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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109652/2021 (V)

Held on 16 November 2021 (By Cloud Video Platform)

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Employment Judge: I McFatridge

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Mr D McDicken

**Claimant
Represented by:
Mr King –
(Former GMB Scotland
Official)**

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Loudonhill Contracts Limited

**Respondent
Represented by:
Mr White -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The respondent's application for strike out of the claim is refused. The claimant will have four weeks from the date of this note to comply with the orders made by the Tribunal on 15 July 2021.

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REASONS

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1. The claimant presented a claim to the Tribunal complaining of unfair dismissal and disability discrimination and that he should be paid a redundancy payment. The respondent submitted a response in which they denied the claims. Following a Preliminary Hearing on 15 July 2021 a Note was issued in which the claimant was ordered to provide further information. Two

Preliminary Hearings for case management purposes have occurred since that date. It is the respondent's position that the claimant has failed to comply with the Orders made at the hearing on 15 July 2021. Following a Preliminary Hearing on 1 October it was ordered that an open Preliminary Hearing be held
5 on 16 November to consider the application by the respondent that the claims made by the claimant be struck out for failure to comply with Orders of the Tribunal under Rule 37(1)(c) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. At the hearing both parties made submissions which I will summarise below. The respondent had
10 helpfully put together a bundle of documents setting out the procedural history of the matters referred to by both parties in their submissions.

Respondent's Submission

2. The respondent's representative ran through the background of the claim and set out the timeline relevant to the issue. The ET1 had been submitted on 20
15 May. The claimant stated that he was claiming unfair dismissal and disability discrimination together with a redundancy payment. He also ticked the box for "other payments". In the ET1 he referred to a requirement to work light duties and to be given a works van as being "reasonable adjustments". The respondent's representative noted that it was the respondent's position that if
20 these requests had been made this related to a period in July 2019 and that any claim of a failure to make reasonable adjustments based on these failures would be time barred. The claimant has not yet confirmed that this is the period of time that he is talking about.

3. The respondent lodged their ET3 on 17 June. Within this (page 29) they noted
25 that the claimant had produced very limited detail and asked the claimant to provide further and better particulars. On 24 June the Tribunal, of its own initiative, issued an Order that the claimant provide medical records together with a disability impact statement. This was ten days before the first Preliminary Hearing took place. Immediately prior to the first Preliminary
30 Hearing there was an email correspondence between the respondent and the claimant where the respondent asked why the claimant had failed to provide

the information and documentation required by the 24 June order. The matter was referred to an Employment Judge who essentially agreed with the claimant that the timescale for producing this before the hearing was too tight and indicated that the matter would be discussed at the Preliminary Hearing on 15 July.

4. On 8 July the respondent had lodged their Agenda for the hearing which again indicated that they required further and better particulars of the claim. The claimant lodged an Agenda where he indicated that he was claiming direct discrimination under section 13 of the Equality Act, discrimination arising from disability under section 15 and a failure to make reasonable adjustments under section 20. As is usual in discrimination cases the Tribunal had attached a schedule to the Agenda for completion by the claimant setting out details of his disability discrimination claim. The claimant did not complete this schedule but lodged it blank. The first Preliminary Hearing took place on 15 July and a Note was provided. The tribunal noted that further and better particulars of the claims were required. The claimant was ordered to provide the disability impact statement together with further and better particulars of his claim (page 60-61). Essentially it was the respondent's position that the claimant had failed to comply with this Order.
5. On 27 July the claimant had sent two documents to the respondent (pages 65-66). These are headed direct discrimination and sets out a generalised complaint that the claimant was not given light duties but was left to work alone. The document does not contain any dates or and is completely unspecific. The claimant also provided a disability impact statement set out in twelve paragraphs. The claimant sent in these documents as photographs. For practical reasons to do with the size of the file the respondent requested that these be sent as Pdf files. The claimant responded to the respondent's representative on 28 July stating "I do not see a requirement for an electronic bundle as I will be requesting a personal hearing and a paper bundle will be supplied to all parties in adequate time. I am seeking advice from a former trade union official." (Page 68).

6. The second Preliminary Hearing took place on 26 August. In advance of this the respondent sent in a further response to the Tribunal setting out their view that the claimant had still entirely failed to properly specify his claim. They noted that the claimant appeared to be relying on an injury to his knee and on that basis they were prepared to accept disability. It should be noted that the claimant has also referred at various times to suffering from low mood/depression and also to having narrowly avoided an eye injury. It is not known whether or not the claimant is intending to rely on these matters as disabilities or not.
7. At the further Preliminary Hearing on 26 August the respondent confirmed their position that the claimant had not complied with the Orders and applied for the claim to be struck out under Rule 37(1)(c). A number of issues were raised by the respondent which are reflected in the Note of Hearing which was lodged (page 75). The Tribunal indicated that the claimant's representative should liaise with the claimant and to produce the information necessary to respond to the Order and deal with the respondent's request for information no later than 23 September. A Preliminary Hearing was fixed for 1 October. The reason for this hearing was stated to be to deal with any issues remaining outstanding in relation to compliance to the Order". (Page 79). A few days before the hearing the claimant applied for a postponement on the basis that he had been diagnosed with Covid and required to self-isolate. The respondents opposed this application and the postponement was refused. At the hearing on 1 October the claimant was represented by Mr King who stated that he had found it difficult to obtain instructions. In the course of the hearing he indicated that he had sent a document to the Tribunal the previous day however this document had not made it to the Tribunal file and was not in front of the Judge dealing with the hearing. The document was lodged (page 56) essentially it stated that the claimant had dealt with and had responded to everything requested by the Tribunal and he had responded to the best of his ability. He stated that the claimant was making a claim of direct discrimination and that "evidence will be led at the hearing". He criticised the respondent for the timing of his application. He referred to the case of "Home Office v

Kuranchie” (sic) being an authority for the proposition that it was the responsibility of the employer not the employee to make adjustments.

8. At the hearing on 1 October the Tribunal had arranged that the strike out application be considered at a further PH (today).

5 9. It is the respondent’s position that the claimant was simply refusing to provide more information. With regard to the direct discrimination claim the claimant’s position was that he would lead evidence and no doubt tell the respondent what this was about at the final hearing. He referred to the respondent applying a PCP but had not said what the PCP was or provided any detail. It
10 was the respondent’s position that at the hearing the presiding Judge had fully advised Mr King what was required and had indicated in paragraph 8:-

*“In the meantime the claimant and Mr King would be well advised to communicate and give attention to the Orders contained in the Note of the Preliminary hearing of 15 July 2021 at paragraphs 5 and 6 and to
15 make a detailed response before the date of the intended hearing on strike out.”*

The respondent’s position was that the claimant had then lodged the document lodged at page 92 which sets out the claimant’s claim to outline in eleven paragraphs. It is the respondent’s position that this does not provide
20 any of the detail required by the Orders. Neither this nor the documents at page 65 nor the claimant’s Agenda provided anything like sufficient detail to enable the Tribunal to properly deal with the claim or enable the respondent to prepare for a hearing. There was an allegation of a failure to make reasonable adjustments but there are no dates and no details about the
25 nature of the adjustments provided or the PCP. The claimant mentions other employees. Presumably this is in connection with his direct discrimination claim. He does not give details of dates nor why the detriments are said to be on account of his disability. In his earlier document he refers to not being put on light duties or allocated a company van when he came out of hospital.
30 It was the respondent’s understanding that he came out of hospital in March 2019 and any such claim would be time barred. The respondents were

entitled to fair notice of the claims. To be met with the assertion by the claimant's representative that "evidence will be led at the hearing" clearly showed that the claimant had absolutely no intention of providing the specifics and was effectively refusing to comply with the Tribunal Orders. The respondent went through the Orders which had been made as set out on page 60. The representative concentrated on the Order for further particulars. The claimant was ordered:-

- 5 (a) Whether he is asserting a claim for direct discrimination, indirect discrimination, failure to make reasonable adjustments and/or claim under section 15 of the Equality Act alleging discrimination arising from disability. It was the respondent's position that the claimant had stated he was claiming a failure to make reasonable adjustments. There was no clarity about his other claims.
- 10 (b) If he is asserting direct discrimination full details of the dates, incidents acts or omissions and identity of people involved that he claims constitute less favourable treatment and why. The respondent's position is that he has failed to produce any of these details.
- 15 (c) If he is asserting indirect discrimination full details of the provision criterion or practice that was applied and how it put the claimant to a particular disadvantage. The respondent's position is that the claimant's representative has referred to the existence of a PCP but has not provided any details of what this is alleged to be, how it placed the claimant at any disadvantage.
- 20 (d) If he is asserting unfavourable treatment arising in consequence of his disability what acts or omissions or the respondent constituted unfavourable treatment (including the dates, times and locations and names of the people involved) it is the respondent's position that the claimant had not provided any names or dates or indeed of any of the information requested.
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5 (e) If he is asserting a failure to make reasonable adjustments what adjustments he considered the respondent should have made when they should have been made and why they were reasonable. The claimant has mentioned lighter duties and a van. He has not given any details about this, he has not responded to the rest of the paragraph other than to state that there is authority for the proposition that it is for the employer to decide what adjustments are reasonable.

10 (f) Full details of the reason why he believes he has been unfairly dismissed and whether or not he considers the dismissal was procedurally unfair. It was pointed out that the claimant has provided no information whatsoever regarding this.

15 (g) Full details of why he considers he is entitled to a redundancy payment. The claimant has not provided any details of whatsoever of this and indeed appears to accept that his job had continued. The most he has said about this is that "it would have been fairer" to pay him a redundancy payment. It was the respondent's position that the redundancy payments claim was almost certainly without any reasonable prospect of success but in the meantime they were content to rely on the claimant's failure to comply with the Orders.

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10. It was the respondent's position that despite numerous opportunities and including the clear explanation given by Employment Judge Young at the previous Preliminary Hearing the claimant had still failed to comply with the Order. The net result was that six months after the claim had been lodged the respondent was still none the wiser at the nature of the claim. There had been four Preliminary Hearings and significant amounts of money had required to be spent by the respondent. If the claimant's claim was based on events in 2019 there was clearly a time bar point. A further Preliminary Hearing on time bar would require to be fixed. The circumstances were such that the claim should be struck out.

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11. The claimant's representative indicated that it was the claimant's position that he had been dismissed on grounds of incapacity. It was his position that this was unfair. It was also his position that he had been treated less favourably and not shown any consideration for his right to reasonable adjustments. The claimant's representative then indicated that the reasonable adjustment claim was far wider than just the van and light duties he did not provide any details of this. He stated that the onus was on the employer to consider reasonable adjustments. He pointed out that this could have meant alternative employment which in his view could have meant that the claimant continued to work. It was the claimant's position that other employees had been treated more favourably than him. He said the claimant had met some and they said they had received full pay while off sick and some were on furlough for a lengthy period. He stated that one common denominator was that he believed the claimant had been singled out for poor treatment because he had raised a damages claim against the respondent following an injury at work. The claimant believed that the employer's attitude turned sour after he lodged this claim. The claimant's representative indicated that he believed the claimant had provided all of the relevant information. He felt that it would be grossly unfair for the claim to be struck out. He referred to the case of *Cox v Adecco and Others UKEAT0339/19*.
12. I asked the claimant's representative whether the claimant would be in a position to provide any further information relating to his claim. The position of his representative was that the claim should be set down for a full evidential hearing at some point in the new year. He indicated that the claimant would not be in a position to provide any additional specification of his claim because the respondent had not provided any further documentation to the claimant. He stated that although the claimant was aware of individuals who had been treated more favourably in terms of being given paid time off these individuals were not prepared to attend the Tribunal to give evidence. Accordingly the claimant would require to obtain Documents Orders from the Tribunal so as to enable the claimant to provide the details required.

13. I gave the respondent's representative the opportunity to comment on the claimant's case. He indicated that it appeared to be the claimant's position that he required the Tribunal to grant Documents Orders and for the respondent to do this before the claimant could say what his case was. The respondent's representative went on to basically restate the respondent's position which was that some six months after the claim was initiated it is still nowhere near the stage of being ready to go to a Hearing and the claimant has wilfully failed to comply with the Case Management Orders made by the Tribunal.
14. I gave the claimant's representative the last word and he stated that it was clear that there was a dismissal and whether it was fair or unfair required to go to a hearing the Tribunal would have to decide whether the employer made the necessary reasonable adjustments. The claimant's position was that they did not. He said there was no attempt for the claimant to make a risk assessment or allow the claimant to return on lighter duties or give him a work vehicle. Thirdly he believed it was evidently clear that the claimant had a disability. He walked with a profound limp. He stated that the claimant believes that the evidence that he could provide at the moment was limited but that the case should not be struck out. He said that if Document Orders were granted this would enable the claimant to provide additional information relating to his case. On being asked to clarify the position he confirmed that no Document Orders had yet been sought by the claimant.

Discussion and Decision

15. I noted the documents lodged by the respondent accorded with those in the Tribunal file. It was absolutely clear to me that, as originally drafted, the claimant's ET1 did not provide sufficient detail of his claims to enable the matter to go to a Hearing. The Tribunal had quite correctly made an Order that the claimant provide further particulars. I entirely agreed with the respondent that the various responses lodged by the claimant and his representative to date were completely inadequate and that there had been a failure by the claimant to comply with the terms of the Order. Essentially I

agreed with the respondent's comments on the detail in relation to paragraph 5 of the Order.

16. The question before me however is whether the claim ought to be struck out. I found the case of *Cox v Adecco* to which the claimant's representative referred me of to be of little assistance since this relates to a application for strike out under section 37(1)(a). The respondent's representative made it clear that at present he is only seeking strike out under section 37(1)(c). It appears to me that it would not be possible to consider a strike out under section 37(1)(a) at present because the claimant has entirely failed to set out what his claim is about. I agreed that if I was looking at strike out under section 37(1)(a) I would require to take the additional steps identified by the EAT in the case of *Cox v Adecco*. The situation in this case is that we are at a different stage in the process. The Tribunal has been doing its best over the course of six months and four Preliminary Hearings to get the claimant to properly set out his claims. He has not done so. The Order was made as long ago as July.
17. The approach to applications for strike out under 37(1)(c) was considered in the case of *Baber v Royal Bank of Scotland Plc EAT0301/15*. The Tribunal requires to go beyond simply noting that there has been non-compliance with an Order. The purpose of a Strike Out Order is not punitive. The issue to be determined by the Tribunal is whether the sanction of strike out is a proportionate response in the particular circumstances of the case. The consideration of this requires consideration of whether a fair trial is still possible or whether some lesser sanction might be appropriate. The case of *Daly v Northumberland Tyne and Wear NHS Foundation Trust (0109/16)* also refers to the importance of the Tribunal making an assessment as to whether a fair trial is still possible or not. In that case the President of the EAT noted that "*it is unusual to conclude that a proportionate response to a claimant's failure properly to particularise his claim was to drive him from the Judgment seat without any determination of his case on the merits.*" I note however that in that case there was nothing to suggest that the case was not capable of

being listed for a hearing following a direction that the claimant provide the specified further particulars.

18. In this case I do have considerable sympathy for the respondent's position. As matters stand it is not possible for there to be a fair hearing of the case. The claimant has not properly specified his claim. The respondent does not have fair notice of the claim. If hearing dates were simply fixed so as to allow the claimant to lead his evidence as suggested by the claimant's representative then the results would either that the claimant's evidence would be cut short on the basis that there was no fair notice of it or alternatively the respondent would subject to a trial by ambush. Neither would constitute a fair hearing.
19. I was particularly perturbed in this case by the fact that the claimant's representative does not appear to accept this but states that he is unable to provide any of the further details sought without obtaining additional information from the respondent. I have to say I think the claimant's representative is simply wrong in this. I note that, for example, the claimant has been asked to state why he considered his dismissal to be unfair and whether he considered it to be procedurally unfair and if so why. This simply requires the claimant to say what he believes. It does not require any input from the respondent.
20. It appears to me that in this case the claimant has been clearly warned by the Tribunal that non-compliance may result in strike out. It appears that the claimant has ignored these warnings. A fair trial is only going to be possible if the claimant properly responds to the Orders made. It will then allow the respondent to properly respond to the claim. It may lead to a hearing on time bar being fixed.
21. In this case it is clear that the claimant was dismissed and considers that his dismissal was unfair. The claimant also believes that he was discriminated against on grounds of disability. Such claims are the routine and everyday business of Tribunals and this is not a case where such a long time had elapsed from the events in question that a fair trial is ruled out. On the other

hand no fair trial can take place until the claimant provides the information sought.

22. I consider the decision to be extremely finely balanced given that at present the claimant's representative advises that he is not prepared to provide the additional information sought. Can I, at this stage, conclude that there is no prospect of a fair trial because the claimant's representative states (quite wrongly in my opinion) that he is not able to provide the further particulars sought.
23. Having considered matters carefully I do not believe that it is in line with the overriding objective to strike out the claim altogether. There have undoubtedly been failures by the Claimant to comply with the orders. The failure is serious as it prevents the case being listed for a hearing. It is however easily remediable if the claimant complies with the orders and provides the information sought. I appreciate that this decision will be a source of frustration for the respondent. I feel that the appropriate way to deal with this will in due course be for the respondent to make an application for costs. I do not wish to pre-empt the decision of the Employment Judge dealing with any such application for costs but it may well be that any fair minded observer would conclude that the claimant's behaviour to date has been unreasonable. It is only right and proper that if the respondent has incurred costs as a result of this then such an application be considered by the Tribunal.
24. I base my decision on the fact there is a strong public interest in ensuring that discrimination claims are dealt with and that cases where discrimination has taken place are identified. I am also aware of the strong judicial authority to the effect that strike out in discrimination cases is a draconian remedy which should only be used extremely sparingly. As noted, I have concluded that in this case a fair trial is still possible. It will require a change of approach from the claimant and his representative. They will require to properly respond to the Orders. In the circumstances I will extend the deadline for complying with the Order to **4 weeks** from the date on which this Order is made. A further Preliminary hearing will be held after that. No doubt any application for costs

made by the respondent can be considered at that Preliminary Hearing. The hearing will also consider what other further procedure is required. Clearly in the event that the claimant still persists in his failure to comply with the Order then the matter of strike out may require to be revisited on the basis that in this particular case despite clear direction from the Tribunal over a period of months the claimant remains unwilling to provide the information sought.

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Employment Judge: Ian McFatridge
Date of Judgment: 29 November 2021
Entered in register: 30 November 2021
and copied to parties

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