EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100047/2017

Held in Glasgow on 23 November 2018

Employment Judge: W A Meiklejohn

Members: Mr I Ashraf
Mr W Muir

Mr Francis Mutombo-Mpania — **Claimant in Person**

Angard Staffing Solutions Limited — **Respondents Represented by: Dr A Gibson - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that -

(i) the Claimant's application for a Preparation Time Order is refused,

(ii) the Claimant's application for a Strike Out Order is refused, and

(iii) the Claimant's application for a Deposit Order is refused.

REASONS

1. This case came before us for a Preliminary Hearing in Glasgow on 23 November 2018. The Claimant appeared in person. Dr Gibson appeared for the Respondent. Ms V Javelaud acted as interpreter for the Claimant. We

had a bundle of productions from the Claimant (provided after the Hearing as the original, sent to the Tribunal office, appears to have gone astray) supplemented by a number of additional productions tabled by the Claimant at the Hearing. We also had a bundle of documents from the Respondent.

2. The issues to be determined at the Preliminary Hearing were as follows -

(i) The Claimant's application for a Preparation Time Order ("PT O") made on 13 December 2017.

(ii) The Claimant's applications to strike out the Respondent's defence to the claim made on 29 May 2017 and 24 November 2017.

3. In his first application for strike out submitted to the Tribunal on 29 May 2017 the Claimant included an alternative submission that, if the Tribunal decided not to strike out the Respondent's response to his claims, it should make a Deposit Order in respect of each of those claims.

Tribunal Rules - Preparation Time Order

4. A Preparation Time Order ("PTO") is defined in rule 75(2) of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 (the "Regulations") as follows -

"A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party') in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case, except for any time spent at any final hearing. "

5. The Regulations provide for when a PTO may be made in Rule 76 as follows –

"(1) A Tribunal may make ….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; or

(b) any claim or response had no reasonable prospect of success. ..."

6. The Regulations provide for the amount of a PTO in Rule 79 as follows -

"(1) The Tribunal shall decide the number of hours in respect of which a preparation time order should be made, on the basis of -

(a) Information provided by the receiving party on the time spent falling under rule 75(2) above; and

(b) the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required.

(2) The hourly rate is £33 and increases on 6 April each year by £1.

(3) The amount of a preparation time order shall be the product of the number of hours assessed under paragraph (1) and the rate under paragraph (2)."

In the year commencing 6 April 2016 the hourly rate was £36. In the year commencing 6 April 2017 the hourly rate was £37. In the year commencing 6 April 2018 the hourly rate was £38.

Tribunal Rules - Strike Out

7. Rule 37 provides as follows -

"(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;

(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;

(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).

(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.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above. M

Tribunal Rules - Deposit Order

8. Rule 39 provides as follows -

"(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a

party ("the paying party') to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order -

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph 5(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order. "

Claimant's position - Preparation Time Order

9. The Claimant argued that a PTO should be made against the Respondent because they and their representative had acted dishonestly by submitting a falsified document to the Tribunal. The document in question was an email dated 23 December 2016 which had formed part of the bundle of documents (at page 76) at an earlier Preliminary Hearing which took place on 24 April 2017. In the version of this email produced at that Hearing the first sentence was missing.

10. The Claimant included both versions of the said email in his bundle of documents - the correct version actually sent on 23 December 2016 at page 8 and the incorrect version with the first sentence omitted at page 9. The first two paragraphs of the correct version of the said email read as follows -

'7 have acknowledged the termination email from Ayse as she sent it once I agreed to it as due to you failing to follow reporting procedures.

You will see from that original email from Ayse that she confirmed your contract of employment with Angard Staffing will be terminated due to failure of reporting non attendance over three occasions. There was no mention of final date whereby you are no longer an employee of Angard Staffing as it takes one week for your P45 to be generated. Plus as per our conversation I was personally looking into the matter for you continue your employment with Angard once I investigated all options for you."

11. In his skeleton argument the Claimant also alleged that the Respondent had lied to the Tribunal by falsely denying receipt of an email sent to it by the Claimant on 11 November 2016 at 13.45. We understood this to be a reference to paragraph 9 of the Respondent's grounds of resistance where the Respondent stated -

"The Respondent has no record of a letter the Claimant says he wrote to Sam Clawson on 11 November 2016 telling him he could not work permanent night shifts."

The Claimant provided a copy of his email to Mr Clawson dated 11 November 2016 at page 10 of his bundle of documents. However, in his submissions to us the Claimant focussed on the alleged falsified document referred to in the preceding paragraph.

12. The Claimant referred to paragraphs 19, 20 and 21 of the Judgment in the case of **Nicolson Highlandwear Ltd v Nicolson UKEATS/0058/09.** Paragraph 21 provides as follows -

"....an Employment Tribunal can be expected to conclude that there has been unreasonableness on the part of a party where he/she is shown to have been dishonest in relation to his/her claim and then to exercise its discretion so as to make an award of expenses in favour of the other party...."

13. The Claimant also referred to paragraph 51 of the Judgment in the Employment Tribunal case of **Carrasco v Edinburgh Language Academy Limited (Case no S/4101590/2016)** where the Tribunal stated -

"If it had been proven that by defending the claim made against it the Respondent had in any way been dishonest then, following the decision of the EAT in the case of **Nicolson Highlandwear Ltd v Nicolson,** the Tribunal might have exercised its discretion so as to make an award of expenses in favour of the Claimant."

14. The Claimant submitted that the email of 23 December 2016, in the form that was included ta page 76 in the bundle of documents for the Preliminary Hearing on 24 April 2017, was a false instrument within the meaning of the Forgery and Counterfeiting Act 1981. He also submitted that recklessness or

negligence was sufficient where a false document was used in a civil (as opposed to criminal) context.

15. The Claimant referred to an email sent by the Respondent's representative to the Employment Appeal Tribunal on 13 December 2017 which formed pages 23-25 of his bundle of documents. The Claimant submitted that this was an acknowledgement that a false document had been submitted to the Employment Tribunal in April 2017 and that this amounted to dishonesty and an attempt to pervert the course of justice.

16. The Claimant referred to the case of **Sud v London Borough of Hounslow UKEAT/0156/14,** a case where the claimant had lied about her medical condition and falsified a document. The order of the Employment Tribunal in that case that the claimant should pay costs and that her claim should be struck out was upheld by the Employment Appeal Tribunal.

17. The Claimant provided the Tribunal with a document detailing the 2000 hours which he claimed had been spent by him undertaking work by way of preparation between December 2016 and November 2018.

Claimant's position - Strike out

18. The Claimant made submissions firstly with reference to Rule 37(1)(b) and (e). He argued that the Respondent had acted unreasonably in defending the claim and that it was not possible to have a fair trial. To produce a false document to the Tribunal was dishonest and should be considered as unreasonable behaviour. The Claimant submitted that falsification eroded public respect for the judicial system. He accused Dr Gibson of acting dishonestly.

19. The Claimant then made submissions with reference to Rule 37(1)(a) and argued that the Respondent's contention at paragraphs 14, 17 and 20 of their grounds of resistance that "The Claimant has not been dismissed from his employment with the Respondent" had no reasonable prospect of success. The email of 23 December 2016 in its correct form made this clear. The

author of the email had given evidence at the earlier Preliminary Hearing and had acknowledged that the Claimant's contract had been terminated on 15 December 2016. The Respondent's solicitor's email to the Employment Appeal Tribunal of 13 December 2017 also acknowledged this.

Claimant's position - Deposit Orders

20. The Claimant submitted that if we were not minded to grant his applications for strike out under Rule 37, we should make a Deposit Order under Rule 39 against the Respondent in respect of their responses to each of the claims. He suggested that the amount of the Deposit Orders should be the maximum of £1000 in respect of each response.

Respondent's position

21. Dr Gibson noted that the Claimant's applications for a PTO and for strike out under Rule 37(1)(b) and (e) relied on allegations of scandalous and unreasonable behaviour by the Respondent and their solicitor. Identical allegations had been made by the Claimant to the Scottish Legal Complaints Commission ("SLCC") and had been found to be "totally without merit". Dr Gibson referred us to the letter to his firm from the SLCC dated 21 August 2018 and the determination within the Eligibility Decision Report which accompanied that letter.

22. The Claimant had lodged an appeal with the Employment Appeal Tribunal against the decision made following the Preliminary Hearing on 24 April 2017 that he was not a disabled person within the meaning of the Equality Act 2010. Prior to a Rule 3(10) hearing the Claimant had sought to amend his grounds of appeal to include an allegation that the Respondent had acted fraudulently with regard to the version of the email of 23 December 2016 lodged with the Employment Tribunal - the same allegation as he was making in his current applications.

23. At the Rule 3(10) hearing the Claimant had been represented by Mr Colin Edward, Advocate, who had made an application to withdraw the amendment to the grounds of appeal. This had been granted by the Employment Appeal

Tribunal. Dr Gibson invited us to conclude that Mr Edward had not been prepared to pursue an appeal based on the allegation in the amendment.

24. Dr Gibson submitted that the Claimant's allegations had no basis in truth. The Claimant viewed the Tribunal as a way to make money. He was a vexatious litigant who had made unfounded allegations of bias against those who had ruled against him in both the Employment Tribunal and the Employment Appeal Tribunal.

25. Referring to the Claimant's document which provided the detail of his PTO application, Dr Gibson said that this equated to 48 weeks at 41 hours per week of preparation time including 18 weeks looking at three pieces of legislation. He alleged that the Claimant was driven by greed and dishonesty.

26. Dr Gibson argued that even if the Claimant was correct in his allegation that the Respondent or their representative had acted fraudulently, there had been no benefit to the Respondent. The Preliminary Hearing on 24 April 2017 had related to disability status. The email of 23 December 2016 was not relevant to that issue. It had been included in the bundle simply to show the timeline of events. It made no reference to disability.

27. The Respondent had accepted their error in providing Dr Gibson with the version of the email of 23 December 2016 with one line deleted. Dr Gibson had lodged the document in the form it was provided to him and he described it as "grossly insulting" to be accused of fraud. In any event, the sentence in the email following the one which had been omitted acknowledged that there had been a previous email terminating the Claimant's contract and so the omitted sentence made no difference.

28. Dr Gibson challenged the Claimant's argument that the Respondent's whole defence to the claims was that there had been no dismissal. He referred to paragraphs 16, 19 and 22 of the grounds of resistance where the Respondent's alternative defence to the claims was set out.

29. Dr Gibson referred to the fact that the Respondent had sent a P45 to the Claimant containing a termination date of 2 May 2017. He argued that this was not inconsistent with the Respondent's position that as at 10 February 2017, when the grounds of resistance were submitted to the Tribunal, the Claimant had not been dismissed. He acknowledged that the matter was disputed but that would require to be decided at a merits Hearing in due course.

Discussion and Disposal

30. We reminded ourselves of the terms of Rule 76 (relating to a PTO) and Rule 37 (relating to strike out). The language of these is similar. Rule 76(1) refers to a party or their representative acting "vexatiously" or "otherwise unreasonably" and to the claim or response having "no reasonable prospect of success". Rule 37(1)(a) refers to the claim or response being "scandalous or vexatious" or having "no reasonable prospect of success". Rule 37(1)(b) refers to the manner in which the proceedings have been conducted being "scandalous, unreasonable or vexatious". Rule 37(1)(e) refers to it no longer being possible to have a "fair hearing".

31. The key point which the Claimant was arguing was that the Respondent and/or their solicitor had acted dishonestly by producing a false document to the Tribunal for the Preliminary Hearing on 24 April 2017. To do so had to be regarded as scandalous, unreasonable and vexatious. If the reason for the false document was recklessness or negligence that was sufficient to amount to fraud.

32. The Respondent's answer to this was the same as had been provided by Dr Gibson's firm to the SLCC. Quoting from the Eligibility Decision Report -

"2.5 *Mr Mutombo-Mpania. …has stated that Mr Gibson presented documents to the Employment Tribunal during the preliminary hearing, on 24 April 2017, and one of the documents was not genuine as it had been altered. Mr Mutombo-Mpania advised that the document which was altered was an email which was sent to him, by a Team Manager, on 23 December 2016 at 16.03.*

Mr Mutombo-Mpania believes that the original (unaltered) copy of this email was important evidence as it showed that he was dismissed by his employer at the injunction of the Team Manager who sent the email. The email was altered as the first line of the body of the text was removed prior to it being presented to the Employment Tribunal. Mr Mutombo-Mpania has advised that Mr Gibson presented the email as a genuine copy of the original when he submitted it to the Employment Tribunal. "

2.6 The firm's position is…. They have advised that Mr Gibson was provided with a copy of the email which was sent to Mr Mutombo-Mpania, dated 23 December 2016, by his clients and he subsequently lodged it with the Employment Tribunal. In his email to the Employment Appeal Tribunal, dated 13 December 2017, Mr Gibson stated that he denied the accusations made by Mr Mutombo-Mpania. His position is that the firm lodged a copy of the email as received and he was unaware that there was a further line which had not been included in the email he was provided with until Mr Mutombo-Mpania provided the firm with a copy on 24 November 2017.

2.7 The firm accept that the email which was sent to Mr Mutombo-Mpania included a line which was not present in the copy which was lodged with the Employment Tribunal; however, this was an error on their client's part and there was no malicious intent. Their client, following their own internal investigation, informed the firm that they believed this had occurred when they had coordinated all relevant correspondence between Mr Mutombo-Mpania and the Team Manager who sent the email (on 23 December 2016). Their understanding is that the member of staff who was responsible for the coordination of the correspondence had cut and pasted the content of some of the emails into a timeline document, and highlighted certain sentences for internal discussions about the claim. The firm were advised by their client that the missing line was one of the highlighted sections and their assumption is that instead of pressing deselect to remove the highlight they have mistakenly selected delete. The document was then sent to the firm without the first line of the body of the text.

2.8 The firm advised that the witness who appeared on behalf of their client (not the member of staff who coordinated the documentation) also stated that their view is that there was no obvious benefit to Mr Mutombo-Mpania's employer caused by the removal of the line of text.

2.9 Mr Mutombo-Mpania provided the SLCC with a copy of the original email he received from the Team Manager, dated 23 December 2016, and a copy of the email which was lodged with the Employment Tribunal. The original letter included a sentence which stated "/ have acknowledged the termination email from Ms X as she sent it once I agreed to it as due to you failing to follow reporting procedures". The following line in the document confirms that Ms X confirmed Mr Mutombo-Mpania's contract of employment was terminated due to failure to report non-attendance over three occasions; however, it did not confirm that the Team Manager had agreed to the termination email which was stated in the original email. …

2.11 If Mr Gibson presented the Employment Tribunal with documentation which was altered and it should have identified this then it may be considered he has not acted honestly.

2.12 The SLCC considers that the firm's letter to the Employment Tribunal, dated 13 December 2017, provided a reasonable explanation of what happened and due to the relationship of mutual trust and confidence which is present between a solicitor and their client Mr Gibson would not have had any reason to doubt that the copy of the Team Manager's email to Mr Mutombo-Mpania, which they had received from their client, was inaccurate. The SLCC also note that the firm's clients have accepted that this was their error. "

33. While we agreed with Dr Gibson that the email of 23 December 2016 was not relevant to the issue with which the Employment Tribunal was dealing at the Preliminary Hearing on 27 April 2017, it would nevertheless be a serious matter if a false document had been lodged. However, there was in our view a material difference between the Respondent (a) making a mistake in

providing a copy of the email of 23 December 2016 which was incomplete - as it was accepted they had done - and (b) attempting to mislead the Tribunal.

34. We found no basis upon which to come to a different decision about Dr Gibson's conduct in this matter from that reached by the SLCC. Dr Gibson did not act dishonestly. There was no substance whatever in the Claimant's assertion that he had done so. He lodged with the Tribunal a document provided by his client having no reason to doubt that it was genuine. He did nothing which could conceivably be described as scandalous, unreasonable or vexatious.

35. That was not the end of the matter because we also had to consider the conduct of the Respondent. It was unfortunate that the version of the email of 23 December 2016 provided by the Respondent to Dr Gibson was incomplete. There was some force in the Claimant's argument that, if the Respondent had been dishonest in any way, that would be unreasonable conduct in the context of both an application for a PTC and an application to strike out the response.

36. However, we did not believe that the Respondent had been dishonest in providing Dr Gibson with an incomplete version of the email of 23 December 2016. The explanation provided by Dr Gibson's firm to the SLCC had been found by them to be reasonable and we came to the same view. That explanation was that a mistake had been made. It was not recklessness or negligence.

37. Recklessness involves a state of mind where a person deliberately and unjustifiably pursues a course of action while consciously disregarding any risks flowing from that action. Negligence involves breach of a duty of care which results in loss or injury to the person to whom that duty is owed; it involves doing something which an ordinary, reasonable and prudent person would not do. The action of the employee of the Respondent who was responsible for the omission of a sentence from the version of the email of 23 December 2016 sent to Dr Gibson was neither reckless nor negligent. We

found that the Respondent had not acted in a way which could be described as scandalous, unreasonable or vexatious.

38. It could not in our view be said that the Respondent's grounds of resistance had no reasonable prospects of success. Dr Gibson was correct to say that even if the Respondent's primary position that the Claimant had not been dismissed (at the time when the response was submitted to the Tribunal) did not succeed, they had an alternative position as set out in paragraphs 16, 19 and 22 of their grounds of resistance. We found nothing in the submissions which the Claimant made to us to indicate that a fair hearing would not be possible.

39. Accordingly we decided that the Claimant's applications for a PTO and to strike out the Respondent's response to his claims should be refused.

40. Finally we dealt with the Claimant's application for Deposit Order. We considered whether any specific allegation or argument advanced by the Respondent could be said to have little reasonable prospect of success. We considered that the question of whether or not the Claimant had been dismissed from his employment at the relevant time could only be decided after evidence has been led at a Final Hearing. Similarly, if it is found that the Claimant was dismissed at the relevant time, the Respondent's alternative argument (that his dismissal was due to his persistent failure to attend for shifts he had accepted without notifying the Respondent that he was not fit to attend) could only be decided after evidence has been led at a Final Hearing.

41. It could not in our view be said that the allegations and arguments set out by the Respondent in their grounds of resistance had little reasonable prospect of success. We therefore decided that it would not be appropriate to make a Deposit Order under Rule 39 and the Claimant's application that we should do so is refused.

Employment Judge: W Meiklejohn
Date of Judgment: 20 December 2018
Entered in register: 20 December 2018
and copied to parties