EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr D Faulkner	**v**	Chestnut Inns Limited

PRELIMINARY HEARING

Heard at: Bury St Edmunds **On:** 26 January 2018

Before: Employment Judge Laidler

Appearances
For the Claimant: No attendance or representation
For the Respondent: Mr N Ashley of Counsel

JUDGMENT

1. **All claims brought by the claimant are struck out.**

2. **The claimant is ordered to pay the respondent's costs incurred in attending the preliminary hearing and that held on 7 December 2017 in the total sum of £2,675.00.**

3. **The full merits hearing listed for the 15 – 23 March 2018 is postponed**

4. **There will be an open preliminary hearing with a time estimate of one day on the 23 March 2018.**

5. **The respondent's costs of preparing for and attending the full merits hearing in October 2017 are reserved. If an application is made it will be determined at the hearing on the 23 March 2018**

REASONS

1. The history to this matter is set out in the Judgment and Reasons sent out on the adjournment of a full merits hearing which had been listed for 18-25 October 2017 and the preliminary hearing summary issued after the last hearing on 7 December 2017.

2. The employment tribunal has received no contact from the claimant following the postponement of the full merits hearing. He was ordered to provide the date of his house move and the new full postal address of the property he was moving to. He failed to comply with that order.

3. The claimant did not attend the preliminary hearing listed for 7 December 2017. That hearing had been listed in the presence of the parties when the full merits hearing was adjourned on 20 October 2017. Further orders were made on 7 December which were sent to the parties on 14 December 2017. These were as follows: -

1.1 To provide his reasons for failing to attend the preliminary hearing listed for 7 December 2017.

1.2 To advise his current address and provide documentary evidence that he resides there in view of his evidence given at the hearing in October 2017 that he was due to move to Devon.

1.3 To confirm that he does intend to continue with these proceedings.

1.4 Whether or not the claimant has obtained or is seeking alternative legal representation.

4. The claimant has not complied with any of those orders, either directly to the employment tribunal or to the respondent.

5. On 7 December 2017 and communicated to the claimant in the orders sent out after that hearing, a further preliminary hearing was listed for today's date, 26 January 2018. The claimant was advised that if he did not attend on that occasion, consideration would be given to whether the claim should be struck out on the following grounds: -

a) That the claim is scandalous or vexatious, or has no reasonable prospects of success.

b) That the manner in which the proceedings have been conducted by or on behalf of the claimant has been scandalous and unreasonable or vexatious.

c) For non-compliance with any of these Rules or with an order of the tribunal.

d) That it has not been actively pursued.

e) That the tribunal considers that it is no longer possible to have a fair hearing in respect of the claim.

6. The orders also provided that the respondent's solicitor would provide details of the costs claimed by them for that hearing and this hearing today. Confirmation was given that a costs schedule was indeed sent to the claimant and no response was received to it.

7. Further, by order number 5, the claimant was told to advise the employment tribunal by no later than 20 January 2018 if he decided not to attend this preliminary hearing stating his reasons for not attending and provide any information and/or submissions he wished to have taken into account in relation to the issue of strike out and costs. He has not complied with that order either.

The respondent's application to strike out

8. The respondent submitted that the claim should be struck out and that all of the grounds in rule 37 of the Employment Tribunal Rules 2013 were satisfied in the circumstances of this case. The claimant was on notice of the application and had been invited to attend or provided written representations but had chosen not to do so.

9. When the hearing was adjourned on 20 October 2017 and in the summary that was sent to the parties thereafter, the claimant was left in no doubt as to what he needed to do, namely to seek alternative legal advice with regard to these proceedings. Even though his representative had no longer been able to act for him, his representative was still present when the hearing was adjourned. He was, in the view of the respondent, treated exceptionally leniently when the hearing came to a halt. The claimant then failed to comply with the orders made on that occasion or turn up at the preliminary hearing which had been listed for 7 December 2017.

10. The original claim should be taken into account. In the grounds of resistance, the respondent made it clear that it took an extremely strong defence of them. There could be no ambiguity in paragraph 2 of the grounds of resistance where the respondent stated:

> "The claimant's contract of employment was founded upon a fraud. In summary, the claimant obtained his contract by a deception, namely representing to the respondent that he had five years' recent experience as a general manager when in fact he did not; and deceiving the respondent in relation to his in fact being heavily involved with a drug rehabilitation centre for most of the same five year period."

11. At the end of the response, the respondent had made its position very clear that it considered the claims to be:

> "vexatious, unreasonable, an abuse of process and had no reasonable prospects of success. They are intended and calculated to deceive the tribunal into accepting jurisdiction to entertain allegations which the claimant otherwise would not be able to litigate and to harass the respondent into settlement of what in reality are claims utterly devoid of all merit."

12. The claimant was put on notice that the respondent would seek to recover the entirety of its legal costs.

13. Upon arrival at the full merits hearing, Counsel for the respondent had submitted a very strongly worded opening note. In that, he had reminded the tribunal and the claimant that the Respondent had pleaded from the outset, that it believed the claimant to be a serial fraudster. The claimant had induced the respondent to offer him a contract of employment through fraudulently misrepresenting his background and experience. He had claimed to have worked as a general manager of the Empire Steakhouse and Grill in Lisbon, Portugal from 2010 to 2015 when in fact this establishment never existed.

14. It was only in his witness statement served on the respondent on 17 October 2017 that the claimant finally addressed the suggestion that there was something wrong with his CV.

15. Counsel at this hearing reminded the tribunal of the various editions of the claimant's witness statement. It was recorded in the reasons sent out to the parties on 28 October 2017 that the claimant had indicated through his Counsel that there were some dates wrong in his original served witness statement. The claimant was allowed to make amendments to the statement before giving his evidence. An amended version was handed up on the second day of the hearing and as noted in paragraph 14 of the reasons sent out, this contained amendments to no less than 20 paragraphs. They were substantive and not just amendments of dates.

16. The tribunal's attention was drawn to paragraph 6 of the statement. In the original served version, it had stated as follows:

> "In the five years before I moved back to the UK to work for the respondent, I lived in Portugal with my Portuguese wife, Alex. During that time, I worked for an English restaurateur as general manager of his busy 180 capacity restaurant, Oscar's Bar and Grill, in the Algarve."

17. Again, in the original statement at paragraph 97, the claimant had accepted that there were inaccuracies in his CVs surrounding his place of work in Portugal. He stated:

> "I sometimes put that I worked at "Empire Bar and Grill" or "Buffalo Bar and Grill" and these were pseudonyms for my real place of work which was Oscar's Bar and Grill in the Algarve – a restaurant owned by a wealthy Englishman. I have previously worked at a place called Buffalo Bar in London but in around 1994. The reason I used these alternative names was because, when you search against my name and Portugal, the blog by Robin Mast comes up straight away."

18. The claimant then explained in what was paragraph 98 that he was advised by his South African lawyer not to mention what he was doing in Portugal:

> "I was told this would affect my ability to find another job, because employers would find the blog and wouldn't hire me. I was working at Oscar's at the same time as running the counselling business because the restaurant work was seasonal and there were only about four months of trade. I was more of a consultant at Oscar's than anything and I was there from 2010 to 2015 with around eight months spent in Mallorca. Again, I haven't mentioned my time in Mallorca on mv CVs as this will link back to the blog when employers search for it online."

19. In the amended witness statement provided on the second day of the full merits hearing, paragraph 6 setting out the history of the claimant's time in Portugal had been amended to add:

> "For the two years prior to this, I lived in Northern Portugal from August 2008 with my ex-wife. I had a car accident in September 2008. I didn't work for 18 months thereafter but studied for a counselling diploma. From 2011, I set up a rehabilitation centre with my new wife in the Algarve. At the end of 2013, we moved to Mallorca for about eight months. The business failed and we returned to Portugal in April 2014. During that time (April 2014 to December 2015) I worked for an English restaurateur as general manager of his busy 180 capacity restaurant, Oscar's Bar and Grill in the Algarve."

20. In the amended version at what became paragraph 96, the claimant added:

> "I didn't really think this through at the time and didn't think it was going to be important. My concern was that if my real place of work was mentioned, it would link to the blog by Robert Mast."

21. In what had been paragraph 98, now paragraph 97, the claimant deleted the sentences about working at Oscar's at the same time as running the counselling business and stated:

> "The correct dates for my employment in Portugal are set out in my paragraph 6 above. These dates are not correctly reflected in the CVs (pages 288-307) because I didn't want to have to refer to my time at the rehabilitation centre due to the blog."

22. The significance of the blog is that in paragraph 6 of the grounds of resistance, the respondent pleaded:

> "On 12 March 2016, an associate of the respondent discovered a blog which accused the claimant of fraud in relation to a drug rehabilitation clinic with which he had been involved, Hope House. The fraud was allegedly perpetrated during the time the claimant claimed to have been working at a restaurant in Lisbon, the Empire Steakhouse and Grill."

23. In his witness statement, the claimant explained that he had been in rehabilitation for alcoholism in 2008. He stated at paragraph 9:

> "My experience instilled me with a desire to help others overcome addiction. So I decided to learn the "12 steps" programme that had so benefited me and to develop it into my own programme which I called "Pathways". I set up Hope House, a drugs and alcohol rehabilitation centre, with my wife Alex in 2012 and taught my "pathways" programme to paying clients until 2014. Hope House was only operating for two years because an online blog created by someone called Robin Mast forced us to shut down."

24. It was submitted on behalf of the respondent that even at the point of service of his first witness statement, the claimant's account of his employment history was fundamentally untruthful. The claimant had given evidence that he had read the statement in a layby on his mobile phone. Even if that is accepted, the claimant, as a party to the proceedings, must accept some responsibility for the contents of the statement and for ensuring it provided accurate information.

25. Counsel accepted that he had not got far in cross-examining the claimant about his differing CVs before the proceedings were brought to a halt. However, he did remind the tribunal of aspects of the CVs that were put to the claimant. The CVs had been disclosed in support of the claimant's mitigation evidence.

26. The first version of the claimant's CV appeared at page 298 of the bundle. This stated the claimant had worked at the Buffalo Bar and Grill from 2011 to 2015 which is now known not to be correct. When this was put to the claimant, he stated that he had been trying to fill a gap in his employment history but accepted the proposition put to him that this was a deliberate misrepresentation of his employment history.

27. In another version seen at page 291 of the bundle, he was stated to have worked at the Buffalo Bar and Grill from 2011 but this time to 2016.

28. In another version on page 294, the same dates were used and they were used again in another CV on page 302.

29. In another version seen on page 305, the claimant stated he was at Buffalo Bar and Grill from 2011 to 2015. This CV however the respondent submitted was significant as it refers to the claimant's achievements whilst with the respondent. It claims that the Claimant planned the successful opening of the Northgate which the respondent submits he had not done. It also states he led a team of up to 130 people which again the respondent states is not correct.

30. The respondent submits that the significance of all of these CVs is that they have been created by the claimant post his leaving the respondent's employment and after he had issued proceedings even knowing that the respondent's defence to the proceedings was that he was a fraudster and had falsely represented his employment history.

31. A CV at page 288 was the one used by the claimant when he applied for the position at the respondent. This gave his last experience as 2010 to 2015 at the Empire Steakhouse and Grill, Lisbon.

32. The respondent submitted that there were therefore grounds under each of the subparagraphs of rule 37 upon which to strike out the claims.

Relevant rules

33. Rule 37:

> "(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;
> > (c) for non-compliance with any of these Rules or with an order of the Tribunal;
> > (d) that it has not been actively pursued;
> > (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."

The tribunal's conclusions on strikeout

34. The tribunal has concluded that the manner in which the claimant has conducted these proceedings entitles the tribunal to strike out the claims under each of the grounds in rule 37.

<u>(a) That it is scandalous or vexatious or has no reasonable prospects of success</u>

35. The tribunal accepts the submissions made on behalf of the respondent that in a case which turned on witness credibility the claimant had no reasonable prospects of succeeding in this claim. All of the CVs provided by him were questionable and even his employment with the Respondent had been founded on inaccurate information provided by him.

<u>(b) That the manner in which the proceedings have been conducted by or on behalf of the claimant has been scandalous, unreasonable or vexatious</u>

36. The tribunal is satisfied that that is indeed the case. To attend at a hearing with a witness statement that had been served but contained so many fundamental errors has to amount to unreasonable conduct. It was not just

dates that needed changing but whole sections of the statement. The claimant may have stopped to read the statement in a layby but it is still his responsibility to present accurate evidence to this tribunal. He was not doing so.

37. Whilst it will also be dealt with below, the claimant has since the adjournment of the full merits hearing failed to comply with any order made by the tribunal and that must also amount to unreasonable conduct.

(c) For non-compliance with any of these Rules or with an order of the Tribunal

38. As stated, the claimant has not complied with any of the tribunal's orders since the date of the adjourned full merits hearing.

(d) That it has not been actively pursued

39. It must be assumed that that is the case from the claimant's inaction in this matter. He was specifically ordered to indicate to the tribunal whether he was proceeding with the claim and he has failed to do so. He has taken no action in connection with it since the matter was adjourned on 20 October 2017.

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response

40. The tribunal has concluded that that is indeed the case in view of all of the actions of the claimant which have been set out above. Counsel referred the tribunal to the Court of Appeal decision in Arel Nominees Inc v Blackledge & Others [2000]. In that case, the court made it clear that:

> "A fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court. The court does not do justice to the other parties to the proceedings in question if it allows its processes to be abused so that the real point in issue becomes subordinated to investigation into the effect which the admitted fraudulent conduct of one party in connection with the process of litigation has had on the fairness of the trial itself."

41. The tribunal believes that the circumstances in this case although not involving a commercial dispute as in Arel Nominees are analogous. The claimant's behaviour, his numerous and inaccurate CVs and his oral evidence all leave the tribunal to doubt whether it would be possible now to have a fair trial. That also requires the claimant's engagement and he is not engaging in any way whatsoever with these proceedings.

42. It follows from those conclusions that all grounds in rule 37 are made out and the claims are dismissed.

The respondent's costs application

43. Rule 76:

> **"**(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.
>
> (2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.
>
> (3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—
>
> (a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and
>
> (b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.
>
> (4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.
>
> (5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing."

44. On the last occasion, the tribunal made it clear that it would deal at this hearing with not only the respondent's costs application for the last aborted preliminary hearing but also of this hearing. No application is yet presented with regard to the wasted costs of the full merits hearing. The tribunal is satisfied having found as it has that its jurisdiction to award costs has arisen and orders the claimant to pay £2,675.00 in respect of the respondent's costs incurred. These are comprised as follows:-

7 December 2017	Counsel	£650.00
	Solicitor attending	£675.00
This hearing	Counsel	£850.00
	Solicitor attending	£500.00
TOTAL:		**£2,675.00**

No VAT has been applied as the respondent accepted this could be recovered by it.

45. The respondent will now consider whether to make application for its costs occasioned in dealing with and preparation for the October full merits hearing. The full merits hearing is now postponed but what would have been the last day, 23 March 2018, remains as a one day preliminary hearing at which Directions will be made as appropriate on any costs applications made by the respondent.

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Employment Judge Laidler

Date: 16 / 2 / 2018

Judgment and Reasons

Sent to the parties on: .....

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For the Tribunal Office