EMPLOYMENT TRIBUNALS (SCOTLAND)

5 **Case No: S/4108562/2018**

Preliminary Hearing Held at Dundee on 17 January 2019

Employment Judge: I McFatridge (sitting alone)

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Mr W Tracey	**Claimant** **Represented by:** **Mr Russell** **Solicitor**
Servest Group Limited	**Respondents** **Represented by:** **Mr Searle** **Barrister**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is

1. The respondents' application for an Order striking out all or part of the claim is refused.

2. The respondents' application for a Deposit Order is refused.

REASONS

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1. The claimant submitted an ET1 in which he stated that he had been unfairly dismissed and discriminated against on the grounds of disability. The respondents submitted a response in which they set out what they considered

to be the factual background of the matter. They requested further and better particulars from the claimant. A Preliminary Hearing took place for case management purposes on 24 August 2018. In his completed Agenda the claimant had noted that his disability discrimination complaint consisted of a failure to make reasonable adjustments. At the hearing the claimant was told that he had to provide the respondents with fair notice of the claims which were being made and at least an outline of the factual averments on which they are based. He was told that this required to be done before the case could proceed to a hearing. An order was made that the claimant provide such particulars on or prior to 7 September 2018. The terms of the order are contained in the Tribunal note issued on 28 August 2018. A further Preliminary Hearing took place on 8 October 2018 by which time the claimant had sent in various further documents to the Tribunal and the respondents. The respondents confirmed they now accepted the claimant was disabled in terms of the Act but indicated they still required further specification of the claim. Reference is made to the note issued following the Preliminary Hearing on 8 October 2018 and the various explanations which the claimant gave. The outcome was that the orders made on 24 August were repeated and the claimant given a further period of time up to 22 October 2018 to comply. At that hearing I specifically declined to make this an Unless Order.

2. The claimant subsequently lodged further documentation with the Tribunal. Some of these were sent on 16 October 2018 and further documents on 22 October 2018. A further Preliminary Hearing for case management purposes took place on 12 November 2018. It was still the respondents' position that the claimant had not complied with the order and that the respondents did not have fair notice of the claim. It was resolved that a Preliminary Hearing be fixed for the purposes of deciding whether or not the claim should be struck out.

3. At the hearing both parties made legal submissions.

Respondents' Submissions

4. The respondents' representative set out the history of the matter and referred in particular to the orders which were made. It was noted that the claimant had had two opportunities to provide further and better particulars of his claim. It was the respondents' position that all of the claimant's submissions taken together did not give proper detail to allow the respondents to properly understand the case they had to meet. It was the respondents' position that all the claimant had said was that he had been discriminated against on grounds of disability. He had not said any more than this and more was certainly required. The respondents were in the position where it was still unclear as to whether this was a case of direct discrimination, indirect discrimination, discrimination arising from disability or a reasonable adjustment case. The respondents had previously applied for an Unless Order and this had not been granted but the claimant had been left in absolutely no doubt by the Tribunal that if he did not comply with the order at the second time of asking then an application for strike out was likely. It was the respondents' position that the claim should be struck out in terms of Rule 37 on the basis that the claimant had failed to comply with orders. It was also the respondents' position that the claim should be struck out in any event on the basis that from the documents before the Tribunal the claimant had no reasonable prospect of success in any of his claims. It was also the respondents' position that if the Tribunal was not with them in finding that the claimant had no reasonable prospect of success then the Tribunal should issue a Deposit Order on the ground that the claimant had little reasonable prospect of success.

5. The respondents' representative accepted the point that there was no mention of a Deposit Order being applied for in the Notice of Hearing but it was his view that he was making the application now and all that was required in terms of the rules was that the claimant or his representative have the opportunity of making representations before a Deposit Order is made.

6. With regard to the issue of whether the claim had no or little reasonable prospect of success the respondents' representative took the Tribunal through the ET1 and ET3 and the other documents. It was clear from the ET1 that the claimant suggested that there had been an exchange between himself and Ms McKimmie in 2016 and this was relied upon in terms of the disability discrimination claim. It was clear that any failure to make reasonable adjustments arising from this was well out of time. It was noted that the claimant suffered from PTSD in his ET1 but there was no attempt to link this to the facts around his dismissal. So far as the dismissal is concerned the claimant did not dispute that he wrongly entered the times for the two days in question but says that he had a good excuse. The respondents' position was that, on any view, completing timesheets falsely to one's benefit is clearly gross misconduct. The respondents' representative also took the Tribunal through the various matters mentioned in the ET3 and in particular the various altercations which had taken place between the claimant and Ms McKimmie after Ms McKimmie had pointed out the inconsistency in the time sheet. The respondents drew Tribunal's attention to paragraph 21 of the ET3 where it was noted that as a result of obtaining the clock-in records from their customer, Tesco, the respondents had established that the claimant was paid an extra 1 hour, 3 minutes on 22 December and an extra 4 hours, 46 minutes on 26 December. It was clear from the ET3 that the respondents had carried out an investigation which was ACAS compliant. There was no suggestion from the claimant otherwise. With regard to the aggressive outbursts by the claimant during the course of the investigation the respondents' representative accepted that the claimant had not been formally charged with this as part of the disciplinary process but it was his position that what this meant was that even if the claimant was able to establish some procedural defect then the application of ***Polkey*** would mean that he would not receive any compensatory award given that the respondents could well have decided to dismiss him for these aggressive outbursts even although in the event they chose to proceed purely on the timesheet issues. They noted that during the investigation the claimant admitted the fraudulent entries in his timesheets. It was noted that the claimant had appealed and that the appeal had been dealt with.

Claimant's Submissions

7. The claimant's representative made the point that he had not had been told in advance the respondents were seeking a Deposit Order based on the claim having little or reasonable prospect of success. His understanding was that essentially the application for strike out was on the basis of the failure to comply with the orders and a lack of fair notice. Nevertheless, he indicated that he would deal with the application for a deposit order. He also made the point that it was not appropriate at a strike out hearing to seek to go into the merits of the case or to ask the Tribunal to base its decision on alleged facts which were disputed between the parties. He was particularly concerned about the respondents' reference to the alleged incidents where the claimant had behaved aggressively to Mrs McKimmie after the investigation commenced. Neither of these incidents had been the subject of the disciplinary proceedings and they were simply allegations. They were not part of the reason given for dismissal at the time and all of the facts of the case were disputed. He made reference to the context of the case which was that the claimant suffered a personal tragedy in the recent past and that he had developed PTSD as a result of this. His disability status was now conceded. With regard to the alleged failure to comply with the order the claimant's representative did not accept that there had been a failure albeit he did not elaborate on this position or seek to show how the documents and information provided by the claimant met the terms of the order. His main argument was that even if I decided that the orders had not been complied, all this meant was that the threshold had been reached which would allow me to exercise my discretion as to whether or not to strike out for this reason. It was his position that on any view of the factual position I should not exercise my discretion to do this.

8. The first point he made was that this was not a case where the claimant had deliberately not complied with an order of the Tribunal. It was his view that this was a case where the claimant who is disabled and was not legally trained nor had any experience of legal processes had simply been unable to provide the

information in the format in which it was sought. With regard to the disability discrimination claim he referred to the well-known case of ***Anyanwu and another v Southbank Student Union and another [2001] ICR 391*** where the House of Lords had highlighted the importance of not striking out discrimination claims except in the most obvious cases. He also referred to the case of ***Williams v Real Care Agency Limited [2012] ICR D27*** and ***Tayside Public Transport Company Limited v Riley [2012] IRLR 755***. It was his position that the Tribunal should look at the claim in its totality. The claim arose from the claimant's dismissal. There were a number of factual disputes. In particular the claimant did not accept that the allegation related to a timesheet. It was his position that the allegations related to a signing in sheet. There were a number of factual disputes and it was not accepted the Claimant had received payment for the additional hours suggested by the Respondents.

9. In relation to the issue of compliance with the crucial factor was that although the claimant had not previously been represented he was now represented by Mr Russell. Mr Russell considered that he would be able to get the pleadings in order to the stage where the respondents could not possibly claim they did not have fair notice within a short period of weeks. He made the point that the first Preliminary Hearing had taken place in August. It could not be said that there had been undue delay or a lengthy period of time having been elapsed. If disability had been disputed we would be round about the stage of having a disability hearing at this stage. We would be no closer to a final hearing than we were now. The claimant's failures in respect of the order were understandable and the claimant was now in a position to remedy them.

10. With regard to the time bar point there were disputed facts. There was also a dispute regarding the context. The claimant did not accept that the incident from 2016 was necessarily time barred since it was part of a continuing course of conduct and the Tribunal would be required to rule on this.

11. So far as the balance of prejudice was concerned the prejudice to the claimant if his claim was struck out would be severe. It is clear from his correspondence

that the claimant feels strongly that he has been badly treated. The responses he has made to the Tribunal's request for further particulars have set out his views with some clarity albeit not in a form which the Tribunal would expect. There is very much a case to be tried and given that the claimant is now legally represented there is no impediment to that happening. On the contrary the prejudice to the respondent if the claim is allowed to proceed will be slight. There is absolutely no adverse effect on their ability to defend the claim. The claimant's representative made the point that the non-compliance in this case was entirely different from that in the case of ***Jones v Blockbuster***. There was no wilful refusal to comply. The claimant had attempted to comply but was simply unable to. In those circumstances it would not be appropriate for the Tribunal to exercise its discretion to strike out the claim.

12. With regard to the Deposit Order the facts of the case were disputed. The claimant had gone to appeal and in fact had lodged his letter of appeal in response to the request for orders. The outcome of the case would depend in part as to the view the Tribunal took regarding the disputed facts. It could not be said at this stage that the claimant had little reasonable prospect of success.

Discussion and Decision

13. Rule 37 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 states

> "(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 –
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> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
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> (b) that the manner ….
>
> (c) for non-compliance with any of these Rules or with an order of the Tribunal."

14. I considered it appropriate to consider the issue of strike out separately in respect of the discrimination claim and the unfair dismissal claim.

15. So far as the unfair dismissal claim is concerned the claimant has asserted that he was unfairly dismissed. In his ET1 he does accept that he made a genuine error with his entry to the signing in book. It is his position that he was confronted by a "very unsympathetic and belligerent Mrs M" about the error and that this led to him having a panic attack and leaving the workplace and thereafter being off with work related stress. He then refers to the disciplinary hearing in very general terms. When asked to produce further particulars he sent a copy of his letter of appeal which raises a very specific point relating to his understanding of an arrangement he had with Mrs M. It appears to be clear that his position is at least to some extent that the respondents ought to have taken a different view of whatever entries were in the signing in book/timesheets. He believes that they should have treated this as an error and dealt with it sympathetically rather than treating it as fraudulent. It appears to me as if the claimant has provided sufficient detail of his claim to enable it to go to a hearing. The orders which were made simply requested the claimant to confirm that he was relying on what he had put in his appeal as part of his unfair dismissal claim. This appears to be the case. Whilst the claimant has not complied with the letter of the order it does appear to me that he has complied with the spirit of the order and in my view it would be an inappropriate exercise of my discretion to strike the claim out for any non-compliance with the order which has been relatively minor. I also do not think it can possibly be said on the basis of the stated positions of both parties that the claim has no reasonable prospects of success. There are disputed facts and these will require to be determined. In my view it would therefore be inappropriate to strike out the unfair dismissal claim.

16. With regard to the claim of disability discrimination I find the matter more difficult. The claimant's representative acknowledged that at the previous Preliminary Hearings the Tribunal had attempted to advise the claimant what he required to do by way of providing further specification to allow his claim to

be heard. It appears to me to be quite clear that the claimant has not done this and has not complied with the order. I entirely agree however with the claimant's representative that that is not the end of the matter and that I require to take a holistic approach. This approach has been endorsed by the higher courts most recently in the case of ***Ahir v British Airways PLC [2017] EWCA civ 1392 CA*** and **Kaur *v Leeds Teaching Hospitals NHS Trust [2018] EWCA civ 978***. I considered there was considerable merit in the argument of the claimant's representative to the effect that the claimant was not wilfully refusing to comply with an order. I agreed that the claimant had attempted to comply with the order but had been unable to do so. I considered this was highly relevant. I also considered it to be highly relevant that the claimant was now represented and it was clear that the issue of lack of fair notice was one which could be addressed relatively quickly. During the course of the hearing the respondents' representative challenged the claimant's representative to the effect that he had only become involved in the case as a result of recent press publicity. Needless to say I have not seen this but the claimant's representative then went on to advise that this was indeed the case. There had been a press article about the claimant and the difficulty he was having and as a result of this various people had referred the claimant to Mr Russell and Mr Russell had agreed to take the case on on a pro bono basis. Whatever the history it appeared to me that the situation here was very different from a case where a claimant has been given lots of opportunity to provide the information sought and has failed to do so and has no prospect of being able to do so in the future. Looking at the matter holistically it appeared to me that it would be inappropriate to strike out the claim on the basis that the claimant has hitherto been unable to formulate his claim in an acceptable form in a situation where we have an assurance that he is now legally represented and will be able to do this within a short period of time. I therefore considered it was inappropriate to strike out the discrimination claim on the ground that the claimant had failed to comply with the order. It was also the respondents' position that I should strike out the discrimination claim in any event since it had no reasonable prospect of success given that the only matter for which fair notice had been

given was the alleged failure to make an adjustment in 2016 and this was time barred.

17. With regard to the 2016 incident I disagreed with the claimant's representative's position that as currently pled this would not be time barred since it related to a continuing act. Section 123(3)(b) of the Equality Act makes it clear that failure to do something is to be treated as occurring when the person in question decided on it. In the absence of any averments in relation to subsequent requests it appears to me that the 2016 incident is indeed *prima facie* time barred albeit the Tribunal would have jurisdiction to extend the time limit if it was just and equitable to do so.

18. That having been said the claimant's representative also made the point that it was his view that the disciplinary process itself gave rise to claims of disability discrimination. In the circumstances I decided that I could not say at this stage that the disability discrimination claim has no reasonable prospect of success. As noted above the claimant's representative readily accepted that he would require to "lick the pleadings into shape". Obviously, it will be up to a future Tribunal to decide whether such further and better particulars should be accepted but even on the basis of the limited information available so far it is clear that the claimant has an issue in relation to what allowances ought to have been made for his disability during the disciplinary process. This is something which will require to be tried and it cannot be said the claimant has no reasonable prospect of success.

Deposit Order

19. Rule 39 states

> "(1) Where at a preliminary hearing (under Rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring

a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."

20. With regard to the claimant's means I was not given any documentary information but at the bar the claimant's representative indicated that the claimant's means were extremely limited. He is on benefits and in receipt of a Personal Independence Payment for himself of around £318 per month. His wife receives a pension of £179 a month.

21. With regard to the unfair dismissal claim I considered that there were a number of factual disputes and that, as with the strike out application, I could not base my decision on any view I took as to how a future Tribunal might resolve these factual disputes. I consider this to be equally the case with regard to the discrimination claim. The two claims are to some extent bound up. There appears to be no factual dispute that the claimant did complete a document with inaccurate start and finish times. The respondents characterise this as fraudulent behaviour and consider that it merited summary dismissal. The claimant's position is that the respondents ought to have dealt with this more sympathetically particularly given his disability. In addition to this there is a factual dispute as to the precise nature of the document which the claimant completed inaccurately and whether the claimant was in fact paid on the basis of this document or not. There also appears to be a dispute regarding the background facts as to whether or not there was an arrangement with Mrs McKimmie along the lines suggested by the claimant in his appeal letter or not. I do not think I can say at this stage that the claimant has little reasonable prospect of success.

22. In the circumstances the respondents' application for strike out which failing a Deposit Order fails.

23. The claimant's representative indicated that it would be appropriate for the Tribunal in those circumstances to make an order along the lines of the order made previously. I therefore repeat the orders made following the Preliminary Hearing on 24 August and give the claimant until 21 February 2019 to comply. A further Preliminary Hearing will then take place on a date to be fixed to discuss case management and hopefully arrangements for further hearings in the case.

24. I have decided not to make this order an Unless Order largely for the same reason I declined to do so at the Preliminary Hearing on 8 October 2018. In my view an Unless Order is appropriate where the nature of the order means that it can be readily determined without any shadow of doubt whether or not there has been compliance. If the matter is more nuanced such as where a claimant is ordered to provide further and better particulars of claim I consider it is better to remove the automatic sanction since the determination of whether or not an automatic sanction has been triggered is likely to take longer than simply deciding what sanction should follow any actual non-compliance. That having been said the claimant and his representatives should be in absolutely no doubt that if the further particulars are not lodged or do not fully address the issues raised then strike out for non-compliance is a definite possibility.

Employment Judge: **Ian McFatridge**
Date of Judgment: **31 January 2019**
Entered in register: **01 February 2019**
and copied to parties