



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100258/2019

Held in Glasgow on 17 February 2020

Employment Judge: Claire McManus

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Mr William Mair

**Claimant
Not present
and not represented**

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Sulzer Elecro Mechanical Services

**Respondent
Represented by:
Mr M Warren-Jones –
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claim is struck out under Rule 37 of the Rules contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 on the grounds that the claim has not been actively pursued in terms of Rule 37(1)(d).

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REASONS

Background

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1. The background in this claim is detailed in the Note issued following the Preliminary Hearing ('PH') in this case on 31 October 2019. Neither the claimant's representative nor the claimant were present at that PH. An Order was then issued, as set out in that Note. That Order required an explanation to be given for that non-attendance.

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2. The claimant's representative's explanation was provided with email of 14 November 2019. On 15 November 2019, the respondent's representative provided comment on the content of that email and requested that the claim be struck out. On 22 November 2019, both parties' representatives were

sent an email from the Employment Tribunal Office seeking their position on whether a hearing on the respondent's strike out application was necessary, or, alternatively, to provide any further written submission they wished to make in respect of the respondent's application that the claim be struck out under Rule 37.

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3. On 23 November 2019, the claimant's representative provided comment on the respondent's representative's position re the purported reasons for non-attendance at the PH on 31 October 2019.

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4. On 25 November 2019, the respondent's representative provided their further written submissions on their application for strike out of the claims, made under Rule 37(1)(d). Those submissions were sent to the ET office by email, showing as being copied to the claimant's representative.

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5. On 28 November 2019, an email was sent to both parties' representatives acknowledging the emails of 23 and 25 November, noting that a reply was still awaited from the claimant's representative in respect of his views as to whether a hearing was required on the strike out application and stating that a reply was due by 4pm on 29 November 2019. No reply was then received from the claimant's representative.

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6. On 5 December an email was sent from the ET office to both parties' representatives informing that EJ McManus had directed that the case be listed for a two hour PH to consider the strike out application and for case management. Both parties' representatives were asked to submit their availability in February and March 2020 by return email. On 17 December 2019, the respondent's representative asked that the PH be listed for a day (with an 11.30am start), with the strike out application being considered first, then time bar, if required. On 3 January 2020, the claimant's representative was asked by the ET office to provide comments on the respondent's representative's email of 17 December, and to do so in writing by 16 January 2020.

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7. A Notice of Preliminary Hearing on Monday 17 February 2020 was issued to both parties' representatives on 8 January 2020. On the same day, the

respondent's representative sought clarity that the PH would commence at 11.30am and that both the strike out application and time bar would be considered. That email was acknowledged by email from the ET office to both parties of 13 January. That email confirmed that an amended PH Notice would be issued. An amended PH Notice was issued to both parties' representatives on 14 January 2020. It was confirmed to both parties' representatives by email from the ET office on 15 January that the PH was listed for 1 day, commencing at 11.30am on 17 February 2020.

8. On 16 January 2020, an email was sent by the claimant's representative to the ET office in the following terms:-

"I refer to the above and to the request for comments on the respondent's application. We advise that we have no objection to the respondent's request in this matter.

We look forward to hearing from you."

9. On 21 January 2020 an Amended Notice of Hearing was sent to both parties' representatives by email from the ET office confirming that the PH would commence at 11.30am on 17 February 2020 and that the following issues would be determined –

- Time Bar
- The Respondent's strike out application
- Case Management

10. No correspondence or other communication was received at the ET office for or on behalf of the claimant's representative or the claimant indicating that there would be no appearance by them at the PH on 17 February 2020.

The claimant's representative was advised by the ET office on a number of occasions that this PH would take place on 17 February 2020.

Proceedings on 17 February

11. There was no appearance by or on behalf of the claimant at this PH. Mr Warren-Jones and Ms Arnold appeared for the respondent.

12. Prior to proceedings commencing, a clerk at the ET office attempted to contact the claimant's representative. Noting the comments made by the claimant's representative by email in respect of his non-appearance at the PH on 31 October, I asked the clerk to confirm to me the numbers called. I was advised that calls were made to the numbers held by the ET office for the claimant's representative, which are noted on the ET1 claim form in this case and begin 0800 and 0794. I was informed that each number went on to a different voice mail message, and a message was left on each by the clerk. No response was then made. The ET office does not have any record of a contact number for the claimant himself.
13. The respondent's representative confirmed that the respondent's position was to seek strike out of the claim under Rule 37(1)(d), this now being made on the basis of :-
- The claimant's representative's late request for a postponement of the PH fixed for 11 July 2019 (made at 14.15 on the day before that arranged PH)
 - Non-appearance by or for the claimant at the PH on 31 October 2019
 - Non-appearance by or for the claimant at the PH on 17 February 2020.
14. The respondent's representative relied upon documents in a bundle with pages numbered 1 – 62. He advised that a scanned copy of the documents in this bundle had been sent to the claimant's representative the previous week, and that no 'bounce-back' email or reply from the claimant's representative had been received to this, or to any of the emails from him to the claimant's representative which are included in that bundle. The respondent's representative referred me in particular to his email sent to the claimant's representative on 10 February 2020 (at page 62). That email noted today's PH and advised the claimant's representative that at this PH the respondent's representative would be making an application for costs (referred to in these proceedings as expenses) in respect of the late

postponement request re the 11 July PH and his failure to attend the 31 October PH.

Decision

15. I issued my Judgment orally at this PH that these claims are now struck out under Rule 37 of the Rules contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 on the grounds that the claims have not been actively pursued in terms of Rule 37(1)(d). Reasons for that Judgment are now stated. I have decided that that the claim has not been actively pursued in the circumstances narrated above and in particular because of the non- appearance by or on behalf of the claimant at the PHs on 31 October 2019 and 17 February 2020.

Comment on Time Bar Position

16. Separately to that strike out decision, because of the possibility of a claim being pursued by the claimant against his representative in these proceedings, it is noted that no response has been made by the claimant's representative to the respondent's representative's position that the claim is time barred. In particular there has been no response from the claimant's representative to the respondent's reliance on the claimant's letter of resignation giving a leaving date of 21 September 2018 and that date being stated as being the termination date on the issued P45. On the face of those documents it appears that the claimant's effective date of termination is 21 September 2018. The respondent's position on time bar in their ET3 is:-

"It is submitted that the claim was submitted out of time. The claimant's employment ended on 21 September 2018 and the primary three month limitation period would end on 20 December 2018. The early conciliation certificate confirms that the early conciliation period commenced on 9 October 2018 and ended on 24 October 2018, which means that the claim should have been presented to the Tribunal before or on 4 January 2019. The ET1 was received by the Tribunal on 16 January 2019 and is therefore 12

days out of time. It is therefore submitted that the employment tribunal has no jurisdiction to hear this matter.”

17. Notice was given that the issue of time bar would be determined at the PH on 17 February. Had there been appearance by the claimant, the Tribunal could have heard the claimant’s evidence on the termination date and the reason(s) why the ET1 claim form was submitted when it was. If the ET1 was then found to have been lodged outwith the legislative time period, I would have applied the appropriate tests, taking into account any evidence heard. The right not to be unfairly dismissed is set out in the Employment Rights Act 1996 (ERA) at Section 94. Section 111 of the ERA provides that such a claim must be presented to the Employment Tribunal before the end of the period of 3 months beginning with the effective date of termination of employment or within such other period as the tribunal considers reasonable in a case where it was satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months. The age discrimination claim is brought under the Equality Act 2010. Section 123 of that legislation states:-

‘(1) Proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it. ‘

Expenses

18. I noted that the respondent's representative seeks expenses in respect of costs incurred by :-

- 5 • the claimant's representative's late request for a postponement of the PH fixed for 11 July 2019 (made at 14.15 on the day before that arranged PH)
- Non-appearance by or for the claimant at the PH on 31 October 2019
- 10 • Non-appearance by or for the claimant at the PH on 17 February 2020.

19. I advised that in the circumstances narrated above I am minded to make an award of expenses in this case against the claimant's representative. The respondent's representative will write to the ET Office and to the claimant's representative within 14 days on this PH i.e. by **2 March 2020**, with details of the sum sought in respect of expenses, with a breakdown of that sum in terms of expenses incurred and submissions on why an award for expenses should be made in that sum. The claimant's representative will then be given until **16 March 2020** to provide comment on those submissions.

20. Taking into account the provisions of Rule 2 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, and in particular with regard to the circumstances narrated above and proportionality, it is intended that the issue of expenses be dealt with by way of written submissions, without a Hearing which the respondent's representative would again be travelling from England to attend.

25	Employment Judge:	C McManus
	Date of Judgement:	18 February 2020
	Entered in Register,	
	Copied to Parties:	24 February 2020

