EMPLOYMENT TRIBUNALS

Claimant: Mr. M. Harris-Donovan

Respondent: ATS Care Limited

Heard at: Wales (by CVP) **On:** 28 May 2024

Before: Employment Judge S Evans

Representation
Claimant: Not in attendance
Respondent: Mr. Ridgeway, Employment Tribunal Advocate

Judgment

The Claimant's claims are dismissed.

Reasons

1. The Claimant issued an ET1 on 15 November 2023 after a certificate of Early Conciliation was issued by ACAS the same day.

2. In the ET1, the Claimant marked the box "I am making another claim which the Employment Tribunal can deal with" only and gave details relating to the provisions of references by the Respondent.

3. A response was provided by the Respondent in form ET3 and a case management preliminary hearing was held on 8 February 2024.

4. Ahead of that hearing, on 26 January 2024, the Claimant wrote to the Tribunal giving further details of his claim. In that correspondence he said he felt "forced to leave" his employment.

5. The record of preliminary hearing of 8 February seems to suggest that the claimant had a live claim of automatic constructive unfair dismissal. For the reasons set out below, it is not clear whether this was the case but for the avoidance of doubt, if there was an existing claim of automatic

constructive unfair dismissal, it is dismissed, along with the detriment claim outlined in the ET1.

6. Paragraph 4 of the Case Management Orders issued on 8 February ("the Orders") ordered that a further preliminary hearing be held on 28 May 2024 and paragraph 5 stated:
"At the preliminary hearing, the following will be considered:
5.1 Was it reasonably practicable to present the complaint of automatically constructive unfair dismissal within the time limit? If not, was it presented within a reasonable period
In general terms, the time limit is three months from the relevant event, as extended by the rules relating to early conciliation. The claimant must persuade the Judge to extend the time limit. If time is not extended, the claim (or that part of it) will be dismissed.

5.2 Any application by the Claimant to amend the claim

5.3 Any further case management and re-listing a final hearing."

7. The parties were ordered to comply with various case management directions in the Orders.

8. On 11 March 2024, in accordance with paragraph 11 of the Orders, the Respondent wrote to the Claimant and the Tribunal providing an amended ET3 and stating
"We **do not** accept the following allegation in the list of issues:
Constructive Unfair Dismissal 103A- paragraphs 1.1 to 1.3.4."
The email went on to state that the claim was not mentioned in the ET1 and that the Claimant would need to make an application to amend.

9. The Respondent did not raise any objection to the detriment issues set out in the record of preliminary hearing of 8th February and did not refer to any need for the Claimant to make an application to amend in relation to these issues.

10. The Claimant responded to the Respondent's email the same day (11 March) requesting more time to "submit a new claim and respond." I understand from the Respondent that the Tribunal wrote to the Claimant on 4 April giving him an extension of time to 8 April.

11. Nothing further has been heard by the Tribunal or the Respondent from the Claimant since 11 March 2024. Correspondence from the Respondent sending a bundle of documents on 18 April 2024 and an email of 1 May 2024 have gone unanswered.

12. On 10 May 2024, the Respondent's representative made an application to strike out the claim under Rule 37(1) (c) and (d) Employment Tribunals Rules of Procedure 2013.

13. On 16 May 2024, a strike out warning was sent to the Claimant from the Tribunal stating that the Tribunal was considering striking out the claim because the Claimant had not complied with paragraphs 12, 17 and 25 of the Order of the Tribunal dated 08 February 2024 and that the claim had has not been actively pursued. The warning stated that if the Claimant wished to object to the proposal to strike out, he should give his reasons in writing or request a hearing by 23 May 2024. No response to the warning has been received from the Claimant.

14. The Claimant did not attend today's hearing. The Tribunal attempted to contact the Claimant by telephone without success. I was satisfied that the Claimant was aware of the hearing and proceeded in his absence.

15. Mr Ridgeway requested that the claim be struck out on the grounds set out in his application of 10 May. It became apparent that two of the points made in the application were incorrect, namely that the Claimant had not complied with paragraphs 10 and 14 of the Orders. At the hearing, Mr. Ridgeway confirmed that both were complied with on 20 February. The Tribunal accepts completely that the inclusion of these two points in the application to strike out was an unintentional error for which Mr. Ridgeway apologised.

16. The remaining points made in the strike out application were that the Claimant had failed to comply with paragraphs 12, 17 and 25 of the Orders and had failed to actively pursue the claim.

17. Paragraph 12 of the Orders stated:
"If the Claimant wishes to make an application to amend, it must write to the Tribunal and the Respondent within 14 days of receipt of the information from the Respondent as set out in paragraph 14 above." The reference to paragraph 14 should have been to paragraph 11.

18. Following the Respondent's email of 11 March, the only application to amend that the Claimant needed to make was to add the claim of automatic constructive unfair dismissal. As I have indicated above, reading the record of 8 February and the wording of he first issue to be determined today, it was not clear to me whether that claim had been recognised as a live claim at the case management hearing. Mr Ridgeway was in attendance at that hearing . He told me he had no recall of a discussion of the unfair dismissal claim and he was unable to locate his notes taken at the hearing. As the first issue listed for today's hearing was stated to be "Was it reasonably practicable to present the complaint of automatically constructive unfair dismissal within the time limit? If not, was it presented within a reasonable period" I concluded that there is at least a possibility that the Claimant did not consider there was a need to make an amendment application on this issue.

19. I considered the points raised by the Respondent carefully along with the relevant law, in particular focussing on whether a fair trial was still possible

and the interests of justice. Mindful of the ambiguity and inaccuracy highlighted above, I do not consider it appropriate to include those points in the consideration of whether to strike out. Accordingly, the relevant arguments for a strike out are the Claimant did not comply with paragraph 17 of the Orders (to provide documents for a bundle for today's hearing), did not comply with paragraph 25 (to provide a witness statement for today's hearing) and has not actively pursued the claim as there has been no engagement with the claim since 11 March 2024. It is of course important that parties comply with Orders made and take steps to actively pursue their claim but I do not consider that strike out is a proportionate sanction to dispose of the case today as, all other things being equal, a fair trial would have still been possible.

20. However, the Claimant did not attend today's hearing and offered no explanation for his absence. The Tribunal's efforts to contact him were in vain. I am satisfied that practicable enquiries have been made and there is no information available to explain the Claimant's absence. It is in the interests of justice to dismiss the claim in accordance with Rule 47 of the Employment Tribunals Rules of Procedure 2013.

Employment Judge S. Evans

Date 28 May 2024

JUDGMENT SENT TO THE PARTIES ON 29 May 2024

FOR THE TRIBUNAL OFFICE Mr N Roche