

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4105603/2017

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Held in Glasgow on 25 April 2018

Employment Judge: Mr R Gall

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Mr G Anderson

**Claimant
Represented by:-
Ms A Peat –
Solicitor**

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Matthew Barsauckas

**First Respondent
Represented by:-
Ms L Bell –
Solicitor**

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25 **Weber Wolf Limited**

**Second Respondent
Represented by:-
Ms L Bell –
Solicitor**

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CASUK Ltd

**Third Respondent
Represented by:-
Ms L Bell –
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

40 The Judgment of the Tribunal is that the Hearing set down for 25 and 26 April 2018 is postponed. A fresh diet is set down for 19 and 20 June 2018, with a reading day **E.T. Z4 (WR)**

being assigned, potentially that day being 18 June. Orders are made as detailed below. The issue of expenses potentially sought on behalf of the claimant and potentially payable by the respondents is reserved until a later date.

REASONS

5 1. This is a case brought by the claimant against Mr Barsauckas and others. A Preliminary Hearing (“PH”) was set down for 25 and 26 April. Notice of those dates was given to parties on 13 March 2018. The two preliminary matters which were to be identified were:-

(1) The identity of the employer

10 (2) Whether the claimant had qualifying service enabling him to bring a claim of unfair dismissal to the Tribunal.

2. A case management PH took place on 15 February 2018. Following that PH note containing orders was issued by Employment Judge McPherson on 16 February 2018.

15 3. At that PH and in order to make conduct of the Hearing more efficient, it was agreed that a joint bundle would be prepared no later than 21 days prior to the first day of the PH. It was also agreed that witness statements would be prepared and that they would be taken as read. Witness statements were to contain evidence in chief and to be exchanged no later than 14 days prior to
20 the start of the PH. Witness statements were to be lodged with the Tribunal no later than 7 days prior to the PH. They were to be signed and dated. The witness statements were to refer to the relevant pages in the bundle when reference was made to any document.

4. A reading day was set aside for the Judge who was to hear the PH so that
25 the Judge could read the witness statements and consider any productions referred to in the witness statements.

5. Witness statements were lodged for the claimant and two witnesses who were to appear on his behalf. They were lodged in time for the reading day, albeit not signed. When the reading day arrived, there had been no statements lodged on behalf of Mr Barsauckas or any witnesses who might appear for the respondents.
6. In an email sent during the course of the morning of the reading day, 24 April 2018, the claimant's solicitor expressed concern that the respondents were now producing documents to which they wished to refer in the PH but which were not included in the bundle. Concern was also expressed that the solicitor for the claimant had not received finalised witness statements for the respondents and any witnesses who might be appearing at the PH on their behalf.
7. By email timed at 13:20 the respondents' solicitor sent to the Tribunal documents for possible inclusion in the joint bundle together with witness statements on behalf of Mr Barsauckas and 3 witnesses who were to appear on behalf of the respondents. A transcript of a telephone call which was also said to be of relevance was also attached to this email. This email with attachments was not however sent by the respondents' solicitor to the claimant's solicitor. The claimant's solicitor therefore had no visibility of the final statements for the witnesses for the respondents, the documents attached to the email and the transcript of the telephone call. That remained the position until the time when the case was to call on 25 April.
8. Of equal concern was the fact that the Tribunal did not have statements from the witnesses for the respondents until the email timed at 13:20 was received. In circumstances where the witness statements were to be taken by the Tribunal as read, and given that there was a specific order in place compliance with which would have prevented this issue, this was a matter of grave concern to the Tribunal. Failure to obtemper the order rendered the reading day somewhat futile. It was entirely unsatisfactory conduct on behalf of the respondents. Their solicitor explained at the PH that this was due to

late instruction from her clients and also as a result of oversight on her part. What happened from the Tribunal's perspective is however precisely what the orders issued by Employment Judge McPherson were designed to avoid.

9. It was Ms Peat's position that the PH should be postponed. She could not see that she was in a position to proceed. She had statements from the respondents' witnesses but without references to pages in the bundle at which relevant documents appeared. Additional documents were now sought to be lodged. She was unclear as to the relevance of those additional documents. She required to take instructions from witnesses as the statements she had prepared and lodged had been compiled in the absence of these additional documents and of the statements from the respondents' witnesses. Further, there was a transcript of a telephone conversation. It was unclear what the relevance of that conversation was. Whilst she herself had not checked the transcript against a recording of the call, her client had done that and said that the transcript was inaccurate in some regards. In those circumstances a postponement was sought. Given the reason for the postponement the claimant wished to "flag" that expenses might be sought in relation to the postponement.
10. For the respondents, Ms Bell said that the claimant's solicitor had had the statements for some days now. It became clear, during her submission, that the email timed at 13:20 sent to the Tribunal had not been copied to the claimant's solicitor. Ms Bell apologised for this. She said this omission had arisen through oversight. She said that the transcript was an accurate record of the telephone conversation. It was appropriate that the transcript be lodged in that reference be made to the telephone conversation as there were issues with the credibility of the witness Mr McCallum.
11. Insofar as the witness statements for the respondents required it, her suggestion was that the claimant's solicitor be permitted to supplement the written statement by questions relating to matters covered in the witness statements for the respondents.

12. I considered the position carefully. It was incredibly frustrating that the respondents' solicitor had not complied with the Order. It is unclear how much of that failure to adhere to the Order is due to the actions or inactions of the solicitor involved and how much is due to the respondents themselves providing late instruction.
13. It would be possible for the Tribunal to read the statements now provided in order that the witness statements were taken as read. I fully understood however the difficulty from the point of view of the solicitor for the claimant. She required to take instruction upon matters raised in the witness statements for the respondents where those statements went beyond matters appearing in the statements she had received in the earlier part of the week. Further, potential additional productions required to be considered. The statements now made clear by referring to pages in the bundle, the documents to which reference was being made at any particular point. That again would require consideration and potentially instructions being obtained. The transcript would require to be considered and reviewed against the recording produced on the memory stick.
14. Ms Bell confirmed that it was accepted by the respondents that the claimant had over 2 years' service with the limited companies, respondents 2 and 3. Those were associated companies. It was disputed however that Mr Barsauckas was the employer. The PH would however be limited to that point given the acceptance on behalf of the respondents that the claimant had over 2 years' service and could therefore bring a claim of unfair dismissal if the employer had been one of the limited companies, respondents 2 and 3.
15. After consideration, I came to the view, with hesitation and reluctance, that the diet set down for 25 and 26 April could not proceed. Prior to coming to the view I had explored with parties the possibility of proceeding on 26 April. The view of both Ms Peat and Ms Bell was that one day would be insufficient and that it was far more preferable to set down a 2 day diet where the

evidence could flow from one day into the next. I agreed that this was the appropriate step.

16. In all the circumstances therefore I concluded that it was appropriate to adjourn the diet set down for 25 and 26 April and to set fresh dates. Given Tribunal availability and availability on the part of Ms Peat and Ms Bell together with their respective witnesses, the dates ultimately identified were 19 and 20 June. The Clerk to the Tribunals is requested to issue hearing notices to both parties confirming those dates as being set down for determination of the preliminary issue, that issue being identity of employer.
17. As mentioned, Miss Peat said that she potentially wished to seek expenses in relation to the abortive diet. I confirm that I would note this and that it should not be lost sight of in the context of the overall case.
18. It was also agreed that a timetable would be set out for fresh statements and a fresh bundle to be prepared. It was considered that rather than have original statements and further supplementary statements, it would be far easier for all concerned if fresh statements were to be prepared. Parties confirmed that they would focus upon the matter for the PH. A fresh bundle would be prepared including within it productions which are relevant to the preliminary issue of identity of employer.
19. It is appreciated that credibility is key in this case at this point. It is important that the merits of the case itself are not gone into but rather that the issues focused upon identity of employer.
20. I raised with parties the fact that I had noticed from the statements that there was said to be a police matter involving a document which Mr Grant had access to and which was said to include forged signatures at the instigation of Mr Barsaukas. I queried in those circumstances whether “the coast was clear” in terms of proceeding with the case or whether it would require to be sisted given potential criminal proceedings. Both Ms Peat and Ms Bell were

of the view that the case could proceed. I said to them that I would note the position as it might be that when evidence comes to be given either by Mr Barsauckas or by Mr Grant that this requires to be kept in mind given that a witness should not be put in a position where they may incriminate themselves by any evidence given at the Tribunal in circumstances where there is a criminal case being considered. Both representatives said that they would bear this in mind at time of the hearing. It might be that whether or not there were going to be any criminal proceedings brought was clear by the time of the hearing. There is also likely to be available by the time of the rescheduled hearing a report in relation to the document on which signatures are alleged to have forged

21. Orders were then made. Those are as follows: –

(1) No later than 29 May 2018 a bundle of documentation relevant to the PH set down for 19 and 20 June 2018 will be prepared and sent by the respondents to the claimant.

(2) No later than 5 June 2018 each party will send to the other finalised statements of witnesses signed by those witnesses and confirming that the information contained in the statements is accurate. The statements will refer to any productions and will include reference to the page number in the bundle where that document appears.

(3) No later than 12 June 2018 the finalised witness statements signed, confirming the contents are true and including page numbers within the bundle when a document is referred to, will be sent to the Tribunal so that the Tribunal has the statements in the bundle in time for the reading day.

22. Given the default which occurred in respect of orders previously made, respective solicitors are reminded of the obligation to meet orders and of the duties in terms of Rule 2. Due to the late submission of statements and

documents by the respondent the reading day was rendered somewhat otiose and the hearing required ultimately to be postponed. Time was incurred by solicitors unnecessarily as it turned out. Parties and witnesses were required to attend unnecessarily. Tribunal time and resources together with Judicial
5 time was occupied in circumstances where the Hearing ought to have been able to proceed but could not due to lack of compliance with the orders.

23. It was agreed that it was appropriate to set aside 2 days for the Hearing. The witness statements which will be submitted in terms of the Order set out above will be taken as read. A reading day requires to be set down. That reading
10 day should be 18 June. Given that no evidence has been heard, the case may proceed before any Employment Judge. It would be appropriate however, if possible, to have the case set down for either Employment Judge McPherson Employment Judge Gall.

15 **IMPORTANT INFORMATION ABOUT ORDERS**

- 1 You may make an application under Rule 29 for this Order to be varied, suspended or set aside. Your application should set out the reason why you say that the Order should be varied, suspended or set aside. **You must confirm
20 when making the application that you have copied it to the other party(ies) and notified them that they should provide the Tribunal with any objections to the application as soon as possible.**
- 2 If this order is not complied with, the Tribunal may make an Order under Rule
25 76(2) for expenses or preparation time against the party in default.
- 3 If this order is not complied with, the Tribunal may strike out the whole or part of the claim or response under Rule 37.

Employment Judge: Robert Gall
Date of Judgment: 26 April 2018
Entered in register: 27 April 2018
and copied to parties

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