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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No:4105879/2022

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Held by Cloud Video Platform on 7 February 2023

Employment Judge E Mannion

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Mrs R Darcy

**Claimant
In person**

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Serco Limited

**Respondent
Represented by
Darren Hogg,
lay representative**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Tribunal is the respondent's application for strike out is denied.

REASONS

Introduction

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1. This is a claim for outstanding payments as per the ET1 lodged on 4 November 2022. The respondent disputes and contests all claims by the claimant.

2. In their ET3 and paper apart, the respondent made an application for strike out on the basis that the facts being relied upon are out of time and the claimant has not provided sufficient detail about the claim. A hearing to consider the respondent's strike out application was scheduled.
- 5 3. The claimant was the only witness and gave evidence on her own behalf. A bundle of productions were prepared and lodged. The respondent provided skeleton submissions in advance which were referred to over the course of the hearing.

Procedural History

- 10 4. The claimant lodged an ET1 on 4 November 2022 claiming outstanding payments from the respondent. An ET3 and paper apart submitted by the respondent disputed these claims. The paper apart noted that the claimant was relying on facts outside of the time limit of the claim and did not have sufficient detail about why the claimant was making this claim. An application for strike
15 out was made within the body of the paper apart.
5. On 9 December 2022 the parties were issued with a notice of hearing, advising that a hearing would take place to consider the respondent's strike out application on 7 February 2022. In the same notice of hearing, the claimant was directed to provide further information of her claim by 6 January 2022.
- 20 6. On 19 December 2022, the tribunal issued a case management order in respect of the upcoming hearing. Part of that order required the claimant to provide information about her case, specifically a written statement with supporting documentation setting out
 - (i) What the claimant seeks by way of remedy;
 - 25 (ii) If the claimant is seeking compensation, how much is sought in respect of each complaint with a detailed explanation of how each sum is calculated;
 - (iii) If the claim related to dismissal, whether the claimant was a member of the respondent's occupational pension scheme;

(iv) Details of any benefits received;

(v) A summary of jobs applied for, details of interviews attended or jobs obtained and details of any income whether from temporary, casual, permanent employment or self-employed work

5 (vi) Details of any other efforts made by the claimant to minimise her loss.

7. The claimant was ordered to provide this information within 14 days from 19 December 2022.

8. On 4 January 2023, the claimant was granted a 7 day extension to comply with the above order.

10 9. The claimant corresponded with the Tribunal over the course of the 5 and 6 January 2023. The Tribunal reminded the claimant in their response on 12 January 2023 to provide a schedule of loss. The claimant provided copies of various documents including pay slips in response.

15 10. A further letter was sent to the claimant on 13 January 2023 reminding her that she did not need to send individual documents as she came across them but instead that these documents should form part of the bundle for the hearing on 7 February 2023. The claimant was again reminded to provide a schedule of loss.

20 11. On 23 January 2023 the claimant emailed the Tribunal and attached various documents including a P60 and pay slips. A further email was sent on 2 February 2023 enclosing a copy of the respondent's bundle which included an undated document entitled "money loss".

Relevant Law – Strike Out

25 12. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulation 2013 provides that a claim may be struck out in the following circumstances:

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—

5 (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;

10 (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).

15 (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.

20 **Respondent's submissions**

13. Mr Hogg provided skeleton submissions in advance of the hearing and spoke to these. These submissions covered the topics of jurisdiction (as it related to time bar), particularization of claim, failure to comply with Tribunal orders, prospects of success. The detail of these submissions are contained further
25 in the decision section below.

14. The skeleton and oral submissions did not refer to case law specifically dealing with strike out applications under Rule 37 although Rule 37, Rule 2 and sections of the Employment Rights Act 1996 were referred to. The majority of case law in the submissions dealt with the question of time bar
30 (***Porter v Banbridge Limited*** [1978] IRLR 271; ***Beasley v National Grid Electricity Transmissions*** [2007] All ER D; ***Marks and Spencer v Williams***

Ryan [2005] IRLR 562; and *Palmer v Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119) with further a reference to the case of *Coors Brewers Ltd v Adcock* [2007] IRLR 440.

Claimant's submissions

5 15. The claimant confirmed that her claim against the respondent was for unpaid overtime, stating that she did at least two overtime shift per week. When she was suspended from work, she was paid her basic pay only and did not receive any overtime payments. She explained that she was suspended from around 22 May 2022 and remained suspended until 9 September 2022 when
10 her employment ended.

16. She confirmed that she provided the Tribunal with wage slips showing the hours of overtime before her suspension. She provided this documentation on or around 2 February 2023 in response to the order of the Tribunal. She confirmed that she received the letters from the Tribunal asking her to provide
15 a Schedule of Loss, that she did not understand and tried to attach files to send to the Tribunal. She stated that that she sent details of her wage slips, a P60 and details of loss. This latter document is at pg 78 in the Respondent's bundle.

17. She stated that she understood the respondent's position was that she had
20 not complied with orders of the Tribunal, that she had difficulties attaching documents to send to the tribunal and was not, in her words, a computer whiz.

Decision

Should the claimant's case be struck out on the basis that it is scandalous or vexatious or has no reasonable prospect of success as per Rule 37(1)(a)

25 18. The respondent's position is that the claimant's case has no reasonable prospects of success as she has not identified when she suffered a deduction from wages.

19. The purpose of this hearing is not to make a decision on the merits of the claimant's claim but whether her claim should be struck out.

20. While I was not referred to the case of **Cox v Adecco and ors** 2021 ICR 1307, EAT it is very relevant to these proceedings. Paragraphs 28 to 32 in particular provide guidance to a Tribunal when considering an application for strike out under Rule 37(1)(a) where a claimant is a litigant in person.
5 Paragraph 28 summarises the law on strike out for no reasonable prospect of success and is quoted as follows;

28. From these cases a number of general propositions emerge, some generally well understood, some not so much.

(1) No one gains by truly hopeless cases being pursued to a hearing.

10 *(2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate.*

(3) If the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate.

15 *(4) The claimant's case must ordinarily be taken at its highest.*

(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is.

20 *(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim.*

25 *(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing.*

30 *(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer.*

35 *(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.*

21. It is therefore necessary to consider the information provided by the claimant
40 as a whole, in order to assess whether the claim should be struck out for no reasonable prospect of success.

22. I have considered the pleadings, correspondence to the tribunal which formed part of the bundle and the submissions made by the claimant over the course

of the hearing. She confirmed during the hearing the 'other payments' that she is claiming relate to overtime payments, as she did not receive any overtime payments during her period of suspension. The claimant in her ET1 has ticked the box at question 8.1 "I am owed other payments". In response to question 8.2 she sets out alleged unfair treatment and states "I have had a big impact on my life and I have lost out on money for overtime". She attempts to provide further information on the 23 and 26 of January and again on 2 February 2023. She emailed the tribunal explaining in part what her claim is, and why she was attaching documents such as pay slips and a P60 as this, in her view, shows the amount of overtime pay received prior to her suspension. She confirmed at the hearing that the document entitled "money loss" at page 78 of the respondent's bundle is her attempt to provide a schedule of loss. This states:

I worked most weeks on overtime where I earned £11.05 an Hour. I done a lot of overtime which you can see from my wage slips. I used to work 6 days a week at the hospital with some double shifts as they were short staff as well it helped me out financially. As you can see with the basic rate when I got suspended I lost over £100 a week as you can see. From the 24th of may until 6th of december After 15 weeks of no overtime just a basic wage That mounts up to Just over £1500 so far.

23. I am also mindful of Justice Eady KC's comment in **Mbuisa v Cygnet Healthcare Limited** UKEAT/0119/18/BA again which I was not referred to but is relevant. The EAT expressed the exercise of caution when considering strike out on the grounds of no reasonable prospect of success where a case is badly pleaded by a litigant in person, particularly with a litigant in person who does "not come from a background such that they would be familiar with having to articulate complex arguments in written form".

24. I further considered the case of **Coors Brewers Ltd v Adock** EWCA Civ 19 and Mr Hogg's submission that for the tribunal to have jurisdiction to hear a claim for unauthorised deductions, the claim must be for an "identifiable sum", submitting that the claimant is unable to provide details of an identifiable sum.

The facts of Coors is quite different to what is before the tribunal in this case. The question considered by the Court of Appeal was whether the claim brought amounted to an unlawful deduction of wages under the Employment Rights Act 1996, giving the tribunal jurisdiction to hear it or an unliquidated claim for damages under breach of contract, where the tribunal had no jurisdiction to hear it. It centred on a profit based bonus scheme which changed structure following a share transfer, whether payments should have been made and if so using which calculation. It was on this basis that the Court of Appeal made the following statements at paragraph 46:

46. *In my judgment, the underlying facts of **Delaney v Staples** are a paradigm of the circumstances in which Part II of ERA 1996 is designed to operate. The employee complains that there has been an unlawful deduction from his wages. He has not been paid an identified sum. He makes a claim under Part II. The employer may have a number of defences. Those defences may raise issues of fact. Those issues will be for the Tribunal to determine. But the underlying premise on which the case is brought is that the employee is owed a specific sum of money by way of wages which he asserts has not been paid to him. That, it seems to me, is the proper context both of **Delaney v Staples** and Part II of ERA 1996.*

25. In the case before me, the claimant's ET1 in response to the question at 9.2 "what compensation are you seeking?" states "I think that's £5,000 plus as I have lost out on money as I always do overtime to help me out financially also the mental impact it has." In her document entitled "money loss" the claimant outlined "after 15 weeks of no overtime just a basic wage that mounts up to just over £1,500 so far." The claimant therefore has identified the sum she states she has not been paid.

26. While the claim may not be set out with the same rigour and detail if submitted by a legal representative, the claimant as a litigant in person is entitled to make her claim as best she can. The overriding objective requires that the tribunal seeks flexibility in the proceedings and ensure the parties are on an equal footing. Mr Hogg submitted that it would not be possible for the parties to be on an equal footing given the case presented and that the respondent will be trying to guess what claim the claimant is making. I do not accept this position. There is sufficient detail in the paperwork provided and what was

submitted today to allow the respondent to understand the case that needs to be met.

5 27. Mr Hogg also submitted that the claim may be out of time given the lack of specification in the ET1 and the fact that the claimant refers to a grievance she raised on 10 February 2022. She submitted at the hearing that she was not paid overtime during her period of suspension which came to an end on 6 September 2022 when her employment also came to an end. As the Acas Early Conciliation claim was submitted on 4 November 2022 and the tribunal claim itself lodged on 2 December 2022, this claim appears to be in time. It may well be that the ET1 refers to matters which are not relevant to the question of 'other payments'. If the claimant intends to make any other claim, relating to her resignation for example, it would be necessary to amend her claim.

15 28. Strike out is a draconian measure whereby a party can no longer seek to enforce or defend their rights. I do not accept that the claimant's case for other payments has no reasonable prospects of success. The respondent's application for strike out on Rule 37(1)(a) is denied.

20 **Should the claimant's case be struck out because that the manner in which the proceedings have been conducted by the claimant has been scandalous, unreasonable or vexatious under Rule 37(1)(b)**

25 29. While relying on this ground for strike out, Mr Hogg's written submissions do not directly refer to what he believes is scandalous, unreasonable or vexatious conduct on behalf of the claimant. The submissions refer to the lack of particularisation in the claim and a failure to comply with an Order of the tribunal. While I was not referred to the leading case of ***Blockbuster Entertainment Ltd v James*** 2006 IRLR 630, CA the Court of Appeal found that where a Tribunal strikes out a claim for unreasonable conduct, it must be satisfied that the conduct involved persistent and deliberate disregard of required procedural steps or has made a fair trial impossible. Striking out the claim must also be a proportionate response to this conduct.

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30. While I accept that the Tribunal was required to remind the claimant to comply with orders for information, the claimant's submission is that she attempted to do so, that she had difficulty in attaching files to emails, that she did not understand and that the document provided at page 78 of the bundle is her statement in compliance with the case management order issued on 20 December 2022. I do not accept that her conduct should be characterised as a deliberate and persistent disregard of required procedural steps.

31. I have also considered whether a fair trial is possible, noting Mr Hogg's submission on this point that the respondent does not understand the claim it is required to meet. There is a balance between the respondent's right to have sufficient notice of the claim against it and the claimant's right to engage in the Tribunal process and seek to enforce her rights. The Tribunal is such that a large portion of users are litigants in person, representing themselves in a process of which they have no previous experience. The overriding objective seeks were possible to place parties on an equal footing, particularly where one party is represented by someone with experience and understanding of the legal system and Rules of procedure and the other is not. This is not to say that a litigant in person can ride roughshod over the Rules of procedure and refuse to provide information on the claim they wish to make. Instead, it requires parties, particularly those with legal knowledge and experience, to accept the manner in which the claim is set out will not always meet the standards that they themselves would observe. Given the documents provided and the submissions heard from the claimant on the basis of her claim, the respondent has sufficient notice of the claims they are required to meet. I find that a fair trial is still possible. Accordingly Rule 37(1)(b) is not met and so the application for strike out on that basis is denied.

Should the claim be struck out for non-compliance with an order of the Tribunal under Rule 37(1)(c)?

32. Mr Hogg in his submissions referred to the case management orders issued by the Tribunal on the 9 and 19 December 2022 and the correspondence between the claimant and the Tribunal from the date of the case management

orders to the date of the hearing. He submitted that the claimant failed to comply with those orders to date and that as at the date of the hearing, the respondent had not received “any particularisation of the Claimant’s complaint of “other payments” and / or any confirmation of the sum that the Tribunal is being asked to award and / or how the figure for which the Claimant contends is calculated and / or (ii) any witness statement on behalf of the Claimant and / or any witnesses that she is proposing to in support of her claim at the Preliminary Hearing.”

33. Having reviewed the case management orders made, there was no requirement to provide a witness statement, either on behalf of the claimant or any other witnesses. Instead, she was asked to provide a written statement with supporting documentation to outline the response to various questions. Witness statements in Scotland is where written evidence is provided in the absence of hearing oral evidence. Such statements are subject to presidential guidance. Parties are quite often asked to provide further information in a written statement but this should not be taken as meaning a witness statement.

34. The claimant in her submissions conceded that she had not complied with the orders, explaining that her correspondence with the Tribunal and her document entitled “money loss” at page 78 of the bundle were her attempts to do so.

35. When considering strike out under Rule 37(1)(c) I must consider the overriding objective and all relevant factors for non-compliance, as per **Weir Valves and Controls (UK) Ltd v Armitage** 2004 ICR 371, EAT, namely:

- the magnitude of the non-compliance
- whether the default was the responsibility of the party or his or her representative
- what disruption, unfairness or prejudice has been caused
- whether a fair hearing would still be possible, and
- whether striking out or some lesser remedy would be an appropriate response to the disobedience

36. It is also necessary to consider whether strike-out is proportionate and if a fair trial is still possible having regard to ***Blockbuster Entertainment Ltd*** referred to above.

37. The claimant's non-compliance with the orders of the tribunal is not total. I
5 accept that her were not in the form as set out by the tribunal. She has
however attempted to provide both a written statement and supporting
document setting out the basis for the alleged non-payment by the
respondent. As the claimant is representing herself, the default is her
responsibility. In terms of disruption, unfairness or prejudice, it should be
10 noted that the strike out application was made as part of the respondent's ET3
response, albeit there was no specific ground referred to in that application.
The primary submission from the respondent on this point is that they do not
know what case they are required to answer. While this might have been the
case on receipt of the ET1, given the information provided by the claimant in
15 writing and in answer to the orders made by the tribunal and the submissions
she has made today which set out her case, any disruption, unfairness or
prejudice is minimal. It is accepted that this information is not set out in the
manner in which the respondent would prefer but the document "money loss"
outlines the basis of her claim. I believe that a fair trial is still possible as the
20 respondent now has a greater understanding of and notice of the claim being
made by the claimant, how she has calculated the amount she believes she
is owed and why she believes she is owed this money.

38. In terms of proportionality, it is accepted that given the form of response from
the claimant, there has been some prejudice to the respondent. The potential
25 prejudice to the claimant however is that she will not be able to enforce her
rights should this claim be struck out and she will be stopped from raising a
similar action on the same facts. Strike-out is not a punitive measure. It is a
draconian measure by its very nature allowing the Tribunal to halt cases in
very specific circumstances, where the fairness of continuing the case given
30 what has occurred is called into question. I do not accept that it is
proportionate to strike-out this claim for non-compliance with an order and so
the application as it relates to Rule 37(1)(c) is denied.

Should the claim be struck out on the grounds that it has not been actively pursued under Rule 37(1)(d)?

39. The skeleton submissions state that Tribunal ought to strike-out the claim under Rule 37(1)(d) (along with the other subsections) for reasons set out under the headings jurisdiction, absence of proper particularization, failure to comply with case management orders and prospects of success. This ground, that the claim has not been actively pursued, was not expanded on in oral submissions.
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40. I am mindful of the precedent set by *Evans and anor v Commissioner of Police of the Metropolis* 1993 ICT 151, CA which considered the Tribunal's power to strike out a claim under this ground. The Court of Appeal held that strike-out under this part of the Rule can occur where a) there has been a delay that is intentional or contumelious (that is disrespectful or abusive to the courts) or b) there has been an inordinate and inexcusable delay, which gives rise to a substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the respondent.
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41. As set out above, in this case the application for strike-out was made in the ET3. It is necessary therefore to consider the actions of the claimant in pursuance of this claim since that point. The ET3 was accepted by the tribunal on 8 December 2022 and a notice of hearing issued on 9 December 2022. In the same notice of hearing, the claimant was ordered to provide further information about her claim by 6 January 2022. A further case management order was issued on 19 December 2022. Correspondence took place between the claimant and the Tribunal in relation to these orders over the course of January 2023 and the hearing has taken place today 2 February 2023. It cannot be said that there has been delay, either intentional or inexcusable, giving rise to the risk a fair hearing is not possible. The claim is being actively pursued by the claimant.
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42. The application for strike-out on the ground of Rule 37(1)(d) is therefore denied.
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Should the claim be struck-out on the ground that it is no longer possible to have a fair hearing under Rule 37(1)(e)?

43. There is a certain amount of overlap between this ground and the others I have considered in this judgment. It is an common feature of Rule 37 to consider if a fair trial is still possible and the comments addressing the application under Rule 37(1)(b) and 37(1)(c) on whether a fair trial is still possible can be taken as reiterated under this ground. As the respondent now has notice of the claim being made against it, a fair trial is possible.

44. The application for strike-out under Rule 37(1)(e) is denied.

Deposit order

45. Mr Hogg submitted that if the Tribunal was not minded to grant the strike-out application, that a deposit order be granted “in light of the claimant’s failure to comply with the Orders of the Tribunal to date”. No further submissions were made on this point. This is not the correct basis for making a deposit order under Rule 39 which allows the Tribunal to make a deposit order where there is little prospect of success. I have considered the submissions made in respect of argument of no reasonable prospect of success. Mr Hogg submitted that there are no reasonable prospects of success as the claim fails to establish an occasion where she suffered a deduction and that the documentation provided by the claimant which forms part of the bundle does not establish this. I do not accept this. While I am considering a deposit order through the prism of little reasonable prospects of success rather than no reasonable prospects of success, I am not persuaded by the submissions made by Mr Hogg. At the outset of the case when the ET1 was initially lodged, it is arguable that there was little reasonable prospect of success based on the lack of detail, but I do not accept that at this juncture, the claimant having particularized the claim as best she can, that a deposit order is warranted. The application for a deposit order is denied.

Further procedure

46. This case will now be passed to the listing department to schedule a one day hearing on the merits.

5 **Employment Judge: E Mannion**
Date of Judgment: 21 April 2023
Entered in register: 24 April 2023
and copied to parties

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