



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4114124/2019

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Held in Edinburgh (by CVP) on 1 February 2021

Employment Judge Beyzade Beyzade (sitting alone)

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Mrs H Webster

**Claimant
In Person**

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Kirkman Ltd

**First Respondent
Represented by:
Mr T Carruthers,
Director**

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Bourse Scot Ltd

**Second Respondent
No appearance or
representation**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The judgment of the Tribunal is that:

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1.1. The Claimant's complaint alleging unfair dismissal by the Respondents having been withdrawn by the Claimant at this Hearing that part of her claim against the Respondents is dismissed by the Tribunal, under Rule 52 of the Rules contained in Schedule 1 of the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013*,

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1.2. The Tribunal orders that the remaining part of the claim alleging non-payment of salary and employer's pension contribution by the Respondents between 01.09.2019 and 15.11.2019 remains standing, and it will proceed to the Final Hearing listed for Thursday 4 and Friday 5 March 2021 at 10.00am via Cloud Video Platform ("CVP").

NOTE FOLLOWING HEARING ON 01 February 2021

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2. On 06th December 2019 the Claimant presented a complaint of unfair dismissal, non-payment of salary (which was treated as an unlawful deduction of wages claim) and non-payment of employer pension contributions (which was treated as a breach of contract claim). The First Respondent submitted an ET3 Response Form on 06th January 2020 resisting these claims but without providing detailed grounds of resistance. The Second Respondent did not submit an ET3 Response Form at that time.

Procedural history

3. A closed Preliminary Hearing for the purpose of case management, conducted by telephone conference took place on 30th March 2020 before Employment Judge Porter. The outcome of that hearing is summarised in Employment Judge Porter's Note dated 03rd April 2020. This included a note that Mr Carruthers would contact his solicitors with respect to making an application to lodge an ET3 Response Form out of time (Rule 20); the issue of the identity of the Claimant's employer was deferred to the final hearing; the First Respondent was to provide Further and Better Particulars within 14 days; the Claimant was advised that if she wanted to make a notice pay claim she would need to apply to amend her ET1 Claim Form: and the Claimant was to send the Tribunal a Schedule of Loss within 14 days.

4. Employment Judge Porter did not make any reference to the Claimant's unfair dismissal complaint in her Note. This may be because the Claimant clearly did not have the necessary qualifying service to bring such a claim, and none of the circumstances where qualifying service is not required applied to this claim.

5. On 15th April 2020 Mr Carruthers sent two emails to the Tribunal enclosing an amended ET3 for the First Respondent (asserting that the First Respondent was not the Claimant's employer and that the alleged contract of employment was fraudulent) and an ET3 for the Second Respondent (although no application was made for an extension of time under Rule 20). The Claimant

provided her Schedule of Loss in an exchange of emails with the Tribunal between 10th and 20th April 2020.

- 5 6. On 04th June 2020 Employment Judge Sutherland having considered the Second Respondent's ET3 decided that it should not be accepted because it was lodged outside the 28-day time limit and no application for an extension of time was made by the Second Respondent in accordance with Rule 20. It appears from the Tribunal's file that Employment Judge Sutherland's decision was not communicated to Mr Carruthers. He was made aware of this for the
- 10 first time at the telephone hearing on 22nd September 2020.
7. Thus, a further closed Preliminary Hearing took place before Employment Judge Meiklejohn on 22nd September 2020 by telephone conference call for the purposes of case management. Employment Judge Meiklejohn stated
- 15 that regardless of whether the Second Respondent made an application for an extension of time the case should be listed for final hearing and he made directions that included, *inter alia*, exchange of documents to take place 28 days before the final hearing; joint bundle of documents (to be ordered in chronological order, page numbered and indexed) to be prepared, filed and
- 20 served by the First Respondent not later than 21 days before the hearing, witness statements to be exchanged 14 days before the hearing in draft form (7 days before the hearing in final form and copied to the Tribunal) and he listed the final hearing for two days to take place by CVP.
- 25 8. The final hearing was listed on 01st and 02nd February 2021.
9. On 29th January 2021 having reviewed the Tribunal file and noted that a joint bundle of documents had not been filed, I directed the First Respondent by way of an email to provide a joint bundle of documents to the Tribunal and
- 30 copy the same to all parties by return. On the same day at 4.19pm Mr Carruthers sent by email to the Tribunal a joint list of documents in a cover email together with 22 electronic attachments (not in chronological order, page numbered or properly indexed).

10. The hearing on 1st February 2021 was held by CVP video hearing pursuant to Rule 46. I noted Employment Judge Meiklejohn's previous order and furthermore I was satisfied that the parties were content to proceed with a CVP hearing, that it was just and equitable in all the circumstances, and that the participants in hearing were able to see and hear the proceedings.
11. The Claimant participated in person and Mr Carruthers represented the First Respondent. The Second Respondent was not represented or present.

Postponement of Hearing listed between 01st - 02nd February 2021

12. The parties were advised at the outset of the hearing that the Second Respondent was not sent Notice of Hearing which they were entitled to notwithstanding the fact that they had not lodged an ET3 Response Form or an application to extend time (in accordance with Rule 21(3)). This may have therefore explained why the Second Respondent was not present. The parties were advised that in the circumstances the Tribunal had no option other than to postpone the hearing, to allow the Second Respondent to be provided with notice of the hearing. Prior to the hearing, having consulted the President of the Employment Tribunals (Scotland), it was directed that the hearing was to be re-listed before an Employment Judge as a matter of priority.

Final hearing

13. The parties provided their dates of availability. The final hearing was relisted with the parties' agreement for 2-days to take place by CVP video hearing on 4th and 5th March 2021 (starting at 10.00am on each day). Thereafter, I conducted a Preliminary Hearing (Case Management).
14. I took the view that irrespective of whether the Second Respondent chooses to attend the re-listed hearing, it was appropriate and consistent with the Tribunal's overriding objective under Rule 2 to deal with cases fairly and justly that arrangements to facilitate the final hearing and any outstanding

preparation in respect thereof should be made. Rule 2 provides that dealing with cases fairly and justly includes so far as practicable: “*avoiding delay so far as compatible with proper consideration of the issues.*”

5 15. The following sub-paragraphs reflect my discussion with the parties about arrangements necessary to prepare for a final hearing:

(a) **Witness statements** – The Claimant complained that the First Respondent sent two witness statements to the Tribunal on 29th January 10 2021. No explanation was provided for their late arrival. Firstly, the Claimant stated that she had inadequate time to review these. The Claimant accepted that by the re-listed hearing dates she will have had adequate time to address any matters arising therefrom. Secondly, the Claimant stated that the First Respondent’s First Statement contained 15 several irrelevant matters and we spent time going through these in detail, following which the Mr Carruthers indicated that he was happy to amend the first statement to delete any irrelevant sections prior to the relisted hearing dates. Thirdly, the Claimant indicated that she objected to the Second Witness Statement of the First Respondent as this contained 20 matters that she had no opportunity to deal with. The Claimant requested permission to adduce a further witness statement in rebuttal. Upon further discussion the Claimant was content to limit her statement to paragraphs 6 and 8 of the First Respondent’s Second Witness Statement only. The First Respondent did not object provided that her further statement was 25 limited to these matters only. I explained that witness statements will normally stand as evidence in chief and both parties will have an opportunity of cross examination (to ask questions to challenge the other parties’ evidence and that put their case) and re-examination.

30 (b) **Documents** – Documents were due to be exchanged not later than 04th January 2021. The First Respondent sent 22 documents to the Tribunal by email on 29th January 2021. The Claimant disclosed the documents

she wanted to rely on previously. As document exchange has taken place, no further order shall be made in relation to documents.

5 (c) **Joint bundle** – Mr Carruthers indicated that he did not understand the previous directions and that as one of the smaller employers he did not find this task to be without challenge. He believed that the email sent on 29th January 2020 was compliant. I explained that the joint bundle must contain both parties’ documents (including the documents referred to in the parties’ witness statements); placed in date order in a single file; 10 contain an index with a document number, description, date, and page reference: and the bundle must be page numbered consecutively. As the hearing was taking place by CVP it was agreed that it would suffice to prepare an electronic bundle (PDF format) and neither party objected to this. The First Respondent may wish to use a programme or secure app of its choice to compress the file if necessary. Mr Carruthers was content 15 with my explanation and was content to prepare the joint bundle.

(d) **Unfair Dismissal Claim** – I noted Employment Judge Meiklejohn’s 20 comments in relation to the unfair dismissal claim. I asked the Claimant to explain whether she wished to pursue her claim and what her position was in relation to the time limit issue. The Claimant stated that she was not aware she was claiming unfair dismissal, she was not sure what boxes to tick and she was happy to confirm she did not want to pursue the unfair dismissal claim. I enquired whether the Claimant was content for me to 25 record that her unfair dismissal claim was withdrawn and thereby dismissed, and she stated she was content with this. Mr Carruthers indicated that he had no objections to this.

(e) **Issues**- The Claimant having withdrawn her unfair dismissal claim, I also 30 asked whether she intended to pursue a claim for notice pay. She stated that she did not wish to make a notice pay claim. The remaining issues therefore relate to alleged non-payment of wages and employers’ pension contribution. I have set out the agreed list of issues in the Orders below.

5 (f) **First Respondent's proposed application** – Mr Carruthers indicated that he intended to seek legal advice and he may make an application to amend the First Respondent's ET3 Response Form to include an employer's contract claim against the Claimant. With specific reference to amendment applications, I was conscious of the details on the making of amendments and how they are to be considered, and I was also mindful of the guidance provided by the case of *Selkent Bus Co Ltd v Moore [1996] ICR 836*. I also advised it was important to consider this matter carefully and to seek advice on the appropriate forum. Certain claims can be made in the Employment Tribunal, whereas some claims will be appropriate to make in the civil courts. The Claimant expressed concern at the further delay an application from the First Respondent may cause. I therefore suggested with the parties' agreement a timetable for any such application (if so advised) to be set out in accordance with the overriding objective.

10 (g) **Dates** – Having liaised with both parties and obtained dates from the Listings Team, it was agreed that the relisted hearing should take place on 4th and 5th March 2021 (2 days).

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16. My Orders as set out below reflect these arrangements for the final hearing.

CASE MANAGEMENT ORDER

25 **Preliminary**

17. As discussed with the parties at the hearing on 1st February 2021 the Tribunal considered it appropriate to make case management orders to prepare this case for a fair hearing without unnecessary delay and at proportionate cost. The following documents have been taken into account:

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- a. the contents of the Tribunal file;
- b. Additional documents, emails and witness statements submitted by the parties;

- c. Practice Direction – Fixing and Conduct of Remote Hearings issued by the President Judge Shona Simon on 11 June 2020; and
- d. Remote Hearings Practical Guidance referred to in the Practice Direction.

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18. The Practice Direction, Remote Hearings Practical Guidance and Frequently Asked Questions about the Impact of COVID-19 on Tribunal practice are all available online.¹ The parties must make themselves aware of the guidance in those documents.

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19. Any electronic communication with the Tribunal relating to these orders should be sent to GlasgowET@justice.gov.uk . Where printed documents are required, these should be sent to the address above and marked “For the attention of the ET CVP Hearing Team”.

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20. If any participant has a disability or if there is any other good reason why the following directions might need to be changed then that must be raised with the Tribunal in writing as soon as possible.

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21. Under Rule 29 of the Employment Tribunals Rules of Procedure 2013, I issued the following case management orders which reflect discussions held with the parties at the hearing on 01st February 2021 for the purpose of the arrangements for preparation for the final hearing in the above proceedings which is taking place remotely by video on the Cloud Video Platform (CVP):-

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Orders

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i) Documents

¹ <https://www.judiciary.uk/publications/directions-for-employment-tribunals-scotland/>

(a) The parties having provided copies to each other of any documents upon which they intend to rely, there are no further orders made in respect of disclosure. For the avoidance of doubt, neither party has permission to rely on any additional or new documents.

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(b) The First Respondent is directed to prepare a single set of documents (“the file”), in chronological order (date order, earliest document first), with numbered pages, and with an index (containing a table listing document number, document description, date, and page number) incorporating all documents intended by both parties to be referred to at the final hearing. The bundle must only contain those documents to which the parties will refer.

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(c) By no later than **4pm on 8 February 2021** the First Respondent shall send to the Claimant and the Second Respondent a copy of the draft Index in relation to the joint bundle.

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(d) By no later than **4pm on 15 February 2021** the Claimant and the Second Respondent shall send the First Respondent any comments they have in relation to the draft joint bundle index.

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(e) By no later than **4pm on 22 February 2021**, the First Respondent shall lodge a copy of the joint file in electronic form (PDF format) with the Tribunal and must also make available a full copy of the joint file in electronic form (PDF format) to the Claimant and the Second Respondent. If practicable, the electronic bundle should include bookmarks. If it is not reasonably practicable for the First Respondent to provide the joint bundle in electronic form (PDF format), the Tribunal and the Claimant and the Second Respondent must by no later than **4pm on 22 February 2021** be provided with a printed copy (or copies) [the First Respondent must consult with the Tribunal prior to doing so in order that an Employment Judge may consider if further Orders or Directions are required].

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(f) Each party is responsible for ensuring that each witness that they wish to call is provided with a copy of the file (or files).

ii) CVP Test

Parties and their representatives must take part in a test of their equipment to ensure they are able to access the CVP hearing if requested to do so by the Tribunal. Normally the Tribunal will provide details of this test by email (using email the addresses provided on the parties' respective ET1 and ET3 Forms). Parties must also ensure that their witnesses are provided with the joining details and that they also take part in this test.

iii) Witness statements

(a) The First Respondent has permission to amend the First Witness Statement of Tomas Carruthers (currently 9 pages, 27 paragraphs) limited to deleting the matters discussed at the Preliminary Hearing which are not relevant to the issues to be determined by the Tribunal. No new matters may be added. By no later than **4pm on 15th February 2021**, the First Respondent shall send a copy of the amended witness statement (both a clean and a tracked changes version in Word format clearly showing any deletions made, using size 12 font and at least 1.5 size line spacing) to the Claimant and to the Second Respondent and provide a copy to the Tribunal.

(b) The Claimant has permission to prepare a second witness statement on her own behalf limited to her response to paragraphs six (6) and eight (8) of the Second Witness Statement of Tomas Carruthers only (bearing in mind the matters discussed at the Preliminary Hearing which are relevant to the issues to be determined by the Tribunal). By no later than **4pm on 15th February 2021**, the Claimant shall send a copy of her Second Witness Statement (in Word format limited to 2-pages of A4 paper, size 12 font and 1.5 size line spacing) to the First Respondent and to the Second Respondent and provide a copy to the Tribunal.

(c) Parties are reminded that statements should be concise, set out in chronological order (date order with the earliest event first) and should cross-refer to pages in the file, as necessary.

(d) Parties must ensure that any witness also has a copy of his or her own statement to read in advance of the hearing and to refer to when they are giving evidence.

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(e) Witness statements, once formally adopted by the witness at the hearing, will stand as their evidence. It is intended that the use of witness statements will replace all or most of oral “evidence in chief” and supplementary questions may be limited to new or unforeseen matters arising. Subject to the discretion of the Tribunal hearing the case it is likely that they will be taken as read in accordance with Rule 43 rather than read out aloud. Cross-examination will take place in the usual way.

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iv) Proposed Application by the First Respondent

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The First Respondent indicated that it may make an application to amend its ET3 Response Form filed in response to the Claimant’s ET1 Claim Form dated 6 December 2019 to include an employer’s contract claim (Rules 23-25). If so advised and the First Respondent wishes to do so, the First Respondent shall make an application to the Tribunal to amend its ET3 Response Form (copying in the Claimant and the Second Respondent in accordance with Rules 30 and 92) **by 4pm on 15 February 2021**. If all other parties are not copied into an application, the Tribunal will normally decline to consider the application. If the Claimant or the Second Respondent wishes to respond to the application, any response shall be sent to the Tribunal (copying in the other parties in accordance with Rule 92) **by 4pm on 22 February 2021**. Thereafter the First Respondent’s application will be referred to an Employment Judge for directions pursuant to Rule 30 (if reasonably practicable).

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v) Agreed Issues

(a) The parties were advised that the Tribunal at the final hearing would investigate and record the following issues as falling to be determined, both parties being in agreement with these:

5 (1) What was the identity of the Claimant's employer between the material dates i.e., 01.09.2019 and 15.11.2019? The Claimant states that the First Respondent was her employer whereas the First Respondent states that it was in fact the Second Respondent that was the Claimant's employer during this period.

10 (2) Did the First Respondent and/or the Second Respondent fail to pay the Claimant's wages for the period of 01.09.2019 to 15.11.2019 which should have been paid in the amount of £31,500 (gross)? Although liability is disputed, the amount of £31,500.00 (gross) is agreed by the parties as being the salary payment that was payable by the employer between the material dates.

15 (3) Did First Respondent and/or the Second Respondent fail to pay the Claimant's employer pension contribution for the period 01.09.2019 to 15.11.2019 in the amount of £937.50? Although liability is disputed, the amount of £937.50 is agreed by the parties as being the pension contribution that was payable by the employer between the material dates.

20 (b) Any party that believes that the above figures or issues are not correct shall make representations to the Tribunal in writing by no later than **4pm on 15 February 2021** (copying in all other parties in accordance with Rule 92).

vi) Postponement and Re-Listing of Final Hearing

(a) The Final Hearing of the Claimant's claim is re-listed by consent of the Claimant and the First Respondent on **Thursday 4 and Friday 5 March 2021** starting at 10.00am promptly on each day to be conducted by Cloud Video Platform ("CVP").
25 Parties are advised to log-in to the hearing at 09.45am and to wait in the virtual lobby area to ensure they have a stable internet connection and that their audio and visual equipment allows them to participate in the hearing. It is the responsibility of a party calling a witness to ensure that they join the CVP hearing at an appropriate time and that they have the relevant log-in details and access to any relevant documents
30 (including their witness statement). The parties are expected to discuss a timetable and if practicable to agree this and to notify the Tribunal of the same. If agreement

is reached in terms of a timetable and the Tribunal is notified, the tribunal will take it into account and may adopt it.

5 (b) Any party that wishes to do so shall make representations to the Tribunal about the format of the final hearing by no later than **4pm on 8 February 2021** (copying in all other parties in accordance with Rule 92).

vii) Overriding Objective

10 Parties are reminded of their obligation to cooperate with each other and with the Tribunal to give effect to the overriding objective. Since the next hearing is due to be heard remotely it is particularly important that these Orders are complied with and that the parties cooperate to ensure that the hearing can take place fairly and efficiently.

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Notes:

1 1 You may make an application under Rule 29 for this Order to be varied, suspended or set aside.
20 Your application should set out the reason why you say that the Order should be varied, suspended or set aside. **You must confirm when making the application that you have copied it to the other party(ies) and notified them that they should provide the Tribunal with any objections to the application as soon as possible.**

25 2 If this order is not complied with, the Tribunal may make an Order under Rule 76(2) for expenses or preparation time against the party in default.

30 3 If this order is not complied with, the Tribunal may strike out the whole or part of the claim or response under Rule 37.

35 Employment Judge: Beyzade Beyzade
Date of Judgment: 05 February 2021
Entered in register: 11 February 2021
and copied to parties

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I confirm that this is my Orders and Note in the case of Webster v Kirkman Ltd and another and that I have signed the Orders and Note by electronic signature.