



## EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4114157/19

Heard in Edinburgh on the 12<sup>th</sup> October 2020

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Employment Judge Porter

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**Mrs W Minto**

**Claimant  
Absent**

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**Midlothian Council**

**Respondents  
Absent**

### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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It is the judgment of the Employment Tribunal to strike out all the claimant's claims in these proceedings on the grounds that the claimant has failed to actively pursue such claims, all in terms of Rule 37(1)(d) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1.

#### Introduction

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1. In these proceedings the claimant's principal claim is one of unfair constructive dismissal in terms of s95(1)(c) of the Employment Rights Act 1996. The claim is resisted and there was a Preliminary Hearing in the matter before EJ Wiseman on the 14<sup>th</sup> July 2020. At that PH the claimant was absent. At the PH the respondents repeated a request they had made in their ET3, that the claimant's claims be struck out under and in terms of Rule 37 of the Employment Tribunals

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(Constitution and Rules of Procedure) Regulations 2013, Schedule 1. In these circumstances, the EJ issued directions for submissions to be exchanged on the issue of strike out.

2. The respondents provided written submissions on the issue of strike out on the 29<sup>th</sup> July 2020. The claimant failed to provide such submissions. Against that background, the case was set down for a Preliminary Hearing on strike-out (written submissions only) on the 12<sup>th</sup> October 2020.

### **The respondents' submissions**

3. The foregoing is a brief summary of the submissions provided by the respondents in support of their application for strike-out.
4. The respondents submitted that that the case should be struck out under and in terms of Rule 37(1)(a) (no reasonable prospects of success) and Rule 37(1)(d) (failure to actively pursue) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 ("the Rules").
5. In support of their application for strike out under Rule 37 (1) (a) the respondents submitted that the claimant has failed to specify the essential matters offering to be proved and in particular has failed to specify how the respondents' conduct amounted to a breach of contract on their part. The respondents submitted that the claimant has had numerous opportunities to provide this specification. In support of their application under Rule 37(1)(a) the respondents relied upon the cases of **Anyanwu and Another v South Bank Student Union and Another and Commission for Racial Equality (2001) UKHL 14** and **Ahir v British Airways plc (2017) EWCA Civ 1392**.
6. The respondents' submitted that alternatively the Tribunal should strike out the case on the grounds of the claimant's failure to actively pursue this case under and in terms of Rule 37(1)(d) of the Rules. To this end the respondents' highlighted the fact that there has been no correspondence from the claimant in this case since the 6<sup>th</sup> of March 2020 and that the claimant did not attend the PH on the 14<sup>th</sup> July 2020. In support of their application under Rule 37(1) (d) of the

Rules the respondents cited the case of **Riley v The Crown Prosecution Service (2013) EWCA Civ 951**.

### Discussion and Decision

- 5 7. The Tribunal considered the respondents' submissions that the claimant's claims should be struck out under and in terms of Rule 37(1)(a) of the Rules on the basis that this case has no reasonable prospects of success. The Tribunal observed that it is correct to state that the claimant's claim is lacking in specification and that the claimant has had ample opportunity to provide such  
10 specification. The respondents are also correct in highlighting that the Notice of Hearing provided in advance of the PH on the 14<sup>th</sup> July 2020 specifically provided that the matters to be discussed would include the nature of the claim being made, the statutory provisions upon which the claimant relies and the essential matters which must be capable of being proved at the final hearing if the claim is  
15 to have a reasonable prospect of success.
8. In determining the respondents' application under Rule 37(1)(a) the Tribunal had regard to the claimant's case as set out in her ET1. Whilst undoubtedly lacking specification, the claimant does set out the background to her claim and her grievances against the actions of the respondents- in other words, she does set  
20 out a factual matrix in terms of which she brings this claim.
9. In determining the respondents' application, the Tribunal had regard to the authority of **Tayside Public Transport Co Ltd t/a Travel Dundee v Reilly (2012) IRLR 755**. At para 30 of the judgment the Lord Justice Clerk (Gill) stated:  
25 *"In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore when the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. ..in the normal case where there is a 'crucial core of disputed facts' it is an error of law to pre-empt the determination of a full hearing by striking out."*
10. After consideration of the terms of the parties' pleadings, and of the authority of  
30 **Tayside Public Transport**, the Tribunal considered that to strike out this claim

under Rule 37(1)(a) would result in an error of law; and for this reason refuses the respondents' application on this ground.

11. The Tribunal then proceeded to determine the respondents' application under Rule 37(1)(d) of the Rules, namely that this claim is not being actively pursued. In determining this application the Tribunal was guided by the principles set out by the House of Lords in **Birkett v James 1978 AC 297, HL** wherein it was authoritatively stated that a tribunal can strike out a claim where there has been delay which is intentional or contumelious (disrespectful or abusive to the court) or where there has been inordinate and inexcusable delay which gives rise to a substantial risk that that a fair hearing is impossible, or which is likely to cause serious prejudice to the respondents.

12. The Tribunal was of the view that there has not been inordinate or inexcusable delay in this case. However, insofar as intentional or contumelious delay is concerned, the Tribunal had reason to consider the chronology of the progress of this case. To this end, the Tribunal observed that the claimant failed to comply with the Case Management Order of the 9<sup>th</sup> of January 2020; that the last communication from the claimant to the Tribunal was the 6<sup>th</sup> March 2020; that the claimant failed to attend the PH on the 14<sup>th</sup> July 2020; that the claimant failed to respond to the Tribunal's request of 21<sup>st</sup> July 2020 for an explanation for her non-attendance; and that the claimant failed to provide submissions for this hearing in accordance with the directions made at the PH on the 14<sup>th</sup> July 2020. After consideration of the above, the Tribunal reached the view that the claimant's persistent lack of response to orders, directions and communications from the Tribunal amounts to intentional or contumelious delay in this case.

13. The Tribunal noted with concern that the claimant's email of 6<sup>th</sup> March 2020 narrated an account of considerable personal difficulties. However, it has been open to the claimant in the last 7 months to update the Tribunal on such difficulties as providing a reason for her absence of communication in respect of her case.

14. Against this background, it is the decision of the Tribunal to strike out the claimant's claims under and in terms of Rule 37(1)(d) of the Rules.

5 Employment Judge: Jane Porter  
Date of Judgment: 12 October 2020  
Entered in register: 13 October 2020  
and copied to parties