

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100408/2017

Held in Glasgow on 23 & 24 October 2017

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Employment Judge: Frances Eccles

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**Claimant
In Person**

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**Respondent
Represented by:
Mr P Warnes -
Consultant**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that: -

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- (1) The claimant's application for leave to amend shall be refused &
- (2) The claim for unfair dismissal shall be struck out in terms of Rule 37(1)(b) and Rule 37(1)(e) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

REASONS

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BACKGROUND

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1. The claim was presented on 13 March 2017. The claimant complained of unfair dismissal, unauthorised deduction from wages, outstanding holiday pay and breach of contract (notice pay). The claimant also sought a redundancy payment. The claim for a redundancy payment was withdrawn at a Preliminary Hearing on 27 July 2017. The claim is resisted. A response was accepted on 13 April 2017 in which the reason for dismissal

was given as third-party pressure amounting to some other substantial reason. It is the respondent's position that her son, ("the service user") for whom she is guardian, no longer wanted the claimant and another Support Worker who was dismissed at the same time, to care for him. The respondent claims that their relationship having broken down and there being the likelihood of the service user's health being adversely affected by continued contact with the claimant, his dismissal was justified. In the alternative, it is the respondent's position that conduct on the part of the claimant was sufficiently serious to entitle her to dismiss him for gross misconduct.

2. The claim was listed for a final Hearing on 27 and 28 July 2017. In advance of the above Hearing various applications were made for case management orders. The applications concerned arrangements to allow the service user to give evidence; an Order under Rule 50(3)(b) of the Rules of Procedure 2013 to anonymise the service user and strike out of the claim in terms of Rules 37(1)(b) and (e) of the Rules of Procedure 2013. The claimant also provided information in respect of which the Tribunal sought clarification about the nature of the claims being pursued. The information contained reference to "whistleblowing" that was not apparent from his ET1. At a Preliminary Hearing held on 27 July 2017 the claimant sought leave to amend his claim. The claimant was allowed an opportunity to make his application in writing. The respondent was allowed an opportunity to make any objections in writing. Special measures were put in place to enable the service user to give his evidence. An Anonymity Order was granted under Rule 50(3)(b) of the Rules of Procedure 2013 in terms of which the service user is to be referred to as "S" for the purposes of these proceedings. The claimant submitted his application in writing for leave to amend on 27 July 2017. The respondents submitted their objections in writing on 3 August 2017.

3. A Preliminary Hearing was listed on 23 and 24 October 2017 to consider the claimant's application for leave to amend and the application by the respondent for strike out. At the Preliminary Hearing, the claimant appeared

in person. The respondents were represented by Mr P Warnes, Consultant. The respondents provided the Tribunal with a Bundle of productions. The Tribunal was also referred to a Bundle previously lodged by parties.

4. At the Preliminary Hearing, the Tribunal considered making an Order that the identities of the claimant and respondent should not be disclosed to the public by the use of anonymisation in terms of Rule 50(3)(b) of the Rules of Procedure 2013. Neither party was opposed to the Tribunal making an Order in the above terms. The Tribunal considered the circumstances of the case. S is a vulnerable adult. He is disabled and requires high levels of care. The respondent is his mother. The claimant was his Support Worker for over 6 years. The claimant alleges that S is guilty of sexual misconduct. He intends to give evidence about S and the respondent of a personal and private nature. It is likely that given the relationship of both parties to S that publication of their names will lead members of the public to identify S. When considering whether to make an Order to restrict the identity of the claimant and respondent by anonymisation, the Tribunal gave full weight to the principle of open justice and the Convention right to freedom of expression. It had regard to the Convention rights of those concerned in the proceedings. The Tribunal was satisfied that anonymising the claimant and respondent will not interfere with the ability of the claimant to present his case or the ability of the respondent to present her defence. In all the circumstances, it was considered appropriate to anonymise the parties to M (the claimant) and F (the respondent). On the basis that the case involves allegations of the commission of sexual misconduct, a Restricted Reporting Order within the terms of Section 11 of the Employment Tribunal Act 1996 was also made in terms of Rule 50(3)(d) of the Rules of Procedure 2013.

APPLICATION FOR LEAVE TO AMEND

5. The claimant seeks leave to amend his ET1 to add a claim of automatically unfair dismissal for making a protected disclosure in terms of Section 103A of the Employment Rights Act 1996. More specifically, the claimant seeks to add by amendment a claim that the respondent decided to dismiss him after

5 he and another Support Worker *“had a discussion with F regarding S’s
filming of young boys for masturbation purposes”*. The above discussion is
said to have taken place on 9 November 2016 during a meeting about
whether the claimant would be prepared to *“start the legal process to be S’s
legal guardian”*. It is the claimant’s position that he subsequently went on
holiday and that on his return received no further work from the respondent
ending with his dismissal on 27 January 2017. The claimant seeks to add
by amendment the averments that after their meeting on 9 November 2016,
10 the respondent contacted the Social Work Department to make several false
accusations against him and another Support Worker because *“she wanted
S to have new Support Workers who didn’t know about his filming children:
(young boys) for self-gratification purposes: (masturbation)”*. The claimant’s
application for leave to amend includes additional information providing
background, reference to exchanges and correspondence between the
15 parties and further allegations of inappropriate conduct by the respondent
and S.

6. The respondent objects to the application. As referred to above, it is her
position that S no longer wished to be cared for by the claimant following
incidents involving alleged mistreatment. She relies on an e mail dated 8
20 January 2016 (B3) sent to the claimant in which she refers to *“several
incidents”* and *“unprofessional and intolerable behaviour”* on his part. It is
the respondent’s position that the claimant’s conduct contributed towards S
no longer wishing to be cared for by him and resulted in his dismissal. It is
the respondent’s position that the amendment comes too late; the claim to
25 be added has no reasonable prospects of success; is unnecessary as the
claimant already has a claim of unfair dismissal and is motivated by a desire
to *“go public”* with unfounded allegations against her son in the hope of
pressurising the respondent to settle the claim.

7. The Tribunal had regard to the guidance provided in the case of **Selkent
30 Bus Company Limited v Moore 1996 ICR 836** when deciding whether the
application should be granted. The Tribunal began by considering the
nature of the amendment. While the Tribunal recognises that the claimant

has already brought a claim for unfair dismissal, it was satisfied that he seeks to add a new claim of automatically unfair dismissal. This is not a case of the claimant adding a new label to facts already pled. He seeks to rely on new factual averments. In his ET1 there is no reference to the meeting that is said to have taken place on 9 November 2016 and at which there was a discussion about alleged sexual misconduct on the part of S. There is no reference to the information which is said to have been discussed. There is no reference to the respondent's intention to replace the claimant with another Support Worker who had no knowledge of S's alleged conduct. The amendment is a substantial alteration adding a new claim in respect of which specific averments have been made which did not feature in the original claim.

8. If the application is granted, the new claim will have been presented out of time. The application for leave to amend was made on 27 July 2017. The claimant states that he was dismissed on 27 January 2017. It is the respondent's position that dismissal was on 8 January 2017. Either way, the application for leave to amend was made more than three months from the date of dismissal and including any extension provided by ACAS early conciliation (the EC certificate was issued on 13 February 2017) was presented at least three months after expiry of the prescribed time limit. The Tribunal was not satisfied that the claimant has been able to provide a satisfactory explanation for this delay or explain why the claim he now seeks to bring was not included in his ET1. It is the claimant's position that he has received advice from employment lawyers and the Strathclyde University Law Clinic. He was represented by the Law Clinic until 5 July 2017 when they withdrew from acting on his behalf. It is the claimant's position that at the time of completing his ET1 he was advised by the Law Clinic that he could "*only state the facts*" and would be able to add more detail once the respondent had told him the reason for his dismissal. He claims that it was only on receipt of the ET3, copied to him by the Tribunal on 19 April 2017, that he realised the reason for his dismissal was because of whistleblowing. This position is unconvincing. It is inconsistent with the position stated in his letter to the Tribunal of 27 July 2017 that he believed that the claim of unfair

dismissal included whistleblowing and that it's omission was "an *oversight on (my) part*". The claimant must have been aware of the facts which he seeks to add by amendment at the time of presenting his ET1. The fact that he attended a meeting on 9 November 2016 and discussed his concerns about S's alleged behaviour must have been known to him at the time of completing his ET1. There is no explanation provided as to why this information did not form part of "*the facts*" which he was advised to include in his ET1. It is not in dispute that the claimant received the e mail dated 8 January 2017 (B3) from the respondent complaining about his behaviour and which was consistent with the reasons given for his dismissal in the ET3. In his application for leave to amend the claimant refers to an e mail he sent to the respondent on 8 January 2017 in which he confirms having read her e mail to him of 8 January 2017 and refers to "*unfounded allegations*" against him of misconduct which he claims "*only started when I challenged you on unfair dismissal*". There is no reference in the claimant's e mail of his dismissal being in anyway related to discussions with the respondent about S's behaviour.

9. From the information before it, the Tribunal was not persuaded that it was not reasonably practicable for the claimant to have included the claim of unfair dismissal for making a protected disclosure in his ET1 or by amendment within the statutory time limit. Even if he was only able to identify the real reason for his dismissal on receipt of the ET3 on or about 20 April 2017, which the Tribunal does not accept, the claimant is still unable to provide an acceptable explanation as to why he waited until 27 July 2017 to seek leave to amend. He was represented until 5 July 2017. In all the circumstances, the Tribunal was not satisfied that it would be appropriate to extend the time limit for presenting a new claim of automatically unfair dismissal.

10. The Tribunal also had regard to the timing and manner of the application. As referred to above, it was the claimant's position that he only became aware of the reason to be advanced by the respondent for his dismissal at the time of receiving the ET3. The claimant however was unable to provide

a satisfactory explanation as to why it took until 27 July 2017, shortly before the Hearing, to make the application for leave to amend given that he received the ET3 in April 2017. As referred to above, the claimant was receiving advice from the Law Clinic until 5 July 2017. He had known of the respondent's concerns about his alleged conduct since 8 January 2017. The Tribunal was not satisfied that the claimant could only have realised the alleged real reason for his dismissal around the time of making his application for leave to amend.

11. The Tribunal had regard to the overall consideration of the relative prejudice to the parties of granting or refusing the application for leave to amend. If the application is granted, the respondent will be required to respond to an entirely new claim. The scope of the evidence will be wider. It will relate to allegations that were made only shortly before a Hearing and which include allegations of a sexual nature against the respondent's son who is a vulnerable adult. It will lengthen and increase the cost of the proceedings. The Tribunal had regard to the claimant's position that he and the respondent were aware for some considerable time of the alleged conduct of S. It is his position that it was only when he threatened to whistle blow to the authorities that he was dismissed. The claimant refers to "*the reason (we) lost the jobs were solely due to (our) plans to Whistle-Blow*". It is not being suggested that there had been any attempt by the claimant to report his concerns to the Police or Social Work while employed by the respondent and before his dismissal. The Tribunal also had regard to the prejudice to the claimant if the application is refused. The claimant will be unable to proceed with his claim of automatically unfair dismissal for whistleblowing. He was however able to bring a claim of unfair dismissal. The reason advanced by the respondent for dismissal can be challenged. No satisfactory explanation has been given as to why the claimant was unable to pursue a claim of automatically unfair dismissal for whistleblowing until shortly before the full Hearing. In all the circumstances, the Tribunal was satisfied that the balance of prejudice favours not granting the application for leave to amend.

APPLICATION FOR STRIKE OUT

12. The respondents sought strike out of the claim on the grounds that the manner in which the proceedings have been conducted by the claimant has been scandalous, unreasonable and/or vexatious and/or it is no longer possible to have a fair Hearing in respect of the claim terms of Rules 37(1)(b) and (e) of the Rules of Procedure 2013. The application is opposed.

13. It is the respondent's position that the claimant's behaviour during the proceedings to date has been so unreasonable as to justify strike out of the claim. In particular the respondent refers to the claimant levelling unfounded and irrelevant accusations against S (that he is a paedophile); the respondent (that she is mentally ill and worked as a prostitute) and a witness for the respondent (that her son is the illegitimate child of a priest). The claimant has stated in writing to the Tribunal that he is *"100% labelling S as a paedophile because he has been filming young children (young boys) for me-time (masturbation) for several years now"*. This has been the claimant's position before the Tribunal. He has referred to the respondent being described as *"an unfit mother"* by other family members. He has referred to her mental health and of *"beetles & bugs infesting her kitchen as a result of her unhygienic lifestyle"*. He has accused neighbours of calling the respondent a prostitute. The relevance of such statements to the issue of whether or not he was unfairly dismissed by the respondent has not been explained by the claimant other than to *"give an insight into my former employer's character"*.

14. As referred to above, it is the respondent's position that the claimant threatened to *"go public"* with his allegations against S in the hope that she would settle the case. The timing of the claimant's application, only a matter of days before the full Hearing, for leave to amend his claim to add allegations against S is consistent with the respondent's position. The claimant reported his concerns to the Police on 10 August 2017. The Tribunal has not been informed of any criminal proceedings against S. The

claimant has alleged that S has "*discs containing inappropriate filming of young children*". The respondent, Mr Warnes and S all deny being in possession of indecent images of children whether on disk or otherwise. It is their position that there is nothing to disclose. The claimant has described the behaviour of Mr Warnes, the respondent's representative, as "*absolutely outrageous*". He has referred to his conduct as being "*under handed*". He has asked the Tribunal to reprimand Mr Warnes because his standard of contempt is "*diabolical*" and his behaviour "*despicable*". He has threatened to continue with such correspondence until Mr Warnes is "*reprimanded*".

The claimant's description of Mr Warnes does not correspond with the Tribunal's observations of his behaviour when appearing for the respondent.

15. Mr Warnes submitted that in addition to the conduct referred to above, the claimant has successfully intimidated a witness for the respondent. The respondent and S have already complained to the Tribunal about the claimant driving past their house causing them to feel threatened. Arrangements were made by the Tribunal during case management to allow S when giving evidence to be seated so that the claimant is not visible to him and the claimant's questions in cross examination are put to him by the Employment Judge. It is not in dispute that the claimant hand delivered a letter to the home of a witness for the respondent. It is also not in dispute that in his letter, the claimant attributed remarks to the respondent about the witness's child being conceived during an affair with a priest. The witness has informed Mr Warnes that she would be too frightened to attend the Tribunal as the claimant delivered a letter to her address that has made her frightened and she does not know what his reaction would be if she saw the claimant at the Tribunal. The respondent intended to call the witness to give evidence at the Hearing about the claimant's conduct and treatment of S. It is the respondent's position that the witness saw the claimant mistreating S. It is the claimant's position that the witness could provide a written statement to avoid attending the Tribunal in person. The claimant has provided written statements from existing work colleagues in support of his claim of whistleblowing. The written statements were provided on the basis that none of the claimant's witnesses were able to attend the Hearing.

16. In all the circumstances, the Tribunal was satisfied that the manner in which the proceedings have been conducted by the claimant has been scandalous and unreasonable. He has persisted in making irrelevant and abusive statements about the respondent. His conduct seeks to cause distress and embarrassment to the respondent. He has made very serious allegations against S who is a vulnerable adult and has limited ability to defend himself. The claimant has intimidated a witness for the respondent. He has written to the witness making scandalous remarks about her child. The witness is now too frightened to attend the Tribunal.

17. The Tribunal, being satisfied that the claimant has behaved scandalously and unreasonably in his conduct of the proceedings, went on to consider whether, in accordance with **De Keyser Ltd v Wilson 2001 IRLR 324**, a fair trial is still possible. The Tribunal was not persuaded that this was the case. The claimant has intimidated a witness for the respondent who has indicated that they are too frightened to attend to give evidence to the Tribunal. Arrangements were made previously to allow S to give evidence in such a way as to minimise distress to him following complaints about the claimant's conduct. The respondent intended to call the witness to give evidence about the claimant's treatment of S which is said to have contributed to the break down in their relationship resulting in dismissal. Her evidence is said to be directly relevant to the issues before the Tribunal and material to the respondent's defence of the case. The claimant's suggestion that the witness provide a written statement rather than attend the Hearing does not address the prejudice caused to the respondent of having her witness intimidated by him. The Tribunal was not persuaded that this is a case in which an award of expenses against the claimant will remedy the prejudice caused by the claimant's conduct.

18. In all the circumstances, the Tribunal concluded that it was appropriate and proportionate to strike out the claim of unfair dismissal in terms of Rules 37(1)(b) and (e) of the Rules of Procedure 2013. The manner in which the proceedings have been conducted by the claimant has been scandalous

and unreasonable. The Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim of unfair dismissal.

19. The claimant also has monetary claims for unauthorised deduction from wages, outstanding holiday pay and a contract claim (notice pay). These claims will be allowed to proceed on the basis that the Tribunal does not understand that the evidence of the respondent's witness is relevant to them. The claim will be listed for a Hearing to consider the claimant's claim for unauthorised deduction from wages, outstanding holiday pay and contract claim (notice pay).

10 CONCLUSION

20. Having struck out the claim of unfair dismissal, the Tribunal considered whether it was appropriate to reconsider its decision in relation to the application for leave to amend to add a claim of unfair dismissal for making a protected disclosure. The Tribunal decided that this was not appropriate. While the Tribunal took into account that the claimant had already brought a claim of unfair dismissal when considering the application to amend, this was not a factor to which the Tribunal attached considerable weight or was in any way decisive when reaching its decision to refuse the application. The Tribunal was not persuaded that it would have granted the application to add a claim of unfair dismissal in circumstances where the claimant did not have an existing claim of unfair dismissal. The Tribunal was satisfied that the same considerations regarding the timing and manner of the application to amend would have applied and resulted in the same decision.

25 **Employment Judge: F Eccles**
Date of Judgment: 05 December 2017
Entered in register: 14 December 2017
and copied to parties