5 **EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: 4103045/2020

Preliminary Hearing heard in Edinburgh on 15 July 2022

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Employment Judge R Mackay

15 **Mr M Hewitt** **Claimant**
In Person

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Lothian Health Board **Respondent**
Represented by
Mr James
Counsel

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The respondent's applications (i) to strike out the claim in terms of rules 37(1)(a)
30 and/or 37(1)(b) of the Employment Tribunal Rules of Procedure 2013 (the Rules);
or (ii) to make a Deposit Order in terms of rule 39 of the Rules are refused.

REASONS

35 1. This case has had a long procedural history. It is now a claim for unfair dismissal alone. It came before the Tribunal to consider the respondent's application for the claim to be struck out on the grounds either (i) that it has

no reasonable prospect of success, or (ii) that the manner in which the proceedings have been conducted by the claimant has been scandalous, unreasonable or vexatious. The respondent makes a subsidiary application that the claimant be required to pay a deposit as a condition of continuing with the claim on the basis that it has little reasonable prospect of success.

2. The claimant was unrepresented; the respondent was represented by Counsel. At the outset of the Hearing, the claimant confirmed that he understood the nature of the applications being made. It was Mr James' position that the applications would be considered on the basis of a paper-based review. Parties lodged a joint bundle of documents, some of which were referred to. Counsel prepared a written submission to which he spoke. As part of this, he summarised the relevant legal principles which he fairly set out.

3. The three separate components of the submission, the claimant's responses to each, and the Tribunal's decisions are set out in turn below.

4. The first submission was that the claim had no reasonable prospects of success. Mr James submitted that the claim had become a simple one of unfair dismissal alone, that the factual circumstances leading to the dismissal were clear and not disputed (even although the label to be applied to the dismissal was pled as either capability or SOSR by the respondent in its ET3), and that the only issue to be determined was substantive fairness.

5. He pointed to a number of steps take by the respondent to facilitate the claimant's return to work, relying principally on the terms of an appeal outcome letter issued. He submitted that the respondent had made every effort to allow the claimant to return to his substantive role, and that he had refused to engage, such that had no reasonable prospect of successfully

demonstrating that his dismissal was outwith the range of reasonable responses.

6. In response to this aspect of the application, the claimant spoke of a series of events over a lengthy period of time leading to his absence from work. He described significant issues with his line manager which in part led to his absence from work. He attributed the dismissal to his manager's dislike of him.

7. The Tribunal had no hesitation in refusing this aspect of the application. Claims of unfair dismissal are heavily fact reliant and this is clearly a case where there is complex factual background which needs to be considered. It is not even certain from the ET3 what the respondent contends to reason for dismissal to be. It pleads as alternatives that the claimant was in fact unfit to work (capability), or that he was asserting that he was unfit (SOSR). Contrary to Mr James' submission, therefore, the reason for dismissal is not clear, far less a matter of agreement with the claimant. Moreover, in looking at fairness, the Tribunal cannot make any meaningful assessment in this case without hearing the evidence. That is true also in respect of the procedures followed. It was noteworthy that Mr James focussed on the appeal outcome in making his submission, yet contended that this was not a case where the appeal was said to be curative.

8. As Mr James accepted, there is a high bar to clear before claims are struck out as having no reasonable prospects of success (***Balls v Downham Market High School and College [2011] IRLR 217***). The question is whether there is a realistic as opposed to a fanciful prospect of success (***Ezsias v North Glamorgan NHS Trust [2007] I.C.R. 112***). This is clearly a case where no determination can be made without hearing the evidence.

There are significant disputes over facts. It is quite clear that the claimant has a realistic prospect of success depending on how the evidence emerges.

9. On the second part of the application – that strike out should be granted on the basis that the proceedings have been conducted by the claimant in a way that is scandalous, unreasonable or vexatious – Mr James submitted that the claimant had repeatedly and wilfully disregarded clear directions (albeit not Orders) from the Tribunal. He referred to what he described as excessive witness order applications. The main focus of his submission related to allegations made by the claimant of inappropriate conduct on the part of the respondent or its representatives. These centred around alleged witness tampering and the withholding or destruction of relevant evidence. Reference was made to a warning from the Tribunal that he should not make a serious allegation of witness tampering without the evidence to substantiate it. In response to this present application, the claimant had made reference to an attempt to "pervert justice". He had also made a reference to the respondent's representative behaving "like a child being caught with his hand in the cookie jar".

10. Mr James submitted that the claimant's conduct was "a misuse of the legal process to vilify others" and involved "giving gratuitous insult to the court in the course of such process" (***Bennett v Southwark London Borough Council [2002] ICR 881***). As a consequence, he submitted that a fair trial was no longer possible. Addressing proportionality, he argued that strike out

was entirely proportionate, the claimant having displayed an escalating pattern of unreasonable behaviour and gratuitous insult.

11. In response, the claimant stated that he had not meant any attack against the professionalism of the respondent's representatives. He suggested that he had found difficulty in performing the role of both party and representative.

12. In relation to witnesses, he pointed out that he had been permitted to seek voluntary attendance of witnesses and found some of the information given to him by the respondent to be lacking. He mentioned that at least one witness who had previously indicated a willingness to attend had changed their mind. This led to his suggestion of tampering. In response to the Tribunal asking for evidence of the allegation he stated that he did his best to provide the evidence as he saw it.

13. As for the allegations of evidence being destroyed or withheld, he referred to being told by the respondent that certain material was no longer available or that certain material would not be provided.

14. He stated that his reference to perverting justice was intended to mean a denial of access to justice given the affordability of the deposit order sought (£1,000). The reference to "hand in the cookie jar" was intended as a characterisation of childish behaviour by the respondent. He apologised for any offence he had caused to the respondent or its representatives on a number of occasions during the course of his submissions.

15. Whilst the Tribunal found some of the comments of the claimant to be intemperate or misguided, it was not satisfied that they met the statutory test in rule 27(1)(b) of the Rules. The claimant is unrepresented and clearly feels

strongly about his case. His language was at times immoderate, but has not been of a character that shows an intention to vilify. It is more misguided than malicious, as reflected in the claimant's explanations and his apology. In relation to witness applications, although the Tribunal previously refused orders, the claimant was told he could seek voluntary attendance so cannot be criticised for doing that.

16. Moreover, there is nothing to suggest that a fair trail is no longer possible. The conduct is simply not of that order. The case seems otherwise effectively managed. Again, it is not necessary to consider proportionality, but even if the other aspects of the test were satisfied, to strike out a claim with an unrepresented claimant in these circumstances would be highly disproportionate with real prejudice to a claimant who has been pursuing the claim for around 2 years.

17. Turning to the third aspect of the application, Mr James asked for a maximum deposit order to be made. In support of the application, he referred to his submissions on strike out and argued that if the prospects did not warrant strike out, they satisfied the lesser test of "little reasonable" prospects which merit the order of a deposit. He referred to the need to consider means but made no comment on that.

18. The claimant asked that no deposit be ordered. He is in receipt of universal credit only and has no savings.

19. For the reasons given by the Tribunal for refusing the first strike out application, the application for a deposit order is refused. Even considering

the lesser hurdle which applies, the outcome is the same. A full exploration of the evidence is required.

20. The respondent's applications having been refused, the case will proceed to a final Hearing in accordance with the timetable already in place.

Employment Judge: Ronald Mackay
Date of Judgment: 03 August 2022
Entered in register: 03 August 2022
and copied to parties