



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs H Kinch

**Respondent:** Compassion in World Farming International

## STRIKE OUT

The claimant's complaint of unfair dismissal is struck out pursuant to rule 37 (1) the complaint has no reasonable prospect of success.

### REASONS

1. This claim came before me on 21 September 2023. The order I made on that occasion includes the following.

**“Application to strike out claim and for a deposit**

6. The respondent has by a letter dated 18 September 2023 indicated an intention to apply for the claim to be struck out on the grounds that it has no reasonable prospect of success. It was not possible to convert the hearing today to an open hearing due to insufficient time between the application and the hearing. It has been agreed with the parties that the consideration of the respondent's application will take place on a consideration of the papers without the need for a hearing to take place.
7. The respondent is also making an application for the claimant to be required to pay a deposit as a condition of being able to continue with the claim. The respondent has indicated that is content that the application be considered on the papers. The claimant is also content that the application is considered on the papers.
8. The respondent must send to the tribunal and to the claimant a copy of their written application for the claim to be struck out and for a deposit to be made by **19 October 2023.**”

And further it was ordered that:

12. By **2 November 2023** the claimant may, if so advised send to the tribunal and copy to the respondent her reply to the respondent's application for the claimant (*sic*) to be struck out, a deposit order and or the question of jurisdiction to consider the employers contract claim.
2. The respondent made an application to strike out the claim on 19 October 2023. The respondent's counterclaim was withdrawn.

3. The basis of the application to strike out the claim is that on the undisputed evidence the claimant is not capable of showing that she was constructively dismissed, and in such circumstances her claim for unfair dismissal is therefore bound to fail.
4. On the 30 August 2022 the claimant resigned from her position of “*UK finance controller*” with the respondent. The respondent accepted the claimant's resignation on the 31 August 2022. The claimant subsequently requested to work a three month notice period from home, this was agreed by the respondent.
5. Before the end of the claimant's 3 month notice, the claimant made a request that the notice period is extended. The respondent agreed that claimant's notice period was to be extended to February 2023. Before the extended notice period came to an end the claimant again asked for an extension of the notice. This was granted by the respondent to the 28 April 2023.
6. On 2 March 2023 the claimant submitted a grievance to the respondent about flexible working. The respondent replied in writing on the same day. On 3 March 2023 the claimant requested a meeting to discuss her grievance. The grievance meeting then took place on 7 March 2023. The claimant was informed of the outcome of her grievance on 8 March 2023. The claimant appealed the grievance outcome and the grievance appeal meeting took place on the 23 March 2023. The claimant was informed of the outcome of her grievance appeal on 31 March 2023
7. The respondent makes an application for the claim to be struck out and in the alternative for a deposit order the grounds set out in an application dated 19 October 2023.
8. The respondent applies pursuant to 37 (1) of the Employment Tribunals Rules of Procedure 2013 for the claim to be struck out on the basis that it has no reasonable prospect of success.
9. The respondent says: (i) that the claimant has continued to work and be paid under her contract of employment for an 8 month period after she resigned; (ii) that the claimant called on the respondent for further performance of the contract by asking the respondent in November 2022 to exercise its discretion to provide the claimant with further occupational sick pay after she had exhausted her entitlement to four weeks of occupational sick pay per year; (iii) that the claimant also pursued a grievance in respect of request for flexible working after her resignation and after the resignation had been accepted by the respondent; (iv) there were two extensions of the notice period which were initiated by the claimant for her own ends (namely she wasn't yet ready to relocate to a foreign country).

10. Section 95 (1) of the Employment Rights Act 1996 provides that an employee is dismissed by her employer if the employee terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct.
11. In Western Excavating (ECC) v Sharp [1978] 1QB 761 it was stated that "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

## Conclusion

12. The claimant's response to the respondent's application is set out in an e-mail dated the 15 November 2023 sent to the tribunal at 15:58. Regrettably this doesn't help me with regards to the issues at hand in this application.
13. I am satisfied that claimant has waited too long, she has affirmed the terms of the employment contract by her actions of seeking an extension of contractual notice. On two occasions securing the benefit of the contract for a period of eight months following her resignation. The contractual notice period is only three months.
14. In my view the claimant's complaint of constructive dismissal is doomed to fail. There is no reasonable prospect of the claimant showing a constructive dismissal.
15. The claimant's complaint that she was unfairly dismissed is therefore struck out pursuant to rule 37(1) because the complaint has no reasonable prospect of success.

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Employment Judge Gumbiti-Zimuto  
Date: 23 November 2023

Sent to the parties on: 4 January 2024  
For the Tribunals Office

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