whether to strike out a claim (or part of) on any grounds, a Tribunal must give consideration to whether a fair trial is still possible. In **De Keyser Ltd –v- Wilson 2001 IRLR 324 EAT** the EAT made it clear that in ordinary circumstances, neither a claim or a response can be struck out on

the basis of a party's conduct unless a conclusion is reached that a fair trial is no longer possible. This approach was endorsed in **Bolch -v- Chipman 2004 IRLR 140** in which the EAT held that a Tribunal must first find that a party has acted in such a manner and on making that finding, consider whether a fair trial is still possible. If a fair trial is still possible, the case should be permitted to proceed. Even if a fair trial is unachievable, the tribunal will need to consider the appropriate remedy in the circumstances which may be a lesser penalty.

Issues to be Determined

- 10 29. Has the respondent complied with the Order of 12 January 2017?
30. If not, should the response be struck out under Rule 37 (1) (c) of the 'ET Regs 2013?'
31. Has the manner in which the respondent conducted proceedings been unreasonable?
- 15 32. If so, should the response be struck out under Rule 37 (1) (b) of the 'ET Regs 2013?'
33. If not, do further case management issues require to be considered

Conclusion

- 20 34. Having considered parties' submissions, the productions lodged, and the Notes from earlier Preliminary Hearings, I have taken the view that the claimant's application to strike out the response on the grounds of non-compliance of an order and the unreasonable manner in which the proceedings have been conducted by the respondent should be dismissed. In reaching this decision I have taken account of a range of factors.
- 25 35. In terms of the non-compliance of an order, the respondent accepts that it did not comply with the Order of 12 January 2017 made at the 'PH' by EJ

Wallington QC in respect of responding to the claimant's further specification of his claim. In his submissions for the respondent, Mr Wallace has provided a detailed explanation for that with reference to the relevant correspondence to the Tribunal and the subsequent decision of EJ Wiseman to allow the respondent an extension of time to provide a response to the claimant's further specification.

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36. In applying the authorities of **Weirs Valves and Controls (UK) Ltd** ("*supra*") and **De Keyser** ("*supra*") I have taken the view that in spite of this default, it would be disproportionate to strike out the response on this ground as a fair trial is still possible. This is because of the reasons the respondent has given for their non-compliance of the Order in its correspondent to the Tribunal of 4 and 6 April 2017 and the subsequent decision of EJ Wiseman on 21 April 2017 to allow the respondent an extension of time to comply with the Order.

15 37. For these reasons, I am therefore of the view that these proceedings are still at a relatively early stage and that no unfairness or prejudice has been caused to the claimant as a result of the respondent's non-compliance of the Order and accordingly in terms of **De Keyser Ltd** ("*supra*"), that a fair hearing is still possible.

20 38. In terms of the application to strike out the response on the ground that the respondent has conducted proceedings in an unreasonable manner, I am not persuaded that the respondent's conduct meets the high threshold required in accordance with **Blockbuster Entertainment Ltd** ("*supra*") in that it involved a deliberate and persistent disregard of required procedural steps.
25 This is because as discussed above, the respondent provided a clear explanation for non-compliance of the Order and that EJ Wiseman subsequently allowed an extension of time application by the respondent to comply with it. As I am not persuaded that the claimant has acted in such a manner, in accordance with the steps set out in **Bolch** ("*supra*"), I am not
30 required to go on to consider whether a fair trial is still possible in terms of **De Keyser Ltd** ("*supra*").

39. For all these reasons the claimant's application for strike out of the response is dismissed.

40. Turning to the issue of the claimant's further specification of his claim, it is clear from D1 and D2 and his correspondence of 1 May 2017, that he has made considerable and genuine efforts to comply with the terms of the 'Order' issued following the 'PH' on 12 January 2017. However, notwithstanding that, it is apparent this claim still requires further clarity and coherence as to the facts the claimant seeks to establish in accordance with the relevant law and it is on this basis that I have issued an Order to that effect.

41. Having considered the different further specification documents lodged by the claimant, I am of the view that the claimant's email of 1 May 2017 setting out the allegations under five separate headings provides a firm basis and the most useful starting point for compliance of this 'Order.' Clearly information contained within the other specification documents lodged may also assist in providing the detail required. As explained to the claimant at the 'PH,' he must consider whether the allegations now pled prior to 2010 form part of his claim or whether these amount to circumstantial evidence which may be referred to in evidence in support of his primary allegations.

42. Furthermore, it is acknowledged that the claimant is a party litigant and that the Tribunal must adhere to the Overriding Objective ("ET Regs 2013") to ensure that parties are placed on an equal footing and that cases are dealt with justly. Constructive dismissal is a complex and technical area of employment law and for these reasons the claimant is afforded time and encouraged to consider seeking legal advice prior to complying with this Order. Equally, the respondent will have an opportunity to reply to the claimant's further specification and to lodge proposed amendments of the Grounds of Resistance accordingly and if deemed appropriate.

43. Finally, as this claim was lodged on 29 March 2016 it is in the interests of both parties that once the Orders issued following this 'PH' are complied with,

that it proceeds to a Final Hearing without further delay. **In this respect date listing stencils for a Final Hearing to be listed in October or November 2017 should be issued to parties for completion and return within 7 days of the date of this Note being issued.**

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10 Employment Judge: R Sorrell
Date of Judgment: 02 August 2017
Entered in register: 02 August 2017
and copied to parties

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