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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000171/2022

Preliminary Hearing held in Dundee on 24 May 2023

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Employment Judge R Mackay

15 **Mr O Nnamuchi**

**Claimant
In Person**

20 **My Care (Tayside) Ltd**

**Respondent
Represented by:
Ms Maguire, Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is as follows:

1. The respondent's application under Rule 37 for strike-out is successful in respect of the claimant's claims of unfair dismissal (including automatically unfair dismissal by reason of whistleblowing) and discrimination on the grounds of marriage.
2. The respondent's applications for strike-out under Rule 37 failing which for a deposit order under Rule 39 in respect of the claimant's claim for notice pay and arrears of pay are refused.

3. The claimant's application under Rule 37 for the striking out of the response is refused.

REASONS

5 Background

1. A case management preliminary hearing took place on 8 February 2022. At that time, the claimant was ordered to provide further and better particulars of his claims. Following receipt of the particulars provided, the respondent's solicitor made an application for all of the claims to be struck out, or in the
10 alternative that a deposit order be made. Although not expressly articulated by the claimant, correspondence from him led to the Tribunal fixing this hearing to consider the claimant's application that the response be struck out in addition to the respondent's application.
2. At the outset of the hearing, the respondent's solicitor requested that the
15 tribunal also consider the question of time bar. The Tribunal declined to do so on the basis that the hearing had not been set for that purpose and it would be unfair to the claimant - particularly as a litigant in person - to be expected to deal with such an application without notice.

Submissions

- 20 3. On behalf of the respondent, Ms Maguire submitted that all of the claims should be struck out on the grounds that they had no reasonable prospect of success.
4. So far as unfair dismissal is concerned, she highlighted the agreed position that the claimant did not have the requisite qualifying period of service in order
25 to claim ordinary unfair dismissal. He was employed for approximately two months only.
5. She accepted that a claim for automatically unfair dismissal by virtue of whistle blowing could be competent. She highlighted, however, what she said

was a complete lack of any pleadings in the ET1 or in the further and better particulars so as to give rise to a competent claim. The complaint raised by the claimant related to an administrative error whereby the letters “xx” were added to his name on certain payroll information.

- 5 6. In relation to the claim for marriage discrimination, Ms Maguire submitted that the claimant had failed to address this in his further and better particulars at all despite having been ordered to do so by an employment judge. Similarly, she highlighted the absence of anything in the original ET1 about marriage discrimination other than the claimant having ticked the relevant box. The same, she said, was true of the further and better particulars
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7. So far as arrears of pay and notice pay are concerned, the respondent’s solicitor asserted that these were not due. On being questioned by the Tribunal however, she accepted that the claimant had highlighted a range of payments which he said had not been paid and had identified a claim for notice pay. She accepted that a factual analysis of those claims would be required.
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8. In the alternative, Ms Maguire requested a deposit of £150 in respect of each of the claimant’s claims.
9. For the claimant, he accepted that he did not have the necessary two years service in order to claim ordinary unfair dismissal. He submitted his claim was competent on the basis that he had made a whistleblowing complaint. He articulated the complaint as being to do with the erroneous “xx” being appended to his name on certain documents. On being questioned as to whether there was any other alleged whistleblowing complaint, the claimant referred to his P45 which he said showed incorrect deductions. He accepted that this was received after the termination of his employment.
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10. The claimant was given an opportunity to articulate his complaint of marriage discrimination. He stated that both he and his wife obtained application forms for the role he was appointed to with the respondent. He applied and was

successful. His wife did not ultimately apply. On being pressed as to what discrimination was being alleged, the claimant made reference to having informed the respondent that he needed time off to attend a criminal court hearing. The court hearing related to allegations against him concerning his children. He did not understand why the respondent would stop him from working because of the court case.

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11. The claimant maintained his claim for notice pay, disputing the existence of gross misconduct entitling the respondent to dismiss him without notice. He also stood by the claims for arrears of pay as set out in his ET1.
- 10 12. The claimant went on to make his request for the response to be struck out. He pointed to what he described as the “mere denials” in response to the claims in the ET3. He described this as a “vexatious approach to defend a lie”. He also referred to having received the bundle for this preliminary hearing only the previous day.
- 15 13. In response, Ms Maguire submitted that the response required to be limited given the lack of specification of the claimant’s claims as evidenced by the subsequent order that he provide further and better particulars. So far as the bundle is concerned, she stated that this contained nothing new and was simply a courtesy to the Employment Tribunal.

20 **Relevant Law**

14. The Tribunal has power to strike-out the whole or part of claim under Rule 37:

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 15 response on any of the following grounds—

- 25 (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;*

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(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).*

10 15. The process for striking-out under Rule 37 involves a two stage test (***HM Prison Service v Dolby*** [2003] IRLR 694, EAT; ***Hasan v Tesco Stores Ltd*** UKEAT/0098/16). First, the Tribunal must determine whether one of the specified grounds for striking out has been established; second, if one of the grounds is made out, the tribunal must decide as a matter of discretion
15 whether to strike out or whether some other, less draconian, sanction should be applied.

16. A Tribunal should be slow to strike-out a claim where one the parties is a litigant in person (***Mbuisa v Cygnet Healthcare Ltd*** EAT 0119/18) given the draconian nature of the power.

20 17. Similarly, In ***Anyanwu and anor v South Bank Student Union and anor*** 2001 ICR 391, HL, the House of Lords was clear that great caution must be exercised in striking-out discrimination claims given that they are generally fact-sensitive and require full examination of the evidence for a Tribunal to make a proper determination.

25 18. In considering whether to strike-out, the Tribunal must take the Claimant's case at its highest and assume she will make out the facts he offers to prove unless those facts are conclusively disproved or fundamentally inconsistent

with contemporaneous documents (*Mechkarov v Citibank NA* 2016 ICR 1121, EAT).

19. The Tribunal has the power to make a deposit order under Rule 39:

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- (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 £1,000 as a condition of continuing to advance that allegation or argument.
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- (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.
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- (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.
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- (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
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- (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.

5 20. In *Hemdan v Ishmail* [2017] IRLR 228, it was confirmed that the purpose of the rule was to identify claims with little prospect of success at an early stage and discourage those but was not intended to act as a barrier to access to justice or to “strike-out by the back door”.

Decision

10 21. The Tribunal first considered the claim of ordinary unfair dismissal. In light of the claimant’s short service with the respondent, that claim has no reasonable prospect of success and is struck out accordingly.

22. It went on to consider whether the claimant has articulated an automatically unfair dismissal by virtue of whistleblowing.

15 23. The relevant test is found in Section 43B of the **Employment Rights Act 1996**:

(1) *In this Part a “ qualifying disclosure ” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—*

20 (a) *that a criminal offence has been committed, is being committed or is likely to be committed,*

(b) *that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*

25 (c) *that a miscarriage of justice has occurred, is occurring or is likely to occur,*

(d) *that the health or safety of any individual has been, is being or is likely to be endangered,*

(e) *that the environment has been, is being or is likely to be damaged, or*

5 (f) *that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.*

24. It is noteworthy that in the note following the case management hearing on 8 February 2022, the claimant was directed to the relevant statutory test and relevant authorities.

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25. Applying the test, the Tribunal considered whether there had been a disclosure of information. Based on the pleadings and submissions of the claimant, it is accepted that he disclosed information relating to his disquiet about the erroneous “xx” being attached to his name on certain documentation.

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26. It then considered whether the claimant believed the disclosure to be in the public interest. There is nothing in the pleadings to suggest that he held such a belief. Even if he did, it would be difficult to establish that an error of this nature could reasonably be believed to be in the public interest. In terms of whether the claimant believed the disclosure tended to show one of the matters listed in Paragraphs (a) to (f) above, he did not identify any of the relevant categories. Equally, it is impossible to contemplate that the claimant might reasonably have held such a belief standing the very minor nature of the error in question.

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27. The Tribunal was not, therefore, satisfied that the claimant has identified a qualifying disclosure. Even if wrong in that, the claimant has not sought to provide any linkage between the alleged disclosure of the clerical error and

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his dismissal. It is not part of his case that the disclosure was in any way connected with the dismissal itself. His point about the P45 comes after the event.

5 28. For those reasons, and whilst mindful of the fact that the claimant is a litigant in person and that the striking out of a whistleblowing claim should be approached with great caution, it is quite clear that the claim has no reasonable prospect of success.

10 29. Having so established, the Tribunal then considered whether as a matter of discretion to order some less draconian sanction. In the circumstances, given the complete absence of a stateable case by the claimant, it elected not to do so.

15 30. The Tribunal went on to consider the claimant's marriage discrimination case. Again, it was particularly mindful of the draconian nature of striking out a discrimination claim brought by an unrepresented claimant. Despite having been given additional opportunity to provide further and better particulars and an opportunity to articulate his claim orally at this preliminary hearing, However, nothing advanced by the claimant could conceivably amount to sufficient particularisation of a complaint of marriage discrimination of any type.

20 31. At its very highest, the claimant referred to the fact that he was married and made reference to his wife having considered applying for the same post as him, but having elected not to do so. No discrimination of any form was alleged relating to marital status.

25 32. His reference to a criminal case in which he was involved and which related to his children appeared in no way related to his employment or indeed his marital status.

33. The Tribunal again found that this claim has no reasonable prospect of success. It again considered whether a less draconian sanction would be

appropriate. Given the complete absence of any valid particularised claim, however, it considered that strike-out was appropriate.

5 34. The Tribunal went on to consider the respondent's application for strike-out of the claimant's notice pay and arrears of pay claims. The Tribunal was not satisfied that these should be struck out. Both are matters of factual dispute which requires to be determined by the Tribunal. The claimant has identified arrears of pay which he says are due. He is a right to have that claim heard. Similarly, he is entitled to advance the position that he was due notice of dismissal on the basis that he had not committed an act of gross misconduct. 10 For the same reasons, the application for a deposit order is also refused. Those claims will, therefore, proceed.

15 35. Finally, the Tribunal considered the claimant's application to have the response struck out. He referred to vexatiousness on the part of the respondent. The Tribunal found no basis whatsoever for that suggestion. The drafting of the ET3 is appropriate and proportionate having regard to the level of specification in the ET1 itself. Moreover, the presentation of a bundle a day in advance of a preliminary hearing, containing documents familiar to the claimant, for the benefit of the Tribunal, is far from vexatious. The Tribunal determined, therefore, that the response should not be struck out.

20 36. The remaining claims will be listed for a hearing in due course. The respondent's solicitor wished to have it noted there remains a live time bar issue concerning these claims. It was agreed, therefore, that the listing of a hearing would include a preliminary question of time bar.

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Employment Judge : R Mackay
Date of Judgment : 15 June 2023
Date sent to parties : 27 June 2023