



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4123304/2018

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Held in Glasgow on 14 June 2019

Employment Judge L Wiseman

10 **Mr W Munro**

**Claimant
Represented by
Mr S Miller -
Solicitor**

15 **Barrhead Travel 2007 Ltd**

**Respondent
Represented by:
Ms A Stobart -
Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided:-

- (i) to accept the document attached to the respondent representative's email of the 10 June, as further particulars of the response;
- (ii) to dismiss the claimant's application to have part of the response struck out,
25 and
- (iii) to dismiss the claimant's application for a deposit to be ordered.

The case will now proceed to be listed for a hearing.

REASONS

- 1. The claimant presented an application to the Employment Tribunal on the 23
30 November 2018 alleging he had been unfairly dismissed.
- 2. The respondent entered a response to the claim in which it accepted the claimant had been dismissed but denied the dismissal was unfair. The

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respondent asserted the reason for dismissal was redundancy or some other substantial reason.

3. The claimant's representative sought further information and documents from the respondent, and on the 8 March, the respondent responded to that request.
4. The claimant's representative, by letter of the 14 March, made an application to have part of the response struck out, or, in the alternative, a deposit ordered.
5. The respondent's representative responded to that letter immediately to confirm they intended to resist the application and would respond to the tribunal substantively setting out the reasons in full for resisting the application.
6. The respondent, by email of the 10 June, lodged further and better particulars of paragraph 21 of the respondent's ET3 and invited the claimant's representative to accept the preliminary hearing was no longer necessary. The claimant's representative rejected that suggestion and confirmed the intention to proceed with the hearing today.
7. This preliminary hearing was arranged to determine the claimant's application to have part of the response struck out in terms of rules 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules) or to have a deposit ordered in terms of rule 39(1) of the Rules.
8. I heard submissions from both representatives.

Claimant's submissions

9. Mr Miller referred to the document submitted by the respondent on the 10 June and questioned its status: was it an amendment to the response or was it uncalled for further particulars? His position was that in either case the tribunal could not have regard to them until such time as there was a formal application for them to be accepted.

10. Mr Miller invited the tribunal to have regard to the claim form, the response, the application for strike out dated 14 March, the respondent's email dated 10 June and his response dated 11 June.
- 5 11. Mr Miller clarified the strike out application had been made following a process of exchange of documents and request for information. The claimant had sought information regarding paragraph 21 of the response, and wanted to know the names of the individuals who had discussed the claimant's role and when they did so. The claimant also wanted to be provided with copies of any documents created as part of the structural review or correspondence regarding the role of the claimant.
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12. The respondent had duly provided the information and confirmed no such documents existed.
13. Mr Miller subsequently made an application for strike out of part of the response because, he submitted, the three individuals named by the
15 respondent as having discussed the claimant's role, were all based in different geographical locations and, it was submitted, it would be extremely unlikely that no single written record was made of their discussions. This, it was submitted, cast significant doubt on whether such discussions had in fact taken place and accordingly, it was said the respondent had little or no
20 prospect of establishing redundancy as a potentially fair reason for dismissal.
14. The respondent also sought to rely on some other substantial reason as the reason for dismissal. The respondent had clarified, following the request for information, that the reason was a reorganisation of the workforce and/or its terms and conditions, and that the claimant refused to agree to those
25 changes. Mr Miller submitted that in order to establish its case the respondent would need to rely on the same facts advanced to support a redundancy (above). He submitted that for the same reasons, this argument should also be struck out as having little or no reasonable prospect of success.
15. Mr Miller submitted that should the tribunal accept the particulars sent by the
30 respondent on the 10 June, the content of those particulars supported an argument that there was a growing frustration on the part of the respondent

regarding the claimant and the performance of his duties. This tended to suggest the reason for dismissal was performance-related. This undermined redundancy being the reason for dismissal.

5 16. Mr Miller referred to the case of **Ukegheson v Haringey London Borough Council 2015 ICR 1285** and to paragraph 23 of the judgment.

17. Mr Miller, in response to Ms Stobart's submission, confirmed the claimant would have no objection to the respondent's application to amend the response.

10 18. Mr Miller reserved the claimant's position regarding an application for expenses because it took the respondent 12 weeks to provide the further particulars of the response.

Respondent's submissions

15 19. Ms Stobart submitted the document attached to the email of the 10 June was further particulars of the response. The respondent had been asked for further details about paragraph 21 of the response and the document set out details to clarify matters. Ms Stobart did not accept a party required to be requested to provide further particulars, but if she was wrong in this matter, then she invited the tribunal to accept the further particulars, failing which she made an application for an amendment to the response to be accepted.

20 20. Ms Stobart noted the claim was one of unfair dismissal. The claimant asserted the process followed by the respondent was a sham, but this was denied.

25 21. The claimant appeared to say that because there were no documents regarding the discussions held in respect of the claimant's role, then the review must have been a sham. Ms Stobart submitted there was no authority for the proposition that the respondent required to have a paper trail.

22. The respondent will seek to prove that the senior executives had discussions over the phone/in person to review the need for the role of chairman. It is a factual matter which is in dispute and cannot be resolved at this hearing. Ms Stobart submitted that it could not be said there was little reasonable prospect

of success when witnesses will come to speak to the business reasons for their decision.

23. Ms Stobart referred to the cases of **Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly 2012 SLT 1191** and **Mecharov v Citibank NA 2016 ICR 1121** where it had been made clear that strike out should be used only in the most exceptional cases particularly in unfair dismissal cases which are fact sensitive.

24. Ms Stobart submitted there were clear factual disputes in this case and therefore it could not be said there was no reasonable prospect of success of the respondent showing the reason for dismissal. Ms Stobart invited the tribunal to dismiss the claimant's application for strike out or a deposit order.

25. Ms Stobart did not accept there had been any undue delay on the part of the respondent. The claimant had made the application for strike out, and requested the preliminary hearing. The respondent considered the matter could have been resolved by the provision of further particulars. The claimant would not accept this. Accordingly, Ms Stobart put the claimant on warning that the respondent may wish to make an application for expenses in relation to this hearing.

Discussion and Decision

26. I firstly had regard to the email from the respondent's representative dated 10 June where they attached further particulars of paragraph 21 of the ET3. I did not consider the document to be an amendment of the response. The letter described the document as further particulars, and the content of the document clearly provided further particulars of paragraph 21 of the ET3 response. I accepted the document as further particulars of the response.

27. I next had regard to the terms of rule 37 which provide that a tribunal may strike out all or part of a claim or response on the basis it has no reasonable prospect of success.

28. I also had regard to the terms of rule 39 which gives the Tribunal authority to order a deposit (not exceeding £1000) as a condition of continuing to advance

an allegation or argument in circumstances where the Tribunal considers it has little reasonable prospect of success.

29. I was referred to the ***Travel Dundee case*** (above) and it is helpful to note from that Judgment (paragraph 30) that the power to strike out may be exercised only in rare circumstances. There was reference to the power to strike out being described as draconian. It was stated: *“In almost every case the decision in an unfair dismissal claim is fact sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the tribunal to conduct an impromptu trial of the facts.”*
30. This approach was upheld by the EAT in the ***Mechkarov case*** (above). That case concerned a claim of discrimination, but the key factor equally applies to claims of unfair dismissal and that is, *“where there were core issues of fact that turned to any extent on oral evidence, they should not be decided without an oral hearing, but the tribunal should not conduct an impromptu mini-trial of such facts...”*
31. I was also referred to the ***Ukegheson case*** (above) and to paragraph 23 of the judgment. I noted from that paragraph that the EAT recognised the important function served by striking out all or part of a claim or response (and that is to provide a straightforward route to remove from consideration claims/responses where there is no prospect in reality of success), but commented that it was important to keep it in its proper place.
32. The claimant’s application for strike out of paragraph 21 of the response, or the order for a deposit, was based upon a proposition that if the three individuals named by the respondent did review the claimant’s role, then it was extremely unlikely that there was no single written record made during that entire process. Mr Miller submitted there was a stateable case the respondent should not be allowed to proceed on an averment that had no reasonable prospect of success.
33. I could not accept Mr Miller’s submission because this is a case which will come down to an assessment of the credibility of each witness’s evidence.

The respondent has confirmed there are no documents of the type sought by the claimant: accordingly, the matter will turn on the oral evidence given by the witnesses. There is clearly a serious dispute on the crucial facts of the case and in those circumstances the case should proceed to a hearing.

5 34. I decided, for these reasons, to dismiss the claimant's application to have part of the response struck out, and to dismiss the claimant's application to have a deposit ordered.

35. The case will now be listed for hearing.

10 Employment Judge: L Wiseman
Date of Judgement: 27 June 2019

Entered in Register,
Copied to Parties: 01 July 2019