

# EMPLOYMENT TRIBUNALS

**Claimant:** Miss E Gachathi

**Respondent:** Marks and Spencer plc

**Heard at:** London Central (by CVP)

On: 7 June 2024

**Before:** Tribunal Judge Andrew Jack, acting as an Employment Judge

## REPRESENTATION:

**Claimant:** Not present and not represented

**Respondent:** Mr H Dhoragiwala, counsel

## PRELIMINARY HEARING IN PUBLIC RESERVED JUDGMENT

The judgment of the Tribunal is as follows:

### Strike out of claim

1. The claim is struck out under Employment Tribunal Rule 37(1)(b) because the manner in which the proceedings have been conducted has been scandalous, unreasonable or vexatious.
2. The claim is struck out under Employment Tribunal Rule 37(1)(c) because the claimant has not complied with the Tribunal Rules or a Tribunal order.
3. The claim is struck out under Employment Tribunal Rule 37(1)(d) because it has not been actively pursued.

# REASONS

## Rule 47

1. The claimant did not attend and was not represented. The Tribunal clerk rang her four times with no response. She also emailed the claimant and received an automatic response which stated that “I am currently not well enough to read and respond to emails. I will respond as soon as I am able.”
2. If a party fails to attend or be represented at a hearing, rule 47 allows the Tribunal to dismiss the claim or proceed with the hearing in the absence of that party. Before doing so it must consider any information which is available to it, after any enquiries that may be practicable, about the reason for the party’s absence.
3. The claimant’s email is automatic. It states that the claimant is not well enough to read and respond to emails. However no evidence to support this assertion has been sent to the Tribunal. Further, four attempts were made to contact her by phone and there is no information suggesting that the claimant is too ill to answer the phone even for a few minutes.
4. I therefore decided to proceed in the absence of the claimant, and Mr H Dhoragiwala explained the respondent’s position.

## Procedural History

5. Early conciliation started on 4 July 2023 and ended on 15 August 2023.
6. The claimant presented her claim on 15 August 2023. The claimant brings complaints of discrimination/harassment because of sexual orientation, race, disability and sex, and of victimisation. Attached to her ET1 there was a 33 page narrative. It appears (but the claimant has not clarified) that the disability relied on is depression.
7. A preliminary hearing was listed for 27 February 2024. In circumstances which are set out in paragraphs 9 to 13 of the Case Summary at the end of the Record of a Preliminary Hearing dated 27 February 2024, the Tribunal clerk rang the claimant twice. In the second call the claimant was asked to attend the hearing to explain why she felt she could not proceed with the hearing, and she declined to do so. EJ Klimov decided to proceed with the hearing with the aim of progressing the case, in so far as practicable.
8. A final hearing was listed for seven days in February 2025.
9. A further preliminary hearing in public was listed today for one day, to: determine whether at the material time the claimant had a disability; consider the claimant’s application to amend to include a claim for unfair constructive dismissal; finalise the list of issues; review the state of preparedness of the case for the final

hearing, and whether these case management orders need to be varied, set aside, or supplemented.

10. The claimant was ordered to:
  - 10.1 Clarify by 27 March 2024 whether she wishes to amend her claim to add a complaint of unfair dismissal and, if so, to say on what basis she says that she has the right to pursue a complaint of unfair dismissal despite not having the 2-year qualifying period of employment.
  - 10.2 Provide by 27 March 2024 her answers to the respondent's questions – which were highlighted in yellow – in the draft list of issues prepared by the respondent. Clear guidance was given to the claimant about how to answer these questions.
  - 10.3 Provide by 27 March 2024 a disability impact statement and medical records.
  - 10.4 Provide by 10 April 2024 a Schedule of Loss.
11. The claimant did not, and still has not, complied with any of these directions.
12. The respondent sent clear and concise chasing emails to the claimant after these deadlines on 2 April 2024, 17 April 2024 and 24 April 2024.
13. The claimant sent an email to the Tribunal on 26 April 2024 saying that her application to postpone the preliminary hearing on 27 February 2024 had not been dealt with. Due to that hearing going ahead and another preliminary hearing being listed for 7 June 2024, she was treating this as intentional discrimination by London Central Employment Tribunals and was raising a complaint against London Central Employment Tribunals.
14. The respondent emailed the claimant at 18:06 on 15 May 2024 reminding her of the directions which had not yet been complied with, and saying that the respondent had significant concerns that the case is not being actively pursued.
15. The respondent received an automatic reply at 18:07 the same day saying that "I am currently not well enough to read and respond to emails. I will respond as soon as I am able."
16. On 20 May 2024 the claimant emailed the respondent. Among other things she said this:

"A formal complaint has been raised against the Tribunal for the discriminatory manner in which the Tribunal has handled this case. This matter is being investigated and it therefore stands to reason that the decisions made by the judge at the preliminary hearing where I was not present, and had communicated reasonable reasons as to why I would

not be present, which the Tribunal chose to not only ignore, but not to not even respond to, will not be complied to, by I the claimant.”

17. The respondent emailed the claimant on 21 May 2024 to say that the directions which had not been complied with were made by the Tribunal and, unless they were amended or set aside by the Tribunal, were still in force.
18. The Tribunal wrote to the claimant on 23 May 2024 to say that EJ Klimov had directed that the claimant must write to the Tribunal and the respondent by 24 May 2024 to explain why she had failed to comply with the Tribunal’s case management orders.
19. No response to that direction, automatic or otherwise, was received from the claimant. (The clerk today checked the London Central inbox for all emails received from the claimant.)
20. The Tribunal wrote again on 29 May 2024 to say that on the Tribunals’ own initiative EJ Klimov was considering striking out the claim because:
  - 20.1 the manner in which the proceedings have been conducted by or on behalf of the claimant has been scandalous, unreasonable or vexatious;
  - 20.2 the claimant had not complied with the Orders of the Tribunal dated 27 February 2024 and 23 May 2024;
  - 20.3 it has not been actively pursued;
  - 20.4 it is no longer possible to have a fair hearing of the preliminary issues in the claim because her failure to comply with the Orders means that the case is unlikely to be ready for the preliminary hearing on 7 June 2024.

The claimant was given the opportunity to object to this proposal by giving her reasons in writing or requesting a hearing at which she could make them by 3 June 2024.

21. No response to that letter, automatic or otherwise, has been received from the claimant.
22. The respondent has not applied for the claim to be struck out. However the respondent supports the Tribunal’s considering this of its own motion.

### **The Law**

23. Rule 2 provides that:

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

- (a) ensuring that the parties are on an equal footing;
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and
- (e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

24. Rule 37 provides that:

(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—

.....

- (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;
- (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.

25. *Weir Valves & Controls (UK) Ltd v Armitage* [2004] I.C.R. 371 provides guidance to a Tribunal considering strike out in a case where there is disobedience to an order.

16. ... The tribunal must be able to impose a sanction where there has been wilful disobedience to an order ...

17. But it does not follow that a striking-out order or other sanction should always be the result of disobedience to an order. The guiding consideration is the overriding objective. This requires justice to be done between the parties. The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience.

### **Conclusions**

26. The claimant was given a reasonable opportunity to make representations, either in writing or, if requested, at a hearing.
27. The claimant has failed to comply with orders of the Tribunal: the orders made on 27 February 2024 and 23 May 2024. There has been no compliance and no attempt at partial compliance. The claimant has not provided clarification in respect of the list of issues. There is no schedule of loss. There is no disability impact statement and has been no disclosure of medical records. Her position in respect of adding a complaint of unfair dismissal remains unclear. It is not possible to finalise the list of issues and deal with the issue of disability today, at what was listed to be a one day hearing to consider these issues. There has thus been significant disruption to the progress of the claim. Indeed, there has been no progress in any part of the claim since case management orders were made four months ago.
28. The claimant made clear by her email of 20 May 2024 that her failure to comply with the directions made on 27 February 2024 was deliberate and intentional. She also made clear that, at that stage at least, she intended to disregard them in future.
29. The claimant has made no applications since 27 February 2024 and has provided no evidence to substantiate what appears to be her position that she is too unwell to engage with the Tribunal or the respondent at all.
30. There is no less draconian alternative to strike out. There is no application for a revised timetable, and no reason to think that a revised timetable would be complied with. The claimant has not assisted the Tribunal to further the overriding objective and, in particular, has not co-operated with the respondent or with the Tribunal in order to progress her claim. Prolonging matters would be unfair to the respondent, imposing yet further costs upon them to no purpose. In the absence of co-operation from the claimant, there is no prospect of a fair hearing of this claim or of any part of it.

- 31. For these reasons I am also satisfied that the manner in which the proceeding have been conducted by the claimant is unreasonable, and that the claim is not being actively pursued.
- 32. The claim is therefore struck out.

***Tribunal Judge Andrew Jack***

**8 June 2024**

Judgment sent to the parties on:

14 June 2024

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For the Tribunal:

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**Note**

Reasons for the judgment were given orally at the hearing. Written reasons will not be provided unless a party asked for them at the hearing or a party makes a written request within 14 days of the sending of this written record of the decision.

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