



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs T Phillips

**Respondent:** Safe Base Care Limited

**HELD AT:** Manchester

**ON:** 9 September 2019

**BEFORE:** Employment Judge Holmes

## REPRESENTATION:

**Claimant:** Not in attendance or represented

**Respondent:** Mr Sugarman, Counsel

## JUDGMENT

The judgment of the Tribunal is that the claimant's claims are dismissed pursuant to Rule 47 of the 2013 Rules of Procedure.

## REASONS

1. The Tribunal today was listed to hear the claimant's complaints of protected disclosure detriment and unfair dismissal which was listed for a seven day hearing following a Preliminary Hearing on 2 November 2018. The claimant was at that time represented by solicitors and the orders made on that occasion by Employment Judge Ryan were indeed made by agreement provided for the hearing today and other Case Management Orders were made. One of which that there be exchange of witness statements by 26 August and secondly, that there be a Schedule of Loss by 2 September. There were also directions for exchange of documents and preparation of the hearing bundle.

2. The Tribunal heard little or nothing from the parties after the preliminary hearing until it received a letter from the claimant's then former solicitors on 29 August informing the Tribunal that they were no longer instructed by the claimant and inviting the Tribunal to communicate directly with her at her home address. The

Tribunal convened and the respondents attended, represented by Mr Sugarman of Counsel and attended with their witnesses and the Tribunal was provided with the hearing bundles and copies of the respondent's witness statements. No witness statement had been prepared or exchanged by the claimant however nor has any Schedule of Loss been prepared or rather an updated Schedule of Loss in accordance with the orders of the Tribunal which should have been done by 2 September of this year.

3. The claimant did not attend and was not represented and consequently enquiries were made as to why that may be. The Tribunal managed eventually to get in contact with the claimant through the Clerk and he has made a note of the conversations that he has had with the claimant who informed him and thereby the Tribunal that she was unaware of the hearing proceeding today and that she was also unaware that her solicitors were no longer acting, the implication of what she said was that she was not attending the hearing today nor indeed would she attend tomorrow given the opportunity or indeed for the rest of the week because she explained that she would need to have time off work and so had clearly not made any preparation to attend a seven day hearing.

4. In these circumstances the respondents and Mr Sugarman have made an application for the Tribunal to dismiss the claimant's claims under Rule 47 of the Tribunals rules of procedures or alternatively, under Rule 37 of the same rules, to strike out the claims on a number of grounds set out in that rule. In terms of the background Mr Sugarman has taken the Tribunal through the history of the communications between the parties and their solicitors, the recent history, which include notification being sent to the claimant on 2 September following communications between her former solicitors and the respondent's solicitors. The relevant communications, copies of which have been provided to the Tribunal begin on the 23 August 2019 between the two firms of solicitors where they were trying to arrange for a mutual exchange of statements. The claimant's solicitor replied on 23 August that the claimant was not in a position to exchange witness statements on 26 August which he correctly pointed out in fact was a bank holiday but saying that he would contact the respondent's solicitors once he was in a better position to say when he would be ready. That then was of course overtaken by the claimant's solicitors ceasing to act for her on 29 August which was notified to the Tribunal and one presumes to the respondents at around the same time because on 2 September the respondents' solicitor sent an email to the claimant at an email address sin fact which is a work email address which the Tribunal will come to in a moment, pointing out to the claimant that they understood that her solicitors were no longer representing her and she was representing herself and asking her to confirm she had a copy of the hearing bundle. They also pointed out the need to exchange witness statements in advance of the hearing. It is right to say that the hearing date was not expressly referred to in that document but the claimant was asked to let the respondent solicitors know if she had a copy of the hearing bundle and when she would be able to exchange witness statements.

5. That prompted the claimant to telephone the respondent's solicitors on 5 September and in that communication she was told of the hearing date of 9

September and there was some discussion as to what she knew or didn't know in terms of her solicitors no longer acting for her, but by that date in that phone call she was questioning why she had been sent this copy of the bundle of documents and it was explained that this was because she was no longer represented she knew, or should have known (a) that she was no longer being represented, and (b) that the hearing was imminent. That would have been of course last Thursday leaving Friday 6 September available to her to make enquiries or to contact the Tribunal which she did not do. She did not do that today either and it wasn't until the Tribunal effectively chased her up and was able to communicate with her directly by telephone that any form of communication was had with her.

6. Mr Sugarman's application under Rule 47 is supported, he says, by the history of non-compliance with the Tribunal's orders and the most significant part of that history is the failure of the claimant to make and serve a witness statement which should have been done, no later than 26 August. That submits the respondent is a serious matter, not least of all because the claimant makes claims of protected disclosure detriment and for automatically unfair dismissal in circumstances where she lacks qualifying service to present a claim of ordinary unfair dismissal. Consequently, the burden will be upon her, both in respect of the protected disclosures detriment claims and indeed the automatic unfair dismissal claims to establish her case and consequently her evidence is particularly crucial in that regard, but in any event she should have served and made a witness statement but she has not done so and so the respondents are not in a position to proceed, even if the Tribunal were minded to hear the case in the claimant's absence, but the application is not to do so, the application is to dismiss the claimant pursuant to Rule 47.

7. That also says the respondents through Mr Sugarman is to be viewed in the context of the claims as a whole, it being pointed out from the pleadings that this is a case in which the claimant was dismissed for misconduct in connection with her behaviour which was the respondents say, improper conduct designed to assist her husband, who was a Director of the first respondent but who had also become a Director of what was then to become a rival business in terms of the claimant obtaining information and behaving in a particular manner set out in the pleadings to support her husband in that endeavour which ultimately led to her dismissal, a dismissal effected not directly by the second respondent who is named as a respondent in the claims, but effectively by an external HR consultancy and the respondents say that that shows that there is in any event a lack of merit in these claims and that they are being pursued for improper purposes.

8. That is the background against which the application is made under Rule 47 but the respondent would also rely upon Rule 37 and the various limbs of that rule whereby a Tribunal can strike out claims on the basis that they have for example been conducted in an unreasonable fashion, that the opposing party has failed to comply with Tribunal orders or rules, or that the claims have no reasonable prospect of success and all three of those grounds would be advanced by the respondent in support of an application under Rule 37, but the primary application is under Rule 47 which entitles the Tribunal to dismiss the claims in the absence of a party if that party

does not attend or is represented at the hearing, provided that the Tribunal has first considered all the information which is available to it after any enquiries that may be practicable about the reason for the parties absence.

9. So that is the application or the potential applications that the Tribunal has had to consider. In terms of the claimant not attending this morning the Tribunal did consider paragraph 4 of the Case Management Orders made on 2 November of last year, that when listing the claims for a hearing today did record as is common these days that did record as is common these days that the first day of the hearing would be for reading and the Tribunal provided in this order that the parties were welcome to attend on the first day but they were not obliged to do so, although the respective representatives were asked to attend at 10.00 am on the first day to consider with the Tribunal any preliminary points, housekeeping or to attempt to agree a timetable.

10. The Tribunal did give consideration as to whether that had led to any confusion on the part of the claimant as to whether she needed to attend, if she was still represented one would expect that she may not attend because she would expect her representative to attend, but of course she had ceased to be represented and the Tribunal considers that she knew that by the end of last week, she therefore would not be entitled to rely upon her representatives attending the first day of the hearing, and indeed anyone in those circumstances, particularly if they were unsure as to what to do would attend the hearing, or if they were unsure would contact the Tribunal and possibly the respondents to explain their confusion and to seek advice as to what they should do which advice would almost certainly have been to attend this morning. The claimant however did none of those things and in nothing that she has said in response to the Tribunal's enquiries has she made any reference to this paragraph of the Case Management Orders made on that occasion and so it seems to the Tribunal she was not confused by that paragraph and was not relying upon that as explaining why she did not attend. Furthermore, it emerges from the enquiries and what the claimant has said that this is not a case where she simply has not attended today she has clearly made no arrangements to attend for the rest of the six day listing, and this is not someone who says oh well I wasn't going to attend on the first day but I was due to come the second day, the claimant has said nothing of the sort and so consequently the Tribunal is quite satisfied that the claimant has made no arrangements to attend this hearing at all.

11. In terms of her explanation for that it appears to be a mixture of not being aware that she was no longer represented and/or not being aware of the hearing date. The Tribunal on the information available to it doesn't accept either of those explanations because it seems to the Tribunal from the correspondence that she had with the respondent's representative that by the end of last week at the latest she was or should have been aware that she was no longer represented and also was or should have been aware that there was an imminent hearing, even if she did not know the precise date those communications should have put her on notice that there was a hearing as it was in the offing and of course the Tribunal also expects that during the time that she was represented given that this hearing date was set as long ago as November of 2018 that this is a date that she would have been provided with long long ago, and indeed it almost certainly would have been consulted as to

her availability, so in terms of the reasons for her non- attendance today the Tribunal is not persuaded on the information currently available to it that she either didn't know a hearing was on or still reasonably believed that she was still represented and that someone would attend, she clearly didn't expect that because she otherwise would have made arrangements to be present during the rest of the hearing which she clearly has not done.

12. That in itself may not have been sufficient for the Tribunal to exercise its discretion to dismiss the claims as the respondent invites the Tribunal to do and the Tribunal might have been prepared to give the claimant the benefit of the doubt and at least have her attend to give further explanation but the Tribunal cannot ignore the history of this matter and in particular the very serious breach of the Tribunal's orders that the claimant make and serve a witness statement by 26 August of this year. She has not done so, nor has she served an updated Schedule of Loss which was due by 2 September, she has previously supplied a Schedule of Loss but that is September 2018 and it is quite clear from the information to the Tribunal today that the claimant has indeed since found alternative employment, that itself would give rise to the need to update the Schedule of Loss as the claimant would have to set out what she has earned since her dismissal, but in terms of that further employer it is not without significance that that further employment is in fact in a company of which her husband is a director and indeed is the same company that he set up allegedly in competition with the first respondent, a company the Tribunal notes from Companies House was set up in February 2018, originally had virtually the same name as the first respondent which was subsequently changed after representations were doubtless made by the first respondent to the name that it currently has and in which the claimant is presently employed, that being Cherished and Devoted Care Limited.

13. The claimant has in her communications to the Tribunal indicated that whether she will be able to attend or not later in the week will depend upon her being able to obtain time off work from her as she puts it "boss", that boss it turns out is likely to be her husband, the director of that company and the former director of the first respondent. It occurs to the Tribunal that he too would probably be aware of the hearing date and indeed it may well have been the claimant's intention to call him as a witness, but that is the person from whom she would have to seek permission to attend this hearing and that is someone the Tribunal would equally expect to be aware of this hearing date and of the circumstances requiring the claimant to attend.

14. So, in terms of that explanation and the absence of any explanation as to why it is the claimant has not complied with the Tribunal's orders, which given the burden of proof as indicated previously in this judgment lies upon the claimant in any event that these are serious breaches of the Tribunal's rules and orders which are relevant the Tribunal considers in terms of how it should approach the Rule 47 deliberations.

15. In relation to Rule 37 whilst Mr Sugarman submitted to the Tribunal that Rule 37(2) which requires that the Tribunal should not strike out a claim unless the party in question has been given an opportunity to make representations that the Tribunal has effectively done so by listing this hearing with respect to his argument it is

somewhat sophistic, Rule 37(2) clearly relates to the application being made in advance so that the parties responding to it can make representations in respect of it. This application under Rule 37 was not made in that way and it is stretching the definition of 37(2) in the Tribunal's respectful view to say that the claimant has been given an opportunity simply by having an opportunity to attend the hearing so the Tribunal declines to exercise any powers under Rule 37 but in terms of Rule 47 for the reasons given and the background of those matters relied upon under Rule 37 which are relevant the Tribunal considers the Tribunal does indeed accede to the respondent's application under Rule 47 that the claims be dismissed on the absence of the claimant or anyone representing her. The claimant will of course have the opportunity if she wishes to seek reconsideration of the Tribunal's decision and that is her entitlement and she has 14 days in which to make such an application. She should be aware however that the matters referred to in support of that Rule 37 application will still be relevant and the respondent would be entitled in response to an application for reconsideration to make such an application under Rule 37 and invite the Tribunal to deal with such an application on such an occasion on the basis that if the Tribunal did as it were, let the claims back in under Rule 47 the Tribunal would then be invited to consider whether to exercise its powers under Rule 37. In short, the Tribunal would therefore require the claimant to address those matters in any application for reconsideration that she makes and it will be important for her to explain what she knew in terms of the communications from her solicitor, when she got them, when she learnt of the hearing date and all other matters that she intends to rely upon in support of any such application and to explain her failure to comply with the Tribunal's orders and to give an indication of when it might be expected that she would be in a position to do so and those at the very least would be the minimum requirements for any application for reconsideration.

16. That however is anticipating matters that may or may not arise and the Tribunal's ruling in relation to the claimant's claims today is that they are dismissed under Rule 47.

Employment Judge Holmes

Dated: 18 October 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

22 October 2019

FOR THE TRIBUNAL OFFICE