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## THE EMPLOYMENT TRIBUNALS

**Claimant:** Ms W Phillip

**Respondent:** De Vere Care Ltd

**Heard at:** East London Hearing Centre

**On:** 6 June 2018

**Before:** Employment Judge Scott

### Representation

**Claimant:** Did not attend and was not represented

**Respondent:** Mr Malik, Trainee Solicitor

## PRELIMINARY HEARING JUDGMENT

The Claimant's claim is struck out under Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 for non-compliance with Tribunal orders and/or failure to actively pursue the claim.

## REASONS

1. Oral reasons were given at the end of the hearing. As the Claimant did not attend and was not represented, these written reasons have been produced.
2. When the Claimant did not attend today, I checked that the notice of hearing was sent by email to the correct email address for the Claimant. It was. The Claimant has not contacted the Tribunal or the Respondent since that notice was sent by email. I asked the Tribunal Clerk to telephone the Claimant at approximately 10:25am this morning, having waited a reasonable period to see if the Claimant was running late. The clerk advised me that the Claimant's telephone was not ringing. I asked the clerk to email the Claimant to which no

reply was received and I asked the clerk to call the Claimant again at 10:45am, but the clerk advised me that the telephone was still not ringing. I determined that it was appropriate to hear the Respondent's application, given that the notice of hearing had been sent to the Claimant by email to the correct email address.

### Issues

3. The Respondent made an application to strike out the Claimant's claim by letter dated 15 May 2018, copied to the Claimant. The Respondent applied to strike out the Claimant's claim under Rules 37(1) (c) and/or (d) and/or (e) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('ET Regs 2013). Judge Burgher vacated the final hearing listed for hearing on 6-8 June in response to the Respondent's application for strike out and directed that the matter be listed for preliminary hearing today to consider the Respondent's application.

### The relevant law

4. Rule 37(1) of the ET Regs 2013 provides (in so far as material) that at any stage of the proceedings the Tribunal may strike out all or part of a claim on any of the following grounds:

*(c) for non-compliance 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....*

5. I must consider whether any of the grounds are established and, if so, whether to exercise my discretion to strike out, given the permissive nature of the rule (*Hasan v Tesco Stores Ltd UKEAT/0098/16*). Mrs Justice Cox commented in *Ridsdill and others v Smith and Nephew Medical UKEAT/0704/05* (paragraph 25) that strike out is a "draconian measure" which ought to be applied only as the final tool in the range of sanctions open to a Tribunal.

6. In deciding whether to strike out a party's case for non-compliance with an order, a tribunal will have regard to the Overriding Objective set out in Rule 2 of the ET Regs 2013 of seeking to deal with cases justly. This requires consideration of a number of relevant factors, including the magnitude of the non-compliance, whether the default was the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused, whether a fair hearing would still be possible and whether striking out or some lesser remedy would be an appropriate response. It must also consider whether a strike out order is a proportionate response to the non-compliance.

7. In *Rolls Royce plc v Riddle [2008] IRLR 873*, the EAT struck out the Claimant's claim on the basis of his intentional and contumelious default. The Claimant had, the EAT said, shown a 'persistent disregard for the Tribunal, its procedures and the Respondent's interests'.

### The proceedings to date/facts

8. By claim form presented on 11 December 2017, the Claimant alleged

that she was required to work in breach of the Working Time Regulations 1998 to her detriment, that she had raised health and safety issues that had not been responded to to her detriment, that the Respondent failed to properly account to HMRC and that the Respondent had failed to pay taxi receipts in respect of taxis she had to take in performance of her duties. The Claimant also ticked the discrimination box on the originating application, alleging that she had been discriminated against because of her religion or belief (see the preliminary hearing summary dated 5 March 2018).

9. Today's preliminary hearing follows a telephone preliminary hearing on 5 March 2018 before Employment Judge Gilbert. Judge Gilbert determined that it was impossible to clarify the issues with the Claimant on that occasion. Judge Gilbert advised the Claimant to consider very carefully what claims she was pursuing, to tell the Tribunal what those claims were and to provide the information already requested by the Tribunal and the additional information requested in the Tribunal's orders attached to the preliminary hearing summary. A further preliminary hearing was listed for 24 April 2018. The Claimant told Judge Gilbert at the hearing on 5 March that she was unwell. She was told that if she could not attend the hearing on 24 April she must provide medical evidence. The Claimant was reminded that she had failed to comply with orders sent to her on 21 December 2017 & 9 February 2018 by Judge Brown & Judge Gilbert respectively for additional information in respect of her religion or belief claim and she was warned by Judge Gilbert that her claim was at risk of strike out by reason of failure to provide the information requested. Indeed, at paragraph 7 of Judge Gilbert's orders, the Claimant was told if she failed to provide the information requested or tell the Tribunal why she cannot comply by 20 March, her claim would be dismissed because she was not actively pursuing the claim. The Claimant has not complied with the orders. The claim was not automatically struck out. The Respondent made its application to strike out the claim.

10. As I say above, prior to the preliminary hearing on 5 March, the Claimant had failed to respond to orders from Judge Brown dated 21 December 2017 and from Judge Gilbert dated 9 February 2018 for additional information in terms of the religion or belief claim. On both of those occasions, the Claimant was warned that her claim was at risk of strike out if she failed to comply with the Tribunal's orders. The Claimant has not complied with the orders.

11. In fairness to the Claimant she did, on 5 March, forward an email to the Tribunal copied to the Respondent that she had sent to the Respondent on 6 September 2017 headed 'Resign'. In that email the Claimant sets out a long list of reasons for her resignation. Mr Malik had the opportunity to address me on that document and, whilst Mr Malik rightly accepts that the letter does set out a long list of reasons why the Claimant resigned, he submits it does not comply with the orders for additional information sent to the Claimant on 12 March, following the 5 March preliminary hearing. I agree. It is not clear from that email whether the Claimant is claiming that she was constructively dismissed, automatically unfairly dismissed because she asserted a statutory right about the Respondent's infringements of the Working Time Regulations, it does not provide any information in respect of alleged discrimination on the grounds of religion or belief, it does not clarify the Working Time Regulations complaint.

12. On 19 March the Respondent sent the Claimant a list of documents, pursuant to the Case Management Orders dated 9 February 2018. The Respondent also requested specific disclosure from the Claimant on 12 April. The Claimant replied that she could not supply the document requested and told the Respondent that her health had deteriorated.

13. The preliminary hearing listed for 24 April was postponed by reason of the Claimant's ill-health. The Claimant was ordered to provide medical evidence on or before 20 April. That deadline was subsequently extended to 11 May because the order was sent to an incorrect email address. The Claimant was warned again that her claim was at risk of strike out. It is now 6 June; the Claimant has not complied with the order for medical evidence.

14. The Claimant has failed to advise us about the reason(s) for her non-attendance today. She has not advised the Tribunal that she is unable to comply with the Tribunal's orders by reason of ill-health.

### **Conclusion**

15. I have concluded that the grounds for strike out under rules (c) and/or (d) are made out. I have also concluded that I should exercise my discretion to strike out the Claimant's claim.

16. The Claimant has not (notwithstanding the email that the Claimant forwarded to the Tribunal and the Respondent on 5 March (see above)), complied with any of the Tribunal's orders. The Claimant has not attended today. Whilst I would be sympathetic, of course, to ill-health preventing the Claimant complying with Tribunal orders and/or attending the hearing today, the Claimant has failed to contact the Tribunal to say that she is unable to attend the hearing today. She has not responded to phone calls (her phone was not ringing) but nor did she respond to an email sent today to the correct email address. The Claimant has been warned on numerous occasions that her claim is at risk of strike out and indeed, on 5 March was warned that it would be struck out if she did not comply with the orders. There is no application from the Claimant for relief from sanction.

17. It has, in short, been made utterly plain to the claimant that her continued failure to comply with Tribunal Orders will result in her claim being struck out. She has also failed to attend today's hearing. This Tribunal would, of course, be sympathetic to medical circumstances being the reason for non-compliance and/or the failure to attend today but we are not aware that is why the Claimant has not complied with orders and/or not attended today. The Claimant has shown 'persistent disregard for the Tribunal, its procedures and the Respondent's interests'. It is critical, in line with the overriding objective, that the Respondent knows the case it has to meet. This claim was issued in December 2017. Some 6 months later, it is still no clearer what the case is that the Respondent has to meet. At the risk of repetition, the Claimant has had many opportunities to comply with the Tribunal's orders; she has failed to comply with the orders and/or failed to explain why she cannot comply with the orders. The notice of preliminary hearing in respect of today's hearing, advised the Claimant that she could submit written representations for consideration today. She has not done

so. In all the circumstances, I consider that strike out is a proportionate and just response to the Claimant's failure to comply with the Tribunal's orders and/or to actively pursue the claim that she issued in December 2017. I am satisfied, notwithstanding the draconian nature of strike out, that on this occasion that I should exercise my discretion to strike out the Claimant's claim.

Employment Judge Scott

27 June 2018