



## EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 4112433/19**

**Held on 30 June 2020**

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**Employment Judge N M Hosie**

**Mrs P Lovie**

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**Claimant  
Represented by  
Ms M McGrady –  
Solicitor**

**Working On Wellbeing Ltd**

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**Respondent  
Represented by:  
Mr S Conlan,  
Solicitor**

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

The Judgment of the Tribunal is that: -

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(i) the respondent's application under Rule 37 to strike out the claims of unfair dismissal and wrongful dismissal is refused; and

(ii) the respondent's application for a Deposit Order under Rule 39 is refused.

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### **REASONS**

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

**The claim**

1. There are outstanding claims of unfair dismissal and wrongful dismissal in  
5 this case. The respondent admits the dismissal but claims that the reason  
was conduct, gross misconduct, and that it was fair.

**Strike-Out/Deposit Order**

2. The respondent's solicitor applied to have both claims struck out, in terms of  
10 Rule 37(1)(a) in Schedule 1 of the Employment Tribunals (Constitution and  
Rules of Procedure) Regulations 2013 ("the Rules of Procedure"), on the  
basis that they have, "*no reasonable prospect of success*". Alternatively, the  
respondent's solicitor sought a Deposit Order, in terms of Rule 39, on the  
basis that the claims have, "*little reasonable prospect of success*". These  
15 applications were opposed by the claimant's solicitor.

**Written submissions**

3. It was agreed that I would determine the issue of the prospects of the claims  
succeeding, "on the papers", by way of written submissions. The  
20 respondent's solicitor made written submissions on 12 June 2020. The  
claimant's solicitor made written submissions on 26 June 2020. I do not  
propose rehearsing these. I did not find the issue difficult to determine. The  
parties' written submissions are simply referred to for their terms.

**25 Discussion and Decision****Strike-out**

4. It was accepted by the respondent's solicitor that the test for strike-out is a  
30 high one. That is abundantly clear from the relevant case law, to which the  
claimant's solicitor referred: -

*Ezsias v. North Glamorgan NHS Trust* [2007] EWCA Civ 303

*Blockbuster Entertainment Ltd v. James* [2006] EWCA Civ 684

*Balls v. Downham Market High School & College* UKEAT/0343/10

*Tayside Public Transport Company Ltd (T/A Travel Dundee) v. Reilly*

5 [2012] IRLR 755

*Romanowska v. Asplations Care Ltd* UKEAT/0015/14.

5. In *Ezsias* the Court of Appeal held that a Tribunal was wrong to strike-out a claim as having no reasonable prospects of success where there was a crucial core of disputed facts that was not susceptible for determination other than by hearing and evaluating the evidence. It was perverse for the Tribunal to have decided at a preliminary stage that the claimant was unlikely to establish the necessary factual basis for the claim.

15 6. Also, in *Tayside* as the claimant's solicitor drew to my attention the Inner House of the Court of Session said this: -

20 *"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 (ED & Mann Liquid Products Ltd v. Patel [2002] EWCA Civ 1550]. There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (Mann Liquid Products v. Patel, Ezsias v. North Glamorgan NHS Trust)."*

25 7. It was clear that in the present case there are central facts which are in dispute. For example, the claimant does not accept that the true reason for her dismissal was the selling of the prescription only medication.

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### Unfair dismissal

8. It was also clear from the claimant's pleadings, and with reference to *British Home Stores Ltd v. Burchell* [1978] IRLR 379, that the claimant has an arguable case in law. Indeed, at para 34 in the paper apart, annexed to the

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claim form, the claimant's solicitor avers, at some length, with reference to s.98(4) of the Employment Rights Act 1996, why it is alleged that the procedures which the respondent followed and the decision to dismiss were "unreasonable" and thereby rendered the claimant's dismissal unfair.

5 **Wrongful dismissal**

9. This claim turns on whether the claimant was guilty of gross misconduct, an issue which, like the unfair dismissal claim, is "fact-sensitive" and can only be properly and justly determined by hearing evidence.

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10. I had little difficulty, therefore, arriving at the view that the competing arguments made by the parties in their submissions in this case are not ones that can properly be determined to the standard of "no", or indeed "little" reasonable prospect of success, on the basis purely of the pleadings, documents and submissions, because there is a body of core disputed facts about matters that may be material to the claims made. I considered that there is a case pleaded, that if established in evidence, might lead to a Tribunal making findings of unfair dismissal and wrongful dismissal.

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20 11. In light of that, I do not consider that the respondent has met the high threshold, set out in the authorities, to strike-out the claim and that application is refused.

**Deposit order**

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12. I then considered whether there ought to be a deposit ordered. The test for that is a lower one, but, as I have recorded above, material facts are in dispute and those disputes can only be properly and justly determined by hearing evidence, not "on the papers". I have concluded, therefore, that, in all the circumstances, it would not be appropriate to order the claimant to make a deposit. I have, therefore, also refused the application under Rule 39.

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13. It would appear the case is now in a position to proceed to a Final Hearing. **The parties' solicitors are directed to make representations with regard to further procedure, within the next 14 days.**

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**Employment Judge**

**Nick Hosie**

**Date of Judgement**

**3 July 2020**

**Date sent to parties**

**3 July 2020**