EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102059/17

Held in Glasgow on 13 September 2017

Employment Judge: Ian McPherson

Mr William Meechan	**Claimant** **In Person**
Sinclair Voicenet Limited	**Respondents** **Represented by:** **Mr John Carruthers - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:-

(1) No ET3 response resisting the claim for unlawful deduction from wages having been lodged by or on behalf of the respondents, despite an extension of time previously granted to them by the Tribunal, and a representative for the respondents having attended this Final Hearing to address the Tribunal, the Tribunal **allowed** the respondents' representative to participate in this Hearing to the extent allowed by the Judge, in terms of **Rule 21(3)**, namely:-

(a) to clarify the respondents' position as regards the claim before the Tribunal, and whether or not they were making any application, under **Rule 20 of the Employment Tribunal Rules of Procedure 2013,** to be allowed to lodge an ET3 response on behalf of the respondents, although late, and/or as regards the amount of arrears of pay sought

by the claimant in respect of unpaid wages allegedly owed to him by the respondents; and

(b) as also to address the Tribunal on the claimant's previously intimated written application, dated 7 September 2017, for leave of the Tribunal to amend the existing ET1 claim to add a new claim against the respondents of unfair constructive dismissal.

(2) The Tribunal notes and records the statement made at this Final Hearing by the respondents' representative that no **Rule 20** application was being made by the respondents to be allowed to lodge a late response to the existing claim for unlawful deduction from wages, and, **of consent of both parties,** and in terms of **Rule 64 of the Employment Tribunals Rules of Procedure 2013,** it is noted and recorded that parties' representatives agreed orally at this Final Hearing that the respondents shall pay to the claimant the agreed net sum in respect of unpaid wages, being **FIVE THOUSAND, THREE HUNDRED and TWENTY FOUR POUNDS, FORTY EIGHT PENCE (£5,324.48)**, representing 7 months' net salary due to the claimant at the agreed rate of £760.64 net per month, with the respondents being responsible to make payment of the appropriate PAYE and NI to HMRC in that regard for 7 months' gross salary at the agreed rate of £1,000 per month;

(3) The claimant having thereafter sought leave of the Tribunal to amend the existing ET1 claim form, rather than go to ACAS for early conciliation, and thereafter bring a fresh claim against the respondents, to add a claim of unfair constructive dismissal, by being allowed to tick the first box at section 8.1 of the ET1 claim form, to add a new claim against the respondents, namely "***I was unfairly dismissed (including constructive dismissal)"***, and to add details of that new claim at section 8.2, by inserting the following words: "As per my email of 7 September 2017 sent at 19:26 to Peter Gough: " ***I regard myself as having been constructively dismissed as a result of non-payment of my salary since 28th February*** (2017)", and the

respondents' representative not objecting to that application to amend, the Tribunal, being satisfied that it was in the interests of justice to allow that amendment, and that being consistent with the Tribunal's overriding objective under **Rule 2** to deal with the case fairly and justly:-

(a) **allowed** the claimant's application to amend, as intimated at this Final Hearing, further to his letter of 7 September 2017 to the Tribunal, and the clarification provided by him orally at this Final Hearing;

(b) accordingly **instructs** the clerk to the Tribunal to add the administrative jurisdictional code "***UDL***" (unfair dismissal) to the Tribunal's case file record, as also to add contact details as provided for the respondents' representative, he now coming on record as their duly appointed agent;

(c) further, the Tribunal **instructs** the clerk to the Tribunal to serve, of new, a Notice of Claim on the respondents, by serving on them, per their representative, a fresh copy of both the ET1 claim form, as also a copy of this Judgment and Reasons, recording the amendment allowed by the Tribunal, and date listing stencils for a Final Hearing in **October, November or December 2017**; and

(d) **allows** the respondents the usual period of 28 days after service of that Notice of Claim to lodge an ET3 response, if they seek to defend the additional claim of unfair constructive dismissal now brought against them by the claimant, and otherwise continues the case, without further Order of the Tribunal, for this Employment Judge to consider further procedure, on receipt of any ET3 from the respondents, or on the expiry of 28 days after service of that fresh Notice of Claim, whichever first occurs.

REASONS

Introduction

1. This case called before me on the morning of Wednesday, 13 September 2017, at 10.00am, for a Final Hearing, as previously intimated to both parties by Notice of Claim and Notice of Final Hearing issued by the Tribunal under cover of a letter dated 3 July 2017. One hour was allocated to hear the evidence and decide the claim, including any preliminary issues. As is detailed later in these Reasons, at paragraph 9 below, that 1 hour allocation was, however, extended to 2 hours, by direction from Employment Judge Shona MacLean, on 12 September 2017, in light of correspondence received by the Tribunal from the claimant, as more fully detailed later in these Reasons, at paragraphs 6 to 8 below.

Claim & Response

2. On 29 June 2017, following ACAS Early Conciliation between 10 May 2017 and 2 June 2017, the claimant lodged his ET1 claim form with the Glasgow Tribunal Office, suing the respondents, for arrears of pay alleged to be due to him from them, in respect of his then ongoing employment relationship with them as a Strategic Advisor. He sought compensation, by way of payment of arrears of salary, but, unfortunately, his ET1 claim form, did not detail any amount for the financial compensation that he was claiming from the respondents, and accordingly did not show how he had calculated any sum being sought from the respondents.

3. His claim was accepted by the Tribunal on 3 July 2017, when Notice of Claim, and Notice of Final Hearing, was served on the respondents, fixing this diet of Final Hearing, and enclosing an ET3 response form for the respondents to complete and return to the Tribunal by 31 July 2017 at the latest. The respondents were advised, as per normal practice, that if they wished to apply for an extension of time to submit their response, they must do so in writing setting out the reason why the extension was sought, but if their response was not received by 31 July 2017, and no extension of time

had been agreed by an Employment Judge, they would not be entitled to defend the claim, and where no response was received or accepted, an Employment Judge might issue a judgment against them without a Hearing.

4. Thereafter, on 28 July 2017, Mr Peter Gough, a Director of the respondents, emailed the Glasgow Tribunal Office, applying for an extension of time to submit a response to the claim, advising that parties were trying to reach an amicable settlement. Following referral to Employment Judge Susan Walker, on 31 July 2017, she granted an extension of time for a further two weeks, and by letter of that date from the Tribunal, the respondents were advised that they should submit their completed ET3 response by 14 August 2017. Notwithstanding that extension of time, granted to the respondents, no ET3 response was submitted by them, or on their behalf, by the extended date of 14 August 2017, or at all.

5. In those circumstances, following referral to Employment Judge Frances Eccles, on 22 August 2017, and as intimated to the claimant in letter of that date from the Tribunal, copied to the respondents for their information, Employment Judge Eccles instructed the claimant to provide details of the sums claimed, and how those sums had been calculated, and also to provide supporting payslips or other relevant documents, and to do so by 31 August 2017. She issued that letter for further information from the claimant, as, on the available information in the ET1 claim form, she was unable to proceed to issue any Rule 21 Judgment on liability and/or remedy for the claimant, no response having been lodged to his claim.

Further Information received from the Claimant

6. By letter dated 5 September 2017, received at the Glasgow Tribunal Office on 7 September 2017, the claimant provided further information, stating that he had not been paid his salary since 27 January 2017, and detailing net payments of £760.64 per month for payments due to him on monthly pay dates between 28 February and 31 August 2017. He advised that the total

sum due to him was **£5,324.48**, albeit that is a net figure with further sums due by the respondents to HMRC in respect of PAYE and NI on his behalf. As he did not have wage slips, he enclosed redacted copies of his bank account from 30 May 2016 to 30 January 2017, highlighting the payments which he had received on or around the last Friday of each month in the net amount of £760.64, being net salary payments from the respondents.

7. Further, by another letter from the claimant, this time dated 7 September 2017, and received at the Glasgow Tribunal Office on 11 September 2017, the claimant, apart from clarifying that parties had not come to an amicable settlement, advised that he would require to amend his claim so that it incorporated a claim for constructive dismissal:-

> "… ***on the basis that my salary has not been paid since 28th February and that no offer has been forthcoming in regard to my employment.***
>
> ***I will obviously attend Wednesday`s Hearing and will be seeking an interim award in respect of the outstanding wages that are due to me.***
>
> ***I will further be seeking consent to the claim being amended to that of constructive dismissal.***
>
> ***As you know no response has been received from the Respondent in relation to the claim that is before you now but it would only be fair that the claim be amended and the Respondent be allowed an opportunity to respond.***
>
> ***I enclose a copy of my email to the Respondent in regard to the claim for constructive dismissal and I confirm having copied this letter to them***."

8. Attached to the claimant`s letter to the Tribunal was a copy of an email sent to the respondents` Director, Peter Gough, on 7 September 2017, at 19:26 hours, in the following terms:-

> "***With regard to the forthcoming Hearing I enclose a copy of my letter to the Employment Tribunal.***
>
> ***You should take this letter as confirmation that I regard myself as having been constructively dismissed as a result of non-payment of my salary since 28th February.***
>
> ***You will note the terms of the letter to the Employment Tribunal in this regard***."

9. Following referral to the duty Employment Judge, on 12 September 2017, and as intimated to both parties by letter from the Tribunal of that date, Employment Judge MacLean instructed that the issues raised in the claimant`s letter of 11 September 2017 be dealt with at this Final Hearing, the length of which she instructed be extended to 2 hours.

Final Hearing before this Tribunal

10. When the case called before me, at around 10.05am, the claimant was in attendance, in person, representing himself, while the respondents were represented by a Mr John Carruthers, a Solicitor from Oracle Law Ltd, Clarkston.

11. The claimant provided to the Tribunal clerk, and I received, a typewritten note, dated 12 September 2017, on which he had calculated a basic award for unfair dismissal, totalling **£5,076.93**. A copy was provided to Mr Carruthers, representing the respondents and, after discussion with both the claimant and Mr Carruthers, I allowed Mr Carruthers to participate in this

Final Hearing, to a limited extent, as detailed above at paragraph (1) of this Judgment.

12. In answer to my request for clarification of the respondents` position, Mr Carruthers advised that he had no **Rule 20** application to make to the Tribunal as regards the Wages Act claim brought by the claimant, but he was aware that the claimant had applied to amend the claim to add an unfair constructive dismissal complaint, and he advised that that was his only interest in attending this Hearing.

13. The claimant stated that he was asking me to grant him judgment for the wage loss, as previously intimated, and verified by his bank statements, as produced to the Tribunal with his letter of 5 September 2017, and, as he now regarded himself as constructively dismissed by the respondents, with effect from the end of last week, he wished to amend his claim to add an unfair constructive dismissal head of complaint, as per his letter dated 7 September 2017.

14. Further, the claimant clarified that he was still seeking 7 months unpaid salary from the respondents, based on his gross monthly salary of **£1,000** per month, and net monthly salary at **£760.64** per month, being the figures stated in his ET1 claim form, and per his letter dated 7 September 2017.

15. Mr Carruthers, for the respondents, confirmed that the claimant`s figures were accurate and, in those circumstances, after I referred them to my powers, under **Rule 64 of the Employment Tribunals Rules of Procedure 2013,** to issue a Consent Judgment, Mr Carruthers confirmed that the respondents consented to judgment passing against them to pay the claimant the agreed net sum in respect of unpaid wages, totalling **£5,324.48**.

16. On the basis of the joint consent of both parties, I issued Consent Judgment for that agreed amount, as per paragraph (2) of my Judgment above.

Claimant's Application for Leave to Amend the ET1 Claim Form

17. The agreed unpaid wages dealt with, of consent of both parties, under **Rule 64,** focus then turned on the claimant`s application to amend his ET1 claim form, to add a new complaint of unfair constructive dismissal, as previously intimated in his letter to the Tribunal of 7 September 2017.

18. The claimant, frankly and candidly, stated that he had no written updated paperwork as regards the terms of his application for leave to amend the ET1 claim form, and he sought time to do so, perhaps by the first week in October 2017. He advised me that he had looked at the relevant Tribunal rules of procedure, but he had not found any practical guidance on how to seek leave to amend, nor what was necessary from him.

19. On that basis, and the claimant being an unrepresented, party litigant, and from his remarks, unfamiliar with Tribunal practice, and/or procedure, I advised him, per my duty under **Rule 2,** and the overriding objective, to deal with the case fairly and justly, ensuring, so far as practicable, that both parties are on an equal footing, that helpful guidance on amendment procedure had been provided by the Employment Appeal Tribunal Judge, Lady Smith, in the well known, but unreported, judgment of ***Ladbrokes Racing Ltd –v- Traynor*** ***[2007] UK/EATS/0067/06***, and in particular, in the 8 steps identified by the learned EAT Judge, at paragraphs 31 to 38 of her judgment.

20. Helpfully, Lady Smith's judgment in ***Ladbrokes*** also quotes, at paragraph 20, from the "***Selkent principles***" from the well-known, reported judgment of the then EAT President, Mr Justice Mummery, in ***Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore*** ***[1996] IRLR 661***, including the need for a Tribunal, dealing with any amendment application, to take into account the nature of the amendment, the applicability of time limits, and the timing and manner of the application, and to balance the injustice and hardship of allowing an amendment against the injustice and hardship of refusing it.

21. The claimant advised that, rather than go back to ACAS for further Early Conciliation, and thereafter bring a fresh claim against the respondents, by a fresh ET1 claim form, he would prefer to amend the existing claim, to add this new head of complaint against the respondents.

22. As a Tribunal can only consider an application for leave to amend an ET1 claim form, once the wording of the proposed amendment is known to both the Tribunal, and the respondents, by way of fair notice, I enquired of the claimant whether he would benefit from an adjournment of proceedings, to consider his position, whether to go back to ACAS, or to insist on his application for leave to amend and, in that event, to draft the necessary wording for his proposed amendment application.

23. It then being around 10.20am, and Mr Carruthers having confirmed that he was not familiar with Lady Smith`s judgment in ***Ladbrokes***, I instructed the clerk to the Tribunal to make a photocopy of the judgment, which I had with me along with my case papers, and provide it to both the claimant, and Mr Carruthers, for their respective information, and attention.

24. A half hour period was agreed as appropriate for the claimant to consider his position, and for the Tribunal to reconvene again, in public Hearing, at that stage, to be advised whether or not the claimant was to proceed with an application to amend, and, if so, in what terms, in which case the Tribunal would then invite comment from the respondents, or whether the claimant had decided instead to go back to ACAS and raise a fresh Tribunal claim against the respondents thereafter, if need be.

25. When proceedings resumed, around 10.55am, the claimant thanked me for the copy ***Ladbrokes*** judgment provided to him by the clerk, he stated that he had read that judgment, and, as far as he was concerned, his letter to the Tribunal of 7 September 2017, and the attached email to the respondents` Director, Mr Gough, were sufficient for the respondents to be

given notice of his claim of unfair constructive dismissal, and for them to respond.

26. Accordingly, the claimant invited me to add a claim for unfair constructive dismissal to his existing ET1 claim form, by allowing him to tick the appropriate box on the claim form, and add some short narrative to the existing claim form on the basis of non-payment of his salary since 28 February 2017, and by that mechanism, he stated that the respondents should be given the opportunity to lodge an ET3 response within 28 days of the date of this Final Hearing.

27. Having noted the various points made by Lady Smith, in the ***Ladbrokes*** judgment, the claimant stated that he felt there was no prejudice caused to the respondents, by allowing this amendment, and then giving them the opportunity to reply by lodging an ET3 response.

28. When I then called upon Mr Carruthers, the respondents` representative, to reply to the claimant`s application for leave to amend the ET1, Mr Carruthers stated that the respondents have no objection to the claimant`s application, and that the claimant`s position was crystal clear, and that there was not much more that the respondents` representative could say about it.

29. Mr Carruthers added that he would deal with it on that basis, once the amendment was allowed, and the ET1 claim form re-served on his clients, when he would then be in a position to respond meaningfully. He further advised me that he accepted that the claimant`s email of 7 September 2017 to Mr Gough is sufficiently relevant and specific for him to deal with the new claim in a meaningful way.

30. At that stage in the discussion, I referred both the claimant and the respondents` representative to the Tribunal`s overriding objective, in terms of **Rule 2**, to deal with cases fairly and justly including, so far as practicable, ensuring that the parties are on an equal footing; dealing with cases in ways

which are proportionate to the complexity and importance of the issues; avoiding unnecessary formality and seeking flexibility in the proceedings; avoiding delay, so far as compatible with proper consideration of the issues; and saving expense.

31. Further, a Tribunal shall seek to give effect to the overriding objective in exercising any power given to it by the Rules, and 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.

32. Having referred parties to **Rule 2**, I invited further comment from both the claimant, and Mr Carruthers. The claimant advised that he regarded the effective date of termination of his employment with the respondents as being his email to Mr Gough at 19:26 hours on Thursday, 7 September 2017, as per the email produced to the Tribunal, and rather than go back to ACAS, and thereafter bring a fresh claim, he wished the respondents to get their defence of the claim in sooner than later, by the Tribunal allowing his amendment, as this Final Hearing, rather than him going to ACAS, and, if necessary, thereafter raising a fresh claim.

33. For the respondents, Mr Carruthers stated that he was content for what he referred to as the "***part judgment***" to be issued, in respect of the agreed unpaid wages, and for the claimant`s application to amend, to add a complaint of unfair constructive dismissal, being allowed, that being a practical attempt to save money and time to both parties, as well as the Tribunal, and ACAS. The claimant added that there is a hidden cost of bureaucracy, but he suggested that I should cut out the need for him to go through ACAS, and just get on with it.

34. When I asked Mr Caruthers if he had anything further to say, he stated that he did not have any specific instructions in this case, as regards what would be stated in the respondents' ET3 response to the unfair constructive

dismissal case, albeit he had attended at this Final Hearing to be as helpful as possible to the Tribunal.

35. After reflection, and without the need to retire, into chambers, for private deliberation, I stated from the bench that, having heard parties' respective submissions, and taken into account the judgment of His Honour Judge Serota QC, in ***Prakash –v- Wolverhampton City Council [2006] UK/EAT/0140/06***, which decided that an unfair dismissal claim may be presented by way of an amendment to an existing claim form, as well as by the presentation of a new claim form, I stated that, there being no objection to the claimant's application to amend, I was satisfied that it was in the interests of justice to allow the amendment, and that being consistent with the Tribunal`s overriding objective under **Rule 2** to deal with the case fairly and justly.

36. In coming to that decision, I was alert to the fact that the claimant had already gone through ACAS early conciliation in respect of his Wages Act claim, before raising the present proceedings against the respondents, and attempts to resolve that dispute amicably had regrettably not proven fruitful, until Mr Carruthers consented to the **Rule 64** Judgment against the respondents at this Final Hearing for that part of the claim.

37. I also bore in mind that the purpose of the ACAS early conciliation provisions is limited, as it does not require or enforce conciliation between the parties, it simply builds in a structured opportunity, through the ACAS conciliation service, for conciliation to be considered, in the first place by an employee / ex-employee as a prospective Tribunal claimant and then, if the prospective claimant agrees, by the employer / ex-employer as the prospective respondent.

38. While the need to go to ACAS, to get an early conciliation certificate is generally required, by **Section 18A of the Employment Tribunals Act 1996,** before instituting Tribunal proceedings, unless an exemption applies

in limited circumstances, I also bore in mind that that process of conciliation is an entirely voluntary and confidential process if both parties want to take advantage of it before a matter reaches litigation in the Tribunal at a Hearing.

39. In the particular circumstances of this case, I was faced with a specific set of facts and circumstances, where, following earlier ACAS early conciliation initiated by the claimant, this claim for unpaid wages had been brought, but not defended, and, at this Final Hearing, the respondents appeared, consented to payment of the agreed net amount for unpaid wages, and they did not oppose the claimant's application to allow the existing claim to be amended, to add a new head of complaint against them.

40. In those peculiar circumstances, and consistent with the claimants request that I should allow his amendment, and "***cut through the bureaucracy***", as he termed it, I decided, after careful reflection, that I would agree to do so, as it seemed to me that such a decision avoids formal processes fettering what the claimant seeks, which is a fast and fair process of justice, where the respondents are not prejudiced, and that overall, the interests of justice are better served by the claimant's approach, no objection by the respondents, than by him going back to ACAS, going through early conciliation again, and then possibly bringing a fresh claim, if conciliation through ACAS does not resolve the new matter.

41. Accordingly, the common sense approach, which I chose to adopt, was to allow the amendment, as that means there is no need for further notification by the claimant to ACAS for early conciliation, their resources are not distracted away from other case requiring their attention, and the resources of the Employment Tribunal can be corralled to dealing with the claimant's case on one casefile, rather than potentially 2 separate claims.

Further Procedure

42. In these circumstances, I allowed the claimant`s amendment application, and I have instructed the clerk to the Tribunal to add the unfair constructive dismissal head of claim to the case file record, as also to add Mr Carruthers contact details on the basis that he has now come on record as the respondents' duly appointed agent. All future correspondence will, henceforth, be addressed to him as their agent, and not to the respondents direct, as previously.

43. Further, I have also instructed the clerk to the Tribunal to serve, of new, a Notice of Claim, and a copy of this Judgment and Reasons, on the respondents, per Mr Carruthers, and to issue date listing stencils for a Final Hearing in the last quarter of this calendar year.

44. While the claimant invited me to allow the respondents to reply within 28 days of the date of this Final Hearing, I have allowed them to do so within the usual period of 28 days after service of that Notice of Claim.

45. So as to try and ensure a degree of judicial continuity in this case, I have further instructed that, on receipt of any ET3 response from the respondents, or on the expiry of 28 days after service of that fresh Notice of Claim, whichever first occurs, the case file be referred back to me for any further procedure to be directed.

46. I take this opportunity to note and record that, in terms of **Rule 3**, a Tribunal shall, wherever practicable and appropriate, encourage the use by the parties of the services of ACAS, judicial or other mediation, or other means of resolving their disputes by agreement.

47. While, by allowing this amendment, the claimant does not require to go back to ACAS, and go through early conciliation again, and thereafter bring a fresh claim, if required, the services of ACAS remain available to both parties in the existing claim, as now amended, should there be a

willingness, on their joint part, to seek to resolve matters by an extra judicial settlement, outwith the Tribunal.

48. This Hearing concluded just before 11.10am, when I advised both the claimant, and Mr Carruthers, that I would dictate a written Judgment and Reasons, which would be issued to parties as soon as possible. This I have now done.

Refund of Tribunal Fees paid by the Claimant

49. By way of postscript, and a thought that occurred to me after the close of this Final Hearing, I see from the casefile that the claimant has paid Tribunal lodging fees of £160 in connection with this claim.

50. In **R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51,** the Supreme Court decided that it was unlawful for Her Majesty's Courts and Tribunals Service (HMCTS) to charge fees of this nature. HMCTS has undertaken to repay such fees. In these circumstances, I shall draw to the attention of HMCTS that this is a case in which fees have been paid and they are therefore to be refunded to the claimant. The details of the repayment scheme are, however, a matter for HMCTS.

51. While the claimant made no application to me at this Final Hearing that I should order the respondents to reimburse him such fees in the meantime, in terms of **Rule 76(4),** as I would have ordinarily have ordered in a situation such as this before the Supreme Court's judgment, I note and record here that had the claimant done so, I would simply have sisted his application.

52. As matters currently stand, the claimant is entitled to be refunded by HMCTS for the Tribunal fees paid by him. I see no reason to order the respondents to indemnify the claimant for his Employment Tribunal fees as he will be able to recover them from HMCTS. Accordingly, I simply note here that no Order is made by me, but the claimant has liberty to re-apply to

the Tribunal in respect of this matter, should the need to do so arise.

Employment Judge: Ian McPherson
Date of Judgment: 15 September 2017
Entered in register: 18 September 2017
and copied to parties