



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111193/2019 (P)

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Employer's Contract Claim: 4101940/2020 (P)

Held in Chambers on 15 July 2020

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Employment Judge M Robison

Miss J Daly

Claimant

Written submissions

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Graeme John Marshall

Respondent

Mrs C Marshall

Respondent's Wife

Written submissions

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JUDGMENT AND ORDERS OF THE EMPLOYMENT TRIBUNAL

1. The respondent's application for strike out of the claim is refused.
2. The respondent's application for the respondent's counter claim to proceed as undefended is refused.
3. This case will be listed for a three day in person final hearing before a judge sitting alone on dates and times to be appointed.
4. Case management orders relating to that hearing are attached in an annex to this judgment.

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REASONS

1. In this case, a final hearing, which did not conclude, commenced on 6 January 2020. At that time the respondent was not represented. During the course of the hearing, the claimant made an application to amend her claim to include a claim for unfair dismissal. That application was subsequently granted. The claimant advised of an alternative address for the respondent and the

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amendment was intimated on the respondent at that updated address. The respondent's subsequent application for his response to be allowed, although late, was granted. In the ET3 response, the respondent included an employer's counter claim, which was in turn accepted by the Tribunal and that acceptance formally intimated to the claimant by letter dated 25 March 2020.

2. Mrs Marshall for the respondent then submitted two applications on 23 April 2020 - one for strike out of the claimant's claim; and a second for the employer's contract claim to proceed as undefended.
3. She had understood that these applications would be dealt with at the case management preliminary hearing which took place by telephone conference call on 17 June 2020. However, that was a misunderstanding. I advised at the preliminary hearing that I would consider the two applications by way of written submissions.
4. Miss Daly had confirmed at the hearing that she intended to defend the respondent's counter claim and she opposed the respondent's application for the claim to be dealt with on the basis that it was undefended. She also said that she opposes the respondent's application for strike out.
5. The claimant was ordered to provide any further written submissions in support of her arguments by 1 July 2020. The respondent was given until 15 July to lodge any further written response to the claimant's submissions.
6. Although this claim includes an employer's contract claim, for the sake of clarity I will throughout this judgment refer to Miss Daly as the claimant, to Mr Marshall as the respondent and Mrs Marshall as the respondent's representative.

Background

7. The claimant submitted an ET1 claim form on 23 September 2019, in which she claimed a redundancy payment, breach of contract, unlawful deduction from wages and outstanding holiday pay. No ET3 was lodged and the claim proceeded as undefended. At a final hearing which commenced on 6 January 2020, following the commencement of the hearing of evidence from the claimant who had affirmed, it became clear that while the claim had been

submitted on 23 September 2019, subsequent events indicated that the claimant had apparently been formally dismissed for gross misconduct on 12 December 2019.

8. In the circumstances, the claimant advised that she intended to make an application to amend the claim to include a claim for unfair dismissal, it being apparent that the claimant had not been made redundant prior to the date of her dismissal.
9. By e-mail dated 10 January 2020, the claimant made a written application to amend the claim to include a claim for unfair dismissal. This was copied to the respondent at the updated address. Mrs Marshall responded on behalf of the respondent in an e-mail dated 31 January, followed up by an e-mail of 10 February. She was advised that if the respondent intended to defend the claim, he would require to make an application for the response to be received although late with a draft of the ET3 response. That application, made on 25 February, was accepted although late.
10. The claimant was sent a copy of the ET3 by the respondent and she sent in an e-mail in response dated 15 March and a further e-mail on 25 March 2020.
11. The ET3 response included an employer's contract claim which was accepted on 24 March 2020. The Tribunal's acceptance of the respondent's counter claim was formally intimated on 25 March 2020. That letter set out how the claimant should respond and indicated that a formal response should be submitted to the Tribunal by 22 April 2020.
12. Mrs Marshall sent an e-mail to the Tribunal on 23 April 2020 enclosing two letters. Miss Daly was copied in and she confirmed at the preliminary hearing that she had received the e-mail and the letters. One letter related to the respondent's application for the employer's contract claim to proceed as undefended, and for the other for the claim to be struck out, as stated above.
13. I deal with each of these applications in turn. In making my decision, I considered the following documentation:
 - (i) The respondent's letters dated 23 April 2020;

- (ii) The claimant's e-mails dated 15 and 25 March, and subsequent e-mails sent 17 June and 26 June (submitted at 16.18) and a second e-mail submitted on 26 June (at 21.07);
- (iii) The respondent's two separate responses dated 2 July (one sent by e-mail at 00.07 and the other at 09.17).

Respondent's application for counter claim to proceed as undefended

14. Miss Daly at the preliminary hearing explained that she had received a copy of the ET3 response on 26 February, and that she had responded to its contents in an e-mail dated 15 March. She had been under the impression that the e-mail she had sent in dated 15 March represented her response to the respondent's ET3.
15. In that e-mail dated 15 March, the claimant said that she was commenting on certain points raised in the ET3, and responded to certain substantive claims made by the respondent. The claimant sent a follow up e-mail dated 25 March having been requested to provide further information by Employment Judge Whitcombe.
16. The Tribunal's acceptance of the respondent's counter claim was not officially intimated until the letter of 25 March 2020, requiring a formal response by 22 April 2020. The claimant did not however submit a formal response, as she was under the impression that the e-mail of 15 March was sufficient. She confirmed that she intended to defend the contract claim but had not sent in any other official response.
17. By letter dated 23 April Mrs Marshall stated that she was making an application in terms of rule 21. I understood Miss Marshall to mean by that given Miss Daly had not submitted a formal response by 22 April 2020 as required, the Tribunal should treat the respondent's counter claim as undefended and proceed to deal with it and issue judgment in the respondent's favour.
18. In that letter Mrs Marshall stated as follows: "I am writing to the Employment Tribunal to request application of rule 21 to the above case. The Respondent [that is the claimant] has failed to present an appropriate response as required

by rule 16. The date given for submission was 22 April 2020, which has now passed. In her email submission to the Employment Tribunal of 15 March 2020, the respondent attached correspondence from the General Dental Council (GDC) which confirms a substantial part of our case. The aforementioned GDC letter also highlighted where further information may be obtained in the GDC documents”.

19. Miss Daly confirmed that she had received both letters dated 23 April and had contacted the Tribunal for guidance. Although she had forwarded a copy of Mrs Marshall's e-mail as requested, no one from the Tribunal administration had got back to her. The next time she heard from the Tribunal was to advise that a case management preliminary hearing would take place on 17 June 2020.
20. Although the claimant's email to the Tribunal was not on the file, it was confirmed to me by a member of Tribunal staff who double checked e-mails which had been sent in relating to this case, that the claimant had contacted the Tribunal for advice and had apparently been told to send in a copy of the respondent's e-mail. Although the claimant did forward the e-mail, no-one responded to give her any advice (or indeed even to acknowledge the correspondence), it seems because that letter did not state that advice was sought, so that the clerk who received it did not understand what it related to.
21. At the preliminary hearing on 17 June, Miss Daly confirmed that she intended to oppose the respondent's counter claim and I advised her to submit a formal response as required by the rules, including making an application for an extension of time to lodge the response. I made a case management order that she should provide a response to the respondent's application under rule 21 (for an undefended judgment in respect of the respondent's counterclaim).
22. In response, Miss Daly set out in an e-mail dated 26 June 2020 (at 16.18) the text of the e-mail which she had sent to the Employment Tribunal on 15 March 2020. She sent a further e-mail dated 26 June 2020 (at 21.07) which included a two page substantive response to the respondent's ET3 and counterclaim, together with supporting documentation.

23. By letter dated 2 July 2020 sent in by e-mail that day at 00.07, the respondent provided further support for the application under rule 21, which centres on the claimant's failure to submit an appropriate response by the due date of 22 April 2020. Mrs Marshall submits on behalf of the respondent that the claimant was aware that the address to which the ET1 was sent was no longer receiving mail and that the claimant already had the respondent's new address by March 2019, and notwithstanding used the address of her former place of employment on the ET1 form. She submits that the claimant knowingly entered an out of date address for the respondent on her ET1 form to prevent the ET1 being served.
24. She submitted further that the claimant had not followed the instructions set out in the PH note in respect of responding to the employer's contract claim and in particular had not made a request for an extension of time to do so. She submitted that the responses submitted (dated 26 June) fail to address many of the elements of the employer's contract claim and neither e-mail confirmed that she wishes to oppose the applications under rule 21.
25. She submitted further that the response to the employer's contract claim fails to dispute many of the claims made and is not on a prescribed form as per rule 16(1). She submitted that an appropriate formal response to the ECC had not been provided by 22 April or 1 July 2020 and no request for extension of time has been submitted by 1 July 2020, and no reason explaining why an extension was sought had been provided. She submitted that neither email satisfies the order of the Tribunal and the deadline for submission has now passed. She submits that the claimant has breached rule 6 – non-compliance with an order of the Tribunal - and rule 16 – the requirement to provide a response. She submitted that although Miss Daly is not legally represented, she has had sufficient time to obtain advice or even to research the rules of the Tribunal, such advice being available from solicitors or the CAB despite the problems caused by COVID 19. She submitted that it would not be fair to allow the claimant a further extension of time.
26. While I accept that the claimant has not, in terms, requested an extension of time to lodge a defence to the employer's contract claim, or said, in terms, that

she intends to oppose the application, the claimant has set out in her e-mail of 26 June 2020 a further substantive defence to the employer's counter claim to supplement what she submitted on 15 March. The claimant explained at the preliminary hearing that she intended to defend the employer's counter claim and that her position has not changed is implicit in her e-mail.

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27. Employer's counter claims are relatively rare proceedings in the employment tribunal. The rules relating to them are not necessarily clear. Indeed, despite the respondent's reference to rule 16 and a prescribed form, that as I understand it relates to the requirement for *the respondent* to include their employer's contract claim on the prescribed form. There is no prescribed form in which a claimant would respond to an employer's contract claim. An e-mail therefore will suffice.

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28. I therefore accept the e-mails dated 15 March and 26 June as a response to the employer's counter claim, confirming that the claimant intends to defend the claim. The order of 17 June required the claimant to provide to the respondent and to the Tribunal a response to the respondent's application in terms of rule 21 by 1 July 2020. The claimant provided a response dated 26 June 2020. Although that response may not satisfy the respondent, I accept that it is a response in fulfilment of that order.

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29. To the extent that it is necessary, I waive the requirement for the claimant to set out in terms in writing her request for an extension of time, as I am permitted to do by rule 6 of the Employment Tribunal Rules.

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30. I should point out that time limits which go to jurisdiction (that is where time limits are set out in the substantive law creating rights for employees and workers to pursue claims in the employment tribunal) require to be strictly adhered to. However, the time limits which are set out in the rules which do not go to jurisdiction are apt to allow further lee-way to parties, as was the case with the respondent in this case who was permitted considerable latitude to lodge a defence to the claim (even from the respondent first having knowledge of the claim which I understand to be on or around January 2020).

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31. The respondent's application for the employer's contract claim to proceed as undefended is therefore refused.

Respondent's application for strike out

5 32. Mrs Marshall for the respondent also makes an application for the claim to be struck out, as set out in her letter of 23 April. At the preliminary hearing, Miss Daly confirmed she had received that letter, and sought advice about from the Tribunal which was not forthcoming, due to an administrative error as discussed above.

10 33. The respondent's letter of 23 April is an application for the claimant's claim to be struck out under rule 37 because the claim is vexatious and for the following reasons:

- (i) The claimant had failed to submit a response to the employer's contract claim by 22 April as required; this indicates that the claimant is not actively pursuing that claim in terms of 37(1)(d);
- 15 (ii) The claimant knowingly provided the Tribunal with an out of date address for the respondent in her ET1 submission, and that she had sent proof of that by submitting a text message sent to the claimant in March 2019. She submitted that "knowingly supplying an inappropriate address may be considered a vexatious act designed to prevent the
20 respondent's involvement in an employment tribunal case";
- (iii) the claimant's nephew made a vexatious and inappropriate telephone call to Mrs Marshall after receiving a letter inviting her to an investigatory hearing;
- (iv) The claimant made a vexatious and malicious complaint to the NHS
25 regarding Mrs Marshall, which complaint was passed to Mrs Marshall's employer; considerable NHS resources were wasted investigating the complaint which was not upheld;
- (v) The claimant has provided no supporting details in her ET1 form which
30 suggests that the claimant has failed to actively pursue her claim under rule 37(1)(d);

- (vi) The claimant has provided a number of false statements in her communications with the employment tribunal, which claims Mrs Marshall rehearsed in the letter and submitted that these demonstrate that the claimant has little respect for the rules or the Tribunal in pursuit of a vexatious claim.
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34. In response, the claimant sets out in the email of 26 June the arguments which she will rely on to support for her claim and her response to the respondent's counter claim.
35. Mrs Marshall responded to that in a letter dated 2 July consisting of 19 pages and 17 appendices. This is largely a repetition and expansion of the points previously made in her letter of 23 April, providing additional detail of the respondent's substantive claim and defence, and a good deal of background information.
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36. In addition, Mrs Marshall submitted that Miss Daly had failed to respond to the Tribunal's order of 17 June to supply a response to the strike out application. She submitted that the e-mail response supplied (dated 26 June) does not confirm that the claimant wishes to oppose the application and nor does it represent a formal response to an employer's contract claim. Given her failure to provide such a document, the claim should be struck out in terms of rule 37(1)(c) for failure to comply with an order of the tribunal.
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37. Mrs Marshall repeated her accusations about the number of false and misleading statements submitted in writing to the Tribunal by Miss Daly. She offered to provide further "documents to demonstrate the deliberate factual omissions and falsehoods provided by Miss Daily in support of her claim".
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38. She repeated her submission that the claim should be struck out because the claimant has made a vexatious claim, and also submitted that she had behaved unreasonably, and such that it was not possible to have a fair hearing in respect of the claim or response in terms of rules 37(1)(a), (b) and (e).
39. Miss Daly advised at the preliminary hearing that she intended to oppose the respondent's application for strike out. While she has not in terms stated in her response of 26 June that she intends to oppose the respondent's application,
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I accept that the response which she has provided (dated 26 June) is a response which implements the Tribunal order of 17 June 2020 and confirms her opposition to the application for strike out. I therefore reject the respondent's contention that the claimant has failed to comply with an order of the Tribunal.

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40. With regard to the respondent's other submissions in support of the application for strike out, I do not accept that it could be said that the claimant's actions indicate that the claim has not been actively pursued; quite the opposite. The claimant has made it clear by her actions that she intends to pursue her claim and to oppose the counter claim.

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41. With regard to the respondent's assertions that the claim should be struck out because it is vexatious, the manner in which it is brought unreasonable or that it is not possible to have a fair trial, I reject those submissions for the following reasons.

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42. The respondent suggests that the claimant deliberately included the business address in order to avoid the respondent becoming aware of the claim. The respondent's so-called proof of that is an assertion that the claimant was aware that the business address was no longer receiving mail and she was corresponding with the respondent at an alternative address (as suggested in a text). Mrs Marshall does not believe the claimant when she asserts that she was advised by ACAS to use the business address. This is a matter of dispute between the parties, but in any event the important matter is that the respondent is now aware of the claim (the claimant having supplied an alternative address) and the respondent has been permitted to defend it. A judgment against a respondent who could not be traced through the stated address would be of no value of the claimant, and once traced any judgment would in all likelihood have been revoked in order for the respondent's defence to be heard.

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43. Nor do I accept that the claimant has deliberately "omitted pertinent facts" including "being struck off from her professional register". Again, this is clearly matter of dispute between the parties. Mrs Marshall says that it is reasonable for her to say that the claimant was "struck off" (by reference to a dictionary

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definition) whereas Miss Daly's position is that she was "removed" from the register as a result of the actions of the respondent (and indeed I note that removal is the term used in the letters from the GDC which the claimant has submitted to support her claim).

5 44. These, and indeed many other issues which are clearly in dispute between the parties, will require to be adjudicated on by the Tribunal after hearing evidence from both parties and their witnesses, and considering the documents lodged by both parties to support their respective claims. The documents which Mrs Marshall has submitted do not "prove" her claim and defence, in the same way
10 that the documents produced by the claimant do not prove her claims. The Tribunal will require to hear supporting oral evidence from parties regarding these documents.

45. It is a matter for the Tribunal to assess at a hearing on the evidence whether the claimant has submitted false information and it is a matter for the Tribunal
15 to assess having heard evidence whether the claimant is a reliable and truthful witness or not. The Tribunal requires to hear evidence from all of the witnesses for both sides, to consider the documents, to make assessments as to their credibility and reliability, to make findings of fact based on the evidence heard and to provide a reasoned opinion as to how the law has been applied to those
20 findings in fact in order to come to a decision whether the claimant's claim and/or the employer's counter claim should succeed.

46. This claim cannot be determined on the basis of assertions and documents alone. A hearing will require to take place to allow the Tribunal to consider the claims and defences of both parties.

25 47. I do not accept therefore that it can be said that this is a vexatious claim (the respondent having accepted that the claimant has been dismissed on grounds of gross misconduct); I do not accept that at this juncture that it can be said that the claimant has submitted false information; I do not accept that on the basis of the information which I have that it can be said that it is not possible
30 for a fair trial to proceed. I therefore reject the respondent's application for the claimant's claim to be struck out, and determine that the claim should proceed.

Further procedure

- 5 48. A hearing will therefore require to be listed in this case in order to hear evidence. Unfortunately, no in person hearings can currently be listed in light of the Presidential Guidance on the Covid-19 Pandemic issued 18 March 2020 and subsequent directions. Consideration requires to be given in the first instance to alternative ways of progressing claims, such as a remote hearing by video conference.
- 10 49. Having discussed this matter at the preliminary hearing on 17 June, and having subsequently considered the paperwork in this case in some detail, and taking account of the Presidential Guidance, I remain of the view that it would not be in the interests of justice to have a hearing by video conference.
- 15 50. This case will therefore require to be listed for an in person final hearing for three days before a judge sitting alone. The undernoted case management orders are issued in regard to preparations for that hearing. These case management orders should be considered carefully by both parties in order to ensure compliance.

20 Employment Judge: Muriel Robison
Date of Judgment: 20 July 2020
Entered in register: 25 July 2020
and copied to parties

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ANNEX - CASE MANAGEMENT ORDERS

Under Rule 29 of the Employment Tribunals Rules of Procedure 2013, the following case management orders are issued for the purpose of the final hearing in the above proceedings:-

- 5 1. No later than 28 days prior to the final hearing, the parties shall provide copies to each other of any documents upon which they intend to rely.
2. Each party shall prepare a set of documents, in chronological order and with numbered pages, incorporating all documentary productions intended to be referred to at the hearing, and shall bring to the hearing the required number
10 of copies as indicated in the Notice of Hearing.
3. The claimant shall send to the respondent, copied to the tribunal no later than 28 days prior to the final hearing, a written statement with supporting documentation setting out:-
 - (a) what the claimant seeks by way of remedy if the claim succeeds.
 - 15 (b) if the claimant seeks the remedy of compensation, how much is sought in respect of each complaint with a detailed explanation of how each sum is calculated;
 - (c) details of any benefits received;
 - (d) a summary of jobs applied for, details of any interviews attended or
20 jobs obtained and details of any income whether from temporary, casual or permanent employment or self-employed work;
 - (e) details of any other efforts made by the claimant to minimise her loss.
4. The claimant shall provide to the respondent, with a copy to the tribunal, no later than 7 days before the final hearing, an updated written statement of the
25 calculation of the sum claimed (together with copies of supporting **Notes**

(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**

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.

- 5 (2) If this order is not complied with, the Tribunal may make an Order under Rule 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.