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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106707/2020, 4106738/2020 & 4105537/2020

Preliminary Hearing Held by Cloud Video Platform (CVP) on 6 May 2021

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Employment Judge: R Gall

Mr M Leonard

**First Claimant
In Person**

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Mr David Baird

**Second Claimant
Not Present and
Not Represented**

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Mr R Ferguson

**Third Claimant
In Person**

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BT PLC

**Respondents
Represented by:
Mr J Boyd,
Barrister
Instructed by DWF, Solicitors**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Judgment of the Tribunal is that

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- a) the application by the claimants that the claims are combined is refused as sought. The claims brought by Mr Leonard and by Mr Ferguson are combined. The claim brought by Mr Baird is not combined with the other claims and will proceed at present as a separate claim.

- b) the application by the respondents for an Unless Order to be granted in the case brought by Mr Leonard and that brought by Mr Baird is granted. Those Unless Orders are detailed below.
- 5 c) The claim of discrimination brought by Mr Leonard, the protected characteristic being disability, is noted as withdrawn. Having been withdrawn by the claimant, the claim of discrimination is dismissed under Rule 52 of the Rules contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.
- 10 d) The hearing in the case brought by Mr Ferguson which is scheduled for 19 and 20 May 2021 is postponed.
- e) A Preliminary Hearing for Case Management purposes is set down for 9
15 AM on Wednesday 7 July in the combined cases of Mr Leonard and Mr Ferguson.

UNLESS ORDERS

- 20 2. The following Orders are made in relation to the claims brought by Mr Leonard:-
- By 17 June 2021 Mr Leonard will detail to both the Employment Tribunal, and the respondents:-
- 25 (1) Why it is that he says his dismissal was unfair in terms of the Employment Rights Act 1996.
- (2) Which provisions of the ACAS Code of Practice it is that he alleges the respondents have failed to comply with and what those failures are said to have been.
- 30 (3) What it is that he asks the Employment Tribunal to award him if he succeeds in his claim of unfair dismissal.

(4) If he seeks a financial award, in addition to specifying that and the amount he seeks, he will set out how the sum which he seeks is calculated.

(5) Whether he has obtained a new job since dismissal by the respondents and, if so, when he started that new job and what income he has received from it.

(6) If he has not obtained a new job since dismissal, he will provide details of any applications made by him trying to find a new job and also whether he obtained an interview for any such possible new job.

(7) Any government benefit he has received since his employment with the respondents ended.

UNLESS PARAGRAPHS 2 (1) – (7) OF THESE ORDERS ARE COMPLIED WITH BY 17 JUNE 2021 THE CLAIM OF BROUGHT BY MR LEONARD SHALL BE DISMISSED ON THE DATE OF NON-COMPLIANCE WITHOUT FURTHER ORDER.

3. The following Orders are made in relation to the claims brought by Mr Baird:-

By 3 June 2021 Mr Baird will detail to both the Employment Tribunal and the respondents:-

(1) The basis on which he says he has sufficient qualifying service with the respondents as an employee, enabling the Employment Tribunal to be able to consider his claim of unfair dismissal.

(2) The date he says his employment with the respondents commenced and when he says it ended.

UNLESS PARAGRAPHS 3 (1) and (2) OF THESE ORDERS ARE COMPLIED WITH BY 3 JUNE 2021 THE CLAIM OF BROUGHT BY MR BAIRD SHALL BE DISMISSED ON THE DATE OF NON-COMPLIANCE WITHOUT FURTHER ORDER.

INFORMATION ABOUT ORDERS

- 1 You may make an application under Rule 29 for the above Orders to be varied, suspended or set aside. 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.**
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- 2 If any aspect of these orders is not complied with, the Tribunal may make an Order under Rule 76(2) for expenses or preparation time against the party in default.
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REASONS

1. This Preliminary Hearing (“PH”) took place by Cloud Video Platform (CVP) on 6 May 2021. It was not practicable to hold an in-person PH. Parties consented to the Preliminary Hearing proceeding by Cloud Video Platform (CVP).
- 15 2. The respondents produced a file of documents (“the file”) for this hearing. It was very helpful that this was bookmarked. That enabled easy navigation of the file both in preparation for the hearing and in the hearing itself.
3. Three claimants, Mr Leonard, Mr Baird and Mr Ferguson have brought claims against the respondents which are said to arise from similar circumstances. A PH was held for case management purposes on 14 January 2021 before Employment Judge Strain. Mr Leonard and Mr Blair were present on that occasion. Mr Ferguson was not present.
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4. At the PH on 14 January Orders were made. Those required Mr Leonard and Mr Baird to respond by supplying information by specified dates. This PH was set down at that time. There were two purposes in it being set down. Firstly, the question of whether the Tribunal had jurisdiction to hear the claim of unfair dismissal brought by Mr Baird was to be determined. Secondly, whether the 3 claims were to be combined and heard together was to be determined.
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5. Between the PH in January and this PH there had been developments. Mr Leonard had confirmed that he wished to withdraw his claim of disability discrimination. That leaves his claim of unfair dismissal as being the one he wishes to make.
- 5 6. At this PH I raised this with Mr Leonard, seeking confirmation that he did indeed wish to withdraw his claim of discrimination. I explained that, if withdrawn, that ground of claim would be dismissed, bringing it to an end. I was conscious that Mr Leonard has referred to learning difficulties on his part. I kept that in mind throughout this PH. I explained to Mr Leonard that he should
10 ask if he did not follow something which was said or wished a further explanation of anything. He confirmed he would do that. He was clear that he wished to withdraw the allegation of discrimination and was aware that element of claim would come to an end. Judgment dismissing that ground of claim is issued in the terms above in those circumstances.
- 15 7. In the lead up to this PH, as occurs in cases to be conducted using CVP, the Clerk to the Tribunals contacted parties to carry out a trial to try to ensure that any IT issues were ironed out before the CVP hearing itself. On contacting Mr Baird, the Clerk was informed by Mr Baird that he could not participate in this PH as he could not obtain time off work for that purpose. The Clerk highlighted
20 to Mr Baird the possibility that he might contact the Employment Tribunal to seek a postponement of the case. No such application was submitted however prior to the time set down for this PH. Mr Baird did not appear on the CVP video call for this hearing. There was no contact from him with the Employment Tribunal to the knowledge of the Clerk on the day of this PH. Mr
25 Leonard and Mr Ferguson had no knowledge of Mr Baird's circumstances or intentions in relation to the claim.
8. As mentioned above, at the PH in January, an Order was made in relation to the claim brought by Mr Baird. He makes a claim of unfair dismissal. From his claim form, and also as confirmed by the respondents, he does not have over
30 2 years of service. The Order was that Mr Baird set out why he contended that he has sufficient service for the Tribunal to have jurisdiction to hear his

unfair dismissal claim. Mr Baird had replied. That reply was dated 15 April 2021 and appeared at page 115 of the file.

9. In his reply, Mr Baird again accepted that he had less than 2 years' service as an employee of the respondents. He appeared to have been with the respondents as an agency worker for a period prior to becoming an employee of theirs. He did not however explain why it was that he said he was able to pursue a claim of unfair dismissal. He appeared to be maintaining that employees of the respondents ought to have recruited him as an employee at a particular time and that, had they done so, he would have had 2 years' service at time of his dismissal. His reply to the Order did not therefore reply specifically to the Order by stating the basis on which he said he was able to pursue a claim of unfair dismissal, bearing in mind his apparent length of service as an employee of the respondents.
10. In addition, in the Order all three claimants were required to lodge with the Tribunal a written submission setting out why the 3 claims should be heard together and what facts and circumstances the 3 claims had in common.
11. There had been no reply from Mr Leonard and Mr Baird to that element of the Order. Mr Ferguson had written to the Tribunal setting out his view prior to the issue of the Order. That was on 7 January, page 95 of the file. He had supplemented that by comments made after Mr Leonard had withdrawn the claim of discrimination initially made by him.
12. The respondents had made an application for Unless Orders in relation to Mr Leonard and Mr Baird (pages 106 to 112 of the file). Those applications were opposed by those claimants, their responses being at pages 113 and 115 of the file.

Application for Unless Orders

13. I firstly sought clarification from Mr Boyd as to whether the application for an Unless Order was insisted upon and if so in what regards. I was conscious that Mr Leonard had withdrawn the claim of discrimination and elements therefore of the original Order were no longer relevant and would therefore be

properly part of the application for the Unless Order. The application would not therefore be advanced at this PH in the terms intimated.

14. Mr Boyd confirmed that he sought an Unless Order in relation to paragraphs 2 a and b of the Order of 14 January as far as Mr Baird was concerned and in relation to paragraphs 3 j, k, l, m, n and o of that Order in relation to Mr Leonard.
15. Mr Baird was not present at this PH, of course. In terms of Rule 47 of the Employment Tribunals (Rules of Constitution & Procedure) Regulations 2013 the option of dismissal of the claim existed. Mr Boyd did not however seek that. He referred to the interests of justice and to equality of arms. He regarded issue of an Unless Order as a fair means of giving Mr Baird one last chance to address the Order issued and to set out the basis on which he said he was able to proceed with a claim of unfair dismissal against the respondents.
16. It is distinctly unsatisfactory that Mr Baird was not present at this PH. I understand the difficulties which may be caused by attending Tribunal rather than being at work. It is unclear when time off was sought, what reason was given for that and indeed why time off was refused. The claim is brought by Mr Baird. He requires to be prepared to pursue it. Despite being ordered so to do, he has not explained why it is that he says he is entitled to bring a claim of unfair dismissal, in circumstances where he does not appear to have had, or to argue that he had, more than 2 years' service with the respondents. This PH was arranged to decide if he was in a position to proceed with his claim. For clarity, Mr Baird does not allege any circumstances exist in which a claim can be brought without qualifying service.
17. I considered it appropriate that an Unless Order be issued requiring Mr Baird to provide the basis he says exists for entitlement on his part to bring claim of unfair dismissal, looking specifically at the requirement of there being 2 years' service for bringing a claim of the type he makes. I am aware of the severe consequences if an Unless Order is not met. Those are the most severe possible from the point of view of a claimant, namely the claim coming to an

end. I was satisfied, however, that issuing an Unless Order was the appropriate step to take.

18. If the Unless Order is complied with, it may be that a PH is appropriately arranged in the case of Mr Baird to determine whether the Employment Tribunal has jurisdiction to hear his claim. That can be assessed if and when the reply to the Unless Order is received.
19. In relation to the application from an Unless Order in Mr Leonard's claim, I had the benefit of Mr Leonard being present. He was able to reply to that application.
20. Mr Leonard reiterated that he had a learning difficulty. He found it hard to understand detailed documents and to prepare a written explanation of his position. He said that he was doing his best, however was struggling. I asked whether he might be able to obtain assistance from family or friends. I mentioned the possibility of assistance being obtained via Citizens Advice Bureau, University Law Clinics or possibly a solicitor. I also said that the Citizens Advice web page had guidance in relation to loss which might be claimed in a case of unfair dismissal and, I believed, had a style or template with relevant headings.
21. Mr Leonard said that Mr Ferguson had confirmed he was willing to help him in the case. Their cases were very similar. They both argued that the ACAS Code had not been followed and that there was inconsistency of treatment in that others who had done as they had done had been treated more leniently. He referred to having covered matters in his appeal letter.
22. I sought to explain to Mr Leonard why it was that the information was sought. It was in his interests to set out his case. That would ensure fair notice of it had been given to the respondents. It would avoid lines of evidence or arguments which he might wish to follow being closed to him as they had not been set out in his case to the Tribunal. There might be a lot of material in his appeal document. He had to confirm to the Tribunal which aspects (which might be all of them) of that document he was relying upon in his claim to the

5 Employment Tribunal. He should set out the points he relied on in his case in his reply to the Order. Similarly, when he said that there had been breaches of the ACAS Code, he had to be specific about what those breaches were said to have been. He had to say, in addition, who it was that he said had been treated differently, or what led him to the view that others had been treated differently and more leniently.

23. Mr Leonard confirmed that he wished time to be able to answer the Order. He now believed that he could do that, potentially with help from Mr Ferguson, family or friends or the other sources of advice mentioned above.

10 24. Mr Boyd expressed the view that the goal was to have clarity as to the claim. When I raised timeframe for any response from Mr Leonard, he said that the respondents wished to ensure that they had the information on the claim and so he did not strongly object to a lengthier time than perhaps usual being granted to Mr Leonard in the circumstances explained.

15 25. I considered the position and came to the view that an Unless Order was appropriate. I understood and weighed in my assessment the difficulties Mr Leonard spoke about. I kept in mind the overriding objective and the interests of justice. I also had in mind the ending of the claim being the consequence of non-compliance with the Unless Order.

20 26. There has been an Order issued previously. Fair notice of the claim is important. It enables the Employment Tribunal to be clear as to the case being advanced and the issues to be determined. It enables the respondents to be prepared for the case to be met. It ensures that the claimant has a basis on which evidence can be led upon the points he wishes to make.

25 27. I was satisfied that Mr Leonard was able to understand what it is that he requires to do to comply with any Order issued. It is helpful that Mr Ferguson is prepared to assist him, in addition to any other assistance he may be able to access.

28. In all the circumstances I was persuaded that it was appropriate to issue an
30 Unless Order at the moment. I concluded that providing a period of 42 days

from date of this PH would give Mr Leonard sufficient time to respond with the required information. I confirmed that time period to him as being the time the was given to reply to the Order. I also explained the effect of an Unless Order and that his case would end if he did not comply with it. The Unless Orders
5 are made above.

Combining of claims

29. I then turned to combining of the claims. The respondents opposed that. Mr Leonard and Mr Ferguson urged me to combine the claims.

30. Mr Boyd recognised that with Mr Leonard's discrimination claim having ended,
10 there was less of a difference between his claim and that of Mr Ferguson. Mr Baird's claim however was following a different path, he said. The preliminary matter of jurisdiction required to be determined. Whilst opposing combining of any of the claims, Mr Boyd submitted that, if any claims were to be combined, those claims should be restricted to the ones brought by Mr Leonard and Mr
15 Ferguson.

31. Mr Ferguson said that there was real overlap between the cases. The claimants all referred to breaches of the ACAS Code. They all said that they had been treated more severely than others who had committed similar "offences". I noted that Mr Ferguson's case was scheduled to proceed to a
20 hearing in 14 days' time. I explained that if the cases were combined it was inevitable, given the Orders issued and time for compliance, that the hearing currently arranged would be lost as it would be postponed. Mr Ferguson accepted this and remained of the view that combining the cases was appropriate. Mr Leonard agreed with Mr Ferguson's points and conclusion.
25 Both Mr Ferguson and Mr Leonard understood the preliminary point which was fundamental to Mr Baird's case and which required to be decided prior to any hearing in his case.

32. I checked my understanding as to witnesses with Mr Boyd. He confirmed that while the investigator was different in each case, the decision to dismiss had

been taken by the same person in each case. Similarly, the appeal had been determined by the same person in each case.

5 33. The view I came to was the cases of Mr Ferguson and Mr Leonard were appropriately combined. They are both cases of unfair dismissal. They involve the same witnesses, save for the investigator. It appears that the arguments being advanced by each claimant are very similar. Mr Ferguson appears likely to be assisting Mr Leonard with his claim. The Order combining the claims is above.

10 34. As a result of this the hearing scheduled in Mr Ferguson's case for 19 and 20 May is postponed.

15 35. Mr Baird also brings a claim of unfair dismissal. A fundamental point is in course of being explored. That is length of service. A PH may be required in relation to that point. I concluded that, certainly at present, it was not appropriate to combine Mr Baird's case with that of the other 2 claimants.

Next Steps

20 36. After discussion, it seemed to me that it would not be appropriate to fix a hearing in the combined cases. Mr Leonard requires to provide the information set out in the Unless Order. That will confirm the areas for decision in the case he brings. The extent of the evidence will be clearer. The length of the hearing will be easier to determine with this fuller information. At present it may be that 5 days are required.

25 37. The course which I decided to follow was to arrange a case management PH for one hour in the combined cases. It was set, after further discussion, for 9am on 7 July. It will be conducted by telephone conference call and will be given a time allocation of one hour. The Clerk to the Tribunals is requested to send to Mr Ferguson, Mr Leonard and to those instructing Mr Boyd the hearing notice for this PH. It should be before me if at all possible. The PH will

consider where things sit given the anticipated reply to the Unless Order from Mr Leonard. It will consider hearing arrangements, including whether written witness statements will be used. Mr Leonard's learning difficulty will be a factor in that decision. Compilation of documents will also be considered, together with hearing length and dates for the hearing.

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38. If Mr Baird's case is proceeding to a hearing then, assuming the combined cases of Mr Ferguson and Mr Leonard have not been heard by then, consideration may be given to any application to combine Mr Baird's case with that of Mr Ferguson and Mr Leonard.

10 39. There were no other matters which I regarded as being relevantly considered or determined in this PH which therefore closed.

15 Employment Judge: Robert Gall
Date of Judgment: 07 May 2021
Entered in register: 28 May 2021
and copied to parties

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