EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4103549/2018 Preliminary Hearing at Glasgow on 11 September 2019

Employment Judge: M A Macleod

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Glenn Marr — Claimant, In Person

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Energetics Design and Build Limited — Respondent, Represented by Mr J Lee, Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claims of constructive unfair dismissal and sex discrimination are struck out on the basis of
30 his failure to comply with the Order of the Tribunal dated 13 September 2018.

REASONS

35 1. In this case, a Preliminary Hearing was fixed to take place on 11 September 2019 in order to determine whether or not the claimant's application to vary an Order of the Employment Tribunal dated 13 September 2018 should be granted.

2. The claimant appeared on his own behalf, and Mr Lee appeared for the respondent.

3. Each party presented a bundle of documents to which reference was made, to a greater or lesser extent, during the hearing.

5 4. Parties made submissions in support of their respective positions.

Submissions

5. For the respondent, Mr Lee explained how this hearing had come to be fixed, and set out the background, helpfully.

6. He referred to a Note issued by Employment Judge Robison following a PH
10 in Glasgow on 21 June 2018. In paragraph 4 of that Note, it was noted that the claimant had sent a number of documents, upon which he wished to rely, to the Tribunal, but not to the respondent, and in paragraph 5, Employment Judge Robison reminded the claimant of the need to copy correspondence such as this to the respondent. Further, in paragraph 8,
15 the claimant was informed that he needed to provide further specification of the legal basis of his claim, and identify the evidence upon which he wished to rely; in doing so, it was suggested that he might like to seek legal advice.

7. On 14 August 2018, a further PH took place before Employment Judge Lucas. Following that PH, he took the step of issuing an Order to pay a
20 deposit, dated 13 September 2018 (R1).

8. The specific terms of the Order are as follows:

"The Employment Judge considers that the following argument(s) or allegation(s) have little reasonable prospect of success:

(1) Complaint of (constructive) unfair dismissal

25 *(2) Complaint that, contrary to the provisions of section 13 of the Equality Act 2010, the respondent discriminated against the claimant by treating him less favourably than it treated or would treat others, and did so*

because of his protected characteristic, his sex (which, in the case of the claimant, is reference to his being a man).

The reasons why the Employment Judge has reached this conclusion are as set out in the Judgment of the Employment Tribunal dated 6 September 2018.

Under Rule 39 of the Employment Tribunals Rules of Procedure, the Employment Judge orders that the claimant is to pay a deposit of (1) £1000 for the complaint of (constructive) unfair dismissal; (2) £1000 for the complaint of sex discrimination by no later than 5 October 2018. This is as a condition of being allowed to continue to advance those allegation(s) or argument(s). "

9. The note attached to the order (R2) stated, in bold type: ***"(1) Unless the deposit is paid within the time limit, the allegation or argument to which this order relates, will be struck out"*** It also confirmed to the claimant that he may apply to have the order varied, suspended or set aside.

10. A further note was also attached to the Order (R3), in which it was stated as follows:

'Timescale

5. Payment must be made <u>within 21 days</u> of the date on which the attached order was sent to you. if payment is made by cheque, the cheque must be received in sufficient time to allow it to be cleared within the period allowed for payment.

Non Payment

6. Unless the deposit is paid within the time limit, the claim or the response or part of either to which the order relates, will be struck out. "

11. Mr Lee then referred to the claimant's email of 27 September 2018 (R7), which was sent to the Tribunal but not copied to the respondent (contrary to

the instructions issued by the Tribunal in its earlier Note). The claimant said:

'7 am out of the UK until this Sunday I haven't read the judgment of 17 September Please could I have an additional two weeks to consider how best to proceed. "

12. Mr Lee confessed to a difficulty in understanding how this could be seen as a proper application to vary the order, particularly when the claimant had confirmed that he had not read the judgment in which the Order was explained. He also queried the competence of the application in light of the failure to intimate it to the respondent.

13. Mr Lee submitted that the claimant did not ask for an extension of time but asked for further time to consider how to respond. However, if there is an application for an extension of time, it would take the claimant up to 11 October 2018. No payment was made by that date.

14. On 17 October 2018, the Tribunal responded to the claimant (R7) confirming that on expiry of the additional two weeks requested, the file had been referred to Employment Judge Maclean, no payment having been made. It was stated that this application was treated as an application for an extension of time, and requested that it be copied to the respondent for comment by 24 October 2018.

15. At that point, said Mr Lee, the claimant had still not complied with the Order.

16. On 17 October 2018, Mr Lee responded (R5/6) to the Tribunal, with a copy to the claimant. Essentially, he set out the points made in his submission, and invited the Tribunal to confirm strike out of both claims, pursuant to the claimant's failure to obtemper the terms of the Tribunal's Orders of 13 September, and in accordance with the terms of those Orders.

17. The Tribunal invited the claimant to make any comments by 26 October 2018. No comments were received.

18. The claimant then submitted an appeal to the Employment Appeal Tribunal. The Tribunal wrote to the parties on 7 November 2018 in the following terms (R10):

"The Claimant's email dated 27th September 2018 has at this stage been treated as an in-time application to vary the order dated 13th September 2018 issued by Employment Judge C Lucas. The Respondent's response to that application dated 17th October 2018 has been received but not yet considered by the Tribunal. In light of the claimant's appeal lodged 23rd October 2018, Employment Judge Robison has decided to take no further action in regard to the application pending the outcome of that appeal. "

19. Mr Lee said that the EAT then rejected the claimant's appeal at the sift stage, and accordingly, having been advised of this, Mr Lee made application to the Tribunal on 12 June 2019 (R12) in the following terms:

"1. To remove the present sist and continue the case for further procedure; and (having done so)

2. To Strike Out the claim pursuant to the Tribunal's Deposit Orders of 13 September 2018.

Said Orders provided for compliance by 5 October 2018. The Claimant has not complied with either of those Orders. The Orders are set out in terms which clearly provide for no further discretion in the event of default by the Claimant. Further, no application was made for variation, suspension or the setting aside of them."

20. On 16 June 2019, the claimant wrote to the Tribunal (with a copy, on this occasion, to Mr Lee) (R13) to apply to set aside the judgment of 14 August 2018. He submitted that the decision to issue deposit orders was based on factors which were incorrect.

21. The claimant said that the Tribunal's decision that there could be no constructive dismissal claim in circumstances where the resignation letter did not make reference to breach of contract or constructive dismissal was wrong, and contradicted by authorities to which he referred.

22. He went on to argue that the Tribunal was not in a position to determine the strength or weakness of his case without hearing the full evidence in the respondent's documents, documents which were either not in dispute or could be refuted.

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23. He also submitted that he had sent in documents on 5 April 2018 to the Tribunal, namely his upheld grievance of 22 October and an appeal document dated 17 November. The Tribunal found that the updated grievance document did not form part of the ET1, but he argued that this was incorrect, as the ET3 had answered the allegation at paragraph 20. The deposit order was granted when the Tribunal was unaware of the email of 5 April 2018.

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24. There was, he said, no time bar issue but the Tribunal took this factor into account when deciding to issue the deposit orders.

25. Mr Lee submitted that the claimant was seeking to reopen the arguments heard by the Tribunal on 14 August 2018, before the Orders were issued. He observed that in his email of 26 June 2019 (R15), the claimant, in stating that when he asked for the extension of time on 27 September 2018, "Although I was aware of the main points of the judgment I had not had the opportunity to read it fully", contradicted what he had said in his request for an extension, when he said he had not read it.

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26. Mr Lee submitted that there was no valid or competent application to vary the order, but insofar as it was valid, it was for 14 days, and that no longer come to the claimant's assistance.

27. Insofar as the terms of the Order were clear, the Tribunal ought to be taken to have exercise any discretion available to it. Once compliance has not been forthcoming, the only option for the Tribunal is to proceed by striking out the claims.

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28. Mr Lee referred to authorities, which are summarised below.

29. He submitted that the interaction with the appeal did not offer the claimant any relief. The authorities are clear - where an appeal is being lodged, it is

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for the claimant to apply to the Tribunal for an extension of time pending the outcome of the appeal. The obligations upon the claimant do not fly off simply because the claimant had appealed.

30. Mr Lee concluded by submitting that the orders have been in place for a year, and that there ought to have been compliance with the orders by now, and indeed, by "long ago". He invited the Tribunal to strike out the claims which were the subject of the deposit orders.

31. The claimant then made a submission on his own behalf.

32. He confirmed, at the outset, that he has not paid the deposits which were the subject of the Orders under consideration. He thought that he lodged the application to vary the Orders about 4 days after the appeal was rejected, on 25 May 2019 (C1). That application essentially set out the arguments which he wished to advance in demonstrating that the Tribunal was wrong to have issued the Deposit Orders in the first place.

33. The claimant made reference to the minutes of a grievance hearing on 11 October 2017, in which, according to the notes he made summarising them, it was said that the claimant had told his former employer that he had grounds for constructive dismissal, and that he was resigning due to the repudiatory breach on the part of the respondent.

34. He went on to submit that the Tribunal were incorrect to say that the allegations of themselves could not prove the claim, since the evidence in support of those allegations would do so. He also argued that the Tribunal should not have taken into account the issues of time bar.

35. The claimant said that the appeal was rejected by the EAT at the sift stage because he had not presented certain documents. He did not ask for a hearing before the EAT. He said that what he was appealing against was that Mr Lee had referred to the claim not having been foreshadowed, but that was incorrect and the deposit orders were issued on that basis.

36. The claimant pointed to the terms of C47, his letter of resignation, in which he said that his only option was to resign:

"Following the compromised investigation into my grievance dated 18 September 2017, I feel my only option is to resign. Please accept my three months notice period as per my contract of employment. I will be raising an action in full with an employment tribunal regarding the unsatisfactory outcome of my grievance."

37. The grievance had, he said, made reference to constructive dismissal, and therefore it was reasonable to assume that that would form part of this Tribunal claim.

38. He then referred to correspondence between himself and the respondent which demonstrated, he said, that his contract of employment had been breached by them. The Judge said that he did not think that the claimant would be able to prove constructive dismissal, but the claimant said that he thought it was a very clear showing of constructive dismissal. He also complained that the Tribunal refused to accept that the grievance documents were part of the ET1, but he argued that they did, and in any event, the respondent answered the points in the ET3.

39. He said he did not believe that there was any time bar issue, notwithstanding that the Tribunal took that matter into account in their decision.

40. He said that when he received the Tribunal's judgment, the best course of action was to appeal. He was a bit confused, he said, and wondered if he had to pay the deposits within two weeks. He did not seek advice but said that he misunderstood the position. When he saw Mr Lee's application for strike out two hours after receiving the appeal decision, he realised that he should have applied to vary the Order, and could have done that all along. His application was treated as an in-time application to vary the order.

41. The claimant invited me to set aside the Orders.

42. Mr Lee responded, briefly. He said that the root issue here is that this matter arose from the PH on 21 June 2018.

43. Employment Judge Lucas did consider the issue of time bar, but only because the authorities required him to do so. He did not make any determination either way on that point.

44. He said that the application now before the Tribunal is to set aside the Orders, and he was unclear as to where this leaves matters. There was no application to vary time for compliance, and accordingly the claims fall to be struck out. The claims, he concluded, should be struck out with effect from 5 October 2018, and not the date of this hearing.

The Relevant Law

45. 1 was referred to the Employment Appeal Tribunal decision of Lady Smith in **Scottish Ambulance Service v John Laing UKEATS/0 038/1 2/BI, a** decision relating to the effect of an Unless Order, at paragraph 35. In that paragraph, Lady Smith observes that looking at matters in the round, considering issues of fair notice, remembering that strike out was a power which ought not to be readily exercised, considering proportionality and reaching a decision by means of the exercise of a discretion are all features which are relevant in considering whether or not to order strike out of a claim. However, they are not relevant when considering whether an Unless Order, a conditional judgment, has been complied with. In that situation, by issuing the Unless Order, the Tribunal had already decided that the draconian sanction of strike out was appropriate in the event that the Unless Order were not complied with.

46. Both parties referred to **Taylor v University Hospitals Birmingham NHS Trust UKEAT/0039/14/DA (& Others). Mr** Lee referred to paragraph 36, in which it was said that a litigant who wishes to have an extension of time for paying a deposit pending appeal ought to make an application to that effect.

47. The claimant referred to paragraphs 27 and 28 of that Judgment, which referred to Rule 20(4) of the Employment Tribunals Rules of Procedure 2004, the predecessor of the Rule to which this case refers.

Discussion and Decision

48. This case has had an unusual history, and it is important before drawing any conclusions that I establish clearly the issue which is before me in making this decision.

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49. The hearing of 11 September was fixed, by Notice of Hearing dated 21 August 2019, to determine the claimant's application to vary the Order dated 13 September (understood to mean 2018).

50. The Order dated 13 September 2018, set out above, was issued by Employment Judge Lucas following a Preliminary Hearing on 14 August 2018. Under normal circumstances, an application to vary an Order would be heard by the same Employment Judge who issued the Order, but in this case, the Employment Judge having retired, this was not possible, and accordingly the hearing was allocated to me.

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51. The context in which the deposit orders were granted is important, as it seems to me.

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52. The hearing of 14 August 2018 was listed to address an application by the claimant to amend his claim, and an application by the respondent for strike out of the claimant's claims of constructive unfair dismissal and sex discrimination, which failing for deposit orders in respect of the continued advancement of those claims.

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53. The application to amend the claim was refused. That may have been the subject of the claimant's appeal to the EAT, but that is not a matter which comes before me at this stage. The claimant appears, in his submission, to have drawn my attention to aspects of the decision taken by Employment Judge Lucas in considering the application to amend, but those matters are irrelevant to the question of whether or not the deposit orders should be varied. For example, the claimant's reference to the passage which dealt with the issue of time bar is not related to the deposit orders, but to whether the principles to be applied from the case of **Selkent Bus Company Ltd v Moore** in deciding whether or not to grant the application to amend.

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54. It is also important, in my judgment, to note that a deposit order is not made because a claim is considered to have no reasonable prospect of success, but because the Employment Judge considered that it had little reasonable prospect of success. The claimant has, it seemed to me, attempted to use this hearing to reopen the entire argument about whether or not his claim had any reasonable prospect of success, but that would be a misunderstanding of the basis of the decision. Employment Judge Lucas did not consider that the case was, to put it colloquially, completely hopeless, but he did have serious reservations as to its strength given what he had heard at that Preliminary Hearing.

55. Having said all of that, the application before me is to vary the deposit orders. The scope and nature of that application appears to have changed in the course of the hearing. The original application was to vary the orders by allocating further time to allow the claimant to consider the matter and decide how to respond. Now, it appears that the claimant, at the very end of his submission before me, wishes the Tribunal to revoke the orders altogether.

56. It is important to consider where we are with the applications. Mr Lee has submitted that the original application for an extension of time was not, in fact, a competent application for an extension of time. In my judgment, there are two reasons why this submission cannot be sustained. Firstly, the claimant, as an unqualified and unrepresented party, may not have used the specific language of the Rules of Procedure, but it is perfectly clear that in plain language he wished to vary the order by asking for more time to respond to it. That was a reasonable and legitimate request, and I do not find that it was incompetent. Secondly, in any event, that matter has been resolved by the Tribunal. It is perhaps understandable that the respondent has expressed a degree of frustration with the way in which this was developed by the Tribunal, but in my judgment, the decision has been taken by the Tribunal that the application was in time, and amounted to an application to vary the date by which compliance was to be granted. The matter is put beyond doubt by the decision of Employment Judge Wiseman

dated 25 July 2019 when she refused to strike the claim out and allocated this hearing for the purpose of addressing the application to vary the orders.

57. There was, unquestionably, an air of uncertainty as to what all of that meant, but in time it was clear enough that the Tribunal intended to allow the matter to remain live while the appeal was dealt with. When that was concluded, the claimant renewed his application to vary the deposit orders.

58. The claimant has not, however, in my judgment, effectually made an application for a further extension of time within which to comply with the Orders. He has not complied with the Orders, and therefore in the absence of the payment of the deposit orders is at risk of losing the right to proceed with them.

59. The claimant has now decided to seek to have the orders set aside completely. His reasons for doing so are that the original decision issued by Employment Judge Lucas was wrong for a number of reasons. However, it is plain that he appealed against that decision to the Employment Appeal Tribunal, and he accepts that his appeal was rejected. On that basis, it appears to me quite clear that it is not open nor competent for the claimant to seek to argue these matters before me.

60. Accordingly, I am not persuaded that the claimant has demonstrated any clear or valid basis for overturning the deposit orders, nor that he has undermined in any event the reasons taken by Employment Judge Lucas for issuing the orders in the first place.

61. This case has now endured a long and tortuous history, which has allowed the situation to develop whereby there is a significant degree of uncertainty as to the proceedings. It is therefore time to bring certainty to the matter, in the interests of justice and in accordance with the overriding objective of the Employment Tribunal.

62. The claimant was ordered on 13 September 2018 to pay deposits as a condition of being permitted to continue with his claims of constructive unfair dismissal and sex discrimination. He has been given very considerable

latitude by the Tribunal over a period now exceeding 12 months, and has been permitted to continue with this claim in the meantime, but without paying the deposits or providing any clear basis upon which he has declined to do so.

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63. 1 accept that failure to comply with an Order in the terms set out by Employment Judge Lucas would normally make it inevitable that the claim should be struck out. My hesitation in moving to that decision is that while there is no doubt that the claimant was ordered to pay deposits as a condition of being allowed to continue to pursue the case before the Tribunal, there has been some doubt (in the minds of all concerned) as to when the date for compliance expired.

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64. Having reflected carefully upon this, however, it is my judgment that it is in the interests of justice, in refusing the application to vary or revoke the deposit orders, that the claimant has failed, over a period of more than 12 months, to comply with the Orders, and having done so, his claim must be struck out, in light of the clear and unambiguous terms of the Orders. That there was some uncertainty about the precise date for compliance can no longer be used by the claimant as an argument for further time, since this hearing was allocated for the precise purpose of determining that issue once and for all. There is an interest in finality in litigation, and the interests of justice require that I pay heed not only to the claimant's interests but also those of the respondent, who have waited a very considerable time for this matter to be addressed and determined.

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65. Accordingly, it is my judgment that the claimant's claims of unfair constructive dismissal and sex discrimination are struck out on the basis of his failure to comply with the Deposit Orders issued on 13 September 2018. The date upon which that strike out comes into effect is the date of this Judgment, given the extensions of time which have been given to the claimant in respect of his compliance with the orders.

Employment Judge:	**M MacLeod**
Date of Judgment:	**6 November 2019**
Entered in register:	**8 November 2019**
and copied to parties	