



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4100007/2023

Preliminary Hearing held in Dundee on 16 August 2023

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Employment Judge A Kemp

Mr A Fleming

**Claimant
In person**

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Perth and Kinross Council

**Respondent
Represented by:
Mrs M McLaren
Solicitor**

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JUDGMENT

The Tribunal refuses the respondent's application for strike out of the Claim under Rule 37.

REASONS

30 Introduction

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1. This was a Preliminary Hearing arranged to address an application for strike out by the respondent. It follows two earlier Preliminary Hearings before me on 27 April 2023 and 17 July 2023. The claimant had not attended the latter hearing. He explained that in addition to having dyslexia he has suffered from MS for 12 years, and that he had been unable to attend the hearing on that date because of it. No report or similar was submitted to the Tribunal, although that had been referred to in the

E.T. Z4 (WR)

Note issued following that hearing. The application had been continued to the present hearing as the Note sets out.

2. The claimant had not provided a Schedule of Loss as had been referred to in the Note following the latter hearing, which had given him the opportunity to do so by 10 August 2023. In brief summary he explained he had not understood what was required. He said that the documents required for it are with his accountants. He also explained that in an email of 14 May 2023 he had listed what documents he sought from the respondent, although that was not obviously apparent from its terms, and that he was waiting for some of them. He had also sent a separate email that day, which was not before me, giving a broad indication of the remedy he sought but without specific information or supporting documents. He had thought that that sufficed as a Schedule of Loss.

Application

3. The respondent sought a strike out of the claim for the breaches of the Orders issued, being primarily in respect of the Schedule of Loss, but also documents for the Final Hearing. A Final Hearing has been fixed to commence on 4 September 2023. It cannot proceed on that date as the documentation to do so is not available. The respondent had sent documents to the claimant.

Law

4. This was set out in the last Note but is repeated for ease of reference.
5. The Tribunal Rules of Procedure are all subject to the terms of Rule 2. It states as follows:

“2 Overriding objective

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

- (a) ensuring that the parties are on an equal footing;
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and
- (e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.”

6. Rule 37 provides as follows:

“37 Striking out

(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 prospects of success.....
- (c) for non-compliancewith an order of the Tribunal.....”

7. The EAT held that the striking out process requires a two-stage test in *HM Prison Service v Dolby [2003] IRLR 694*, and in *Hassan v Tesco Stores Ltd UKEAT/0098/16*. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim. In *Hassan* Lady Wise stated that the second stage is important as it is 'a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit'.

Discussion

8. Having regard to the terms of Rule 2, and the specific Rule 37 as to strike out as explained in the case law, I did not consider that it was in accordance with the overriding objective to strike out the claim. The claimant has been in breach of two sets of orders. That is a concern. But I have formed the view that that is as he is a party litigant who suffers from dyslexia, as well as MS on his explanation, and has not been aware of

what is required. The breach is not wilful or reckless, although that is not a pre-requisite for strike out. It is however a factor to consider when exercising discretion.

9. If the claim is not struck out the respondent will be put to expense, and there will be delay in bringing it to a conclusion, which is one other factor to weigh in the balance. Another is that the claimant's claim is not as clear as it might be. It is his onus of proof that there was a dismissal in law. That requires breach of a fundamental term of contract, in brief summary of the test.
10. It appears to me however that the claimant's claim, whilst not without difficulties for him, is one that in general it is fair and just to hear at a Final Hearing. In the language of *Hassan* it may yet have merit, although that can only be decided after hearing the evidence, and it is far from saying that the claimant's claim will, or is likely to, succeed. There is a case to argue for both parties, and there is a core of disputed fact which can be decided after hearing evidence. The case for the respondent includes issues such as *Polkey*, which is to say whether there could have been a fair dismissal separately, and contribution, amongst others, but they do not mean that there is not a claim to determine.
11. It appears to me that after the discussions held at the hearing that the position with the outstanding documentation for the hearing should be capable of being resolved, and that a fair hearing of the claim remains possible. There is proposed to be a total of five witnesses. Although there is a delay in the fixing of new dates for a Final Hearing it is not unduly long, with new dates likely by the end of 2023, and the delay is not likely to cause forensic prejudice, at least to any material extent. In the event that it does, however that is a factor that the Tribunal can take into account at a Final Hearing. There is the outstanding issue of a Schedule of Loss and supporting documentation, which I address further in a separate Note including making an Unless Order. That order means that if the claimant does not produce an appropriate Schedule of Loss within the period set out, the claim will be dismissed.

12. I consider that in all the circumstances it is not in accordance with the overriding objective to grant the application for strike out under Rule 37. For the avoidance of doubt I did consider whether to strike out the claim for the failure to attend the hearing, noting that there was no report provided, under the terms of Rule 47 but considered for essentially similar reasons that to do so was not in accordance with the overriding objective.

Conclusion

13. The application is refused.

Employment Judge: A Kemp
Date of Judgment: 22 August 2023
Date sent to parties: 24 August 2023