



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr TE Farquharson**

**v**

**Angle House Orthodontics**

**Heard at:** Watford

**On:** 12 March 2018

**Before:** Employment Judge Wyeth

## **Appearances**

**For the Claimant:** Did not attend

**For the Respondent:** Mr J Heard, Counsel

## **JUDGMENT**

1. The claimant's claim is struck out under Rule 37(1)(d) of the Employment Tribunals (Constitution and Rules of Procedure) Regulation 2013.

## **REASONS**

### **The application**

1. By way of a letter dated 12 September 2017, the respondent made an application for strike out under Rule 37(1)(d) on the ground that the claimant's claim has not been actively pursued. A copy of that application was emailed to the claimant. On the same day, 12 September 2017, the claimant replied to the tribunal by email at 19:26 hours objecting to any strike out. He concluded his email by stating "Further, in light to your [*sic*] email sent last week I can confirm that I am able to attend a hearing that can be re-listed any time from January 2018." Notably the claimant offered no explanation as to why the hearing could not be listed for almost a further three month period.

### **The background**

2. The claimant issued his employment tribunal claim on 25 October 2016. He ticked the boxes indicating that he was claiming unfair dismissal and disability discrimination. He also ticked the box stating that he was owed

other payments. In section 8.1 of his ET1 form he indicated that he was making another type of claim and set out in the box provided: "I am making a deterrent claim because I have been treated discriminated against for whistle blowing [sic]."

3. In the details section at 8.2 he set out five short paragraphs in support of his claim. Those paragraphs contained broad assertions about matters pertaining to the claimant's employment with the respondent and were not sufficient to enable the detail or nature of his claims to be properly identified. Indeed, the respondent, in its response filed on 9 December 2016, indicated in its opening paragraph of its Grounds of Resistance that the claimant had not provided sufficient particulars to allow the respondent to properly respond to the allegations contained or intimated within the claim form. I was informed by the respondent's counsel, Mr Heard, that the respondent also requested further and better particulars of the claimant's claim from the claimant on 9 December 2016 and the claimant has never responded to that request.
4. A preliminary hearing was scheduled for 31 January 2017. On the morning of that preliminary hearing the claimant telephoned the tribunal to advise that he was unable to attend as he was unwell and had been vomiting and had "stomach flu". The claimant did not provide any medical evidence to support his assertion either at the time or subsequently.
5. On 9 February 2017 the tribunal sent correspondence re-listing a preliminary hearing for 11 April 2017. No more than five days before that preliminary hearing was due to take place, on 6 April 2017, the claimant sought a postponement on the basis that he had another hearing to attend at a different tribunal on an entirely separate matter. In support of that late written application, he produced a letter from HM Courts & Tribunal Service dated 21 March 2017 notifying of a Personal Independence Payment Appeal scheduled to be heard on the same day in London. The claimant offered no indication as to whether he had made any attempt to postpone or have that Social Security hearing re-listed even though it would appear that notification came after he had received notification of the re-listed preliminary hearing to be heard at this tribunal. The respondent did not object to that application.
6. Accordingly, the hearing scheduled for 11 April 2017 was re-listed for 6 July 2017 but upon receipt of notification of the new date, at the request of the respondent, the matter was postponed again because the respondent's HR and Compliance Manager was not available on that date. The respondent provided unavailability dates for the purposes of the re-listing. The claimant did not object to that application and requested that any re-listing was not in the month of August 2017.
7. On 28 June 2017 the tribunal listed the preliminary hearing to take place on 5 September 2017. The following day, the claimant emailed the tribunal (but did not copy the respondent) to say that he was starting employment on 4 September 2017 and he would not be able to take time off to attend the

hearing. He requested that the hearing be listed either shortly before 4 September or after September.

8. Unfortunately, the respondent was not made aware of the claimant's application and was not informed until 4 September 2017 that the claimant had indicated that he was unable to attend the preliminary hearing the following day.
9. In response the respondent objected to the claimant's request for the preliminary hearing to be postponed from 5 September 2017 on the basis that it was unclear why the claimant commencing employment represented a reasonably legitimate explanation as to why he would be unable to attend the hearing on the allocated day given that he had received more than two months' notice of the hearing date and that it did not constitute reasonable grounds for non-attendance at the hearing. Accordingly, the respondent made an application for the claimant's claim to be struck out.
10. Following the claimant's email objecting to strike out, the matter was listed by Employment Judge Lewis for a preliminary hearing to determine the application to strike out at 2pm on Monday 12 March 2018 (today).

#### **Today's hearing**

11. The tribunal service emailed the claimant last week at the email address given by the claimant ([tristian\\_farquharson@hotmail.co.uk](mailto:tristian_farquharson@hotmail.co.uk)) requesting that he confirm that he would be attending the hearing on Monday. No reply was received. Despite the respondent attending, the claimant did not attend. At approximately 2.10pm today, the clerk of the tribunal attempted to call the claimant to establish his whereabouts. The telephone number provided by the claimant on the ET1 was no longer obtainable.
12. Having waited for the claimant until 2.35pm the hearing proceeded thereafter in his absence.
13. Mr Heard, on behalf of the respondent, made submissions in support of the application to strike out the claimant's claim on the basis that it was not being actively pursued.

#### **The law**

14. Having heard those submissions I reminded myself of the relevant law that I must apply when determining the issue of strike out in these circumstances. In accordance with Evans and another v Commissioner of Police of the Metropolis [1993] ICR 151, CA, when exercising the power to strike out a claim for want of prosecution it should be done in accordance with the principles that apply to the equivalent power in the High Court as set out by the House of Lords in Birkett v James [1978] AC 297, HL. In essence, a tribunal may strike out a claim where:

“(1) there has been delay that is intentional or contumelious (disrespectful or abusive to the court), or

(2) there has been inordinate and inexcusable delay, which gives rise to a substantial risk that a fair hearing is impossible or which is likely to cause serious prejudice to the respondent.”

15. This principle was recently upheld in the EAT decision of Rolls Royce plc v Riddle [2008] IRLR 873.

## **Conclusions**

16. I am satisfied on the information available to me that there has been serious prejudice to the respondent and there is now a substantial risk that a fair trial would not be possible as a consequence of the delays that have occurred in this matter. Aside from the fact that the respondent has a legitimate expectation that the matter will be dealt with in a reasonable period of time, this is a situation in which the claimant has not properly pleaded his case and it is far from clear what the allegations of discrimination are against the respondent. Furthermore, the claimant has not set out in any detail to whom or when he made any particular alleged protected disclosure or how he says he suffered any detriment as a consequence. These are all matters that needed to be clarified at a preliminary hearing at the earliest opportunity. I am mindful of the fact that limitation periods in employment tribunal cases are short for the very reason that the factual matrix in such disputes can be complicated and generally requires early attention.
17. On the basis of the claimant’s pleaded case it is impossible for the respondent to know with any precision what is being alleged against it or how it is to be expected to defend such allegations. It is over eighteen months since the claimant says his employment ended with the respondent and the respondent is no further forward in understanding what is being alleged against it or the case it has to meet. Furthermore, it is over thirteen months since the respondent would have had a better understanding of the case against it had the initial case management hearing, listed to clarify the claims being pursued, proceeded. There is no doubt in my view that memories will have faded considerably over that eighteen month period and the respondent has not had a proper opportunity to investigate the facts.
18. Save for the hearing listed on 11 April 2017, the claimant has not provided any evidence to support his requests for postponements of the listed preliminary hearings. Even in relation to the request related to 11 April 2017 listing, the claimant provided no indication as to any endeavours he had made to have his other hearing rescheduled. When balancing the prejudice to each party, I am satisfied that the respondent will suffer more than the claimant if the claim is now to proceed for the reasons I have identified above. The claimant has offered no explanation as to why he is not in attendance today and it appears that his telephone contact number is no longer up to date. The claimant was aware that this matter was being re-listed because he opposed the application for a strike out but does not appear to have had any further contact with the tribunal subsequent to his email opposing that application.

19. For all these reasons I consider that the respondent suffers far more significantly in terms of the balance of prejudice and for that reason the claim is struck out.

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Employment Judge Wyeth

Date: ...28 March 2018.....

Sent to the parties on: .12 April 2018.....

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For the Tribunal Office