



EMPLOYMENT TRIBUNALS

Claimant: Miss O Motajo-Adebayo

Respondent: Precious Homes Limited

RECORD OF A PRELIMINARY HEARING

Heard at: In private CVP **On:** 5 July 2024

Before: Employment Judge Richard Wood; Mrs J Costley; Mrs F Betts

Appearances

For the claimant: Dr O Taiwo (Representative)

For the respondent: Mr L Pike (Solicitor)

JUDGMENT

1. The claimant's application to strike out the response under rule 37(1)(c) is dismissed.

REASONS

2. This was an application by the claimant to strike out the response under rule 37(1)(c) of the Employment Tribunals Rules of Procedure 2013 on the grounds that the respondent had failed to comply with orders made by Employment Judge Davidson on 12 March 2024. The application was made at a preliminary hearing listed with the primary intention of having the Tribunal decide whether the claimant had a disability at the relevant time, and whether the respondent had knowledge of any disability.
3. Judge Davidson had made standard directions for the preparation for the preliminary hearing, including for the compiling of a hearing bundle, and the preparation of witness statements. In summary, nothing was done by way of compliance with these orders until 3 July 2024, for a hearing on 5 July 2024. In particular, the claimant, who appeared not to be professionally represented, had not had sight of the bundle, or the respondent's witness statement, until a day or so before the hearing. The claimant had not provided a witness statement at all. Neither party had a satisfactory explanation for the failures. In Mr Pike's case, this was particularly disappointing, because he is a solicitor.

4. The claimant's representative, Dr Taiwo, robustly suggested that the claimant was severely prejudiced by the claimant's failure. She had not been allowed fair and reasonable opportunity to prepare her case, and in particular, her oral testimony. Dr Taiwo submitted that it was appropriate to strike out the response in the circumstances. The respondent resisted the application.
5. Establishing one of the specified grounds on which a claim or response can be struck out is not of itself determinative of a strike-out application. When considering whether to strike out a claim, a tribunal must first consider whether any of the grounds set out in rule 37 have been established; and then, having identified any established grounds, it must decide whether to exercise its discretion to order strike-out.
6. In deciding whether to order strike-out, tribunals should have regard to the overriding objective of dealing with cases 'fairly and justly'. This includes, among other things, ensuring so far as practicable that the parties are on an equal footing, dealing with cases in ways that are proportionate to their complexity and importance, and avoiding delay. The overriding objective requires that the proportionality of the sanction must be at the forefront of the judge's mind, having regard to the relevant default, its effect on the other side, and whether a lesser sanction is available and appropriate.
7. In this case, the Tribunal accepted that there was likely to be some prejudice to the claimant if the hearing proceeded on the day. The potential disadvantage of being provided with all of the evidence, at such notice, was apparent. However, the Tribunal took the view that the proposed sanction was severe having regard to the default by the respondent. It was also the first such failure. The respondent had a perfectly viable defence to these claims, which it would be denied from presenting if struck out. On the other hand, it was the Tribunal's view that the prejudice to the claimant could be wholly addressed using lesser sanctions, such as an adjournment. The Tribunal also noted that the claimant was, to some extent, culpable in relation to the orders, given that she had not provided a witness statement. The proposed strike out was, in the tribunal's judgment, disproportionate in the circumstances.
8. Accordingly, the Tribunal dismissed the application and adjourned for a further preliminary hearing.

Employment Judge Wood
5 July 2024

Sent to the parties on:

06/08/2024
For the Tribunal Office: