



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4101683/2017

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Preliminary Hearing Held in Glasgow on 18 December 2018

Employment Judge: Mr A Kemp (sitting alone)

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Mr D Wardrop

**Claimant
(Did not attend)**

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SThree Partnership LLP t/a “Huxley Associates”

**Respondent
Represented by:
**Mr N Macdougall
Advocate****

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JUDGMENT

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The Claim is struck out under Rule 37, Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

REASONS

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1. This Preliminary Hearing was arranged to consider the Claimant’s application for strike out which failing for a deposit order, and followed an Order from the Tribunal dated 3 October 2018 in which an unless order was made with regard to the unfair dismissal claim and a further order with regard to the breach of contract claim (“the Order”).

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2. The Claimant did not attend the Preliminary Hearing before me. That is not the first time that he had failed to do so. He had not contacted the Tribunal in advance of the hearing. The clerk sought to contact him by telephone, but

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without success. I considered that it was appropriate to proceed with the hearing in his absence.

- 5 3. The Order required the Claimant to write to the Tribunal and Respondent by 17 October 2018 with information in relation to the claims. The Claimant did not do so. In light of the terms of the Order and the Claimant's failure to comply with its terms, the unfair dismissal claim is struck out under Rule 37(1)(c) for the non-compliance with that Order.
- 10 4. Mr Macdougall for the Respondent sought strike out of the remaining element of the claim, for breach of contract, on two bases – firstly that there was no reasonable prospect of success, and secondly that the claim had not actively been pursued. He explained that an Order had been granted on 15 March 2018 which included writing to the Tribunal and Respondent by 26 March 15 2018 setting out the facts that led him to say at the preliminary hearing on 19 December 2017 that he believed "he was employed by Huxley". He was informed that if he failed to do so the Tribunal may strike out the claim in whole or part.
- 20 5. There was a reply by email dated 3 May 2018, which claimed that that was "the first I have seen this ruling". His reply was:
 - 25 "1. I was recruited by Huxley in June 2016 and was continually employed at Polmadie recycling plant by them until 31/1/17. Mr John Cullen was my contact at Huxley, they arranged my interview and Mr Cullen visited me twice on site during my employment.
 2. I was employed from 27/6/16 to 13/1/17 by Huxley for 2 companies, firstly Interserve then Viridor as a process commissioning engineer."
- 30 6. The Claimant had not replied at all to the Order, which amongst its requirements required at paragraph 17 "specifying what control the respondent exercised over him or his employment while he worked at sites operated by Interserve Construction Ltd or Viridor (Glasgow) Ltd or Viridor Waste Management Ltd."

7. Mr Macdougall argued that the email, which was the only relevant information provided, was wholly insufficient to provide a basis for the claim that the Claimant was an employee, and that his employer was the Respondent. He referred by way of background to the Master Agreement between the Respondent and Orange Genie Cover Limited, which he produced a copy of. In that contract the Respondent was “the Company”, and Orange Genie Cover Limited “the Service Provider”. The basis of the agreement was set out in the preamble under “Background” as follows:
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- “(A) The Company’s Clients require consultancy services and the Service Provider and its Consultants have the required levels of expertise to provide those services.”
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8. He also referred to clauses 3.1.5 whereby the Consultant “is employed by the Service Provider”, and 16.9 that “Nothing in this Agreement shall serve to create any employer/employee relationship.....between....the Company and the Consultant.”
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9. He argued that there was no detail provided as to control, or mutuality of obligation which was an essential part of the employment relationship.
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10. With regard to the failure to actively pursue the Claim he referred to the history of the Claim, which is summarised in the Order dated 3 October 2018. He argued that the Claimant had been given ample opportunity to respond, had failed again to appear, and had not provided any explanation for the previous failure to appear despite that having been sought by the Tribunal.
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11. Rule 37(1) provides that the Tribunal may strike out all or any part of a claim on a number of grounds, the relevant ones of which are:
- “(a) that it has....no reasonable prospects of success
(d) that it has not been actively pursued.”
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12. Rule 37(2) states that “A claim.... May not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.”

13. I considered matters in the context of the overriding objective in Rule 2. I considered that the claim had no reasonable prospects of success. The Respondent had been added as an additional Respondent, and had set out their position, that the Claimant was not employed by them, in their Response Form. In previous Orders the Claimant had been requested to set out the facts on which he relied in his arguments that he was an employee, and that his employer was the Respondent. His email of 3 May 2018 fails to do so to the extent required. It is in essentials not inconsistent with the Respondent's position, which was, putting it shortly, that they supplied the Claimant as a Consultant to Orange Genie Cover Limited, who in turn supplied him to work for Clients of theirs. The Master Agreement produced was evidence of that arrangement. It is not determinative, but the Claimant has not provided any basis in fact for an argument that the Respondent was his employer.

14. Separately, the Claimant has been given a number of opportunities to respond to the Tribunal, as referred to in the Order, and to appear at the hearing before me, and has not taken them. I considered that he had had a reasonable opportunity to make representations, and that the position was clearly set out in the earlier Orders I have referred to. I considered that the claim had not actively been pursued.

15. Accordingly I struck out the Claim under Rule 37.

16. Finally I record that the Respondent wished to reserve its position on expenses, and the procedure for that matter was set out in paragraph 15 of

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the Order.

Employment Judge: A Kemp
Date of Judgment: 20 December 2018
5 **Entered in Register: 24 December 2018**
Copied to Parties