EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100378/17

Held in Glasgow on 18 and 19 January and 5 March 2018

Employment Judge: Iain F Atack

Miss Georgina Campbell	**Claimant** **Represented by:** **Mr W McParland - Solicitor**
Addaction	**Respondent** **Represented by:** **Mr P Brown**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgement of the Employment Tribunal is: –

1. That the respondent's application for the claimant's claim to be struck out under Rule 37(1) of the first schedule to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 is refused.

2. That the respondent's application that the Employment Tribunal make an order under Rule 39 of the first schedule to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 requiring the claimant to pay a deposit as a condition of continuing to advance her argument that she was constructively unfairly dismissed is refused.

3. That the respondent's application for a wasted costs order against the claimant's representative, Mr Obi under Rule 80 of the first schedule to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 is refused.

REASONS

Introduction

1. This was a Preliminary Hearing to determine the issues of strike out, the making of a deposit order and expenses. The matter of expenses was an application by the respondent for a wasted costs order in terms of Rule 80 of Schedule 1 of Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("***the Rules***"). The application for wasted costs was against Mr E Obi, whom the respondent alleged had been the claimant's representative at the relevant time. The claimant opposed striking out of her claim and the making of a deposit order. Mr Obi opposed the granting of a wasted costs order against him.

2. The parties produced a joint bundle of documents extending to 408 pages. During the course of the Preliminary Hearing further documents were added by the parties and Mr Obi which were accepted and numbered 409 to 443. The respondent substituted pages 199 to 206 of the original bundle and no objection was taken to that.

3. On the final day of the Hearing the claimant's solicitor, Mr McParland, submitted further information relating to the claimant's means. Mr Brown objected to this information being produced as the claimant was not present on the final day of the Preliminary Hearing and could not be questioned about that new information. The claimant had informed her solicitor that she was ill and could not attend the Hearing but had not produced a certificate on Soul and Conscience from her General Practitioner, confirming her inability to

attend. In the circumstances that further information relating to the claimant's means was not taken into account.

4. Reference to documents referred to at the Preliminary Hearing will be by reference to their page number.

5. The Employment Tribunal heard evidence from the claimant herself, from Ms Pamela May an HR operations partner with the respondent and from Mr Edward Obi . Mr Obi was not represented but confirmed he had taken legal advice before preparing the document headed "***Response from Deux Consulting Ltd***" which formed pages 412-415 and which he updated for his submissions on the final day of the Preliminary Hearing.

6. From the evidence which I heard and the documents to which I was referred I made the following material findings in fact.

Facts

7. In her claim form, ET 1, lodged on 23 February 2017, the claimant brought a claim for constructive unfair dismissal. At paragraph 8 of the ET 1 she also ticked the box to state she was making another type of claim which she described as harassment and victimisation.

8. On 7 April 2017 the Employment Tribunal requested the claimant's representative's comments in respect of paragraphs 3, 28, 88, 62 and 63 of the ET 3 paper apart lodged on behalf of the respondent, page 40a. The letter stated the claimant should respond by 20 April.

9. On 21 April the Employment Tribunal sent a reminder to Mr Obi as no reply had been received to the earlier letter, page 41.

10. On 24 April the respondent's solicitors sent an email to Mr Obi advising they had requested an order from the Tribunal that unless the claimant provided responses to the letter of 7 April by no later than 3 May, the claim be struck out its entirety, page 43-44.

11. On 1 May Mr Obi sent the claimant's comments upon the letter of 7 April to the Employment Tribunal , pages 48 – 50.

12. The respondent informed the Employment Tribunal and Mr Obi on 3 May that they would proceed on the basis that the claimant's comments to paragraph 62 of the ET 3 set out the allegations the claimant would rely upon in respect of her claims of victimisation and harassment, page 51. They advised the Tribunal that Mr Obi had still not responded to paragraph 58 of the ET 3. That was a question about a sentence in paragraph 45 of the ET1 which the respondent did not understand

13. On 5 May 2017 the Employment Tribunal asked the claimant's representative to respond to paragraph 58 and requested confirmation from the claimant's representative whether the particular sentence quoted in that paragraph had been submitted in error, page 53.

14. On 11 May Mr Obi on behalf of the claimant confirmed that the particular sentence was an error and should be ignored, page 57.

15. On 15 May the Employment Tribunal wrote to Mr Obi reminding him his comments were also required on the respondent's representative's correspondence of 3 May, page 58, in which they had said they would proceed on the basis that the claimant had set out what she relied upon in respect of her claim for victimisation and harassment. The comments were to be returned by 22 May.

16. On 22 May Mr Obi responded to the Employment Tribunal , pages 61-63.

17. Notice of a case management Preliminary Hearing to be held by a telephone conference call on 18 August 2017 was sent to the parties on 24 July ,page 65.

18. On 26 July standard orders were issued to the parties by the Employment Tribunal including that the claimant send to the respondent within 21 days, a written statement with supporting documentation relating to, amongst other things, details of any benefits received; a summary of jobs applied for, details of any interviews attended or jobs obtained and details of any income whether temporary, casual or permanent Employment or self employed work and details of any other efforts made by the claimant to minimise her loss , page 67.

19. On 11 August the respondent's solicitor wrote to Mr Obi advising they did not consider the claimant would succeed in any of her claims. They also sent a detailed agenda for the case management Preliminary Hearing setting out points upon which they would seek clarification at that Hearing pages 69-72. They also sent a copy by email to the claimant.

20. On 11 August Mr Obi wrote to the respondent's solicitor stating "***I see no reason why you copied my client into this email considering I am her representative.***" He also stated that any future communication should be sent to himself directly, page 74.

21. The respondent's solicitor explained to Mr Obi why she had also sent the email to the claimant. Later on 11 August Mr Obi responded to the solicitor stating "***You do not need my client's instructions considering I am duly representing her***", page 73 .

22. Mr Obi produced a schedule of loss, pages 80 – 82.

23. The Preliminary Hearing took place on 18 August. The Note of that Hearing narrates that the claimant did require to amend the claim as it appeared she was referring to claims of victimisation and harassment, but there was no specification of any protected characteristic or the grounds upon which Equality Act 2010 was allegedly breached. It noted that Mr Obi accepted there was no formal claim of discrimination specified. The Employment Judge directed that by no later than 11 September Mr Obi would provide in writing a proposed amendment to the claim including a complaint of discrimination.

24. He was also ordered to provide further specification as to the legal basis for the constructive unfair dismissal claim and provide answers to the points set out at points 1 and 2 under the heading "***Constructive Unfair Dismissal***" in the Agenda which had been prepared by the respondent.

25. The Employment judge made an order that unless the claimant and her representative complied with the directions set out in the Note by 11 September 2017 then the claim in so far as it related to harassment and victimisation would be dismissed on the date of non-compliance, without further order.

26. At that preliminary hearing the respondent raised the issue that the standard orders issued on 26 July had not been fully complied with. In particular there was no documentation in relation to what jobs the claimant had applied for and there was no information as to why the claimant appeared to have been receipt of benefits and was no longer so. The Employment Judge directed that information be provided by Mr Obi no later than 18 September.

27. On 23 August the respondent's solicitor wrote to Mr Obi regarding the schedule of loss. They asserted that the claimant had been working for Mr Obi's company, Deux Consulting Ltd. since February 2017. The solicitors also advised Mr Obi that they considered his client's claims to be vexatious and without any merit and that her conduct in the proceedings had been both scandalous and unreasonable, warranting an award of expenses, page 91.

28. On 28 August the respondent's solicitors wrote to the Employment Tribunal setting out their concerns regarding their belief that the claimant was working for Deux Consulting. They sought an order for further specific information to be provided by the claimant regarding the nature of her relationship with Deux Consulting Ltd. They expressly reserved their position in relation to expenses and to any strike out application that might flow from the response to the matters raised in their application for that order, pages100-101.

29. The claimant made a subject access request to the respondent on 28 August 2017, page 103.

30. Mr Obi sent an amendment of the claimant's claim to the Employment Tribunal on or about 10 September, pages 106 – 109. The amendment stated it was to include a claim of indirect sex discrimination.

31. At about the same time the claimant's agenda response was lodged. This set out further and better particulars of the claimant's claim of constructive unfair dismissal and separately of harassment and victimisation. In respect of the claims of harassment and victimisation, the claimant was relying on sections 26 and 27 respectively, of the Equality Act 2010 , pages 110-111.

32. The claimant also presented an amended schedule of loss, pages 112-114.

33. On 14 September the respondent wrote to the Employment Tribunal asserting that the proposed amendment, to include a claim of indirect sex discrimination, was an entirely new claim. The respondent considered the new claim was misconceived and out of time. They alleged that Mr Obi and the claimant were misleading the Tribunal regarding the schedule of loss. They sought an order for specific disclosure against the claimant setting out exactly what information they wished to be provided, pages 115-118.

34. The respondent specifically reserved its position with regard to expenses and advised it was likely they would be instructed to apply for costs against the claimant or wasted costs against her representative.

35. Mr Obi responded on 18 September 2017 with his comments regarding the information sought by the respondent.

36. On 4 October the Employment Tribunal advised parties the case would be listed for an open Preliminary Hearing to consider the claimant's application to amend the ET and the respondent's objection to that.

37. Mr Obi informed the Employment Tribunal and the respondent's solicitor on 4 October that he was no longer representing the claimant, page 12. He advised that the claimant's new solicitors would contact the Employment Tribunal .

38. The Employment Tribunal issued an order for the claimant to provide documents on 4 October, pages 133-4. The documents ordered to be provided were those requested by the respondent. The documents were to be provided by the claimant on or before 10 October 2017.

39. The parties were advised that the Preliminary Hearing to determine the issue of the claimant's application to amend the ET1 and the respondent's objections would be heard on 17 November 2017.

40. The respondent's solicitors wrote to the Employment Tribunal and the claimant on 11 October alleging they had not been provided with any of the documentation set out in the document order which had been issued. They requested that the claim be struck out or, in the alternative, that a Deposit Order of £1000 be made as a condition of the claimant continuing with the proceedings, page 138.

41. The claimant's new solicitor requested an extension of time to comply with the order of 4 October. The Employment Tribunal granted an extension for compliance with that order until 17 October 2017.

42. The claimant's solicitors were one day late in complying with the order. They said that was simply due to an oversight on their part. Their position with regard to the documents requested was that they did not exist, page 147.

43. The respondent applied for a strikeout order or, alternatively, for the granting of a Deposit Order on 19 October, pages 154-157, on the basis that the order had not been fully complied with.

44. The claimant's new solicitors withdrew the application to amend the ET 1 on 2 November 2017. They asserted that the claimant had complied with the order in so far as she could, page 171 – 2.

45. On 3 November the claimant's solicitors wrote to the Employment Tribunal withdrawing her claims of victimisation and harassment and reiterating the withdrawal of the application to amend the ET1 to include a complaint of indirect discrimination. They stated the claimant intended to persist with her claim of constructive unfair dismissal, page 174.

46. The respondent's solicitors did not accept the assertion that no documents as sought by them were available and sought an application for strike out of the claimant's claim on the basis (i) that the claimant's conduct of the proceedings had been unreasonable, (ii) that her claim was not being actively pursued,(iii) that she had not complied with an order of the Tribunal and (iv) that the claim had no reasonable prospects of success. They requested the Tribunal deal with the matter of strike out on paper, but, if the Tribunal was not persuaded to do so, they requested the preliminary hearing, already assigned, deal with the matter and also an application for expenses against the claimant and her former representative based upon their conduct and if

necessary an application for a Deposit Order against the claimant as a condition, of her proceeding further with her claim, page 176-179.

47. The claimant's solicitors objected to the application for strike out, setting out their objection in detail in an email to the Employment Tribunal on 10 November, pages185-186.

48. The Employment Tribunal changed the purpose of the Preliminary Hearing due to take place on 17 November 2017 in order that it could determine as a preliminary issue the respondent's application for strike out, the Deposit Order and expenses.

49. The Preliminary Hearing did not take place on 17 November and was reassigned to 18 and 19 January 2018.

50. The claimant resigned from her Employment with the respondent on 5 January 2017. The reasons for her resignation as set out at page 238.

51. The claimant had been introduced to Mr Obi through a mutual friend.

52. Mr Obi acted as the claimant's representative until he informed the Employment Tribunal on 4 October that he was no longer acting for her.

53. Mr Obi is a director of Deux Consulting Ltd. That is a business which provides HR advice to small and medium-sized businesses.

54. The business is based in Aberdeen and has an office in Glasgow.

55. The claimant was engaged from February 2017 to assist in the start-up of the Glasgow office. The only payment she received from Deux Consulting Ltd. during the period of her engagement was the reimbursement of the cost of a parking fine in the sum of £50.

56. The claimant attended three networking meetings on behalf of Deux Consulting. The cost of the attendance of the claimant at the networking events was paid for by Deux Consulting Ltd..

57. Mr Obi considers himself to be an expert in HR matters. He has a CIPD qualification, a post graduate certificate in mediation and a Master's degree in international strategic studies.

58. The claimant has the sum of £160 per month left from earnings after paying for food and other expenses.

Submissions

Respondent

59. Mr Brown referred to Rule 37 which sets out the grounds upon which an Employment Tribunal may strike out a claim.

60. He submitted that the claim had no reasonable prospect of success ; that the manner in which the proceedings had been conducted by or on behalf of the claimant had been scandalous, unreasonable or vexatious; that the claimant had not complied with the rules; that the claim had not being actively pursued; and that it was no longer possible to have a fair hearing. He sought strikeout in respect of all these matters.

61. Alternatively, if the case was not to be struck out, he sought a Deposit Order to be made against the claimant. He accepted that the claimant was not wealthy but still wished to apply for a Deposit Order to make her fully aware of the fact she faced the possibility of a full award of expenses against her if she persisted with this case.

62. The respondent's position with regard to the application for an award of expenses against the claimant would be reserved until the conclusion of the case.

63. Mr Brown sought a wasted costs order against Mr Obi under Rule 80 on the basis that Mr Obi was acting as a representative of the claimant. His submission was that Mr Obi acted as the claimant's representative until the new solicitors took over.

64. Mr Obi's business was that of HR consultants and he had given evidence that he was an expert in HR matters. However he had said he was not competent to appear before the Employment Tribunal and therefore should not have run the case at all. He passed over the case to solicitors at a late stage. There were a significant number of missed orders and failure to supply information and failure to provide full disclosure of the claimant's employment position. In particular there was the failure to mention the claimant had been employed by Mr Obi and was working for him.

65. The claimant already had alternative employment when the claim was lodged yet she had not ticked the box at paragraph 7 of the ET 1 to show that was the case. Mr Obi also knew prior to submitting the form that the claimant was working for him.

66. Even when the schedule of loss was updated no evidence of income was provided by the claimant.

67. Mr Brown referred to the conflict of evidence between the claimant and Mr Obi as to whether she had been copied in to the communications with the Employment Tribunal including being sent a copy of the ET3. He referred to the fact that Mr Obi had on the final day of the hearing produced an email at page 431-2 which appeared to show that the claimant had seen the letter from the Employment Tribunal of 7 April 2017 requesting further information.

68. It was his position that the claimant was simply not telling the truth when she said she had not received copies of documentation from Mr Obi. The claimant was simply trying to distance herself from Mr Obi and blaming him for failing to inform her.

69. Mr Brown submitted that Mr Obi was indeed a representative and that he was performing the role of a representative of the claimant. He failed to comply with the orders.

70. At the Preliminary Hearing held in August there were three cases being put forward by the claimant namely: constructive unfair dismissal, victimisation and harassment. The respondent's solicitors spent time preparing the agenda for that Preliminary Hearing and setting out the orders which they would seek. Mr Obi never produced the legal basis for the claims which he was making on behalf of the claimant and only referred to sections of the Equality Act 2010. Mr Obi had also raised the prospect of another discrimination claim at that Preliminary Hearing although none was pled at that stage.

71. There was no merit in the claim for discrimination but as a result of its being made the respondent was put to more expense in seeking to clarify what the claim was about. Just before the November Preliminary Hearing the claimant's new solicitors withdrew all the claims other than that of constructive unfair dismissal. The work done relating to those other cases was all wasted time so far as the respondent was concerned.

72. With regard to the application for wasted costs Mr Brown referred to Rule 80. He rejected any suggestion that Mr Obi was not a representative as defined in that rule and submitted that Mr Obi was acting for profit. He suggested that there was a contingency agreement between the claimant and Mr Obi's business.

73. It was his submission that Mr Obi's conduct as a representative had been unreasonable in that his whole conduct of the case had been to avoid

providing any clarification of it. Mr Obi's actions had been negligent and the respondent was entitled to a wasted costs order.

74. With regard to the application for strike out it was Mr Brown's submission that the whole conduct of the case had been scandalous or vexatious. The lodging of the further claim was vexatious. It was his position that Mr Obi acted on the instructions of the claimant throughout.

75. He submitted the case had no reasonable prospects of success. The claimant had not complied with the orders of the Tribunal. The claimant could not avoid responsibility for her claims as she was well aware of what was happening.

76. He submitted that the claim was not being actively pursued as it had taken months of argument to actually focus the issues.

77. Mr Brown also submitted that it was no longer possible to have a fair hearing.

78. It was his position that the claim be struck out on all of the grounds contained in Rule 37. If, however the Employment Tribunal was not with him on that point he then requested a Deposit Order be made.

79. With regard to the wasted costs order, Mr Brown submitted that the schedule produced at page 199 of the bundle (as amended) shows what expenses incurred by the respondent were related to the wasted costs. He sought a wasted costs order against Mr Obi and reserved his position with regard to general costs against the claimant which would be dealt with on completion of the case.

80. Mr Brown referred to the following cases:-

Balls v Downham Market High School and College [2011] IRLR 217

Romanski v Aspirations Care Ltd UKEAT/0015/14

Sud v The Mayor and Burgesses of the London Borough of Hounslow UKEATPA/0182/14

Sud v London Borough of Hounslow UKEAT/0156/14

Claimant

81. Mr McParland submitted that the burden on a respondent seeking strike out of a claim was an onerous one and the respondent had not met that threshold in this case.

82. He did not consider that the behaviour by the claimant had been unreasonable: Mr Obi was her representative and she relied on him as he was an HR expert whom she trusted and that such reliance was not unusual.

83. She provided information to Mr Obi when he requested it and did not question those requests.

84. The claimant only realised there were issues with the claim when she met her new solicitors in early October 2017. She accepted the solicitors' advice and withdrew the claims of harassment and victimisation and the application to amend her case to include a claim of indirect discrimination. The act of withdrawing her claims was not unreasonable and was not vexatious or scandalous.

85. The respondent could not rely on the conduct of the claimant in respect of the claims of victimisation and harassment as those claims no longer existed. It was his position that claims are frequently lodged with a number of heads of claim, some of which are dropped during the course of the proceedings as new information becomes available. It was his position that the claimant's conduct did not display an intention to mislead either the Employment Tribunal or the respondent.

86. He submitted there was no basis for the assertion that the claimant was not actively pursuing her claim. She is still pursuing the claim for constructive unfair dismissal.

87. Mr McParland submitted that all orders of the Employment Tribunal had now been complied with insofar as the claimant was able to do so. Any failings were not deliberate and the orders had been complied with one day late at a time when she was transferring agency to her new legal representative.

88. Mr McParland also submitted that it could not be argued the case had no reasonable prospect of success. There were issues to be determined in the ET 1 and the Employment Tribunal would require to hear evidence to determine them. The facts in this case are sensitive and can only be determined at a Full Hearing. He submitted that the application for strike out be dismissed as none of the grounds set out in Rule 37 had been met.

89. If the Employment Tribunal considered a Deposit Order was appropriate, it still had to be satisfied that the claim had little prospect of success. Whilst that was not as rigorous a test as that for strike out, there must be a basis for the view that the claim has little prospect of success.

90. Further, the award must be capable of being complied with and the claimant would have difficulty in raising any amount of money to pay a Deposit Order. Such an order would act to impair her access to justice.

91. Mr McParland also took issue with the respondent's schedule of costs and submitted that there was no vouching of the various invoices produced. He questioned whether it was appropriate for the case to have been handled at partner level and submitted it could have been handled at a more junior level. He submitted that most of the cost would have been incurred in any event as the claimant was proceeding with her claim of constructive unfair dismissal. He also stated that the claimant was in receipt of legal aid.

92. Mr McParland referred me to the following cases in respect of his various submissions:-

Blockbuster Entertainment v Jones [2006] IRLR 630

North Glamorgan NHS Trust v Ezsias [2007] ICR 116

Balls v Downham Market High School and College (above)

Romanowski v Aspirations Care Ltd (above)

Hasan v Tesco Stores Ltd UKEAT/0098/16/2206

Hemdan v Ishmail & Ali- Megraby UKEAT/0021/16

Mr Obi's submissions

93. Mr Obi referred to Rule 80. It was his position that there was no agreement between himself and the claimant whereby he would be acting in pursuit of profit with regard to the proceedings. He was not acting on a contingency or conditional fee arrangement and was not acting in pursuit of profit.

94. He submitted he acted only on a voluntary basis and not for any potential gain.

95. Mr Obi claimed he had met all deadlines and that he did not present any misleading information to the Tribunal . It was his position that the focus of the initial schedule of loss which he had produced was earnings listed about jobs applied for from the effective date of resignation and not before. The second schedule was rectified to include a job which the claimant held prior to her resignation. The focus he said was on earnings. The claimant was employed by Deux Consulting Ltd. on a commission only basis and that was

disclosed in the second schedule of loss. She had earned nothing from his company.

96. He submitted that the claimant's claims were clearly spelt out and all the required information was produced.

97. Mr Obi referred to the following cases:

Ridehalgh v Horsefield and Another [1994] 3 All ER 848 CA

Mitchells Solicitors v Funwerk Information Technologies York Ltd. UKEAT/0541/07

Hafix & Haque Solicitors v Mullick and another UKEAT 0356/14

Medcalf v Mardell and Others [2002] 3 All ER 721 HL

Decision

98. The issues to be decided in this case are:-

1. Should the claimant's claim be struck out under Rule 37 on any of the grounds set out in that rule;
2. If the claimant is not struck out under Rule 37 should a deposit order be granted in terms of Rule 39 on the basis that the claim has little reasonable prospect of success and;

3. Should a wasted costs order be granted against Mr Obi under Rule 80.

These issues will be dealt with in turn.

Should the claim be struck out?

99. In terms of Rule 37(1) an Employment Tribunal may strike out all or part of a claim on any of the following 5 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 respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of the rules or with an order of the Tribunal;

(d) that it is not being 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).

100. Mr Brown sought that the claimant's remaining claim be struck out in respect of each of the above grounds. The only claim remaining for the claimant is the claim of constructive unfair dismissal. The other claims of victimisation and harassment and the potential new claim of indirect discrimination have all been withdrawn by the claimant's new solicitors. The application for strike out therefore only relates to that remaining claim.

101. In her statement of claim the claimant has set out and offers to prove that a "***systemic and toxic environment was created by various events***", page 17. It is her position that that was what led her to resign. Further reasons for her resignation are set out in her letter of resignation at page 238. The respondent denies the allegations made by the claimant.

102. In the case of ***Balls v Downham Market High School and College*** (above), Lady Smith stated at paragraph 6:-

> "***Where strike out is sought or contemplated on the ground that the claim has no reasonable prospect of success, the structure of the exercise that the Tribunal has to carry out is the same; the Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET 3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects***."

103. In the case of ***Tayside Public Transport Ltd v Reilly*** (above) it was stated at paragraph 30:-

> "***In almost every case the decision in an unfair dismissal claim is fact- sensitive. Therefore when the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the Tribunal to conduct an impromptu trial of the facts."***

104. The Court also stated in the same paragraph:-

> "***But in the normal case where there is an "crucial core of disputed facts," it is an error of law for the Tribunal to pre-empt***

***the determination of the hearing by striking out (Ezias v North Glamorgan NHS Trust*),"**

105. I could not conclude that in this case the claimant's remaining claim had no reasonable prospects of success as there are competing allegations as to whether or not the treatment of the claimant by the respondent entitled her to resign and claim constructive dismissal. That can only be determined after hearing the evidence in the case.

106. The next ground upon which strike out is sought was that the manner in which the proceedings had been conducted by or on behalf of claimant had been scandalous, unreasonable or vexatious. It was Mr Brown's position that the whole conduct of the case had been to avoid providing information as to what the claim was actually about, which he said was unreasonable. He submitted that the attempt to present a new case of indirect discrimination was vexatious. The only case now remaining is that of constructive unfair dismissal as the other claims have been withdrawn. I did not consider that the fact the claimant had made other claims, had sought an amendment to include a new claim of indirect discrimination and had subsequently withdrawn all those claims should impact upon the striking out of the only remaining claim.

107. In my opinion if there was any complaint about the manner in which the proceedings had been conducted by or on behalf of the claimant then that is a matter more appropriately dealt with in any application for expenses against the claimant which may be made at the conclusion of the proceedings rather than by striking out the only remaining claim.

108. It was submitted that the claimant had failed to respond to orders of the Tribunal but I accepted that all the orders had now been complied with in so far as the claimant was able to do so. It was the claimant's position that there is nothing further to be produced. It is true that the Employment Tribunal had

to send reminders to Mr Obi and the time for compliance with orders was extended but at the end of the day the orders had been complied with in so far as the claimant could comply with them. I

109. I did not accept that the claim was not being actively pursued. It may not have been pursued in the manner in which the respondent would have wished, but I did not consider that it could be stated that the claim was not being actively pursued. The correspondence from the respondent and the Employment Tribunal to the claimant's representative had been dealt with even if all the information the respondent had sought was not provided in a manner acceptable to them. It could not be said that the claimant had in any way abandoned her claim for constructive unfair dismissal. She was, and is still, pursuing that claim.

110. The final ground upon which the respondent sought strikeout was that it was no longer possible to have a fair hearing in respect of the case. This argument was based upon the question of the credibility of the claimant given the evidence led at the preliminary hearing. It was argued that she was not a credible witness and that as a result a fair trial was not possible. I did not accept that submission. In my opinion a fair trial is possible in respect of the sole remaining case. It will be for the Employment judge hearing the case to make decisions upon the evidence presented and the credibility of the witnesses. It was not suggested that witnesses would be unavailable or that there had been such a significant passage of time that witnesses' recollections would be unreliable. I therefore found no basis on which it can be properly stated that it was no longer possible have a fair hearing.

111. Rule 37 (1) requires a 2 stage test (***Hasan v Tesco Stores Ltd*****)** (above). The first involves a finding that one of the specified grounds for striking out has been established and, if it has, the second stage requires the Tribunal to decide as a matter of discretion whether to strike out a claim, order it to be amended or order a deposit to be paid. In this case I have not found that any

of the specified grounds for striking out has been established and accordingly do not require to exercise my discretion in favour of not striking out.

Should a deposit order be made?

112. Rule 39(1) provides that where any specific allegation or argument in a claim has little prospect of success a Tribunal may make an Order requiring a party (the paying party) to pay a Deposit Order not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

113. Although this is a less demanding test than that to be applied for a strikeout order the Tribunal must be satisfied that there is "***little reasonable prospect***" of the argument succeeding. There must however be a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim- ***Jansen Van Rensburg v Royal Borough of Kingston upon Thames and others UKEAT/0096/07*****.**

114. In this case the claimant is offering to prove that the respondent's behaviour towards her entitled her to resign from her employment and to claim she has been constructively dismissed. She has set out the basis of her claim in the ET1 and in her letter of resignation at page 238. Taking those averments at face value, I could not state that the claim had little reasonable prospects of success. I am aware that the respondent denies the allegations but on the basis of the pleadings alone I could not conclude that the case had "***little reasonable prospect of success***". I therefore reject respondent's application to make a Deposit Order.

115. If however I had considered that the case had little reasonable prospect of success I would have exercised my discretion to make a Deposit Order. That would have been limited to the sum of £100 on the basis of the evidence given by the claimant herself regarding her means that she was left with the sum of only £160 per month after bills had been paid.

116. The claimant however should not presume from my refusal to make a Deposit Order that she will undoubtedly succeed in her case and should be aware of the comments made by the respondent's representative that they are likely to seek a full award of expenses against her in the event of the remaining claim being dismissed.

Should a wasted costs order be made?

117. Rule 80 provides:-

> **"(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs –**
>
> **(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or**
>
> **(b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.**
>
> **Costs so incurred are described as "wasted costs".**
>
> **(2) "Representative" means a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit."**

118. In the case of ***Ridelhagh v Horsefield*** (above) the Court of Appeal advocated a three stage test for courts (and, by extension Employment Tribunal s) to adopt in respect of wasted costs orders:

- firstly, has the legal Representative acted improperly, unreasonably, or negligently?

- secondly, if so, then did such conduct cause the applicant to incur unnecessary costs?

- thirdly, if so, is it in the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

119. Mr Obi sought to argue during his evidence that he was not a representative of the claimant but was simply supporting her. I did not accept that argument.

120. In his email to the respondent's solicitor of 11 August at page 73 Mr Obi stated "***You do not need my client's instructions considering I am duly representing her***". On page 74 he stated to the solicitors "***I see no reason why you copied my client into this email considering that I am her representative***." In an email to the solicitors on 15th November at page 203h Mr Obi stated "***I no longer represent the claimant***".

121. There was no suggestion prior to this preliminary hearing that Mr Obi was simply acting as a "***supporter"*** for the claimant, as he alleged, and all the correspondence referred to is entirely consistent with his acting in the capacity of a representative. I also noted that during his evidence Mr Obi replied to a question from Mr Brown by stating he was proceeding with the claim "***on the instructions of my client***".

122. In my opinion Mr Obi was acting as a representative of the claimant I did not accept his argument that he was simply ***"supporting***" her. From the facts set

out above I was satisfied that Mr Obi was indeed a representative of the claimant.

123. Mr Obi held himself out to be an HR expert and a provider of HR advice to businesses. He should have been aware that the claims of harassment and victimisation had no merit from, at the latest, the time of the preliminary hearing in August 2017. He persisted in advancing those claims and lodged an amendment introducing a further claim of indirect discrimination following that preliminary hearing. He should have known that the proposed new claim of indirect discrimination had no merit. Those actions caused the respondent further expense in defending claims which had no merit. They were withdrawn shortly after the claimant had consulted her current solicitors.

124. I considered it was unreasonable for a person who held himself out as an expert in HR matters and can, when necessary, refer to the relevant statute and case law, as shown in correspondence and in his submissions to persist in advancing claims which had no real merit and which he should have known had no merit.

125. In my opinion the period of unnecessary expense incurred by the respondent as a result of Mr Obi's actions dates from the date of the preliminary hearing on 18 August 2017 until he ceased act in November of that year. Up until the date of the preliminary hearing there was no real difference in the expense incurred by respondent as they would have been required to defend the constructive unfair dismissal claim in any event.

126. Although Mr Obi, in my opinion, was a representative of the claimant in the ordinary use of language it is necessary to look at the definition of "***Representative***" in Rule 80(2), as set out above. There was no evidence that Mr Obi was acting in pursuit of profit. The claimant and Mr Obi had a business relationship but the only evidence produced was that the relationship was commission based and that no payments had been made to the claimant as no work had been generated by her for Deux Consulting

Ltd.. Mr Brown's suggestion of an agreement between them such that the claimant did work for Mr Obi's company and the payment to her for that was in the nature of representation by him at the Employment Tribunal was simply speculation.

127. There was no evidence of any existence of a contingency agreement and again any suggestion that there was such an agreement was, in the absence of anything to substantiate it, purely speculation.

128. As a result Mr Obi in my opinion, is not a representative as defined by Rule 80(2) and cannot be held liable for wasted costs. The application for wasted costs therefore fails at this hurdle. If it had not I would have exercised my discretion to award wasted costs as a result of Mr Obi's unreasonable conduct in the handling of this case. Although no evidence was led of his means, he is in business as an HR advisor and did not seek to argue that he could not pay the sum which the respondent was seeking which was set out in the schedule of costs in the sum of £8,371.37 plus VAT

129. In the circumstances, Mr Obi not being a representative as defined in 80(2) the application for wasted costs is refused.

130. The case will be listed for a Hearing in respect of the claim of constructive unfair dismissal.

Employment Judge: I F Atack
Date of Judgment: 26 March 2018
Entered in register: 04 April 2018
and copied to parties