



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms. W. Zgud

**Respondent:** Ms M. Harvey, trading as The Pickle Barrel

**London Central**

**7 November 2022**

**Employment Judge Goodman**

## JUDGMENT

**The response is struck out under rule 37.**

### REASONS

1. This unfair dismissal claim is about the disputed circumstances of the claimant's termination of employment in July 2019. Briefly, according to the claimant, the shop where she worked was closed for flooding, she was then on maternity leave, when she sought to return, the shop was still closed, and in the face of an alleged redundancy consultation, she terminated her employment. According to the response, on the scheduled day of return the respondent arranged for another person to go to the (closed) shop with the keys and a list of duties, but the claimant did not attend.
2. There was a case management hearing before Employment Judge Quill on 11 May 2020. He made a detailed list of issues and set directions, the last of which required an exchange of witness statements in September 2020. This was not done. On 11 May 2021 the respondent's representative said that his client had explained that she had been too ill to check her draft witness statement. In October 2021 the claimant asked about progress, and was told by the respondent that he had no instructions. The respondent did not supply any medical evidence. The case was listed for final hearing. On 21 January 2022, the claimant applied to strike out the response for failure to comply with directions or actively pursue the case. When it came before Employment Judge Deol on 1 April 2022, he decided, with regret, that as the parties had only

been given seven days' notice of conversion to an open preliminary hearing, he could not decide the application then, but he invited the claimant's representative to make a further application if there continued to be no progress, particularly in compliance with the revised days for compliance with case management orders. The case was listed for a five-day hearing starting 10 November 2022.

3. The respondent did not comply with an order to file a finalised list of issues on 14 June (the first of a series), and claimant made a further application to strike out on 15 June 2022. It was copied to the respondent's representative (Peninsula Business Systems). The respondent has not made any comment on the claimant's application, then or now. Nor have any of Judge Deol's orders been complied with
4. On 28 October 2022, the respondent's representative applied for a postponement of hearing on grounds of the respondent's ill health. There has been no application to vary directions. There is no explanation why directions have not been complied with before now.
5. Some medical evidence was attached to the application: a letter from an NHS doctor in March 2022 recording a telephone consultation that the claimant suffered from breathlessness and was tired. There is a further NHS consultation letter of 2 October 2022, noting various investigations she had now had, and that "she has had repeated reviews to tell her all is well". (The investigations and reviews were to exclude a pulmonary embolism or other heart difficulty as a cause of breathlessness). The most likely diagnosis was said to be long Covid. In the meantime the claimant has consulted other doctors in Poland. There are scan reports of 12 August and 15 September 2022, recording (with someone's handwritten translation) that pain in the ribs was likely to be a neuroma, and a longer letter of 16 August 2022, which is in Polish, which I cannot read, and has not been translated. There is a note in the 28 October application to postpone that the claimant would provide a sick note, but she had to wait 14 days to get an appointment to see the GP. There is no suggestion as to the prognosis.
6. In the meantime, as of today, two days before the hearing is to start, there is no information on disclosure of documents by the respondent, or preparation of the hearing bundle, or the exchange of witness statements. The claimant provided a remedy statement and schedule of loss as ordered back in 2020.
7. I appreciate that if the respondent has had or does have long Covid, she may have needed to take more time to review the draft witness statement than someone who is well, and that she may need breaks during a hearing. Nevertheless, it is plain that little or no progress has been made towards compliance with the case management directions to prepare this case for a five-day contested hearing with Polish translation, and also that for very long periods the respondent has not corresponded with the claimant, even to say why there has been no correspondence. It is also plain that the case is not ready for a five-day contested hearing starting on 10 November.
8. I have considered postponing the hearing to a future date, as asked, but in the absence of any information about prognosis, this puts off solving

the problem of the respondent's lack of engagement. The respondent has said nothing about why she has not complied to date or when she will comply.

9. There is little point in making an unless order. On past form, it is highly unlikely that the respondent will be able to provide disclosure and any witness statements (she will presumably be filing a statement from the person who, according to the response filed was sent to the premises with the keys on the date the claimant was supposed to return to work) before 10 November, when she has had so long in which to do so.

**10. Order 37 of the Employment Tribunal Rules of Procedure 2013 provides:**

(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.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

11. It is clear from the history that the response has not been actively pursued. The respondent may have been tired and breathless, but she has been capable of finding relevant documents, and approving the draft witness statement she was sent, and she has now had a very long time in which to do so. This is the first occasion on which she has provided any medical evidence, despite requests from the claimant when an earlier hearing was postponed.

12. The claimant's representatives have been aware, at least since January 2022 that the claimant sought to strike out the response because it was not actively pursued, and they knew from Employment Judge Deol's comments in April that he was not unsympathetic to this, and that the application was only not been decided because of administrative error in the notice of listing. The respondent knew from 15 June 2022 that there was a renewed application to strike out, as invited by Judge Deol, but has done nothing about this until this very last minute application to postpone a long hearing. Even now the respondent has made no representation why she should not be struck out for failing to participate, or comply with necessary case management orders.

13. I conclude that there has been a failure actively to pursue the response. In deciding whether strike out is the appropriate action, I have regard to the overriding objective to deal with cases fairly and justly. It is now over three years since the disputed events. Other than that the respondent suffering breathlessness (and there is no information about when this began; it was first mentioned at the end of 2021) there is no explanation why she has

not complied with the case management orders made two and a half years ago. She has had representatives (Peninsula) throughout. Parties to litigation are entitled to a public hearing of the dispute within a reasonable time. The evidence is already stale. It is not possible to predict when it will be ready for hearing. The history suggests that the difficulty is not really the respondent's health, although that has of course made things more difficult for her, but that she does not pursue the claim with conviction. The respondent's conduct of the claim has been borderline unreasonable.

14. Having regard to those factors, this is a case where it is right to strike out the response and enter judgement on liability. The respondent is no longer entitled to participate in proceedings, although it may attend the hearing, where the employment tribunal will consider (1) whether the claimant proves her claims of unfair dismissal, sex or maternity discrimination, failure to provide pay statements or amended particulars of employment (2) appropriate remedy.

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Employment Judge - Goodman

Date: 07<sup>th</sup> Nov 2022

ORDER SENT TO THE PARTIES ON

07/11/2022

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FOR THE TRIBUNAL OFFICE

**Note**

Written reasons will not be provided unless a written request is presented by either party within 14 days of the sending of this written record of the decision.

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