



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4106989/2019

Preliminary Hearing Held at Edinburgh on 6 January 2020

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Employment Judge A Kemp

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Mr R Gelpernas

**Claimant
No appearance**

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NSL Limited

**Respondent
Represented by:
Mr M Brien
Barrister**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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1. The Claim is dismissed under Rule 47 and struck out under Rule 37 in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (“the Rules”).

2. The respondent is awarded expenses in the sum of ONE THOUSAND ONE HUNDRED AND SEVENTY SEVEN POUNDS FIFTY PENCE (£1,177.50) under Rule 76 of the Rules.

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REASONS

Introduction

E.T. Z4 (WR)

1. This case was arranged for a Preliminary Hearing to determine whether to strike out the claim as having no reasonable prospects of success, or alternatively to make a deposit order on the basis that the claim had little prospects of success. The respondent had also sought an award of expenses (which is referred to as costs in England).
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2. The Tribunal had earlier conducted a Preliminary Hearing before EJ Meiklejohn on 26 July 2019. The claimant had not appeared at that hearing. He had shortly beforehand requested that it be undertaken by telephone conference call, but that was refused. At the Preliminary Hearing the respondent sought to have it conducted as an open hearing but that was refused by the Judge (the same application having earlier been made in writing and refused) and the present Preliminary Hearing, an open one, was fixed. Notice of the same was duly given to the parties. It was to determine the applications for strike out, which failing deposit order, and expenses.
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3. The claimant again, late in the day, by email on 3 January 2020, applied to have the present hearing conducted by telephone conference call, but that application was refused by EJ Porter.
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4. The claimant however did not appear at the Preliminary Hearing before me. The hearing commenced after 11am, although it had been due to commence at 10.30 after notice of the later start date was given to the parties by email. No explanation was provided by the claimant for his non-attendance, and there was no communication from him after he was informed that his application to have the hearing held by telephone conference call had been refused.
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5. In the absence of the claimant the Hearing commenced.
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Submission for respondent

6. Mr Brien argued that the claimant had on two occasions failed to appear, and that strike out of the claim was appropriate under Rule 47.

7. In the alternative he argued that the claim should be struck out under Rule 37. He referred to the letter sent to the tribunal by the respondent's solicitors on 10 July 2019 in which they had set out the argument for doing so in detail.

8. He also sought an award of expenses under Rule 76. He provided a costs schedule, following the terminology in England, which had details of the work carried out by a legal assistant and partner. The total sought, exclusive of VAT which the respondent could recover as a VAT registered entity, was £2,864.50. In making the argument for expenses he referred to a letter sent to the claimant initially on 26 June 2019 and then re-sent when there was no response on 12 August 2019 in which the respondent had offered to allow the claimant to withdraw his claim without any award of costs (as it was there referred to), to which there had been no reply.

Law

9. Rule 47 of the Rules found in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules") provides as follows:-

"47 Non-attendance

If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence."

10. Rule 37 of the Rules 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—

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(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,.....”

11. Rule 76 of the Rules provides as follows:-

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“76 When a costs order or a preparation time order may or shall be made

(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

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(a) a party..... has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part).....;

(b) any claim or response had no reasonable prospect of success.....”

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12. The Rules are construed in accordance with the overriding objective found in Rule 2, which provide:-

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“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;
- 5 (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
10 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
15 overriding objective and in particular shall co-operate generally with each other and with the Tribunal.”

13. 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
20 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
25 prematurely of a claim that may yet have merit' (paragraph 19). I consider that the same principle applies to dismissal sought under Rule 47.

14. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances. In *Anyanwu v South Bank Students' Union [2001] IRLR 305*, a race discrimination case heard in the House of
30 Lords, Lord Steyn stated at paragraph 24:

"For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."

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15. Lord Hope of Craighead stated at paragraph 37:

" ... discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."

16. In ***Ukegheson v Haringey London Borough Council [2015] ICR 1285***, it was clarified that there are no formal categories where striking out is not permitted at all. It is therefore competent to strike out a case such as the present, and becomes an exercise of discretion.

17. That was made clear also in ***Ahir v British Airways plc [2017] EWCA Civ 1392***, in which Lord Justice Elias stated that

"Employment Tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in

circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context.”

18. Unlike court actions, in Tribunals expenses do not follow success, and the
5 fundamental principle remains that they are the exception not the rule. For
example in ***Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78***) Lord Justice Mummery stated the following:

10 “The ET’s power to order costs is more sparingly exercised and is more
circumscribed by the ET’s rules than that of the ordinary courts. There
the general rule is that costs follow the event and the unsuccessful
litigant normally has to foot the legal bill for the litigation. In the ET
costs orders are the exception rather than the rule. In most cases the
15 ET does not make any order for costs. If it does, it must act within rules
that expressly confine the ET’s power to specified circumstances,
notably unreasonableness in the bringing or conduct of the
proceedings.”

19. The fact that the claimant is a litigant in person, who is not legally qualified,
20 is one factor to consider. In ***AQ Ltd v Holden [2012] IRLR 648*** the EAT
stated this:

25 “...lay people are likely to lack the objectivity and knowledge of law
and practice brought by a professional adviser. Tribunals must bear
this in mind when assessing the threshold tests in [what is now Rule
76(1)(a)]. Further, even if the threshold tests for an order of costs are
met, the tribunal has discretion whether to make an order. This
discretion will be exercised having regard to all the circumstances. It
is not irrelevant that a lay person may have brought proceedings with
30 little or no access to specialist help and advice.”

20. The EAT in that case did confirm that that does not mean that litigants in
person, such as the claimant, are immune from expenses orders, and that

some were found to have acted unreasonably even when allowance of their lack of experience and objectivity is made.

21. In **Vaughan v London Borough of Lewisham [2013] IRLR 713** another
5 division of the EAT endorsed those comments, and observed in that case that there had been a “fundamentally unreasonable appreciation the test is whether objectively there were reasonable grounds for the pursuit of the claim, not whether the claimant genuinely believed in the claim subjectively”.
- 10 22. In **Cartiers Supermarkets Ltd v Laws [1978] IRLR 315**, decided under the then Rules which provided that the conduct of the party was frivolous, the EAT held that it was necessary “to look and see what that party knew or ought to have known if he had gone about the matter sensibly”. But in **Lothian Health Board v Johnstone [1981] IRLR 321** the EAT in Scotland indicated
15 that that did not lay down a general proposition. Later, in **Keskar v Governors of All Saints Church of England School [1991] ICR 493** it was held that if the person “ought to have known that the claims he was making had no substance” that was at least capable of being relevant.
- 20 23. A warning letter as to expenses will not lead inevitably to an award, but is one factor to take into account. In **Peat v Birmingham City Council UKEAT/0503/11** a costs order was made where a warning letter was given, but there the unsuccessful claimants were legally represented.
- 25 24. The issue is not considered only when the claim is commenced, but includes whether it is properly pursued (**NPower Yorkshire Ltd v Daly [2005] All ER (D) 403**).
25. The Tribunal may take into account the claimant’s ability to pay any award,
30 but that does not have to be decided at the point of any award and can take account of changes in the future (**Arrowsmith v Nottingham Trent University [2012] ICR 159**). There is only a requirement to take that matter into account (**Brooks v Nottingham University Hospitals NHS Trust:**

UKEAT/0246/18/JOJ reported on 17 October 2019). Any award should be reasonable and proportionate in the circumstances (**Herry v Dudley Metropolitan Council [2017] ICR 610**).

5 **Discussion**

26. I considered whether it was appropriate to dismiss the Claim under Rule 47. The claimant has not engaged adequately with the process. The present hearing was fixed to consider strike out of the claims, and he did not appear. That was so despite the terms of the previous Preliminary Hearing and the Notice that confirmed the purposes of it. No reason for that non-appearance was given by him. His very late application for it to be heard as a telephone conference was rejected. Nothing further was heard from him.

15 27. I then considered whether it was proportionate to dismiss the claim and concluded that it was. This was the second occasion of a failure to attend. It was entirely clear that a personal attendance was required from the terms of the first Preliminary Hearing, and the Notice sent thereafter, as well as from the failure of the application to convert the hearing to one by telephone. I considered that it was appropriate to dismiss the claim for non-attendance in these circumstances.

25 28. Separately I considered that there were no reasonable prospects of success, and that it was proportionate to strike out the claim under Rule 37. The claim was I considered essentially misconceived. The claimant alleged firstly unfair dismissal for asserting a statutory right, but he did not respond to the respondent's explanation for matters either in their Response Form or their letter of 10 July 2019. In simple terms, the claimant had, very late in the day, asked for annual leave, which he then took without formal approval. But it was later approved. Against that background it did not seem to me that the claim for dismissal for asserting a statutory right had any reasonable prospects of success. His service was very short and he did not have the

jurisdiction to claim unfair dismissal under section 92 of the Employment Rights Act 1996.

- 5 29. The claim for age discrimination was not explained in any detail, but it was the respondent's position that the basis of it – that the claimant was treated in a way that others were not – was not accurate. The claimant did not give any detail of why he made the allegation he did. If this was a claim of indirect discrimination under section 19 of the Equality Act 2010, no PCP was clearly identified as having been applied to him that satisfied the terms of that section. If it was a claim of direct discrimination under section 13 of that Act, which appeared to be less likely, no comparator was properly identified, and there was no real basis for an argument of unfavourable treatment in terms of the statutory provision. Whilst the test for striking out a discrimination claim is a high one, it appeared to me that the allegations made were so lacking in specification and so removed from the statutory terms that it did have no reasonable prospects of success, and that strike out of it was proportionate.
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- 20 30. The claim for unlawful deduction from wages appeared to be unfounded, as the claimant accepted that he was paid notice, a claim for statutory sick pay does not apply to the first three days of absence, and there was a termination of employment by letter dated 1 April 2019, such that no wages would be due thereafter.
- 25 31. It appeared to me accordingly that all claims made by the claimant had no reasonable prospects of success, and that it was proportionate, and in accordance with the overriding objective, that they be struck out. I did have in mind that discrimination claims are only struck out in exceptional circumstances, and that there is a public interest in having them considered fully with evidence, but also that where appropriate strike out is competent.
- 30 32. I then turned to the issue of expenses. It appeared to me that the claimant had conducted the proceedings in a wholly unreasonable way, had failed to provide any reasons for not attending either of the two hearings fixed, and

that he was aware from the terms of the Response Form, and the letter dated 26 June 2019, subsequently resent, that the respondent would be seeking an award of expenses. He had the opportunity to avoid that either by accepting the terms of the offer made to him by those letters, or by attending the tribunal and arguing against a strike out, or the award of expenses. He has failed to do either.

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33. Whilst awards of expenses are not the norm in tribunal proceedings, and are exceptional they may be made where the conduct is sufficiently unreasonable and I consider that this is such a case. I have considered the terms of the costs schedule and am satisfied that it is reasonable, both as to the hourly rates charged for the assistant and partner, and the work that was carried out as there referred to.

15 34. I do however take account of other factors. Firstly, the Judge did not allow the first Preliminary Hearing to proceed as an open one. Secondly, I have had regard to the claimant acting for himself, and from the terms of his Claim Form and indeed name I infer that English is not his first language. I consider that the award of expenses is not appropriate for the steps taken up to and including that hearing. For the period thereafter however, when the claimant had the detail from the first Preliminary Hearing, together with the letters from the respondent both setting out their position in detail and giving him a warning as to costs, I consider that his conduct, including his failure to attend the hearing before me, was sufficiently unreasonable that an award of expenses is appropriate. I do so having regard to the fact that the claimant is unrepresented and that for him English appears to be a second language.

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30 35. I had no information as to the claimant's means, and his ability or otherwise to pay any award. The reason for that however is that the claimant has not provided that information, by failing to attend the hearing, or by providing alternatively any submissions in writing for example.

36. I have considered the terms of the Schedule of Costs for the period after the first Preliminary Hearing and consider that the expenses set out there,

amounting to £1,177.50, is in a sum which is reasonable and proportionate. That is the net sum, with VAT recoverable by the respondent which is, I understand, VAT registered.

- 5 37. In light of all the circumstances and the terms of the overriding objective I consider that it is appropriate to make the award for expenses as above. In the event that the claimant considers that his ability to pay ought to be considered further, he can seek a reconsideration of this Judgment under the terms of Rule 70.

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Conclusion

38. I dismiss and strike out the claim under Rules 47 and 37 respectively, and make the award of expenses, in the sum set out above, under Rule 76.

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Date of Judgement: 8th January 2020

Employment Judgement: A Kemp

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Date Entered in Register: 9th January 2020

And Copied to Parties