EMPLOYMENT TRIBUNALS

Claimant: **Mr N Sprengel**

Respondent: **Rolls Royce Plc**

Heard at: **Nottingham** **On:** **Thursday 14 February 2019**

Before: **Employment Judge P Britton (sitting alone)**

Representatives

Claimant: **Did Not Attend and No Explanation**
Respondent: **Mr M Salter of Counsel**

JUDGMENT

The claim is dismissed it having no reasonable prospect of success.

REASONS

1. This case now has a long and unfortunate history. As long ago as the 13 September 2007 the Claimant brought his claim (ET1) to the Tribunal. It appeared to be claims of constructive unfair dismissal and non payment of final wages due, consequent upon him having resigned the employment with Rolls Royce effective 2 June 2017. At the date of that resignation he had been working as a TA Manager for the Respondent on a long term secondment, based on the Isle of Wight. He had sold his property in Derby and relocated to live in Seaview on the Isle of Wight.

2. There was in due course filed a response (ET3) and which was supplemented on the 22 December 2017. A first telephone case management discussion took place on the on 7 March 2017 held by Employment Judge Milgate. The Claimant failed to participate. For reasons which are clear from her record of that TCMPH[1], Employment Judge Milgate listed this matter for an attended Preliminary Hearing which was held on the 14th March 2018 to inter alia determine whether the claim of constructive unfair dismissal should be dismissed as having no prospect of success or a deposit ordered it having only little reasonable prospect of success. The Claimant failed to attend. For reasons which she set out[2] she decided that the constructive unfair dismissal claim had only little reasonable prospect of success, and so she ordered that the Claimant

[1] See in the bundle before me prepared by the Respondent that record which is as Bp (equals bundle page) 47-49.
[2] Bp51-59.

should pay a deposit of £750.00. He was required to pay this within 21 days of the issuing her orders, failing which of course that claim would be struck out. Her orders were sent out on 30 April 2018.

3. As it is the Claimant did not pay the deposit order and so on 14 June 2018 this Judge dismissed the constructive unfair dismissal claim for that reason. This left the claim for the non payment of the wages. Orders had already been made in that respect. On 31 July 2018 the Respondent applied to the Tribunal for an "unless Order", the Claimant having failed to comply with the order to provide a schedule of loss. The unless order was duly made requiring compliance by the Claimant by 14 August. He attempted so to do on 13 August in a lengthy e-mail with enclosures to the Tribunal. Although he didn't include a schedule of loss, he did set out, albeit somewhat confusingly, the substance of the non payment of wages claim and to which I shall in due course return. Also he seemed to be submitting that he ought to have the deposit order revoked on the basis that he hadn't had the correspondence, but again somewhat confusingly he nevertheless referred to the orders of Judge Milgate. In any event if this was an application for reconsideration of the deposit judgment and thus the ensuing strike out, it was not referred to a Judge and so nothing was done about it. The Claimant has not subsequently, and in particular in the run up to today sought to make plain that he seeks a reconsideration of that judgment.

4. So against that background a further unless order was made in terms of the non compliance by not providing the schedule of loss to which I have referred The date for compliance was 18 September 2018. This he complied with. Against that background the Respondent had applied by that time for a strike out of what was of course by now the remaining claim of non payment of wages on the basis that it had only little reasonable prospect of success, or that he should pay a deposit as a condition precedent of continuing with it on the basis that it only had little reasonable prospect of success. It is to be noted that it copied its application to the Claimant at the e-mail address which he had given. The Claimant must have had notice of that application because of the ensuing e-mail traffic. The matter was duly listed for hearing but the notice of listing failed to set out that on the agenda was strike out or a deposit order. That hearing was listed to take place at Nottingham on 12 November 2019. The notice went out on 13 October. The Claimant sought to get it adjourned on the basis that he had "issues around work commitments and use of annual holidays". This was on 26 October. His application came before Employment Judge Legard on 5 November 2018. He issued an order that said inter alia as follows:

> "The Claimant's request for a postponement is refused. The Claimant having failed to provide any good reason for the same the Preliminary Hearing shall proceed and it will include a determination of the Respondent's application for a strike out or alternatively a deposit order."

So the Claimant now had clear notice that on the agenda for the Preliminary Hearing was strike out and a deposit order.

5. As it is that hearing had to be taken out of the list for want of judicial resources. A letter to that effect was sent to the parties on 9 November 2018 to that effect. It was made plain:

> "…Decided to postpone the hearing which will now be relisted on a mutually convenient date…"

So the agenda could be read as remaining the same.

6. As it is unfortunately the agenda that went out to the parties dated 17 November 2018 listing the matter for a Preliminary Hearing today again made no reference to these core items on the agenda, simply referring to Judge "will conduct a Preliminary Hearing to make case management orders". But this was again sought to be corrected by the Respondent in its e-mail to the Tribunal of 20 November making it plain what the hearing was about and that it should be in public and that 2 hours were needed to address the issues. That it was intended to therefore be a hearing to not only determine the deposit order application but strike out cannot be clearer from the referral from a clerk to another Judge to that effect on 29 November in terms of relisting. As it is the notice of clarification that went out only referred to address "the Respondent's deposit order". That is clearly an error as is now self-evident.

7. So in those circumstances can I entertain the Respondent's application that the case be struck out today? Before I go any further its application is essentially thus. It would appear that the Claimant is trying to say that going back to when he was originally employed by the predecessor in that respect of the Respondent, namely International Combustion Limited (ICL) on 30 August 1994 [3], that he was not paid wages for a period of 2 months, receiving a first wage on the payroll run at the end of October 1994 and it only being for one month's wages. Thus he was thenceforth owed a month's wages. Thus he appears to be saying that the liability for the same transferred across to Rolls Royce when he started to work for them as a result of the absorption by acquisition of Internal Combustion Limited. Sweep forward, and when he resigned to leave the employment, the EDT being circa 2 June 2017 he should have been paid 2 months' money not one month. This contention only came about when the Respondent had sought to deduct from the last wages due to him for such things as reimbursement costs. The Respondent denies that it is liable, it having always paid him correctly at the end of each month. Furthermore it pleads that if he was wrongfully not paid the first of the two months' wages ie for September 1994 then this was not something that carried over at the TUPE; and in any event in the sense that there would be a time limit of 3 months to bring such a claim, time at latest time would have started to run at the end of October 1994 and therefore of course the claim is many years out of time. Second, in any event the contractual provision with ICL stated that he would be paid monthly in arrears[4]. But it cannot say whether he was because of course it doesn't keep payslips for all those years ago and may never have received them in the first place. But of course the burden of proof is with the Claimant. He has so far produced no pay slips for the material time. So that is its case. On the face of it, absent convincing evidence from the Claimant it appears to be a strong defence. That is why it made the applications for strike out or a deposit order. And I have no doubt from the e-mail traffic before me and in particular that emanating from the tribunal, that the Claimant would have known this to be the case and thus what today's hearing was about. As it is I have no explanation for his non attendance today whereas the Respondent has attended.

8. So can I proceed today to strike out? As to the merits of the application, and which I have rehearsed, I have no Claimant present to gainsay. Therefore on the face of it the claim has no reasonable prospect of success. Pursuant to Rule 37(1)(b) I therefore have the power to strike out the claim for that reason. As to the forum being a preliminary hearing Rule 53(1) states:-

[3] In due course there was a TUPE.
[4] Bp33.

> *"A Preliminary Hearing is a hearing at which the Tribunal may do one or more of the following:-*
>
> > *"…*
> >
> > *(c) Consider whether a claim or response should be struck out under Rule 37…*
> >
> > *(d) make a deposit order under rule 39*
> >
> > …"

9. That brings me to Rule 54:-

> *"A Preliminary Hearing may be directed by the Tribunal on its own initiative… or at any time thereafter as a result of the application by a party. The Tribunal should give the parties reasonable notice of the date of the hearing. In the case of a hearing involving any preliminary issues, at least 14 days' notice shall be given and the notice shall specify the preliminary issues that are or may be decided at the hearing."*

10. The point then becomes did he have notice? I am attracted by the argument put before me today by learned Counsel that he has logically had notice on more than one occasion of what the Preliminary Hearing was about. Therefore, it is not fatal that the last notice of listing only refers to potentially making a deposit. The reason why it could be said that he had had previous notice and that he was at risk of strike out is obvious from the correspondence and procedural trail to which I have now referred. That brings me back to Rule 37(2):

> "A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations whether in writing or was requested by the party at a hearing."

11. Well of course he has had the opportunity to make representations in writing why the claim should not be struck out post notice of the application, copied to him of the Respondent on 19 October 2018. And had he come today he would have been able to make them. Furthermore, if he was incapacitated and he has given no reasons that he was, then he could have sent in written representations. After all he was capable of doing that on the schedule of loss front to which I have already referred.

Conclusion

12. So that brings me to the overriding objective and the need to deal with cases justly and in a proportionate manner. The Respondent has had to prepare a bundle, attend today and deploy Counsel. This is the second time when the Claimant has failed to attend a hearing. He has given no explanation why he hasn't done so today. Thus given the history, the apparent weakness of his claim, and that by his absence he has in any event failed to prosecute it, I therefore find that it is just and equitable in accordance with the overriding objective to strike out the claim and because on the face of the papers before me it has no reasonable prospect of success.

Employment Judge Britton

Date: 11 March 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE