



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 8000215/2023

Employment Judge: M A Macleod

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John Harkins

**Claimant
Written Submission**

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McQueen's Dairies Ltd

**Respondent
Written Submission**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 **The Judgment of the Employment Tribunal is that the claimant's application for strike-out of the respondent's response to his claim is refused.**

REASONS

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1. The claimant presented an application on 27 September 2024 to the Tribunal for strike-out of the respondent's response, on the basis that the respondent's defence has no reasonable prospect of success.

2. The respondent opposed this application.

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3. Parties then agreed that it was appropriate for the Tribunal to address the application by way of written submissions alone.

4. I set out a summary of the application and submissions, summarise the law briefly and then my decision below.

The Application

5. The claimant set out his application by reference to a number of statutory provisions, and attached thereto a number of “Exhibits” or documentary evidence which he relied upon in support of his application.
- 5 6. He relied upon that evidence in support of his claim of automatically unfair dismissal under section 99(1)(c) of the Employment Rights Act 1996 (ERA) for a reason connected with taking paternity leave. He argued that he was dismissed during the protected period, and that his dismissal was therefore automatically unfair, the employer’s reasoning or intentions being irrelevant.
- 10 The evidence he provided related to the approval of his paternity leave, his P45 backdated to 9 February 2023, issued during his paternity leave and his email on 14 February confirming that he had not resigned, and explaining his mental health struggles.
- 15 7. He pointed to the ET3 submitted by the respondent in which they had claimed that they had assumed that he had resigned or was absent without leave. He sought to rebut this by maintaining that he kept up regular communications, including informing the respondent of his mental health issues. He argued that assumptions of resignation do not negate protections under section 99 of ERA.
- 20 8. He submitted, therefore, that the respondent’s defence lacked any merit and should be struck out.
- 25 9. Secondly, he argued that the respondent acted in breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures, contrary to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, which allows Tribunals to adjust awards by up to 25% for failure to comply with the Code.
10. He identified the failure to provide a letter of dismissal, the assumption that he had resigned, the absence of any opportunity to respond and the absence of a right of appeal as being in breach of the Code of Practice.

11. He referred to the letter of 13 February 2023 by Human Resources assuming that he had resigned, his response explaining his mental health struggles, and a further email and response on 16 February 2023.
12. The claimant maintained that the respondent's procedural failings further
5 weakened their defence, and made it unreasonable to allow the defence to proceed.
13. Thirdly, the claimant argued that there was a lack of viable defence and procedural irregularities. The respondent's defence, he said, was predicated on an unfounded assumption of his resignation, contradicted by his multiple
10 communications demonstrating that he did not resign, and the respondent ignoring his attempts to clarify and resolve the situation.
14. He criticised the respondent's failure to participate meaningfully in the ACAS Early Conciliation process, contravening the "spirit of dispute resolution" encouraged by the Tribunal.
15. He summarised this heading as the lack of a viable defence, procedural irregularities and non-compliance with Tribunal rules.
16. Fourthly, the claimant emphasised the impact upon him, referring to his medical records confirming an increased dosage of medication, and relies upon this as a basis for seeking aggravated damages, due to the
20 respondent's high-handed and oppressive conduct in issuing a backdated P45 during his paternity leave, assuming resignation without basis or proper communication, rescinding his statutory paternity pay and other entitlements and ignoring his attempts to resolve the situation amicably.
17. The claimant therefore sought strike-out of the respondent's response on
25 the basis that it lacks any reasonable prospect of success.

The Respondent's Response

18. By email dated 3 October 2024, the respondent submitted their opposition to the claimant's application.

19.They maintained that they were entitled to maintain a defence to these claims, which they say lack merit. Their position is that the claimant's employment terminated following his failure to return to work after his period of paternity leave.

5 20.They set out under "Background" a narrative of events surrounding the claimant's communications with the respondent from the start of January 2023. Essentially, they argue that the claimant was absent from work in February 2023 when he was invited to a welfare meeting by his manager, to which he responded by saying that he was on paternity leave. The
10 respondent submits that the claimant had not previously notified his manager that he wished to take a period of paternity leave, and failed to follow the notification procedures required. However, the respondent agreed to backdate his paternity leave and forwarded the forms for him to complete.

15 21.The respondent then say that they wrote to the claimant to advise him that they expected him to return to work on 12 February 2023, but that the claimant did not attend on that or the following day. On 13 February 2023, the respondent wrote to the claimant an "AWOL" letter which assumed that he had resigned. The claimant replied to say that had not resigned, but did not explain his position nor did he return to work. A further letter was sent to
20 him on 16 February to say that since he had not returned to work nor explained his position he would be treated as a leaver.

22.The respondent therefore argued that the claimant had failed to demonstrate that the response had no reasonable prospect of success, and that in their view it was the claimant who would struggle to prove his claim.

25 23.They then went on to argue that the claimant's pursuit of his claims had become increasingly disruptive and unreasonable. No application was, however, included within their response.

The Claimant's Further Response

24. The claimant then sent a "Supplementary Note on Communication, Paternity Leave and Mental Health Impact" by email dated 11 October 2024.

5 25. He maintained that he properly notified the respondent of his intention to take paternity leave, having discussed it with Bob Bruce, and it was entered into the respondent's holiday system as a period of leave. Delays still followed in its acknowledgement by the respondent. The delay caused confusion about his absence, which the respondent later used as grounds
10 for assuming my resignation.

26. A welfare meeting was fixed to take place by telephone on 6 February 2023 with Bob Bruce, but the meeting was cancelled without notice, which left the claimant feeling isolated and uncertain about his employment status.

15 27. This eroded the claimant's confidence in Bob Bruce's ability to fairly address his concerns.

28. The claimant emphasised his mental health struggles during this period, of which he had been open with HR and Mr Bruce. He did not want to lose his job, but was seeking understanding and when he sought accommodations to allow him to return to the workplace. He also reiterated that he wrote to
20 the respondent on 14 February 2023 making clear that he did not want to resign.

29. The claimant then referred to the ongoing impact of these events, in which his condition has been misunderstood by the respondent (and also by the Tribunal process). He also confirmed his intention to appeal against the
25 Tribunal's recent decision and affirmed that this has not affected his resolve to pursue the matter.

The Relevant Law

30. Rule 37(1)(b) of the Employment Tribunals Rules of Procedure 2013 provides:

“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-

5 (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...”*

31. Rule 37(2) provides:

10 *“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.”*

32. The well-known case of **Ezsias v North Glamorgan NHS Trust 2007 ICR 1126 CA** provides helpful guidance in considering whether to strike out a claim involving whistleblowing allegations, and said that the same approach should be taken in such cases as requires to be taken in discrimination claims, which require an investigation to be conducted into why an employer acted in a particular way. It was stressed that only in an exceptional case will a case be struck out as having no reasonable prospect of success
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20 where the central facts are in dispute.

Discussion and Decision

33. It is appropriate to consider the claimant's application in relation to each of the points made.

34. The first point made by the claimant is that he argues that he was
25 automatically unfairly dismissed by the respondent, and that the respondent's assumption that he had resigned or was absent without leave did not negate the protections of section 99.

35. In my judgment, there are difficulties with the claimant's assertions here. It is plain that the claimant does not accept that he resigned, and that the

respondent does not consider that they dismissed him. As a result, until the termination of the claimant's employment is determined by the Tribunal, following the hearing of evidence, it is impossible to make any assessment of the strength of the position of either party. The claimant asserts that he
5 was in regular communication with the respondent, but the respondent's position is that he was not, and that there were issues relating to the type of leave he was actually taking at the time. It is also their position that the claimant was in fact due to end his paternity leave on 12 February 2023.

10 36. When the claimant says that "assumptions of resignation do not negate protections" under section 99, it is not entirely clear what he means. If he intends this to mean the fact that the respondent assumed that he had resigned does not mean he cannot claim that he was dismissed by the respondent, in fact, as a result of having taken paternity leave, that may be correct. If he means that because they assumed he resigned, they cannot
15 defend a claim of automatically unfair dismissal, it is entirely unclear on what basis he asserts that.

20 37. It appears to me to be clear that the respondent is disputing the claimant's version of events leading up to the point where his employment ended, and that until that dispute of fact is resolved following the hearing of all evidence in the case, it is impossible for the Tribunal to conclude that the respondent's response has no reasonable prospect of success.

25 38. The claimant's assertion that the respondent's defence lacks merit because automatic unfair dismissal under section 99 does not consider the employer's belief or assumptions is again unclear. It is plain that before any legal analysis may be applied to the circumstances of the ending of the claimant's employment with the respondent, the Tribunal would require to make findings of fact about what actually did happen. In order to reach a conclusion that the claimant was automatically unfairly dismissed under section 99 as averred, the Tribunal would require to resolve the factual
30 disputes and determine exactly what happened in relation to the ending of his employment. In other words, the Tribunal would require to determine whether the claimant was dismissed by the respondent, and if he was,

whether that dismissal was automatically unfair because he was dismissed for a reason relating to paternity leave. Since the respondent disputes both of those statements, it would be premature at this stage, and not in the interests of justice, for the Tribunal to determine that the respondent has no reasonable prospect of persuading the Tribunal that the claimant was not dismissed or not dismissed for an automatically unfair reason.

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39. Since there are complex factual and legal questions to be determined by the Tribunal it is my view that to decide those questions, which is the effect of the application, would be unsafe without hearing the full evidence in the case. It is not the case that the respondent has no reasonable prospect of success in their defence at this stage, without hearing evidence.

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40. The second point raised by the claimant is that the respondent failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. In my judgment, these points, which are clearly made by the claimant in his application, may go to the question of whether or not the claimant was unfairly dismissed on procedural grounds. However, before determining whether or not the Code of Practice was breached, the Tribunal requires to reach a view on the evidence about whether or not the claimant was dismissed by the respondent. These questions will arise if it is relevant once that determination has been made, but not before (that is, at this stage).

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41. The third point is that the respondent's defence is predicated on an unfounded assumption of the claimant's resignation. He points to multiple communications demonstrating that he did not resign and the respondent ignoring his attempts to clarify and resolve the situation.

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42. This is a very similar point to the first point raised by the claimant, but in support of his assertion on this front, the claimant refers to the respondent's refusal to participate meaningfully in the ACAS early conciliation scheme. There is no legal wrong identified by the claimant here. It is a matter for any party to determine the extent to which they wish to negotiate in relation to any claim, whether claimant or respondent. The claimant is clearly

dissatisfied with the respondent's efforts to reach an agreement with him, but the ACAS conciliation scheme falls, quite appropriately, outwith the scope of the Tribunal's jurisdiction. This is a matter which falls between the parties. In any event, while it is clearly a source of frustration, it has no bearing on this application, which relates to whether or not the defence has any reasonable prospect of success. Whether or not a party participates in the ACAS scheme simply has no relevance to the strength or weakness of their pleadings.

43. The claimant also refers to the multiple communications demonstrating that he did not resign. Once again, this goes to the heart of the matter, that is, how his employment came to an end, which can only be determined following a full hearing on the evidence. That evidence of multiple communications by the claimant will clearly be relevant to the Tribunal's decision on this but without hearing and determining the highly disputed facts about the point, the Tribunal cannot draw a conclusion that the respondent's position lacks any reasonable prospect of success.

44. The fourth point made by the claimant is that he has suffered severe anxiety and emotional distress caused by his dismissal. This is a question of remedy relating to the claim if it is determined to be successful. The claimant is levelling criticisms, as he is entitled to do, against the respondent for the way in which they treated him, but the context of these complaints is in relation to the claim to the Tribunal. If he is successful in his claim, these matters will require to be considered carefully in order to determine what award should be made to the claimant.

45. Again, the points made by the claimant do not have a bearing on whether or not the respondent's defence has any reasonable prospect of success.

46. In conclusion, it is clear to me that there is a significant and live dispute between the parties both in relation to the facts of this case as well as to their interpretation in law. To strike out a response would be a draconian result for the respondent, who would then be prevented from presenting their defence to the allegations which they dispute both factually and legally.

Albeit that the case of **Eszias** discussed a case in which whistleblowing is complained of, this case is analogous in that it requires consideration of a complex legal issue, namely automatically unfair dismissal for a reason related to paternity leave under section 99 of ERA. The court in that case made clear that only in an exceptional case could the Tribunal justify striking out a claim (and by extension a response) where the central facts are in dispute.

47. I do not consider this case to belong in this category. The dispute on the facts and the law is live between the parties, and it would not be in the interests of justice to prevent the respondent from presenting their defence without a hearing on the evidence. At this stage, in my judgment, it cannot be said that the respondent's defence has no reasonable prospect of success. There are too many uncertainties which can only be properly resolved by the evidence being fully ventilated at a final hearing, and it would be grossly unfair to the respondent to prevent their having the opportunity to maintain their defence to the claims made.

48. Accordingly, it is my judgment that the claimant's application for strike-out of the respondent's response is refused.

Employment Judge: M A Macleod
Date of Judgment: 23 December 2024
Entered in register: 23 December 2024
and copied to parties

I confirm that this is my Judgment in Harkins v McQueen's Dairies Ltd and that I have signed the Judgment by electronic means.