



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4114935/2019 (A)**

**Preliminary Hearing held by telephone on 8 September 2020**

**Employment Judge A Kemp**

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**Mr D Peebles**

**Claimant  
Represented by:  
Mr A Bourke,  
Consultant**

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**Richard Lawson Autoecosse Ltd**

**Respondent  
Represented by:  
Mr A McCormack,  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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**The claimant's application for strike out of the Response Form under Rule 37 is refused.**

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**REASONS**

**Introduction**

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1. This Preliminary Hearing was held to address the claimant's application for strike out under Rule 37, which was pursued on the basis that the respondent had failed to comply with the terms of an Order granted under Rule 31 on 12 August 2020.

2. The application was opposed by the respondent.

### **Submissions**

3. The parties had set out their initial positions in email correspondence sent to the Tribunal. The claimant contends that the order has been breached as he has not had access to documents falling within item 1, that there was a contract of employment the claimant signed as a single document, which has not been produced, and that only parts of a handbook were produced. The claimant has been sent electronic versions of emails, which fall within item 1 of the Order, but despite attempts his agent Mr Bourke has not been able to open them, and argues that the Order has not been complied with.
4. The respondent contends that it has complied with the terms of the Order. It has provided electronic copies of emails falling within item 1, which is argued to be compliance, but the difficulty is that the claimant's representative has not been able to access them. The respondent contends that there was no single document contract of employment, falling within item 2 of the Order, but that it has provided the offer and acceptance that did exist, and that there was no other contract, letter or email with regard to reduced terms. In relation to item 3 the respondent contends that there was no Handbook as that is ordinarily understood, being a compendium of various HR and similar policies and procedures, but that there were disciplinary and grievance procedures which were produced. There was a separate Sales Handbook which was not produced, as it was said not to be within the terms of the Order. Although it was contended that that Handbook did not fall within the Order Mr McCormack agreed to send it to Mr Bourke. It does appear to fall within the terms of the Order simply as it is a Handbook.

### **Law**

5. A Tribunal is required to have regard to the overriding objective when making decisions, which is found in the Rules at Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 which states as follows:

**“2 Overriding objective**

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

- 5 (a) ensuring that the parties are on an equal footing;
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
- 10 (d) avoiding delay, so far as compatible with proper consideration of the issues; and
- (e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules.

15 The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.”

6. Rule 37 provides as follows:

**“37 Striking out**

- 20 (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

.....

- (c) for non-compliance with any of these Rules or with an order  
25 of the Tribunal,.....”

7. The EAT held that the striking out process requires a two-stage test in ***HM Prison Service v Dolby [2003] IRLR 694***, and in ***Hassan v Tesco Stores Ltd UKEAT/0098/16***. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has,  
30 the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim. In ***Hassan*** Lady Wise stated that the second stage is important as it is 'a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit'

(paragraph 19). The same considerations apply to avoid the bringing to an end prematurely of a defence which may yet have merit.

8. An order for documents under Rule 31 does not require a party to produce that which does not exist. Nor does it require a party to make up a document to comply with it, in the sense of preparing it anew. Orders may be made on the basis of what one party understands exists, which is then disputed.

### **Discussion**

9. I considered that there had been a reasonable attempt to comply with the terms of the Order, that whilst the compliance has been incomplete that that did not lead to there being a breach, and that it was not proportionate to strike out the response even where the claimant had not been able to access the material in large part. It is understood that there are approximately 3,000 emails produced electronically, being the entire contents of the claimant's inbox and outbox from his email account at the respondent for the period of the Order.

10. It is however necessary that the claimant have access to those documents. That is proportionate in the sense set out above, and means to do so are required. I proposed that the respondent provide contact details for the external IT consultant advising it, or Mr McCormack, or both, and that a period to 4pm on 11 September 2020 be allowed to see if the claimant and his representative can gain access to those emails. The respondent agreed to do so, and Mr Bourke agreed to attempt that. I direct that such an attempt be made within that period accordingly. If that attempt fails then it will be necessary for the respondent to provide paper copies of those emails to the claimant, and I direct that the respondent do so, should that be required, as soon as reasonably practicable after the end of that period should that stage of requiring paper copies be reached.

11. Mr Bourke is due to provide Further and Better Particulars of the claim by 11 September 2020. He sought additional time to do so as he wished to view the material falling under the Order. I consider that in all the circumstances that that is appropriate, and in accordance with the overriding objective. He has not been able to access documents that had

been intended to be seen by him before now. I direct that the period to provide such Particulars be extended to 18 September 2020 at his request. The respondent's time to answer, if so advised, is extended to 14 days after receipt of those Particulars.

5 12. In so far as issues remain disputed in relation to documents falling within the Order, they can be addressed in evidence at the Final Hearing. At this stage I do not consider that I am in a position to decide whether the claimant or respondent is correct.

10 13. A Preliminary Hearing on issues identified in the earlier Note has been fixed for 26 and 27 October 2020. It is in the parties' interests to do all that is practicable to ensure that that hearing takes place on those dates to avoid further delay and additional expense, and I would encourage the parties and their representatives to do all that they can to co-operate in achieving that aim, and in doing so to apply the terms of the overriding  
15 objective.

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30 **Employment Judge:**  
**Date of Judgment:**  
**Date sent to parties:**

**Alexander Kemp**  
**09 September 2020**  
**09 September 2020**