



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110659/2019

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Employment Judge P O'Donnell

Mrs Janet Fullerton

Claimant

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Caring Homes Ltd

Respondent

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The claim is struck out under rule 37 of the Rules contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 on the grounds that the claim has not been actively pursued in terms of rule 37(1)(d) and that it is no longer possible to have a fair hearing of the claim in terms of rule 37(1)(e).

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REASONS

1. This case has an unfortunate history; the ET1 was lodged in September 2019 and, despite numerous attempts, it has not yet progressed to a final hearing.
2. The Tribunal should be clear that it does not consider that the Claimant has in any way conducted herself in a manner which is blameworthy but the fact remains that, putting aside the delays caused by the Covid pandemic, the delays in progressing the case arise from matters relating to the Claimant.
30 None of the delays can be laid at the feet of the Respondent.
3. The Tribunal considers that a short summary of the procedural history of the case will assist in putting matters in context:

- 5 a. A final hearing was initially listed for January 2020. This was postponed on an application by the Respondent (which was endorsed by the Claimant by way of her then representative). The reason for the application was that there had been no engagement from the Claimant with the standard Orders issued by the Tribunal for preparation for the hearing in terms of exchanging documents for a joint bundle and the provision of a schedule of loss as well as evidence of mitigation. The explanation from the Claimant's then representative was that he had had health difficulties which delayed matters.
- 10 b. The hearing was re-listed for May 2020 but that was postponed due to the pandemic. A telephone case management hearing was listed on 18 May 2020 to discuss further procedure; there was no attendance by either the Claimant or her representative. Subsequently, that representative withdrew from acting due to health difficulties. A further
- 15 case management hearing took place in June 2020 at which the Claimant attended.
- 20 c. The Claimant instructed new agents in July 2020 and a further case management hearing took place in August 2020. It was agreed at that hearing that the final hearing would take place remotely by way of cloud video platform (CVP) due to the pandemic restrictions at the time. Directions were also made for the preparation for the hearing including the provision of a schedule of loss and mitigation, exchange of documents and the use of witness statements.
- 25 d. A final hearing to be heard by way of CVP was listed for 16 & 17 March 2021. This hearing was postponed as a result of an application by the Claimant's representative on 10 March 2021. In summary, the reason for the application was that they were not prepared to proceed with the hearing due to various factors.
- 30 e. The hearing was relisted for 14 & 15 June 2021. This hearing was postponed, again on the application of the Claimant's agent due to the

state of preparation for the hearing. In particular, that they had had difficulties contacting proposed witnesses to take statements.

- 5 f. The hearing was again relisted for 31 August and 1 September 2021. This was postponed on the application of the Respondent on the basis that the witness statements from two of the Claimant's witnesses contained a number of allegations which had not been foreshadowed in the ET1. The first day of the hearing was converted to a case management hearing at which further directions setting out a timetable for preparation for the hearing were made.
- 10 g. The final hearing was relisted for 3 days starting on 1 December 2021. This was postponed as the person dealing with the Claimant's case had left the firm of solicitors that she had instructed and they needed to recruit a replacement. Ultimately, the firm withdrew from acting on 26 November 2021.
- 15 h. The Claimant was given a period of time to find a new representative. However, by June 2022, the Claimant had not been able to find a representative. In these circumstances, the Tribunal proceeded to list a final hearing in person to be heard on 28-30 September 2022.
- 20 i. This hearing did not proceed. The Claimant sought a postponement because she had no representative and on health grounds. The first day of the hearing was converted to a case management hearing to discuss steps that could be taken to allow the Claimant to participate in the hearing as a litigant-in-person. The rest of the hearing was discharged.
- 25 j. In the event, the case management hearing did not proceed as the Claimant indicated that she was unfit to attend. She was asked to provide evidence from her GP or medical advisers confirming that she was unfit to attend the hearing and providing a prognosis of when she would be fit to proceed with a final hearing. To date, despite a number
- 30 of reminders, no such evidence has been provided; the Claimant has

provided an extract from her medical records but this does not address the issues in question.

5 k. A further case management hearing was listed to be heard by telephone on 9 January 2023. The Claimant did not attend the hearing and no application for postponement had been received by the Tribunal.

l. At the January hearing, the following matters were identified with the Respondent's agent in relation to the state of preparedness for a final hearing:-

10 i. No schedule of loss or mitigation has ever been provided by the Claimant despite the fact that this was ordered as early as 2019 with a number of further directions made in relation to this in the intervening period.

15 ii. The Respondent has their own bundle of documents but have never received any documents from the Claimant.

iii. The Respondent has draft witness statements for their witnesses. However, those witnesses left the Respondent's employment around two years ago and contact with them since has been sporadic.

20 iv. The Respondent has received a witness statement for the Claimant and some of her witnesses. They are not clear as to how many witnesses the Claimant wishes to call due to the lack of contact from her.

25 m. A strike-out warning was issued to the Claimant as part of the Note of the January 2023 hearing indicating that the Tribunal was considering striking-out her claim under Rule 37(1)(d) and/or (e). At the same time, a final hearing in person was listed for 19-21 April 2023.

n. The Claimant was given 14 days to respond to the strike-out. No response was received within this deadline.

- o. A further reminder was sent to the Claimant on 25 January 2023. No response has been received.
4. The Tribunal considers that further delay is not in keeping with the Overriding Objective or in the interests of justice. There is a need to do justice to the Respondent in having the case resolved as there is in ensuring that the Claimant has the opportunity to present her case. The Claimant has had more than sufficient opportunity to proceed to a hearing and, as noted above, the postponement of the various hearings which have been listed arise from the Claimant's side albeit in circumstances in which she is not blameworthy.
5. The length of the delay will undoubtedly impact on the recollection of witnesses and the quality of the evidence.
6. The Tribunal is particularly concerned with the lack of engagement by the Claimant since the hearing in September 2022 was postponed. She has not replied to recent Tribunal correspondence and failed to attend the January hearing.
7. In these circumstances, the Tribunal considers that the Claimant has failed to actively pursue her claim and that the considerable delay in progressing to a final hearing means that a fair hearing is no longer possible given the inevitable impact this passage of time will have on the recollection of all the witnesses.
8. For these reasons, the claim is struck-out under Rule 37(1)(d) and (e).

25 **Employment Judge: P O'Donnell**
Date of Judgment: 10 February 2023
Entered in register: 13 February 2023
and copied to parties