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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000861/2024

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Heard by CVP on 3 September 2024

Employment Judge E Mannion

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Miss S Stephen

**Claimant
In person**

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GSR Nursing Limited

**Respondent
Represented by
Ms McKenzie
Lay Representative**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The respondent's application for strike out of the claim under Rule 37 is granted.

REASONS

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1. The claimant lodged a claim for unpaid holiday pay on 18 June 2024, stating that during her employment with the respondent from 2015 to February 2024, she did not receive holiday pay. Specifics as to the amount of holiday pay due and owing were not provided at that time. The respondent disputed the claim noting that the claimant received rolled up holiday pay from 2015 until 2023 at which point the respondent's holiday pay method changed from rolled up payments.

2. In the claimant's last salary payment on 28 February 2024, the claimant received £82 for accrued but untaken annual leave. On 2 September 2024, the respondent paid a further £451.03 to the claimant in outstanding annual leave payments.

5 **Application for strike out**

3. On the 2 September 2024, the respondent made an application by email to have the claim struck out under Rule 37 found in Schedule 1 of Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the ET Rules"). The claimant was copied into this application.
- 10 4. The application argued that the claim should be struck out on the following grounds:
- a) That the claim was scandalous or vexatious or has no reasonable prospect of success (Rule 37(1)(a));
 - b) Non-compliance with the Tribunal's orders (Rule 37(1)(c)); and/or
 - 15 c) It was no longer possible to have a fair hearing (Rule 37(1)(e)).
5. The application included a brief submission on the three separate grounds. In relation to Rule 37(1)(a), the respondent submitted that they conceded that further holiday pay was due to the claimant, that this amounted to £451.03 and that it had been paid that day, being 2 September. Any further litigation of the claim was therefore vexatious and/or had no reasonable prospect of success. In relation to Rule 37(1)(c) the respondent stated that the claimant failed to comply with orders relating to the preparation of the joint bundle and the exchange of witness statements. In relation to Rule 37(1)(e) the respondent submitted that the failure to comply with the above orders impacted on the respondent's ability to prepare for the case and in the absence of documents the claimant wished to rely on or the claimant's witness statement, a fair hearing was no longer possible.
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6. The submission argued that it was consistent with the overriding objective for the claim to be struck out.

7. On the afternoon of 2 September 2024, the claimant emailed the Tribunal, copying in the respondent. The email was entitled Re: LS114082 8000861/2024 Urgent Application for Strike Out. Although it did not explicitly state that the claimant was objecting to the strike out application, the email stated that the claimant believed the unpaid holiday pay from May 2019 to February 2024 amounted to £6,721.92 rather than £451.03. The figures were based on an entitlement of 5.6 weeks per year and the claimant chose particular months from that year to calculate the average weekly pay for the holiday year.

Hearing the application

8. As a final hearing was scheduled to take place on 3 September 2024, the Tribunal directed that the strike out application would be considered at the outset of the hearing and that both parties would be given the opportunity to make full representations.

Law

9. A Tribunal is required to have regard to the overriding objective, found in the Rule 2 of the ET Rules. The overriding objective states as follows: *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.

5 10. The strike out provisions are set out in Rule 37 of the ET Rules which states:

(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—

- 10 a) *that it is scandalous or vexatious or has no reasonable prospect of success;*
- 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;*
- 15 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)*

20 11. When considering an application for strike out under rule 37(1)(a) the statutory wording must be considered. Vexatious is where a claim or defence is not pursued in order to resolve the legal dispute between the parties, but instead to harass the other side and use the court process to this end. If it is found that vexatious conduct has been found, the Tribunal must consider if a
25 fair hearing is still possible.

12. Where a strike out application is made on the ground of no reasonable prospects of success the Tribunal must take a view on the merits of the case and only where satisfied that the claim or response has no reasonable prospects of success can it exercise its power to strike out.

30 13. Strike out where there has been noncompliance with Tribunal orders (rule 37 (1)(c)) requires the Tribunal to make a proportionate decision and as per Weir

Valves and Controls (UK) Limited v Armitage [2004] ICR 371 requires consideration of '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 possible'.

- 5 **14.** The EAT held that the striking out process requires a two-stage test in **HM Prison Service v Dolby** [2003] IRLR 694, and in **Hassan v Tesco Stores Ltd** UAEAT/0098/16. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the Tribunal to decide as a matter of discretion whether
- 10 to strike out the claim.

Rule 37(1)(a)

15. In brief, Ms McKenzie submitted that when preparing for the hearing, the respondent became aware of a shortfall in holiday pay to the claimant, primarily from the 2023/2024 holiday year. I was referred to a breakdown of
- 15 the amounts owing from 2018/2019 through to 2023/2024 with a detailed spreadsheet for each year setting out the hours worked, the rate of pay (both hourly rate and holiday rate when rolled up pay was paid) and any discrepancy. This shortfall amounted to £451.03. The claimant was informed of this approximately 10 days prior to the hearing along with a breakdown of
- 20 the amount. Ms McKenzie submitted that the claimant disputed this was the total amount owing but did not provide any evidence to the respondent showing a higher amount was due. She also submitted that the calculations used by the claimant were based on the holiday entitlement for a full time worker and were in any event incorrect. Ms McKenzie submitted that from
- 25 that point, in or around 10 days prior to the hearing, the claimant began to act in a vexatious manner by continuing to litigate the case in the absence of evidence that monies over and above the £451.03 were due and owing to her.

16. Ms McKenzie also submitted that there was no reasonable prospect of the
- 30 claimant succeeding with her claim. She pointed to the claimant's contract of employment and induction materials which outlined that the respondent

operated a rolled up holiday pay process, and a pay sheet setting out the hourly rate and holiday rate. The pay rate changed in or around 2023 and the respondent paid holidays at the time they were taken. No further monies other than the £451.03 that had been paid were due to the claimant.

5 17. In brief the claimant submitted that she was not acting vexatiously but instead was trying to enforce her rights and get what she was entitled to.

18. The claimant submitted that she believed she was owed more than the amount the respondent came to and that the figure of £6,721.92 was an estimate of the total amount owed. She stated that she didn't have access to
10 all her payslips and so used her bank statements to calculate this amount. This was described as an estimate of what was due to her. She said that her payslips do not show what was her hourly rate and what amount was for holiday but does accept a rolled up system of holiday was operated until some date in 2023. She was provided with copies of the breakdown of the amount
15 provided by the respondent but felt there was not much she could do with this in the absence of payslips. It was put to her that the calculation she used in her email of 2 September was not correct and she had no response to this. She confirmed that she was a zero hours worker and stated the reason she resigned is that she was not getting enough hours of work from her employer.
20 It was also put to the claimant that, even when taking her case at its highest, there were restrictions on how far back she could claim in unpaid wages. She submitted in response that she always thought she was getting paid correctly until she spoke with other employees at the end of 2023.

Rule 37(1)(c)

25 19. In relation to the failure to comply with Tribunal Orders, the respondent made reference to witness orders and orders in relation to the joint bundle. On further discussion, it was noted that witness orders had not been granted and rather than a Tribunal Order regarding the bundle, the respondent was basing
30 this on the standard directions contained in the Notice of Hearing. In any event, the claimant submitted that she provided documents on 31 July and

had no further documents to add to the bundle. She also submitted that she provided witness statements on 31 August.

Rule 37(1)(e)

- 5 20. The respondent submitted that the lack of cooperation from the claimant on documents and witness statements, impeded the ability of the respondent to prepare for the hearing and so a fair hearing was not possible. The claimant submitted that she too was impeded in her preparation because she did not have access to all of her payslips from the respondent.

Decision

- 10 21. Having regard to the caselaw and the submissions made by the parties, I am striking out this claim under Rule 37(1)(a) on the basis that there is no reasonable prospect of success. I do not find that the claimant acted vexatiously at any point. I note that the claimant was paid £82 for holiday pay when her employment ended and has been further paid £451.03 as of the 2
15 September. This figure represents a shortfall in pay primarily from the 2023/2024 holiday year but also in the years 2018-2024. It was accompanied by a detailed breakdown setting out the hours worked, rates of pay and any discrepancies for each week of each year to date. This was not challenged. The claimant did not dispute that the respondent operated and paid rolled up
20 holiday pay from the start of her employment until some point in 2023. The calculations she was relying on to present her alternative amount were incorrect. I took into account that the claimant is a litigant in person and not legally qualified.
22. In light of the circumstances set out above and the case law, and having
25 regard to the terms of the overriding objective, I am satisfied that it is appropriate for me to strike out the claim on the basis that there is no reasonable prospect of success.
23. As I am striking out the claim under Rule 37(1)(a), I am not making a decision under Rule 37(1)(c) or 37(1)(e).

**Employment Judge: E Mannion
Date of Judgment: 6 September 2024
Entered in register: 9 September 2024
and copied to parties**

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