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EMPLOYMENT TRIBUNALS

Claimant: Ellie Church

Respondents: 1. Medicare EMS Group UK Limited
2. Rapid Response Medical Services Ltd
(In Administration)

Heard at: East London Hearing Centre

On: 29 August 2023

Before Employment Judge Sugarman

Representation
Claimant Did not attend
Respondent Mr Dominic Bayne, Counsel

JUDGMENT

1. “Rapid Response Medical Serviced Limited (In Administration)” is added as a Second Respondent to the Claimant’s claim.
2. The Claimant’s claim is struck out on the basis that it has not been actively pursued, pursuant to Rule 37(1)(d) of Schedule 1 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

REASONS

Background

1. The Claimant presented a Claim Form on 19 January 2023 naming the Medicare EMS Group UK Limited (“Medicare”) as the Respondent. She brought claims of unfair dismissal, discrimination because of pregnancy or maternity and a claim for notice pay.
2. The details of her complaint set out that she had been working for Rapid Response Medical Group (“Rapid”) up to December 2022 when she was told that she may potentially be made redundant, but that she should seek advice from Medicare about whether she was going to transfer to them under “TUPE” (the Transfer of Undertakings (Protection of Employment) Regulations 2006), which she did. She says she was informed by Kirstie Smith of Medicare that she was going to transfer but then heard nothing further. She was eventually told, after numerous attempts to ascertain the position after she was not paid, that she had not transferred but been made redundant as Medicare had not taken on

Rapid's administrative staff.

3. In its Response, Medicare pleaded that whilst a number of clinical and/or frontline ambulance staff formerly employed by Rapid had transferred to it under TUPE as a result of its successful tender for a number of contracts previously operated by Rapid, it had not taken on any patient transport contracts and thus none of the staff assigned to that work transferred to it. It averred the Claimant was employed in a patient transport role. It admitted that Ms Smith had at one point, wrongly believing the Claimant to be a clinician, erroneously informed the Claimant she would transfer to the Respondent.
4. The matter came before Employment Judge Massarella on 19 June 2023 for a private Preliminary Hearing. The Claimant confirmed her original role was a patient transport role but she said she was moved to an administrative role in June 2022 because she was pregnant. It is not clear from the Case Summary whether confirmed whether that move was a temporary or permanent one. She did not know if any other administrative staff had transferred over to Medicare. Medicare's position was that they had not.
5. Employment Judge Massarella sent out notice to Rapid, care of their administrators, that the tribunal was considering making an order that it be added as a respondent and asking whether the administrators consented to that proposal. He listed the case for a public Preliminary Hearing on 29 August 2023 to decide whether the Claimant's contract of employment had transferred to Medicare and whether the Claimant's claims against either respondent (if Rapid were to become one) should be struck out or a deposit order made.
6. Employment Judge Massarella made Case Management Orders which included:
 - a. The Respondent (Medicare) to disclose by way of list and copies relevant documents to the Claimant by 10 July 2023;
 - b. The Claimant to provide the Respondent with any additional disclosable documents by 17 July 2023;
 - c. Witness statements to be exchanged by 7 August 2023.
 - d. The parties to confirm to the Tribunal that they were ready for the hearing by 14 August 2023 and if not, to explain why.
7. On 3 July 2023, Kroll, Rapid's administrators, confirmed they consented to Rapid being added as a Respondent. They averred that the Claimant was listed in a Sale and Purchase Agreement dated 5 December 2022, which they provided. As such, their position was that the Claimant had transferred to Medicare. No further information was provided however about the Claimant's role nor why it was said that she was assigned to the part of the business or the contracts that were transferring.
8. On 22 August, the Respondent wrote to the Tribunal, copying in the Claimant, to explain that it was ready to proceed but that it had heard nothing from the Claimant. It said a request had been made to the Claimant on 3 August 2023 for documents in the Claimant's possession and to discuss witness exchange but there had been no response and it was therefore unclear whether the claims were actively pursued. There was no response from the Claimant to that email.

The Hearing

9. The Claimant did not attend the hearing listed at 10am. The Tribunal clerk was

asked to make enquiries as to her whereabouts. The Claimant was called twice but did not answer. A voicemail was left asking her to make urgent contact with the Tribunal but she did not. An email was sent to the email address provided on her Claim Form but no response was received.

10. The Tribunal waited until 10:25am but the Claimant did not attend. As such, the hearing commenced.
11. I explained at the outset that Mr Bayne was known to me, as was his instructing solicitor, both in a professional capacity. Mr Bayne is a colleague in the same chambers that I practice from when not sitting and his instructing solicitor has previously instructed me as a barrister, I believe once. I have never worked for the Respondent in this case and have no connection to it. There was no application for me to recuse myself though I considered whether it was appropriate to do so. I took into account the relevant authorities including **Porter v Magill** [2001] UKHL 67, [2002] 2 AC 357 and **Locabail (UK) Ltd v Bayfield Properties Ltd** [2000] QB 451 as well as the latest Guide to Judicial Conduct. In my judgment, a fair-minded and informed observer, having considered the facts, would not conclude that there was any real possibility that the tribunal was biased from such facts. I therefore concluded it was not necessary to recuse myself.
12. Mr Bayne confirmed there had been correspondence beyond that on 3 and 22 August. The Respondent had disclosed its documents, albeit a day late, on 11 July. There was no response to it doing so. It had sought an extension for service of witness statements, to which there was no response, and had sent its statements (password protected) last week to the Claimant. That was met with no response either. He confirmed the Claimant had not responded to any of the Respondent's correspondence : there had been no contact from the Claimant whatsoever following the last Preliminary Hearing.
13. In light of the Claimant's failure to engage in the Tribunal process at all following the last Preliminary Hearing, he invited me to strike out the claim under Rule 37(1)(d) on the basis it was not being actively pursued.

Decision

14. There has been a wholesale failure to comply with the Tribunal's Case Management Orders by the Claimant following the last Preliminary Hearing. Not only has she not complied with her disclosure obligations, she has failed to provide any witness evidence in relation to the matters listed for today. She has also seemingly failed to reply to numerous emails from the Respondent, the last of which specifically raised doubts about whether she wished to pursue her claims. She did not notify the Tribunal was she was ready to proceed or explain why she was not.
15. She has failed to attend the Preliminary Hearing today, having provided no explanation whatsoever for that failure.
16. The primary issue for determination today was whether there had been a TUPE transfer. The Claimant avers there was. Medicare, as putative transferee, denies it but has limited information about the Claimant because it contends it was never her employer. Rapid is in administration and has provided limited information in support of a contention that she did transfer. It was crucial for the Claimant to provide evidence in support of her assertion, in particular about her role, what she did, how it related to the work which Medicare accepts was transferred to it and whether her role was temporary or not. Assignment appears to be the key issue in the case. It seems only she can give that evidence in light of Rapid's administration and Medicare's position that it was never her employer. She is also

likely to have documentation which Medicare has not seen which will be of relevance to the issue of transfer, including contractual documentation.

17. I am conscious that there has only been a relatively short period of time between the last Preliminary Hearing and this (2 months) and thus this is not a case about delay per se. However, the Claimant has done nothing after the last Preliminary Hearing to progress her case at all and or prepare for the issues which require determination today.
18. I have reminded myself of the principles set out in **Evans v Commissioner of Police for the Metropolis** [1993] ICR 151. In light of the extent of her failures, I conclude that her failure to progress the claim has been intentional. I also conclude that her failure to progress the claim has been inexcusable, no excuse having been provided. It is not possible to have a fair hearing today of the issue of whether there has been a transfer or not, or whether new employment has been offered and accepted, absent the Claimant's disclosure and evidence from her. She holds key evidence to allow a determination of the issues. There has of course been no application for a postponement of today's hearing to a later time for a fair hearing to be effected at some point in the future.
19. It would not be fair to the Respondents for me to determine the issue of whether there has been a transfer or not in such circumstances today, nor would it be in the interests of justice to postpone the case. Although Rapid has not attended either, that is less surprising given it is in administration and it has provided at least some disclosure through the administrators.
20. The Claimant was on notice of the Preliminary Hearing today and on notice that the Tribunal was going to consider strike out. She was able to attend and make oral submissions, if she so wished, but did not do so.
21. I have concluded that the claim should be struck out because it is not being actively pursued by the Claimant, pursuant to Rule 37(1)(d).
22. In the alternative, had I not done so, I would have dismissed the claim under Rule 47 because of the Claimant's non-attendance, essentially for the same reasons. I could not have fairly determined the issues today on the information before me and it would not have been in accordance with the overriding objective to allow the claim to continue without the issue of the TUPE transfer having been determined, as it was listed to be. Dismissal is a draconian step but in my judgment is justified in these circumstances.
23. Of course, as Mr Bayne pointed out, if there is a good reason for the Claimant's persistent default since June, and her failure to attend today, it is open to her to apply for to the Tribunal for it to reconsider its decision.

Employment Judge Sugarman

29 August 2023