



EMPLOYMENT TRIBUNALS

Claimant

Mr T Wren

v

Respondent

Samera Contracting Limited

Heard at: Bury St Edmunds (by CVP)

On: 20 August 2021

Before: Employment Judge M Warren

Appearances

For the Claimant: Ms Owusu-Agyei (Counsel).

For the Respondent: Mr Swatton (Managing Director).

JUDGMENT AT AN OPEN PRELIMINARY HEARING

1. The response in relation to the claimant's claims of unlawful deduction from wages, for unpaid holiday pay and for notice pay is struck out on the grounds that it has no reasonable prospects of success. The claimant's claims in those respects succeeds. The sum to which he is entitled in respect of those claims will be determined at a remedy hearing, notice of which will follow in due course. The respondent will be entitled to be heard and to make representations as to remedy at that hearing.
2. The claimant's application for the response to be struck out on the grounds that it has no reasonable prospects of success or in the alternative for a deposit order on the grounds that it has little reasonable prospects of success in relation to the claimant's claims that he was automatically unfairly dismissed and subjected to a detriment for having made protected disclosures and that he was automatically unfairly dismissed for asserting a statutory right, is refused.

REASONS

Background

1. Mr Wren was employed by the respondent as Commercial Manager between 1 March and 30 August 2020. After early conciliation on 2 October 2020, he issued these proceedings on 6 October 2020 bringing claims of automatic unfair dismissal for having made a protected disclosure, detriment for having made a protected disclosure, automatic unfair dismissal for having asserted a statutory right, unlawful deduction from wages, holiday pay and a breach of contract claim for notice pay.
2. The proceedings were resisted by an inadequate and poorly prepared ET3.
3. By letter dated 29 January 2021, Mr Wren's solicitors applied for the response to be struck out as having no reasonable prospects of success, in the alternative for a Deposit Order on the grounds that the response has little reasonable prospects of success, and further in the alternative, for an Unless Order to be made requiring the respondent to provide further and better particulars of its defence. The application was originally listed to be dealt with at an Open Preliminary Hearing on 24 May 2021. That was postponed because of a bereavement on the part of Mr Swatton.

Papers before me today

4. This hearing was conducted remotely and I did not have the tribunal file before me. I had a bundle of documents prepared by the claimant's solicitors, for which I am grateful. I also had an Agenda prepared on behalf of the claimant.
5. I had an email from Mr Swatton dated 19 August in which he made an application for an adjournment today. He attached a copy of a statutory demand and a letter from Companies House giving notice to show cause why the company should not be struck off the register and dissolved.

Respondent's Adjournment Application

6. Mr Swatton applied for an adjournment of today's hearing citing the following reasons:-
 - 6.1 He is, as he has been throughout these proceedings, stuck in Saudi Arabia unable to return to the United Kingdom for reasons to do with the lack of a visa. He is hopeful of returning to the United Kingdom in 2 weeks' time.
 - 6.2 The respondent is without funds and unable to pay for lawyers to represent it.

- 6.3 He says that there is a possibility of funds becoming available, perhaps in September or October, as he is hopeful that he may have found a new Saudi sponsor.
7. The adjournment application is opposed on the grounds that:
 - 7.1 10 months have elapsed since these proceedings were issued and from the outset, Mr Swatton has been asking for a delay whilst he seeks legal representation in the hope of improved financial circumstances.
 - 7.2 Similar hopes were offered to support a postponement application in May.
8. Having regard to the overriding objective and the need to seek to balance the relative prejudice to each of the parties, I decided to refuse the application:
 - 8.1 Mr Swatton's presence in the United Kingdom is of no bearing; we were conducting the hearing by CVP which presented no difficulty.
 - 8.2 I took into account that in this particular case, the claimant is legally represented and has counsel today, the respondent is effectively a litigant in person and there is therefore an inequality of arms.
 - 8.3 The respondent has had a period of 10 months in which to sort out its finances and secure legal representation, if that is its wish.
 - 8.4 That the company might be about to be struck off is not something I have any control over and indeed, may be an imperative to proceed without delay.
 - 8.5 Justice delayed is justice denied.

Strike Out/Deposit Order Application

The Law

Strike Out

9. Employment Tribunals Rules of Procedure, 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 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.*

10. A tribunal should be slow to strike out a litigant in person on the basis that it has no reasonable prospects of success, see Mbuisa v Cygnet Healthcare Ltd UKEAT 0119/18. Strike out is a draconian step that should only be taken in exceptional cases. If a case is poorly pleaded, the appropriate step is to record how the case is put, ensure that the pleading is amended and make a deposit order if appropriate.

11. In exercising discretion, a Tribunal should have regard to the overriding objective. Rule 2 sets out the Overriding Objective as follows:

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;*

(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 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 overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

12. In exercising discretion, one must also balance the relative prejudice to the parties.

Deposit Order

13. The Employment Tribunals' rules of procedure at Rule 39 provide as follows:

(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

...

14. In the case of Hemdan v Ishmail and another UKEAT/0021/16, the then President, Mrs Justice Simler, reviewed the legal principles to be applied when considering whether or not to make a Deposit Order. She said at paragraph 10,

"There can accordingly be little doubt in our collective minds that the purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails."

At paragraph 12,

"The test for ordering payment of the deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strike out which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. The fact that a tribunal is required to give reasons for reaching such a conclusion serves to emphasis the fact that there must be such a proper basis."

She says at paragraph 13,

"The assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay. ...a mini-trial of the facts is to be avoided..."

Where there is a core factual conflict it should be properly resolved at a full Merits Hearing where evidence is heard and tested."

Lastly, at paragraph 15,

“Once a tribunal concludes that a claim or allegation has little reasonable prospect of success, the making of a deposit order is a matter of discretion and does not follow automatically. It is a power to be exercised in accordance with the overriding objective, having regard to all of the circumstances of the particular case. That means that regard should be had for example, to the need for case management and for parties to focus on the real issues in the case. The extent to which costs are likely to be saved, and the case is likely to be allocated a fair share of limited tribunal resources, are also relevant factors.”

The Application

15. Ms Owusu-Agyei took me to the following:
- 15.1 There was a contract of employment in the bundle signed by both parties which provides for the respondent to pay Mr Wren a salary of £98,000 per annum payable in monthly instalments on the twenty-eighth of each month. Mr Swatton acknowledged that not a single payment has been made.
 - 15.2 The contract provides that Mr Wren would be enrolled on a stakeholder pension with Scottish Widows.
 - 15.3 The contract provides for 28 days annual leave per year and payment in lieu of accrued but unused holiday upon termination.
 - 15.4 The contract provides for 4 weeks' notice.
 - 15.5 The claim was issued on 6 October and includes claims of unlawful deduction from wages, holiday pay, notice pay, automatic unfair dismissal for having made protected disclosures and detriment for the same and automatic unfair dismissal for having asserted a statutory right, namely that to payment of wages.
 - 15.6 The ET3 was filed on 6 December and at 6.1 whilst the box is ticked, “Yes” indicating that the respondent intends to defend the claim, the narrative where the respondent should set out the facts relied upon to defend the claim reads as follows:

“Unsure I need to seek advice.

However I believe I acted in the best interest of the claimant and the company under very difficult market conditions which were not the fault of either party and cannot be considerable to be norm for contractual working and project negotiations due to Covid-19.

It has to be seen as an extreme time and companies have to act to protect their interests to survive.”

- 15.7 Also on 6 December, the respondent emailed the claimant's solicitors stating that it needed more time in order to obtain advice.
- 15.8 On 4 May 2021 the respondent indicated it was intending to instruct somebody called "Ben Stanton of Franklins" but it was without funds.
- 15.9 In that same email Mr Swatton had written, "We agree that Mr Wren is owed his back salary, we don't agree he is owed anything else as he was unsuccessful in the execution of his role."
- 15.10 In an email terminating Mr Wren's employment on 27 August 2020 he wrote, "I will pay your salary owed, and any sums owed to you under your contract once sums reach Samera UK ... it is clear to me our mutual frustration and my inability to place you on another contract which isn't UK based is an issue. But mostly there is a complete breakdown in trust between us which clearly can't be reconciled now due to this long delay, lack of work contract and issues with paying you ... we will pay any due notice period ..."
- 15.11 I was referred to circa 50 pages of WhatsApp messages in the bundle of Mr Wren pressing for payment of his salary and that of his colleagues.
16. I asked Ms Owusu-Agyei whether she could take me to anything amongst those documents that showed clearly the reason for dismissal or detriment was Mr Wren's request for payment. She took me to the termination email which I have already quoted and to page 144 where Mr Swatton wrote, "Instead of asking money money money. What about can I help???? Never see that message." Which she says, is clear evidence of frustration on Mr Swatton's part.
17. Mr Swatton confirmed to me:
- 17.1 That at the time the respondent had 12 employees all of whom were also dismissed except for a Mr Snell who is Chief Financial Officer and Chairman and an Indian Shareholder.
- 17.2 He confirmed to me that his case is that the respondent dismissed Mr Wren, (and everybody else) because of its financial circumstances and lack of business, (a redundancy situation).
- 17.3 He confirmed that the respondent does not dispute that Mr Wren is entitled to his salary, his notice pay and accrued holiday pay.
18. I observed that in the ET3 at 4.1 in a box in which the respondent is invited to explain why it disagreed with the dates for employment given by the claimant, Mr Swatton had written:

“The claimant is saying he was unfairly treated and dismissed. However the company wasn’t able to secure the contracts which it was expected to agree before Covid and those contracts did not materialise. After many months of frustration and lack of progress on both sides the relationship became one of lack of trust as contracts weren’t secured. We noted the claimant at know point during his employment activated his email address to enable participation in the company business correctly.”

Conclusions

- 19. The respondent clearly admits Mr Wren’s claims for wages, notice pay and holiday pay. These claims are not resisted in the ET3. I will strike out the response in relation to those three claims insofar as it might be read as resisting them. The claimant is entitled to Judgment on those three claims with quantum to be assessed at a Remedy Hearing in due course, at which the respondent will be entitled to make representations as to remedy only.

- 20. As for the automatic unfair dismissal and detriment claims, it seems to me that on the wording of the ET3 as quoted and bearing in mind that the form was completed by a litigant in person, it is clear that the respondent’s case is that the reason Mr Wren was dismissed and the reason for the detriments complained of was the lack of financial resources and the respondent’s failure to the secure contracts that it had been hoping for. In those circumstances I do not consider that it could be said that the defence has no or little reasonable prospects of success and I therefore decline to make either a strike out order or deposit order.

Employment Judge M Warren

Date: 14 September 2021

Sent to the parties on: ...23.09.2021..

.....GDJ.....
For the Tribunal Office