



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Hurlock

**Respondent:** David Morris Window Cleaning Ltd

**Heard at:** Newcastle Employment Tribunal By Telephone

**On:** 22 November 2022

**Before:** Employment Judge Sweeney

**Appearances:** For the Claimant, No attendance For the Respondent, Amanda Mills, Sapience HR

## JUDGMENT

1. The Claimant's complaint of unfair dismissal has no reasonable prospect of success and is struck out pursuant to Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013.
2. The Claimant's complaint of breach of contract for failure to pay subsistence/food allowances has no reasonable prospect of success and is struck out pursuant to Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013.
3. The Claimant's complaint of wrongful dismissal (failure to give notice) is struck out on the basis that the manner in which the Claimant has conducted the proceedings is unreasonable and for non-compliance of orders of the Tribunal, pursuant to Rule 37(1)(b) and (d)

## REASONS

Legal principles

## Strike out

1. Rule 37 provides that:

(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 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;
  - 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 the part to be struck out)
2. One of the grounds for striking out is that the manner in which the case has been conducted is unreasonable. The Tribunal would have to be satisfied that the conduct was deliberate and persistent and made a fair hearing impossible. Strike out is a serious and draconian step for a tribunal to take and must be a proportionate response.

## The Complaints

3. By a Claim Form presented on **20 January 2022**, the Claimant brought the following complaints

3.1 Unfair dismissal

3.2 Wrongful dismissal (a claim for notice pay)

3.3 Other payments: a claim of breach of contract for failure to pay expenses (in respect of food)

4. As regards the claim for food and subsistence, the Claimant claims **£1,575** in that:

4.1 He says he should have been paid at least £25 for every 24 hours he worked away from home as these were costs that he incurred for food, drinks and toiletries. He claims **£1,000** in respect of the total number of periods of over 24 hours:

4.2 He says he should have been paid £10 for every day he worked over 15 hours, making an amount of **£250**.

- 4.3 He says he should have been paid £5 for every day he worked over 10 hours, making an amount of **£325**.
5. As regards the claim of unfair dismissal, the Claimant did not have two years' continuous employment.
6. As regards the claim of failure to give notice (wrongful dismissal), on the face of it, the Claimant was entitled to be given 1 week's notice of termination (subject to any argument by the Respondent that the Claimant had fundamentally breached his contract, entitling it to dismiss summarily).
7. The Respondent also has an Employers Contract Claim ('ECC'). This was served on the Claimant on **21 April 2022**. The date for responding to that claim was 19 May 2022. However, the Claimant did not respond. On **10 June 2022**, the Tribunal wrote to the Claimant to say that a judgment could be entered against him and that he is only entitled to participate in that claim to the extent permitted by the judge who hears it.

#### **Procedural background to this hearing**

8. There was a telephone preliminary hearing before Employment Judge Loy on 20 June 2022. Judge Loy made a number of orders:
- 8.1 That the Claimant send a schedule of losses claimed, by **04 July 2022**
- 8.2 That the Claimant and Respondent exchange copies of documents relevant to claim by **11 July 2022**,
- 8.3 That the Claimant and Respondent agree documents to go into a final hearing bundle by **18 July 2022**,
- 8.4 That the Respondent prepare and send bundle to C by **15 August 2022**,
- 8.5 That the parties witness statements by **05 September 2022**
- 8.6 That the Claimant write to the Tribunal and R by **29 August 2022** with a clear statement of the basis of his claim for unfair dismissal;
9. On **07 September 2022**, the Respondent applied to strike out all the claims or I the alternative for an order that the Claimant pay a deposit.
10. On **26 September 2022**, the Tribunal asked for the Claimant's comments on the strike out/deposit application by **03 October 2022**. He did not respond. On **14 October 2022**, the Tribunal sent a reminder to the Claimant, directing him to reply by **21 October 2022**. The Claimant replied that day to say: "*I replied that I'm fine with it and asked whether I could have a solicitor represent me the rest of my case*". In

another email, the Claimant said: *"I have complied with what has been asked I've sent my evidence of receipts from my bank which I sent over to Naomi as evidence."*

11. On **18 October 2022**, Judge Arullendran directed the Claimant to say whether he was agreeing to his claims being struck out? This was clearly a reference to the Claimant's comment *'I'm fine with it'*. The Claimant responded: *"Why am I having to decide whether or not I agree to having this struck out before the hearing date?"* He sent a separate email saying he did not want his claims struck out; that he has sent The Respondent his copies of receipts for the extra money he spent while working for them. As regards his complaint of unfair dismissal, the Claimant said: *"I don't think I am eligible for a claim but that's besides the point"*.

12. On **21 October 2022**, Judge Aspden listed a public preliminary hearing by telephone to consider whether to strike out any part of the Claimant's claims on the grounds that:

- 12.1 The claim has no reasonable prospect of success, or
- 12.2 The claim has not been actively pursued, or
- 12.3 The claimant has failed to comply with the orders of the Tribunal

13. She also directed that the Tribunal decide – if the claims are permitted to proceed - whether a deposit should be ordered under rule 39 et Rules of Procedure.

### Today's Hearing

14. On dialling in at 10am, Ms Mills was in attendance. The Claimant was not. As he had provided no telephone number, I asked the tribunal clerk to email him. An email was sent to the Claimant at 10.10am. He did not respond and did not dial in. I noted that this was the second time that the Claimant had failed to dial into a hearing and it was only as a result of the efforts of the Tribunal that he attended on **20 June 2022**. I considered it proportionate to continue to hear the Respondent's application in the Claimant's absence.

15. The Respondent had submitted a statement from Ms Mills on **16 November 2022**, copied to the Claimant. In that statement, she explained what was contained in the 'notepad' text documents disclosed by the Claimant and gave an example in paragraph 2. Those notepad texts are the only documents relied on by the Claimant in support of his from that he was entitled to the amounts set out in paragraph 4 above. That is clear in his email of **21 October 2022** (see paragraph 10 above).

### The claim for unfair dismissal

16. The dates of employment are not in dispute. The Claimant does not have sufficient continuity of employment to pursue a claim of ordinary unfair dismissal. He was directed to set out any basis for a claim of automatically unfair dismissal but has not done so. In his email to the Tribunal he recognises that he does not have a claim but that this is 'besides the point'. It is very much to the point because he has claimed

unfair dismissal. In the circumstances, it is clear that this complaint has no reasonable prospects of success and I strike it out.

**The claim for breach of contract (other payments)**

17. The Claimant does not identify any express term to the effect that he was entitled to be paid for the amounts claimed. There was no written contract. There is no basis that I can discern for implying any term entitling him to payment, and none is identified by the Claimant. In any event, a term can only be implied if it is necessary to do so. A term can only be implied if the Tribunal can presume that it would have been the intention of the parties to include it in the agreement at the time the contract was made. The Tribunal would have to be satisfied that of one of the following:

- 17.1 That the term was necessary in order to give the contract business efficacy;
- 17.2 That it is the custom and practice to include such a term in contracts of that particular kind;
- 17.3 That the intention to include the term is demonstrated by the way the contract was performed;
- 17.4 That the term is so obvious that the parties must have intended it (the 'officious bystander test')

18. There is no suggestion that the contract of employment was unworkable in the absence of such an agreement. The Claimant does not rely on any custom and practice or on any other case where the Respondent has paid the amounts claimed to others. He does not identify any implied term in respect of which it can be said is so obvious that its inclusion at the time of entering into the contract 'goes without saying'. On an objective reading, the Claimant's case is that he thinks such a term would have been 'fair' to him. That is not the legal test.

19. I am satisfied that the Claimant has no reasonable prospect of establishing that there was a term in the contract entitling him to be paid for the amounts claimed or any amount beyond that which was expressly agreed. Therefore, the claim for breach of contract has no reasonable prospect of success.

**The claim for notice pay (wrongful dismissal)**

20. As to the claim for failure to give notice, I cannot say this has no or even little reasonable prospect of success. It is not disputed that the Claimant's employment was terminated without notice. Given the length of his employment, he is on the face of it entitled to 1 week's notice. The Respondent's appears to be that the Claimant had, by his conduct, repudiated the contract. If that is right, the Respondent is not contractually obliged to give him notice. However, that will depend on the facts and the evidence in the case. The Respondent would have to show that by his actions, the Claimant had fundamentally breached the contract. If it does, then he would not be entitled to damages for failure to give notice.

21. Therefore, there is no basis for striking that claim out on grounds of no reasonable prospect of success.
22. Ms Mills said that the application to strike out was made on other grounds and Judge Aspden listed the matter not only in respect of reasonable prospects but on other grounds (see paragraphs 12.2 and 12.3 above).
23. It is right to say that the Claimant's response to Tribunal orders and correspondence has been poor and in one respect, his email to the Respondent was rude and offensive (that is the email of **21 April 2022**). As to whether C has failed to comply with IET orders, I note that he did not send a Schedule of the losses he is claiming, as directed by Judge Loy. Nor did he respond to Judge Loy's direction regarding the complaint of unfair dismissal. The Claimant did send documents (notepad texts) and nothing more but, I proceed on the basis that he has no other documents to send.
24. Had the Claimant attended today, I may have been persuaded have struck out his claim for notice pay. However, I have decided to take that action. The Claimant has, in my judgement, demonstrated that that he is not actively pursuing his complaint, which is listed for a final hearing in February 2023. I am satisfied, from a reading of the correspondence as a whole, from his previous failure to dial in to a hearing and by his failure to attend today, that his conduct is intentional or '#contumelious' (in the sense of being disrespectful to the tribunal). I have not taken this action lightly. However, I must have regard to the overriding objective, to the cost and inconvenience to the Respondent as a result of the Claimant's failure to attend today and to respond to their correspondence and requests for information. I also have regard to the wider administration of justice and the interests of other cases.
25. The Claimant has also demonstrated to my satisfaction that his conduct of these proceedings is unreasonable. I have in mind his failure at times to respond to tribunal correspondence, the tone of his email to the Respondent, his failure to dial in on **20 June 2022** until contacted by the Tribunal, his failure to attend today. If not struck out, the Tribunal would have to re-list a preliminary hearing and make further case management orders which would mean the hearing in February 2023 would be unlikely to proceed, resulting in further delay to the Respondent. In those circumstances, I do not believe that a fair hearing by February would be possible.
26. Therefore, the claim of wrongful dismissal (notice pay) is struck out pursuant to rule 37(1)(b) and (d).
27. That leaves the Respondent's ECC. Ms Mills said that, in light of the decision to strike the Claimant's claims out, it may be that the Respondent does not proceed with its claim, in the interests of proportionality. However, she would need to take instructions on this. I considered it proportionate to stay that claim to enable her to do so and to inform the Tribunal and the Claimant by 06 January 2023 if that claim against the Claimant is to be withdrawn.

**22 November 2022  
Employment Judge Sweeney**