



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103797/2022 (V)

5

Held via Cloud Video Platform (CVP) in Glasgow on 14 October 2022 (with subsequent deliberation in chambers)

Employment Judge W A Meiklejohn

10

Mr Alastair Hendry

**Claimant
In Person**

15

Ally Hendry Welding Ltd (in liquidation)

**First Respondent
No appearance and
No representation**

20

**Department of Business, Energy and Industrial
Strategy**

**Second Respondent
Represented by:
Mr P Soni -
Senior Tribunal
Officer**

25

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30

The Judgment of the Employment Tribunal is that the claims for (a) arrears of pay and (b) holiday pay are struck out under rule 37 of the Rules contained in Schedule 1 to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 on the ground that the claims have not been actively pursued in terms of rule 37(1)(d).

REASONS

35

1. This case came before me for a final hearing, conducted remotely by means of the Cloud Video Platform ("CVP"), on 14 October 2022. The claimant participated in person. The first respondent did not participate. The second respondent was represented by Mr Soni.

Nature of claims

2. The claimant was seeking arrears of pay and holiday pay. He had also been seeking a redundancy payment but accepted at the start of the hearing that he did not have the requisite period of qualifying service. These claims were resisted by the second respondent (the first respondent being in liquidation).

Hearing

3. The hearing commenced at 10.15 on 14 October 2022. I had a bundle of documents prepared by the second respondent. It was agreed that the claimant should give evidence, and he began to do so.
4. At 11.33 the claimant became disconnected from the CVP hearing. When the claimant failed to reconnect and the clerk was unable to contact him, I adjourned the hearing to 13.00. The clerk sent an email to the claimant advising him of the adjournment and asking him to log back into the CVP virtual hearing room at 13.00.
5. The hearing resumed at 13.00 but the claimant did not reconnect. I considered that this brought rule 47 (**Non-attendance**) into play but I decided (a) not to dismiss the claim because, in the absence of contact with the claimant, I did not know the reason for his failure to attend the resumed hearing and (b) not to continue with the hearing in the claimant's absence because this would be impractical - his evidence being incomplete and cross-examination not being possible. I decided instead to adjourn the hearing to 14.15. I asked the clerk to advise the claimant of this and again an email was sent to the claimant advising him of the further adjournment.
6. When the hearing resumed at 14.15 the claimant did not reconnect. Mr Soni invited me to dismiss the claim under rule 47. I decided not to do so because I did not know why the claimant had dropped out of the CVP virtual hearing room, had not been contactable by the clerk, and had not responded to the clerk's emails. I decided that the case should be re-listed for a half day continued hearing, and that the claimant should be asked explain what had happened, and to state whether he still wished to pursue his claim.

Procedure following hearing

7. On 17 October 2022 the Tribunal wrote to the claimant recording what had transpired at the hearing (as narrated above). That letter included the following -

5 *"The Judge has directed that the claimant should advise the Tribunal in writing of the reason for his disconnection from the CVP hearing on 14 October 2022 and his failure to rejoin the hearing when asked to do so. The Judge has also directed that the claimant should confirm to the Tribunal whether he still wishes to pursue his claim. The claimant must respond within 7 days."*

10 8. The claimant did not respond to the Tribunal's letter. On 1 November 2022 the Tribunal sent a strike out warning letter to the claimant giving him an opportunity to provide in writing by 15 November 2022 his reasons for disagreeing with the proposed strike out of his claim or to request a hearing in order to consider why the claim should not be struck out. Once again, the
15 claimant did not respond.

Rule 37

9. Rule 37 (**Striking out**) provides, so far as relevant, as follows -

(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
20 response on any of the following grounds -*

(a)

(b)

(c)

(d) *that it has not been actively pursued. ...*

25 (e)

- (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....*

Discussion and decision

- 5 10. A decision on whether to strike out a claim (or response) involves two stages. The first stage is to consider whether one or more of the circumstances in which, per rule 37, a claim may be struck out has or have been engaged. The second stage is to consider whether or not actually to strike out.
- 10 11. In ***Evans and another v Commissioner of Police of the Metropolis 1993 ICR 151*** the Court of Appeal in England held that a Tribunal can strike out a claim where:
- there has been delay that is intentional or contumelious (disrespectful or abusive to the court) or
 - there has been inordinate and inexcusable delay, which gives rise to a
- 15 substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the respondent.
12. I considered whether it could fairly be said that the claim in this case had not been actively pursued. I noted that the claimant had been given two opportunities to explain himself. These were afforded to him by the Tribunal's
- 20 letters of 17 October 2022 and 1 November 2022. The letter of 1 November 2022 satisfied the requirement under rule 37(2) to provide a reasonable opportunity to make representations. The claimant had not responded to either letter.
13. I believed that it was reasonable for me to conclude that the claimant's failure
- 25 to respond to the Tribunal's letters was either intentional or contumelious, or both. Rule 2 (**Overriding objective**) places parties under an obligation to cooperate generally with each other and with the Tribunal. Co-operation includes responding to correspondence from the Tribunal.

14. I decided that the claimant's failure to respond to correspondence from the Tribunal did indicate that his claim was not being actively pursued. He had been asked specifically whether he still wished to pursue his claim and had been given a timescale within which to reply, but he had not done so.

5 15. I then considered whether or not to exercise my discretion to strike out the claim because it had not been actively pursued. That took me back to rule 2. After stating that the overriding objective of the Rules is to enable Employment Tribunals to deal with cases fairly and justly, the rule continues -

Dealing with a case fairly and justly includes, so far as practicable —

- 10 (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;*
- 15 (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. ...

20 16. I was therefore obliged by rule 2 to deal with the matter fairly and justly when deciding whether or not to exercise my power to strike out the claim because it had not been actively pursued. I took the following into account -

- (a) It did not seem to me that the claimant was materially disadvantaged by not having the benefit of representation in terms of his ability to
- 25 > respond to the correspondence he had received from the Tribunal. Being asked to explain his disconnection from the CVP hearing on 14 October 2022 and whether he still wished to pursue his claim were not difficult questions.

- (b) I did not consider that the issues in this case were of such complexity and importance to require any departure from what seemed to me to be the normal practice which had been followed by the Tribunal.
- (c) I believed that I had already sought to avoid unnecessary formality and be flexible by deciding that there should be a half day continued hearing, so that the time spent on hearing evidence from the claimant on 14 October 2022 would not be wasted.
- (d) I considered that it was inevitable that the case would take longer to conclude if I did not exercise my power to strike it out.
- (e) I also considered that it was inevitable that the respondent would be put to further expense if the case continued because I had not exercised that power.
17. Looking at matters in the round, I considered that the claimant had been given a chance to provide an acceptable reason why his claim should not be struck out or, in the alternative, to request a hearing. He had done neither. It would not have been difficult for the claimant to respond (a) to explain what had happened on 14 October 2022 and (b) to state whether he still wished to pursue his claim. His failure to do so meant that his claim had not been actively pursued.
18. In these circumstances I decided that the claims brought by the claimant should be struck out under rule 37(1)(d) because they had not been actively pursued.

Employment Judge: S Meiklejohn
Date of Judgment: 25 November 2022
Entered in register: 29 November 2022
and copied to parties