EMPLOYMENT TRIBUNALS

Claimant **Respondent**

1. **Mr J Neckles** **v** **1. The Abbeyfield Society t/a Abbeyfield**
2. **PTSC Union**

Heard at: Watford (in public; by video) **On**: 8 June 2021

Before: Employment Judge Quill (Sitting Alone)

Appearances
For both Claimants: Mr D Ibekwe, trade union member
For the Respondent: Ms H Bollard, solicitor

JUDGMENT having been sent to the parties and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

CORRECTED LIABILITY REASONS

1. The Employment Tribunal Rules provide for cases to be struck out in certain circumstances without a full merits hearing. It is necessary for the party making the application first to demonstrate that the criteria in one of the relevant sub paragraphs of Rule 37 (1) have been met and, second, that the judge should exercise discretion and strike out the case.

2. Strike out is a draconian step that should only be taken in exceptional circumstances.

3. Recently, in *Cox v Adecco and ors EAT 0339/19*, the Employment Appeal tribunal stated that if the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate.

4. The claimant's case must be taken at its highest and the tribunal must consider in detail what the claims and issues are. There has to be a reasonable attempt at identifying the claim and the issues before considering strike out or indeed, making a deposit order.

5. In the case of a litigant in person, the claim should not be ascertained only by requiring he claimant to explain it in the hearing itself. The Judge must also take treasonable care to read the pleadings including additional information

and key documents in which the claimant sets out their case. If respondents are legally represented, they should, in accordance with their duties to assist the tribunal, bear in mind the overriding objective and make sure that they do not take procedural advantage of litigants in person. They must aid the tribunal in identifying relevant documents in which the claim is explained even if it is not set out in the same manner that a lawyer might draft a claim.

6. If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment which may or may not be granted but that should be considered as a potential alternative to striking out in relevant circumstances.

7. Rule 37(1)(a) reads 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;

8. The power to strike out a claim on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances. Generally, cases should not be struck out when the central facts are in dispute. On a strike out application, the tribunal does not conduct a mini trial to decide disputed facts and it is only very exceptionally that it will be appropriate to strike out a claim where there are conflicting pieces of evidence about which the tribunal at the final hearing would have to make a decision.

9. A judge should exercise great caution before striking out a claim on the basis of no reasonable prospects. There is a high threshold to be met by a party seeking strike out under this ground. If a case has more than fanciful prospects of success, then strike out on this basis might not be appropriate.

10. Sub paragraph (b) of Rule 37(1) is:

> (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;

11. Where those conditions are fulfilled it is necessary for the tribunal to go on to consider whether striking out is a proportionate response to the misconduct in question, bearing in mind that strike out is a draconic power not to be readily exercised. A summary of some of the factors and the steps that the tribunal might go through is included, amongst other places, in paragraph 55 of Bolch v Chipman. It is not enough that a party has simply behaved unreasonably in some way; it is necessary that the *proceedings* have been conducted unreasonably (by the party or on the party's behalf). A decision that a fair trial is no longer possible is also necessary before striking out on this ground (at least where the misconduct is not such that the tribunal decides that the party has been deliberately flouting the tribunal's authority or seeking to prevent a fair trial).

12. Regulation 9 of the Employment Relations Act 1999 blacklists Regulations 2010 states:

> 9.— Detriment
> (1) A person (P) has a right of complaint to an employment tribunal against P's employer (D) if D, by any act or any deliberate failure to act, subjects P to a detriment for a reason which relates to a prohibited list, and either—
> (a) D contravenes regulation 3 in relation to that list, or
> (b) D—
> (i) relies on information supplied by a person who contravenes that regulation in relation to that list, and
> (ii) knows or ought reasonably to know that information relied on is supplied in contravention of that regulation.
>
> (2) If there are facts from which the tribunal could conclude, in the absence of any other explanation, that D contravened regulation 3 or relied on information supplied in contravention of that regulation, the tribunal must find that such a contravention or reliance on information occurred unless D shows that it did not.
>
> (3) This regulation does not apply where the detriment in question amounts to the dismissal of an employee within the meaning in Part 10 of the Employment Rights Act 1996.

13. Just pausing there I do note that because of Regulation 9(2), a claimant has some assistance in that the burden of proof might shift in certain circumstances and that is therefore a relevant piece of information that must be taken into account when deciding if a claim has no reasonable prospects of success.

14. The 2010 Regulations are made under s.3 of the Employment Relations Act 1999. Section 3(d) states that regulations can be made under this section which include provision permitting proceedings to be brought by Trade Unions on behalf of members in specified circumstances and 3(6) says:

> "(6) Subject to subsection (5), expressions used in this section and in the Trade Union and Labour Relations Consolidation Act 1992 have the same meaning in this section as in that Act."

15. Section 3(5) defines "list" and "worker", but not "employee". The definition of "worker" cross-refers to section 13 of the 1999 Act, which, in as far as is relevant to this case, cross-refers to section 230(3) of the Employment Rights Act 1996.

16. In the 1992 Act, section 295 has the heading "Meaning of employee and related expressions". It states:

> **295.— Meaning of "employee" and related expressions.**
>
> (1) In this Act—

> *"contract of employment"* means a contract of service or of apprenticeship,
>
> *"employee"* means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment, and
>
> *"employer"*, in relation to an employee, means the person by whom the employee is (or, where the employment has ceased, was) employed.
>
> (2) Subsection (1) has effect subject to section 235 and other provisions conferring a wider meaning on "contract of employment" or related expressions.

17. So, in this hearing today, at the outset, having ensured that the parties all had the same documents that I had, I went through the claim forms of both claimants with their representative, Mr Ibekwe. The claims are clearly set out in the documents and they refer to specific pieces of legislation.

18. In making my decisions, I take into account that Mr Ibekwe is not a qualified lawyer and I also take into account that nor is Mr Neckles. However, it does not follow that Mr Ibekwe and Mr Neckles have zero experience of employment tribunals; the documents at pages 75 and 76 of the bundle describe some of the union's (the second claimant) and Mr Neckles' (the first claimant) past experience. I am satisfied that during the course of the hearing today and based on what I have read, the claimants have had every opportunity to clarify and explain their case thoroughly and that I understand the arguments which they would like to go forward to a final hearing.

19. Reliance is placed on the 2010 Regulations and specifically Regulation 9. The claimants invite me to assume that at least one of the Union's members (Phyllis Appia-Kobi) has been subjected to unlawful treatment, including by alleged breaches of sections 10 and 12 of Employment Relations Act 1999. She has a claim elsewhere (at the Employment Tribunals - London East), in which Mr Neckles and the Union represent her (or are assisting her, at least) and it suggested that potentially, rather than striking out these claims, I should recommend that they be transferred and consolidated with Ms Appia-Kobi's claim.

20. The argument that I am being asked to consider is that the union and/or Mr Neckles should have their own mechanism (independently of Ms Appia-Kobi's right to present a claim) to bring claims to the tribunal. Mr Ibekwe says that there should mechanism by which the employment tribunal can grant a declaration in favour of the two claimants (or one of them) even the tribunal does not see fit to also award compensation to these two claimants.

21. The reason it is said that the employment tribunal ought to find that it has jurisdiction to make such a declaration is that, according to the Claimants:
    21.1 the Union and/or Mr Neckles has been prevented from representing the Union's members in the way envisaged by the 1999 Act (in particular section 10).
    21.2 the 1999 Act itself does not give the Union and/or Mr Neckles a right to a declaration, or compensation, because of the Respondent's alleged actions in preventing them so doing, ask me to decide that

21.3 and therefore (Mr Ibekwe says), Parliament must have intended that the Union and/or Mr Neckles must be able to use regulation 9 of the 2010 regulations as a means of enforcing a right to represent/accompany their members.

22. The Claimants have asked me to consider (and I have), the case of EAD Solicitors LLP and 7 others v Abrams, a decision of the Employment Appeal Tribunal ("EAT") in June 2015. They rely on that case for the propositions (firstly) that a body corporate is a person in accordance with the Interpretation Act and (secondly) that a body corporate can be a claimant in claims brought in the employment tribunal.

Analysis

23. I assume that all the facts are as alleged by claimant. I am not making any decision to that effect, just assuming it. I am therefore assuming that - as alleged by the claimants - the respondent has breached Ms Appia-Kobi's rights under the 1999 act and that it has refused to allow either of the claimants to represent her or accompany her at relevant meetings. As I say, that is not a decision and – obviously - those are matters for another tribunal to decide, but they are things I assume for the purpose of deciding the applications in this case today.

24. My decision is that there are no reasonable prospects of either claim succeeding.

25. The Regulation 9(1) refers to P being "a person". That word does not in itself prevent a claim being brought by a body corporate, because a body corporate is not excluded by the word "person". However, in order to succeed under Regulation 9(1), a claimant would have to prove that the respondent was their employer. That requirement applies to each of the respective claims by Mr Neckles and the Union.

26. Looking at the definition in 295 of 1992 Act, it does not seem to me that either claimant has any chance at all of showing that the respondent was their employer. It does not seem to even be alleged by either of the claimants that they have any contract at all with the Respondent, let alone a contract of employment.

27. I assume for present purposes that the respondent is Ms Appia-Kobi's employer. Mr Ibekwe argued that the requirement for an "employer" as per Regulation 9 is met on the basis that the Respondent was the "employer" of Ms Appia-Kobi. However, the plain wording of Regulation 9(1) is that the claimant is the person defined as "P" and the respondent is the entity defined as "D" and it is clear from the wording that the respondent in the claim has to be P's employer as opposed to anybody else's employer.

28. There is therefore no reasonable prospect of the claim succeeding. I do think that this is an appropriate case for me to exercise my discretion and I do strike out the case under Regulation 37(1)(a)

29. I turn briefly to Regulation 37(1)(b). I would not strike out the case under Regulation 37(1)(b). The respondent has not persuaded me that the claims have been brought in order to annoy or harass the respondent as opposed to having been brought because\se the claimants genuinely believed that they have enforceable rights in the employment tribunal which they were entitled to pursue in accordance with the 2010 Regulations. The application to strike out under Regulation 31(1)(b) is refused. However, as I have just mentioned, that is irrelevant in the circumstances because the claims are struck out in any event under Regulation 37(1)(a).

COSTS REASONS

30. Rule 76 of the Employment Tribunal Rules describes when a costs order or preparation time order shall be made.

> (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;
> (b) any claim or response had no reasonable prospect of success

31. Rule 77 refers to the procedure:

> A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

32. So, an employment tribunal has discretion to make a costs order and it is a two-stage test. Firstly, whether or not the ground has been made out, and, secondly, if so, whether or not to exercise discretion to actually award costs on the facts of the case.

33. A costs application was made today pursuant to rule 77.

34. The fact that a costs application might be made was referred to in a letter to Mr Neckles, who was both the first claimant (and a litigant in person in the claim) and the representative of the second claimant, the union, according to Box 11 of the union's claim form. That letter was dated 14 May 2021. Mr Ibekwe argues on behalf of both claimants that that letter was not without prejudice and I tend to agree with him. But, in any event, even if it was "without prejudice save as to costs", I can take it into account at this stage.

35. The letter refers to costs of up to around £5,500 plus Vat. A schedule of costs was sent to the claimants. I am told it was emailed on 3 June. In any event a further copy was sent by email at around 10.20am today

36. Mr Ibekwe confirmed he was able to deal with his response on behalf of the claimants to the application today.

37. In this case, my decision earlier today was that the claims had no reasonable prospects for the reasons which I gave. Rule 76(1)(b) is satisfied.

38. In considering the exercise of my discretion, I take into account the costs are compensatory not punitive. Costs are the exception rather than the rule. Just because a ground for an order of costs is made out, it does not automatically follow that costs should be awarded.

39. The means of the paying party are potentially relevant. However, it has not been argued that either claimant would be unable to afford to pay costs in this case. Mr Neckles is the Legal Secretary of the union, and one of its founders.

40. The letter of 14 May clearly sets out a warning about why the claims are said to lack prospects and of the basis on which a tribunal can consider making a costs award. The letter also offers the claimants the opportunity to drop the claim within 7 days and not face a costs application.

41. In the reasons I gave earlier today I did not find for the respondents on every one of the points made in that detailed letter. However, the central reason that there were no reasonable prospects of success is that the claimants were not employed by respondent and that was the main focus of the letter and it is also the focus of the grounds of resistance that was submitted in the claim at the outset.

42. I gave my reasons for deciding that the definition of “employer” in Regulation 9 should be that given in the 1992 Act. This very specific point was not one highlighted by the Respondent in the 14 May letter, or prior to today’s hearing. However, regardless of whether one considers the meaning of “employer” by using the common law precedents, or uses the 1992 Act definition, or just looks in an ordinary dictionary, there was not reasonable prospect of either claimant ever being able to convince a court or tribunal that they were an employee of the Respondent. This was not a difficult technical point, and they both ought to have been aware that they could not succeed on it. There was no reasonable prospect of them ever being able to do that and indeed, they did not even argue that they were in fact employees.

43. For the reasons I gave when striking out, the claimants could not succeed in their claims unless they were able to show that they were an employee of the Respondent, and the suggestion that it was enough that someone else (a union member, and/or someone who wanted them to accompany her in accordance with her section 10 rights) was an employee was contrary to the plain wording of Regulation 9. There was no reasonable prospect of them being able to persuade the tribunal to uphold such an argument.

44. It is my finding, exercising my discretion, that Regulation 9 is clearly worded, and it clearly would tell even a casual reader that a claimant could only

succeed when they bring a claim against the claimant's employer. In other words, even without legal training, I am satisfied that the claimants in this particular case, could easily see that the respondent's points were valid and that they were going to prevail at this hearing. So, for that reason I do think that this is an appropriate case for me to exercise my discretion and to award costs.

45. I am not going to award the full amount set out in the schedule.

46. It is appropriate, having looked at the schedule, for me to award the costs from the drafting of the skeleton argument; so that is 13 May entry (£350 plus VAT) for the remainder of the case up to today (but disallowing the follow-up and debrief with the client which is the bottom entry in the schedule). The items charged are reasonable both in terms of the reason for the work and the time spent. The hourly rate that is charged is not an unreasonable rate for a claim being brought in the South East Region and in the Watford Employment Tribunal. It is appropriate to aware the charged amounts for the work that has been done in preparation for a hearing of this nature, including the preparation of the documents, preparation of arguments and attending the hearing itself.

47. It is appropriate for me to divide the costs 50 per cent each so each claimant will have to pay 50 per cent. Obviously, it is a matter for the claimants how they decide to split that between themselves, but the judgments will be for each claimant to pay 50 per cent.

48. The total is £350 + £16.50 + £12.50 + £82.50 + £297 + £66 + £99 + £99 + £495 which is £1,517.50 plus 20 per cent VAT = £1,821. Dividing it by 2 means that for each claimant the order is that they pay costs to the respondent in the sum of £910.50.

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Employment Judge Quill

Date: 24 July 2021

Sent to the parties on: 31/1/2022

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For the Tribunal Office