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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4104993/2020 & 4102173/2020 (A) Preliminary Hearing by Cloud
Video Platform on 30 July 2021

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Employment Judge: M A Macleod

15 Mr S Livesey

Claimant
Represented by
Mr G Bathgate
Solicitor

20 Ineos Infrastructure (Grangemouth) Limited

1st Respondent
Represented by
Mr C McDowall
Solicitor

25 Mr L Bond

2nd Respondent
Represented by
Mr C McDowall
Solicitor

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Mr N MacDonald

3rd Respondent
Represented by
Mr C McDowall
Solicitor

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Ms A Barrett

4th Respondent
Represented by
Mr C McDowall
Solicitor

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Ms T Harris

5th Respondent
Represented by
Mr C McDowall
Solicitor

Mr A Gill 6th Respondent
Represented by
Mr C McDowall
Solicitor

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Mr D Bell 7th Respondent
Represented by
Mr C McDowall
Solicitor

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Mr M Brolly 8th Respondent
Represented by
Mr C McDowall
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The Judgment of the Employment Tribunal is that the respondent's application for strike out of the claimant's claims is not granted at this stage; but that an Unless Order is now issued in terms set out at the conclusion of this Judgment, which requires compliance by the claimant.

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REASONS

1. In this case, the claimant has raised two claims, one against Ineos Infrastructure (Grangemouth) Limited and 8 individuals employed by them, and the other only against Ineos Infrastructure (Grangemouth) Limited (the first respondent).
 2. The respondents have applied, on 12 April 2021, for strike out of the claimant's claims under Rule 37 of the Employment Tribunals Rules of Procedure 2013, failing which a deposit order; and in addition, at an earlier stage, they applied for an unless order under Rule 38 on 12 February 2021, and subsequently reiterated that application on 12 April 2021.
 3. The applications are opposed.
 4. A Preliminary Hearing was listed to take place on 1 August 2021 by Cloud Video Platform (CVP) in order to determine the respondents' applications.
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The claimant was represented by Mr Bathgate, solicitor, and the respondents by Mr McDowall, solicitor.

- 5 5. On the day prior to the hearing, the claimant made an application for postponement of this hearing, on the basis that he had a family matter to which he had to attend. That application was refused on the basis that the claimant did not require to be in attendance at this hearing, since no evidence would be required of him.
- 10 6. Mr McDowall presented a written submission, to which he spoke, and Mr Bathgate responded with an oral submission. What follows is a short summary of the submissions made by the respective representatives.
7. A joint bundle of productions was also presented to the Tribunal and reference was made to it in the course of the hearing.

15 **Respondent's Submission**

- 20 8. Mr McDowall set out in detail the chronology which has led to this Hearing. The first claim was presented on 14 April 2020, the ACAS Early Conciliation Certificate having been issued on 15 March 2020. The respondent submitted an ET3 response on 28 May 2020, within which they set out their requests for further specification of the claimant's claims (145-150), including requests to specify the less favourable treatment and comparator upon whom he wished to rely, the PCP which the respondent applied which presented a substantial disadvantage to him and the exact date of the allegedly discriminatory comments made to him on the grounds of race, as well as the names of those involved.
- 25 9. A Preliminary Hearing, for the purpose of case management, was listed for 14 August 2020. The claimant sought a postponement of this hearing, but it was refused. The reason for the claimant's request was that he had recently been dismissed by the respondent. The hearing proceeded and

the claimant attended and was represented by his partner. Following that hearing, the Tribunal issued an Order requiring the claimant to provide further and better particulars of his claims (182-185). Mr McDowall identified this in his submission as “the Order”.

- 5 10. The claimant was due to comply with the Order by 3 September 2020 but sought an extension of time on 2 September due to personal circumstances. The Tribunal granted the extension unopposed, so that the Order was then to be complied with by 17 September 2020.
- 10 11. Mr McDowall then pointed out that the claimant sought further time to respond to the Order, and cited the need for the proceedings to be sisted following the termination of his employment on 14 September 2020. He engaged, he submitted, in lengthy and complex correspondence with the Tribunal, making numerous statutory references. The Tribunal refused the application to sist and issued a further Order (the Second Order), requiring
15 the claimant to respond within 14 days, that is by 14 October 2020.
12. The claimant then presented his second claim to the Tribunal on 22 September 2020, and again the respondent’s ET3 set out the need for further specification of a number of areas within the claim.
- 20 13. The claimant did not respond to either the Order or the Second Order within any of the deadlines set down. He maintained, in response to a request from the Tribunal, that he had in fact complied with the Order on 17 September, but Mr McDowall observed that the Second Order was issued on 30 September by Employment Judge Jones in light of his failure to comply with the Order.
- 25 14. Mr McDowall continued to set out the history of the cases, taking into consideration the Interim Relief hearing on 5 November and the Preliminary Hearing listed for 20 November 2020 for the purpose of case management. The latter was postponed on the application of the claimant due to his disability and current state of his physical and mental health, which was not
30 opposed by the respondent. Mr McDowall pointed out that this was the second postponement granted to the claimant shortly before a hearing.

15. On 4 December 2020, the respondent sought an Unless Order to deal with the claimant's ongoing failure to comply with the Orders issued by the Tribunal. Mr McDowall submitted that despite his failure to comply with the Orders, the claimant had still managed to raise a second Tribunal claim, enter into detailed correspondence with the Tribunal, apply for interim relief, appear at the interim relief hearing and apply for reconsideration of that decision.
16. A further Preliminary Hearing was listed for 2 February 2021 and the claimant confirmed in writing that he wished this to proceed. However, on the morning of the hearing, the claimant wrote to the Tribunal informing it that he was suffering from "laryngitis (no voice)" and was unable either to attend or to be represented at the hearing. That postponement, the third requested by the claimant, was granted. On 8 February the Tribunal wrote to the claimant requiring him to provide medical information supporting his assertion that he had been unfit to attend the 2 February hearing. The claimant provided a medical note from April 2020, and was asked again by the Tribunal to provide a medical certificate relevant to the issue at hand. Mr McDowall observed that in his response, in which he said that he had not consulted a doctor but had self-diagnosed, the claimant was evasive at best.
17. A further Order was issued by the Tribunal requiring the claimant to produce GP records, a schedule of loss, a Scott Schedule and medical evidence supporting his assertion that he was unfit to attend on 2 February (the Third Order). It was confirmed by the Employment Judge that he was not quite yet ready to issue an Unless Order. By this point Mr Bathgate had been instructed to appear on behalf of the claimant. After a further extension of time granted to him, the claimant provided a Scott Schedule on 6 April 2021, together with a Schedule of Loss.
18. At that point the respondent sought an Unless Order and strike out of the claimant's claims for the reasons set out below.

19. Mr McDowall argued that the same pattern has continued since 12 April 2021 by the claimant, and even the day before this hearing, he sought yet another postponement of the hearing, his fifth.

20. Mr McDowall then set out the legal principles, and the Tribunal Rules, relevant to the Tribunal's consideration of whether or not to strike out the claimant's claim.

21. He argued that the claimant's continued insistence in pursuing his claims against the individual respondents amounted to vexatious and scandalous conduct in the proceedings. The claimant does not seek any financial remedy against the individuals, but asks for an apology, a remedy which the Tribunal cannot provide him. He submitted that the individual respondents are private individuals finding this process very stressful, and still unclear as to the precise claims being made against them individually. The respondents argue that the claimant only wishes to pursue these matters individually to subject them to stress and harassment, and that to continue with the claims is out of all proportion to any gain likely to accrue to the claimant. Many of the claims against the individuals are out of time, and are not properly specified.

22. This does not apply to the second claim.

23. Mr McDowall then argued that the manner in which the proceedings have been conducted is scandalous, unreasonable or vexatious, and this applies to both the first and second claims.

24. He described the claimant's conduct of the proceedings as "staggering", setting out the chronology of his actions.

25. He pointed out that the claimant has failed to provide further and better particulars of both claims, and that he had demonstrated a pattern of behaviour in which he has delayed the process and not properly specified his claims. He failed to produce a PH agenda, and has twice applied for the proceedings to be sisted. He has made 4 applications to postpone hearings, all at the last minute, and a 5th in the EAT proceedings. He was

warned by the Tribunal that he required to provide medical evidence of his condition justifying the postponement of the hearing on 2 February, and has been evasive in his responses. The Tribunal has engaged in significant case management but the claimant has failed to comply with any of the three Orders issued to him. He has continued needlessly to pursue claims
5 against a number of private individuals which are clearly out of time and will not attract any remedy from the Tribunal even if successful.

26. Mr McDowall submitted that the claimant has had ample time within which to respond to the Orders but has failed to do so, in complete disregard for
10 the Tribunal process. He suggested that the claimant had repeatedly attempted to thwart the Tribunal process, and that he is able to comply with Tribunal requirements when he considers it in his best interests to do so.

27. He raised the “dubious” non-attendance at the PH on 2 February 2021, following which the claimant was evasive and required to have information
15 teased out of him.

28. Mr McDowall observed that when the claimant had the benefit of legal representation, he produced his Scott Schedule on 6 April, a week after the extended deadline for compliance with the Third Order, and despite its length, it fails to comply with the requirements of the Order.

20 29. Now that the claims have been ongoing for some time the claim is not fairly or reasonably defensible in its current state. He submitted that the claimant has deliberately flouted the Tribunal’s Order for further specification of his claim. Significant disruption and expense has been caused to the respondents, and there has emerged a clear pattern whereby the claimant
25 seeks last minute postponements of hearings. A fair hearing is not possible. The claimant cannot articulate his claims against the individual respondents, for example.

30. Mr McDowall then went through the claims against the individual respondents, and suggested that in each case it is not possible to discern a
30 specific claim against the individual concerned, despite attempts to clarify those claims.

31. The claim of alleged race discrimination is clearly out of time, he submitted.

32. As a result of his submissions, Mr McDowall contended that the respondents' application for strike out of the claims should be granted, which failing a deposit order should be issued against the claimant as a condition of continuing to pursue his claims. In the event that neither is granted, Mr McDowall proposed that an Unless Order be issued as set out in the emails of 12 February and 12 April 2021.

Claimant's Submission

33. For the claimant, Mr Bathgate expressed his gratitude to the respondent's agent for his extensive and articulate submissions. He indicated that he felt that he was in a slightly difficult position as he did not have his client with him.

34. He acknowledged his obligation to act in the best interests of his client but also to assist the Tribunal as an officer of the court, and to comply with the duty of candour to the Tribunal.

35. Mr Bathgate proposed that the claims should not be struck out at this stage. He suggested that his continuing involvement, as an experienced solicitor acting in the interests of and to support the claimant in this rather complex claim, was of considerable importance.

36. He confirmed that once he was instructed through the Trade Union scheme, he had spent some considerable time with the claimant and tendered certain advice to him. He did not disclose to the Tribunal what that advice was, given the requirement upon him to maintain confidentiality between solicitor and client, but there have been some difficulties in obtaining the claimant's instructions due to communication issues.

37. Mr Bathgate accepted that the claims which have been presented do require to be clarified and restructured in order to provide fair notice to the respondents and claims which are ascertainable by the Tribunal, so that when the case reaches an evidential hearing all concerned will be clear as to the scope of the evidence and the hearing.

38. He recognised the weight behind Mr McDowall's submissions about the manner in which the proceedings have been conducted to date, in terms of the notice given.

5 39. Mr Bathgate submitted that in light of the position which he had outlined, the Tribunal should not grant the respondent's application for strike out of the claims, but should issue an Unless Order to the claimant requiring him to provide confirmation within a maximum of 4 weeks as to which claims he intends to proceed with, and provide specification of those claims.

10 40. He acknowledged that this is the "last chance saloon" for the claimant. He does have a disability which makes dealing with the Tribunal challenging for him, but Mr Bathgate also accepted that the claimant's selective approach, alleged by the respondent, requires to be considered by the Tribunal. While criticisms may be laid at the claimant's door, he submitted that we are not at the stage of strike out quite yet, and therefore it would be proportionate to
15 insist that the claimant clarifies which claims he wishes to pursue, and specifies the basis of each of those claims, within 4 weeks under the threat of an Unless Order.

20 41. With regard to the request for a Deposit Order, the claimant is not working, and is living with his partner. He had no details as to what earnings his partner receives, but the claimant is only in receipt of a modest Army pension.

25 42. While Mr Bathgate recognises that some of the claims being made by the claimant are incapable of substantiation on the basis that they do not have any reasonable prospect of success, he does not have instructions from his client to withdraw any of the claims against any of the respondents at this stage, and therefore he confirmed that he was not inviting the Tribunal to strike out any of the claims made, but urging the Tribunal to give the claimant one more chance to put his claim in order.

Respondent's Response

43. I gave Mr McDowall the opportunity to respond to Mr Bathgate's submission, but he advised that his only instructions are to press for strike out of the claims.

Discussion and Decision

5 44. There was a stark contrast between the approaches taken in submission by the claimant and the respondents in this Hearing. The respondents advanced their arguments for strike out forcefully and in considerable detail. The response on behalf of the claimant was essentially a plea for "one last chance" to put the claim in order. Mr Bathgate plainly understood, in a way
10 which the claimant has not hitherto indicated that he does, that the claimant has been given very considerable latitude in responding to the Tribunal's Orders, over a long period of time.

15 45. I do not consider this to be a complex decision. The claimant is plainly in default of the Orders issued to him requiring further and better particulars of his claim. His attitude to the proceedings is unsatisfactory, and to some extent suggests a degree of arrogance on his part. The clear pattern of communication from the claimant exposes his habit of putting forward regular excuses for his failure to comply with Orders while at the same time demonstrating his ability to engage with the Tribunal and Employment
20 Appeal Tribunal in complex issues such as the interim relief application.

25 46. I made clear in the course of the hearing that I considered the claimant's conduct in relation to the postponement of 2 February 2021 to be completely unsatisfactory, and that any repeat of such conduct would be met with a strong response by the Tribunal. The claimant was asked for evidence of his laryngitis, the reason he clearly gave for his incapacity for the hearing, but provided an outdated and irrelevant letter from the Occupational Health service which did not have any bearing on his request for postponement. Despite several further requests, no response was forthcoming from the claimant.

30 47. This is highly unsatisfactory, and it is plain that the claimant has not properly engaged with the Tribunal on this matter, giving rise to a degree of

suspicion that what he said to the Tribunal at the time may not have been entirely reliable. I regard the matter, of itself, as closed and do not wish to reopen it, though of course it is an issue which forms part of the wider application for strike out by the respondent and in that context still has relevance.

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48. However, in light of the very candid and effective submissions by Mr Bathgate on the claimant's behalf, I am prepared to grant him the final chance which his solicitor implored me to give him. This is not to say that I found Mr McDowall's submission unpersuasive: in fact, it was very clear, precise, exhaustive and persuasive in demonstrating that the claimant's conduct of these proceedings has been unhelpful to the Tribunal.

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49. What I am prepared to do, now, is to accede to the request of Mr Bathgate to issue an Unless Order to the claimant, with a deadline of 28 days from the date of this Note, to allow him the final opportunity not only to clarify his claims but also to give the most urgent consideration to narrowing down the issues by withdrawing claims which are unsustainable, and reducing the number of respondents.

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50. The claimant should be warned that he must comply with the Unless Order, and that its very nature means that a failure to comply with it will result in the dismissal of his claims. He should also understand that even if he were to clarify his claims, and possibly even reduce the number of respondents, the Tribunal may still consider that the claims have not been satisfactorily pled and take action on them at that stage.

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51. In addition, it is important for the claimant to understand that I find the respondents' submissions that the claims as directed against the individual respondents are lacking in clarity and specification, and that given the additional stress which accrues to individual employees and managers who are named as respondents in legal proceedings I am minded to grant Mr McDowall's application to strike out the claims as against these individuals unless they are either withdrawn or properly clarified.

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52. The Order is appended to this Note.

53. I wish to record my gratitude to both Mr McDowall and Mr Bathgate for their most helpful and articulate submissions in this difficult and tangled matter.

CASE MANAGEMENT ORDER

Under Rule 29 of the Employment Tribunals Rules of Procedure 2013, the
5 Employment Judge now issues the following case management orders

1. No later than 28 days from the date of this Note, the claimant shall provide to the respondents, with a copy to the Tribunal, further and better particulars of the claims which he seeks to advance under the Equality Act 2010, and in particular, details of:

- 10 a. The unlawful act complained of;
- b. The date upon which that act allegedly took place;
- c. The person or persons guilty of the alleged act;
- d. The circumstances in which the alleged act occurred;
- e. The basis upon which the claimant asserts that it was an act of
15 unlawful discrimination; and
- f. The provision or provisions of the Equality Act 2010 under which the complaint is made.

2. No later than 28 days from the date of this Note, the claimant shall confirm in writing to the Tribunal, with a copy to the respondents,
20 whether he continues to insist upon his claims insofar as directed against the individual respondents named in the claim; and if he does, the precise basis upon which he does so, with full specification as required in paragraph 1.

3. No later than 28 days from the date of this Note, the claimant must
25 provide, or prove to the Tribunal that he has already provided, compliance with the Order issued by the Employment Tribunal dated 12 March 2021 and produced at pp337 & 338 of the bundle of productions in this Hearing.

UNLESS THIS ORDER IS COMPLIED WITH BY THE DATE SPECIFIED, THE CLAIM SHALL BE DISMISSED ON THE DATE OF NON COMPLIANCE WITHOUT FURTHER ORDER.

5 You may make an application under Rule 29 for this Order 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 and notified them that they should provide
10 the Tribunal with any objections to the application as soon as possible.

 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
15 default.

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

20 Any person who without reasonable excuse fails to comply with this Order shall be liable on summary conviction to a fine of £1,000.00.

25 Employment Judge: Murdo Macleod
 Date of Judgment: 24 August 2021
 Entered in register: 08 September 2021
 and copied to parties