



# EMPLOYMENT TRIBUNAL

**Claimant:** Mrs Andrea Moore  
**Respondent:** Clarion Housing Group Limited  
**On:** 24 May 2021  
**Before:** Employment Judge T Russell (sitting alone)  
**HELD AT:** East London Hearing Centre ( by Cloud Video Platform)  
**Appearances:**  
**Claimant:** No Appearance  
**Respondent:** Ms. C Meehan , Counsel

## OPEN PRELIMINARY HEARING

### JUDGMENT

The Claimant's claims are struck out under Rule 37 (1) ( c) and (d) of the Employment Tribunal Rules due to non-compliance with orders of the Tribunal and because the claim has not been actively pursued .As a result the Claimant's claims are dismissed and the hearing listed for 9-12 November is vacated. The Claimant as well as her representative (and the Respondent ) to be sent this judgement.

### REASONS

#### **Background**

1. The Respondent provides social housing and the Claimant (who has continuity of employment from March 2010) remains employed by the Respondent as a Housing Support Co-Ordinator/Tenancy Sustainment Specialist ( the exact job title is disputed). Her role includes the important responsibility of supporting vulnerable tenants faced with eviction but she is currently off work through sickness and has been for some time. It appears she currently benefits from the Respondent's income protection scheme giving her a percentage of normal salary during her sickness rather than just SSP.
2. The Claimant was initially employed by Circle Care and Support Limited. Her employment transferred to the Respondent under TUPE on 1 April 2019. Following the transfer, the

Claimant's initial place of work was Cambridge and then, due to the closure of that office, the Claimant's place of work changed to Bishops Stortford with effect from 1 June 2019.

3. The Claimant claims direct and indirect disability discrimination and a failure to make reasonable adjustments. She also claims victimisation as a result of inadequately specified but claimed unfavourable treatment after requests for reasonable adjustments were allegedly denied to her.
4. Finally she claims unlawful deduction of wages. The Claimant believes she is paid less than others doing the same or a similar job to her and received less mileage allowance. The Respondent justifies this by reference to the broad band of pay for her level of seniority ( her role is classed as Care and Support South East Level 2 and her pay is based on a salary range of £17,894 – £22,622 ) and the fact that some employees of the Respondent are able to claim a higher mileage because they do not receive a cash allowance or car and are required to drive to fulfil their duties.
5. It is claimed that she has had cervical dystonia from April 2016 and spasmodic and perhaps laryngeal dystonia from March 2019. She may also be claiming anxiety and depression. The position remains uncertain and although Respondent accepts she is disabled they query the extent of this and the time periods covered by her disabilities.
6. It is accepted that the Claimant did make requests for reasonable adjustments (for instance as to a more ergonomic chair after a change of office, flexibility as to days worked, working from home and the way in which she communicated with clients/tenants because of her speech difficulties). But the detail remains unclear along with the extent the Respondent accepted her requests. They state, following on from an Occupational Health referral, they did accommodate or attempt to accommodate the Claimant, including minimising the need for phone communication, the provision of a chair with head support, an upright mouse, a DSE assessment and increased working from home. The pandemic obviously complicated the position and allegedly increased the Claimant's symptoms of cervical dystonia, laryngeal dystonia and anxiety as well as contributing to delays in the process that may otherwise have assisted the Claimant back into work. The Respondent denies that there has been any failure to make reasonable adjustments. In addition to her other discrimination claims the actions taken or not taken in respect of "reasonable adjustments" may have been the main area of dispute at any full hearing as part of the fact finding process then.
7. The proposal had been that the Claimant returned to work on 13 July by which time she had instructed Scott-Moncrieff, solicitors, to act on her behalf and had filed her ET1 claim (4 July 2020). But for reasons set out in the pleadings and correspondence she remained unable to return to work and blamed the Respondent for this.
8. Preliminary Hearings took place on 26 October 2020 and 7 December 2020 with orders made to include the Claimant having to provide further particulars of her claims. But she has consistently failed to do so. The delay appears to be initially due to the Claimant as the first PH was adjourned because the Claimant's representative did not have sufficient instructions. But the Claimant's ongoing noncompliance with the ET orders is due primarily to the Claimant's solicitor, Ms. Deakin, and her inability (apparently through her own illness) to take any material steps in this case. Despite clear orders to do so. On 10 February 2021 she belatedly asked for a 6 week stay in the case management orders which was agreed by the Respondent and the Tribunal. But there has been no apparent communication from the Claimant or her representative since then, the deadline of 14 April for providing the ordered particulars has come and gone and neither the Claimant

or her representative made an appearance today.

### **Open Preliminary Hearing May 24**

This hearing was listed by EJ Burgher to consider whether to strike out the Claimant's claims, pursuant to rule 37 of the Employment Tribunal Rules, on the basis of:

- 1.1 Non-compliance with an Order of the Tribunal;
- 1.2 That the claim has not been actively pursued;
- 1.3 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).

EJ Burgher's order from the hearing of 7 December stated that, alternatively, Tribunal will consider whether to order the Claimant to pay a deposit as a condition of proceeding with any or all of her claims pursuant to rule 39 of the Employment Tribunal rules. However this was absent from the notification of hearing sent to the parties on 16 December. Rule 39 provides that where the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument. However this is not relevant here as the Claimant's arguments have not had an opportunity to be rehearsed. And the Application before me concerns noncompliance with tribunal orders and or that the claim has not been actively pursued and or that it is no longer possible to have a fair hearing . Under Rule 37 (1) (c) (d) and (e).

In addition the Respondent asked me to consider an Unless Order if a Rule 37 Order was not to be made.

### **Findings**

Having heard submissions from the Respondent and read the Hearing Bundle I make the following findings

- a) Orders made on 6 October (EJ Massarella on her own volition), 26 October and 7 December (both EJ Burgher) all received by the Claimant's representative have not been complied with by the Claimant. This noncompliance is material.
- b) The Claimant has not engaged in the process at all including as to the list of issues provided by the Respondent (as per the ET Orders) where comment was sought (but not provided) from the Claimant.
- c) The Claimant's representative attended the hearing of 26 October but has failed to attend preliminary hearings of 7 December and today. In both cases this failure to attend was not known before the hearing.
- d) Through the ET orders and through letters of 16 December and 5 March 2021 (Regional Employment Judge Taylor) all sent to the Claimant representative Ms. Deakin (although she has clearly been ill), and presumably her client, were aware of the hearing today , 24 May. And knew that a strike out order was being considered.
- e) There has been no communication with the Tribunal to seek a postponement of this hearing and or explain the Claimant's absence and the fault lies with the Claimant's solicitor who has remained on record. As a result, for instance, the Respondent were not permitted to contact the Claimant directly and so had to keep pressing her solicitor (in

vain) for a reply.

- f) There has been no explanation of the nature of the Claimant's representative's illness or medical evidence provided as to this.
- g) Although Ms. Deakin earlier stated that she had to personally have the care and conduct of the case she works in a large firm of London based solicitors (Scott-Mocrieff & Associates Ltd) who market themselves as "*having specialist employment lawyers offering services throughout England*" including some 12 locations mentioned on their website. In referring to the employment law advice (which they give as one of the firm's key areas of expertise) they state "*Scott-Mocrieff boasts some of the most highly rated employment law solicitors in the country*". And yet the matter was not assigned to another lawyer. As one would expect in situations where one solicitor is prevented, for whatever reason, from acting and for whatever reason.
- h) Certainly, to the extent Ms. Deakin could not undertake the work herself due to illness, she or a colleague /partner at the firm could have informed the Claimant that she could no longer act and or assist the Claimant to find another representative.
- i) The Respondent has conscientiously and fairly followed up with the Claimant in writing on five separate occasions to encourage compliance with the case management orders and contacted the Tribunal more than once as to the Claimant's failure to comply. In the only apparent communication from the Claimant other than asking for a stay in February the Claimant's representative promised on 13 January to deal with the outstanding queries as soon as possible but has not done so.
- j) Significant recent efforts were made to contact Ms. Deakin by the Respondent. These include messages left for her and texts sent on her phone (the number supplied and used being mentioned 4 times in the ET1 particulars under sections 1.6.1.7. 11.5 and 11.6) as well as emails correctly addressed and that were clearly received by her office. No Out of Office message and/or alternative email contact was provided nor was there any other evidence that Ms. Deakin was uncontactable. And indeed at one time the Respondent was informed a message would be passed onto her and Ms. Deakin would get in touch (though she did not), suggesting that she has been working at least part of this period.
- k) The Tribunal and Respondent could and should have been contacted at some point in the last 6 weeks after a generous extension of time for compliance was permitted.
- l) The Respondent, having supplied a draft list of issues, had and has legitimate and significant queries as to the Claimant's claims. Queries which have been upstanding for some 7 months, the Claimant having first been ordered to supply further particulars of the claim by 20 November 2020. Whilst it is unlikely to be the fault of the Claimant herself the Respondent is in the invidious position of incurring considerable costs to defend a claim which is inadequately pleaded and therefore one where they have to chase up such detail through (then unanswered) correspondence.
- m) The Case is listed for 9-12 November 2021. No progress has been made on the issues to be considered at that hearing for 7 months and the directions timetable is months behind as a result including disclosure and exchange of witness statements and all because of inaction from the Claimant.

Strike Out  
Rule 37

I have put the relevant provisions for this case in bold italics.

***(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.*

*(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.*

Unless orders  
Rule 38

*(1) An order may specify that if it is not complied with by the date specified the claim or response, or part of it, shall be dismissed without further order. If a claim or response, or part of it, is dismissed on this basis the Tribunal shall give written notice to the parties confirming what has occurred.*

*(2) A party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations.*

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

I also have regard to Rule 6 of Employment Tribunal Rules which provides that the ET may take such action as it considers just, including waiving or varying the requirement, striking out the claim or response in whole or in part, barring or restricting a party's participation in proceedings or awarding costs.

It does not of course follow that a striking out order or any other sanction should always be the result of even material noncompliance with an order. But considering all the circumstances in this case including the magnitude of the default along with the overriding objective it is clear, from my findings, that even if the Claimant's solicitor was too ill to progress this case action

should have been taken to ensure the Claimant was properly represented or could progress matters herself as a litigant in person. This is a case of persistent or deliberate failures to comply with rules or orders (as identified in the case of **Blockbuster Entertainment Ltd v James** [2006] EWCA) and these are unjustifiable in view of my findings and have now reached the “point of no return” as referred to in that case. The fact that the blame lies with the Claimant’s solicitor exacerbates the offence caused in that unrepresented parties are, naturally, sometimes overwhelmed by the Tribunal procedures and may need more latitude and assistance.

I have not found that there cannot be a fair hearing in this case given this is not listed until early November (even though the postponement of that listed hearing would be increasingly likely) and I do not strike out the case on this ground but the noncompliance has been serious. I therefore have to consider whether a strike out is justified under rule 37 (1) (c) for non-compliance with any of these Rules or with an order of the Tribunal and/or (d) that it has not been actively pursued.

Many if not most Strike out Applications seek to claim that the complaints made have “no reasonable prospect of success” under Rule 37 (1) (a) and the case authorities in such cases underline the reluctance to strike out discrimination claims in particular (for instance **Anyabwu v South Bank Student Union** [2001] ICR 391 and **Ezsias v North Glamorgan NHS Trust** [2007] ICR 1126). But this strike out application before me is not as to the merits of the claims but is brought under the less usual Rule 37 (1) (c-e).

The Claimant had already been warned to comply with the orders. This is not a first or even second offence. There have been repeated breach of case management orders to provide Additional Information and to finalise the List of Issues. The result is that the Respondent is still not in a position to adequately understand the issues, despite the passage of time. As the Respondent states “preparation for the case has been brought to a standstill”.

I have been referred to the case of **Khan v London Borough of Barnet** UKEAT/0002/18 where the EAT upheld an EJ’s decision to strike out a claim just under five months after it had been started on the ground that it was not being actively pursued. The Claimant had failed to attend a Preliminary Hearing and then failed to respond to two letters sent by the ET about possible strike out of the claim and medical evidence. The EAT noted the “exceptional circumstances” of the case given the Claimant’s complete lack of engagement with the progress of his claim in any meaningful way and the tendency to pick and choose which emails and requests to comply with.

This case differs from Khan. The Claimant’s solicitor has been ill and asked for an extension of time on one occasion and although she has not replied to any communication in a substantive way she did indicate an intention of doing so. But nevertheless she has, directly (through inaction herself) or indirectly (through a failure to get assistance or have the Claimant instruct a different firm or even act on her own as so many Claimants do) caused a wholly unacceptable standstill to the proceedings.

The Respondent continues in her submissions to refer to the judgment of Lady Smith in **Rolls Royce plc v Riddle** [2008] IRLR 873 which the EAT paid attention to in the **Khan case**

*“A decision to strike out a claim is not to be taken lightly. It is a matter of last resort. In this case the reason for strike out was because the Claimant appeared not to be actively pursuing his claim and had not complied with directions. I was referred by counsel for the Respondent to an authority, Rolls Royce plc v Riddle [2008] IRLR 873, and, in particular at paragraphs 18 to 20 of the report. At paragraph 20 Lady Smith sets out as follows:*

*"20. ... it is quite wrong for a claimant, notwithstanding that he has, by instituting a claim, started a process which he should realise affects the employment tribunal and the use of its resources, and affects the respondent, to fail to take reasonable steps to progress his claim in a manner that shows he has disrespect or contempt for the tribunal and/or its procedures. In that event a question plainly arises as to whether, given such conduct, it is just to allow the claimant to continue to have access to the tribunal for his claim. ..."*

And applying these legal authorities and given my findings my judgement is that this is such a case and it is proportionate to strike out the claims. The extent of the Claimant's failure to comply the tribunal orders, even when put on notice of the importance of doing so by the Tribunal, is considerable. And there has been a total lack of engagement in the process and to progress the claims. And even when facing a strike out claim there has been no communication from the Claimant or her representative.

I agree with the Respondent' Counsel's submission when she states

*"As in **Rolls Royce**, it is "wrong" for C to have commenced a claim, taking up the ET's and R's resources, yet at the same time failing to take any reasonable steps to progress that claim. R contends that this demonstrates disrespect to the ET and/or its procedures"*

I have considered whether an Unless Order might be sufficient as a sanction here. To give the Claimant one last opportunity to comply with the Tribunal orders. But the Claimant has, in practice, already had this chance. And I also have had regard to Rule 6 of Employment Tribunal Rules and the provisions of Rule 37.

It is significant that, knowing that a strike out order was being considered, the Claimant's solicitor has again failed to communicate with the ET or appear at this Open Preliminary Hearing or even provide an explanation for this. A hearing fixed many months ago and the subject of many communications and reminders since.

This is an exceptional case in that one rarely sees such lack of engagement from a represented party but, despite the fact the Claimant herself may be innocent of any fault, my findings lead me, having considered the legal position, to a judgment that the Claimant's claims be struck out. I have considered rule 37(1) (c) and (d) carefully and separately but make my judgment based on the material breach of both sub sections, specifically, because of both non-compliance with an order of the Tribunal and (though this overlaps of course) because the claim has not been actively pursued.

Finally, recognising the likely lack of fault attributable to the Claimant here who nevertheless now has her claims dismissed (her remedy, as a result, may be against Scott-Moncrieff, solicitors) I have asked for her to be sent the judgment directly as well as to her solicitor so that she is sure of receiving it.

**Employment Judge T Russell**  
**Date: 26 May 2021**