5 **EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case Number: 4107039/2019

Held in Glasgow on 11 October 2019

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Employment Judge R Gall

15 **Mr D Nisbet** **Claimant**

Trac Engineering Ltd **First Respondent**

Network Rail Infrastructure Limited **Second Respondent**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is as follows: –

25 1. The application by the second respondents for strikeout of the claim insofar as directed against them is successful. The claim will proceed against the first respondents, the hearing being set down for 25 October as previously intimated.

2. As stated at the hearing, in terms of rule 62 of the Employment Tribunals
30 (Constitution & Rules of Procedure) Regulations 2013, written reasons will not be provided unless they are asked for by any party at the hearing itself or by written request presented by any party within 14 days of the sending of the written record of the decision. No request for written reasons was made at the

hearing. The following sets out what was said, after adjournment, at the conclusion of the hearing. It is provided for the convenience of parties.

REASONS

3. This case called for a Preliminary Hearing ("PH") at Glasgow on 11 October 2019. Mr Nisbet appeared on his own behalf. The first respondents had written intimating that as the application was one made by the second respondents and as the claim was set to proceed against the first respondents irrespective of the outcome of the application by the second respondents, they would not be appearing and would not be represented at this PH. They confirmed that they intended no disrespect to the Tribunal or any other party by taking this step.

4. The application was by the second respondents for strikeout of the claim as directed against them. The second respondents lodged productions. Those contained documents with which Mr Nisbet was familiar as they comprised documentation already submitted to the Tribunal or, in one instance, the outcome of the appeal process as confirmed in a letter to Mr Nisbet.

5. Mr Nisbet was employed by the first respondents. The first respondents were subcontractors to Balfour Beatty Ltd. Balfour Beatty in turn were in a contractual relationship with the second respondents.

6. A case management PH had been held on 7 August 2019. At that PH and in the note which followed upon it, the note being dated 7 August and sent to parties on 12 August, Mr Nisbet was ordered to provide information in response to the following questions.–

   (a) On what basis does Mr Nisbet consider that the Tribunal has the power to order the second respondent to provide an accurate and consistent medical and return his tickets?

   (b) On what basis does Mr Nisbet say that he was discriminated against on the grounds of a protected characteristic?

7. Mr Nisbet replied by email of 20 August stating that the second respondents had had the final say on the outcome of suspension of his tickets and requiring his absence from the railway infrastructure for a 5 year period. This prevented him from obtaining further employment in that scenario. He said that the test administered as part of the screening for drugs and alcohol was wrongful and inconsistent. He regarded himself as having a right to proceed against the second respondents.

8. At the PH Mr Nisbet said that in his view the Employment Tribunal did have jurisdiction. He had been recommended by ACAS and by a solicitor, he said, to bring his claim to the Employment Tribunal. His position was that if the second respondents could make the decision which they did, he surely had the right to challenge it. The decision which they made meant that he could not work on the rail infrastructure for 5 years. The tests administered to form the basis of the decision taken by the second respondents were flawed. His employment was at issue. By suspension of his tickets, he was being prevented obtaining a job elsewhere.

9. In relation to remedy, he asked the Tribunal to look at the decision made by the second respondents and to have his railway tickets put back in place so that he could get back working. He also wished to clear his name. Former colleagues and his family had been asking him what it was that he had done. The whole situation was not right and he wished it to be addressed. In his view the Employment Tribunal could do this.

10. In relation to the protected characteristic, Mr Nisbet did not in his response of 20 August detail any protected characteristic as that term is defined in the Equality Act 2010. He said that he was discriminated against in the sense that he was judged and tarred with the brush of being an alcoholic/drug abuser, with there being a massive difference between that situation and someone taking prescription or over-the-counter medication to improve their health.

11. Mr Nisbet did not expand upon this at the PH.

12. The second respondents maintained that anything which had been set out by Mr Nisbet did not provide a legal basis for a claim against them by him at the

Employment Tribunal and that the claim as brought against them by Mr Nisbet had no reasonable prospect of success.

13. Mr Love said that Mr Nisbet had been given three chances to detail a ground on which it was said that the Employment Tribunal had jurisdiction. In his ET1 that chance existed. It also existed at the PH on 7 August. The order which emerged from that PH and which resulted in further and better particulars had provided a further opportunity to give that information. On these occasions and also during this PH Mr Nisbet had not set out, Mr Love said, a potential basis of claim which could be heard by the Employment Tribunal. A remedy might exist in a different forum. There was no proper ground of claim advanced which might be considered by the Employment Tribunal. Looking at the remedy sought confirmed that as the Tribunal would not be in a position to order that Mr Nisbet had return of his railway tickets.

14. The test which had been administered had been administered by Balfour Beatty Ltd. Network Rail had acted upon the recommendation received. Balfour Beatty Ltd were not part of this claim. There was however a claim against the first respondents who were the former employers of Mr Nisbet. There was a right of recourse therefore. As far as directed against the second respondents, however, there was no reasonable prospect of success in this claim.

15. For clarity, Mr Love confirmed that he did not doubt that Mr Nisbet was sincere in what he said. There was a proper basis however for strikeout.

The issue

16. The issue for the Tribunal was whether the claim as directed against the second respondents was to be struck out or not.

Applicable law.

17. Rule 37 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 provides that a claim may be struck out if it has no reasonable prospect of success.

18. A Tribunal must consider carefully the case advanced and whether it is truly the case that there is "no reasonable prospect of success". A case can clearly look to be a difficult one to advance successfully but yet when the facts are known and the law is applied to those facts, such a case might prove to be successful.

19. Strike out is not a course to be followed without proper consideration of prospects as they appear from Mr Nisbet's case, taken at its highest. It is a draconian remedy which, if granted, causes the claim struck out to come to an end, in this instance against the second respondents. It is not a step taken save when the test of no reasonable prospects is met. The rule however is there and enables a Tribunal to strike out a claim if it is satisfied that there is no reasonable prospect of success.

Submissions

20. Submissions by both parties are summarised above.

Discussion and decision.

21. I understood Mr Nisbet's sense of frustration at the situation in which he finds himself. I have to consider over whether it is the case that there is no reasonable prospect of success in the claim which he brings before the Employment Tribunal against the second respondents.

22. An Employment Tribunal is a creature of statute. It can only apply powers as granted to it by statute and regulation. It can only grant a remedy where it is permitted so to do. Claims can therefore only proceed before it in circumstances where it is potentially the case that success might follow.

23. From what had been said by Mr Nisbet in correspondence prior to the PH and from what was said by him at the PH, I did not see that there was a basis of claim against the second respondents which might properly be dealt with by the Employment Tribunal. I was satisfied that notwithstanding how unjust Mr Nisbet might believe it to have been and how concerned and upset he is by what he perceives as having been the actions of the second respondents, he has not set out in this claim a case which has a reasonable prospect of

success before the Employment Tribunal. His claim as set out and as explained has, I have concluded, no reasonable prospect of success insofar as directed against the second respondents. The claim against them is therefore struck out.

24. To be clear, it is not that the decision of the second respondents is beyond challenge. That is not what this Judgment is saying. There may be other routes open to advance such a challenge. The conclusion I have reached however is that there is no basis on which an Employment Tribunal has jurisdiction to hear any such challenge. I appreciate that Mr Nisbet regards this as a work-related dispute and I can see why he might initially have thought that the logical place to come to was the Employment Tribunal. There are clearly very serious implications for Mr Nisbet's working life as a result of the decision taken. I regret, from his point of view, that I do not see that the Employment Tribunal has any ability or power to consider his claim as against the second respondents. In my view that claim has no reasonable prospect of success.

25. There is a hearing in the case as against the first respondents, now the only respondents in the case. That hearing is set down for 25 October 2019. It will proceed.

26. Prior to adjourning to consider and come to a view upon the application, Mr Love intimated that in the event of success in the application the second respondents sought expenses of this hearing. He explained that the possibility of an application for expenses had been mentioned at the earlier PH. The respondents had also highlighted this to Mr Nisbet. I explained that it was appropriate that I made a decision upon the application for strike out prior to considering any application for expenses. I also highlighted that in determining whether to make any award of expenses and if so in what amount, it was appropriate that the Tribunal considered the ability of Mr Nisbet to make any payment. I asked Mr Nisbet whether he had any information as to his means i.e. income and outgoings and capital whether by way of a house or savings. He said that he did not have this information.

27. On resuming and after intimation of the decision as set out above, I asked Mr Love whether the application for expenses was still being made. He confirmed it was.

28. I explained to Mr Nisbet that if he wished ability to pay to be taken into account he would require to set out his income and capital, together with outgoings and to provide copies of any documentation supporting the figures, e.g. pay slips, benefit statements, gas or electricity bills, savings, house value, mortgage, rent payments etc. He expressed concern about disclosing this information. I explained that if he did not wish ability to pay to be taken into account in deciding whether an award of expenses would be made or in deciding the amount of such an award if one was made, he did not require to disclose the information. He could not however simply say that he did not have much money therefore no award, or a very small award was appropriate. It might be that on disclosure of his means the second respondents would reconsider their application for expenses.

29. If information is to be produced, with back up documentation, it is important that it is produced by a particular date. That will allow the second respondents to confirm whether or not they insist on their application and, if they do, whether or not they dispute any of the figures put forward. Evidence and cross examination might be necessary at the hearing on expenses. Mr Love was keen that it be held by phone if possible. That however will depend on how much is in dispute.

30. It was agreed that by 5pm on 11 November 2019 Mr Nisbet will produce to both the second respondents and to the Tribunal the statement of means with back up documentation. The second respondents will then have 14 days in which to state whether they insist upon their application for expenses and, if they do, to what extent, if any, they challenge the information in the statement of means. A decision will then be taken by the Tribunal as to the nature and timing of any hearing in relation to expenses.

R Gall
Employment Judge

14 October 2019
Date of Judgment

Date sent to parties **15 October 2019**