



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4114935/2019 (A)

Preliminary Hearing held by telephone on 30 November 2020

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Employment Judge A Kemp

Mr D Peebles

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**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.

REASONS

Introduction

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1. This Preliminary Hearing was held to address the claimant's second application for strike out under Rule 37, which was pursued on the basis that the respondent had conducted proceedings scandalously and

E.T. Z4 (WR)

vexatiously in terms of paragraph (1)(b) of that Rule. It was opposed by the respondent.

Submissions

2. The claimant set out his argument in an email to the Tribunal on 5 17 October 2020, at which time he had not received the payslips he sought, and Mr Bourke supplemented that in an oral submission. The following is a brief summary of the principal points. He complained that the Preliminary Hearing fixed for 26 and 27 October 2020 required to be discharged as the respondent had not provided the Bundle of Documents 10 by 19 October 2020, having done so on 21 October 2020, that by then his agent was on holiday and not able to prepare for the hearing such that he sought its discharge, that that was opposed by the respondent, that a paper copy of the Bundle was not sent to his agent despite an email from the respondent stating that that would be done, that payslips which had 15 been sought were not produced until 25 November 2020, and that the respondent then argued that they were not accurate. The claimant argued that there ought to be a sanction for failing to comply with orders and that in the circumstances the conduct of the proceedings by the respondent met the test in the Rule, with the claimant arguing that it was akin to 20 continuation of the bullying he feels that he was subjected to by the respondent.
3. Mr McCormack explained that he had asked his client to progress the issue of payslips on the day of the last hearing on 6 October 2020, his 25 undertaking having been noted in the Note issued thereafter, and that a paper copy of the Bundle had not been sent to the claimant's representative as he was working remotely, and there had been an error made. He also referred to the discharge of the hearing in that connection, although Mr Bourke pointed out that it had been discharged very late and that had it not been sending a paper copy would not have arrived in time. 30 He argued that there was no basis to hold that the test in the Rule was met, and that in any event strike out of the Response was disproportionate.

Law

4. 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—

- 10 (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;
- 15 (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.

- 20 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.”

5. Rule 37 provides as follows:

“37 Striking out

- 25 (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—
-(b) that the manner in which the proceedings have been conducted by or on behalf of therespondent.... has been
- 30 scandalous, unreasonable or vexatious.”

6. It has been held that there are two 'cardinal conditions' for the exercise of the power under this part of the Rule being that the unreasonable conduct

has taken the form of a deliberate and persistent disregard of required procedural steps, or has made a fair trial impossible (*Blockbuster Entertainment Ltd v James [2006] IRLR 630*, a decision of the Court of Appeal).

- 5 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, the second stage requires the tribunal to decide as a matter of discretion
10 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.
- 15 8. In so far as the application proceeded on the basis of failing to comply with orders the provisions and authorities in relation to that were set out in my Judgment on the first application for strike out.

Discussion

9. I considered that it had not been established that the test in Rule 37(1)(b)
20 was met. Whilst it was at the very least unfortunate that the earlier hearing required to be discharged, and that does appear to have resulted from some delay on the part of the respondent who ought to have prepared the Bundle by 19 October 2020 and were two days late, that it took the respondent as long as it did to provide the payslips requested, and that
25 they are immediately said by it to be inaccurate, and also that a paper copy of the Bundle was not sent to Mr Bourke when an email from the respondent's solicitor said that it had been, I do not consider that these and the other matters referred to meet either of the conditions set out in *Blockbuster*. Whilst the respondent's agents accepted that they were in
30 error in not sending a paper copy of the Bundle to the claimant's representative Mr McCormack is working remotely, and that is an additional difficulty that arises from the current pandemic. There were two days of delay in preparing the Bundle, and it contained little beyond basic

documentation such as the Claim Form, Response Form and Tribunal documentation, Mr Bourke argued that there ought to be a sanction for not complying with the Orders issued. In addition to the question of the Bundle he referred to production of the payslips, but when the Order he referred to was examined in that latter regard it did not require in terms that the payslips be produced, and the most recent Note from EJ Meiklejohn did not require anything to be done by way of order, but noted an undertaking from Mr McCormack, which he acted on that same day.

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10. Even if it were to meet the requirement for a breach of the first part of Rule 37 in some way, I consider that strike out is disproportionate. The claimant has separately made an application for an expenses order under Rules 74-78 which is to be determined separately as the Note issued of even date herewith specifies, and therefore no decision has yet been made but the matter can be pursued by the claimant. At this stage it is still possible to have a fair hearing, even if that is delayed by about three months.

11. I appreciate that these delays, and the difficulties associated with them, may cause additional anxiety and other issues for the claimant, but such delays are not uncommon, and although to be avoided are not I consider sufficient to allow me to grant the application.

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12. For completeness I would add that I considered whether the claimant might have argued that there were no reasonable prospects of success under Rule 37(1) (a) that might have justified consideration of strike out on that basis, but concluded that that was not the case. There is a difference between the parties on what happened on 2 August 2019. It is set out in the Note issued of even date. Whilst the claimant appears to have sent emails to the respondent on that day and on 2 September 2019 to neither of which he says he received a reply, and which on the face of them support the claimant's position, the respondent's position is that they were not read by the intended recipient, whose understanding of what had been agreed between them also differed from that of the claimant. The emails are not determinative of that issue. It cannot be said that the respondent's position has no reasonable prospects of success as matters

depend to an extent at the least on the oral evidence of the two people who were present.

13. In summary, there was insufficient to justify the draconian step of striking out the Response Form, and I refused the application.

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

Alexander Kemp
01 December 2020
03 December 2020