

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100502/2017 Held in Glasgow on 19 October 2017

Employment Judge Shona MacLean

5 Mr Norman McPhedran Claimant
Not Present and
Not Represented

10 GIST Limited Respondent
Represented by:
Ms K Brown
Solicitor

15 **ORDER OF THE EMPLOYMENT TRIBUNAL**

The Order of the Employment Tribunal is that the claimant's claims of unfair dismissal and discrimination on the grounds of the protected characteristic of disability are struck out on the grounds of non-compliance with the Tribunal Orders dated 31 May 2017 and that the claims are not being actively pursued.

20 **REASONS**

Background

1. On 13 March 2017, the claimant sent a claim form to the Tribunal in which he complains of unfair dismissal contrary to Section 98 of the Employment Rights Act 1996 and complains of discrimination on the grounds of disability
25 as the relevant protected characteristic.

2. On 26 April 2017, the Tribunal received a response for the respondent. The respondent denied that the claimant had been unfairly dismissed. The respondent said that the claimant was dismissed because of capability. The respondent did not accept that the claimant was a disabled person in terms
30 of the Equality Act 2010 (EqA) and in any event the respondent denied that it discriminated against the claimant on the grounds of disability as alleged or at all.

3. On 25 May 2017, a case management Preliminary Hearing was held at which the details of the claims and response were discussed. The claimant accepted that the factual and legal basis of his disability discrimination claim was unclear and unequivocal. He was referred to the legal definition of a disabled person in Section 6 of the EqA and to guidance on the internet from the Equality and Human Rights Commission of which he was aware having undertaken in his own research. The Employment Judge suggested some steps the claimant could take to secure advice and assistance if representation was not found going forward. As the factual and legal basis of the claim need to be further and better specified by the claimant to give fair notice to the respondent the Tribunal made orders for additional information and documents to be provided by the claimant including a disability impact statement.
4. As the claimant was seeking compensation and a possible recommendation. The Employment Judge directed the claimant guidance on the internet as to how to prepare a Schedule of Loss. The Tribunal made orders for the claimant to provide specification about his schedule of loss with supporting documentation regarding details of all the jobs that he had applied for and benefits received.
5. It was proposed that disability status during the period 24 July to 25 August 2017 and that a Final Hearing would take place in the eight-week period after 25 August 2017. The parties were invited to provide details of their availability.
6. The Tribunal Orders were issued on 31 May 2017 with compliance on or before 4pm on 8 June 2017. The parties were advised of the importance of full and timeous compliance with the Tribunal Orders and if this did not happen the Tribunal may strike out the whole or part of any claim or response.
7. On 14 June 2017, the Tribunal wrote to the claimant noting that there had been no response to the Tribunal Orders and a response was requested. A

further reminder was sent to the claimant on 27 June 2017 requesting a response by 5 July 2017.

8. On 10 July 2017 Ms Brown wrote to the Tribunal with a copy to the claimant advising that she had taken over the conduct of the case.

5 9. Ms Brown wrote to the claimant on 12 July 2017 notifying him that the respondent believed that he was not actively pursuing the claim and if he did not respond to Ms Brown by 20 July 2017 she would apply to the Tribunal to strike out the claim.

10 10. On 24 July 2017 in absence of any response from the claimant to the Tribunal's letters sent on 14 and 27 June 2017 the claimant was asked if he wished to proceed with his claim. A response was requested by 31 July 2017.

15 11. The claimant did not reply by 31 July 2017. In the absence of the respondent receiving a response, the respondent made an application referring to the response sent by the Tribunal which the claimant had failed to respond to. In addition, Ms Brown advised that as the respondent's legal representative she wrote to the claimant notifying him that the respondent did not believe he was actively pursuing his claim and that if she did not hear from him to the contrary by 25 July 2017 the respondent would apply to the Tribunal for strike out of the claims. The claimant did not respond.

20 12. The respondent therefore made an application for the claims to be struck out in terms of Rule 37(1)(d) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Tribunal Rules). However, to allow the claimant a further chance to comply with the Tribunal Orders the respondent applied to the Tribunal to issue an Unless Order in terms of Rule 38(1). It was suggested that the order should state that unless the claimant complied with the Tribunal Orders and confirmed that he intended to actively pursue his claim by 11 August 2017 his claims would be automatically struck out from that date. This correspondence was
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30 copied to the claimant.

13. The Tribunal did not issue an Unless Order but sent a further reminder to the claimant dated 3 August 2017 requesting that he provide a response no later than 14 August 2017.
14. By 15 August 2017 there had been no response from the claimant. The respondent applied for the claimant's claims to be struck out in terms of Rule 37(1)(c) and 37(1)(d). The respondent said it was in the interests of the overriding objective in Rule 2 in that it saved the respondent the expense of overseeing the claim which was not being actively pursued by the claimant. Furthermore, strike out would allow the claims to be disposed of fairly and justly given that the claimant has failed to comply with the Tribunal Orders despite being given numerous reminders.
15. On 23 August 2017, the Tribunal wrote to the claimant advising of the respondent's application for strike out. The claimant was advised that if he disagreed with the application he should set out his reasons in writing by 31 August 2017 or request that a hearing be fixed so that he could put forward his reasons in person. The claimant was informed that if nothing was heard within the timescale the decision to strike out the claim, or part of it based on the information available.
16. In the absence of any reply from the claimant the Tribunal nonetheless decided that it was appropriate to fix a hearing to consider the matter. A letter was sent to the claimant on 27 September 2017 advising that a Preliminary Hearing was fixed for 19 October 2017 at 10am to consider whether to strike out the claims on the basis that they were not being actively pursued.
17. Although Preliminary Hearing was scheduled to commence at 10am owing to pressure of other business it did not in fact do so until 11.30am. The Tribunal was advised that in the intervening period the claimant had not attended and was not represented. The clerk had telephoned the claimant's mobile number provided on the claim form on repeated occasions but the number was ringing out.

18. Ms Brown who appeared for the respondent confirmed that the claimant had not been in touch with her firm since the case management Preliminary Hearing and had not been in touch with ACAS or the Tribunal's office. There was no application to postpone the Preliminary Hearing nor was there any other written communication from the claimant that could be taken into consideration.

Submissions

19. Ms Brown referred to the background leading to the application. She said that a claim could not be struck out unless the claimant has had an opportunity to make representations under Rule 37(2) of the Tribunal Rules. The claimant has been given an opportunity and no written representations had been received nor had he attended the Hearing.

20. She reminded the Tribunal that strike out applications are subject to a two-stage consideration by the Tribunal:

- a. Whether any grounds under Rule 37(1)(a) to (e) have been established.
- b. If so, the Tribunal should exercise its discretion and decide whether to strike out the claim.

21. Dealing with the first issue, the Tribunal Orders had been breached (Rule 37(1)(c)). This has been going on since May 2017. The claimant had been reminded several times by the Tribunal and the respondent. It was the claimant who had defaulted. Without further specification, the claims cannot proceed. This has caused delay to hearing the claim (the claimant was dismissed on 14 October 2016). While a fair hearing could still be possible there was real prejudice to the respondent in that it already has waited five months for specification which means that any Final Hearing would be much more than a year after the termination of employment meaning that the evidence of its potential witnesses could be impaired by the delay.

22. From such cases as *Esscombe v Nando's Chickenland Limited* UKEAT/0550/06, strike out is a draconian order which should be used in a clear and obvious case. It was submitted that this was one of those cases as no attempt had been made by the claimant to comply with the tribunal Order.

23. Turning to the claim not being actively pursued under Rule 37(1)(d) this is in respect of the lack of response to correspondence and attendance at the Preliminary Hearing. There has been an inordinate amount of delay in dealing with the claim which could pose prejudice to the respondent's defence and witness evidence. Given the claimant's non-attendance it is a clear case of the claim not being actively pursued. There has been no involvement from the claimant since May 2017.

24. Turning to the second issue; use of discretion to strike out. It was submitted that there were two failures by the claimant which were linked; a failure to comply with the Tribunal Orders and a failure to pursue his claim by responding to correspondence and attending the Preliminary Hearing.

25. The respondent believed that it would be in the interests of the overriding objective to strike out the claim for the following reasons:

a. This would avoid any further delay in the claim in terms of Rule 2(d) – there has been no communication for five months from the claimant and the respondent was entitled to understand the full claim against it in the terms of obtaining full specification of the claim. This allowed it to preserve its best evidence and for its witnesses to be able to remember events clearly. The claimant has been given plenty of opportunity to take part in the claim.

b. This would save expense on the part of the respondent as the respondent has been properly defending this claim and making appropriate requests for information and strike out. It has not been incurring unnecessary costs but there remained the cost of seeking advice and preparing for and appearing at this hearing. The respondent did not apply for a strike out at an unreasonable time and

has given the claimant plenty of opportunity to correspond by post and e-mail. It was disproportionate to expect the respondent to continue to oversee a claim brought by a claimant in which the claimant was not participating.

5 c. The respondent was entitled to have the claim dealt with expeditiously. The respondent has been waiting five months for further information about the claims to prepare its full defence. The claimant's lack of contact means that the claims cannot be dealt with expeditiously and this was disadvantageous and prejudiced to the
10 respondent.

d. Parties whether represented or not must comply with the Tribunal's rules or face the consequences of non-compliance. As a matter of public policy orders were there to be obeyed and the claimant had failed to comply with this. The correspondence had been clear what
15 he must do to comply with the Tribunal Orders. His continued non-compliance demonstrated a lack of respect for the Tribunal system.

e. While the Tribunal may decide that an Unless Order would be less draconian it was contended that such an Unless Order would be futile in this situation. The respondent previously requested an
20 Unless Order in its correspondence of 31 July 2017. The claimant did not reply to this letter or object to it. The Tribunal did not grant an Unless Order and wrote to the claimant requesting a response. None was provided. As a result it was now proportionate to consider strike out.

25 26. It was submitted that the claim should be struck out for failure to comply with an order and because the claim is not actively pursued.

Deliberations

27. The Tribunal noted that it can exercise its power to strike out a claim at any stage in the proceedings but in doing so it must exercise its power in accordance with reason, relevance, principle and justice.
- 5 28. The claimant has been given notice of this Preliminary Hearing to consider the strike out of his claims. He had chosen not to make representations in writing. He did not request a hearing but on being advised that it was taking place he has not attended or requested that it be postponed.
29. The Tribunal was satisfied that that there had been non-compliance with the
10 Tribunal Orders and the claimant had not responded to any correspondence with the Tribunal and the respondent for around five months.
30. In considering whether to exercise its discretion and strike out the claims for the Tribunal had regard to the overriding objectives set out in Rule 2 of seeking to deal with cases fairly and justly. This required the Tribunal to
15 consider all relevant factors including the magnitude of non-compliance; whether the default was the responsibility of the party or his representative; what disruption to fairness or prejudice had been caused; and whether a fair hearing would still be possible and whether strike out or some lesser remedy would be more appropriate.
- 20 31. The Tribunal considered that despite the guidance provided to the claimant at the case management Preliminary Hearing he had made no attempt to comply with any part of the Tribunal Orders. Despite repeated opportunities to do so has the claimant has not explained why there has been a failure or delay in doing so.
- 25 32. The claimant knew what information was required of him and without this being provided the respondent was not clear what case it was being asked to answer. The difficulty for the respondent was that the claimant was dismissed in October 2016 and although the Tribunal Orders for specification of the claim were issued on 31 May 2017 the respondent was
30 still not clear what the case it is being asked to meet. It was therefore

difficult for the respondent to know what evidence will be required and for it to take steps to preserve it.

5 33. It was acknowledged that a fair hearing is still possible. However, there is still an outstanding preliminary issue about whether the claimant is disabled in terms of the EqA. Accordingly, it is likely that a further Preliminary Hearing will be required to determine this issue before it is possible to have a Final Hearing.

10 34. The Tribunal appreciated that to strike out a claim particularly a claim involving discrimination is draconian. However, the only lesser sanction would be to issue an Unless Order. The Tribunal agreed with the respondent that on information available there appeared to be little likelihood that the claimant would comply. The respondent and the Tribunal have continued to write to the claimant at the addresses (postal and e-mail) that he provided. If the claimant was no longer contactable at these addresses he is aware that he is pursuing claims and he has not provided the tribunal or the respondent with any alternative point of contact.

15 35. In this respect that the Tribunal was mindful that it was not just a failure to comply with the Tribunal Orders but the fact that the claims did not appear to be actively pursued. The claimant has not been engaged in the process for five months against a background that he was aware of the timescales envisaged for a Preliminary Hearing and Final Hearing as this was discussed at some length during the case management Preliminary Hearing on 25 May 2017.

20 36. On the day of this Preliminary Hearing the clerk attempted unsuccessfully to contact the claimant on the telephone number that he had provided. The Tribunal reserved its judgment in case the claimant contacted the Tribunal after the Preliminary Hearing. The claimant has not done so.

25 37. While the Tribunal was reluctant to strike out the claims it felt that the claimant had shown disrespect to the Tribunal, its procedures and the respondent's interest. In the absence of any other explanation the Tribunal considered that this was intentional. Accordingly, the claimant's claims of

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unfair dismissal and discrimination on the grounds of the protected characteristic of disability are struck out on the grounds of non-compliance with the Tribunal Orders and that the claims are not being actively pursued.

- 5 Employment Judge: Shona MacLean
Date of Judgment: 31 October 2017
Entered in Register: 06 November 2017
and copied to parties