Case No. 1306635/2019

EMPLOYMENT TRIBUNALS

BETWEEN

Ms S Walley	**AND**	**Neville Clarke Limited (1)** **Mr N Jellyman (2)**
Claimant		**Respondent**

HELD AT **Birmingham (By CVP)** **ON** **17 December 2020**

EMPLOYMENT JUDGE Self

Representation

For the Claimant: Ms R White (Counsel)

For the Respondent: Mr C Price (Counsel)

JUDGMENT

The Second Respondent's applications pursuant to Rule 29, 34, 37 and 39 are dismissed.

WRITTEN REASONS
(As requested by the Second Respondent)

1. On 12 August 2019, the Claimant lodged a claim against Windsor House Property Services Limited (Windsor) and Neville Clarke Limited (Clarke) for unfair dismissal, notice pay, holiday pay, arrears of pay, failure to provide a statement of particulars of employment and other (unspecified payments). The Company's name changed from Windsor to Clarke on 7 June 2019.

2. Clarke has not lodged a Response to the Claim. On 23 October 2019, a Liquidator was appointed and a creditors voluntary winding up process is ongoing. The Statement of Affairs indicates that the Company owes Mr

Jellyman (hereafter R2) £243,373 and the estimated deficit on winding the company up is approximately the same amount. It seems clear that even if liability is established against Clarke there will be no funds from the Company to satisfy any Judgment.

3. An Order for disclosure were made by EJ Hughes on 23 June 2020 and an application was made on 28 September 2020 by the Claimant to add R2 to the proceedings.

4. On 30 September 2020 correspondence was received from Mr Price who had been instructed by R2 to make written representations against R2 being joined (504). Those representations are pertinent to the hearing today.

5. The application to join R2 came before EJ Perry on 2 October 2020 and full written reasons were provided and sent out to the parties on 7 October 2020. I will not recite them again here save to say that the Application was granted. EJ Perry found that "there were substantial and important issues that arise between the parties that meet the threshold in Rule 34" (para 26) and that "it was in the interests of justice to add (R2) to the Claim".

6. On 19 October 2020 Mr Price on behalf of R2 made an application to set aside that Order pursuant to Rule 29 of the Employment Tribunal Rules or, alternatively, he sought to make a renewed application under Rule 34. It is that application that is before me today. The Claimant filed a response to that application on 19 November 2020. Both parties have drafted skeleton arguments in support of their positions.

7. Rule 29 reads as follows:

Case management orders

29. The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. The particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend, or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.

8. Rule 34 reads as follows:

34. The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included.

9. It is also suggested that I should consider either striking the claim out under Rule 37 or impose a deposit order under Rule 39. So far as is material those Regulations read as follows:

   37.—(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—

   (a)that it is scandalous or vexatious or has no reasonable prospect of success;

   (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party’s ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal’s reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

10. R2 urges me through each rule individually or in any combination to dismiss R2 from the proceedings. What test do I need to apply? I am able to vary EJ Perry’s order under Rule 29 if I consider it in the interests of justice to do so. I consider that R2 did have the opportunity and indeed did make representations at the previous hearing and so when considering the interests of justice, I need

not be troubled by that part of the Rule. Under Rule 34 "…if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included". It seems again that the interests of justice are at the core of any decision under that.

11. I am mindful that EJ Perry has already considered the matter on the information before him and determined that on that information that there was an issue to be determined between the Claimant and R2 and that issue was whether or not R2 was, in fact, the Claimant's employer. He determined that it was in the interests of justice for R2 to be joined and he weighs up the various prejudice arguments in some detail within that Judgment.

12. That basic situation still pertains at this point in time and is placed into sharp relief by the fact that Clarke has gone into liquidation and from the evidence before me would not be able to satisfy any Judgment if one were given against that entity. It seems to me that there is only one circumstance where it would not be in the interests of justice for the Claim to proceed against R2 and that would be if there were no reasonable grounds for success or to put it another way, the Rule 37 criteria are met. To place a Respondent in a situation where he had to incur time and expense in defending a claim that had no reasonable prospect of success would not be in the interests of justice.

13. If I were to find that the Claim had little reasonable prospects of success that would not be sufficient to vary the order of EJ Perry as that would be to impose a back door strike out when the circumstances did not meet that level of action. It would be appropriate in those circumstances to not vary the original Order but to make the deposit order in the normal way.

15 The EAT has held that the striking out process detailed above under requires a two-stage test (see *HM Prison Service v Dolby (2003 IRLR 694), EAT*, at para 15; approved and applied in *Hasan v Tesco Stores Ltd* UKEAT 0098/16 *(22 June 2016, unreported)*. The first stage involves a finding that one of the specified grounds for striking out under Rule 37(1) has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim.

16 In *Hasan*, the EAT held that the failure of the employment judge in that case to consider 'whether to exercise his discretion in favour of not striking out following his finding that the claims had no reasonable prospect of success' amounted to

a clear error of law (para 18). According to Lady Wise, 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' (para 19).

17 It has been held that the power to strike out a claim under Rule 37(1)(a) on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances (*Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly* (2012) IRLR 775 at para 30). More specifically, cases should not, as a general principle, be struck out on this ground when the central facts are in dispute (see *Ezsias v North Glamorgan NHS Trust* (2007) IRLR 603 and *Romanowska v Aspirations Care Ltd* UK EAT 0015/14). The reason for this is that on a striking-out application (as opposed to a hearing on the merits), the tribunal is in no position to conduct a mini-trial, with the result that it is only in an exceptional case that it will be appropriate to strike out a claim on this ground where the issue to be decided is dependent on conflicting evidence.

18 Such an exception might be where 'it is instantly demonstrable that the central facts in the claim are untrue' (*Tayside*), or there is no real substance in the factual assertions made, particularly if contradicted by contemporary documents, or, as it was put in *Ezsias*, where the facts sought to be established by the claimant were 'totally and inexplicably inconsistent with the undisputed contemporaneous documentation' (para 29, per Maurice Kay LJ). In these circumstances, it has been said that the correct approach for a tribunal to adopt is to take the claimant's case at its highest, as it is set out in the claim, 'unless contradicted by plainly inconsistent documents' (*Ukegheson v London Borough of Haringey* (2015 ICR 1285*, EAT*, at para 21, per Langstaff J.

19 In *Community Law Clinics Solicitors Ltd & Ors v Methuen* UKEAT 0024/11, it was stated that in appropriate cases, claims should be struck out and that "*the time and resources of the ET's ought not be taken up by having to hear evidence in cases that are bound to fail."*

20 Although the circumstances in which it is justifiable to strike out claims at a preliminary stage on the ground of no reasonable prospect of success are rare, it has been stated that tribunals should not be deterred from doing so, even where a dispute of fact is involved, 'if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context' (*Ahir v British Airways plc (2017)*

IRLR 1392, at para 16, per Underhill LJ). *Ahir* was one of those rare cases. The claimant was suspended and then dismissed after an anonymous letter was sent to the respondent pointing out that he had wrongly stated in his CV that he had been made redundant by his previous employers whereas in fact he had been dismissed for gross misconduct. His claim to the employment tribunal included claims for unfair and wrongful dismissal and victimisation, the main thrust of which was his assertion that it was the respondent itself which, being aware of the circumstances in which the claimant left his previous employers, sent the anonymous letter in order to trigger an investigation that would reveal true information which would justify his dismissal, and that this was done as part of a well-laid plan to get rid of him as a troublemaker. The claims were struck out by an employment judge as having no reasonable prospect of success and his decision was upheld by the EAT and the Court of Appeal. In the Court of Appeal Underhill LJ held that it was wholly unsurprising that the employment judge concluded that there was no reasonable prospect of an employment tribunal accepting the basis on which the claimant's case was advanced. This was partly due to its inherent implausibility, and partly because the claimant could not point to any material which might support it. His Lordship continued (at para 24):

> "[I]n a case of this kind, where there is on the face of it a straightforward and well documented explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to advance some basis, even if not yet provable, for that being so. The employment judge cannot be criticised for deciding the application to strike out on the basis of the actual case being advanced."

21.The Respondent's position is clearly set out within their application and as reiterated by their counsel orally. They say it is palpably clear that the Claimant's employer was Clarke and not R2 in his individual capacity. R2 has produced a witness statement in which he sets out his position which I have carefully considered. I have been taken to many documents in the bundle which are supportive of the fact that Clarke is the real employer of the Claimant.

22.There have been a number of allegations about the sufficiency and the probity of disclosure in this case. I make no findings on that now, but it is clear that it has been a process that has taken much time and it appears that there are still some issues that are not to the satisfaction of either party. The Claimant asserts in its Response to this application (p.525 et seq) issues of day-to-day control and assertions as to why the true employer was R2 and not the Company. I have seen that some salary payments were made to the Claimant from R2 personally.

23.I remind myself, that from the case law detailed above, that striking out a claim at this stage which is fact sensitive is very much the exception as opposed to the rule.

It is not for me to conduct a mini trial on the basis of things as they stand at the moment. From what I have seen today the evidence would seem to favour the Respondent's contentions but there are clearly points that the Claimant may have in her favour such as being paid by R2 on occasion and the general manner she was treated and utilised. There are many allegations of foul play and non-disclosure which may also shed light on the true nature of the relationship and from which inferences mat be drawn and they need to be considered and weighed up along with all the evidence. I do not consider this to come with the exceptional circumstances that would give rise to the claim being struck out nor indeed for a deposit order to be made on the basis that they have little reasonable prospect of success.

24.In essence I have been provided with a bundle of 567 pages and been taken to parts of that bundle that supports each parties' case. This is clearly a matter that needs to be determined at a full merits' hearing and I reject each of the applications made by R2.

Employment Judge Self

Signed on 16/02/2021