



EMPLOYMENT TRIBUNALS

Claimant: James Corpe

Respondent: Fulcrum Private Clients Limited

JUDGMENT

The response is struck out in part, namely the third sentence of paragraph 18 of the Grounds of Resistance.

REASONS

1. The claimant indicated in his agenda for a case management hearing on 23 May 2023 that he wished to apply for part of the Grounds of Resistance to be struck out. The claimant explained the basis of its application in detail at that hearing.
2. The issues in the case as discussed in the hearing were listed in the Case Summary. The parties were directed to write to the Tribunal if they considered the list to be wrong or incomplete. Neither party did so.
3. At the hearing on 23 May 2023 the parties agreed to directions requiring the claimant to file and serve its strike out application in writing no later than 26 May 2023, and the respondent to make any submissions on that application in writing no later than 2 June 2023. Neither party requested a hearing for the determination of the application.
4. On 25 May 2023 the claimant set out its application for the third sentence of paragraph 18 of the Grounds of Resistance to be struck out on the basis that it has no reasonable prospect of success. (The claimant referred to the second sentence of paragraph 18 in his application, but it is obvious – as the respondent has pointed out – that his application related to the third sentence of paragraph 18.)
5. On 2 June 2023 the respondent set out its objections to the application. It did not request a hearing for the determination of the application. For the reasons which follow the respondent's representations are not sufficient to show that this part of the response has a reasonable prospect of success.

6. I am sorry that this application has not been dealt with earlier. I only received a copy of the application on 21 July 2023.
7. Rule 37(1)(a) provides that a Tribunal may strike out part of a response on the grounds that it has no reasonable prospect of success.
8. A response may not be struck out unless the respondent has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing: rule 37(1)(b).
9. When one party to a contract commits a repudiatory breach, the other party can either accept the repudiation or affirm it e.g. *George Avery v Samuel Wilson Bowden*, (1855) 5 Ellis and Blackburn 714. Accepting the repudiation is inconsistent with affirming the contract, and affirming the contract is inconsistent with accepting the repudiation.
10. In *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126, CA, at paragraph 29, Lord Justice Kay said this:

It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation.

11. In *Ezsias* the respondent's case was that the claimant had been dismissed because of a breakdown in relations between the claimant and his colleagues. The respondent relied on a letter, which stated that there had been a total breakdown in working relationships, and was dated prior to his dismissal. The claimant's case was that he had been dismissed because of whistleblowing and that he had made allegations of fraud against some of the signatories of the letter. He disputed the date of the letter and challenged the good faith of at least some of the signatories. Lord Justice Kay held that there was a crucial core of disputed facts in the case that was not susceptible to determination otherwise than by hearing and evaluating the evidence (paragraph 29).
12. This is a claim for unlawful deduction from wages. The issues include but are not limited to the following. Were the wages paid to the claimant in December 2022 and January 2023 less than the wages he should have been paid? The respondent says not, because of the claimant's repudiatory conduct on or around 21 November 2022, which the respondent accepted.
13. The third sentence of paragraph 18 of the Grounds of Resistance says this:

Furthermore, the Claimant's actions on or around 21 November 2022, including the matters set out in paragraph 14 above of these Grounds of Resistance amounted to repudiatory conduct on the part of the Claimant which the Respondent accepted, and accordingly the Respondent is no longer bound by any obligations

under the Advisor Agreement which may otherwise have survived termination of the Advisor Agreement.

14. This says, clearly and explicitly, that the claimant's actions on or around 21 November 2022 amounted to a repudiatory breach, and that the respondent accepted *that* repudiation.
15. The claimant says that this part of the response has no reasonable prospects of success, because the respondent's solicitors wrote to the claimant on 2 December 2022 and said that the respondent "elects to affirm the contract" (bundle, p. 43). The respondent accepts that it purported to affirm the contract and that the claimant's application has identified an "ostensible contradiction".
16. The letter of 2 December 2022 is from the respondent's solicitors, it expressly states that the respondent elects to affirm the contract, and it is not disputed that the letter communicated that to the claimant.
17. The respondent says that it is open to the respondent to argue that it was not in fact able to affirm the contract because performance of the contract was no longer possible due to the claimant's total failure of consideration. One difficulty with this submission is that the Grounds of Resistance, drafted by the respondent's solicitors, do not say that the respondent was unable to affirm the contract. The pleaded case is that the claimant's conduct on or around 21 November 2022 amounted to a repudiatory breach, and that the respondent accepted that repudiation.
18. The respondent further argues that even if there was an affirmation, it is open to the respondent to argue that new termination rights arose shortly thereafter. Again, the difficulty with this submission is that the Grounds of Resistance, drafted by the respondent's solicitors, do not say that the claimant repudiated the contract on or around 21 November 2022, and that although the respondent affirmed the contract, new termination rights arose shortly thereafter. The pleaded case is that the claimant's actions on or around 21 November 2022 amounted to repudiatory conduct, and the respondent accepted *that* repudiatory breach.
19. The tribunal should not strike out part of a response where its prospects of success depend on disputed facts which are not capable of determination otherwise than by hearing and evaluating the evidence. The letter of 2 December 2022 is apparently very clear, but letters and their effect sometimes need to be assessed in context. As *Ezsias v North Glamorgan NHS Trust* makes clear, the proper evaluation of a letter may depend on a contested factual context. The respondent says that, despite the letter of 2 December 2022, there are arguments which are open to it. But it does not identify the factual basis on which it says that those arguments should succeed, and so has not identified factual issues which the tribunal can only determine after hearing the evidence. The respondent has not said (either in its pleadings or its submissions) on what facts it relies to show that there was a total failure of consideration or that new termination rights arose. So this is not a case in which there is a clear factual dispute, one that can only be determined after hearing evidence.

20. For these reasons the part of the response which states that the claimant's actions on or around 21 November 2022 amounted to a repudiatory breach, and that the respondent accepted that repudiation, has no reasonable prospect of success.

Employment Judge Andrew Jack

22 July 2023

JUDGMENT SENT TO THE PARTIES ON

24th July 2023

FOR THE TRIBUNAL OFFICE