

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No S/4100224/2017**

**Held at Glasgow on 24 April 2017**

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**Employment Judge: Mr R Gall**

**Mrs E McBride**

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**Claimant**  
**Represented by:**  
**Ms A Bennie –**  
**Advocate**

**Fraser Pharmacies**

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**Respondent**  
**Represented by:**  
**Mr I MacLean –**  
**Employment Consultant**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that the application for the claim to be struck out in terms of Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 is refused.

As stated at the Hearing, in terms of Rule 62 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, written reasons will not be provided unless they are asked for by any party at the Hearing itself or by written request presented by any party within fourteen days of the sending of the written record of the decision. No request for written reasons was made at the Hearing. The following sets out what was said, after adjournment, at the conclusion of the Hearing. It is provided for the convenience of parties.

## REASONS

1. This was an application by the respondents that the claim be struck out in terms of Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (“the Rules”). The ground of strike out  
5 advanced was that the claim had no reasonable prospect of success.
2. Mr MacLean for the respondents confirmed that there was no alternative application in terms of which a Deposit Order was sought under Rule 39.
3. In assessing the application, the claimant’s case is to be taken at its highest with the test then being applied to it.
- 10 4. Mr Maclean’s position was that the claim was one of unfair dismissal. The claimant had however not been dismissed. She had resigned. She did not claim to have withdrawn the resignation. The resignation was with immediate effect. Any proposed withdrawal would in any event require to be accepted by the respondents. That had not occurred.
- 15 5. Having resigned with immediate effect and there being no agreed withdrawal of resignation, she could not claim unfair dismissal. Her claims for notice payment and payment of wages after date of resignation were also claims with no reasonable prospect of success given that resignation had been effective. Mr MacLean pointed to the case **of Wallace v Ladbroke Betting and Gaming Limited UKEAT0168/15 (“Wallace”)** in  
20 particular in support of his position.
6. Ms Bennie for the claimant said that the claimant claimed she was dismissed in January of 2017. She had resigned in September of 2016. If that resignation terminated the contract then she claimed constructive unfair  
25 dismissal as she had resigned in relation to a fundamental breach of contract. That claim was pled. If the Tribunal found that there was no fundamental breach of contract by the respondent entitling the claimant to resign, then the claimant’s resignation was itself a repudiatory breach of contract as she had resigned without notice. Notice was required under her  
30 contract of employment. That therefore was not the situation in **Wallace**.

7. A repudiatory breach of contract, such as resignation without notice, required to be accepted by the other party. Ms Bennie referred to the case of ***Geys v Société Generale, London Branch, [2013] 1AC523***. The fundamental breach of contract by the claimant had not been accepted by the respondents. Her employment therefore continued. Her employment had been ended by the respondents issuing the P45 to her in December.
8. Ms Bennie said that the facts and circumstances of the case were of significance. Evidence was essential in the case.
9. She referred to the cases of ***Hasan v Tesco Stores Ltd UKEAT/0098/16*** and ***Tayside Public Transport Co Ltd v Reilly [2012] SLT1191***. Those cases emphasised that strike out should only be a course followed in rare circumstances and in exceptional cases. It was a draconian remedy. Further, even if the Tribunal concluded that the claims had no reasonable prospects, the Tribunal was still required to look at the remedy in that situation and to use its discretion. It might be that strike out did not follow notwithstanding there being no reasonable prospects.
10. I have considered the position very carefully. There were during the PH interesting legal points thrown up and explored.
11. I understand that to the respondents this may appear to be a straightforward situation. There was a resignation by the claimant. Her employment ended. There was therefore no dismissal.
12. The respondents may be right, for all I know, either on the facts or law. The question however I have to determine is whether there is no reasonable prospect of success in the claim.
13. As case law has emphasised, strike out is a draconian remedy only to be used in exceptional circumstances. The test is whether there is no reasonable prospect of success. It is not whether the case perhaps looks a bit thin or whether it appears there may be an element of difficulty in advancing the case. The test is whether there is no reasonable prospect of success.

14. Facts are almost always important in cases. There are generally disputes involved in cases. It is only when the facts are found that the law can then be applied.
15. The claimant offers to prove that she was dismissed in December 2016. That leads to a question for resolution as to whether she was employed beyond what she accepts was resignation tendered by her. Whether the resignation by the claimant brought the contract to an end in circumstances where a claim to the Tribunal is possible depends upon the view taken on the e-mail from the respondents of 30 September 2016. Was that a fundamental breach of contract by the respondents? In my view evidence is required upon that point.
16. Further, whether there was acceptance of the resignation is also a matter which in my view requires evidence. The respondents say that there was no payment made and that that constituted acceptance by them of the resignation. There were however meetings being the grievance and grievance appeal. There was an exchange of communications. The factual position is quite complicated.
17. The respondents' position became that strike out of the claims of unfair dismissal, wrongful dismissal and for wages unpaid should occur. That would leave standing the claim of constructive unfair dismissal. Termination of that would turn on the situation as at 30 September, the time of resignation.
18. Ultimately my view was however that exploration and determination of facts in the case was key. I could not conclude that there was no reasonable prospect of establishing that employment continued until December 2016 with the claimant then being dismissed. It may be found that the claim is unsuccessful. On the other hand the claim may be successful. It is important and key however that the facts are established as to what, if anything, was exchanged between the parties regarding resignation. The circumstances of intimation and acceptance or otherwise of resignation are also of importance.

19. The claimant also advances the case that she was constructively dismissed in September of 2016. I could not conclude that there was no reasonable prospect of success in that ground of claim. The facts are again key in my view and require to be established. That might lead to a Judgment that  
5 resignation was not warranted as there had been no fundamental breach of contract. Whether there was or was not a fundamental breach of contract would be a matter for evidence as I see it.

20. A strike out on the grounds of there being no reasonable prospects is not appropriate if there is a dispute over key facts. Strike out brings the case to  
10 an end. I can understand the way in which the respondents see things and perhaps there is frustration on their part that they are facing a claim in the circumstances as they see those. The test I have applied however is that which I require to, namely whether there is no reasonable prospect of success on the ground of claim. I could not say that on the case as pled in  
15 my view. It may be that once the facts are out the claim is successful. That remains to be seen. What the claimant offers to prove does not in my view lead appropriately to strike out on the basis of there being no reasonable prospects.

21. The case will therefore be set down for Hearing with date listing letters being  
20 issued to parties. The clerk to the Tribunals is requested to issue date listing letters.

25 Employment Judge: Robert Gall  
Date of Judgment: 26 April 2017  
Entered in register: 27 April 2017  
and copied to parties

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