



EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case No: 4101722/2022

Open Preliminary Hearing Held by Cloud Based Video Platform on 17 June
2022

10

Employment Judge O'Donnell

15

Mr G Mckinlay

**Claimant
In Person**

Darren Hush

**Respondent
Represented by:
Mr Hay (counsel
instructed by
Morton Fraser)**

20

25

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim is dismissed under Rule 27 as having no reasonable prospects of success.

30

REASONS

Introduction

35

1. This hearing has been listed to determine whether the present claim should be dismissed at initial consideration under Rule 27 on the basis that it has no reasonable prospects of success.

2. This is the third claim which the Claimant has brought against the present Respondent (an employee of Royal Mail) relating to the Claimant's

employment with Royal Mail and its termination; one of the previous claims was withdrawn by the Claimant and dismissed under Rule 52 and the other was struck out as having no reasonable prospects of success.

- 5 3. The Claimant has also brought two claims against Royal Mail relating to the same matters; the first of these was settled by way of COT3; the second was dismissed on the basis that the COT3 agreement had ousted the Tribunal's jurisdiction. The second set of proceedings were determined at a hearing because the Claimant had asserted that he had not understood what he was
10 doing when he agreed to the COT3 but the Tribunal determined that the Claimant did not lack capacity and that the COT3 was valid.
4. I had made the judgment striking out the most recent set of proceedings against the present Respondent (4111685/2021) which was dated 11 April
15 2022. For the sake of brevity, I will not set out the detail of why I struck out that claim and that judgment is referred to for its terms. In summary, I found that the Tribunal lacked jurisdiction to hear the claim under a number of heads which include the terms of the COT3 signed in the first set of proceedings against Royal Mail in which the Claimant gave up his right to
20 pursue claims against Royal Mail and any of its employees in relation to his employment with them and its termination, time bar and the dismissal of the previous claim against the present Respondent which raises the issue of *res judicata*.
- 25 5. The present claim came before me at initial consideration and I identified that it was pled in almost identical terms to claim 4111685/2021. I, therefore, considered dismissing the present claim as having no reasonable prospects for the same reasons as the previous claim.
- 30 6. The Claimant was given the opportunity to comment on this and he objected to the claim being dismissed. This hearing was listed to consider whether the claim should be permitted to proceed.

Claimant's submissions

7. Much of the Claimant's submissions were concerned with the merits of his claim rather than the various jurisdictional issues which arise in this case. He asserted that the Respondent had brought about the end of his career by telling lies and that this had ruined his life. He has lost his pension of 23 years and had no dignity or respect.
8. He accepted, in response to a question from the Tribunal, that he had signed a COT3 agreement in relation to his initial claim against Royal Mail but did not know what he was signing and had not read the agreement before signing it.
9. He also accepted that he had brought two previous claims against this Respondent, one of which he withdrew and the other having been dismissed.
10. He submitted that he had never had answers for what had been done to him and this case should be heard because he has never had a full hearing and so never had closure.
11. The Claimant concluded his submissions by stating that, unless someone came up with a decision, *"I will never drop this case"*.

Respondent's submissions

12. The Respondent's agent referred to the ET3 for a timeline of the procedural history of this case and the previous claims as well as the terms of the COT3.
13. Mr Hay submitted that it was clear, on the face of the ET1, that this was precisely the same claim as the two previous claims against this Respondent and the two claims against Royal Mail.
14. It was accepted that the Claimant felt strongly about these matters but, it was submitted, that this is not a reason in law for the present claim to proceed.

15. There was reference to the Claimant's behaviour in raising duplicate claims being unreasonable but the Tribunal has not taken account of this as it is not one of the grounds for dismissing a claim under Rule 27.

Relevant Law

- 5 16. Rule 27 of the Employment Tribunal Rules of Procedure 2013 states:-

(1) If the Employment Judge considers either that the Tribunal has no jurisdiction to consider the claim, or part of it, or that the claim, or part of it, has no reasonable prospect of success, the Tribunal shall send a notice to the parties—

10

(a) setting out the Judge's view and the reasons for it; and

15

(b) ordering that the claim, or the part in question, shall be dismissed on such date as is specified in the notice unless before that date the claimant has presented written representations to the Tribunal explaining why the claim (or part) should not be dismissed.

20

(2) If no such representations are received, the claim shall be dismissed from the date specified without further order (although the Tribunal shall write to the parties to confirm what has occurred).

25

(3) If representations are received within the specified time they shall be considered by an Employment Judge, who shall either permit the claim (or part) to proceed or fix a hearing for the purpose of deciding whether it should be permitted to do so. The respondent may, but need not, attend and participate in the hearing.

30

(4) If any part of the claim is permitted to proceed the Judge shall make a case management order.

17. The dismissal of a claim on the grounds that it does not have reasonable prospects is analogous to the power of the Tribunal to strike-out a claim on

the same grounds under Rule 37 and the same principles, derived from the case law, should be applied.

- 5 18. The relevant test when considering a strike out on the grounds of lack of reasonable prospects is not whether the claim is likely to fail or whether it is possible that it will fail but, rather, whether the Tribunal can properly conclude, on the basis of the material available to it, that the claim has no reasonable prospect of success (*Balls v Downham Market High School & College* [2011] IRLR 217).
- 10 19. 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.
- 15 20. 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 fact-sensitive and require full examination of the evidence for a Tribunal to make a proper determination.
- 20 21. In considering whether to strike-out, the Tribunal must take the Claimant's case at its highest and assume she will make out the facts she offers to prove unless those facts are conclusively disproved or fundamentally inconsistent with contemporaneous documents (*Mechkarov v Citibank NA 2016 ICR 1121, EAT*).
- 25

Decision

- 30 22. The Tribunal does bear in mind that the power to dismiss a claim under Rule 27 is as draconian a power as that to strike-out a claim under Rule 37. It should, therefore, be exercised with extreme caution where no evidence is being heard or findings in fact being made.

23. However, this is not a case where the prospects of success depend on the resolution of a dispute of facts or can only be assessed after hearing evidence.

5 24. Rather, this is a case where there are fundamental issues in relation to the jurisdiction of the Tribunal arising from the following matters:-

10 a. The Claimant has signed a COT3 agreement which waives his right to bring or pursue claims about his employment with Royal Mail and its termination, not just against Royal Mail but, also, its employees (which includes the present Respondent). The relevant term of the COT3 is set out in the ET3 and the Claimant does not dispute the accuracy of this.

15 b. The matters which form the basis of the claim occurred several years ago and so the claim is out of time. The Claimant did not seek to argue that it would be just and equitable to hear the claim out of time.

20 c. The present claim is a repeat of two previous claims against the same Respondent arising from the same matter. Both of these previous claims have been the subject of judgments dismissing them and the principle of *res judicata* means that the Claimant should not be permitted to pursue the same claim for a third time.

25 25. Whilst the Claimant is clearly aggrieved at what happened during his employment with Royal Mail, this is not sufficient to get him over these jurisdictional hurdles. Indeed, nothing said by the Claimant addresses these issues at all, let alone sets out a reason why there is, in law, the power for the Tribunal to hear these claims despite the matters set out above.

30 26. The Claimant complains that there has never been a hearing which determined whether or not what had happened was fair. This is correct but the reason for that is that the Claimant chose to settle his first claim with Royal Mail. If he did want a hearing to give him closure, as he put it, then he could have chosen to pursue that claim to a conclusion.

27. However, he did not do so and, rather, chose to settle that claim. He may now regret that choice but that does not mean that he is not bound by the consequences of it, one of which is that he gave up his right to pursue claims regarding his employment with Royal Mail.

5

28. The Tribunal notes that the Claimant asserts that his mental health at the time meant that he did not know what he was signing. However, the issue of the Claimant's capacity to agree the settlement was determined by Employment Judge d'Inverno in claim number 4103573/2020 in a judgment dated 14 April 2021 and I am not prepared to re-open that issue in circumstances where the Claimant had not appealed that decision.

10

29. In these circumstances, I consider that this is case where it would inevitably be found that the Tribunal has no jurisdiction to hear the claim and so it has no reasonable prospects of success. I, therefore, dismiss the claim under Rule 27.

15

20 Employment Judge: Peter O'Donnell
Date of Judgment: 20 June 2022
Entered in register: 20 June 2022
and copied to parties

25