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EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case Number: 4109137/2018

Held in Glasgow on 29 November 2019

Employment Judge: David Hoey (sitting alone)

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Mr P Burns

**Claimant
Represented by:-
Ms A Bennie -
Counsel**

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Entcorp UK Limited

**Respondent
Represented by:
Mr T Wilkinson -
Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Respondent's application to strike out the claim because it has no reasonable prospects of success fails. The Respondent's application for the Tribunal to issue a deposit order because there are little reasonable prospects of success fails.

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E.T. Z4 (WR)

REASONS

1. This case called as a Preliminary Hearing to determine two issues that had
5 been raised by the Respondent – whether the claim for constructive unfair
dismissal had reasonable prospects of success and (in the alternative)
whether a deposit order should be issued. Both parties were represented by
Counsel. The Claimant was in attendance for part of the hearing and an
agreed bundle of productions had been produced running to some 110 pages.
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2. An initial issue that had arisen was whether or not evidence would be led to
determine the issues. The Respondent's position was that in their application
to the Tribunal they had identified the preliminary issue, which was whether
or not the reason for the Claimant's resignation was connected to the alleged
15 fundamental breach and that this was a point that could be determined by the
leading of evidence, namely the Claimant leading evidence as to the reason
for his resignation and being subject to cross examination.
3. The Claimant's position was that before evidence could be led there required
20 to be clear and robust orders from the Tribunal that set out the parameters of
the evidence. Further it ought to be clear what facts were agreed. It was
important to ensure that the context of the Claimant's evidence was set out.
To elicit the evidence from the Claimant to determine the preliminary issue,
more than simply asking the reason for his resignation would be needed (in
25 Ms Bennie's view). The Claimant's position was that there was a sequence of
events that caused him to resign and this would require to be led in evidence.
The Claimant's position was that no evidence should be led and the hearing
should proceed by submissions only.
- 30 4. The Respondent's position was that the application that had been made had
contained clear reference to oral and written evidence being required and the
Notice of Hearing had made it clear that parties should ensure relevant
witnesses were in attendance.

5. In any event it transpired that the Claimant required to attend an urgent hospital appointment around 30 minutes following the conclusion of the submissions. Counsel for the Respondent had indicated that cross examination would take at least that length of time. It was not therefore going to be possible to hear evidence in the circumstances.

6. After a short adjournment, the Respondent's counsel indicated that the Respondent wished to proceed by submissions based upon the pleadings and productions. The Claimant's counsel confirmed that there were no issues in connection with the productions which could be taken as authentic.

Issue to be determined

7. The issues to be determined were in sharp focus:

1. Should the claim be struck out because it has no reasonable prospects of success (the reason for the claimant's resignation being in no way connected to any alleged breach of contract)?
2. Should a deposit order be issued because the claim has little reasonable prospects of success for the above reasons?
3. If so, how much should the deposit be?

Findings in Fact

8. I am able to make the following findings in fact from the productions that were referred to and given the agreement that existed between the parties. These are findings in fact that are relevant to the two preliminary issues only. As no evidence was led from the Claimant (or any other person) these findings do not bind any subsequent Tribunal which hears evidence from persons who

can speak to the documents. The findings are therefore only for the purposes of determining the above preliminary issues.

- 5 9. The respondent was undertaking a restructuring exercise from around November 2017. A number of roles were affected, including the claimant's.
10. On 24 January 2018 the Claimant agreed to attend a telephone interview with another company for another job.
- 10 11. In an email dated 25 January 2018 Mr Bryans (a Respondent employee) advises another employee of the Respondent that the Claimant had agreed to be redeployed into another role.
- 15 12. On 2 March 2018 the Claimant is asked whether he had resigned. This was because the Respondent had received a reference request for their "ex-employee" (the Claimant). The Claimant replied stating that he was "just about to send" an email.
- 20 13. On 2 March 2018 the Claimant sends an email to the Respondent making a "formal request to be made redundant". The email sets out the Claimant's concerns that led him to make this request. The email suggests that the process that had been undertaken by the Respondent (which had been ongoing in November 2017) was unfair and unreasonable
- 25 14. On 2 March 2018 the Claimant signs a contract of employment with his new employer stating, in an email of that date "I am looking forward to joining NGA HR" (the new employer).
- 30 15. By email of 7 March 2018 the Claimant advised the Respondent that following the response to his request to be "made redundant" he was in the process of sending his resignation letter. He suggested a severance package.

16. On 9 March 2018 the Claimant writes to the Respondent formally resigning “with immediate effect”. That letter states that he had “no choice” “in light of my recent experiences regarding a fundamental breach of contract and breach of trust and confidence”.
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17. On 9 March 2018 the Claimant raised a grievance. The covering email stated that he considered 4 points (and the grievance details) to amount to a fundamental breach of contract that led to him resigning with immediate effect. That grievance ran to 13 pages. The grievance stated that it was “based on the following concerns”:
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1. Calculated effort by the Business (EMEA Digital Sales) to engineer a desired outcome that was neither fair nor reasonable
 2. Inappropriate action and comments made by senior management that have caused the claimant to feel harassment in the form of bias towards age stress and anxiety
 3. Territory alignment that is unfair and unreasonable
 4. Potential performance management due to territory alignment making his position untenable and forcing him to resign from his job
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18. The claimant maintained in his grievance that the outcome had been predetermined. He refers to a meeting on 27 November 2017 at which he alleges he was told he would not be successful in the selection process. He alleges that his final consultation meeting was cancelled. As at 9 March 2018 the only communication he said he had received was a change of job role notification and he had not received any paperwork regarding his appeal or redeployment. He says he verbally agreed to redeployment.
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19. At paragraph 8 of the grievance he says:

“Had I been provided at this time (January 2018) with the information and data now in my possession, I would have accepted redundancy actively pursuing other career opportunities.”

5 20. The Claimant started his new employment on 12 March 2018.

21. In the Paper Apart to the Claim Form it is stated that:

10 “7. The Claimant raised a grievance about the subsequent events that led to the Claimant resigning his position with the Respondent. A copy of the grievance is attached which narrates what the Claimant felt he was left with no option other than to resign.

15 8. It is the Claimant’s position that he had lost all trust and confidence in the Respondent given the manner in which he had been treated (as set out in paragraphs 3 to 6 of the paper apart and the Claimant (sic) grievance). The Claimant concluded that he had no option other than to resign with immediate effect which he did by letter of 9th March 2018. In all the circumstances the Claimant is of the view that he has been
20 unfairly constructively dismissed from his position.”

22. The Claimant left the new employment in October 2018 and is presently unemployed. He was not in receipt of benefits and was seeking new employment. He lives with his wife who retired for medical reasons and the
25 only income was his wife’s pension which was around £900 a month. Monthly outgoings amounted to £2500.

The law

30 23. In order to claim constructive dismissal, a Claimant needs to show that there was a fundamental breach of contract, which was connected to the Claimant’s resignation (and there is no unreasonable delay in resigning). The focus in this hearing was on the reason for the Claimant’s resignation. In deciding the

reason for a Claimant's resignation in a constructive dismissal case, the Tribunal must consider whether the repudiatory breach of contract had played a part in the resignation. It did not need to be the sole, major or main cause: **Wright v Ayrshire Council** 2014 ICR 77. Thus the fact that there are other reasons for the resignation does not, by itself, mean that the claim could not succeed.

24. Rule 37 sets out the test in respect of strike out. It states that (amongst other things) where a claim has no reasonable prospects of success the Tribunal may strike the claim out. This has been considered in a number of authorities which emphasise the 2 stage process that is required and the Tribunal's discretion. The authorities include **Hasan v Tesco** UKEAT/98/16 and **Chindove v Morrisons** UKEAT/76/17.

25. Rule 39 allows a Tribunal to order that a deposit be paid where a claim has "little reasonable prospect of success".

Respondent's submissions

26. Mr Wilkinson's began by focusing on the grievance letter and noted that paragraph 20 states that the claimant "more than likely" would have accepted redundancy if he had been given the spreadsheet analysing the data. The grievance states at para 21 that the claimant believes he was left with no other option other than resignation as assigning the territory to him made his position untenable with the only outcome, he alleges, being performance management potentially resulting in his termination.

27. Mr Wilkinson noted that it is not clear exactly what the claimant's case is with regard to constructive dismissal – is it a last straw case or is only one term being relied upon? But what the grievance states, maintains Mr Wilkinson, is that the claimant says that if he had been given the data he would have accepted redundancy rather than take the new role in January 2018. That is important context.

28. On 25 January 2018 there is evidence that the Claimant had agreed to be redeployed and so the territory issue was not live at this stage. On 24 January 2018 the Claimant had accepted a telephone interview with a new role. Thus
5 the territory issue was no longer a live issue and could not reasonably be considered a reason that caused the Claimant to resign. Mr Wilkinson submitted that this showed that the Claimant had already decided to leave.
29. A formal offer had been made to the Claimant on 20 January 2018. He then
10 resigned on 9 March when it was clear no package would be made available to him. He started his new role on 12 March 2018.
30. Mr Wilkinson's position was that the timings (which are not in dispute) undermines what the documents say. He says the only credible reason for the
15 Claimant's resignation was because he had not secured a package from the Respondent to leave and he had another job to go to. He maintains that there is little or no reasonable prospects of the Claimant's position (that he resigned because of alleged breaches of contract) being accepted.
- 20 31. Mr Wilkinson submitted that there were no reasonable prospects of success and therefore the Claim should be struck out, which failing a deposit order should be made for a sum to be determined by the Tribunal.

Claimant's submissions

- 25 32. Ms Bennie did not take any issue with the productions and chronology. In relation to the territory issue, she submitted that The Claimant received the information after 25 January 2018 (when the email says the claimant agreed to redeployment) and before 9 March 2018 (the date of the grievance) and
30 possibly earlier, maybe 2 March 2018. While the Claimant may have said he would have "accepted redundancy", that does not mean that the Claimant is accepting redundancy would have been fair. The Claimant would have made a decision at that point as to his position.

33. Ms Bennie submitted that there is a course of conduct that is relevant to the reason for the Claimant's resignation. In essence the Claimant was being told before the redundancy process had concluded that he would not have a role. The Claimant had raised concerns about the process in November 2017 and the final straw was the territory information (between 25 January and 2 March 2018).
34. The fact the Claimant was looking for another job does not suggest that the Claimant did not resign because of the Respondent's actions. The reason the Claimant was looking for another job was because of the treatment he received by the Respondent from November 2017 until March 2018. That is what the Claimant says in his Claim Form and his grievance.
35. Ms Bennie then set out the law in this area and noted the question is whether the fundamental breach played a part in the resignation of the Claimant.
36. Ms Bennie summarised the legal position in relation to strike out referring to the 2 stage tests. She argued there were reasonable prospects of showing a reason for the resignation was the treatment the Claimant had suffered and in any event even if there were not, it would be disproportionate to dismiss the claims or issue a deposit order. These were draconian measures particularly where the issue is highly fact sensitive.
37. Ms Bennie's position was that the Claimant had faced conduct which he considered to amount to a fundamental breach of contract. That was a course of conduct and he took time to consider his options and then resigned because of that, even although he had another job to go to.

Respondent's response

38. Mr Wilkinson responded by noting that while there is a 2 stage process in connection with exercising discretion under rule 37, in the circumstances there were no reasonable prospects of success, or little reasonable prospect and so his position should be preferred.

Decision

39. Having carefully considered the productions to which I was directed and the helpful submissions of both counsel, I prefer the submissions of Ms Bennie. I am not satisfied that it has been shown that there is no reasonable or little reasonable prospect of the Claimant establishing that the fundamental breach of contract on which he relies did not in some way play a part in his resignation.

40. While there is clearly evidence that suggests he resigned because he failed to secure a package from the respondent, that, by itself, does not mean that there were no other reasons that caused him to resign. Further, in an issue such as this, given its importance, it would be necessary to assess the Claimant's credibility and his reason for resigning. As Mr Wilkinson pointed out, it may be necessary to look beyond what the documents say to fully understand what was intended. That is something that would require the hearing of evidence and the assessing of credibility and reliability and the making of a finding in fact as to the reason (or reasons) that led the Claimant to resign.

41. The issues in this case are not dissimilar to the position in **Wright** where there was 2 or more reasons that played a part in the resignation. It is clear from the productions to which I was referred that the Claimant was unhappy with the process in the course of November 2017. He says that he was unhappy with the way in which the matter was dealt with and this caused him stress and anxiety. That is information contained within his grievance, which was

lodged after he had accepted a role with a new employer. Nevertheless that does not necessarily mean that there are no reasonable prospects of showing the concerns the Claimant had about the way in which he was treated did not still feature as a reason for his resignation. That is a matter of evidence.

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42. The fact that the territory issue had been resolved, since the Claimant had accepted the new role, may well be relevant in showing the reason for his resignation but in my view, it does not definitely rule out the fact that the Claimant may well have also resigned for other reasons, which could potentially include the fact that he was unhappy with other aspects of the procedure, which could amount to a fundamental breach of contract.

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43. In all the circumstances therefore the Respondent's application to strike out the claim because it has no reasonable prospects of success fails. The Respondent's application for the Tribunal to issue a deposit order because there are little reasonable prospects of success also fails.

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44. The matter should now be listed for a Hearing to determine the claim.

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Clarification of the claim

45. Mr Wilkinson suggested that the Respondent was unclear as to the precise basis of the claim for constructive unfair dismissal, in that the particular acts relied upon had not been specified and it was not clear if a final straw was relied upon. This ought to be a matter which the Claimant can clarify to ensure the basis of the claim is clearly set out. It is open to the Respondent to seek an order for such clarity in the absence of voluntary provision of this information.

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46. It ought also to be possible for the parties to agree a chronology and a statement of facts to reduce the issues in dispute and thereby progress matters in accordance with the overriding objective.

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Employment Judge: David Hoey
Date of Judgment: 14 December 2018
Entered in register: 18 December 2018
and copied to parties

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