EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4123544/18 Held on 21 March 2019

Employment Judge: Mr N M Hosie

Mr R Duvenage	**Claimant** **In person**
NSL Limited	**Respondent** **Represented by:** **Mr A Fox** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant's application to strike out the response in terms of Rules 37(1) (a), (b) and (e), in Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, is refused.

REASONS

Introduction

1. The claimant commenced his employment with the respondent as a "Customer Service Representative" on 12 December 2016. His employment is continuing.

2. His claim claim form was submitted on 10 December 2018. Following a Preliminary Hearing for case management purposes on 4 February 2019, Employment Judge Hendry recorded in his Note that the claim comprised complaints of: *"race, sex discrimination, breach of contract, and detriment (whistleblowing) and an alleged failure on the part of the respondent to provide a statement of employment terms".*

3. The respondent's solicitor submitted a response to the claim on 10 January 2019. The claim is denied in its entirety.

Strike Out Application

4. On 22 January 2019, the claimant applied to have the response struck out in terms of Rules 37(1)(a), (b) and (e) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

5. The application was opposed by the respondent.

6. At the Preliminary Hearing on 4 February, it was agreed that the strike out application would be determined on the basis of written submissions. Employment Judge Hendry's Note is referred to for its terms. Thereafter, the claimant applied to have the issue determined at a public Hearing. However, this was opposed by the respondent, in light of which and having regard to the "overriding objective" in the Rules of Procedure and the agreement previously reached, I refused. The claimant then applied for a reconsideration of my decision. However, it is only a Judgment which can be reconsidered in accordance with an employment tribunal's general

power under Rule 70. My decision was not a "Judgment" as defined by Rule 1 (3) (b). It was a "case management order, as defined by Rule 1 (3) (a). His application was incompetent, therefore, and I refused it. In any event, only "*the party in question"* can request a public Hearing under Rule 37 (2). The respondent is the *"party in question",* and they wished the issue to be determined on the basis of written representations, as previously agreed.

7. I proceeded, therefore, to consider and determine the claimant's strike out application on the basis of the parties' written submissions.

Claimant's Submissions

8. The claimant's strike-out application was set out in an attachment to his e-mail of 29 January 2019, which is referred to for its terms.

9. In support of his submission he referred to the Judgment of Mr Justice Langstaff in **Chandhok v Tirkey [2015] IRLR 195**.

10. He submitted that the respondent, *"is a significant organisation with substantial resources and had instructed a solicitor in connection with these proceedings".*

Rule 37(1)(a)

11. The claimant submitted that the response should be struck out as it was, *"scandalous or vexatious or has no reasonable prospect of success"*.

12. He submitted that as the Employment Tribunal carried out an *"initial consideration"* under Rule 26, that this implied a rejection of the respondent's preliminary issues on jurisdiction and that, *"the respondent continues to respond to the claimant's particulars of claim in an incoherent manner, introducing in the response, the case which best seems to suit the moment from their perspective. Bare and blanket denials cannot cure this terminal defect".*

13. He submitted, with reference to **Chandhok**, that a blanket denial of this nature *"is impermissible"* and that the respondent had failed to respond *"comprehensively"* as it was required to do: *"the response reads more like a witness statement than a substantive response".*

14. He also submitted that, while the response was, *"ostensibly coherent it did not amount in law to a defence."*

15. He further submitted, with reference to Article 3(c) of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 that an employee was entitled to bring a claim for damages for breach of contract, rather than a claim which was outstanding on the termination of the employee's employment. In support of his submission he referred to: **AMA (Newtown) Ltd v Law [2013] SLT 959**.

16. He submitted that the respondent had, *"wilfully or negligently misrepresented the wording of the Article 3 (c)".*

17. He also submitted, with reference to para 78 of the Grounds of Resistance, that the *"threat"* by the respondent's solicitor to strike out the claim was "entirely scandalous" as were the threats in paras 79 and 80. In support of his submission he referred to: **Anyanwu v South Bank Student Union [2001] ICR 391**.

Rule 37(1)(e)

18. The claimant also submitted that it was no longer possible to have a fair hearing in respect of the claim. He submitted that the response was, *"presented in such an obtuse format and content that a telephonic Preliminary Hearing could not adequately be conducted and concluded in an hour".* He submitted that, as a consequence, the claim could not be concluded, *"speedily, effectively and with a minimum of complication".*

19. He submitted that the respondent's solicitor would require to amend the response as it fell, *"so far short of the requirement set out in **Chandhok** it*

would not be in the interests of justice to allow such an amendment, in any event it would be out of time".

20. The claimant submitted, *"that it would be in the interests of justice giving effect to the overriding objective and in the public interest to strike-out the Response. The public has an interest in the orderly and cost-effective conduct of proceedings in the Tribunal and not to have Tribunal resources taken up by the improper conduct of vexatious litigants".*

21. Accordingly, the claimant submitted that the response and the manner in which the proceedings were being conducted were, *"scandalous and/or vexatious or had no reasonable prospect of success; that it was no longer possible to have a fair hearing in respect of the claim; that it was in the interests of justice and the proper conduct of the proceedings for the Tribunal to strike out the response".*

Respondent's Submissions

22. On 18 February, the respondent's solicitor sent an e-mail to the Tribunal, copied to the claimant, with a letter attached objecting to the claimant's application. The letter was in the following terms:-

> *"The Claimant alleges that the Respondent has failed to comply with various rules contained within the Employment Tribunal Rules of Procedure 2013 (ET Rules). This is denied. The Respondent has complied with the Tribunal's rules in relation to submitting a response to this claim. The Claimant's claims have been addressed, and the Respondent's position in respect of each of his claims has been stated.*
>
> *The Respondent was required under Rule 16 of the ET Rules to provide a response to the Claimant's claim on a prescribed form and within 28 days of the date a copy of the claim form was sent to the Respondent by the Tribunal. The ET3 form was completed and submitted in time, along with detailed Grounds of Resistance. In these*

Grounds of Resistance, each of the Claimant's claims were identified and the claims were denied. However, the Respondent did ask for further and better particulars because the claims were not presented clearly. The Respondent's response was accepted by the Employment Tribunal.

We submit that the Respondent has complied with its obligations to the Tribunal to respond to the Claimant's claim, and that the burden remains on the Claimant to prove his claims. The Respondent's response outlines its version of the events detailed by the Claimant, and we submit that this is a perfectly acceptable response to the issues raised by the Claimant.

The Claimant has no reasonable grounds on which to consider the Respondent's response to be scandalous, vexatious, or with no reasonable prospect of success. The Claimant appears to be of the view that the Tribunal can determine the merits of his claim without having reviewed the evidence, and we submit that this can only take place at a final hearing. It would be entirely contrary to the overriding objective and the interests of justice if the Respondent's response were to be struck out.

Furthermore, we consider that if the Tribunal were to hold a preliminary hearing in this matter that would be a waste of the Tribunal's resources and a waste of time and costs for the parties. The only way in which the Tribunal will be able to make a determination as to whether the Respondent's denial of the Claimant's claims is reasonable will be to review all of the available evidence, and this can only take place at a final hearing.

The Respondent's ET3 contained a submission as a preliminary issue that the Claimant is unable to proceed with his breach of contract claim due to the Tribunal not having the jurisdiction to hear it. This remains a preliminary issue for the Tribunal to consider. The Employment

Tribunals Extension of Jurisdiction (Scotland) Order 1994 ("Order") states at Article 3(c) that:

'Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if –

(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in Scotland would under the law for the time being in force have jurisdiction to hear and determine;

(b) the claim is not one to which article 5 applies; and

(c) the claim arises or is outstanding on the termination of the employee's employment.'

The Claimant alleges that the Respondent has 'willfully or negligently' substituted the word 'may' for the word 'only'. We submit that the Claimant has misinterpreted the above Article, and that the only way a breach of contract can be brought in an Employment Tribunal is in the circumstances set out in Article 3(a), (b) and (c).

We submit that the Order requires a breach of contract claim to have arisen or be outstanding on the termination of employment. As the Claimant's employment has not terminated, his breach of contract claim cannot have arisen or be outstanding on termination of his employment.

The Claimant claims that the manner in which these proceedings are being conducted is scandalous, unreasonable or vexatious. This again is denied. To date, the Respondent has been required to submit a response, which it has done, and which has been accepted by the Tribunal. The Respondent was then required to attend a preliminary hearing, which it did, and in preparation for the hearing drafted a set of issues and completed agenda to assist the Tribunal and the Claimant with the progress of this claim. Nothing about the way in which the proceedings have been conducted would amount to the Respondent's conduct being scandalous, unreasonable or vexatious.

The Respondent's Grounds of Resistance contained reference to the possibility of asking the Tribunal for a deposit order or making an application for costs; however, no such application has been made, and the Tribunal is not being asked to determine such an application at this stage.

The Claimant has suggested it is the Tribunal's role to determine the factual issues at the final hearing, not for the Respondent to present its own case at that stage. As submitted above, the Respondent has provided a response to the Claimant's claims, and it will be for the Tribunal to decide at the final hearing which party's version of events is supported by the available evidence. Such evidence will require review by the Tribunal at that hearing before any decision can be made.

The Claimant has applied for the Respondent's response to be struck out. We object to this application, as the response clearly sets out the Respondent's position in relation to the claims brought by the Claimant, and it is denied that the response is malicious, vexatious, or has no reasonable prospect of success.

Further, the Claimant cannot reasonably argue that these proceedings have been pursued in a scandalous, unreasonable or vexatious manner considering all case management orders to date have been complied with. It is denied that the Respondent has willfully or negligently misrepresented the wording of Article 3(c) of the Order, as the Respondent's ET3 clearly contains a quote from Article 3(c) containing the exact wording from the order. We submit that, in any event, the Tribunal is aware of the wording and operation of the Order. We submit that the Claimant's suggestion that it is no longer possible to have a fair hearing is simply unfounded. The Respondent's response is clear, the parties have yet to exchange documents or witness statements, and the Tribunal will have the opportunity to consider all of the evidence at the final hearing before any decision is

made. The Claimant has provided no reasonable basis to his argument that it will no longer be possible to have a fair hearing.

We consider that the Claimant's application for strike out is no more than an attempt to increase the time and cost incurred by the Respondent in defending this claim, and the application itself has no merit.

Finally, it would not be in the interests of justice or in line with the overriding objective for the Respondent's response to be struck out considering all requirements of submitting a valid response have been complied with and whether or not the Claimant's claim is successful will depend on the evidence provided by both parties at the final hearing, and there are no reasonable grounds for the Tribunal to consider striking out the Respondent's response."

Claimant's Further Submissions

23. The claimant submitted a response to the respondent's response by way of an attachment to his e-mail of 5 March which is referred to for its terms. In these further submissions he referred to the following cases: -

Parekh v London Borough of Brent [2012] EWCA Civ 1630
Chandhok
Grant v ASDA UKEAT /0231/16/BA
Bone v Fabcon Projects Ltd [2006] ICR 1421

24. He clarified that his strike-out application was not based on any procedural irregularity, but rather, with reference to **Chandhok**, a failure on the part of the respondent, to provide a substantive response to his claim and that they should not be permitted to submit *"a second response"* which would be out of time and, in any event, none had been applied for.

25. He further submitted that, *"the respondent's defence in respect of jurisdictional points is without merit".*

Discussion and Decision

26. It was significant, in my view, for the purposes of the issue with which I was concerned, that I was required to take the respondent's averments in the ET3 response form and in particular the "Grounds of Resistance", at their highest value. In other words, for the purpose of determining the issue, I assumed that the respondent would be able to prove all that was averred.

27. It was also significant that the onus is on the claimant to prove the various complaints comprising his claim.

Breach of Contract

28. I am bound to say, that I had some difficulty understanding the claimant's submission in this regard as it is clear from the relevant statutory provision, namely Article 3(c) of The Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994, that an Employment Tribunal only has jurisdiction to consider a breach of contract claim which has arisen or is outstanding on the termination of employment. The claimant remains in the respondent's employment. I am minded, therefore, to dismiss this complaint for want of jurisdiction. The claimant is directed to make further representations in this regard, should he wish to do so, within 14 days, failing which I shall dismiss this complaint.

29. So far as the remainder of the claimant's submission was concerned, although the strike out of a respondent's response to a claim occurs less frequently than the striking out of a claim (or part of a claim), nevertheless the same five grounds for striking out, as set out in Rule 37(1), apply to a response just as much as they do to a claim.

30. While mindful of the guidance of the EAT in **Chandhok**, I was not persuaded that the response has, *"no reasonable prospect of success".* In arriving at this view, as I recorded above I required to take the respondent's averments at their highest value and the burden of proof lies with the claimant. Nor did I accept the claimant's submission that by allowing the claim to proceed after the "initial consideration" by an Employment Judge

under Rule 26 that this in some way implied, *" a rejection of the respondent's preliminary issues".* The Employment Judge was only confirming that there were, *"complaints and defences within the jurisdiction of the Tribunal".* Whether a Tribunal has jurisdiction, in the particular circumstances of a case, can often only be considered and determined properly and justly at a subsequent Preliminary Hearing which will often require evidence to be heard.

31. I was also mindful of the guidance in the relevant case law and such cases as **Anyanwu,** which the claimant referred to, that as discrimination cases tend to be "fact sensitive" strike-out should only be ordered:

"*In the most obvious and clearest cases.*"

32. In my view, this is not one of these cases.

33. Nor was I persuaded that either the response itself or the manner in which the proceedings have been conducted on behalf of the respondent have been, *"scandalous, unreasonable or vexatious or indeed it is not possible to have a fair hearing".*

34. I was satisfied that the submissions by the respondent's solicitor were well founded. Indeed, the ET3 response form with the "Grounds of Resistance" comprising 80 numbered paragraphs is comprehensive. It addresses the complaints and gives "fair notice" of the respondent's position.

35. I am also of the view that the respondent's solicitor has conducted the proceedings thus far in an entirely acceptable and professional manner and in accordance with the Rules of Procedure.

36. He simply intimated at paragraphs 78, 79 and 80 of the Grounds of Resistance that he wished to reserve his position to apply for strike out, a deposit order or expenses. There is nothing to suggest that that was done other than to provide the claimant with "fair notice" of these possibilities.

37. It is abundantly clear to me that, subject to further clarification of the factual and legal bases for the complaints being advanced and determination of an application to amend by the claimant, which is opposed by the respondent, the issues between the parties in the case can only properly be determined by hearing evidence from witnesses at the Final Hearing. There is no impediment, in my view, to such a Hearing being fair.

38. Nor would it be in the interests of justice, or in accordance with the *"overriding objective"* in the Rules of Procedure, to strike out the response.

39. For all these reasons, therefore, the claimant's strike out application is refused.

Employment Judge: **Nicol Hosie**
Date of Judgment: **03 April 2019**
Entered in the Register: **03 April 2019**
And Copied to Parties