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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100407/2017

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Held In Glasgow on 18 June 2018

Employment Judge: Robert Gall

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Mr Del Muir

**Claimant
Not Present and
Not Represented**

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25 **Sky Subscribers Services Limited**

**Respondent
Represented by:-
Ms L Lilburn -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

35 The Judgment of the Tribunal is that the claim is dismissed in terms of rule 47 of the
Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 by
reason of the failure of the claimant to attend at the Hearing set down for 18 June
2018 to consider the respondents' application for strike out of the claim.

E.T. Z4 (WR)

REASONS

1. There is a substantial history to this claim. Very little progress has however been made in advancement of the claim.
2. The claim brought is one of discrimination, the protected characteristic being said to be disability. The claimant also initially advanced a claim of unfair dismissal and of breach of contract for notice pay. He accepted however at a Preliminary Hearing (“PH”) held at Glasgow on 20 July 2017 that he did not have qualifying service enabling him to bring what might be referred to as a “standard” unfair dismissal claim. He also accepted at that PH that any monies due to him by way of notice pay had been paid to him by the respondents.
3. An Order was issued following that hearing. It was dated 24 July 2017. The purpose of the Order was to obtain specification from the claimant as to what physical or mental impairment he considered affected him. Details of the impact of that impairment were sought. Medical evidence in support of the position being advanced by the claimant was also ordered to be produced. Questions were posed of the claimant as to whether discrimination was alleged to have occurred on the basis of that discrimination being direct, arising from disability, failure to make reasonable adjustments, harassment, victimisation or indirect discrimination. A schedule of loss was ordered to be produced.
4. The Order provided that the response to it was required on or before 18 August 2017.
5. The respondents produced a bundle for the PH held on 18 June 2018. They were represented at the PH by Ms Lilburn. The lead up to the PH is explained more fully below. At the PH there was no appearance and no representation for the claimant.

6. The response from the claimant to the Order was sent on 17 August 2017 by way of email. A copy of that email appeared at pages 49 to 51 of the bundle. A copy of the Note and Order appeared at pages 39 to 47 of the bundle.
7. A further PH was held on 20 September 2017. The claimant was present at that PH as he had been at the PH on 24 July 2017. The respondents sought strike out of the claim on the basis of failure to meet the Order. They sought in the alternative a Deposit Order. A one-day hearing was to be arranged to consider those applications. It was set down for 16 November 2017.
8. The claimant wrote to the Tribunal on 2 November 2017 explaining that his health had continued to deteriorate and that he had been unable to contact the Tribunal prior to that point. It was confirmed to him that the hearing in relation to strike out or fixing of a Deposit Order would proceed.
9. The case called for the purposes of considering those applications by the respondents on 16 November 2017. The claimant did not appear. It was noted that he had not supplied a telephone number to the Tribunal. An email was sent to the claimant asking whether he would be attending. During the course of the hearing an email arrived from the claimant saying that he was unable to attend due to a downturn in his current welfare. The Employment Judge became aware of this email shortly after the hearing finished. Prior to receipt of the email she had determined that a strike out warning letter would be issued to the claimant. On becoming aware of his email, and conscious of his comment about his health, the Employment Judge directed the claimant to provide a medical certificate from his general practitioner detailing whether in the view of the general practitioner the claimant was able to attend and prepare for a Tribunal hearing. The Employment Judge highlighted to the claimant in the Note produced following the PH that he had not let the Tribunal or the respondent's agents know that he did not intend to be present at the PH. The inconvenience and discourtesy of this was stressed. A soul and conscience certificate was to be obtained from the claimant's GP by 10 January 2018. No such certificate was received.

10. The Tribunal wrote to the claimant's GP on 1 February 2018 seeking information from him as to the claimant's health and ability to deal with Tribunal case. By letter of 12 February 2018, page 85 and the bundle, the GP replied in the following terms: -

5 *"This patient does suffer from anxiety and depression.*

However I do think he is fit to attend court and have advised patient of this today"

11. The claimant wrote to the Tribunal on 23 March 2018 stating that he had never claimed that he was unable to attend the Tribunal office. It was, he said, the
it) handling of the case which he was *"unable to continue"*.

12. Given the comments made by the claimant in his email of 23 March, the Employment Judge raised in correspondence with the claimant the possibility of him seeking advice from law centre, citizens advice bureau, trade union, Employers Association or other source of advice. The Equality and Human
15 Rights Commission was mentioned. Information potentially available from ACAS was also mentioned.

13. A PH was set down for 18 June 2018 consider the following preliminary issues: -

20 1) The respondents' application to strike out the claim and the claimant's objections

2) The respondents' application for a deposit order.

14. The respondents sought an Unless Order. They sought that the claimant clarify his position. The Unless Order was not issued. Clarification of the claimant's position was sought no later than 30 May 2018. This was in terms
25 of a letter of 24 May 2018. In the absence of reply, by letter of 5 June 2018 the claimant was asked to respond to the Tribunal by 12 noon on Monday 11 June at the very latest to confirm whether he wished to continue to pursue his

claim and whether he intended to be present at the PH set down for 18 June. It was explained that failing any reply it was likely that an Unless Order would be issued. It was also explained that of the claimant did not attend the hearing without reasonable excuse he should appreciate that it was likely that in any event the claim would be dismissed.

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15. The claimant replied by email of 5 June. He said that he was *“not in great health right now as since last correspondence I have had a close family bereavement as well as receiving a petition for divorce. Understandably, this has not exactly aided my earlier documented illnesses and as such I have really not been a great place.”* *

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16. The claimant said he intended to continue with the case. He said he was in process of having his GP draft correspondence outlining his condition, prognosis, medication and *“attributory side effects”*. No such correspondence has been received by the Tribunal pursuant to that.

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17. The Tribunal wrote to the claimant on 11 June 2018 stating: -

“The Employment Judge has requested that I inform the claimant that if his General Practitioner certifies that he is unfit to attend the Tribunal on 18 June 2018, that it is possible that the hearing could be converted to a Preliminary Hearing to consider case management which could take place by way of a telephone conference call. At that Preliminary Hearing it will be possible to discuss the issues which the claimant raises about documents, and to consider preparation for a rescheduled Preliminary Hearing to be held in Public.

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However, the claimant must make a formal application for this hearing on 18 June 2018 to be postponed and converted to a Preliminary Hearing to consider case management by telephone. The Employment Judge has directed that any postponement request should be accompanied by appropriate medical evidence and the claimant must confirm that he is able to participate in the conference call or that he will engage a representative to do so.

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The claimant should lodge any postponement request with the Tribunal by return accompanied by the appropriate medical evidence. ”

18. On 14 June the claimant sent an email stating that *“with some regret I will be unable to partake in your proposed hearing of Mon 18 June 2018.”* He went on to say that he did not have the means of preparation with respect to his ongoing health issues. He said he would like to continue the case. A copy of that email appeared at page 112 of the bundle.

19. A reply was sent to the claimant on 15 June. He acknowledged that reply. The letter from the Tribunal in reply to the claimant’s email of 14 June said that-

In the Tribunal’s email of 14 June 2018 you were reminded that you could apply for a postponement of the hearing (in which case you should provide appropriate medical evidence) or for it to be converted to a telephone hearing for case management.

In your email in reply timed at 22:44 on 14 June 2018 you do not appear to apply for either of those things, but you do notify the Tribunal that you do not feel able to attend the hearing. You are not obliged to attend the hearing but you should be aware that it may well continue in your absence if you do not.

If on reflection you do wish to make either of the applications referred to above, or any other application, these make that clear by return of email. In order to avoid any doubt, if you are content for the hearing to proceed in your absence then it would be helpful if you could confirm that too.

20. By email of 18 June 2018 the claimant stated

“Sorry, I’m just not in a good place right now and I apologise.

Thanks in advance. ”

21. Against this background, Ms Lilburn said that the claim should be struck out. The claimant had not properly addressed the Order. That Order had been in place for almost a year. He had not appeared at this PH on 18 June although

well aware of that diet. Medical evidence did not support non-attendance as being justified on medical grounds. The claimant had been pointed in the right direction by the Employment Judge at the PH in July 2017 and by issue of the subsequent Order. Possible sources of advice to him had been highlighted to him at later times. The Rules gave Tribunal the ability to dismiss a claim if there was failure by a party to attend or to be represented at a hearing. The limited medical evidence had confirmed that the claimant was able to attend a hearing and indeed the claimant himself had accepted that. The respondents had, she said, sympathy with the claimant and his health difficulties. The case however was not being actively pursued. An Order had not been met. The claimant had not appeared at the PH. There was no reasonable excuse for his non-appearance.

22. I considered the position and the history in this case in weighing up whether it was appropriate to dismiss or strike out the claim. I was acutely aware of the mental impairment by which Mr Muir says he is affected. His GP is confirmed that Mr Muir suffers from anxiety and depression. That can be a very debilitating condition.

23. The GP and the claimant have both confirmed that Mr Muir is able to attend hearings in principle. The correspondence in the lead up to the PH on 18 June makes it clear that Mr Muir should be present or should produce a medical certificate with an application for a postponement or an application to have the PH altered to become a telephone case management PH. No such application was made. No medical evidence was produced.

24. There are 2 parties in the claim. The Tribunal must keep in mind that there are these competing interests.

25. Given the history to the claim and the exchanges both in the days before and on the day of the PH, it seemed to me that the time had come when there was substantial force in the application by the respondents for dismissal of the claim due to non-appearance by the claimant. There was also a basis for strike out of the claim in terms of Rule 37 (1) (d). The basis of strike out in terms of that provision is that the claim has not been actively pursued.

Further, it seems to me to be the case that the Tribunal Order of 24 July 2017 has not been met in some areas. If the claimant was engaging with the Tribunal it might be possible to obtain those further details sought in terms of the Order. It might be the case that if this was the sole issue, strike out would not occur.

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26. I kept in mind that this was a claim of discrimination. Such claims should not readily be struck out or dismissed given the public interest aspect of not discouraging such claims. The claimant is unrepresented. The overriding objective highlights that it is appropriate that parties are, as far as possible, placed on an equal footing by the Tribunal. The Tribunal has been keen to try to obtain from the claimant the basis of the claim. It has done that by issuing a lengthy Order. It has granted time to the claimant to comply with the Order. It has encouraged the claimant to seek advice when he indicated that as being a possibility. It has been sympathetic to his issues with illness and has kept in mind the fact that he has mentioned the unfortunate circumstances of a recent family bereavement and divorce action. Medical information has been obtained.

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27. Nevertheless, in light of the history to the claim and attempts made thus far to see progress in it and given the absence of supporting medical information confirming difficulty with attendance or progression of the case by the claimant, it is my view that the non-appearance of the claimant at the PH on 18 June appropriately results in dismissal of his claim in terms of Rule 47. Had I not been of that view, I would have been likely to strike out the claim in terms of rule 37 (1) (d).

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28. I appreciate that the claimant feels distinctly upset and annoyed at the actions of the respondents as he sees it. I believe however that for the reasons

set out above, dismissal of the claim is appropriate in the facts and circumstances which currently exist.

5 **Employment Judge: R Gall**
 Date of Judgment: 19 June 2018
 Entered in register: 21 June 2018
 and copied to parties

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