



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4107637/2021

Held on 10 November 2021

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Employment Judge J M Hendry

Mr A Voinea

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**Claimant
In Person
Interpreter
Mr C Tondor**

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Caledonian Logistics Ltd

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**Respondent
Represented by
Mr P Singh,
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:-

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1. The claimant is allowed to amend his ET1 to include a claim for unfair dismissal.
2. The claim under Section 15 of the Equality Act in relation to non-payment of breaks having no reasonable prospects of success is struck out.
3. The following claims shall proceed to a merits hearing:
 - a) The claim for unfair dismissal.
 - b) The claim that in the light of the claimant's disability and the employer's knowledge at the time whether it was a reasonable adjustment that he should have been allowed to continue as an ARTIC driver on a different route and

E.T. Z4 (WR)

that it is just and equitable for the claim to be heard out of time subject to a deposit order in the sum of £100.

- 5 c) The claim that the claimant was directly discriminated against by the respondent's managers by refusing to pay for his breaks because of his disability having little prospects of success shall be subject to a Deposit Order of £100.

REASONS

- 10 1. The claimant lodged an application with the Employment Tribunal on 12 February 2021. In that application he claimed that he was unfairly dismissed and discriminated against on the grounds of his disability and for "other payments". The claimant at that point had not been dismissed. He e-mailed the Tribunal in Glasgow on 26 February:

15 *"Today at 10.30am I have been dismissed from the company because of the operation. The forklift driver happened in 3 February 2021 and now I'm out of work. Please add this to my case.*

Thank you

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Alfred Voinea"

2. On 24 February he had also written:

25 *"Good Afternoon Judge, I'd like to add another complain(t) about my employee (employer?), they hand over to me a letter that tomorrow 25-02-21 at 13:00 there will be a disciplinary hearing regarding 'my mistakes' from 2020 September till now and they are trying to dismiss me with those issues (a reason to be terminated by contract) which will be unfair dismissal and this action is because I tuck (took) the company in Employment Tribunal and they*
30 *want so I said to put everything together for a reason to be dismissed."*

3. Neither letter was copied to the respondent in terms of the Rules nor unfortunately forwarded to them for comment probably because the ET3 had not yet been lodged.

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4. On 2 March the claimant lodged his Agenda document and in it he indicated that the respondent had failed to make reasonable adjustments, changed his employment contract and taken away his entitlement to paid breaks. They refused to allow him to continue as a lorry driver (“ARTIC” driver) and gave
5 details of his disability which was a birth defect relating to his legs. ARTIC’s or articulated lorries are the largest type of lorry requiring a Heavy Goods Vehicle License to drive.
5. The respondent’s solicitors lodged a response form or ET3 on or about 18
10 March. They opposed the claims. They indicated the claimant had latterly been employed as a warehouse operative and at the time he was submitting his ET1 form he was still employed and that accordingly the claim was invalid. He had been dismissed for gross misconduct. They did not accept the claimant was disabled in terms of the Equality Act. Their position was that the
15 claimant had no basis for a constructive dismissal claim.
6. The case proceeded to a preliminary hearing on 13 April. Unfortunately, the claimant did not have an interpreter at that hearing. The focus of the hearing was whether he was disabled. A Note issued after the hearing records as
20 follows:

25 *“The claimant should consider whether or not he believes the fact he was disabled in some way affected the employer’s attitude to his dismissal as it appears that he tells me there is a long history problems he experienced in the workplace. He explained to me he had problems sweeping up because of his leg problems and he would have to take breaks. This came to the attention of management who were critical of him taking a break. There was also, he said, a difficulty with a customer and overall he believes he was less well treated because of his disability than other employees.*

30 *The claimant will have to prepare Better and Further Particulars setting out the basis on which he believes he was unfairly dismissed and discriminated against. These written statements are called pleadings and must give the other party fair notice of the claimant’s position and what he hopes to prove
35 in evidence. This aspect of his claim will probably have to be treated as an amendment to the original claim if, as it appears, he was dismissed after the claim was lodged.”*

7. Mr Voinea attempted to comply with the Orders and by e-mail of 5 May 2021 gave further information. In these he made reference to his terms and conditions being changed on 8 October 2020 but did not give any background as to how this had occurred. It appears from today's hearing when he was able to speak with the assistance of an Interpreter that the background was that he employed as a "ARTIC driver". He would deliver goods to customer's premise and they would be unloaded by forklift. He had various set deliveries on his 'run'. Because of a problem that had arisen with a particular customer he was taken off these duties and given two options (which he refers to in the Better and Further Particulars) namely to be a class 2 driver or a forklift truck/warehouse operative. He considered that being a Class 2 driver would have caused him problems because of his leg condition. This was because these drivers have to manhandle goods onto and off a rear lift rather than have them taken on and off on pallets as with ARTIC lorries. He reluctantly opted to accept the offer to become a forklift driver/warehouse operative. The claimant had previously made reference to his terms and conditions being changed. It was not clear what the background to this was until the hearing when it became apparent that the company changed his terms and conditions from that of a lorry driver to that of a warehouse operative.
8. A further case management hearing took place on 1 July 2021. At this hearing the claimant was assisted by an interpreter. That hearing focussed on disability status.
9. The claimant wrote again following the hearing on 26 July this time giving more information in relation to his discrimination claim. He gave some further background. He made reference to five claims for discrimination. He made clear that part of the background was that he had been taken off one of the "runs" as an ARTIC driver and thought that because of his disability (he had trouble walking or standing) an appropriate action or adjustment should have been to allow him to carry out different runs as a lorry driver this avoiding the customers he had rowed with.

10. The respondent's solicitors intimated a detailed response to the allegations on 2 August explaining that the claimant had been taken off the route because of rude behaviour to a customer. They had decided not to take disciplinary action but to move him to another role namely that of class 2 vehicle driver or a warehouse operative. He ultimately took the latter option.

11. A further case management hearing took place on 2 September to deal with the respondent's application on 4 August for strike out. At that hearing today's hearing was arranged to deal with strike-out/deposit order.

Strike Out Application

12. When the hearing started I advised Mr Singh that I had come across the earlier correspondence from the claimant seeking to amend his ET1 at an early stage. This had been lost sight of.

13. Mr Singh spoke briefly and to the point about the basis for strike out/deposit orders referring the Tribunal to the authorities cited in the Skeleton Argument. The application for strike-out under Rule 37 was on the basis that the claim had no reasonable prospects of success due to a lack of jurisdiction as the unfair dismissal claim was inept. It was also argued that the direct discrimination claim should be struck out as having no reasonable prospects of success for non-compliance with an Order of the Tribunal (through failing to give sufficient detail). The indirect discrimination claim should be struck along with the claim for discrimination arising from disability under s.15 of the Equality Act on the same grounds. The claimant's Better and Further Particulars signed on 26 July were still lacking in specification.

Breach of Order

14. In Mr Singh's submission the Order of the Tribunal to prepare Better and Further Particulars had not been complied with. This was the Order made

following the preliminary hearing on 13 April for failure to provide specification of the claim.

15. The respondent's agents had helpfully sent a copy of their written submissions to the claimant in good time prior to the hearing to allow him an opportunity to consider these. They also lodged an Inventory of Productions which contained some of the correspondence between the respondent and the claimant which gave further background to the Tribunal.
16. Mr Singh's submissions dealt with the various claims in order. In relation to unfair dismissal there was nothing in the ET1 that gave the respondent's notice of the claimant's position nor did the Better and Further Particulars assist. He took the Tribunal though these. The claimant was in breach of the Order to give the basis of his unfair dismissal claim. There was actually no complaint of unfair dismissal pled. Mr Singh then took me through the procedural history of the matter. Disability status had been conceded in July. He made reference to the claimant's e-mail on 26 July. Even if it was treated as Better and Further Particulars it wasn't in any way clear why the dismissal was unfair. He pointed out that July was some months following the original Orders made in April. There was simply a lack of specification as to how the claimant believed the dismissal was unfair.
17. Mr Singh then moved on to consider the various disability discrimination claims essentially making the same arguments that the pleadings were insufficient. They did not say how these claims arose. The claimant's own position was that this issue may have arisen in September/October leaving aside the fact that it was not clear what the reasonable adjustments were meant to be they were time-barred. In addition, there was no comparator given in relation to any indirect discrimination claim nor was any PCP identified. There was no basis to show unfavourable treatment arising from disability discrimination. Mr Singh's position was that the claim should be struck out. He appreciated that the Tribunal should be slow to strike-out such claims. He referred to the authorities set out in the strike-out application. In

the event the claims are not struck out the claimant should be given a deposit order. These proceedings were he said becoming burdensome for the respondent company.

5 18. We then went on to discuss deposit orders in general. I explained to the claimant what was involved in these. Mr Singh made reference to the case of **Hemdan v Ms Ishmail and Another UKEAT/0021/16/DM**. The claimant indicated that he was single. He worked part-time through an agency. He was earning £430 and £450 per week.

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19. I then turned to the claimant to ascertain his position. It had become evident that the claimant's understanding of matters had been greatly assisted by the services of the Interpreter. I told the claimant that I did not expect him to provide me with any detailed legal submissions unless he had prepared some
15 but I asked him to take me through the various claims. He then with the assistance of the Interpreter explained what his position was. In passing I would observe that the claimant's command of English although no doubt adequate for everyday use did not seem to have allowed him to grasp the detail much of the written documentation.

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Disposal

20. I was not persuaded that the claimant was intentionally in breach of the order to provide better specification of his claims. He tried to comply. I had formed
25 the impression that the claimant's command of English was not as good as he was prepared to admit and I wondered if he had fully understood the Notes and other correspondence. In addition, as a party litigant he would have found it difficult to know what the different legal claims and issues were even if English was his first language. In the whole circumstances here it would be
30 disproportionate to strike out the claims on this basis. The respondent sought under Regulation 37 of the Employment Tribunals Rules of Procedure 2013 a strike out of the claim on the basis that it had no reasonable prospects of

success. The powers of the Tribunal are set out in that Rule which is in the following terms:

5 “37.—(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;*

10 (b)*that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*

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

15 (d)*that it has not been actively pursued;*

(e)*that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).*

20 (2) *A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.”*

21. It has been observed that the power of strike out is a draconian one and could only be exercised in rare circumstances. The effect of a successful strike out application would be to prevent a party proceeding to a hearing and leading
25 evidence in relation to the merits of their claim. (**Balls v Downham Market High School & College [2011] IRLR 217 EAT**)

22. As a general principle discrimination cases should not be struck out except in very clear circumstances and the cases in which such claims are struck out before the full facts could be established are rare (**Chandhok & others v Tirkey [2015] IRLR 195 EAT**).

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23. For the purposes of Rule 37(1)(a) a vexatious claim has been described as one that is not pursued with the expectation of success but to harass the other side out of some improper motive. Vexatious proceedings are those that have little or no basis in law and where the intention of the proceedings or their
35 effect is to subject the respondent to inconvenience, harassment or expense out of all proportion to any likely gain. Such behaviour involves an abuse of process (**Attorney General v Barker [2000] FLR 759**).

Application for Deposit Order

24. In the alternative Mr Singh submitted that the claims have little reasonable
5 prospect of success and that a Deposit Order should be made if the case is
not struck out. The test is not as rigorous as “no reasonable prospect of
success”. The Tribunal’s power to order a Deposit Order of up to £1000 for
each specific allegation or argument (**Doran v Department of Work and
Pensions UKEAT ES/0017/14, Van Rensburg v The Royal Borough of
10 Kingston Upon Thames and others UKEAT/0096/07 and UKEAT/0095/07,
Wright v Nipponkoa Insurance (Europe) Ltd UKEAT/0133/14.**
25. Mr Singh had referred to Rules 37 and 39 in his submissions. He accepted
15 that strike out was a draconian power that should be exercised in limited
circumstances. His position in essence was that the claimant had been given
enough opportunity to state valid claims.
26. In relation to unfair dismissal it seems that the claimant accepted that there
20 had been some difficulty with one of the respondent’s customers and had been
moved to another job. This had led to him being taken off that particular “run”.
His position was that he should have been put on a different “run” as an ARTIC
driver. He felt pressurised in accepting an offer to work in the warehouse
(nevertheless he did accept it). He told me about the attempts as he saw it to
25 change his terms and conditions. I concluded after we looked at the
correspondence he had with his employers over this issue that there might
have been a misunderstanding or failure of communication between the
claimant and his employers.
27. It was on 8 January that the respondent’s managers were, he believed,
30 attempting to make his breaks unpaid. The claimant indicated that other
warehouse operatives were entitled to paid breaks so it wasn’t a question of

bringing his terms and conditions into line with theirs. He felt singled out. This resulted in a grievance being raised him. The outcome of the grievance was that his breaks were to be unpaid. The employers accepted that there were periods when he was paid incorrectly for breaks. He was not asked to repay these. The employers wrote:

“There was no aim to oust you from your role, the unpaid breaks role, otherwise all other staff and hourly paid employees and workers.

- *There can be no argument there is a discriminatory element to the non-payment of your break times.”*

28. The claimant has stated that the problem over breaks related to his disability for example being disadvantaged because he must take more breaks because of his leg condition. After discussing the matter with Mr Voinea it appeared that his position amounted to this. He had been dismissed for driving his forklift truck in the forward position with his view obscured when driving into the warehouse rather than reverse in. He accepted they should not have done this and he accepted it was bad practice but he could see “enough”. However, all the forklift drivers did the same he said. Management were aware of this. He was spotted by Ms Bremner, the new manager doing this. It was some two or three weeks later before he was dismissed. His view was that if the matter was serious he would have been suspended at that point. I cautioned him that there might be a number of explanations why he was not immediately suspended and he should not rely too heavily on this matter. He also believed that the company were trying to get rid of him because of his disability which made his less useful as a driver (the claimant did not mention that in his previous particulars he made reference to the employers complaining about him taking breaks because his legs were sore when working as a warehouse operative).

29. The claimant believes his dismissal was unfair because he thinks he was treated more harshly than other employees because the employers, he believes, wanted to terminate his employment because he was less able (took

more breaks when sweeping up etc) than others. His position was that the incident he was dismissed for was not serious enough to justify dismissing him (outwith the band of reasonable responses) and that others had breached the rule about driving in this way but had not been punished. (He asked for the CCTV to be retained showing this). The claimant has an arguable case although not an easy position to prove but this shall proceed to a hearing. I do not accept that the tests of either no reasonable prospects or little reasonable prospects are met.

10 30. We then worked our way through principally the claimant's particulars of the 26 July. The claimant's first claim for discrimination for a failure to make reasonable adjustments for putting him on a different "run" and only giving him the options of a class 2 job or warehouse job. Disability is somewhere in the background and it is not clear if the claimant's medical condition was considered or it's impact discussed when considering the two options he was given. It seems clear that the claimant was taken off the ARTIC job because he had difficulties with a client. There was no indication that disability played some direct part in this thought process. The claimant said that because of his disability he should have been kept as an ARTIC truck driver because his disability cause him problems if he was deployed either as a class 2 driver and a warehouse operative. This was not particularly clear from some of his papers. There were, however, better and further particulars of 26 July which say:

25 *"Now we can see clearly what the both the clipboard said the same thing that I can do/suitable more driving than physical work or being a warehouse worker."*

30 31. In other words, he was saying that the other two jobs were less suitable for him because of his disability. It may be that it was not practicable to put the claimant on another run or that the employers felt it was unsafe to do so given the problems that had arisen. It is not clear whether the respondent's managers took the claimant's medical condition into account at all when offering him the other two jobs. In relation to the change from ARTIC truck

driver to warehouse man the claimant's claims for disability discrimination appear time barred. That matter is best dealt with when hearing the merits of the case and this will allow the claimant to explain why it was a reasonable adjustment to allow him to work on another run, why he did not take action within three months of the claim arising why it is just and equitable to allow such a claim late. My conclusion is that weighing matters in the round the claim for a reasonable adjustment here namely to reallocate the runs or routes is problematical and has little reasonable prospect of success and will attract a deposit order of £100.

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32. In relation to the second third and fourth discrimination claims these all relate to unpaid breaks. The claimant believes he was singled out because of his disability and this was why the breaks were not paid. There is an overlap with his unfair dismissal claim. He believes he was treated differently from other warehouse men. He would have to show he had been treated differently because of his disability. Being treated differently is not enough. This claim has little prospects of success on the basis of the material before me and will attract a deposit order of £100. The third and fourth discrimination claims seem to overlap with the first. The only other possible claim is under Section 15 of the Equality Act for discrimination arising from disability. There is really nothing the respondents can answer to in the pleadings and in the absence of that there is no reasonable prospects of success and the claim is struck out.

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33. In relation to the matter of amendment to include unfair dismissal I agree that the ET1 that was lodged has to be amended to encompass a claim for unfair dismissal as it was lodged pre dismissal. The Tribunal has wide powers of amendment where there is an existing claim. The claimant at an early stage indicated that this was what he wanted to do.

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34. I also bear in mind that he is a party litigant and in relation to at least the first two preliminary hearings he did not have the assistance of an interpreter. Applying the guidance in *Selkent* my conclusion is that the balance of

hardship favours the claimant and that the amendment to include a claim for unfair dismissal should be allowed. His correspondence should have been treated as an application to amend but was unfortunately forgotten. Although I accept that some months have gone since the dismissal by there was no actual evidence before me that the delay itself would cause the respondents some particular difficulty. I accept that Mr Singh was entitled to point to the delay and indicate that the evidence could perhaps become a little “stale” but beyond that he could not go. My view is that this general observation does not, in these circumstances, go far enough to point to any particular prejudice.

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35. I cautioned the claimant that if proceeding with his position that others regularly breached the proper driving of forklift trucks and that the respondent’s employer’s knew this he would do well to set out why he believes this with reference to dates, times and the people involved. I appreciate that he has asked the respondents for the CCTV for that day which he claims will show other forklift drivers breaching the rules. The respondent should make clear whether or not the CCTV is still available.

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Employment Judge	J Hendry
Date of Judgement	26 November 2021
Date sent to parties	26 November 2021