



EMPLOYMENT TRIBUNALS

Claimant: Miss S Burden-Smith

Respondent: Department for Work and Pensions

Heard at: London South, by video.

On: 30 April 2024

Before: Employment Judge Cawthray

Representation

Claimant: Did not attend

Respondent: Ms. Jennings, Counsel

RESERVED JUDGMENT

The claim is struck out under Employment Tribunal Rule 37(1)(d) because it has not been actively pursued.

REASONS

Introduction

- 1) The Claimant did not attend the hearing today, and at 10.00am the Tribunal clerk attempted to contact the Claimant by telephone. The Tribunal clerk spoke with the Claimant, and it was reported to me that the Claimant told the Tribunal clerk that she was in work until 10.00pm and would not be attending the hearing today. The Tribunal clerk asked the Claimant if they had received the email about the hearing, and she said she had not. The clerk checked the Claimant's email address with her, and the Tribunal has been using the correct email address.
- 2) There was some confusion about the start time, but I joined the hearing at approximately 10.15am, after the Respondent's Counsel, Ms. Jennings had joined. The Tribunal clerk had informed Ms. Jennings that they had spoken with the Claimant and relayed the conversation, I also confirmed my understanding as set out above.

- 3) Although there had been some initial confusion regarding start time, Ms. Jennings confirmed she was ready and wished to give submissions on the Respondent's application.
- 4) I explained to Ms. Jennings that I had access to the electronic file only, and it became apparent that the Respondent had prepare a bundle for the hearing. Ms. Jennings forwarded a copy of the bundle to me.
- 5) Ms. Jennings gave oral submissions on the application to strike out. The most recent form of the application is set out in an email to the Tribunal, copied to the Claimant, dated 4 January 2024.
- 6) In short, Ms. Jennings primary submission was that the claim was effectively already struck out because there had not been compliance with an Unless Order made by Employment Judge Bedeau and referenced the Case. Management Order sent to the parties on 8 December 2023. She said the Claimant did not reply to the order requiring the Claimant to set out why the claim should not be struck out on the basis of not being actively pursued by the deadline and sent only a short email on 27 December 2023. She also stated the Claimant failed to comply with the orders regarding privileged material and in relation to documentation and statement production for the preliminary hearing listed for 25 January 2024.
- 7) Ms. Jennings further submitted that the Claimant is not actively pursuing the claim and has not meaningfully engaged. She pointed out the Claimant's non-attendance (without explanation) at the hearing on 14 November 2023, that the Claimant had not replied to any emails from the Respondent in preparations for the hearing on 14 November 2023 and that listed for 25 January 2024, that the Claimant had not provided any documentation or witness evidence as ordered by Employment Judge Bedeau and that the claim is no further forward.
- 8) Ms. Jennings gave baseline submissions in relation to time. In short, she submits the Claimant contacted ACAS promptly and within the rime limit and that an Early Conciliation certificate was issued on 29 September 2022. The claim was submitted on 23 March 2023, and Ms. Jennings says it should have been submitted by 13 December 2022 and therefore was some 10/11 weeks late and was not submitted with any explanation as to why it was late and has not submitted any such information why since. She submits that on this basis there is no reasonable prospect of the Claimant showing that it would be just and equitable to extend the time limit.

Key events

- 9) I have considered the electronic file, the bundle provided, the submissions regarding actions and noted the key chronological events as below.

21 February 2023 – ET1 submitted.

19 April 2023 – ET3 received.

14 November 2023 Case Management Preliminary Hearing – A notice of hearing had been sent to the parties on 13 May 2023. The Claimant did not attend the hearing. A Case Management Order was sent to the parties on 8 December 2023 and included orders with a strike out warning and orders for producing a bundle and witness statements in readiness for the Public Preliminary Hearing scheduled for 25 January 2024 to consider time limits. The text regarding strike out is copied below.

“1. Strike out warning

- a) *The claimant is ordered to state in writing to the Tribunal and the respondent, by **no later than 14 days from the date of her receipt of these orders**, why her claims should not be struck out as they are no longer being actively pursued by her.*
- b) *Further, the claimant shall state in writing to the Tribunal and the respondent by **no later than 14 days from the date of receipt of these orders**, references to legally privileged correspondence and discussions involving ACAS, should not be removed from the claim form and in her details of complaint, in Box 9.2, the first sentence in the last paragraph; in the second page of the details of claim, all of the paragraph, “DWP agreed to reinstate...”, including the first sentence of the next paragraph, and the entire final paragraph.*
- c) *Failure to reply in writing will result in the claims being struck out without further order.”*

22 December 2023 – the deadline for the Claimant responding to the strike out warning.

27 December 2023 – The Respondent emailed the Tribunal stating the Claimant had not complied with the Orders and requested the claim be struck out.

27 December 2023 – The Claimant replied and stated: *“I did reply in November to state I was working that day and couldn't get away. And that I would like the case to continue. Its not easy for me to attend due to my work rotas. I apologise if you hadn't received my reply in November.”*

4 January 2024 – The Respondent wrote with an application for strike out on basis the claim was out of time, that it was not being actively pursued and the Claimant had failed to comply with orders.

25 January 2024 – Public Preliminary Hearing postponed due to lack of judicial resource. The parties were notified of the postponement on 24 January 2024. The Claimant acknowledged the email.

5 February 2024 - A notice of hearing for a case management hearing to take place at 2.00pm on 30 April 2024. The notice referred to case management preliminary hearing, and not a public preliminary hearing, in error.

7 February 2024 – The Respondent emailed the Tribunal requesting that the hearing be converted to a public preliminary hearing to consider its application.

19 March 2024 – The Tribunal wrote to the parties stating:

“The hearing on 30 April 2024 will be converted to a public preliminary hearing and will consider whether to strike out the claim on grounds that the claimant is not actively pursuing her claim and/or has failed to comply with Tribunal orders.

The Tribunal will also consider whether to strike out the claim on the basis that there is no reasonable prospect of the Tribunal concluding that the claim was presented in time. This will be dealt with on the basis of submissions and no evidence is required to be prepared or exchanged in advance of the hearing.”

19 March 2024 – The Claimant emailed the Tribunal in response to the letter dated 19 March 2024 (which was sent by email) stating:

*“Good evening,
Where would this be taking place on 30th April. As I will see if I’m able to attend this”.*

The Tribunal staff replied on the same day stating: *Thank You for your E Mail, the hearing on 30th April 2024 is via video, you will receive the log in details the working day prior to the hearing, before 5pm.*

20 March 2024 - The Claimant replied: *“OK, thank you”.*

- 10) I asked the Tribunal clerk to check for any emails from the Claimant in November 2023, and no emails were found.

The Law

- 11) Rule 37 of the Employment Tribunals (Constitution & Rules of Procedure) Regulation 2013 are set out below.

Striking out

37.— (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—*
(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.

(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.

- i) *(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*

Conclusion

- 12) The Respondent's primary submission was that the claim should be treated as if it had automatically been struck out.
- 13) It does not appear that non-compliance with the strike out warning was considered by an Employment Judge prior to today. The strike out warning was not referenced as being an unless order and no reference to rule 38 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 is set out in the Order. I note that Claimant replied in very brief terms and not fully addressing the elements of the order on 27 December 2023, which was past the 14 days for response. I further note the Claimant has not complied with orders regarding provision of documents and statements. However, the claim was not struck out and it has not continued.
- 14) On balance, I do not consider it appropriate to strike out the claim on the basis of non-compliance with an order.
- 15) The Respondent relies on Rule 37(d) and submits that the Claimant has not actively pursued his claim and therefore should be struck out.
- 16) The Tribunal must give the Claimant a reasonable opportunity to make representations before a claim is struck out. In this case, the Claimant was aware of the strike out application, and has been provided with a copy of the Case Management Order from Employment Judge Bedeau, been copied into the correspondence from the Respondent and been notified of the hearing today.
- 17) Indeed, as indicated by the Claimant's emails dated 19 and 20 March 2024, she was aware of the hearing today and the matters being considered.
- 18) In advance of the hearing today, the Claimant has provided no explanation as to why she may not be able to attend and has not requested a postponement. The Claimant made no contact with the Tribunal and the only reason the Tribunal has become aware that the Claimant was not attending was when the Tribunal staff telephoned the Claimant this morning as set out above.

- 19) The Claimant has not engaged with any case preparation for any of the hearings to date and not given any reasons why she has not engaged or complied with orders.
- 20) A final hearing is listed for 17 to 19 September 2024, and I have kept in mind that should the claim continue, it would be necessary for a further preliminary hearing to take place to clarify the claims (including the disabilities relied on), the Respondent would need to submit an amended grounds of resistance, disclosure (possibly also in relation to medical evidence), production of a bundle and production of witness statements. There is approximately three and half months until the listed final hearing, and I do not consider that to be an adequate period of time for case management preparation to enable a fair final hearing to take place on 17 to 19 September 2024.
- 21) On balance, taking all the above into account, I have decided to strike out the entire claim under Employment Tribunal Rule 37(1)(d) because it has not been actively pursued.
- 22) For completeness, as I have made the decision to strike out on the basis that it has not been actively pursued, I have not gone on to make a determination in relation to whether or not there are no reasonable prospect of concluding that the claim was presented in time.

Employment Judge Cawthray

30 April 2024

Date 1st May 2024

RESERVED JUDGMENT & REASONS SENT TO
THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS

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Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified

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by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

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