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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102937/2023

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Hearing held in Glasgow on 15, 16 and 18 January 2024

**Employment Judge R Mackay
Tribunal Member Ms M McAllister
Tribunal Member Mr R McPherson**

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Ms M Coulter

**Claimant
In Person**

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The Scottish Police Authority

**Respondent
Represented by:
Ms K Nelson
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The unanimous judgment of the Employment Tribunal is that the claim be struck out in accordance with rule 37(1)(b) and (e) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (“**the Rules**”).

REASONS

Background

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1. This is a claim of discrimination on grounds of sexual orientation contrary to section 13 of the Equality Act 2010. To summarise very briefly, the claimant argued that she had been treated less favourably (in being subjected to

informal disciplinary action and being moved to work in a different team) following issues raised over the content of certain communications from the claimant to a colleague.

2. The case was listed for a five day final Hearing commencing on 15 January 2024 at 10:00 am. The claimant was represented by a solicitor in the earlier stages of the claim. Some time prior to the Hearing her solicitor withdrew from acting. Thereafter, the claimant represented herself.
3. The claimant contacted the Tribunal by e-mail of 10 January 2024. In the e-mail, she made an application for anonymity under rule 50 of the Rules. In particular, she requested non disclosure of her identity in any judgment issued. She set out her justifications for the application in a series of numbered paragraphs. She referred to her wish for privacy as it related to her "*private life*" and identified the possibility of future employers searching the Tribunal judgment online. She stated that she felt this could be detrimental to future job applications, and as part of this, she identified disclosure of her age as being a potential concern. She also referred to the possibility of stigma and what she described as "*defamation*" against her by the respondent.
4. By e-mail the following day, the respondent's solicitor objected to the granting of an anonymity order. She characterised the application as falling under rule 50(3)(b) of the Rules. The claimant had not specifically referred to that rule but it was clear that her application fell within the scope of that provision. The respondent's solicitor referred to the principles of open justice and the desirability of full judgments being in the public domain.
5. The correspondence was considered by an Employment Judge who directed that the application would be considered at the outset of the Hearing.
6. On the first day of the Hearing, one of the Tribunal Members assigned to the case was not able to attend. The parties were informed that there would be a delay in starting the Hearing pending the appointment of another Member. Another Member was identified and parties were told that the Hearing would

commence at 2:00 pm that day. Both parties indicated through the Tribunal clerk that they were looking for additional documents to be added to the bundle.

5 7. The Tribunal and the respondent's solicitor arrived in time for the Hearing to commence at 2:00 pm. At that time, two emails sent by the claimant earlier that morning were provided to the Tribunal.

8. The first, timed at 11:32, referred to the hearing having been postponed until 2:00 pm. The claimant went on to write:

10 *"Given that it is zero degrees outside, is it possible to start this ET tomorrow instead?"*

Thank you."

9. The second e-mail, timed at 12:25, was in the following terms:

"I have not received a response to the below after waiting in the icy cold a further 50 mins.

15 *I can not feel my feet, my nose is now running, and I am now chilled to the bone, and feeling terribly uncomfortable with the icy, freezing weather.*

I am not willing to catch a cold or worse.

I can no longer physically wait till 2pm.

I am heading home now as a result.

20 *Can this ET begin tomorrow please, or if not, can it be rescheduled to just whenever is available.*

Thank you."

10. The Tribunal sat at 2:00 pm as scheduled. The claimant did not attend. The respondent's solicitor was made aware of the emails from the claimant that morning. At that stage, the claimant had not received a response to either.
11. The respondent's solicitor made an application for the case to be dismissed by virtue of the claimant's non attendance under rule 47 of the Rules. She submitted that it was clear from the claimant's communications that she had chosen not to attend and that whilst accepting that the weather was very cold, there was no reason why the claimant could not have stayed within the Tribunal building or made other arrangements. She referred to the overriding objective and highlighted the risk that if the case started the following day, it may not conclude within the allotted time, particularly given the outstanding preliminary issues relating to anonymity and additional documents.
12. The Tribunal asked Ms Nelson to go through her objections to the claimant's additional documents. It became clear that many were simply different versions of documents already in the bundle.
13. Having had regard to Ms Nelson's submissions and the terms of the claimant's emails, the Tribunal determined that dismissal of the proceedings was not appropriate. Whilst it was very critical of the claimant's unilateral decision not to attend, and her failure to make appropriate arrangements in the interim, it was clear that she had made attempts to contact the Tribunal and had not received a response reminding her of the need to attend at the appropriate time. Moreover, the Tribunal was satisfied that the case was capable of being concluded within the remaining time allocated. The claimant was advised by e-mail that she should attend the following day to start at 10:00 am.
14. Parties attended the Tribunal in time for the commencement of the Hearing the following day, 16 January 2024. At the outset, the claimant was updated on the respondent's application the previous afternoon. She was asked why, given the temperature outside, she had not remained in the Tribunal building.

5 She responded to the effect that she did not know that to be an option. The Tribunal advised the claimant that although it had not dismissed the claim, her actions the previous day had not been appropriate, had been disrespectful to the Tribunal, and had caused delay and inconvenience to the Tribunal and the respondent. She was reminded of the importance of attending in good time for the start of any hearing fixed.

15 15. The Tribunal went on to address the claimant's request for an anonymity order. Parties were advised that the Tribunal had elected to consider this following conclusion of the evidence. The reasons for this were twofold. First, 10 whilst the Tribunal was not persuaded by the written application, it considered it would be better placed to assess its validity having heard the evidence. Secondly, having already lost one day of the Hearing, there was a desire to make immediate progress in hearing the evidence. Neither party raised any objection to this course of action.

15 16. The remaining issues between the parties over additional documents were swiftly resolved and the claimant commenced giving evidence. She 20 concluded her evidence on the morning of 18 January 2024 (the Tribunal did not sit on the 17th). The Tribunal adjourned for a mid-morning break with a view to hearing from the first of the respondent's witnesses immediately thereafter.

17. On recommencing the Hearing, the claimant indicated that she had a point she wished to raise. During the break, she had become aware that the sister of the respondent's first witness proposed to sit in the Tribunal while the witness gave evidence. The respondent's solicitor confirmed this to be the 25 case and that the witness wanted her sister there for moral support.

18. The claimant stated that she objected to the presence of the sister. She questioned whether her being in attendance was designed to intimidate her. She also questioned why she had not been advised by the Tribunal that she could have someone to accompany her.

19. The Tribunal advised the claimant that the hearing was public and that the witness's sister was entitled to attend. She was advised that she would sit at the back of the room and play no part whatsoever in the proceedings. It was also explained that it was not incumbent on the Tribunal to give her advice as to who might attend with her.
20. The claimant went on to question what she described as the Tribunal's failure to deal with her request for an anonymity order at the start of the Hearing (in line with the correspondence from the Tribunal). The Tribunal reminded her of the way in which this had been addressed at the start of the Hearing. She was also advised that, even if granted, the anonymity order requested would not prevent a member for the public from attending the Hearing.
21. The claimant stated that had she known the witness's sister would be present she would have withdrawn her claim. She stated that she was not willing to proceed if the sister were to be admitted. The Tribunal reiterated that the individual was entitled to attend and that if the claimant refused to participate further in the Hearing, her claim may be dismissed. The claimant made a request that the hearing be postponed.
22. The Tribunal agreed to consider that postponement request and adjourned to do so. It refused the application and communicated the decision to the parties. In doing so, the public nature of the hearing was explained again, as was the entitlement of the individual to be present. It was again made clear that the person would play no part in the proceedings.
23. The claimant was asked if, considering the refusal of her postponement application, she was willing to proceed. She refused to do so. She stated that she would not do so if the witness's sister was present.
24. On behalf of the respondent, Ms Nelson applied for the claim to be struck out in light of the claimant's approach. She submitted that claim could not proceed without the claimant present and that in the circumstances it should not be taken any further.

25. The Tribunal asked the claimant whether she wished to take some time to consider further, being mindful of the potential dismissal of the claim, and noting the fact that the Hearing was by then about to finish for the day anyway (it was not scheduled to sit in the afternoon that day). She did not take up
5 the opportunity and stated in clear terms: “*I will not attend if that person is in the room*”.

Relevant Law and Decision

26. Section 37 of the Rules provides as follows:

10 (1) *At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*

(a) *that it is scandalous or vexatious or has no reasonable prospect of success;*

15 (b) *that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*

(c) *for non-compliance with any of these Rules or with an order of the Tribunal;*

(d) *that it has not been actively pursued;*

20 (e) *that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).*

(2) *A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.*

27. Where any of the grounds listed have been established, the Tribunal must go on to decide whether to exercise its discretion to strike out or to take some other action (***Hasan v Tesco Stores Limited UKEAT/0098/16***).
28. In considering whether to strike out a claim, it will also be relevant to assess whether a fair trial is still possible (***De Keyser Ltd v Wilson UKEAT/1438/00***).
29. Even if a fair trial is not possible, the Tribunal should consider a less draconian sanction such as an award of expenses (***Bolch v Chipman UKEAT/1149/02***).
30. Whilst decisions to strike out mid-hearing should be considered with great caution, such an approach may exceptionally be appropriate including in circumstances where a party refused to participate further (***Leslie v Imperial College Healthcare NHS Trust UKEAT/02014/19***).
31. The factual circumstance which led to the Tribunal considering striking out the claim was, in essence, the claimant's refusal to participate further in the Hearing. Her refusal was wilful, repeated and without justification. She demonstrated a clear willingness to disregard the authority of the Tribunal. She refused the opportunity to reflect on the matter further.
32. Considering these events, the Tribunal categorised the claimant's behaviour as being unreasonable in the conduct of the proceedings (rule 37(1)(b) of the Rules).
33. The Tribunal considered whether to take action short of strike out, and in particular whether, as an alternative, to adjourn the Hearing. The conduct of the claimant led to the Tribunal to conclude that this would not be an appropriate or proportionate course of action. She made clear on a number of occasions that she would not participate further in the Hearing unless the Tribunal were to take the step of excluding the sister of a witness from attending. That step would have been inappropriate in a public hearing, and

as was explained to the claimant was not relevant to her request for an anonymity order. It was clear from the conduct of the claimant that she was signifying a refusal to continue to participate in the Hearing and whilst the Tribunal might have adjourned until the following day, there was no expectation that the claimant would have attended. She was given an opportunity to take time to reflect on her position. She declined to do so. In addition, she had previously demonstrated an unwillingness to ensure attendance at the appropriate time and to adjourn would have led to further additional cost and inconvenience for the respondent and the Tribunal.

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10 34. Her actions were akin to a proposed breach (non attendance) falling under rule 47 of the Rules. Had the Tribunal been adjourned, and the claimant failed to attend (as she said she would), the Tribunal would have exercised its discretion to dismiss the claim in these circumstances. The effect would have been the same.

15 35. In considering whether a fair trial was still possible, the claimant was not willing to participate further in any trial at all. She was adamant in her refusal to do so.

36. The Tribunal nonetheless considered whether a less draconian sanction might be appropriate, for example continuing with the Hearing in her absence.
20 It did not consider this to be an appropriate course of action in circumstances where the claimant's refusal to attend was wilful, repeated and without justification. It was not considered fair to expect the respondent to lead evidence in defending a claim which the claimant was refusing to pursue.

37. The Tribunal was mindful of the fact that the claimant was a litigant in person and of the caution which should be exercised in striking out discrimination claims in particular. It was satisfied, however, that the highly unusual circumstances of this case (like **Leslie**) warranted the conclusion reached.
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38. Given the terms of this judgment and the absence of any narration of the evidence or findings in fact as they relate to the substantive claim, the

Tribunal did not consider it to be in the interests of justice to make any anonymity order.

39. It is open to the claimant to apply for reconsideration of this judgment under rules 70 to 72 of the Rules should she consider that it is necessary in the interests of justice for the Tribunal to do so.

R Mackay

Employment Judge

**Date of Judgment
20 February 2024**

Date sent to parties
