



# EMPLOYMENT TRIBUNALS

**Claimant: Mr P Whitwell**

**Respondent: Allerton Damp Proofing Knottingley Ltd**

**Heard at: Leeds**

**On: 15 April 2020**

**Before: Employment Judge Shepherd**

## **Appearances**

**For the claimant: Written submissions**

**For the respondent: Written submissions**

## **JUDGMENT**

The claim is struck out pursuant to rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 as the claimant has not complied with an order of the Tribunal.

## **REASONS**

1. The claimant submitted a claim to the Tribunal for outstanding wages. He claimed he was entitled to 2 weeks' pay and one day at double time. He contended that he was employed as a Freelance Operative by the respondent from 17 September 2019 until 27 October 2019.

2. In its response the respondent denied that the claimant was an employee or a worker.

3. The respondent requested that the Tribunal order that the Claimant disclose all relevant documents pertaining to his alleged worker status (required to bring a claim before the Employment Tribunal) including but not limited to:

- a) Any documentation relating to the Claimant's registrations for the Construction Industry Scheme ('CIS')— which requires him to assert that he is self-employed in business on his own account; and

b) The Claimant's tax returns from the previous 3 years — which, given his registration for CIS, will include signed declarations of self-employment and details of business expenses claimed (and any business profit and loss accounts he submitted with the returns).

4. On 11 February 2020 the claimant provided his comments and contended that he was not registered with CIS and that he believed the tax documents to be irrelevant.

5. On 19 February 2020 Employment Judge Jones directed that the claimant was to provide the documents requested as he was satisfied they were relevant documents. It was ordered that they must be served by 28 February 2020.

6. On 19 February 2020 the claimant sent an email to the Tribunal indicating that he was not registered with the CIS. He also requested further time to provide the tax documents.

7. Also on 19 February 2020 the respondent sent an email to the Tribunal indicating that the claimant was registered with the CIS and providing evidence in this respect.

8. On 23 February 2020 the claimant accepted that he was registered with the CIS but did not provide any of the documents in this respect. He provided overviews of his tax returns. He indicated that he was aware that these were not the full documents ordered.

9. On 25 February 2020 the Tribunal wrote to the claimant indicating that Employment Judge Jones had directed that these were not the claimant's tax returns and that he must contact the tax office and obtain the documents he filed with HMRC by 28 February 2020 and to confirm that he was still required to disclose the documents in the order by 28 February 2020.

10. On 6 March 2020 the respondent applied for the claim to be struck out due to the Claimant's failure to provide the required documents.

11. On 13 March 2020 the Tribunal wrote to the claimant indicating that

"Employment Judge Davies had ordered that the Claimant must disclose the documentation he has been ordered to disclose immediately and must confirm to the Tribunal that he has done so. Compliance with Tribunal orders is not optional. If the Claimant does not confirm by close of business on 16 March 2020 that he has disclosed the required documents, Employment Judge Davies will consider striking out his claim".

12. On 16 March 2020 the respondent wrote to the Tribunal indicating that the claimant had not disclosed the documents and, once again, requested that the claim be struck out.

13. On 18 March 2020 the claimant indicated that he had not obtained the documents.

14. On 19 March 2020 the Tribunal indicated that it would be difficult for the respondent's application to be dealt with at an attended hearing and asked if the

claimant consented to it being determined on the papers or whether he requested an oral hearing.

15. On 25 March 2020 the claimant's representative indicated that the claimant consented to the hearing being considered on the papers. The claimant provided a summary to be taken into account in determining this application. That summary consisted of submissions in respect of the legal tests to determine whether the claimant was an employee. It made no reference to the documents ordered to be provided. It concluded as follows:

"It is for these reasons that Mr. Whitwell feels that he has an entitlement to refer the case to an Employment Tribunal and that there should be no strike out. He acknowledges he has worked in a capacity of self-employment for many years as a sole trader with its inherent risks and rewards but the work arrangements undertaken in that capacity are in sharp contrast to that undertaken at Allerton Damp Proofing. He regrets and apologises for earlier misunderstandings and his inability to obtain the full paperwork requested."

16. It was submitted by the respondent that the Tribunal had ordered disclosure of the CIS and tax records on four separate occasions and that there was no reason to believe that the claimant would comply if a fifth attempt was provided. It was submitted that there is a legal requirement that tax records be retained for 6 years and they should easily be obtained from HMRC online. These are documents which should be available to the claimant. No explanation has been provided at all for why they cannot be obtained.

17. It was also submitted that the claimant had incorrectly claimed twice that he was not CIS registered (an HMRC Scheme in which an individual would have to assert they were in business on their own account in an approved trade in the construction industry and expressly assert they were not an employee). It was only when the respondent proved the claimant's registration that he admitted that he was registered. It was submitted that this affects the claimant's credibility and proves there is the potential for the Tribunal to be misled if the case proceeded without proper records, and that the respondent would be prejudiced if it could not have access to tax records which could be evidence of the claimant being in business on his own account.

18. The respondent's submission referred to the case of **Lynch v Help-Link UK Limited ET 1806868/2018**, in the Leeds Employment Tribunal, in which it was provided that Employment Judge O'Neil ordered such disclosure and held that "*I consider it likely that a Tribunal considering the distinction between employee and worker status may well find that the tax returns of the claimant are helpful...*" It was also submitted that when the documents were eventually received in that case, numerous expenses had been claimed consistent with a business and there were discrepancies in the income declared to HMRC.

19. It was also submitted by the respondent that there is a public policy in enforcing disclosure obligations and an overriding objective to place parties on an equal footing. It was said that the respondent would be prejudiced without disclosure and a fair hearing would not be possible. On that basis, it was submitted that the claim should be struck out in full for deliberate and persistent breach of the order and/or because the Tribunal

should have lost trust in the claimant's veracity such that there could no longer be a fair trial.

20. I have considered the submissions and the documents in this case. It has been determined that the documents were relevant to the issue to be determined by the Tribunal and should be disclosed. The claimant has been ordered to disclose his CIS records and tax returns on a number of occasions. He has been given a reasonable amount of time in which to disclose these documents. He has repeatedly failed to provide disclosure and has provided no adequate explanation as to why the documents have not been disclosed.

21. I am satisfied that, in these circumstances, this claim should be struck out as the claimant has failed to comply with the order to disclose the documents. He has been provided with a reasonable opportunity to make representations. He has provided submissions but these did not address his failure to comply with the order. It is proportionate and in accordance with the overriding objective that this claim should be struck out.

**Employment Judge Shepherd  
15 April 2020**