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# EMPLOYMENT TRIBUNALS

**Claimant:** Mr L Phythian

**Respondent:** Toomey Renno Limited

## STRIKE OUT JUDGMENT

The judgment of the Employment Tribunal is that: -

1. The Claim is struck out forthwith.

## REASONS

1. Mr Liam Phythian presented a claim on 3 August 2018. He had worked for the Respondent between 30 August 2016 and 5 May 2018 as a Service Advisor. In the section of the Claim Form in which he was required to set out what his Claim was about, he ticked the box which said that he was owed “other payments”. He also ticked the box which said that he was making another claim which the Tribunal could deal with. He added the words “breach of contract” in the big box in Section 8.1.
2. He then continued in box 8.2 as follows:

“up until the day I was sacked there was no indication that there was any problem, I’d had my review which had all been positive, they were happy with the way I was performing. I was also booked on a final course to qualify as a Renno Service Advisor for the following week.

Also, the receptionist there was dismissed. She was called into the office one morning and left the same day. She hadn’t as far as I know done anything wrong. She received one week’s money and no notice. She was there two years or less funny enough she started two months or more before me”.

3. The Claim Form had apparently been prepared by a firm of solicitors, Harrison Carter.
4. By a Response Form which was presented on 12 September 2018, the Respondent stated in terms that they simply did not understand on what basis the Claimant had brought the Claim and considered that the Claim unless clarified, should be struck out for showing no basis of claim whatsoever. They noted that the Claimant had acknowledged that he had less than two years' service and therefore would not be entitled to bring a Claim for unfair dismissal. They further noted that the Claimant had not claimed notice pay, holiday pay, nor arrears of pay but rather referred to "other payments" which the Claimant stated were in respect of breach of contract.
5. The Respondent also referred to the fact that the Employment Tribunal had by then made a Case Management Order requiring the Claimant to "set out in writing to the Respondent what remedy the Tribunal is being asked to award...". They noted that to date that Order had not been complied with.
6. The Case Management Order had been set out in the Notice of Claim, which was sent to the parties, which was dated 15 August 2018. By that notice the hearing was also listed to take place on 29 October 2018.
7. The Respondent further applied by letter dated 19 September 2018 for the Claim to be struck out under Rule 37(1)(a) and/or (c) on the basis that the claim was scandalous, vexatious and had no reasonable prospect of success and/or that the Claimant had not complied with Employment Tribunals Rules or Order.
8. The Tribunal wrote to the Respondent indicating that Employment Judge Gilbert had directed the Tribunal administration to inform the Respondent that the Claim was for a breach of contract. By a letter dated 11 October 2018, solicitors acting on behalf of the Respondent acknowledged receipt of that letter but indicated that there was no explanation as to what breach was being alleged and therefore it was impossible for the Respondent to prepare for the hearing. They asked for further case management action.
9. By a letter dated 9 October 2018 meanwhile, Harrison Carter had written to the Tribunal with a copy to the Respondent indicating that the client was claiming for a breach of contract (employment contract) against the Respondent and was relying upon his Employment Contract. They asked for sight of the Employment Contract. In a further letter to Jefferies Essex, the solicitors acting on behalf of the Respondent, Harrison Carter asked for disclosure of what they described as the "Full Employment Contract" as they had apparently only seen an offer letter in which the Respondent referred to a 'Full Employment Contract'.
10. In the light of this state of play, the Tribunal directed that the forthcoming hearing would be converted to an Open Preliminary Hearing to consider striking out the

Claim because it was totally unclear what the nature of the Claim was, other than  
“breach of contract” although not apparently, a claim for notice pay etc. at section 8 of the Claim Form. The Claimant’s advisers were warned that they needed to “attend to this issue urgently as a fair hearing could not take place if there was no clarity about what was claimed”.

11. A further application for disclosure of the Claimant’s contract of employment ensued from the Claimant’s solicitors dated 23 October 2018.
12. The solicitors acting for the Respondent sent among other matters a copy of what they described as “the contractual documentation that the Respondent can locate”. They acknowledged however that it appeared that the Claimant had that documentation as well namely, a single sheet headed “Personalised Commission Plan” and signed by the Claimant and a director on behalf of the Respondent. There was also an offer letter to the Claimant.
13. The hearing proceeded as an Open Preliminary Hearing before Employment Judge Goodrich. The outcome of the hearing was the Claimant was ordered to pay a deposit as a condition of being entitled to pursue his Claim. In addition to being sent a judgment in relation to the application to strike out which was refused on that occasion, the parties were sent a summary of the discussion at the Preliminary Hearing (Open) and also Case Management Orders.
14. The employment offer letter dated 21 July 2016 stated that the “full terms and conditions of employment are contained in the probationary contract “Main Terms and Conditions of Employment”, which will be issued to you in due course. The salary for the post was stated to be £19,250 gross per annum. The post was said to be subject to a probationary period for the first forty-five weeks.
15. In Employment Judge Goodrich’s summary of the hearing, he noted that he was informed that the Claim was for termination of a contract of an apprenticeship or training contract one week before the completion of the Claimant’s training contract. The Claimant apparently said that his training contract was terminated approximately one week before the contract was due to be completed and the Claimant would have acquired his qualification.
16. In relation to what actual breaches of contract were being alleged, the Claimant’s representative said that he believed that there was other contractual documentation that the Claimant no longer had after moving home. Mr Jones on behalf of the Respondent had said that he believed that the Claimant had been provided with all the contractual documentation that the Respondent had.

17. In addition to making the Deposit Order, Employment Judge Goodrich directed that the Claimant should give further Particulars of the Claim setting out the basis of it on or before 19 November 2018.
18. The deposit ordered was in the sum £100.00.
19. The Claimant had not attended the Open Preliminary Hearing.
20. Employment Judge Goodrich's Case Management Orders and summary of the hearing was sent to the parties on 19 November 2018.
21. By letter from the Respondent dated 26 November 2018, sent by email to the Tribunal, it appeared that the Claimant had not provided the further Particulars of his Claim as directed by Employment Judge Goodrich.
22. Further, the Claimant's solicitors wrote to the Tribunal on 3 December 2018 informing the Tribunal that they were applying for an extension of time for the deposit to be paid. This was received by the Fines and Support Centre by 7 December 2018.
23. Employment Judge Hyde granted the extension of time as requested and by a letter sent to the parties on 18 December 2018 set this out and also expressed reservations about the considerable resources which were being taken up both by the parties and the Tribunal without clarity about the extent of this Claim. The Tribunal stated that in an attempt to break the deadlock, she had directed that the Respondent send to the Claimant the documents sought by the Claimant in the application dated 4 December 2018 which had been copied to the Respondent. Thereafter, the further Case Management Orders could be complied with.
24. The Application for disclosure was in relation to the 2016 Probationary Employment Contract, 2016 Pension Scheme, 2016 Full Employment Contract issued after 45 days and 2016 Commission Schedule. These documents were to be sent to the Claimant within fourteen days.
25. By email dated 21 December 2018, the Respondent sent to the Tribunal with a copy to the Claimant a blank contract which they said was used around the time the Claimant started and that the contract covered both the probationary and post probationary periods. They also sent details of the 2016 Pension Scheme and further copies of the Offer letter and Commission details which had been sent previously.
26. The solicitors acting for the Claimant acknowledged receipt of the additional documents from the Respondent's solicitors but indicated that they would be grateful to be sent a copy of the Order as they had not received it. This was a reference to my direction to the Respondent to disclose the additional

documents. It was not apparent why they needed a copy of an Order, especially as they had now received the documents which they had asked for.

27. This communication was followed by a further email on 24 December sent at 16.45 by Ms Griner on behalf of the Claimant raising among other matters, a concern that the document was “not a proper Order as the reasons are not signed by the ET

Judge in accordance with the rules”. Mr Rotherman on behalf of the Respondent had written to the Claimant by email on 24 December 2018 saying that they looked forward to finally receiving details of the Claimant’s Claim within fourteen days as ordered. This was the Order that the Claimant representative was referring to.

However, the Claimant’s representative appeared to have overlooked the fact that Employment Judge Goodrich had already ordered this further clarification to be provided.

28. On 7 January 2019, the Claimant’s representative applied for an extension of time of seven days from 7 January to set out the Claim. This application was then renewed before the Tribunal had considered it by a further email sent on 14 January

2019. They indicated expressly that “a further seven days would be sufficient”.

29. In a letter sent on 15 January 2019 by the Claimant’s representatives, there was an acknowledgment that three sets of documents had been sent to them. They stated that it was “now clear that those documents rely on other documents and cannot be read in isolation”. They then asked for the company handbook to be supplied. They also wanted the termination letter and employment service record of Mr Phythian.

30. The Respondent strongly resisted the extension of time application and set out something of the history in an email sent on 16 January 2019.

31. The Claimant’s solicitors then sent to the Tribunal a draft witness statement from Mr Phythian which was also unsigned, which ran to some three pages.

32. Among other matters in the statement, the Claimant talked about feeling that he had been unfairly dismissed. As the Tribunal has already noted, the Claimant did not have sufficient service to bring an unfair dismissal claim.

33. The Tribunal responded to the correspondence on the file by writing a letter which ran to some six paragraphs expressing disappointment at the apparent lack of progress and the plethora of correspondence. At paragraph three of the letter, the Claimant’s representatives were asked whether the complaint was that the Claimant was dismissed summarily i.e. without notice? The Claimant was asked to confirm if this was the position. The Tribunal also directed the

parties to the fact that remedy for such a breach is limited to contractual notice pay. The Claimant was told that if this was the complaint and the Claimant had not been paid money in lieu of notice and/or did not serve his notice, then this should be stated simply.

34. The Tribunal's letter went on to state that if there was another complaint of breach of contract, the Claimant needed to indicate what he believed the Respondent had done wrong and which was in breach of contract. That had to be the "starting point". Once the Claimant had set out what his complaint was, progress could be made. The Claimant was told that the disclosure ordered by the Tribunal from the Respondent by letter sent on 18 December 2018 had been an indulgence. The formulated complaint should precede disclosure.
35. The Tribunal also noted the Respondent's position in relation to protesting at the ongoing litigation without the Claimant complying with the orders. The parties were told that as an Open Preliminary Hearing had already occurred in this case, the Claimant was given notice under Rule 37 of the Employment Tribunal Rules of Procedure 2013 that consideration was being given to striking out the Claim for the reasons set out in the Respondent's email to the Tribunal and copied to the Claimant, sent at 16:41 on 16 January 2019; and that the Claimant may provide representations in writing on this issue by 22 February 2019, or the Claimant may request a hearing at which to make those representations.
36. The Tribunal concluded by stating that it would have regard to the correspondence and orders already made in this case when making the decision as to whether or not to strike out the Claim.
37. By email sent on 27 February 2019, Solicitors acting for the Claimant resent the letter of 21 January 2019 which the Tribunal had addressed in the letter sent to the parties on 8 February 2019. They asked to be advised when they would get a reply to Mr Phythian's application in that letter of 21 January 2019. In that letter they were essentially saying that they needed further disclosure to address the Order of the Tribunal as to clarification of the Claim.
38. The Tribunal sent further copies of the email of 8 February 2019 from the Tribunal and also sent a further covering letter which referred to the Claimant's letter of 27 February 2019 and told the Claimant that the case file had been referred to the Employment Judge for consideration of an Order striking out the Claim in line with the warning given in the letter 8 February 2019. The letter from the Tribunal erroneously used the word "time" rather than "line".
39. By letter sent on 5 April 2019, which was received at the Tribunal on 8 April 2019, solicitors acting for the Claimant acknowledged receipt of the letter of 3 April 2019 and confirmed receipt of an email from the Tribunal at 17:50 enclosing an email of 8 February 2019. It stated that this had been "overlooked".

40. Sadly, instead of addressing the issue of a simple statement of what the Claimant's breach of contract Claim was, especially in light of the correspondence which had taken place in this case, the Claimant once again complained about the conduct of the disclosure process by the Respondent.

They alleged that the

Disclosure Order which the Tribunal had made in respect of the Respondent on 18 December 2018 had still not been fully complied with and that this had in turn "hampered the progression of the case." The Claimant did not clarify which aspect of the Order had not been complied with. It appeared to the Tribunal as set out above that the Respondent had indeed provided the documents that the Tribunal had ordered.

41. They then complained that the application for the Claim to be struck out was a tactical strategy of the Respondent which appeared to have been planned to make a fully pleaded Claim virtually impossible to bring before the Tribunal, without the documents they asked to see. The Claimant's solicitors therefore asked for a further indulgence from the Tribunal namely, a further Disclosure Order by way of an Unless Order and then for the matter once the pleadings had concluded, to be listed for an oral hearing to finally allow the matter to be resolved.

42. The Tribunal considered that the Claimant's solicitors and possibly the Claimant himself, had simply not taken on board that they had failed to comply with the basic requirement in litigation of setting out with sufficient clarity what the claim was about. The numerous attempts by the Tribunal in correspondence, at the Open Preliminary Hearing on 29 October 2018 and most recently in the letter to the Claimant of 8 February 2019, had all failed to elicit an appropriate response. The Tribunal had regard to the resources which had already been applied to seeking to identify what the Claimant's case was. The Tribunal considered that the difficulty that the Claimant's representatives apparently had in clarifying what the Claimant was complaining about was an indication that there was little likelihood of a fair trial proceeding and of justice being done in this case.

43. The Tribunal considered that it in the circumstances it was not appropriate to allow this Claim to continue, given that the Order of Employment Judge Goodrich requiring clarification of the Claim some four months previously, had not been complied with. Further it did not appear that there were any reasonable prospects of the complaint succeeding which may be why the Claimant's representative had, had such difficulty in formulating what the breach of contract was.

44. The Tribunal had regard to all the options which were available to the Claimant in the Claim Form and which he had not ticked and the degree of uncertainty in his draft witness statement about what the nature of the Claim was. In all the circumstances the Tribunal considered that it was in the interests of justice to strike out this Claim.

Employment Judge Hyde

4 July 2019