RESERVED **Case No: 2412054/2021**
2402055/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr M Barlow

Respondent 1: Applearn Limited
Respondent 2: Applearn International Limited

HELD AT: Liverpool **ON:** 18 & 20 October 2021 (in chambers)

BEFORE: Employment Judge Shotter (sitting alone by CVP)

REPRESENTATION:

Claimant: Mr Boyd, counsel
Respondents 1 & 2: Mr Harris, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is:

1. The response is not struck out against the first respondent under Rule 37(1) of the Employment Tribunals Rules of Procedure 2013, and the claimant's application dismissed.

2. All claims are dismissed on withdrawal against the second respondent, by consent.

REASONS

1. This has been a remote hearing by video which has been consented to by the parties. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

2. The claimant seeks to strike out the Grounds of Resistance pursuant to Rule 37 of the Employment Tribunal Rules on the basis that the Grounds are vexatious and/or have no reasonable prospect of success. The application is set out in a letter dated 26 May 2021, which was responded to in a letter setting out the respondent's objections dated 15 June 2021, this exchange of correspondence was followed by a further exchange of party to party correspondence set out in the bundle, that I have read, and a Skeleton Argument provided by Mr Boyd, together with copies of case law relied upon.

3. Mr Boyd confirmed this application is now solely aimed at the first respondent's assertion that it carried out a fair dismissal.

4. I have been taken to the relevant pages in the bundle by both parties, and do not intend to set out the documents in any detail, with the exception of the key documents which let me to conclude this application. That does not mean to say the other documents have not been considered, however I am not conducting a mini-trial and had the legal principles in mind when considering the documentary evidence before me.

5. No oral evidence was heard on the facts in this case, and I have not made any determination that could tie the judge's hands at the liability hearing. Given my reservations about the fairness of the respondent's dismissal referred to below, I should not be the judge listed to hear the case dealing with liability.

The bundle

6. The Tribunal has before it a bundle of documents totalling 170 pages which included documents provided by both parties in respect of this application. This is an important point as the respondents' solicitors and Mr Harris indicated there were additional documents which had not been produced evidencing the claimant's alleged underperformance. These were not before me; the respondents had the opportunity to rely on these documents and either they do not exist or the respondent chose not to include them in the bundle. I take Mr Harris's point that witnesses will give oral evidence on the alleged underperformance and the procedure followed; and have dealt with this below.

The claim

7. By a claim form received on the 19 February 2021 following ACAS early conciliation that took place between 23 December 2020 to 2 February 2021, the claimant claims unfair dismissal, wrongful dismissal (notice pay) and a claim brought under section 1 of the Employment Rights Act 1996 ("ERA") for failure to provide a written statement of terms and conditions. All that remains is the unfair dismissal claim as I have, in a separate judgment, dismissed on withdrawal by the claimant the wrongful dismissal claim and section 1 ERA claim. I have also dismissed on withdrawal by the claimant all claims against the second respondent, who is not the claimant's employer.

8. Mr Boyd sets out the basis of the claimant's claim in the first 5 paragraphs of his Skeleton Argument. Essentially, the claimant was the founder and CEO of both respondents. He was also statutory director of both companies with a 20.8%

shareholding in the second respondent. K1 Investment Management LLC ("K1") purchased 30.8% of the shares in the second respondent in August 2019, and appointed new directors to the Board. On 5th December 2020, Mr. Michael Velcich (employed by 2nd respondent) communicated to the claimant that K1 had lost confidence in him and wanted him to step aside as CEO. The claimant was invited to a meeting of the Board of Directors on 11th December 2020 "to discuss and resolve the management team going forward into 2021." That meeting was instead adjourned to 18th December 2020. The claimant did not attend because he took the view there was a conspiracy to terminate his employment and dismissal was a fait accompli. The claimant informed the respondents of this by email sent before the meeting.

9. On the 18 December Mr. Michael Velcich emailed the claimant dismissing him. He referred to a previous board meeting at which he had allegedly explained to the claimant that his performance had not been to the standard required and as a result the board had lost trust and confidence in him. There was no such meeting, and the claimant takes the view that his dismissal had already been decided on and it was a foregone conclusion before the 18 December 2020 board meeting he did not attend. Further, the claimant was not informed of his right to an appeal, and he did not appeal.

10. The claimant pleads that the impact of the world economy affected the trading position of the first respondent, steps were being taken to address this and the adverse impact of the Covid19 pandemic. The claimant alleges that at the same time as his dismissal his two sons were also dismissed on "spurious reasons" of redundancy.

11. The claimant's sons Mark and Andrew Barlow issued separate proceedings and in a letter dated the 17 June 2021 sent by the Tribunal, the parties where informed that all the claims should be considered together because they appear to give rise to common or related issues of law or fact. Both respondents objected to consolidating the three complaints, and it was agreed at this preliminary hearing that (a) if I were to find the respondent had no reasonable prospect of success in its defence that claimant had not been procedurally and/or substantively dismissed it would not be appropriate for the claims to be consolidated as the claimant's case would proceed to remedy and his son's cases to a liability hearing, and (b) if the claimant's application does not succeed the respondent will look to reaching an agreement on consolidation once Mr Harris has taken instructions and in the event of an agreement not being reached, the issue will be dealt with at the second preliminary hearing. As the claim is proceeding to a liability hearing to determine unfair dismissal the respondent will set out cogent reasons for why the proceedings should not be joined and heard together.

12. The respondents deny the claimant was unfairly dismissed, maintaining the claimant was dismissed for performance issues. The claimant was employed as CEO from 3 May 2011 under a service agreement, until termination on performance grounds on 18 December 2020. The first respondent alleges the claimant's performance caused increasing concern during the third quarter of 2020 and the claimant was made aware of this in management and board meetings. The claimant disputes that this was the case and evidence will need to be heard to determine the matter, which is key to the issue of fairness.

13. As a result of the claimant's continual performance failings the respondent pleads that it lost trust and confidence in him, and a board meeting was convened on the 11

December 2020 which the claimant was unable to attend due to IT issues. The claimant confirmed he would not be attending the reconvened meeting on the 18 December 2020 which went ahead in his absence, at which members of the second respondent's board unanimously decided the claimant should be dismissed. The claimant's employment was terminated in the letter of 18 December 2020 and he was paid three months in lieu of notice. It is notable that the claimant's claim for wrongful dismissal was pleaded and has since been dismissed.

14. At paragraph 24 of the Grounds of Resistance it is pleaded in response to the claimant's claim that he was given no right of appeal to terminate his employment, the claimant did not have a contractual right of appeal against his dismissal and given the breakdown of trust and confidence, even if he had been "afforded the right of appeal, the respondents do not consider that this would have changed the ultimate outcome."

15. In a letter dated 12 July 2021 written by the claimant's solicitors, an application for order of disclosure of documents was requested against the respondents which supported their defence that a fair procedure was followed, on the basis that the respondent was refusing to provide this evidence for the preliminary hearing. The application included the following observations; "They are by their own account withholding evidence that they have asserted is relevant to their client's defence; they are seeking to hide behind the absence to date of formal disclosure orders…they are seeking to take unconscionable advantage of the huge delay in dealing with claims occasioned by the pandemic and are failing to assist the Tribunal with avoiding such delay…if the respondents' have evidence that supports their insistence there is a triable issue on whether a fair procedure was followed, it will save the time and expense of the application to strike pout the defence if they give early disclosure of the same."

16. In a letter dated 3 August 2021 from the Tribunal dealing with a number of matters including the respondent's disclosure for the preliminary hearing, EJ Holmes directed no order for disclosure is made "if the respondent does not wish to disclose documents which it claims will show its response has merit, that is a matter for the respondent. There may, however, be costs consequences if the respondent gives no, or late disclosure, ahead of the strike out application".

17. Apart from the board meeting of 18 December 2020, no other board or management meetings have been included in the bundle by the respondent, and nor has any contemporaneous documentary evidence been provided concerning the fair process the first respondent maintains it followed in respect of performance managing the claimant prior to dismissal..

<u>Written and oral submissions made on behalf of the claimant.</u>

18. Mr Boyd made the following oral and written submissions:

18.1 The benchmark in the second part of rule 37(1)(a) is clearly worded. What is required is that "all or part of a claim or response" has <u>no</u> prospect of success. It is accepted that on its face, the benchmark is a high one.

18.2 The Tribunal is able to strike out the Response, or to strike out that part of the Response which alleges that the dismissal was a fair one, and should do on the basis that:

18.2.1 No apparent investigation was undertaken or allegations of underperformance set out for the claimant was able to meaningfully respond to. A predetermined decision does not provide this.

18.2.2 The claimant had not been offered any kind of representation at the meeting on 18th December 2020. While he did not in fact attend, the point remains;

18.2.3 Given that claimant had not persistently failed to attend a meeting regarding his future (see ACAS code) no consideration was apparently given to seeking the claimant's s attendance or his input by some other means (in writing etc.);

18.2.4 There was no apparent discussion regarding the alleged failures in performance beyond a bald assertion that "performance has not been to the standard required, particularly in relation to company results and execution of management responsibilities to create alignment within the executive and management teams". The Board meeting was on its face a summary process;

18.2.5 No sanction other than dismissal was apparently considered, and no justification for termination (as opposed, for example, to some form of warning) was given;

18.2.6 The dismissal letter was clearly written in advance of the meeting on 18th December 2020 when it is alleged a decision was taken.

18.2.7 No right of appeal was given. The respondent's answer to that is that "the Claimant did not have a contractual right of appeal." That is a bogus point for two reasons. Firstly, the claimant did not have a contract of employment according to the Response. Secondly, the claimant does not understand the law to be that an employer can contract out of providing the employee with a right of appeal. The failure to provide a right of appeal is contrary to the ACAS code and in and of itself would render the dismissal unfair;

18.2.8 The respondent states that an appeal would not have changed the outcome that rather makes claimant's 's point as to the overall unfairness. If, absent any pleaded clarity as to the nature of the allegations of poor performance against the claimant, or at least in the absence of any response from him, Limited/International are in a position to say, in effect, "whatever he would have said would not have made a difference", it is hard to see how the process could possibly be seen to be fair.

18.2.9 While the proceedings are at a relatively early stage, it is appreciated that the Tribunal may not be in a position to determine that the dismissal was *substantively* unfair, in the sense that the real reason for dismissal was something other than capability.

18.2.10 No documents have been disclosed by the respondent's advisers for the purposes of the application to support the assertion that the dismissal was

procedurally fair beyond that which is in the hearing bundle. The claimant would suggest that this casts significant doubt on the substantive fairness of the dismissal – i.e. it suggests that Limited/International are not in a position to make good the contention that there was a genuine view of a lack of capability on the part of C.

Oral submissions made on behalf of the respondent by Mr Harris and the letter dated 8 June 2021.

19 Mr Harris relying on the case law referenced below, submitted in order for the defence to be deemed "vexatious" it need not be pursued not with the expectation of success but to harass the other side for an improper purpose, and is anything that is an "abuse of process."

20 Striking out is a draconical step and should only be exercised in exceptional cases; Mbusia v Cygnet Healthcare Ltd EAT 0119/18.

21 There are disputed facts in this case, and if the question of whether a claim has reasonable prospects of success turns on the factual issues that are disputed, then it is highly unlikely a strike out will be appropriate: Cox v Adecco and ors EAT 0339/19.

22 It is unfair to strike out a claim where there are crucial facts in dispute and there has been no opportunity for the evidence in relation to those facts to be considered: Balls v Downham Market high School and College UKEAT/0343/10/DM.

23 Almost all unfair dismissal claims are fact sensitive and that where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances: Tayside Public Transport Co Ltd. v Reilly [2012] IRLR 755, Ct Sess (Inner House). The present case was not one of those exceptional cases.

Law: strike out

24 The Tribunal's power to strike out the Claim is set out in Employment Tribunals Rules of Procedure 2013 Rule 37(1) that "*(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 … has been scandalous, unreasonable or vexatious*".

25 Mr Harris has set out case law regarding section 37 applications not being appropriate in cases where there are facts which are in dispute The claimant does not dispute the jurisprudence.

26 Mr Harris referred to the case law cited in Osborne Clarke's letter of 8 June 2021; ET Marler Ltd v Robertson [1974] ICR 72 NIRC and Attorney General v Barker [2000] 1 FLR 759, QBD (DivCt).

27 Taking into account the well-known case of Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330, the Court of Appeal held, as a general principle, cases should not be struck out on the ground of no reasonable prospect of success when the central

facts are in dispute. On a striking-out application (as opposed to a hearing on the merits), the Tribunal is in no position to conduct a mini-trial, with the result that it is only in an exceptional case that it will be appropriate to strike out a claim on this ground where the issue to be decided is dependent on conflicting evidence. Such an exception might be where there is no real substance in the factual assertions made, particularly if contradicted by contemporary documents or, as it was put in Ezsias, where the facts sought to be established by the claimant were 'totally and inexplicably inconsistent with the undisputed contemporaneous documentation' (para 29, per Maurice Kay LJ). I had Ezsias in mind when reconciling the lack of documentation relied upon by the respondent, who maintained evidence would be given by witnesses and documents disclosed in accordance with the usual case management orders, concluding there was no inexplicable inconsistencies with the contemporaneous documents.

Law: unfair dismissal

28 The legal principles are in agreement and set out in Mr Boyd's Skeleton which I have reproduced for ease of reference. I have also gone back to first principles and reminded myself of section 94 and 98 of the ERA which were borne in mind when considering this application.

General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show —

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

29 Section 94(1) of the Employment Rights Act 1996 ("the 1996 Act") provides that an employee has the right not to be unfairly dismissed by his employer. Section 98(1) of the 1996 Act provides that in determining whether the dismissal is fair or unfair, it is for the employer to show the reasons for the dismissal, and that it is a reason falling within section 98 (2) of the 1996 Act. Section 98(2) includes capability of the employee as being a potentially fair reason for dismissal.

30 Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

31 The question for the Tribunal is the reasonableness of the decision to dismiss in the circumstances of the case, having regard to equity and the substantial merits of the case. The Tribunal will not substitute its own view for that of the respondent. In order for the dismissal to be fair, all that is required is that it falls within the band of reasonable responses open to employer. It is necessary to apply the objective standards of the

reasonable employer – the "band of reasonable responses" test – to all aspects of the question of whether the employee had been fairly dismissed, including whether the dismissal of an employee was reasonable in all the circumstances of the case.

32 The test remains whether the dismissal was within the range of reasonable responses and whether a fair procedure was followed. Section 98 (4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

33 The law relating to performance/capability dismissals as set out by Mr Boyd, for which I was grateful:

1.1 With regard to the question of substantive fairness, the employer needs to show evidence of poor performance and show that that was the reason for dismissal: see Alisdair v Taylor *[1978] ICR 445, CA* (@ 453D);

1.2 In terms of procedural factors, it has long been established that employers should follow a fair procedure before dismissing an employee for incapability: Lewis Shops Group v Wiggins *[1973] ICR 335* (@ 338A);

1.3 A fair dismissal for performance capability, except in exceptional circumstances will involve the following basic steps:

(i) Proper investigation/appraisal of the employee's performance and identification of the problem(s);
(ii) Warning of the consequences of failing to improve; and
(iii) A reasonable chance to improve.
See James v Waltham Holy Cross UDC [1973] ICR 398 (@404E-G);

1.4 The ACAS code should be taken into account in the specific circumstances of this performance/capability case, as a factor when considering the reasonableness of the dismissal is made clear by *Holmes v QinetiQ Ltd [2016] ICR 1016* (@ 1020G-H);

1.5 In terms of the various tenets in the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015), the following are relevant:

(i) Employer to carry out investigation, to inform the employee of the basis of the problem, to allow the employee to put their case, to allow the employee to be accompanied to any formal disciplinary or grievance meeting and to allow an appeal against any formal decision made;
(ii) Where an employee is found to be performing unsatisfactorily it is usual to give the employee a written warning;
(iii) If the unsatisfactory performance is sufficiently serious, it may be appropriate to move directly to a final written warning;

1.6 Where an employee is persistently unable or unwilling to attend a disciplinary meeting without good cause, the employer should make a decision on the evidence available

Conclusion

Rule 37(1)(a) – scandalous, vexatious or has no reasonable prospects of success

34 A Tribunal should be slow to strike out a claim where in the word of Maurice Kay LJ in Ezsias, there is 'a crucial core of disputed facts' that was 'not susceptible to determination otherwise than by hearing and evaluating the evidence.' This is one of those cases.

35 Mr Boyd in oral submissions accepted that where the facts are in dispute there should be no strike out; the claimant "hotly disputes" the respondent's criticism of his performance but there can be no dispute about procedure. At the very least, there are facts in dispute about performance and the respondent's procedure for dealing with it i.e. the claimant maintains there was one meeting on 5 December 2020, the respondent a number of board an management meetings.

36 There was no appeal. At first blush Mr Boyd's argument regarding the procedural unfairness of the dismissal was persuasive bearing in mind the distinct possibility that the claimant's dismissal may have been pre-determined with reference to the documents in the bundle, particularly the instruction to payroll on 18 December 2020 at 10.01 to pay the claimant up to "today's date" and the email response stating that this had been carried out. The email sent on 18 December 2020 at 10.25 confirmed the claimant's P.45 was to be held back until "early next week" as there was a board meeting "later today," and the minutes of the board meeting held at 3pm on 18 December 2020 terminating the claimant's employment as CEO took place after these emails were sent. The termination letter dated 18 December 2020 is final with no reference to any right of an appeal. The claimant, who chose not to attend, did not appeal, and as pleaded at paragraph 24 of the Grounds of Resistance in response to the claimant's claim that he was given no right of appeal, the claimant did not have a contractual right of appeal against his dismissal and given the breakdown of trust and confidence, even if he had been "afforded the right of appeal, the respondents do not consider that this would have changed the ultimate outcome." Cumulatively, all of these matters strongly point to possibility that the dismissal was both substantively and procedurally unfair and in breach of the ACAS Code, and it is for this reason I have made it clear I should be the judge making a decision on liability taking into account fairness to both parties, particularly the respondent.

37 I am mindful of the fact that there is a core of disputed facts concerning why the claimant was dismissed; was the reason for the dismissal because "performance has not been to the standard required," had the respondent's trust and confidence in the claimant broken down and what was the effect of the respondent failing to offer the claimant an appeal? All of these issues can only be decided after the evidence has been heard in full.

38 Jurisprudence reflects that employers should follow a fair procedure before dismissing an employee for incapability. Mr Boyd has referred me to a number of cases cited above of which I am cognisant. The revised Acas Code of Practice on Disciplinary and Grievance Procedures (2015) ('the Acas Code') sets out principles for handling disciplinary and grievance procedures in the workplace with which employers and employees are expected to comply. The Code is relevant to the question of liability and will be taken into account by a Tribunal when determining the reasonableness of a dismissal, and confirms 'disciplinary situations' include 'poor performance' where there could be 'fault' on the part of the employee.

39 The Acas Code sets out one disciplinary procedure to deal with both 'conduct' and 'poor performance'. A failure to the ACAS procedure to the letter will not necessarily render a dismissal unfair. The Acas Code of Practice recommends that employees be provided with an opportunity to appeal and an unreasonable failure to provide an appeal risks incurring liability. The appeal process (or lack of) plays a part in the overall determination of fairness by the Tribunal, and in the particular circumstances of this case as explored in the pleadings and documents, I am unable to conclude the respondent's defence to a procedural and/or substantive dismissal had no reasonable prospects of success, which is a high hurdle.

40 It may be difficult for the respondent to persuade a judge hearing this case that the dismissal without an opportunity to appeal fell within the range of reasonable responses, but that does not mean this issue should not go forward to a liability hearing.

41 There may be some situations where unfairness in the appeal will not always or inevitably lead to a finding of unfair dismissal. It is a relevant matter to be taken into account when accessing reasonableness. Lack of an appeal is not always a strike out blow. There may be rare situations where an opportunity to appeal is not necessary and where the lack of any further meeting or appeal may not render the dismissal unfair, for example, when an employer has lost trust and confidence in the capability/performance of its CEO who is then dismissed by a unanimous decision taken at board level to prevent further financial damage to a company facing a crisis i.e. Covid19 Pandemic, a failure to offer the employee an appeal may not be held to be an unreasonable failure resulting in either a substantively or procedurally unfair dismissal, especially if the offer of an appeal would have made no difference to the final outcome bearing in mind the trust and confidence that had been lost.

42 Striking out the Grounds of Response in whole or in part is draconian, and a costs application should the respondent fail to defend the claim, may be a fairer way of dealing with the case. The success or otherwise of the respondent's defence will depend on the Tribunal hearing all of the evidence, dealing with the conflicts and disputed core facts before applying the law and concluding whether the lack of procedure described by Mr Boyd so ably, including a lack of an appeal, resulted in an unfair dismissal with arguments on the Polkey "no difference rule" and contributory fault to be decided by the judge who has the whole factual matrix before him or her, and not the snapshot I am dealing with today at this preliminary hearing. Mr Harris in oral submissions described this case as fact sensitive, and I agree with his assessment that a strike out should only take place in exceptional circumstances and this case does not fall within that definition. I also agree with Mr Harris that the Tribunal hearing this case at liability stage will need to consider both the procedural and substantive fairness of the

dismissal. It is central to the claimant's case that a conspiracy against him had taken place, and an exploration into the procedural deficiencies of the dismissal (if any) may (I put it no higher than that) point to the conspiracy alleged seen in context and against the backdrop of the facts as found by the judge.

43 In conclusion, to establish whether the claimant's dismissal was not sufficient for the purpose of S.98(4) will require all of the evidence to be heard before a determination can be made. It cannot be said that the respondent's defence to the unfair dismissal claim has no reasonable prospect of success or that the manner in which the proceedings have been conducted by or on behalf of the claimant has been scandalous, unreasonable or vexatious.

44 The response is not struck out Rule 37(1) of the Employment Tribunals Rules of Procedure 2013 and the claimant's application dismissed.

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Employment Judge Shotter

Date: 21 October 2021

Judgment and reasons SENT TO THE PARTIES ON

Date: 26 October 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS