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EMPLOYMENT TRIBUNALS

Claimant: **Mr M Johnson**

Respondent: **Anglian Windows Limited T/A Anglian Home Improvements**

Heard at: **East London Hearing Centre**

On: **Tuesday 25 February 2020**

Before: **Employment Judge Burgher**

Representation

Claimant: In person

Respondent: Mr M Duggan QC (Queens Counsel)

JUDGMENT

1. The judgment of the Employment Tribunal is that the Respondent's application to strike out the Claimant's claim is dismissed.

2. The Claimant did not have 2 years continuous employment to be able to advance his claims for unfair dismissal and a redundancy payment. The Tribunal therefore does not have jurisdiction to consider the Claimant's claims which are dismissed.

REASONS

Strike Out

1 At the outset of the hearing Mr Duggan QC on behalf of the Respondent applied to strike out the Claimant's claim on a number of grounds. He had prepared a 14 page document setting out his submissions.

2 I indicated to Mr Duggan that I did not consider it to be in accordance with the overriding objective to use the finite time allotted to consider an application to strike out

that was based on determining factual disputes as these matters would require evidence to be heard. Mr Duggan was content to limit his application to strike out to matters where no oral evidence was required.

3 Mr Duggan advanced his application strike out on the basis that the Claimant had failed comply with Tribunal Orders, and it was submitted that the Claimant's failure to do so was contumelious.

4 Rule 37 of the Employment Tribunal rules states:

> The legislation is as follows:
>
> Strike Out
>
> 37.—(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 response (or the part to be struck out).
>
> (2) 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.
>
> (3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

5 In summary, Mr Duggan submitted that the Claimant had wholly failed to comply with the order of Employment Judge Massarella to provide details of the financial records and accounting of Apex Home Improvements UK Ltd (Apex), which is the company that the Claimant owns a 50% shareholding.

6 By order dated 17 February 2020 Employment Judge Massarella ordered the Claimant to provide the Respondent:

a. Management accounts or other information showing the total revenue since its incorporation on 8 February 2019

b. Pay return since 8 February 2019

c. Records of dividends paid to shareholders

d. Records of commissions or other fees paid to self-employed individuals providing services to Apex

7 The Claimant was ordered to provide this information by 20 February 2020.

8 The Claimant had not provided any information at all about the financial situation of Apex. The Respondent's position was this was necessary in respect of the Claimant's schedule of loss and assessment of the Claimant's credibility. The order stated that if the Claimant fails to comply with this order it is likely to provide further grounds for strike out.

9 By 19 February 2020 the Claimant had arranged for Apex's accountant, Roger Brading, to address the application for disclosure. Mr Brading sent an email of 19 February 2020 specifying that Apex was incorporated in February 2019 and its trading period ends on 31 March 2020 and the filing date for the return of accounts of 31 December 2020.

10 Mr Brading stated that the directors are also the shareholders involved in daily management and there are no reasons why management accounts need to be prepared. He stated that there are were only two directors, who are employees of the company but that they had not been paid a salary in order to grow the business. He stated that there be no consideration of dividends until after the preparation of the first period of accounts and that there was no information relating to commissions.

11 The Claimant stated that he could not provide information that he did not have and relied on Mr Brading's email. He submitted that he was not in breach of the Tribunal Order.

12 Separately, the Claimant stated that it was at a disadvantage by the failures of disclosure from the Respondent and this adversely impacted on his preparation for the hearing.

13 The Claimant had not provided any information at all relating to financial situation at Apex, no bank statements, creditor/ debtor ledgers or business plans. I did not accept as credible his submission before me that there was no such management information. Therefore, I approached the Respondent's strike out application on the basis that the Claimant had failed to comply with the Tribunal Order of 17 February 2020.

14 It had been made clear to the Claimant following the preliminary hearing on 10 October 2019 and the order of 17 February 2020 what the potential consequences of

failing to comply with Tribunal orders could be.

15 Mr Duggan referred me to the case of **Rolls Royce v Riddle** UKEAT/0044/07 EAT as part of his submissions as I had made it clear at the outset of his submissions that key considerations for me exercising my discretion to strike out would be the interests of justice and balance of prejudice. Mr Duggan highlighted that prejudice was not necessary a consideration when considering intentional and contumelious default. The EAT case of **Rolls Royce v Riddle** addresses the 2004 ET Rules in the context of a claim not being actively pursued. Lady Smith stated at paragraph 19:

> *The rule is not drafted so as to fetter the discretion that is conferred by any particular considerations. However, as with all exercises of discretion, it will be important to take account of the whole facts and circumstances including the fact that strike out is the most serious of sanctions. That being so, as commented in Harvey, it is usually considered appropriate to take account of the principles laid down by the High Court in England prior to the introduction of the current Civil Procedure Rules. Those show an expectation that cases of failure to actively pursue a claim will fall into one of two categories. The first of these is where there has been "intentional and contumelious" default by the claimant and the second is where there has been inordinate and inexcusable delay such as to give rise to a substantial risk that a fair trial would not be possible or there would be serious prejudice to the respondent: Birkett v James [1977] 3WLR 38. The Birkett principles were applied in the Industrial Tribunal context in the case of Executors of Evans and anr v Metropolitan Police Authority [1992] IRLR 570.*

16 I also referred to the case of **S Chidzoy v British Broadcasting Corporation** UKEAT/0097/17/BA where HHJ Eady QC (as she then was) stated at paragraphs 23 and 24:

> *23. It is common ground between the parties that the striking out of a claim is a draconian measure that should not be imposed lightly, see **Blockbuster Entertainment Ltd v James** [2006] IRLR 630 CA. More specifically, in **Bolch v Chipman** [2004] IRLR 140 the EAT (Burton P presiding) held that, where the ET is considering the possibility of striking out a claim or response due to the way in which the proceedings have been conducted, there were four matters it would need to address (I paraphrase):*
>
> *(1) There must first be a conclusion by the ET not simply that a party has behaved unreasonably but that the proceedings have been conducted unreasonably by her or on her behalf.*
>
> *(2) Assuming there is such a finding, in ordinary circumstances the ET will still need to go on to consider whether a fair trial is still possible, albeit there can be circumstances in which a finding of unreasonable conduct can lead straight to a Debarring Order (see **De Keyser Ltd v Wilson** [2001] IRLR 324 EAT (Lindsay P presiding)). That might be, for example where there has been "wilful, deliberate or contumelious disobedience" of an ET Order, otherwise it might be where the conduct in issue is so serious it would be an affront to the ET to permit the party in question to*

continue to prosecute their case (see ***Arrow Nominees Inc v Blackledge*** *[2000] EWCA Civ 200).*

(3) Even if a fair trial is not considered possible, the ET must still consider what remedy is appropriate and whether a lesser remedy might be more proportionate.

(4) And even if it determines that a Debarring Order is the appropriate response, the ET should consider the consequences of that Order (allowing that, for example, where a response has been struck out at the liability stage, it might still be appropriate to allow the Respondent to participate in any remedy hearing). See also observations to similar effect made by the EAT (Simler P presiding) in ***Arriva London North Ltd v Maseya*** *UKEAT/0096/16 (12 July 2016, unreported).*
24. When an ET is satisfied that a Claimant has conducted the proceedings unreasonably (or scandalously or vexatiously), it should not move to strike out the claim when firm case management might still afford a solution - in some cases, the objectionable conduct may not be irreversible, see ***Bennett v Southwark London Borough Council*** *[2002] IRLR 407 CA (a case in which the claim had ultimately been struck out by a second ET, the first having considered it was bound to recuse itself given the nature of the conduct in question). In order to determine whether irreparable damage has been done, the ET would need to assess the nature and impact of the wrongdoing in issue, to consider whether there was, in truth, any real risk of injustice or to the fair disposal of the case, see* ***Bayley v Whitbread Hotels*** *UKEAT/0046/07 (16 August 2007, unreported). It will, for example, be a very rare case in which it would be appropriate to strike out a case at the end of a trial; in such circumstances, it would, in almost all cases, be more appropriate for the Tribunal to dismiss the claim in a judgment on the merits, which could take account of the wrongdoing in issue, in the usual way (and see the observations to this effect in* ***Zahoor and Ors v Masood and Ors*** *[2009] EWCA Civ 650).*

17 Having considered the law and submissions, and even accepting Mr Duggan's submissions that the Claimant has acted in a contumelious way to result in a debarring order, when considering the interests of justice and balance of prejudice I conclude that a fair hearing is still possible and the issues in this case of unfair dismissal and redundancy payment can still be properly and fairly determined.

18 Insofar as matters relating to the remedy being sought, I accept that the absence of Apex documentation puts the Respondent at a disadvantage but that disadvantage can be fairly addressed by orders securing immediate disclosure or making findings against the Claimant arising from the non-production of the relevant documentation. In respect of credibility, I concluded that this is an ancillary consideration and the non-production of documentation does not undermine the Respondent's ability to seek to establish that the Claimant's evidence on central matters for consideration is unreliable.

19 In these circumstances, I concluded that it is not appropriate to take the

draconian step to strike out. Therefore, Respondent's application to strike out the Claimant's claim is dismissed and the case will proceed.

Preliminary issue – Continuity of employment

20 Following consideration of the strike out application I considered, as a preliminary issue, whether the Claimant had had sufficient continuity of employment to bring a claim for unfair dismissal or a redundancy payment pursuant to sections 108 and 155 of the Employment Rights Act 1996 (ERA). These sections require a claimant to have continuous employment of not less than two years ending with the effective date of termination.

21 The Claimant's stated that he was self-employed working as a Marketing Manager with the Respondent from 1998. He states that he became an employee of the Respondent, working as a Regional Sales Support Manager from 12 March 2012 before commencing the role of Area Sales Leader on 7 June 2017 and then as Regional Sales Manager on 7 July 2017. The Claimant was dismissed by the Respondent on 7 December 2018 and he therefore maintains that he was continuously employed for more than 2 years, between 12 March 2012 to 7 December 2018.

22 The Respondent's position was that the Claimant worked from 12 March 2012 as Regional Sales Support Manager until his resignation was accepted by the Respondent on 26 May 2017. It asserts that the Claimant was then paid in lieu of notice. The Respondent maintains that the Claimant commenced a self-employed role for them as Area Sales Leader on 7 June 2017. The Respondent contends that (regardless of the employment status of the Claimant from 7 June 2017) there was a break in the Claimant's continuity of employment between the period 26 May 2017 and 7 June 2017 when section 210 ERA and the other the relevant provisions relating to continuity of employment were considered.

Evidence

23 I heard evidence from the Claimant. Mr Matthew Ottaway, Divisional Sales Director gave evidence for the Respondent. They both gave sworn evidence and were subject to cross examination and questions from the Tribunal.

24 I was also referred to specific pages in an agreed hearing bundle.

Facts

25 I have found the following facts from the evidence presented to me.

26 The Claimant was Regional Sales Support Manager employed by the Respondent from 12 March 2012. He was successful in this role. In May 2017 he was offered a role working for a competitor of the Respondent, Zenith, on a self-employed basis. The Claimant had previously indicated to Mr Ottaway that he was resistant to working on a self-employed basis with the Respondent. In any event, the Claimant considered the Zenith offer and decided to accept it. He submitted his resignation by

email on 23 May 2017:

> *This is written confirmation regarding our conversation today, I have that resigned from the post of RSSM.*
>
> *Please accept this is my one month's notice. I would like to express that it has been great working with you and I have learned a lot from your experience.*

27 This email resulted in a discussion between the Claimant and Mr Ottaway on 26 May 2017. The Claimant maintained that he was going to be getting a signing on bonus at Zenith of £5000 and a weekly payment of £1500. Mr Ottaway expressed his surprise that the Claimant would seek to work on a self-employed basis as the Claimant had previously indicated that he did not wish to work on a self-employed basis. Mr Ottaway then offered the Claimant the opportunity to work on a self-employed basis for the Respondent. During this meeting Mr Ottaway made it clear to the Claimant that he may be precluded from working for the Zenith for a six month period pursuant to the restrictive covenants set out at clause 34 of his contract of employment and that he may not be paid any notice pay if he chose to leave immediately. A workaround to seek to retain the Claimant with the Respondent on similar terms to Zenith was discussed. This resulted in an agreement for the Claimant's contract to be terminated with immediate effect, the Claimant being given a payment in lieu of notice, and an offer of a new contract, purportedly on a self-employed basis to commence after a 7 day break. This agreement is set out in an email from Mr Ottoway to the Claimant dated 27 May 2017 which states:

> *As promised last night here is a summary of our conversation*
> *We will accept your resignation and agree an immediate end to your contract of employment. This means we will pay you in lieu of your notice period (the figure will be in the region of £3000 but I will confirm the exact amount on Tuesday).*
> *I will advance £2000 of this final payment by CHAPS on Tuesday*
> *Following a 7-day break in service you can begin in the self-employed role of ASL.*
> *We will advance £1500 weekly again shall override [commission] for the first two months in the ASL role. Obviously if your override is more than the amount advanced then the balance will be paid to you*
> *Finally, we will agree some fair targets on two KPI's for the two first two months in the role which for achieving a further £2000 bonus be paid over and above the standard override.*
> *I'm really looking forward to furthering your career and becoming the top ASL in Anglian.*

28 The Claimant maintains that the discussion with Mr Ottaway on 26 May 2017 was solely on the basis of how he could be paid a £5000 bonus similar to what Zenith was offering him. The Claimant maintains there was no agreement for payment of staged commission payments and he simply expected to be paid £5000 that he would have otherwise received as a signing bonus for Zenith.

29 The Claimant stated that the contents of Mr Ottaway's email were incorrect and he continued to work for the Respondent without break, and it was agreed that the Respondent would make an additional payment of £5000 to him and £1500 per week. The Claimant maintained that whilst he received the email he thought nothing of it because he believed that the agreement that he had made with Mr Ottoway on the 26 May 2016 would be honoured and that the email was simply a procedural paper trail to enable Mr Ottaway to actually pay the Claimant the sums agreed whilst complying with the Respondent's processes. The Claimant stated that he believed that his payment in lieu of notice was part of this paper trail.

30 The Claimant was paid a payment in lieu notice of a net sum of £2000 in two instalments on 30 and 31 May 2017. This was consistent with Mr Ottaway's email of 27 May 2017.

31 There was a letter dated 1 June 2017 sent to the Claimant from the Respondent's Human resources that stated that the Claimant's last day of employment was 30 May 2017. This was a mistake. It was accepted by both parties that this was wrong because the discussion about immediate termination and payment in lieu of notice did in fact take place on 26 May 2016.

32 The Claimant stated that he continued to work reporting to Mr Ottaway between the period 27 May through to 7 June 2017. He was unable to clearly specify the work he was said to have done during that period apart from "reporting to Mr Ottaway". Mr Ottaway denies that the Claimant worked during this period and stated that the 7 day break was specifically required by HR before any new contract was offered. On the evidence, in particular the contemporaneous emails, the payment of £2000 in lieu of notice and Mr Ottaway's denial, I do not find that the Claimant worked for the Respondent during this period.

33 The Claimant signed an Areas Sales Leader contract on 7 June 2017 stating that his contract began on 7 June 2017. The Claimant recorded that his previous employment with the Respondent was between 1997 and 27 May 2017. The Claimant stated he did this because he trusted Mr Ottaway to honour the terms of the discussion that they had on 26 May 2017.

34 From 23 June 2017, the Claimant received a tax-free weekly payment of £1500 on account commission for a four-week period. This was compatible with the details of the email sent by Mr Ottaway to the Claimant on 27 May 2017.

35 The Claimant was offered a contract of employment as Regional Sales Manager with the Respondent, which he signed and dated on 7 July 2017. The stated period of continuous employment for the contract was 5 July 2017.

Law and submissions

36 In respect of the calculation of the period of continuous employment

37 Section 210(4) ERA states:

> *(4) Subject to sections 215 to 217, a week which does not count in computing the length of a period of continuous employment breaks continuity of employment.*

38 Under section 235(1) ERA week is defined as "a week ending with Saturday".

39 Section 211(1) ERA states:

> *An employee's period of continuous employment begins on the day on which the employee starts work and ends with the day by reference to which the length of the employee's period of continuous employment is to be ascertained.*

40 Section 212 (1) ERA states:

> *Any week during the whole or part of which the employee's relations with the employer are governed by a contract of employment, counts in computing the employee's period of employment (s.212(1)).*

41 It is therefore necessary to consider whether there are any weeks during the period of employment alleged by the Claimant which do not count.

42 Mr Duggan submitted that there was no contract between the Claimant and the Respondent between 26 May 2017 and 7 June 2017. As such there was a break in the continuity of the Claimant's employment regardless of the status of the self-employed contract. In these circumstances he submitted that the Tribunal had no jurisdiction to consider the Claimant's complaint of unfair dismissal and redundancy payment.

43 The Claimant contended that he had continuous employment and that he worked between the period of 26 May 2017 and 7 June 2017. Consequently, his claims should be heard.

Conclusion

44 When deciding between the competing evidence and submissions I conclude that the email of 27 May 2017 accurately recorded the agreement between the Claimant and Mr Ottaway. The Claimant did not strike me as a person who would have accepted a wholly erroneous representation of an agreement, as specified in the email. The Claimant did nothing to challenge it and in fact confirmed it by signing an agreement on 7 June 2017.

45 I do not accept that the Claimant undertook any work for the Respondent between 26 May 2017 and 7 June 2017. To have done so would have meant that he would have not had any advantage than simply working out his notice. It is more likely that the Claimant accepted that under the terms of his contract he would not be able to be paid anything if he left the Respondent immediately and that he could have been precluded from working for a competitor for 6 months. In these circumstances the offer of payment in lieu of notice, combined with the offer of another contract was accepted as a beneficial offer to him.

46 Therefore, I conclude that there is a break in continuity of the Claimant's

employment with the Respondent between 26 May 2017 and 7 June 2017, regardless of the status of the Claimant's Areas Sales Leader contract dated 7 June 2017.

47 In the absence of continuity, the Tribunal does not have jurisdiction to consider the Claimant's claims of unfair dismissal and/or a redundancy payment. The Claimants claims are therefore dismissed.

Employment Judge Burgher

2 March 2020