



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4111685/2021 (A)

In Chambers on 14 March 2022

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Employment Judge O'Donnell

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Mr G Mckinlay

Claimant

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Darren Hush, Royal Mail Edinburgh West

Respondent

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim is struck out under Rule 37(1)(a) as having no reasonable prospects of success.

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REASONS

Introduction

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1. The Claimant is a former employee of Royal Mail who has brought complaints of unfair dismissal and disability discrimination against another employee of Royal Mail. The subject matter of these complaints is the Claimant's dismissal from his employment with Royal Mail.

2. At a previous preliminary hearing for case management held on 14 March 2022, the Tribunal, on reviewing the ET1 and ET3, had identified four fundamental issues which went to the Tribunal's jurisdiction to hear the claim:-

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a. The first issue is the question of whether the ET1 sets out a cause of action which the Tribunal has the power to hear:-

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i. The Claimant brings a claim of unfair dismissal under the Employment Rights Act 1996. Such a claim does not lie against a fellow employee such as the present Respondent but against the employer, that is, the person with whom a claimant has a contract of employment. On the face of it, the unfair dismissal claim against the present Respondent is not a valid claim.

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ii. The Claimant also brings a claim of disability discrimination under the Equality Act 2010 in relation to his dismissal. Such a claim is normally brought under s39 of the Act and, again, such a claim lies against the employer and not a fellow employee. The Equality Act does have other provisions which allow for claims against other types of respondents but it was not clear from the ET1 on which provisions of the Act the Claimant relies.

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b. The second preliminary issue is that of time bar. The Claimant was dismissed in 2018 and the ET1 was lodged in 2021, long after the end of the three month time limit running from the date of dismissal for bringing a claim under either the Employment Rights Act or the Equality Act. The Claimant did not set out any basis in the ET1 on which he says the Tribunal should exercise its discretion to hear the claims out of time.

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c. The third issue is that the Respondent alleges that the Claimant had previously brought proceedings in the Tribunal against Royal Mail regarding the same issue as the present proceedings (that is, his

dismissal) and that this previous claim was settled by way of a COT3 agreement via ACAS. The terms of that agreement are said to include a clause in which the Claimant accepts that the COT3 settles all claims he could bring against Royal Mail and any of its employees in relation to his employment with Royal Mail and its termination. It is said that this means that the Claimant has given up his right to pursue the present claim. Further, the Claimant has previously sought to raise a second set of proceedings against Royal Mail in the Tribunal and that this was dismissed on the basis that the terms of the COT3 agreement meant that he could not bring such a claim.

d. The fourth issue is that the Claimant has previously brought proceedings in the Tribunal against the present Respondent which were withdrawn by him and dismissed by the Tribunal under Rule 52.

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3. At the preliminary hearing, the Tribunal indicated that it was considering striking out the claim under Rule 37 on the basis that it had no reasonable prospects of success in light of the issues outlined above. The Claimant was not present at the preliminary hearing and the Tribunal considered that he should be given the opportunity to set out his position on these issues. The Tribunal, therefore, made directions that the Claimant should provide further information as set out at paragraph 15 of the Note of the Preliminary Hearing of 14 March 2022 which is referred to for its terms.

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4. The Claimant was given until 11 April 2022 to provide this information to allow him time to take legal advice. However, he replied by email dated 16 March 2022. The Claimant's response can be summarised as follows:-

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a. The reason why he was *"going for this case to be heard again"* was because of the way he had been treated by the Respondent.

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b. He was *"still"* claiming unfair dismissal because he had been targeted by the Respondent which had affected his health.

c. He accepts that he signed a COT3 agreement in 2019 but alleges that he did not know what he was signing due to the stress he was

experiencing at the time. He makes reference to not having touched the money which he was paid under the COT3 agreement.

- d. He believes that he is entitled to compensation because of what had been done to him.

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5. The Respondent was given the opportunity to comment on the further information from the Claimant which they did by an email from their agent dated 23 March 2022 which can be summarised as follows:-

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- a. The Claimant has not specified the statutory basis on which he is entitled to pursue the claim.

- b. The Claimant has given no explanation why he says the Tribunal should hear his claim out of time.

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- c. There is an acceptance by the Claimant that he signed a COT3 agreement in the terms specified. In relation to the assertion that the Claimant did not know what he was signing, it is noted that the Claimant's capacity was an issue before the Tribunal in a claim brought by the Claimant against Royal Mail (4103573/2020) and, in a judgment dated 14 April 2021, EJ d'Inverno had found that the Claimant did have capacity when signing this agreement.

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- d. The Claimant had provided no direct response on the issue of the withdrawal and dismissal of the previous claim against the present Respondent.

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6. Neither party had sought a hearing and, in order to minimise cost and delay to both parties, the Tribunal consider that it would be in keeping with the Overriding Objective to deal with this matter on the papers before it.

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Relevant Law

7. Section 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 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;*

10 (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).*

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8. 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 whether to strike out or whether some other, less draconian, sanction should be applied.

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9. 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.

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10. 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

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fact-sensitive and require full examination of the evidence for a Tribunal to make a proper determination.

11. In considering whether to strike-out, the Tribunal must take the Claimant's case at its highest and assume he 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*).

10 Decision

12. The Tribunal bears in mind the draconian nature of its power to strike-out and that it should be slow to exercise this power especially where the Claimant is a party litigant.
13. However, the issues identified above are fundamental and go to the heart of whether the Tribunal has the power to hear this claim. Further, this is not a case where there is any dispute of fact in relation to these issues; the Claimant does not dispute that he has pursued previous claims in relation to the same issue (that is, the termination of his employment with Royal Mail) against this and another respondent; he does not dispute that those previous claims were withdrawn and dismissed; he does not dispute that he signed a COT3 agreement in which he gave up his right to pursue such claims against Royal Mail and its employees (which would include the present Respondent).
14. The Tribunal does consider that this claim has no reasonable prospects of success when the following matters are taken into account:-
- a. There is no valid legal basis on which the Claimant can pursue a claim of unfair dismissal against the present Respondent. Such claims lie against the other party to the contract of employment and not against a fellow employee.
 - b. Under the terms of the COT3 agreement which he signed, the Claimant has validly given up his right to pursue a claim regarding his

employment with Royal Mail, and its termination, against Royal Mail and its employees (which would include the present Respondent). In these circumstances, the Tribunal's power to hear this claim has been validly ousted in terms of s203 of the Employment Rights Act and s144 of the Equality Act.

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c. Whilst the Claimant may feel that he did not understand the terms of the settlement, the question of his capacity to settle was determined by the judgment of Employment Judge d'Inverno dated 14 April 2021. If the Claimant disagreed then the appropriate course of action was to have sought a reconsideration of that decision or appealed it to the Employment Appeal Tribunal. He did neither and the time limits for both of those options have now passed. It is not permissible to simply raise new proceedings and seek to re-argue this point. The principles of *res judicata* and judicial certainty mean that parties only have "one bite of the cherry" and once an issue has been determined then it cannot be re-litigated in later proceedings.

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d. The events giving rise to the claim occurred more than 3 months before the claim was presented and so are clearly out of time. The Claimant has not sought to argue otherwise. The Claimant has not set out any basis on which he says the Tribunal should exercise its discretion to hear these claims out of time and it is difficult to see what the basis there could be for this in circumstances where he has raised multiple proceedings in relation to the same issue.

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e. The principle of *res judicata* also arises in relation to the fact that the Claimant has raised proceedings in relation to the same matter against the same Respondent previously which were withdrawn and dismissed. The effect of this is to bring such proceedings to an end and mean that they cannot be raised again.

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30 15. In these circumstances, the Tribunal is not persuaded that the Claimant has any reasonable prospects of succeeding in relation to any of these four preliminary issues. Indeed, the Tribunal would go so far as to say that the Claimant has no prospects of success in relation to these issues.

16. Given that any of these issues, let alone all four of them taken together, would be enough to prevent the claim proceeding (in the sense that the Tribunal would have no jurisdiction to hear the claim), the Tribunal is of the view that the claim has no reasonable prospects of success and so exercises its power to strike-out the claim under Rule 37.

Postscript

17. It is clear to the Tribunal that the Claimant has a continuing sense of grievance about the end of his employment with Royal Mail. It is very often the case that parties are unsatisfied with the outcome of legal proceedings where these are settled or even where they win because the outcome does not bring them the closure or satisfaction that they thought it would. However, it is hoped that the Claimant would reflect on what is said above and realise that there is no mileage in simply pursuing claim after claim in relation to this matter as the results will likely be the same. He is simply putting himself to unnecessary work and stress in doing so with little or no prospects of achieving anything.

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Employment Judge: Peter O'Donnell
Date of Judgment: 11 April 2022
Entered in register: 13 April 2022
and copied to parties

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