



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110210/2021

Held via CVP (Cloud Video Platform) on 6 June 2024

Employment Judge: C McManus

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Ms J Gawelczyk

Claimant

No Appearance

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Carers Direct Ltd.

Respondent

Represented by:

Mr A Philp

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Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The claim is struck out under Rule 37 of the Rules contained in Schedule 1 of the
Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 on
the grounds that:-

- (i) the claim has not been actively pursued in terms of Rule 37(1)(c).
- (ii) the claim has not been actively pursued in terms of Rule 37(1)(d).
- (iii) the claim has not been actively pursued in terms of Rule 37(1)(e).

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REASONS

Background

1. The ET1 was submitted by the claimant herself on 25 June 2021. The complaint made was stated to be under sections 48(1), 44(1)(c), 47B(1) and 47 (1A) (*sic*) of the Employment Rights Act 1996 ('the ERA') (public interest disclosure ('whistleblowing') provisions). No detail of what was relied upon in that complaint was given in the ET1. On 28 June 2021 the claimant submitted to the Tribunal a 13 page attachment, stating that the file was 'too large' to submit on 25 June 2021. A summary of the significant background relevant to the strike out, now follows.
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2. The ET3 was received and a Case Management Preliminary Hearing ('CMPH') was scheduled to proceed via telephone conference call on 22 September 2021.
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3. On 20 September 2021 the claimant requested a postponement of that CMPH. With her request, the claimant provided a letter from NHS Highland's Kintyre Community Mental Health Team dated 20 September 2021, supporting the postponement on the grounds of the claimant's '*physical and mental health issues*'. The CMPH was postponed on the claimant's request and re-arranged for 2 November 2021.
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4. On 26 October 2021 the claimant requested a postponement of the CMPH scheduled for 2 November at hearing, due to '*chronic pain and my mental condition*'. The claimant provided certification of her being unfit for work. By letter from the Tribunal of 28 October 2021, the claimant was asked if there was a reason that she would be unfit to attend a phone call to discuss her claim. The claimant provided information in relation to her pain and new medication. In email from the Tribunal of 1 November 2021, parties were informed that postponement of the PH scheduled for 2 November 202 had been granted and the claimant was asked if she required any adjustments. The CMPH was re-scheduled for 30 November 2021.
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5. On 22 November 2021 the claimant requested postponement of the CMPH scheduled for 30 November 2021. That was refused. The CMPH took place via telephone on 30 November 2021. A Note was issued on 8 December 2021 summarising discussions at that CMPH and including a Case Management Order ('CMO'). As set out in that Note, it was decided that there
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would be a Preliminary Hearing ('PH') on time bar, with the issues for determination by the Tribunal at that PH being set out at paragraph 6 of that Note. As set out at paragraph 7 of that Note, the issue of whether the claimant had made a qualifying disclosure was reserved for the Final Hearing, should the outcome of the PH be that the claim be allowed to proceed. The PH on time bar was scheduled to take place via video on 25 April 2022.

6. On 11 March 2022 a reminder was sent by the Tribunal for the claimant's compliance with the CMOs. On 18 March 2022 the claimant requested an extension to comply with the CMOs. On 21 March 2022 the Tribunal granted the claimant's request for an extension to comply with the CMOs. The letter from the Tribunal of 21 March 2022 included:-

- Re-stating the issues for determination at the PH on 25 April 2022
- Confirming that only documents relating to the delay in the ET1 claim form being submitted should be relied on that PH, and that that may include medical evidence
- That the claimant may be able to seek legal advice from a CAB or Law Clinic
- That a Polish interpreter was booked for the PH on 25 April 2022, and what that interpreter's role would be
- That that PH would take place remotely by video, in line with the Road Map issued by the Presidents of the Employment Tribunals in England and Wales and in Scotland
- If the claim proceeds to a Final Hearing that that would be in person
- That the Employment Tribunal does not have jurisdiction to hear a complaint of personal injury
- That the claimant should advise the Tribunal whether she is fit to proceed with the claim, and if she is seeking to put the claim proceedings on hold, for how long.

7. On 14 April 2022 the PH scheduled for 25 April 2022 was postponed on the grounds of the claimant's health and because she had returned to Poland and there were difficulties in obtaining permission for her evidence to be given from Poland.
- 5 8. On 28 April 2022, the claimant's request that the proceedings be put on hold (sisted) was granted, until 28 July 2022.
9. On 4 August the Tribunal requested an update from the claimant, by 11 August 2022.
10. On 11 August 2022 the claimant requested that the proceedings be sisted for a further 3 month period. With that correspondence was a doctor's Statement of Fitness certifying the claimant as unfit for work for 3 months from 2 August 2022. The claimant had not complied with Rule 92 of the Employment Tribunals (constitution and Rules of Procedure) Regulations 2013 ('the Tribunal Rules'). Due to the sensitive nature of the information provided, that information was not copied by the Tribunal to the respondent's representative. The respondent's representative sought that information, on the basis that it was in line with the overriding objective in Rule 2 of the Tribunal Rules for them to know the basis for the claimant's request for a further 3 months sist, so that they could provide comment on that. The claimant was asked for her response to the respondent's position.
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11. On 29 August 2022 the Tribunal wrote to parties stating :-
- That a response was awaited from the claimant
 - The terms of Rule 2
 - *"In order that Employment Judge McManus can consider whether or not it would be in line with this overriding objective to further sist this case, the claimant is directed to provide medical evidence supporting her position that she is currently unfit. To take part in these proceedings. That may be a letter or other report from a treating medical practitioner. The medical evidence relied upon by the claimant should be provided to the Tribunal by 30 September 2022 and should*
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include an indication of when the claimant is likely to be able to be fit to continue these proceedings.

Taking into account that the medical report may contain sensitive content, if there is any part of the report which the claimant does not wish to be disclosed to the respondents representative, a redacted version should be supplied to the respondent's representative also copied to the Tribunal."

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12. On 30 September 2022 the claimant sent an email to the Tribunal, copied to the respondent's representative. That email began:-

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"After talking to my GP, I would like to inform you that the doctor did not decide to prepare a solemn conscience letter."

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In that email the claimant set out her position in relation to her poor mental and physical health, and the reasons for this. The claimant attached to that email an undated document purporting to be from a 'psychologist, psychotherapist' in Poland. That document was headed 'Information' and in 6 lines set out that the claimant had '*signed up for two psychological consultations*' in May 2022 and that her condition indicated that further diagnosis and urgent treatment was required. The claimant provided no medical evidence supporting her request for a further 3 month sist.

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13. On 28 October 2022 a strike out warning was sent to the claimant warning that EJ McManus was considering striking out her claim under the Tribunal Rules, in particular Rule 37(1)(c) on the grounds of non-compliance with the CMO and Rule 37(1)(d), on the basis that the claim was not being actively pursued. The claimant was directed to that if she disagreed then she should set out her reasons for disagreeing in writing by 12 February 2024, also stating if she requested a hearing so that her reasons could be put forward in person. The letter informed that if the claimant did not reply within the required timescale a decision would be made on strike out on the information available to the Tribunal.

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14. On 8 November 2022, following further correspondence with the parties, a CMO was issued on the claimant for production of documents and witness

statements for the PH on time bar. The PH on time bar was scheduled to proceed in person on 11 January 2023.

15. On 30 November 2023 the claimant sought that the PH be re-scheduled until after February 2323, on the basis that she would be undergoing surgery. The respondent objected to further postponement.

16. On 13 December 2023, the postponement request was refused, stating:-

“The Judge’s reasons for refusing the request are it is not in the interest of justice to postpone the listed preliminary hearing. The claimant has provided no medical vouching of why she is unable to attend the listed date, 11 January 2023, or why she can’t attend before 7 February 2023.”

17. On 9 January 2023 the respondent’s representative emailed the Tribunal, copied to the claimant, noting that the claimant had not complied with the CMOs of 8 November 2022 and had not replied to communications from the respondent’s representative. Given that a Polish interpreter was booked for the PH on 11 January, and given the claimant’s previous position, the respondent’s representative was concerned to ascertain whether the claimant would attend the PH on 11 January 2023. The respondent representative put the claimant or notice that they may seek expenses from her.

18. On 9 January 2023, correspondence was then sent to parties from the Tribunal, including the following:-

“If the claimant does not attend this Preliminary Hearing on time bar, in terms of Rule 47 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (‘The Tribunal Rules’) the claim may be dismissed or may proceed in the absence of the party. If the claimant does not attend this Preliminary Hearing, the Tribunal will not have the claimant’s evidence on her reasons why the claim was not lodged with the Employment Tribunal within the statutory time period.

This Preliminary Hearing will not be postponed at the claimant’s request unless on the basis of medical evidence that the claimant is unable to attend. If the claimant seeks to rely on any medical evidence and wishes to renew

her application for postponement of the preliminary hearing on that basis, she should do so ASAP.

It is noted that the claimant has provided no responses to the Case Management Orders issued on 8 November 2022 and has provided no explanation for this failure. If the claimant no longer seeks to pursue this claim before the Employment Tribunal, she should notify the Tribunal Office and the respondent of this as soon as possible.”

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19. On 10 January 2023 the claimant replied to the Tribunal (not copied in compliance with Rule 92). No medical evidence was provided. Email correspondence was sent to the parties converting the PH to proceed by telephone conference call and confirming that the only evidence which the Tribunal would hear at that PH would be on the claimant's reasons for not having lodged the claim sooner, and what she was able to do within the period when the claim ought to have been submitted.

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20. On 11 January 2023 the PH on time bar was part heard, with proceedings as summarised in the Note of Proceedings issued on 24 January 2024. As referred to at paragraph 22 of that Note, an issue arose in relation to the claimant having received legal advice on her claim, prior to her submission of the ET1. As that may be significant to the determination of the time bar issue, exchange of relevant documents was agreed. The PH was continued to 21 and 22 February 2023, with a Polish Interpreter being again booked for that PH. Paragraph 24 of that Note states:-

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“If it is the claimant's position that she is unfit to continue with these proceedings at the present time, she should provide medical evidence of her position, e.g. a letter from her GP confirming her medical situation, proof of prescribed medication or a letter showing or in respect of any recent or ongoing medical treatment.”

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21. On 16 February 2023 the respondent's representative made an application for strike out of the claim, to be dealt with as a preliminary matter at the PH on time bar. In summary, the grounds of the strike out application were:-

- The claimant's failure to comply with CMOs of:-

- 6 December 2021
- 8 November 2022
- 25 January 2023

- The claimant's failure to comply with directions from the Tribunal of:-

- 5
- 3 February 2022
 - 11 March 2022
 - 4 August 2022
 - 29 August 2022
 - 5 October 2022

10 22. On 16 February 2023 parties were informed by the Tribunal that the respondent's strike out application would be dealt with as a preliminary matter at the PH on 21 – 22 February 2023. That letter included:-

15 *“Both parties should prepare to make representations to the Tribunal at that Preliminary Hearing on whether the claim should be struck out, for the reasons relied upon by the respondent's representative in their letter to the Tribunal of 16 February 2023, or not. Both parties are referred to the terms of Rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ('the Tribunal Rules').*

20 *The claimant is reminded of her duty under Rule 2 of the Tribunal Rules to cooperate with the Tribunal and the respondent's representative.*

The claimant should liaise with the respondent's representative as soon as possible with regards to the documents to be included in the bundle for the Preliminary Hearing. Only documents relevant to the issues to be determined at that preliminary hearing should be included in that bundle.”

25 23. On 20 February 2023, the claimant contacted the Tribunal office by telephone saying that she was unfit to attend the PH on 21 and 22 February 2023. The letter from the Tribunal to parties sent in response included:-

“Employment Judge McManus is concerned that the claimant may not be fit to participate in the scheduled Preliminary Hearing. If the claimant is not fit to participate, she should contact the Tribunal (copied to the respondent’s representative) as soon as possible. It may not be necessary for medical evidence confirming that the claimant is unfit to participate in this hearing to be sent with any such adjournment request, but if an adjournment is sought, an indication should be given of when medical evidence can be provided to support that application, and from whom (e.g. GP letter).”

24. On 21 February 2023, postponement of the PH arranged for 21 and 22 February 2023 was granted, on the grounds of the claimant’s incapacity. In the Tribunal’s letter to parties granting that postponement, it was stated that the pressures on the NHS were taken into account (in respect of the parties’ positions on the provision of medical evidence). That letter included:-

“The claimant should, however, obtain a report from her GP. The claimant should now write to her GP in the following terms. :-

“I have brought a claim before the Employment Tribunal. Hearings in respect of this claim have been postponed because I have been unfit to participate in them. The Employment Judge has now asked me to write to you in these terms and to ask you to provide a report setting out your view on when I would be likely to be fit to participate in these Tribunal proceedings. I am unrepresented. My participation will include preparing my case, liaising with the solicitor acting for my former employer, identifying documents relevant to the preliminary issues, giving evidence before the Tribunal, answering questions from the Employment Judge, requiring to answer cross examination questions from my former employer’s solicitor, as relevant to the issues which are for the Tribunal’s determination, and complying with any directions or Orders given by the Tribunal.

Although normally the hearings would be in person, the Tribunal has allowed the hearing to take place via video, so I can participate from my home, so long as I have a secure and reliable internet connection and can be seen and heard without issue.

Can you please provide a letter setting out your views on when I would be likely to be able to participate in a Hearing in this case?"

*The claimant is asked to provide the Tribunal with an update by **no later than 13 March 2023.**"*

- 5 25. On 27 February 2023 the claimant provided email correspondence indicating that a request was sent to her GP practice. The claimant subsequently provided to the Tribunal (but not the respondent's representative) a letter from Dr Norrie at Campbelltown Medical Practice, dated 10 March 2023. Due to the sensitive personal information contained in that letter, that letter was not
- 10 forwarded by the Tribunal to the respondent's representative.
26. On 15 March 2023 a letter was sent to the parties from the Tribunal. That letter included :-
- 15 • Noting that in his letter to the Tribunal dated 10 March 2023, Dr Norrie confirms that the claimant is currently unfit to participate in these Tribunal proceedings.
 - The claimant being asked to inform the Tribunal if she gives consent for Dr Norrie's letter of 10 March 2023 being forwarded to the respondent's representative by the Tribunal.
 - 20 • That the claimant had disclosed in her email to the Tribunal of 13 March 2023, which was copied to the respondent's representative, that she has appointments for psychotherapy in April and May 2023.
 - That it is considered to be in line with the overriding objective in Rule 2 of the Tribunal Rules for these proceedings to be put on hold until 5 June 2023.
 - 25 • That after her psychotherapy sessions, but before 5 June 2023, the claimant should provide the Tribunal and the respondent's representatives with an update, including. Add indication of when the claimant would be likely to be fit to participate in the tribunal proceedings.

- That it would be helpful if with that update a report is provided by the claimants treating psychotherapist to indicate when the claimant will be likely to be fit to participate in these proceedings.

5 27. On 13 June 2023, the claimant sent an email to the Tribunal (copied to the respondent's representative). The claimant stated in that email that she was due to have a medical procedure on 5 July 2023 and she referred to a criminal hearing due to proceed on 17 July 2023.

10 28. On 16 June 2023, correspondence was sent to the parties by the Tribunal. The claimant was asked to provide the Tribunal and the respondent's representative with a copy of documentation confirming the date and nature of her medical procedure on 5 July 2023 and the date of the criminal hearing. The claimant was asked to give an indication of when she would be likely to be able to fit it to engage in these proceedings, on the basis that the PH on time bar may be fixed in the period September to November 2023.

15 29. On 28 June 2023, correspondence was sent to the parties from the Tribunal informing that:-

- The continued PH would take place remotely via video on 1 & 2 November 2023
- CMOs were issued for specification, disclosure of documents and information and for preparation of the Joint Bundle for the PH.

20 30. On 15 September 2023, the CMO of 28 June 2023 was varied in respect of the compliance date for call 10 of that CMO.

25 31. On 21 September 2023 the claimant sent an email to the Tribunal (not copied to the respondent's representative) asking that documents from the Tribunal be sent to her translated into Polish.

32. On 28 September 2023, correspondence was sent from the Tribunal to the claimant (copied to the respondent's representatives) in the following terms:-

“Employment Judge McManus notes that Case Management Orders were issued in this case on 28 June 2023. This was to ensure preparation for the

Preliminary Hearing scheduled to take place on 1 & 2 November by video link (using the Cloud Video Platform 'CVP'). Employment Judge McManus is concerned that it was only in her e-mail of 21 September 2023 that the claimant requested a translation of the Case Management Order.

5 *The administrative function of the HM Courts and Tribunals Service has now informed that a translation may be obtained. The cost of the translation service may require to be made by the individual requiring the translation. A price is being obtained from the translation service.*

10 *The Case Management Order set out certain compliance dates (dates when things had to be done by). Employment Judge McManus notes that some of those dates have now passed. In all the circumstances. EJ McManus is now drafting an amended Case Management Order with revised dates when certain things have to be done by, and setting out the reasons for the issue of the Case Management Order. It is that new Case Management Order which*
15 *should be translated. This will be sent to the translation service, who will then inform of the cost of that translation and parties will then be informed.”*

33. On 17 October 2023, a CMO was issued in similar terms to the CMO of 28 June 2023, but with revised compliance dates and with Reasons. Those reasons included setting out the basis of the respondent's representative's
20 application for strike out of the claim. The reasons concluded at paragraph 16, which stated:-

25 *“The claimant is reminded that the hearing scheduled to take place via video (using the Cloud Video Platform ('CVP')) on 1 & 2 November 2023 is a Preliminary Hearing on (1) the respondent's application for the claim to be struck out (2) time bar. It is not a hearing on the full merits of the claim. The information sought in the Case Management Order above re specification of the 'whistleblowing' claim is so that the decisions can be made properly taking into account the balance of prejudice to each party.”*

34. On 24 October 2023, correspondence was sent from the Tribunal to the
30 claimant (copied to the respondent's representatives) informing that the claimant would be required to pay for the translation of the CMO issued on 17

October 2024, if she required it. That correspondence was sent following the decision by administration that HMCTS would not cover the cost of this translation, in circumstances where the proceedings had been ongoing for over 2 years, where a large amount of correspondence had been sent to the claimant from the Tribunal, including CMOs, and the claimant had not previously made any request for translation. The letter stated that there may be an option to translate online e.g. Google Translate, although the Tribunal could not verify the accuracy of any such translation. In a separate letter also sent to parties on 24 October 2023, the claimant was reminded that her compliance with the CMO remained outstanding.

35. On 27 October 2023 the PH scheduled for 1 & 2 November 2023 was postponed and parties were written to in the following terms:-

“Although Employment Judge McManus appreciates the position in the respondent’s representatives e-mail objecting to the claimant’s application for postponement, she takes into consideration that the outcome of the Preliminary Hearing (PH) may be that the claimant’s claim is struck out. In the interests of justice it is considered to be very important that the claimant appreciates that possible consequence and is fit to participate in the PH. It is noted that EJ McManus’ own observations from the adjourned PH were that the claimant was not fit to participate at that time and that the claimant’s position is that her condition has not improved since then. The claimant has certification that she is unfit for work.

Employment Judge McManus’ decision is that it is in the interests of justice to postpone the continued preliminary hearing scheduled for 1 & 2 November 2023. That continued preliminary hearing is rescheduled for 19 and 20 February 2024. An amended version of the most recent Case Management Order will be issued, changing the dates in the Orders.

Separately, Employment Judge McManus notes the claimant's position in her application for a postponement is that she hurt her knee at work. The claimant’s claim before the Employment Tribunal does not relate to alleged physical injury at work. If the claimant considers she has been injured at work due to the respondent's fault, she should take legal advice on a personal injury

claim. The Employment tribunal cannot give legal advice. The hearing arranged for 1 & 2 November 2023 has therefore been cancelled.

The hearing has been relisted for 19 and 20 February 2024. A notice of hearing is enclosed.”

5 36. On 28 November 2023 revised CMOs were issued, in the same terms as previously, but with revised compliance dates and at paragraphs 13 and 16 of the Reasons, to take into account that the PH had been postponed, to proceed on 19 & 20 February 2024. The correspondence sent from the Tribunal to the claimant (copied to the respondent’s representatives) included the revised CMO and stated:-
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“The claimant should ensure that she is aware of the terms of the attached. It is understood that the claimant will obtain a translation. Free translation services may be available online. The Employment Tribunal cannot confirm the accuracy of any such translation.”

15 37. The claimant did not comply with the CMO.

38. On 30 January 2024 a strike out warning was sent to the claimant warning that EJ McManus was considering striking out her claim under the Tribunal Rules, in particular Rule 37(1)(c) on the grounds of non-compliance with the CMO and Rule 37(1)(d), on the basis that the claim was not being actively
20 pursued. The claimant was directed to that if she disagreed then she should set out her reasons for disagreeing in writing by 12 February 2024, also stating if she requested a hearing so that her reasons could be put forward in person. The letter informed that if the claimant did not reply within the required timescale a decision would be made on strike out on the information available
25 to the Tribunal.

39. On 31 January 2024 and 14 February 2024 the respondent’s representative sent to the Tribunal and the claimant an email with attached document setting out their updated submissions on their application for strike out of the claim.

40. On 16 February 2024, the PH scheduled for 19 – 20 February was postponed
30 at the respondent’s representative’s request, on the basis that a period of 4

weeks would enable parties to resolve their dispute by agreement. The respondent's representative's request, the proceedings were sisted (put on hold) until 15 March 2024.

5 41. On 15 March 2024, the respondent's representative emailed the Tribunal office (copied to the claimant) informing that they had had no contact from the claimant since 16 February 2024 and seeking that the claim now be struck out, or that the continued PH on strike out and time bar be rescheduled.

42. The continued PH was rescheduled to proceed via video on 6 & 7 June 2024.

10 43. On 30 May 2024, following further correspondence from the respondent's representatives, a letter was sent from the Tribunal to parties setting out what would be considered by the Tribunal at the continued PH. That letter informed that at the continued PH there would be consideration of possible strike out of the claim under Rule 37 (b) (c) and (d), because –

15 - The claimant has not complied with the Orders issued by the Tribunal (as set out by the respondent's representative in their letter of 16 February 2023 and letter of 7 May 2024 and updated submissions of 14 February 2024).

- The manner in which the proceedings have been conducted by the claimant has been unreasonable

20 And / or

- That the claim has not been actively pursued by the claimant.

That letter included:-

25 “The claimant has not yet provided any comment on the respondent's representative's application for strike out. The claimant has the opportunity to provide in writing comments on the respondent's representative's application for strike out, if she wishes to do so. Any written comments from the claimant on the strike out application should be provided to the Employment Tribunal and copied to the respondent's representative **by 12 noon on Wednesday, 5 June 2024.**”

44. On 27 May 2024 the claimant sent an email to the Tribunal (not copied to the respondent's representative) setting out the personal circumstances which she relied upon.

45. On 5 June 2024 the claimant sought postponement of the PH scheduled for 6 and 7 June 2024. Correspondence was sent to parties by the Tribunal in the following terms:-

"The claimant's email sent to the Tribunal on 5 June 2024 was not copied to the respondent's representative. The claimant has been told by the Tribunal office on numerous occasions that correspondence sent by her to the Tribunal office must be copied to the respondent's representative, in compliance with Rule 92 of the of the Employment Tribunal (Constitution and Procedure) Regulations 2013 ('the Tribunal Rules')."

As this case has been ongoing for some time, and is scheduled for a Hearing on 6 & 7 June 2024, the claimant's email and attachments are now forwarded to the respondent's representative.

The Hearing scheduled for 6 & 7 June 2024 is a Preliminary Hearing to on (1) Strike Out (2) Time Bar. At that Preliminary Hearing, there will be a determination of whether the claim should be struck out, for the reasons set out in correspondence previously sent to the claimant (most recently on 30 May 2024). Before the decision is made, the claimant would be given the opportunity to state her position in respect of the strike out application.

If the claim is not struck out, there will then be evidence heard relevant to the issue of time bar. The decision on whether or not the claim is time barred would be issued thereafter.

The claimant has provided with her email:-

- *Copy Statement of Fitness for work dated 22/5/2024, certifying that the claimant is not for work for 3 months, due to 'Depressive disorder NEC / chronic knee pain (awaiting knee replacement)'.*

- Copy letter dated 18 May 2024 re breast screening appointment at Campbelltown Hospital at 15.43 on Thursday 6 June 2024.
- Copy letter dated 28 May 2024 from NHS Highland asking the claimant to make contact to arrange an appointment at the Chronic Pain Management Service Clinic.

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These are now forwarded to the respondent's representative.

In her email to the Tribunal of 5 June, the claimant seeks cancellation of the Hearing on 6 June. It is noted that:-

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- *The claimant has not provided any evidence of her having requested that her Breast Screening appointment be changed*
- *The claimant has not stated why she has not contacted the Tribunal before today to request cancellation of the 7 June date (given that the letter informing her of that date is dated 18 May 2024.*
- *The claimant has provided no medical report setting out that she is unfit to attend the Preliminary Hearing*
- *The claimant has provided no evidence on the matters relied on by the respondent in their strike out application.*

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In all the circumstances, EJ McManus is not minded to cancel the Preliminary Hearing. It will proceed, as arranged, via video on 7 and 8 June 2024. If the claimant does not attend the arranged Hearing, the respondent's application for strike out will be considered in her absence. That matters taken into account in that consideration would then include the fact of the claimant's non-attendance on 6 June."

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46. On 5 June 2024(at 10.59am) an email was sent to the parties from the Tribunal with the details for to join the video PH on 6 June 2024. That email included the web browser link to join the PH and guest PIN details. It stated that these were for the hearing at 10am the following day (6 June 2024).

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47. On 6 June 2024, at 9.49am, the claimant sent an email to the Tribunal stating:-

"Today I have a phone appointment with the doctor between 11am and 12:15.

I would like to ask, if possible, to postpone the hearing to 12:30 or 1 p.m.

5 *I have a video app on my phone and if I'm connected, I'll be able to receive calls from the doctor."*

48. That email was not copied to the respondent's representative, but at 9.53am the email was sent again to the Tribunal office, copied to the respondent's
10 representative. An email reply was sent to parties from the Tribunal informing that the claimant's request was refused and that the PH would commence at 10am. That email was sent from the Tribunal at 10.04am.

49. At 10.12am the claimant sent an email to the Tribunal stating:-

'ok.

15 *I understand.*

I'm waiting for phone.'

50. There was no appearance by or on behalf of the claimant at the PH on 6 June 2024.

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51. At 10.25am on 6 June 2024 an email was received by the Tribunal from the claimant stating

"I'm waiting for phone contact.

25 *My application in phone is ready*

but I haven't pin to the connect.

I don't know what to do know."

52. The PIN for the PH video hearing had been sent to the claimant in email of 5
30 June 2024.

53. At 10.58am an email was sent to parties informing the claimant that the PH had proceeded in her absence and the respondent's representative's strike out application had been granted. That email informed that written reasons

would be issued and the claimant would have the opportunity to appeal the decision.

Respondent's Application for Strike Out

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54. The respondent's application for strike out of the claim is set out in their letters to the Tribunal of 16 February 2023 and 7 May 2024, and in their updated submissions of 14 February 2024. These have all been provided to the claimant, who has provided no comment on them.

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55. In their application for strike out made on 16 February 2024, the respondent relies on the claimant's failure to comply with :-

1. Order of 6th December 2021 to provide further particulars of her claim by 30th January 2022
- 15 2. Order of 6th December 2021 to provide a Schedule of Loss by 30th January 2022
3. Direction of 3rd February 2022 to provide dates to avoid by 10th February 2022
4. Order of 11th March 2022 requiring the claimant to comply with the
- 20 Orders of 6th December 2021 by 21st March 2022
5. Direction of 4th August 2022 requiring the claimant to provide dates to avoid and update the Tribunal on her health issues.
6. Direction of 19 April 2024 requiring the claimant to provide further particulars by 3 May 2024.

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56. In their application for strike out made on 7 May 2024, the respondent relies on the claimant's failure to actively pursue the claim and the claimant's failure to comply with :-

1. Order of 6th December 2021 – to be complied with by 30th January 2022
- 30 2. Order of 26th June 2023- by 13th September 2023
3. Order of 3rd October 2023- by 13th October 2023
4. Order of 28th November 2023- by 15th January 2024
5. Order of 22nd January 2024- by 29th January 2024
6. Strike out warning issued on 28 October 2022
- 35 7. Strike out warning issued on 30 January 2024 – with response required by 12 February 2024
8. Direction to provide further particulars on 19 April 2024 – by 3 May 2024

57. The respondent's representative relied on the following case authorities:-

- *Anghel v Middlesex University 2022 EAT 176*
- 5 - *Royal Bank of Scotland plc v Theobald 2007 EAT 444*
- *Ian Pearce v Bank of America Merrill Lynch*
- *Bliss Residential Care Ltd v Fellows 2003 EAT 8*
- *Smith v Tesco Stores Ltd 2023 EAT 11*
- *Emuemukoro v (1) Croma Vigilant Scotland Ltd (2) Miss C Higgins*
10 *and Others Data Care*

Decision

58. I issued my Judgment orally at this PH that, on the application of the
15 respondent the claim is now struck out under Rule 37 of the Rules contained
in Schedule 1 of the Employment Tribunals (Constitution and Rules of
Procedure) Regulations 2013.

59. Subsequent to that oral judgment, I was informed by administration that the
20 claimant further emailed the Tribunal (at 10.12am and 10.25am, as set out
above). The claimant had received Notice of the PH, including joining
instructions, and did not attend. The claimant's email to the Tribunal sent at
9.49am on 6 June indicates that the claimant was aware that that the PH was
due to proceed by video. The claimant gave no indication of not having the
25 joining instructions for the video PH until her email received at 10.12am on 6
June 2024.

60. I made my decision in accordance with the overriding objective in Rule 2 of
the Tribunal Rules. In accordance with *Baber v RBS plc* 0301/05 EAT, I
considered the magnitude of the claimant's non-compliance with the CMOs
and whether it was proportionate to strike out, or consider some other action.
30 I accepted the respondent's representative's submission that in all these
circumstances it was proportionate for the claim to be struck out.

61. In the circumstances set out in the 'Background' section above, the claim is
struck out for the following reasons:-

Rule 37(b) – Non compliance with Case Management Orders

62. The claimant has been given significantly extended opportunities to provide information and documents to the respondent's representative, as required in the issued CMOs, and has not done so. The claimant has been provided with the reasons why compliance with the CMOs is necessary and has provided no comment on those reasons. The claimant has provided no recent medical evidence to explain why she has not complied with the CMOs.

Rule 37(c) – The manner in which the proceedings have been conducted by the claimant has been unreasonable

63. The claimant has repeatedly requested postponement of a Hearing, shortly before that Hearing was due to commence. In particular, as set out in the letter to parties from the Tribunal of 30 May 2024, the claimant made a late request for postponement of the PH scheduled for 6 & 7 June 2024, with reliance on information that appeared to have been in her knowledge at an earlier date and without any explanation as to whether she had sought to make alternative arrangements or why the postponement request had not been made previously. The claimant subsequently did not provide any response to the position set out in that letter of 30 May 2024.

64. In all the circumstances, I accepted the respondent's representative's reliance on Rule 37(1)(c), as set out in the application for strike out and supporting submissions.

Rule 37(d) – The claims have not been actively pursued

65. Other than in relation to requests for postponement, since the PH on 11 January 2023 the claimant has taken no steps to contact the Tribunal in pursuit of her claim.

66. In the circumstances narrated in the 'Background' section above, I have decided that the claim has not been actively pursued by the claimant.

General

67. For the avoidance of any doubt, the decision to strike out the claim is made separately in relation to each subsection of Rule 37.

68. In furtherance of the overriding objective in Rule 2 of the Tribunal Rules, I require to avoid delay and to consider the position of both parties.

5 69. I must take into account the balance of prejudice to the parties. On the face of it, the whistleblowing claim brought by the claimant in her ET1 is likely to be timebarred. On the basis of the information discussed at the PH on 11 January 2023, it appears that the claimant had received legal advice in relation to the matters relied on in this claim. Taking that into account, it is
10 likely that if this claim were to proceed to a continued PH on time bar then the outcome would be that the claim would be found to be timebarred.

70. I have taken into account the claimant's position on her personal circumstances as set out in her email to the Tribunal of 27 May 2024.

15 71. I require to balance the interests of both parties. The claim has been ongoing since 2021 and there has been no indication from the claimant of her intention to comply with the issued CMOs, or when she would be able to do so.

72. I have taken into account that after 10am on 6 June 2024 the claimant sent an email to the Tribunal office with her position that she would take part in the PH. The claimant was not present on the video PH. Call 7 of the issued CMO
20 required the claimant to take part in a CVP test. No steps were taken by the claimant to take part in this test or to check the joining details for the video PH.

73. The respondent's representative's position as set out in their emails of 16 February 2023 and 7 May 2024 and in their updated submissions of 14
25 February 2024 are accepted. Other than to rely on her personal circumstances, the claimant has provided no comment on the respondent's representative's application for strike out, and has been given opportunity to do so. In her claim the claimant relies on events alleged to have occurred in 2020. Given the period which has elapsed since that time, and the
30 respondent's turnover of staff, there is a risk that there may not now be able to be a fair hearing in this case.

74. I was satisfied that in the circumstances narrated in the 'Background' section above, had the claimant appeared at the PH, no significant progress would have been made in respect of the claimant's compliance with the CMOs. In all the circumstances, I accepted the respondent's position as set out in the applications for strike out and updated written submissions.

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Employment Judge: C McManus
Date of Judgment: 10 June 2024
Entered in register: 11 June 2024
and copied to parties

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