EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107716/21(V)

Held on 4 August 2021

Employment Judge J M Hendry

Mr. L Cox	**Claimant** **In Person**
R Robertson and Son Ltd	**Respondent** **Represented by** **Ms J Wyper,** **RBS and Natwest** **Mentor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the application for strike out is well founded and that the claimant's application for unfair dismissal and breach of contract is dismissed.

REASONS

1. The claimant, Mr Cox, made an application to the Tribunal for a finding that he had been (automatically) unfairly dismissed. The claim was also registered as a breach of contract claim but the basis for this was not clear and it is mentioned only for completeness.

2. The claimant did not have the requisite service to make an "ordinary" unfair dismissal claim. The claim was resisted by the respondent company.

Background

3. Mr Cox was dismissed on 31 January 2021 from his job as a bus driver with the respondent company. He raised the current proceedings which were registered at Glasgow Employment Tribunal on 19 February 2021.

4. The respondent lodged grounds of resistance on 31 March 2021. In their grounds of resistance they raised a preliminary jurisdiction issue. They also sought a strike-out. They wrote in these terms:-

"*Even if the Claimant succeeds in proving what he has alleged in part 8.2 of his claim form it is submitted that this cannot amount to an automatic unfair dismissal, on any grounds, as plead. He refers, mainly, to alleged procedural failings on the Respondent's part. The only reference to H&S is where is states "I felt that I would not be safe in my work due to the employer Sonia Robertson not taking grievances seriously". That does not set out any basis for a H&S claim. Further, it is an undisputed fact that the Claimant did not refer to H&S in his appeal against his dismissal. As plead, this claim is misconceived in fact and law and has no, or little, prospects of success. It should be struck out or the Claimant should be ordered to pay a deposit as a pre-requisite of proceeding further with this claim.*"

5. A preliminary hearing took place on 20 May 2021 in order to discuss case management issues and to decide the next procedural step. At that preliminary hearing the respondent's representative indicated that they were still seeking a strike-out hearing. That application was granted.

6. The case proceeded but it would be fair to say that it did not proceed uneventfully. It generated a considerable volume of correspondence principally from Mr Cox seeking information, documents and generally challenging the respondent's factual position. It was explained to him that these matters were not at this stage relevant but might become so if the case proceeded to an evidential hearing. For example, in June the claimant asked for CCTV footage and also information in relation to track and trace.

7. The respondents opposed the disclosure of the information sought writing to the Tribunal on 28 June. This e-mail also dealt with the claimant's request for copies of his grievances (six grievances apparently had been intimated to the respondent prior to the termination of his employment). The respondent's position was seeking this information was premature. The Tribunal declined to make any Order.

8. On 14 June an Order was made for the case to proceed to an open preliminary hearing on strike-out. It provided that the respondent's representatives should intimate a copy of their skeleton argument/submissions to the claimant seven days before the start of the hearing.

9. On 27 July the respondent's agents asked for variation of the case management Order to allow the skeleton argument to be lodged on 2 August explaining that the solicitor dealing with the matter was absent due to the death of a family member. They indicated that Counsel would be instructed to prepare the skeleton argument and conduct the hearing. Mr Cox took objection to this indicating that the skeleton argument was due to be prepared and given to him in the timescale I had ordered, which would allow him ample time to consider it before the hearing. He strongly objected to further time being given to the solicitors explaining that he was working during the day right up to the hearing and would have no time to properly consider it.

10. The Judge (Employment Judge Hosie) granted the application indicating that it was consistent with the overriding objective.

11. The skeleton argument was e-mailed to the claimant on Monday 2 August. However, in response to the Judge allowing further time for the skeleton argument to be lodged Mr Cox e-mailed asking for a postponement referring to new evidence that he had.

12. The respondent's agents sent a bundle of documents to the Tribunal for the hearing and intimated this to Mr Cox. He discovered in the bundle a letter

from the respondent which bore to be a letter of dismissal. It was a letter that had never been sent to him. He was concerned because he thought that the respondent was changing its position as he had been dismissed by a letter of a different date. He e-mailed the Tribunal on 29 July indicating that he was concerned that the respondent company was now saying that he had been sacked on 18 January whereas the dismissal letter he had actually received indicated a dismissal on 31 January. He did not appreciate that the respondents had never formally changed their position.

Hearing-4 August

13. I have narrated this background because it is important to understand the context in which the hearing developed and the outcome.

14. At the outset, I asked the claimant if he had access to the Employment Tribunal Rules. He told me that he had internet access but had not looked at them. I explained that we would first of all hear from Mr Franklin, Counsel on behalf of the respondent who would set out their position. I would then go through those submissions carefully with Mr Cox ensuring that he understood what was being said and assist him articulate his response. I encouraged him to ask me questions as we went along both as regards the process and their procedure but also the language used and to check with me to ensure he had a full understanding. I explained in general terms what was involved in a strike-out application and that strike-out and deposit orders were based on Rules 37 and 39.

15. I asked if there were any preliminary matters we needed to discuss. Mr Cox indicated that there were a number of matters that he wanted to raise at the start. It became apparent in the course of our discussions that there was a difference between the numbering of Counsel's bundle and the bundles that had been intimated. These difficulties were easily surmounted and the correct documents identified.

16. Mr Cox told the Tribunal that he had asked for copies of the six grievances that his employer's said they had received about him. He believed that these were relevant and important for the strike-out application. Mr Franklin responded that they were not relevant. They were, he said, not relied on in relation to the strike-out application. He explained that the application dealt solely with the statutory criteria required for the sort of claim he was making. We would not, he continued, be hearing evidence or going into the detail of the grievances as it was not necessary for his submissions.

17. Mr Cox was not persuaded. He was adamant that he believed that the grievances were significant and important. We discussed the matter. I struggled a little to understand why they were significant. I suggested that if in the course of discussions it became clear the grievances would assist then the matter could be revisited.

18. The second matter Mr Cox was concerned about was the letter indicating that he had been dismissed on 18 January. This was in his view a lie. It showed that the respondent's management were liars. It showed, in his view, that the respondent's managers were prepared to lie and manipulate documents. He did not accept the explanation proffered by the respondent's Counsel that the letter was drafted but ultimately not sent out because of the receipt of his grievance. He did not accept this saying that the grievance was sent on 17 January before the letter was constructed on the 18th. At a later point Mr Franklin drew the Tribunal's attention to the fact that the 17 January was a Sunday and that it was not in his view unreasonable to suggest that the writer of the letter might not aware of the terms of the grievance until Monday of that week. Mr Cox was sure it would have been read on the Sunday. Mr Cox was adamant this proved skulduggery of some sort.

19. In order to move matters on I asked him to look at the letter and confirm whether he had seen it before. He confirmed that he had not seen the letter of 18 January before receiving it in the bundle. I then suggested to him that as the respondent company was not changing their position about the date of his dismissal and as he had not seen the letter at the time it must be clear

that it was not an effective dismissal letter or relevant to today's proceedings. I indicated that if the case proceeded to a hearing where evidence was led from the writer of the letter, Ms Robertson, questions could be put to her about the terms of the letter of 18 January , when she had first seen the grievance and so forth but that at this stage I struggled to see how it could be relevant. In the course of these discussions I cautioned Mr Cox to be careful about his language. He nevertheless expressed the view on a number of occasions that the respondent's managers were lying.

20. The next matter Mr Cox raised was why the respondent company had been allowed a strike-out hearing and he had not been allowed one. I advised him that unless I went through the history of the matter I couldn't immediately answer that but from memory on the last occasion he asked for a strike-out was because of the difficulty the respondents encountered in lodging the skeleton argument in time. That application had no merit as there was no default on their part as the Judge had allowed variation of the Order. Mr Cox observed that he had been in contact with the EAT and would be making contact with them again. He then stated that he hadn't had time to prepare for the hearing. He worked he said. He used his evenings to relax and not to prepare for such hearings. In short, he felt it was unfair and he had been disadvantaged.

21. I adjourned because I advised Mr Cox that I had been on leave and I wanted to know the exact history (which I have narrated earlier). On my return I advised him that he was clearly aware that the skeleton arguments document was going to be late. Mr Cox had withdrawn his application for postponement. I also pointed out that the respondent had, in any event, fully set out their position in the ET3. It had been touched on at the preliminary hearing and although of a technical nature was not overly complex. Nevertheless, my view was that because the Order was initially put in place to provide him as a party litigant time to consider the legal arguments against his case I would allow him seven days after the date of the hearing to lodge any further written submissions he wanted to make. Disappointed, Mr Cox indicated that he was

not proceeding with the strike-out and was leaving the hearing. I persuaded him that this would not be in his best interests and he stayed.

Respondent's Submissions

22. Mr Franklin first of all went through the circumstances of the late lodging of the skeleton argument and the history. His information was that Mr Philps, the respondent's solicitor had e-mailed the skeleton argument to the claimant at 10:52 am on Monday and had not received a response. He was therefore aware of the document at this stage and earlier of the application's terms.

23. I then invited Mr Franklin to outline the respondent's position. He did so very much in accordance with the skeleton argument stressing that his principal position was that there were no pleadings to justify a claim for automatically unfair dismissal. He took me through the terms of s.100 of the Employment Rights Act. He indicated that in order to avoid inflaming the situation he would decline to go through the second part of his application for strike which was based the claimant's unreasonable behaviour preferring to rely on the written text.

24. His position broadly was that the claimant was trying to ''engineer'' a claim for automatically unfair dismissal. There was no reference in the papers in his grievance, appeal or ET1 which set out the position he was now adopting. The Tribunal could take into account his behaviour, considering prospects of success, the burden of proof was on him. The claimant, he said seemed to have an obsession with the rights and wrongs of what was said and what was done wanting copies of the grievance documents no doubt to find out who had said what. The respondent he advised was not prepared to provide these as they genuinely feared for their employees' safety.

25. Before Mr Cox addressed me I indicated to him that taking matters out of order although I had not come to any view about whether the strike-out should be granted or a deposit order I reminded him that in terms of the Employment Tribunal Rules I could take into account his financial circumstances if I came

to consider a deposit order. I would not press him today on that matter but he should reflect on it and in his additional submissions advise me what his financial position is if he wants me to take that into account.

Claimant's Response

26. Mr Cox then took issue with the respondent's position that there was no reference to health and safety. He was a bus driver. Health and safety was very important to him. The issue here in his view was whether wheels were torqued (tightened) after certain periods. He had checked the position and his understanding was that there were various regulations that required this process. The respondent he knew were aware of this and wanted to keep the matter private. He had spoken to Mr Henderson, a Mechanic, about this. Mr Henderson had agreed that these were the correct procedures. He had various texts with Mr Henderson that he had not yet produced. His position was that the texts showed that he had raised health and safety matters with Mr Henderson and Mr Henderson had spoken to Ms Robertson who then dismissed him to keep this quiet. I asked him why he had not raised this in the grievance letter and his position was that he intended raising these matters at the grievance hearing but it had been cut short by Ms Robertson.

27. I asked the claimant to consider this matter namely if Ms Robertson was unaware of these health and safety issues how could he say that she had dismissed him because he raised health and safety issues. He explained that he believed Mrs Robertson had spoken to Mr Henderson about these matters. This he said was an important issue for the respondent. They could lose their operator's license for such failures. The claimant speculated that he should perhaps contact the Vehicle Licensing Authority. I advised him that he should think very carefully about any action he takes that might cause the respondent financial damage unless he was very sure of his position. I said that I was certainly not in a position to give him advice about such matters.

28. I explained to the claimant that the essential rule in pleadings was not, as he seemed to understand it, to keep cards close to his chest or up his sleeve as it were but to give fair notice of his position to the respondent. He had not done that in the pleadings if what he is now saying was true. The pleadings do not reflect these discussions he says he had with Mr Henderson, the text messages and so forth. I advised him that I could not give him advice as to what he should do but reminded him that the Tribunal has the power to allow the amendment of pleadings if an amendment was sought. I told him that any amendment at this stage was likely to be opposed but that that has it's own particular process and rules.

29. Mr Franklin's response was that the case as pled had no reasonable prospects of success. He concluded by observing that retaining information in his "back pocket" as it were seems highly unusual. The claimant, if he genuinely thought he had been sacked for health and safety grounds would have been "shouting it from the rooftops", and making reference to it in his grievance or in his appeal or even in his ET1.

Events following the hearing

30. On the 5 August Mr Cox sent information to the Tribunal about the need for a vehicle to have its wheel nuts 'retorqued' after fitting of a wheel. It came from the Institute of Road Traffic Engineers.

31. On the 9 August the claimant sent copies of text messages he had referred to in the hearing. He explained that Mr Henderson was a mechanic with the respondent company. He wrote*: "please find copy of messages between myself and James Henderson …I was intending bringing up at the grievance meeting which never happened …."* He then went on to write: "*So I would like to add this admission to my case that will prove that it was health and safety related why I was sacked because as a bus driver I have health and safety of passengers and this was not followed due to the fact James*

Henderson did not follow the law..by not retorquing the wheels of the bus after 30 miles …and the message states from James Henderson that it was done after my shift which was 105 miles and I believe Mrs Robertson knew this hence why I was sacked..'' He went on to say that the respondent could have lost their Operator's Licence due to the failure and that the grievances were untrue as he had passed his probation period in November.

32. The text bore to be an exchange with James Henderson who I will accept for these purposes as being a mechanic with the respondent company. The texts seem to reflect a difficult relationship. The claimant writes: *''..and you stated in post that YY64 needed wheel talk (torque?) after 30 miles well never happened and again did I say anything no''*. The response was: *''wheel torque was done at the depot after you finished. Not particularly professional to do it in front of customers.''*

33. The respondent's Counsel commented on the exchange and the application to amend. He began by reminding the Tribunal that the claimant has the burden of proving that his dismissal falls within the exception. His pleaded position was that a failure to take his grievances seriously was a health and safety reason and he now relies on the WhatsApp messages. This would be a substantial amendment and there is no good reason why this was not pled at the beginning. He has also referred to taking legal advice. Even if amendment were to be allowed it would not cure the problems with the claimant's case. To succeed he must show that the sole or principal reason for his dismissal was that he brought to his employer's attention circumstances connected to his work that he reasonably believed were harmful or potentially harmful to health and safety. The texts were in any event insufficient to raise such matters as required by the statute. They were addressed to James Henderson who was not a manager. A text to him was not a reasonable means of bringing a health and safety matter to the employer's attention. They show that he did not choose to bring the issue to his employer's attention writing: *''you stated in post that Yy64 needed wheel talk after 30 miles well never happened and again I say anything no''*. The

context of the messages showed that the claimant was responding to a perceived attack on himself not raising health and safety matters.

34. It was apparent Mr Franklin submitted that the claimant did not bring the texts to the attention of the employers whether or not he intended to. His behaviour in the proceedings militates against him being persuading a Tribunal that his dismissal was for any other reason than his behaviour at work.

Discussion and Decision

Legal Framework

35. The Employment Tribunal Rules set out the basis for an application for strike out as follows:

"37. Striking out

(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;…..

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

36. In applying the Rules the Tribunal must have regard to the overriding objective in Rule 2:

"*Overriding objective*

2. 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; (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. 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."

37. It has been recognised that striking out is a draconian power that must be exercised carefully. If exercised it would prevent a party from having their claim determined by a Tribunal.

38. In the House of Lords case of **Anyanwu & Ano v South Bank Student's Union and Ano 2001 ICR 391** a case involving discrimination, at paragraph 39 in the judgment of Lord Hope of Craighead, said as follows:

"Nevertheless, I would have held that the claim should be struck out if I had been persuaded that it had no reasonable prospect of succeeding at trial. The time and resources of the employment tribunals ought not to [be] taken up by having to hear evidence in cases that are bound to fail."

39. In **Ezsias v North Glamorgan NHS Trust 2017 ICR 1126,CA** , the Court of Appeal in England was considering a case involving public interest disclosure and held that a claim should not ordinarily be struck out where there was a:

"*29. … crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. … It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. …"*

40. In the more recent case of **Ahir v British Airways plc [2017] EWCA Civ 1392**, Underhill LJ said as follows:

"*16. … Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact 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 such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that*

exercise is assisted by attempting to gloss the well-understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success'."

41. Firstly, I will deal with the submission that the case has no reasonable prospects of success. It is a high hurdle to surmount in an application for strike out.

42. The claimant must plead facts from which a Tribunal could conclude that the sole or principal reason for his dismissal was the raising by him of health and safety matters. The starting point is the ET1. It is an important document and the claimant has narrated why he believes he was dismissed. He also raises health and safety matters but in an unusual way saying that he would not feel safe at work because his employer did not take grievances seriously. What is said in the ET1 is wholly insufficient to found a claim under Section 100(1)(c) of the ERA which requires him to prove ‘‘***he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.***’’

43. However, I bear in mind that the claimant is a party litigant and the usual case management of his claim was somewhat truncated without having discussed the issues in the case and it having proceeded to a strike out hearing. I therefore feel obliged to consider the claimant's case in the light of the new information he has provided and the amendment he has proposed. The amendment seeks to change his case radically and to suggest that he raised health and safety matters with a mechanic James Henderson who in turn be believes spoke about these concerns to Ms Robertson who then dismissed him because of those concerns. Neither at the strike out hearing nor in the email of the 9 August does he say why he came to this belief. There is nothing

to suggest he has any real idea whether the matter was discussed with Ms Robertson at all. There is no reference to her mentioning it to him or raising it as an issue. It is clearly an assumption and there appear to be no surrounding circumstances pled that would seem to allow the Tribunal to infer that she knew about the exchange with Mr Henderson.

44. It is also important to look at the statutory requirements needed to engage the protection of section 100. I could envisage circumstances where someone like Mr Henderson, perhaps because he was working at the employers premises or if the issue was a mechanical one could be asked by an employee like the claimant to raise an urgent health and safety concern with the manager but that is not the situation here. It is clear from the terms of the texts that this was a private conversation as it were between the claimant and Mr Henderson. It was patently not intended to raise health and safety matters with the employer. Even if the txt had been explicit it must be remembered that Mr Henderson was a mechanic and not a manager or the claimant's line manager but a fellow employee with no other status.

45. It was argued that the claimant's own behaviour in these proceedings would corroborate the employer's contention that the claimant behaved badly in front of Ms Robertson and was dismissed for his behaviour. A Tribunal must be careful as it is almost an invitation to consider factual matters best left to a merits hearing. Whilst the claimant's behaviour in the proceedings could be evidenced at any merits hearing and the claimant cross examined about that behaviour we are not at that stage. The focus must be on the claimant's pleaded case and the most that can be said at this stage is that the employers have set out an reason for dismissal, which if accepted, would mean the dismissal would not fall under section 100.

46. If I had been persuaded that the claim had little reasonable prospects this is the sort of case where a Deposit Order would have been appropriate despite the claimant's modest means. This is case that is likely to cost the employer both significant time and effort and probably expense. The claimant accepted

keeping or trying to keep his full case ‘‘up his sleeve’’. He has now tried to significantly amend his case. His conduct has made the proceedings more complex and time consuming (such as his repeated requests for CCTV footage or copies of grievances etc). In addition, he must know whether or not he acted badly at the meeting with Ms Robertson and whether this was the likely cause of his dismissal.

47. Considering the pleadings and the proposed amendment I have determined that the claim has no reasonable prospects of success and that the application for strike out is well founded. I accordingly agree with Mr Franklin’s submissions that Rule 37 is engaged and the claim must be dismissed. I have not allowed the amendment but as noted have considered whether it assists the claimant in the case he wants to advance.

48. I have not determined the strike out on the grounds of the claimant’s behaviour as I have not needed to do so. That part of the strike out application raises a number of issues. I noted that the claimant’s behaviour at the Preliminary Hearing was raised by the respondent’s Counsel and I do not criticise him for doing so but I am hesitant to rely solely on my own observations.

49. The test where a claim is to be struck out on the grounds of scandalous or vexatious behaviour is that there can no longer be a fair trial. This matter was considered at some length in the recent EAT case of **A v B UKEATS/0042/19/SS** with which I have some passing acquaintanceship. Given that I was involved effectively as a witness in some of the matters alluded to by the respondent essentially the claimant’s behaviour at the strike out hearing and preliminary hearing if the matter comes back before the Tribunal it would be best for a different judge, unconnected with these events,

to deal with the strike out argument based on these grounds.

Employment Judge	**Judge JM Hendry**
Dated	**13 August 2021**
Date sent to parties	**13 August 2021**