

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: S/4100491/2017**

**Held in Glasgow on 30 June 2017**

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**Employment Judge: Ian McPherson**

**Mrs Katarzyna Malgorzata Tusinska**

**Claimant  
Not Present and  
Not Represented**

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**Michael and Liz Ritchie  
t/a Sew Easy**

**Respondent  
Represented by:-  
Mr John Norrie -  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

20 The judgment of the Employment Tribunal is that:

(1) the claimant having failed to appear or be represented, the Tribunal converted the assigned Preliminary Hearing into a Final Hearing, in terms of **Rule 48 of the Rules contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, and proceeded in the absence of the claimant ; and

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(2) in terms of **Rule 47**, having heard from the respondents' solicitor, and after considering the information available to it, after unsuccessful telephone enquiries by the Tribunal clerk to the claimant, to enquire about her failure to appear or be represented, the Tribunal **dismissed** the claim for the claimant's failure to appear or be represented at the assigned Preliminary Hearing, as also for her failure to comply with previous Orders of the Tribunal made on 25 May 2017, and for want of active prosecution by the claimant, on account of the claimant's failure, without any proper explanation, to appear or be represented on 30 June

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2017 at the further Case Management Preliminary Hearing assigned to consider her claim against the respondents, and it appearing to the Tribunal that the claimant is no longer actively pursuing her claim.

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## **REASONS**

### **Introduction**

10 1. This case called before me on the morning of Friday, 30 June 2017, at 10.00am for a further Case Management Preliminary Hearing, before an Employment Judge sitting alone, further to Notice of Preliminary Hearing issued to both parties' representatives by letter from the Tribunal dated 1 June 2017.

15 2. Two hours had been set aside for this Preliminary Hearing, and a Polish interpreter had been booked by the Tribunal to attend this Hearing, which had previously been assigned by me to conduct a further consideration of the case with both parties, and to discuss further procedure, and listing for an appropriate substantive Hearing in August to October 2017.

### **Background**

20 3. There had been a previous Case Management Preliminary Hearing held before me, in private, on 25 May 2017, which the claimant had attended, represented her partner, Mr Janusz Tomasz Jozwiak. Mr Norrie had attended as solicitor for the respondents, and a Polish interpreter was in  
25 attendance to translate the proceedings at that Hearing.

4. At that previous Hearing, lasting around 1.5 hours, I had made various Case Management Orders for additional information from the claimant, together with a detailed Schedule of Loss, within 14 days, i.e. by 8 June 2017, that 14 day period having been agreed by the claimant and her representative  
30 as appropriate for compliance by them with those Orders of the Tribunal, with 7 days thereafter for Mr Norrie to reply on behalf of the respondents.

5. I had also ordered, at that previous Hearing, that the case be relisted for this further personal attendance Case Management Preliminary Hearing to be held in private before me at this sitting of the Tribunal, with the Tribunal clerk instructed to again arrange for a Polish interpreter to be present to translate the proceedings.
6. Further, the date and duration for this further Hearing was also then agreed with both parties, and they were both ordered, by no later than 4.00pm last Friday, 23 June 2017, to intimate to the Tribunal, and to each other, their Lists of Issues for consideration by me at this further Hearing.
7. My written Note and Orders of the Tribunal, dated 26 May 2017, were issued to both parties' representatives under cover of a letter from the Tribunal dated 30 May 2017.

**Parties' Compliance with Orders of the Tribunal**

8. On 8 June 2017, the Tribunal received some additional information, as ordered by me in Order (2)(a) made on 25 May 2017, as intimated to the Tribunal office in a letter jointly signed by the claimant and her representative, dated 7 June 2017.
9. A copy of that letter was not sent by the claimant or her representative to the respondents' solicitor, despite judicial direction at that previous Preliminary Hearing of the importance of **Rule 92** intimation. It contained only partial compliance with my Order.
10. The further additional information, as ordered by me in Order (2)(b) was not provided, by the due date, or at all, nor was the detailed Schedule of Loss, as ordered at Order (4), nor, by 4.00pm last Friday, the claimant's List of Issues for this further Hearing, as ordered of both parties at Order (9). As such, there was whole scale failure by the claimant and her representative to comply with those Orders.

11. Mr Norrie, on the other hand, had fully and timeously complied with the Tribunal's previous Orders, on 15 June 2017, enclosing the respondents' one-page response to the claimant's further and better particulars, which the Tribunal had copied to him on 12 June 2017, and on 16 June 2017, enclosing his 4-page detailed proposed List of Issues for discussion at this Preliminary Hearing. As per **Rule 92**, he gave intimation that a copy of each had been sent to the claimant's representative.

**Correspondence from the Claimant**

12. On 13 June 2017, the Tribunal received a letter, dated 9 June 2017, signed by the claimant, stating that Mr Jozwiak ***"reports that due to unforeseen travel to Poland from June 20, 2017 to June 27, he will not be able to receive correspondence via Royal Mail. The only form of contact remains the email, or phone. He informs that he will be on June 30, 2017 in the orchard of work."***
13. In response to that letter from the claimant, a letter was sent by the Tribunal, on my instructions, to the claimant's representative, who resides at the same address with Mr Jozwiak, on 19 June 2017, requesting that the claimant's representative confirm to the Tribunal, by 26 June 2017, whether he would be attending this Preliminary Hearing listed for 30 June 2017.
14. Thereafter, on 25 June 2017, the Tribunal received an e-mail sent at 16:17 from Mr Jozwiak's e-mail address, but signed by Ms Tusinska, stating that: ***"I am requesting to postpone the hearing of 30 July 2017 for another term. The reason for my request is the lack of opportunity for my attorney and myself to appear. The situation is in Poland, not dependent on me."***
15. Further, also on 25 June 2017, the Tribunal received another e-mail sent at 16:31 from Mr Jozwiak's e-mail address, in identical terms to the first e-mail, but this time signed by Ms Tusinska, and Mr Jozwiak.

16. Finally, on 27 June 2017, by e-mail sent at 13:08, from Mr Jozwiak's e-mail account, and jointly in name of the claimant and himself, the same message was sent, for the third time, but this time with an additional sentence reading: "***The lack of access to the Internet (not dependent on me) I send only today e-mail for what I'm sorry.***"

**Postponement Request Refused by the Tribunal**

17. On this e-mail correspondence from the claimant and her representative being referred to me, on 28 June 2017, I directed that it could not be considered, as the application had not been copied to the other party, as per **Rule 92** (about which the claimant and her representative had been repeatedly advised by the Tribunal of the need to comply).
18. On my instructions, on 29 June 2017, a letter was sent by the Tribunal clerk to the claimant and her representative, at their respective e-mail addresses, at 10:48, and 13:23, and they were asked to confirm that they had copied their postponement application to the respondents, as the other party.
19. The Tribunal's letter further advised them, and Mr Norrie, to whom it was copied, that I had stated that this Preliminary Hearing was being held today, Friday, 30 June not 30 July 2017, as their emails had wrongly stated, and that this Hearing would proceed, as the postponement application had not been intimated to the respondents per **Rule 92**, and an interpreter had been booked, the respondents had submitted a List of Issues on 15 June 2017, and that the claimant was required to attend in person even if her representative was in Poland,
20. In response to the Tribunal's e-mail at 10:48, Mr Norrie advised the Tribunal, with copy sent to Mr Jozwiak's email address, at 12:05, that a copy of the claimant's postponement request was copied to him, and, for the avoidance of doubt, he was opposing the Hearing being postponed.
21. Following referral to me, by email sent to both the claimant and Mr Jozwiak, at 13:21, they were advised that I had confirmed that this Preliminary

Hearing would proceed as listed. In light of Mr Norrie's' objection, I had refused the postponement application. An attempt by the Tribunal clerk to speak with the claimant and / or her representative, at the two mobile telephone numbers held on file was unsuccessful.

5 **Preliminary Hearing before this Tribunal**

22. When the case called before me, as an Employment Judge sitting alone, for the assigned Case Management) Preliminary Hearing, the claimant was not in attendance, nor represented, at the assigned start time of 10:00am.
23. On the Tribunal's behalf, the clerk to the Tribunal telephoned the claimant at her two mobile telephone numbers, given on the ET1 claim form as being where she stated she could be contacted during day time, but the clerk reported that the claimant's mobile phone went straight to voicemail, and a message was left by the clerk for the claimant to contact the Tribunal, as there was no answer at her phones.
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24. Having waited until around 10.15am, and there being no contact from the claimant and no attendance by her, nor any representative in attendance for her, the Tribunal proceeded in the claimant's absence
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25. When the case called before me, I first of all discharged the Tribunal appointed interpreter who had been in attendance since 9.45am, Ms Ada Lebiezinska, advising her that her pre-booked services were not required, on the basis that neither the claimant nor her representative had appeared, nor nobody else had appeared on the claimant's behalf.
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**Respondents' Application for Dismissal of the Claim**

- 25 26. Mr Norrie, the respondent's solicitor, being in attendance, and ready to proceed, I asked him what motion he had to make to the Tribunal, as regards further procedure. He advised me that his application was to invite the Tribunal to apply **Rule 47 of the Employment Tribunal Rules of**

Procedure 2013, and to dismiss the claim, or, alternatively, to Strike Out the claim, under Rules 37(1) (c) and (d).

27. He appreciated that as this case had been listed for this private Case Management Preliminary Hearing I might not be able to proceed forthwith to Strike Out, and I confirmed that that was indeed the case, as Rule 37(2) provides that a claim 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.
28. Further, Rule 54 ordinarily requires at least 14 days notice of fixing of a Preliminary Hearing, and Rule 56 requires a Strike Out Preliminary Hearing under Rule 37(1) (b) or (c) to be conducted in public.
29. In these circumstances, Mr Norrie advised me that his principal application was for dismissal under Rule 47. As Rule 48 allows me to convert a Preliminary Hearing into a Final Hearing, I decided to do so, as I was properly constituted for that purpose, and I was satisfied that neither party would be materially prejudiced by the change.
30. From the claimant's perspective, I felt that she and her representative has been on notice, since 15 June 2017, when Mr Norrie intimated his List of Issues for the respondents, that the respondents would have been seeking a substantive public Preliminary Hearing to address various preliminary and jurisdictional issues, as more fully detailed in his detailed List of Issues, and yet the claimant and her representative had still not attended, or been represented, at this Preliminary Hearing.
31. I felt that to have discharged this Hearing, and issue a Strike Out Warning and / or an Unless Order to the claimant, while within the range of case management options open to me, was neither appropriate nor proportionate.
32. Similarly, I felt while I could instead just have assigned a public Preliminary Hearing to consider Strike Out at a later date that would not have been in

the overall interests of justice, nor consistent with the Tribunal's overriding objective, under **Rule 2**, to deal with the case fairly and justly, including avoiding delay (so far as compatible with proper consideration of the issues) and saving of expense.

5 **Respondents' Expenses Reserved**

33. Mr Norrie advised me that he had no further application to make at this stage, and, in particular, he was reserving the respondents' right to seek an award of expenses against the claimant and / or her representative, as per **Rules 74 to 84**, at any stage up to 28 days after the date on which this Judgment is issued to parties.

34. He explained that Mr Jozwiak is the claimant's partner and, as detailed in his response of 15 June 2017 to the claimant's further and better particulars, Mr Jozwiak had previously worked for the respondents, but that employment had come to an end in acrimonious circumstances on or around 18 March 2017.

35. I noted that that date was immediately prior to the ET1 claim form being presented on 21 March 2017, and served on the respondents on 27 March 2017, which claim they resisted for the detailed reasons given in the ET3 response that Mr Norrie had lodged on their behalf on 20 April 2017.

20 36. Mr Norrie confirmed that, as he had stated at the last Preliminary Hearing, the claim was still wholly lacking in any specification or clarity, but he did not have any specific instructions about expenses being sought at this stage.

37. I noted his position, and that he will take instructions. I observed that proceedings to date, viewed in light of the information provided about Mr Jozwiak's previous employment, perhaps begs the question whether the claim is being pursued by the claimant in good faith, or perhaps for some other ulterior purpose, such as might found an application for Strike Out, under **Rule 37(1) (a) and / or (b)**, and / or an application for expenses under **Rule 76(1)(a)** for the claimant or her representative acting vexatiously, abusively, disruptively, or otherwise unreasonably in either the



bringing of the proceedings or the way in which they have been conducted by the claimant, and on her behalf, to current date.

**Claim Dismissed**

- 5 38. Having heard from Mr Norrie, and reviewed the information contained in the Tribunal's case file, evidencing the procedural history of this case, and correspondence with the claimant, and/ or her representative, I decided that it was appropriate, in all the circumstances, to dismiss her claim, in terms of **Rule 47.**
- 10 39. In deciding to dismiss the claim, I took into account the claimant's failure, without any proper explanation, to appear or be represented at this Hearing, and inferred that the claimant is no longer insisting in her claim, and that she has, in effect, abandoned it, notwithstanding her unsuccessful last minute attempt to seek a postponement
- 15 40. I would observe that this *laissez-faire* approach by the claimant is not, in my view, consistent with a claimant promptly and diligently attending to prosecution of a claim presented to the Employment Tribunal. Her failure to appear, or to be represented at that Hearing, is a further clear indicator that she is not actively pursuing her claim.
- 20 41. While the Employment Tribunal process is informal, it is nonetheless a judicial process. Parties should, in pursuit of proceedings raised before the Tribunal, either attend, or be represented, or if the matter is to be abandoned or withdrawn, take proactive steps to advise the Tribunal and the other party of their position, at the earliest possible opportunity.
- 25 42. In such circumstances, the claim can be dismissed, or withdrawn, as circumstances may require, and the Tribunal diary re-arranged, if time permits, to allow for other cases requiring judicial attention to be heard, and unnecessary previously scheduled Hearings cancelled.

- 5 43. By the claimant's failure to appear or be represented, and on account of the Tribunal's inability to effectively communicate with her, yesterday or today, in advance with this Hearing proceeding, the Tribunal system has quite understandably proceeded on the basis that the two hour Hearing allocated to this claim would proceed.
- 10 44. In the event, by the claimant's failure to attend, or be represented, the proceedings were concluded by around 10.30am, when two full hours had been set aside, and as such, other users of the Tribunal system who await a Hearing have been deprived of that opportunity at this sitting of the Tribunal. Further, the Tribunal has borne the cost of the interpreter being booked and attending.
- 15 45. If there is good cause for the failure of the claimant and / or her representative to appear or be represented at this Preliminary Hearing, she can seek reconsideration of this Dismissal Judgment under **Rule 70**, within 14 days of the date of this Judgment being issued to both parties

Employment Judge: G. Ian McPherson

Date of Judgment: 3 July 2017

Entered in register and copied to parties: 3 July 2017