



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr D Paton

v

Winchmore Brickwork Ltd

Heard at: Cambridge Employment Tribunal **On:** 11 November 2019

Before: Employment Judge King

Members: Mr Vaghela and Mrs Gaywood

Appearances

For the Claimant: Failed to attend

For the Respondent: Mr T Yianni

JUDGMENT

The claim is dismissed.

REASONS

1. The Claimant failed to attend the full merits hearing listed for three days commencing on 11th November 2019. The Respondent was in attendance and enquiries were made as to the Claimant's whereabouts who told the clerk that he was at work and could come tomorrow if needed.
2. The Claimant's emails to the Tribunal (said to be further and better particulars) have confirmed that the claims are all prior to 3rd May 2017. ACAS early conciliation was not commenced until 7th August 2017 and the certificate issued on the 9th August 2017 with the claim being presented on 14th August 2017. As identified in the earlier case management orders the claim is out of time and the claimant was to set out in his witness statement the reasons for the late submission so the full hearing could consider whether it was just and equitable to extend time.

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3. The case has had a long and checkered history in the tribunal. There was one unless order issued against the Claimant for non-compliance with orders on 18th June 2018.
4. The case was not ready to proceed for the originally listed hearing in September 2018. On 18th January 2018, a case management hearing was held in person and directions made to May 2018. Another case management hearing took place on the first day of the September 2018 listing and the earlier orders were varied due to non-compliance. The case was almost struck out on 1st July 2018 for non-compliance.
5. The hearing was relisted for 1/2/3 April 2019 but once again the matter had to be listed for a case management hearing on 26th February 2019 by telephone as directions were not being complied with by the Claimant.
6. On 28th April 2019 a notice of hearing was sent to the parties by email. This was the correct email address for the Claimant listing the matter for three days starting today.
7. Again following the Respondent's application for a strike out for the Claimant's non-compliance with directions, the matter was referred to a Judge. On the 11th September 2019 an order a letter was sent to the parties to say that no order for a strike out was made. On the 5th October 2019 the respondent's application for strike out was refused as the claimant was saying he had not received documents. The respondent's agreed to send the documents yet again by recorded delivery.
8. By email the Claimant acknowledged the receipt of the bundle on 19th October 2019. This is the same email address with which the Tribunal has been corresponding.
9. By letter dated 3rd November 2019 the Claimant was told that the full merits hearing remained listed to start today.
10. The clerk to the Tribunal called both parties on Friday 8th November 2019 to confirm attendance but the Claimant did not answer the call and there was no facility to leave a voicemail. The Respondent confirmed his attendance.
11. The Tribunal had to decide today how to proceed. In accordance with Rule 47 we could dismiss the claim or proceed without the Claimant. We could grant a postponement until tomorrow, until the next available date after 29th June 2020 or strike out the claim. The Respondent confirmed it had not heard the audio recording referred to by the Claimant in the papers, not received a witness statement from the Claimant or any disclosure.
12. The Respondent requested a strike out again orally at the hearing. The Tribunal has the power to strike out a claim under Rule 37 on the application of the party or on its own initiative.
13. Rule 37 Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 states:

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—*

- (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;*
- (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).*

14. The Tribunal must consider the Overriding Objective as contained in Rule 2 Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 which states as follows:

2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

- (a) ensuring that the parties are on an equal footing;*
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and*
- (e) saving expense.*

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The 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.

15. Rule 47 Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 deals with non-attendance as follows:

47. If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence.

16. It is clear to us that there is no guarantee that if we postponed until tomorrow the case would be any different. It is clearly not in a position (despite having had a disproportionate amount of judicial input to date) to proceed. The Respondent has not seen any of the Claimant's evidence or heard any recording. The Claimant has failed to comply with orders made on multiple occasions for disclosure and exchange of witness statements and there is no schedule of loss on file. Even if the Respondent felt it

could proceed tomorrow given the late disclosure and exchange, we are not confident that given the parties are unrepresented that the case would conclude within the remaining two days listed. Any part-heard case would likely now be listed for 2020.

17. We have considered whether the hearing should be postponed for a third occasion which would be not before 2020. However, we are concerned that given in over 12 months the case is still not ready for a hearing, that this would not change and further judicial resources would be wasted on a hearing which would be ineffective for the fourth time.
18. We have considered whether Rule 30A Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 also applies to this claim. Whilst the previous postponements have not been expressly applications by the Claimant they have nevertheless been because of the claimant's inability to actively pursue his claim. The respondent does not consent to a further postponement and in our view the exceptional circumstances provisions would not apply. Even if the Claimant had requested postponements (rather than just not attending) Rule 30A Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 would have prevented us from granting a postponement in this case.
19. We have therefore decided to dismiss the claim as the claimant has failed to attend under Rule 47 Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013. Had the Claimant attended today and not prepared his case we would have been equally minded to strike out the claim.
20. As set out above had the claim not been dismissed for non-attendance given the history a strike out under Rule 37 would have been appropriate. The manner in which the proceedings have been conducted by the Claimant has been unreasonable under Rule 37(1)(b) Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013. Further, the Claimant has failed to comply on multiple occasions with orders of the Employment Tribunal. He has been given an unless order and the case was almost struck out last year. This would have been further grounds to strike out the claim under Rule 37(1)(c) Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013.
21. In addition, the claimant has taken no steps to prepare his case that either the respondent or the Tribunal has seen. The Claimant (despite having received two notifications of the listing for today) has failed to attend. This would have been further grounds to strike out the claim under Rule 37(1)(d) Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013. We also have concerns as to the delay in ordering another postponement and whether it would be possible to have a fair hearing under Rule 37(1)(e) Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 as by the time the case is heard the claimant's allegations would be over three years old.
22. We have considered the Overriding objective in Rule 2 and that to proceed tomorrow would not have put the parties on an equal footing, the hearing would have been ineffective and this would have resulted in further delays for the parties and further expense for the Respondent. The Claimant has

had ample time and directions to properly prepare his case. At a time when the Tribunal Service is experiencing a backlog in its hearing times this is unacceptable. The Claimant has been given multiple chances to advance his case and prepare his case to be heard.

23. It is for these reasons that it is the unanimous decision of this Tribunal that the claim be dismissed.

Employment Judge King
11/11/19

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE