**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4101680/2022**

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**Held in Glasgow on 14 and 15 September 2022**

**Employment Judge W A Meiklejohn**

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| **Mrs Helen McKenna** | **Claimant**<br>**No appearance and**<br>**No representation** |
| **Drivercheck Ltd** | **Respondent**<br>**Represented by:**<br>**Mr S Healy -**<br>**Barrister** |

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

20 The Judgment of the Employment Tribunal is that, the claimant having failed to attend or be represented at the hearing on 15 September 2022, her claim of constructive unfair dismissal is dismissed.

**REASONS**

1. This case was listed for a final hearing on 14, 15, 16, 19 and 20 September 25 2022, to deal with the claim of constructive unfair dismissal brought by the claimant against the respondent. The claimant did not attend on 14 and 15 September 2022. The respondent did attend on these dates and was represented by Mr Healy.

**Nature of claim**

30 2. The claimant in her ET1 claim form asserted that she had been unfairly dismissed by the respondent. She referred to a "complete breakdown of trust" and to the "breaking point" being when the previous owner of the respondent company (Mr E Eusebi) appeared at her home "on the pretence that he would

need to take my computer away due to bugs on my computer". The claimant also alleged that she had been threatened by Mr Eusebi.

3. In her letter of resignation dated 25 February 2022, the claimant referred to "irretrievable breakdown of trust/victimisation", citing events said to have occurred between 10 December 2021 and 18 January 2022. The claimant also referred to a "threat", citing events said to have occurred on 25 and 27 January 2022.

4. In their Grounds of Resistance, the respondent denied that the claimant resigned in response to any breach of her terms of employment.

5. Accordingly, this was a claim of constructive unfair dismissal. This engaged section 95 of the Employment Rights Act 1996 which, so far as relevant, provides as follows:

   *"(i) For the purposes of this Part, an employee is dismissed by his employer if…*

   *(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

6. For her constructive unfair dismissal claim to succeed, the claimant would need to present evidence showing that there had been conduct of the respondent which amounted to a breach of an express or implied term of her contract of employment, and that the breach had been material, i.e. going to the root of the contract or showing that the respondent no longer intended to be bound by some essential term of the contract. The Tribunal would need to be satisfied that the claimant resigned in response to that breach (i.e. it was a reason for her resignation) and that she did not wait too long before doing so.

7. Because the onus of presenting such evidence to the Tribunal rests on the claimant who asserts constructive dismissal, it is normal practice for such a claimant to give evidence first at the final hearing. The respondent's

representative mentioned this in an email sent to the Tribunal on 7 September 2022, which email referred to the hearing starting on 14 September 2022 and was copied to the claimant at the email address provided by her in her ET1. References below to the "*email address*" are to this address.

**Fixing of hearing date**

8. The final hearing was previously listed for 20, 21 and 22 July 2022, but this was postponed on the application of the respondent. On 9 June 2022, the Tribunal wrote to the claimant asking her to provide a list of her unavailable dates in September and October 2022. This letter was sent by covering email of the same date, using the email address. The case file contained a number of emails sent by the Tribunal, and by the respondent's representative, to the claimant at the email address, and also a number of emails from the claimant from the email address.

9. On 16 June 2022, the claimant sent an email to the Tribunal, which appeared to be a reply to the Tribunal's covering email of 9 June 2022, in which she stated –

*"I am free whenever"*

10. The Notice of Hearing setting the dates of 14 – 20 September 2022 was dated 22 June 2022 and was sent to the claimant, using the email address, by covering email of the same date.

**Application for postponement**

11. On 13 September 2022, the Tribunal wrote to the claimant to advise that following the announcement of the death of HM Queen Elizabeth II, all hearing centres would be closed on 19 September 2022. The letter confirmed that the other dates – 14, 15, 16 and 20 September 2022 – were unaffected. This letter evidently confirmed a telephone call made by the Tribunal to the claimant on 12 September 2022. It was sent by covering email of the same date to the email address.

12. The claimant replied to that email at 15.23 on 13 September 2022 in these terms –

*"The first I knew of the new arranged date for tribunal was yesterday, when I received a phone call from a lady, informing me about Mondays arrangements.*

*I have heard nothing from yourself or from drivercheck.*

*As it happens, I am not available on dates provided, as am on holiday.*

*Unsure why I thought this, but was convinced the tribunal would not be taking place until jan 2023 (although, admittedly don't know why I thought this)".*

13. The Tribunal responded to the claimant's email by email sent at 17.26 on 13 September 2022 to the email address, attaching a letter of the same date. This letter advised the claimant that her application to postpone the hearing had been refused by Employment Judge McManus. The reasons for refusal were expressed as follows –

*"The Judge's reasons for refusing the request are that the applying party has made the application late (that is less than 7 days before the date the hearing was due to begin) and therefore for the Tribunal to allow a postponement one of the conditions under Rule 30A(2)(a) – (c) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 must be met. The Tribunal is not satisfied that any of the conditions has been met and therefore refuses the application."*

14. The Tribunal's letter included the following –

***"The case remains listed for hearing on 14 September 2022"***

and also –

*"The postponement request is to be discussed at the outset of the hearing on 14 September 2022."*

**14 September 2022**

15. At the scheduled start time of 10.00am on 14 September 2022, the respondent (in the person of Mrs M Eusebi) was in attendance, along with Mr Healy of counsel. The claimant did not attend.

16. I asked the clerk to contact the claimant by telephone. Having done so, the clerk reported to me that the claimant had said she was at work and would not be attending the hearing. The claimant told the clerk that (a) she would be unable to attend on 15 and 16 September 2022 for the same reason but (b) she would be available in the following week as she would be on holiday.

17. The hearing on 14 September 2022 commenced at 10.13. I stated what had occurred. I observed that I had noticed in the case file the email of 7 September 2022 (referred to in paragraph 7 above) sent by the respondent's representative to the Tribunal, copied to the claimant, which referred to –

*"….the hearing starting on 14th September 2022 and running to 20th September 2022."*

18. Mr Healy told me that there had been other email correspondence from the respondent's representative to the claimant in which the hearing dates had been mentioned. Mr Healy invited me to dismiss the claim under Rule 47. He submitted that the alternative under that Rule of proceeding with the hearing in the claimant's absence would not be appropriate since, in the absence of evidence from the claimant, the burden on her of proving dismissal could not be discharged. Mr Healy also submitted that it would not be in accordance with the overriding objective to require the respondent to give evidence.

19. I decided that it would not be appropriate to dismiss the claim under Rule 47, nor to proceed with the hearing (as the onus of providing dismissal was on the claimant). Instead, I directed that the Tribunal should write to the claimant in terms of a draft letter which I prepared. I also directed that the clerk should telephone the claimant again to state that she would require to attend the Tribunal on 15 September 2022.

20. The Tribunal duly wrote to the claimant on 14 September 2022. That letter set out Rule 47 and also quoted part of Rule 90. It concluded in these terms –

**"The Judge directs that the claimant shall attend in person at Glasgow Tribunal Centre at 10.00am on 15 September 2022. Unless the Judge decides otherwise, the hearing of evidence will commence at that time (with the claimant giving evidence first).**

**If the claimant does not attend on 15 September 2022, the Judge will consider matters under Rule 47."**

21. This letter was sent to the claimant by email, using the email address, at 12.26 on 14 September 2022. The Tribunal's covering email referred to the telephone call made by the clerk to the claimant at 12.21 on 14 September 2022.

**15 September 2022**

22. At the scheduled start time of 10.00am on 15 September 2022, Mrs Eusebi and Mr Healy were again in attendance. The claimant was not present.

23. I asked the clerk to contact the claimant by telephone. Having done so, the clerk reported to me that the claimant had said that she would not be attending.

24. The hearing on 15 September 2022 commenced at 10.08. I stated what had occurred. I announced that I had decided to dismiss the claim under Rule 47. My reasons for so deciding are set out below.

**Application for expenses**

25. Mr Healy made an application for expenses (costs) under Rule 76, due to the unreasonable behaviour of the claimant. He submitted that it had been unreasonable to fail to attend a hearing. It showed complete disrespect for the respondent and for the Tribunal. The amount of expenses sought by the respondent was £3300 being Mr Healy's fees. Having regard to Rule 84, Mr

Healy observed that the Tribunal might want to have a further hearing on expenses.

26. I reminded myself of Rule 77. I decided that the claimant should be given an opportunity to make representations in response to the application for expenses. I arranged for the Tribunal to write to the claimant about this.

**Rules**

27. I have referred to various Rules above and, before setting out the reasons for my Rule 47 decision, I will set out the Rules relevant to that decision and also those I have mentioned relating to expenses.

28. The Rules are found in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. Rule 2 (**Overriding Objective**) provides as follows:

*"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable –*

*(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;*

*(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. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."*

29. Rule 47 (**Non-attendance**) provides as follows –

*"If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence."*

30. Rule 75 (**Costs orders and preparation time orders**) provides (so far as relevant) as follows –

*"(1) A costs order is an order that a party ("the paying party") make a payment to –*

*(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative; …"*

31. Rule 76 (**When a costs order or a preparation time order may or shall be made**) provides (so far as relevant) as follows –

*"(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –*

*(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; …"*

32. Rule 77 (**Procedure**) provides as follows –

*"A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application."*

33. Rule 84 (**Ability to pay**) provides as follows –

*"In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay."*

5 34. Rule 85 (**Delivery to the Tribunal**) provides (so far as relevant) as follows –

*"(1) Subject to paragraph (2), documents may be delivered to the Tribunal –*

*(a) by post;*

*(b) by direct delivery to the appropriate tribunal office (including delivery by a courier or messenger service); or*

10 *(c) by electronic communication…."*

35. Rule 86 (**Delivery to parties**) provides (so far as relevant) as follows –

*"(1) Documents may be delivered to a party (whether by the Tribunal or by another party) –*

*(a) by post;*

15 *(b) by direct delivery to the appropriate tribunal office (including delivery by a courier or messenger service); or*

*(c) by electronic communication…"*

*(2) For the purposes of sub-paragraphs (a) to (c) of paragraph (1), the document shall be delivered to the address given in the claim form…*

20 *(3) If a party has given both a postal address and one or more electronic addresses, any of them may be used unless the party has indicated in writing that a particular address should or should not be used."*

36. Rule 90 (**Date of delivery**) provides as follows –

*"Where a document has been delivered in accordance with rule 85 or 86, it*
25 *shall, unless the contrary is proved, be taken to have been received by the addressee –*

*(a) if sent by post, on the day on which it would be delivered in the ordinary course of post;*

*(b) if sent by means of electronic communication, on the day of transmission;*

5 *(c) if delivered directly or personally, on the day of delivery."*

**Reasons for Rule 47 decision**

37. I considered that, where a party fails to attend a hearing, there are in effect three options available to the Tribunal. Two of these are provided by Rule 47 –

10 (a) dismiss the claim, or

(b) proceed with the hearing.

These are not obligatory, in the sense that the Tribunal must do one or the other, as the Rule provides that "*the Tribunal may dismiss the claim*...." It remains open to the Tribunal to use its case management powers under Rule 15 29 and adjourn the hearing. That was what I did when considering Rule 47 on 14 September 2022.

38. On 15 September 2022, when deciding what to do in light of the claimant's non-attendance, I considered the same three options. I also reminded myself that I should not make a decision under Rule 47 without first considering any 20 information available to me after enquiries made about the reasons for the claimant's absence.

39. The information which was available to me included the following –

a. The case file which disclosed electronic communication between the Tribunal and the parties, using in the case of the claimant the email 25 address.

b. The claimant's email of 16 June 2022 regarding her availability in September/October 2022 – see paragraph 9 above.

c. The fact that the respondent had, in correspondence with (or copied to) the claimant, referred to the hearing dates.

d. The claimant's assertion in her email to the Tribunal of 13 September 2022 that she had heard nothing from the Tribunal or the respondent about the hearing date.

e. The conflicting statements made by the claimant about her availability on the dates listed for the hearing – see paragraphs 9 and 12 above – and what she said to the Tribunal clerks.

f. The information given to me by the Tribunal clerks on 14 and 15 September – see paragraphs 16 and 23 above.

g. The fact that I knew the claimant had been told in a telephone conversation with the Tribunal clerk at 12.21 on 14 September 2022 that she was required to attend the hearing on 15 September 2022.

h. The Tribunal's letter of 14 September 2022, sent to the claimant by email to the email address, which contained my direction that the claimant should attend in person on 15 September 2022.

40. I considered that the enquiries which had been made by the Tribunal clerks on 14 and 15 September 2022 were as much as could practicably be done in the circumstances. Accordingly, the "*before doing so*" part of Rule 47 was satisfied.

41. In deciding what to do under Rule 47, I believed it would not have been appropriate, nor in accordance with the overriding objective, to proceed with the hearing. The claim could not succeed without evidence from the claimant on the basis of which a finding could be made that she had been constructively dismissed. The onus was on her. It would have been unreasonable, and would have occasioned unnecessary expense, to require the respondent to lead evidence.

42. I also believed it would not have been appropriate to adjourn the proceedings. I considered that was the right course to follow on 14 September 2022, so

that my direction to attend on 15 September 2022 could be communicated to the claimant. However, that having been done, a further adjournment would have entailed delay and expense to the respondent, which ran contrary to the overriding objective.

43. That left the remaining course of action under Rule 47 – dismissing the claim, I recognised that this was a draconian step akin to strike out, and it was appropriate to consider any lesser alternatives. That was, in effect, what I had done on 14 September 2022 when I adjourned the hearing to the following day. My reason for not doing so again is set out in the preceding paragraph.

44. Mr Healy had floated the suggestion of an unless order (under Rule 38) during the hearing on 14 September 2022. I did not believe that would have been appropriate. The claimant had been directed to attend the hearing on 15 September 2022 and had been made aware of the Tribunal's power to dismiss under Rule 47. In any event, proceeding by way of an unless order on 15 September 2022 would have hesitated a further adjournment, the reasons against which I have already articulated.

45. I found myself in agreement with Mr Healy that the claimant had, on the face of it, been disrespectful to the Tribunal by failing to attend the hearing on 15 September 2022 having been directed to do so. A party should follow the Tribunal's directions, or seek to have those directions varied or set aside. The claimant had not done so.

46. I was uncomfortable with the conflicting information provided by the claimant to the Tribunal as to her availability. She stated initially that she was available "*whenever*". When seeking a postponement she said she was not available because she was on holiday on the hearing dates. She then told the Tribunal clerk on 14 September 2022 that she could not attend because she was at work, and would also be at work on 15 and 16 September 2022.

47. I considered the claimant's assertion, made in her email of 13 September 2022 (see paragraph 12 above) that she had been unaware of the hearing dates. I was wary about making any finding on this in the absence of

representations from the claimant. However, in terms of Rule 90, emails sent to the claimant by the Tribunal and the respondent at the email address - being an address given in the claim form per Rule 86(2) - were *"taken to have been received"* by the claimant on the day of transmission unless the contrary was proved.

48. I therefore came to the view that I was required to proceed on the basis that the claimant had received (a) emails sent to her at the email address by the Tribunal, including the one attaching the Notice of Hearing and (b) emails sent to her at the email address by the respondent including the email of 7 September 2022. If the claimant believes that she can prove the contrary, she may wish to consider an application for reconsideration of this Judgment under Rules 70-72 (**Reconsideration of Judgments**).

**Decision**

49. In all the circumstances, I came to the view that the appropriate course of action under Rule 47 was to dismiss the claim. My Judgment above reflects this.

Employment Judge: Sandy Meiklejohn
Date of Judgment: 26 September 2022
Entered in register: 05 October 2022
and copied to parties