



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4102310/2020 (A)**

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**Employment Judge R McPherson**

**Held via telephone conference call on 11 September 2020**

10 **Mr J Bbosa**

**Claimant  
In Person**

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**Falkirk Council**

**First Respondent  
Represented by:  
L Usher -  
Solicitor**

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**Laura Smith**

**Second Respondent  
Represented by  
L Usher -  
Solicitor**

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30 **Wendy Grimely**

**Third Respondent  
Represented by  
L Usher -  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Employment Tribunal is that

- 40 1. The First, Second and Third Respondent's Amended Grounds of Resistance are allowed in accordance with **Rule 29** of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the 2013 Rules); and

2. The Claimant's application for Strike Out under **Rule 37(1)** of the 2013 Rules of the First, Second and Third Respondent's responses is not granted and is dismissed; and
3. The Claimants' existing applications in terms of **Rules 31** and **32** of the 2013 Rules for order for disclosures of documents and orders information as intimated on 6 August 2020 (and 21 July and 7 July) are dismissed; and
4. The Tribunal has issued separate Case Management Directions in relation to further procedure and relating to the existing Case Management Preliminary Hearing scheduled for **Thursday 8 October 2020**.

### REASONS

1. No findings of fact are made beyond reference to the following background narrative reflecting the documentation available to the Tribunal and/or where appropriate matters accepted to be in the public domain.
2. This Preliminary Hearing took place by Telephone.
3. Parties were in agreement that, what has been referred to as lockdown, in relation to the current pandemic commenced on or about **Tuesday 24 March 2020**.
4. The Claimant presented his ET1 on **Tuesday 28 April 2020**. The paper apart headed Executive Summary of Claim has 146 numbered paragraphs.
5. On **Wednesday 20 May 2020**, the Tribunal intimated that, if a response was accepted, a 1-hour Preliminary Hearing would set for **Thursday 8 October 2020** and Standard Agenda document was provided for same.
6. On **Friday 12 June 2020**, the Respondents' representatives, referencing the pandemic sought an extension of time in terms of Rule 20 of the 2013 Rules, to submit ET3 on 3 grounds:
  - a. The First Respondent's offices being closed due to the pandemic and the Respondent's not being aware of the claim until 2 June; and
  - b. The Third Respondent was on pre-arranged leave; and

- c. The ET1 contained what the Respondents described as “*numerous allegations*”.

That application was not determined.

7. On **Wednesday 17 June 2020** (that is within time), the Respondents’ representative submitted an ET3 for all 3 Respondents in skeletal form stating that they did so to preserve the position. That ET3 identified preliminary matters as;
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- a. Application for extension of time to present ET3 (indicating that the Respondents will apply to amend in accordance with extension sought on or before 1 July 2020 unless further communication is received from the Tribunal); and
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- b. Disability Status (asserting that the Claimant had not specified what his disability was and stating that it was not admitted that he was a disabled person at the relevant time for the purposes of the Equality Act 2010 and that if he was it was denied that the Respondents had actual or constructive knowledge); and
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- c. Time Bar (asserting that and many of the claims of race and disability discrimination are out of time and the Tribunal does not have jurisdiction to hear them); and
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- d. Specification of Claims (asserting that the Claimant had not specified the legal and factual basis for many of the allegations that are referred to as either race or disability discrimination).
8. On **Friday 19 June 2020** the Tribunal confirmed that the ET3 responses had been accepted on behalf of all 3 Respondents.
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9. On **Monday 22 June 2020** the Tribunal advised that the claim would proceed to the Preliminary Hearing already listed for 8 October 2020 and directed that before the Hearing the parties should consider and seek to agree a list of the legal issues the Tribunal will require to determine
- (a) What preliminary issues arise; and

(b) Whether this claim is suitable for determination by a remote CVP Hearing.

10. On **Monday 22 June 2020**, the Claimant intimated a request for information about the response made by the Respondents, within 14 days.
11. On **Wednesday 1 July 2020** the Respondent's representative sought order that they be given leave to amend its response (the Respondent's Amendment Application of 1 July 2020).
12. No prior written notice of opposition to the Respondent's Amendment Application of 1 July 2020 was intimated by the Claimant in advance of this date, his e-mail to the Tribunal of **Tuesday 7 July 2020** "*in relation to the respondent's new amended grounds of resistance*", requested Further and Better Particulars from the Respondents' set out as a Request for Additional Information in Relation to the Respondent's New Amended Grounds of Resistance - which contained around 116 questions (**the Claimant's Information Request of 7 July 2020**).
13. The Respondents' representative emailed the Claimant on Monday 20 July 2020 setting out its position on the **Claimant's Information Request of 7 July 2020**.
14. The Claimant e-mailed the Tribunal and Respondent on **Tuesday 21 July** seeking an application for Order from the Tribunal for the Respondents to provide additional information (**the Claimant's Information Request of 21 July 2020**), which contained around 115 questions, intimating that he considered the information to be essential to know the case in relation to the respondents new amended grounds of resistance application made of 1<sup>st</sup> July and it would enable him to know the case he has to meet and prepare properly for the hearing.
15. The Respondents responded to the Claimant's Information Request of 7 July 2020 on **Tuesday 21 July 2020** intimating to the Claimant and Tribunal their view that they did not consider the questions to be proportionate.
16. On **Wednesday 22 July 2020**, the Claimant set out his position in relation to his Information Request of 7 July 2020.

17. On **Wednesday 29 July 2020**, the Tribunal intimated that the Tribunal Judge had directed that a telephone hearing will be listed in September to consider whether to make orders for further information and documents. The Tribunal Judge instructed that the Claimant must provide a revised list of questions by 7 August 2020 intimating that *"it is not the purpose of the requests for further information to ask questions which are already answered by the response to the claim"*.
18. On **Thursday 30 July 2020** the Tribunal directed that a Preliminary Hearing should be appointed to determine the Preliminary Issue *"whether to make the orders for further information and documents sought by the claimant"*- that is to the Claimants request set out email Tuesday 21 July 6.40 am, the Respondents' representative replied Tuesday 21 July 9.52pm, and the Claimant's further commented Wednesday 22 July 2020 8.09 am.
19. On **Monday 3 August 2020** the Respondents sent what they describe as proposed Scott Schedule (setting out what they suggest are some 20 matters or events) to the Claimant (and the Tribunal) and have provided that with their Agenda for this Preliminary Hearing.
20. On **Tuesday 4 August 2020** the Claimant intimated that he sought *"an extension of time for a further 21 days to reformulate"* his questions (that is to 24 August 2020). The Respondents intimated that they did not object to the application.
21. On **Thursday 6 August 2020** the Claimant provided a copy of his Revised List of Questions which extended to around 130 questions (**the Claimant's Information Request of 6 August 2020**).
22. On **Friday 14 August 2020** the Tribunal directed the Respondent that it should confirm whether a response would be provided to the questions, and if so which of the questions asked, intimating that a response was due by **21 August 2020**. Further, the Tribunal intimated that if the respondents were to reply to any of the questions this should be done by **Monday 24 August** (the Tribunal's Direction of 14 August 2020).

23. On **Tuesday 25 August 2020** the Claimant intimated that he sought strike out (Rule 37 of the 2013 rules) of the Respondents ET3's response on the basis that there had been "*non-compliance with any of the rules or with an order of the tribunal*" and that the claim had not been actively pursued – he set out that he relied upon **Hasan v Tesco Stores** [2016] EAT /0098/16, **Rolls Royce v Riddle** [2018] IRLR 873 **Weir Values v Armitage (Armitage v Weir Valves)** [2004] ICR 371, **Khan v LB Barnet** EAT/002/18, **Fons v HF Corporal Ltd** [2013] EWHC 1278, **Scott v Inland Revenue** [2004] and **Dattini v Chief Constable of West Mercia** [2005] IRLR 327 (the Claimant's 25 August 2020 Application for Strike Out). In relation to his request for Order he further referred to **Scott v Inland Revenue** [2004] (**Scott**), **Dattini v Chief Constable of West Mercia** [2005] IRLR 327 (**Dattini**) and **Meister V Speech Design Carrie Systems GMBH**, no citation given.
24. On **Friday 25 August 2020** the Respondents responded to the Strike Out Application. They set out that they apologised for the delay and set out that they objected to strike out on the basis that was, they said, clearly premature and disproportionate. They intimated that they did not accept that the Claimant had been in any way prejudiced and set out their position including intimating that the claimant had asked (they said) 135 questions and that they should not be required to answer the questions until after the Preliminary Hearing scheduled 11 September. They intimated that there were preliminary matters and made reference to the claim of disability discrimination which is not admitted and intimated that a determination should be made on that issue before the Respondents were required to answer questions on the substance of that claim. In addition, they provided what they described as a Scott Schedule document which they intimated they had provided to the Claimant and they intimated that he had advised he did not agree to same.
25. On **Wednesday 26 August 2020** the Claimant renewed his Strike Out applications setting out further points that
- a. The Respondents had failed to comply with Tribunal Order which required confirmation by Friday 21 August; and

- b. The Tribunal should consider available evidence setting out that it was in his view clear that the Respondents knew or ought to have known that the Claimant was disabled; and
- c. The deadline of Friday 21 August 2020 “*was set up by the tribunal to address the issues in connection with the questions*”, commenting that the Respondents had failed to comply with that Order; and
- d. It was clear that the Respondents had not pursued the claim;
- e. The Respondent’s email in connection with the strike out application did not address the Respondents’ failure to comply with the Order.
- 10 26. The Claimant issued Agenda (provided for the 8 October 2020 Preliminary Hearing) to the Respondent and the Tribunal on **Sunday 6 September 2020**.
27. The Respondent issued Agenda (provided for the 8 October 2020 Preliminary Hearing) to the Claimant and Tribunal on **Sunday 6 September 2020**.
- 15 28. At this Preliminary Hearing on 11 September 2020, the Claimant advised that he opposed the Respondent’s 1st July Amendment Application, and in addition to his written applications for Strike Out of the ET3 for the respondent’s Responses and his Information Request of 7 July 2020, and wished same to be considered.
29. At today’s Preliminary Hearing the Claimant;
- 20 a. intimated that he opposed receipt of the Respondents’ Amendment Application of 1 July 2020; and
- b. insisted upon his 25 August 2020 Application for Strike Out; and
- c. insisted upon his Information Request of 6 August 2020.
- 25 30. The Respondents opposed the application for both Strike Out and the Information Request as premature and sought that their application for Amended Response be allowed.

### Relevant Law

**General**

31. Rule 2 of the Schedule 1 to Employment Tribunals (Constitution & Rules and Procedures) Regulations 2013 (the 2013 Rules) sets out that:

5 *“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—*

(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;*

10 (c) *avoiding unnecessary formality and seeking flexibility in the proceedings;*

(d) *avoiding delay, so far as compatible with proper consideration of the issues; and*

(e) *saving expense.*

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

32. Rule 6 of the 2013 Rules provides that

20 ***“6 Irregularities and non-compliance.***

*A failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal (except for an order under rules 38 or 39) does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such*

25 *action as it considers just, which may include all or any of the following*

(a) *waiving or varying the requirement;*



- (b) *striking out the claim or the response, in whole or in part, in accordance with rule 37;*
- (c) *barring or restricting a party's participation in the proceedings;*
- (d) *awarding costs in accordance with rules 74 to 84."*

## 5 Relevant Law

### Respondents Application to Amend

5. Rule 29 of the 2013 contains the general case management powers for the Tribunal from which the Tribunal, may at any stage in proceedings, on its own initiative or on application, make a case management order, including allowing or permitting amendment.
6. In relation to Amendment I reminded myself that the EAT in **Selkent Bus Co Ltd v Moore** [1996] IRLR 661 (**Selkent**) indicated that the Tribunal "*should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it*".

## Relevant Law

### Strike Out

7. Rule 37 of the 2013 Rules provides:
- "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;*
  - (b) *that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*

(c) *for non-compliance with any of these Rules or with an order of the Tribunal;*

(d) *that it has not been actively pursued;*

(e) *that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).*

(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.*

(3) *Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above."*

8. For the Claimant in relation to his written application for Strike Out, made reference to and relied upon **Hasan v Tesco Stores** [2016] EAT /0098/16 (Hasan) where the EAT overturned a decision to strike out an unrepresented Claimant claims' as there had been where no clear advance warning of same and was overturned, **Rolls Royce v Riddle** [2018] IRLR 873 (**Riddle**) where a Claimant had failed to attend and was unable to support his claim that he was too ill), **Armitage v Weir Valves** [2004] ICR 371 (**Armitage**), where arising from a failure to comply with simultaneous witness statement exchange it was considered that there had been an unfair advantage); **Khan v LB Barnet** EAT/002/18 (**Khan**), where the EAT accepted that from a chronology that Claimant had a history about being selective in responding to Tribunal, the EAT cautioning in that case that strike out was draconian) and a decision which he identified was under the English Civil Procedure Rules; and **Fons v HF Corporal Ltd** [2013] EWHC 1278 (**Fons**) a chancery division case which concerns not filing a witness statement simultaneously - creating prejudice.

9. I reminded myself that a leading case in relation to Strike Out is **Evans v Met Police Comm** [1992] IRLR 570 (**Evans**) which supported **Birkett v James** [1977] 2 AllER 801 (**Birkett**), which identified in summary that Strike Out was

not appropriate unless there was intentional or inordinate and inexcusable delay leading to a substantial risk that a fair trial will not be possible. Further in **James v Blockbuster Entertainment Ltd** [2006] IRLR 630 (**Blockbuster**) the Court of Appeal identified that striking out of claim was a power not to be exercised too readily. In addition, I noted the comments of Lady Smith in **Balls v Downhall Market High St** [2011] IRLR 217 (**Balls**), so far as may be relevant that in respect that Strike Out is a high test.

### **Application for Order for the Respondent to Provide Additional Information.**

#### **Relevant Law**

10 10. Rule 31 of the 2013 Rules provides

*“The Tribunal may order any person in Great Britain to disclose documents or information to a party (by providing copies or otherwise) to allow a party to inspect such material as might be ordered by a county court or, in Scotland, by a sheriff”.*

15 11. Rule 32 of the 2013 Rules provides:

*“32 Requirement to attend to give evidence.*

*The Tribunal may order any person in Great Britain to attend a hearing to give evidence, produce documents, or produce information.”*

20 12. The Claimant has referred to **Scott v Inland Revenue** [2004] (**Scott**), in relation to the continuing duty to disclose, and what he says can be drawn from **Dattini v Chief Constable of West Mercia** [2005] IRLR 327 (**Dattini**) a claim under the former Race Relations Act 1976 which held that on proper construction of s65 of the former Act inferences might be drawn from a questionnaire not in prescribed form. I have noted both (the case citation being unclear) **Meister V Speech Design Carrie Systems GMBH** [2012] ICR 1006 (Meister 2012) and **Meister V Speech Design Carrie Systems GMBH** [2014] AllER(EC) 231 (**Meister 2014**) both of which dealt with a unsuccessful job applicant, the first of which held that it was for the referring court to ensure that a refusal of disclosure in the context of identified cause of actions of direct

or indirect discrimination was not liable to compromise the relevant Directive. The second of which did not entitle an unsuccessful job applicant to be advised whether the employer had filled the role, it being for the referring court to determine whether a refusal to grant information might be a factor to take into account in the context of identified cause of action of direct or indirect discrimination.

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13. The statutory basis upon which disclosure of documents and evidence may be ordered by a Sheriff is set out at s1(1) of Administration of Justice (Scotland) Act 1972 *'Without prejudice to the existing powers of the Court of Session and of the sheriff court, those courts shall have power ... to order the inspection, photographing, preservation, custody and detention of documents and other property ... which appear to the court to be property as to which any question may relevantly arise in any existing civil proceedings before that court ... and to order the production and recovery of any such property ... .'*
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14. Lord President Hope stated in **McInally v John Wyeth & Brother Ltd** 1995 SCLR 1117(**McInally**) *"... the proper approach was to look at the interests of justice rather than to take a strict approach to the test laid down in Moore. This test, he said, was not a test of absolute necessity but rather as to what was reasonably required for the proper conduct of the litigation."*
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15. A party is not entitled to mount a *'fishing diligence'*, which has been described as involving too wide a search among the papers of another party, as Lord President Clyde observed (albeit in the context of medical records) in **Boyle v Glasgow Royal Infirmary and Associated Hospitals Board of Management** 1969 SC 72 (**Boyle**) *"it has long been settled that, if the diligence is of the nature of a fishing diligence, that is a clear ground for refusing it."*
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## DISCUSSION AND DECISION IN RELATION TO RESPONDENTS AMENDED GROUNDS OF RESISTANCE

16. The Tribunal considered the Claimant's opposition to the Respondent's Amendment.
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required for the proper conduct of the litigation. Directions in relation to further procedure, including matters related to identifying the relevant factual matrix and cause of actions for the existing Case Management Preliminary Hearing scheduled for Thursday 8 October 2020 are set out separately.

- 5 24. The Claimants' application is refused.

### **Conclusion**

25. A tribunal is required to receive the submissions of the parties before it. It is required to form a judgment as to the submissions which have persuasive force in coming to a conclusion. It is not required to set out extensively the  
10 submissions of the parties in every case. It is required to explain the basis upon which it reaches its conclusion. Sometimes that requires it to set out submissions in summary and on other occasions more fully.

26. In coming to this view the Tribunal has applied the relevant case law.

27. If there are further submissions which either party considers it is necessary,  
15 in the interests of justice, to address supplemental to their respective existing submissions, they should set out their position in a request for reconsideration in accordance with Rule 71 of the 2013 Rules.

20 Employment Judge: R McPherson  
Date of Judgment: 11 September 2020  
Entered in register: 16 September 2020  
and copied to parties

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