



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4103549/2018**

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**Held in Glasgow on 24 July 2019**

**Employment Judge L Wiseman**

10 **Mr Glenn Marr**

**Claimant  
In Person**

**Energetics Design and Build Ltd**

**Respondent  
Represented by:  
Mr J Lee -  
Solicitor**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

20 I decided to refuse the respondent's application to have the claim struck out.

The case will be listed for a one day preliminary hearing to determine the claimant's application to vary the order dated 13 September 2018.

### **REASONS**

25 1. This was a preliminary hearing to determine the respondent's application to have the claim struck out. A Deposit Order was made on the 13 September 2018, ordering the claimant to pay a deposit of £1000 as a condition of being allowed to continue with his claim of constructive dismissal and a deposit of £1000 as a condition of being allowed to continue with the claim of direct sex discrimination.

30 2. The deposit had to be paid by 5 October 2018. The claimant, by email of the 27 September, made an application to vary the Order and subsequently appealed to the EAT. There is a dispute between the parties regarding the effect of the claimant's email of the 27 September: the respondent's position

**E.T. Z4 (WR)**

is that the deposit was not paid, and accordingly the claims should be struck out. The claimant's position is that the application to vary the Order has not yet been heard and that his claims should not be struck out until that application has been heard.

5 **Respondent's submissions**

3. Mr Lee referred the tribunal to the preliminary hearing on the 14 August 2018 which was arranged to determine the claimant's application to amend the claim and the respondent's applications for strike out of the claim failing which a deposit.

10 4. The Employment Judge refused the claimant's application to amend the claim and the respondent's application to have the claim struck out, but made a Deposit Order. The Deposit Order was dated 13 September and ordered the deposit to be paid on, or by, 5 October 2018.

15 5. Mr Lee drew my attention to the notes attached to the Deposit Order which provide as follows:

*"(1) Unless the deposit is paid within the time limit, the allegation or argument to which this order relates, will be struck out.*

20 *(2) You may apply to have this order varied, suspended or set aside. You must confirm when making such an application that you have copied it to the other party(ies) and notified them that any objections to your application should be provided to the Tribunal as soon as possible."*

25 6. The claimant, sent an email to the Employment Tribunal on the 27 September 2018. The email was in the following terms: *"I am out of the UK until Sunday I haven't read the judgment of the 17 September Please could I have an additional two weeks to consider how best to proceed."*

7. Mr Lee submitted the email from the claimant was not a competent application to vary the Order because it had not been copied to him. In the alternative, the application was for an extension of two weeks in which to pay the deposit (that is, by the 11 October 2018). The claimant has not paid the deposit.

8. The tribunal sent an email to both parties, dated 17 October 2018, in the following terms: *“I refer to the above named proceedings and acknowledge the claimant’s correspondence dated 27th September 2018. On the expiry of the 2 weeks requested and on checking with the relevant department that the deposit order had not been paid, the case was referred to Employment Judge McLean. Employment Judge McLean who has stated that she believes the claimant’s email appears to be an application to vary the order which was issued and request that we copy this to the respondent for comments.”*
9. Mr Lee responded on the 17 October 2018 in the following terms: *“We understand that the claimant has requested, by email of the 27 September, an extension of time in which to consider his position. This has been treated as an application to vary the Tribunal’s Order that a deposit be paid in respect of both of the claimant’s claims dated 13 September. We would make the following observations in respect of the claimant’s application ...”*
10. Mr Lee went on in his letter to refer to the terms of the Deposit Order and the notes (set out above). He further referred to the fact the claimant had previously been reminded by an Employment Judge of the need for him to copy the other side into all correspondence sent to the tribunal.
11. Mr Lee argued the application to vary was incompetent because it had not been copied to him, and accordingly there was no valid application to vary the Order, presented to the tribunal for consideration prior to the 5 October 2018. Mr Lee referred to the fact the Employment Judge making the deposit order had discussed with the claimant, the effect of making the order.
12. The claimant was asked by the tribunal to comment on the respondent’s letter, but did not respond. The claimant did lodge an appeal with the EAT.
13. The tribunal wrote to both parties on the 7 November 2018, noting correspondence had been received from the EAT and stating: *“The claimant’s email dated 27th September 2018 has at this stage been treated as an in-time application to vary the order dated 13th September issued by Employment Judge C Lucas. The respondent’s response to that application dated 17th October 2018 has been received but not yet considered by the*

*tribunal. In light of the claimant's appeal lodged on the 23rd October 2018, Employment Judge Robison has decided to take no further action in regard to the application pending the outcome of that appeal."*

14. Mr Lee advised the tribunal, by email of the 12 June 2019, that the EAT had  
5 rejected the claimant's appeal. He made an application to remove the current  
sist and to strike out the claim pursuant to the Deposit Order made on the 13  
September 2018.
15. The claimant, in response to that email, wrote to the tribunal on the 16 June  
2019, stating he was applying for the Deposit Order to be set aside.
- 10 16. Mr Lee referred the tribunal to the cases of **Taylor v University Hospitals  
Birmingham NHS Trust UKEAT/0039/14** at paragraph 36, where it was  
stated that if an appeal against a deposit order is being made, the employee  
should also make an application for an extension of time in which to pay; and  
15 **to Scottish Ambulance Service v Laing UKEATS/00381/12** where the EAT  
stressed a tribunal had no discretion regarding strike out in circumstances  
where there had not been compliance with an unless order. Mr Lee submitted  
the same was true of a failure to pay a deposit order.
17. Mr Lee, in conclusion, submitted the application to vary made on the 27  
September 2018, was not competent. The claimant had not paid the deposit,  
20 and accordingly the claim should be struck out.

### **Claimant's submissions**

18. Mr Marr explained that on the 27 September he had been out of the UK, and  
was contacted by his son who told him he had lost at the preliminary hearing.  
Mr Marr sent the email dated 27 September because he needed time to read  
25 and process the Judgment. Mr Marr only had use of his mobile phone and did  
not have the respondent's email address available, and this was why it had  
not been included on the email. Mr Marr accepted he had been reminded by  
an Employment Judge to copy correspondence to the other side, and he had  
complied with this except on this one occasion where he had been unable to  
30 do so.

19. Mr Marr acknowledged the terms of the deposit order, but referred the tribunal to rule 5 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, (the Rules) which deals with extensions of time.
20. Mr Marr referred to the tribunal's letter of the 7 November 2018: he understood from that letter that the 5 October date had been put on hold.
21. Mr Marr stated it had not been clear to him whether he had to pay the deposit in order to appeal, or be able to argue that it should be set aside. He still was not clear on this.
22. Mr Marr noted he was a litigant in person and could not be expected to know the rules to any great degree.

### Discussion and Decision

23. I noted there was no dispute regarding the fact a Deposit Order was made on the 13 September 2018, ordering the claimant to pay the sum of £1000 as a condition of being allowed to proceed with the complaint of (constructive) unfair dismissal and £1000 as a condition of being allowed to proceed with the complaint of sex discrimination. The deposit had to be paid no later than 5 October 2018.
24. The claimant has not paid the deposit.
25. The issue in this case focussed on whether, in circumstances where the deposit has not been paid, the claims should be struck out; or whether the claimant's email dated 27 September 2018 prevented that.
26. I had regard firstly to the fact the claimant was entitled to apply to have the Order varied, suspended or set aside. The claimant's email dated 27 September informed the tribunal he was out of the country and had not read the Judgment. He asked if he could have an additional two weeks to consider how best to proceed.
27. This email was not processed by the tribunal until the 12 October, when it was referred to an Employment Judge. I noted that in the intervening period the time limit for making payment had passed. I also noted that the claimant,

having made his request on the 27 September, did not have a response from the tribunal until after expiry of the time limit for payment.

28. The email sent from the tribunal to the claimant on the 17 October, noted the Employment Judge believed the email to appear to be an application to vary the order, and that comments were invited from the respondent (to whom we sent a copy of the claimant's email). Mr Lee responded immediately to the tribunal's letter.
29. I considered the letter to both parties, from the tribunal dated 7 November 2018, to be crucial. That letter stated the claimant's email of the 27 September 2018 had been treated as an "in time application to vary the order dated 13 September". Further, it noted the respondent's response to the application had been received but not yet considered. However, in light of the claimant's appeal, no further action would be taken "in regard to the application pending the outcome of the appeal".
30. I did not doubt that if the claimant had not paid the deposit and had not taken any action, his claim would have been struck out automatically upon the failure to pay. However, the claimant did take action in this case: he emailed the tribunal on the 27 September asking for an additional two weeks to consider how best to proceed.
31. I acknowledge the respondent may wish to argue whether this was a competent application to vary the order, but it was clear from the tribunal's letter to parties dated 7 November, that (i) the claimant's email of the 27 September 2018 has, at this stage, been treated as an in time application to vary the order dated 13 September 2018; (ii) the respondent's response to that application has been received but not yet considered and (iii) the matter was put on hold pending the outcome of the appeal to the EAT.
32. I considered the parties' arguments regarding the application to vary the order are still to be heard and in those circumstances I concluded the respondent's application to have the claim struck out is premature.

33. I directed that this case be listed for a one day preliminary hearing to determine the claimant's application to vary the order dated 13 September. The claimant will, at that hearing, have an opportunity to explain why he considers the order should be varied (or set aside) and the respondent will have an opportunity to respond to that application. I acknowledge some of the arguments advanced by the respondent today (for example in relation to the competency or otherwise of the application) may have to be repeated.

34. I decided for all of these reasons to refuse the respondent's application have the claim struck out.

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Employment Judge:

L Wiseman

Date of Judgement:

25 July 2019

Entered in Register,

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Copied to Parties:

01 August 2019

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