



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4108417/2021(P)

Held on 21 October 2021

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Employment Judge J M Hendry

Mr N Hearn

**Claimant
In Person**

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20 **Eday Community Enterprise Ltd**

**Respondent
Represented by
Ms P Cunningham,
Peninsula Business
Services Limited**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The claimant's application for a Strike-Out Order not being well founded is refused.

REASONS

1. The claimant in his ET1 sought a finding that he had been unfairly dismissed
35 by the respondent organisation. The respondent denied that they had unfairly
dismissed the claimant contending that he had been fairly dismissed from his
post as a Manager because of redundancy. The respondent is a community
enterprise who are managed by a Management Committee.

E.T. Z4 (WR)

2. The claimant lodged his application for unfair dismissal on 17 March 2021. The ET3 was received by the Tribunal Office in Glasgow on 7 May 2021. The application was refused being out of time. That decision was taken by Judge McManus and intimated to the respondent's representatives on 11 May 2021.
5 The application was resubmitted on 14 May together with an application for reconsideration of the decision to reject and an application and for an extension of time. The application was made under Rule 71 of the Employment Tribunal Rules and they contended that an application had been made on time on 20 April but due to an error on the e-mail address it was not
10 received by the Employment Tribunal.
3. The respondent's representatives advised that they were unaware of this difficulty until Judge McManus' decision was intimated to them. They contended that this was a minor administrative error. It was explained that no
15 earlier application for an extension had been made because they were unaware of any issue. It was held that it was in accordance with the overriding objective to grant the application. This was intimated on 27 May 2021 to the respondent's representatives.
- 20 4. The case then proceeded to a case management hearing on 23 July which was conducted by Judge Kemp. Following the hearing he prepared a Note which was issued to parties. It was noted by Judge Kemp that the claim was for unfair dismissal under s.94 and s.98(4) of the Employment Rights Act and also in respect of s.100 of the Act. The respondent's representatives sought
25 Better and Further Particulars. The claimant indicated that had he provided a report to Mr R Shaw, the Chairman of the Management Committee on 11 November setting out his health and safety complaints. It was agreed that the case should proceed to a full hearing. Following the hearing before Judge Kemp the Tribunal sought parties' availability to identify dates for a full
30 hearing.
5. One of the Orders made by Judge Kemp was for the preparation of an Inventory of Documents. The claimant e-mailed the Tribunal on 10

September indicating that the respondent's representatives had not complied with the Order which was for the Inventory to be prepared by 3 September. The respondent's representatives e-mailed on 20 September indicating that they had not been in a position to provide the Inventory because further information provided by the claimant in relation to the health and safety aspect of his unfair dismissal complaint had resulted in initial investigations. They made an application to extend the period for 14 days from 20 September indicating that they would hope to produce the bundle by 22 October and exchange Witness Statements by 4 November. The claimant objected to any extension of time by e-mail dated 20 September. He indicated that "another extension" was unreasonable. The respondent's representatives were asked to provide their comments within 7 days. By e-mail they did on 22 September and did so on 27 September objecting to the strike-out application. His position was that the application was "wholly unreasonable" writing:

"The Claimant's assertion that the Respondent is asking for an opportunity to restructure their entire response and evidence submission, giving way to an unfair advantage and potential future unfair advantages is wholly misconceived. Any further response, and additional documents, would not seek to substantially change the Respondent's response. It would simply address the health and safety claim that the Claimant has sought to advance through his further particulars."

6. By early October a hearing had been fixed for the 1, 2, 3 and 4 February.

7. On 23 July the claimant lodged a document headed "Update" which appeared to provide the Management Committee with information including information in relation to health and safety issues.

8. On 22 July the respondent's representatives sought detailed further information from the claimant in relation to the basis of his claim.

9. It is not clear from the file but I suspect that the information provided by the claimant on 23 July headed "Update" document is meant to be his Better and Further Particulars. There is no reference in the file to him responding to the

e-mail from the respondent's representatives on 23 July seeking detailed information in relation to the health and safety/whistleblowing matter.

- 5 10. The respondent's representatives e-mailed the Tribunal on 15 October setting out their opposition in relation to the claimant's strike-out application. They indicated that the respondents were not a traditional employer and the business was a community enterprise run by volunteers. They stated that there was no single point of contact to provide instructions or documents as there would be in a more traditional business. Their main contact appeared
- 10 to be a Mr Shaw who worked away from the Islands for periods. They had provided an amended ET3 Response dealing with the health and safety matters. Their position was that the Response did not substantially alter their defence.

15 **Discussion and Decision**

11. Strike Out is dealt with in Rule 37 of the Employment Tribunal Rules. It sets out the sort of circumstances in which the claim or response can be struck out.
- 20 12. The Tribunal understands the claimant's frustration at the delays in this case but must observe that overall the delays were not, at least in the current climate, substantial. The issues surrounding the original ET3 appear to have been a relatively minor mishap. The case was firmly back on the rails when
- 25 Judge Kemp dealt with it in July.
13. There are grounds for some criticism for both parties. The respondent's representatives should have kept the claimant and the Tribunal abreast of difficulties as they arose and asked for extensions. The claimant did not
- 30 specifically mention s.100 in his ET1 and it is still problematic as to whether or not that section assists him or is engaged. He did not detail his health and safety complains in his ET1 concentrating at that point on the redundancy process. He is of course perfectly entitled to raise health and safety issues as

background and explain why he thought members of the committee were biased in some way against him and seeking his dismissal.

5 14. Nevertheless, looking at the matter in the round there is no firm basis for the strike-out application. Although there is a breach of Judge Kemp's Order. That breach is not significant. It would not be proportionate to strike out the response. It would lead to a windfall for the claimant.

10 15. The purpose of preparing an Inventory or Bundle was to prepare the case for a hearing and that hearing was, at the time of the breach (and still is) , a long way off. There is absolutely no prejudice to the claimant in the Inventory being lodged late. In addition, I have no reason to disbelieve the respondent's explanation for the difficulties they encountered which appear both understandable and reasonable. **Accordingly, an extension will be**
15 **granted to allow them to lodge the Joint Bundle by the 30 November.**

20 16. The claimant hasn't specifically addressed in his correspondence why he believes the ET3 has changed their position. He must understand as I have observed that there is a lack of detail in his ET1 as to how he believes the health and safety matters impacted on the respondent's decision making. Although he submitted a document showing that health and safety issues had been raised by him with the committee he would be wise to address the matters raised by the respondent's representatives in their e-mail of 22 July. He will recall that Judge Kemp noted at the case management hearing that
25 the information that the claimant had given was sufficient to raise this matter but was in the context of discussing case management. I will not make a formal Order for the claimant to do this but he would be wise to work his way through the above noted letter responding to the various issues raised essentially setting out why he thinks health and safety issues impacted on his
30 ultimate redundancy and to lodge the factual basis for these views in written pleadings headed Better and Further Particulars. This will ensure that he has given fair notice of his position in good time prior to any hearing.

Employment Judge J Hendry

Date of Judgement 9 November 2021

5 Date sent to parties 9 November 2021