



# THE EMPLOYMENT TRIBUNALS

**Claimant:** Mr R Nyamaah  
**Respondent:** JH Hart & Company Solicitors  
**Heard at:** East London Hearing Centre  
**On:** 5 November 2020  
**Before:** Employment Judge Burgher

**Representation**  
Claimant: Did not attend  
Respondent: Ms S Wookey (Counsel)

## JUDGMENT ON PRELIMINARY HEARING (OPEN)

1 The Claimant's claims are struck out.

### REASONS

1 The hearing took place by Cloud Video Platform. The Claimant did not attend and the hearing started late in order for the clerk to attempt to contact the Claimant by email and by telephone. No response was forthcoming and no explanation was provided by the Claimant in respect of the reasons for his non-attendance. The hearing proceeded in his absence.

2 The matter was listed before me for a preliminary hearing to consider:

- 2.1 Whether to strike out all or any part of the Claimant's claim, pursuant to rule 37 the Employment Tribunal rules, on the grounds that it:
  - 2.1.1 had no reasonable prospect of success;
  - 2.1.2 they had been non-compliance with Tribunal orders;
  - 2.1.3 the claims are not being actively pursued.

2.2 Whether to order the Claimant to pay a deposit in respect of any allegation as a condition of continuing the claim pursuant to rule 39 of the Employment Tribunal rules.

3 I was provided with a skeleton argument from Ms Wookey, counsel for the Respondent, a signed witness statement for Vikesh Bharaohda, solicitor for the Respondent with relevant 18 page attachment.

Relevant factual background

4 The Claimant commenced employment as a paralegal for the Respondent on the 12 December 2019 and was dismissed on 28 February 2020. He contacted ACAS in respect of his claims on 2 April 2020, and ACAS certificate was issued on 22 April 2020 and the Claimant subsequently presented his complaint for race discrimination on 20 May 2020.

5 The narrative of the Claimant's claim refers several times to racial undertones to the treatment he was subjected to but there is an absence of comparators and in some instances references to the whole working environment been difficult for everyone. Miss Wookey submits that this undermines any claim for race discrimination and as such his claims has no reasonable prospect of success. Miss Wilkie submitted that CPR 24 should be referred to by analogy and have no real prospect of success and as such his claims should be struck out/

6 The Claimant's claim makes reference to the fact that he is suffering from anxiety.

7 The Respondent submitted its ET3 on 6 August 2020

8 On 7 August 2020 the Claimant wrote to the Tribunal stating amongst other things "I am due in court with the Respondent for the preliminary hearing on 14 September, yet have not received the defence/response the ET1"

9 On 18 August 2020 the Claimant was ordered to provide a statement of remedy by 1 September 2020 and the parties will order to agree a schedule of issues by 1 September 2020. The full merits hearing was listed for two days on the 11th 12 February 2021.

10 The Claimant did not provide a statement of remedy or cooperate with the Respondent to provide a statement of issues as ordered.

11 The preliminary hearing took place on 14 September 2020 before Employment Judge Russell. The Claimant did not attend or give any reason as to why he was unable to attend. Case management orders were made and sent to the parties on 13 October 2020. The Claimant was ordered to provide further information about his claims by 26 October 2020 and also provide a statement of remedy by 26 October 2020

12 The Claimant wrote to the Tribunal and the respondent on 13 October 2020 stating:

"I am seeking mental health help due to JH Hats (sic) racist treatment towards me. I hope you can treat me better. I'm sorry I did not tell you but I have told

the respondent many many times about my health which is in derails (sic) and thought they would tell you.

My doctor is sending me a letter to send to you.”

13 The Claimant did not provide this statement of remedy or the further information that was ordered by Employment Judge Russell.

14 The Claimant did not provide any medical evidence to support his non-attendance on 14 September 2020 or why he was unable to comply with the Tribunal orders. The Claimant has not corresponded with the Tribunal to indicate his inability to attend this preliminary hearing or provide any reasons for his non-attendance.

### Law

15 The relevant rules and law is as follows:

#### Strike Out

37.—(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.

Deposit

39 (1) Where at a preliminary hearing (under rule 53) 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.

(2) The Tribunal shall make reasonable enquiries into the paying party’s ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal’s reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

16 In Zeb v Xerox (UK) Ltd UKEAT 0091/15 Simler J gave a summary of the relevant application of the legislation.

The Employment Tribunal's power to strike out a claim at a preliminary stage is derived from Rule 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. That Rule enables a Tribunal to strike out a claim that has "no reasonable prospect of success". This power has rightly been described as a draconian one, and case law cautions Employment Tribunals against striking out a claim in all but the clearest cases, particularly where that claim involves or might involve allegations of discrimination. Cases in which a strike out can properly succeed before the full facts have been found are rare. As Lord Steyn explained in Anyanwu v South Bank Students' Union [2001] IRLR 305:

"24. ... For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest. ..."

17 In Ezsias v North Glamorgan NHS Trust [2007] ICR 1126 in the Court of Appeal, Maurice Kay LJ said:

"29. It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the employment tribunal to decide otherwise. ... It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level."

18 In the case of Van Rensberg v Royal Borough of Kingston Upon Thames UKEAT/0096/07, Elias J stated that a Tribunal has greater leeway when considering whether or not to order a deposit to make a provisional assessment of the credibility of a parties case.

19 When considering the amount of a deposit the case of Hemdan v Ishmail [2017] ICR 486, EAT Simler J stated:

*"the purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails...the purpose is emphatically not...to make it difficult to access justice or to effect a strike out through the back door". (para. 10-11)*

*"Accordingly, it is essential that when such an order is deemed appropriate it does not operate to restrict disproportionately the fair trial rights of the paying party or to impair access to justice. That means that a deposit order must both pursue a legitimate aim and demonstrate a reasonable degree of proportionality between the means used and the aim pursued" (para. 16)*

## Conclusions

20 In summary, Ms Wookey submitted that the Claimant's claims for race discrimination, race harassment and victimisation should be struck out at on the basis that they had no reasonable prospect of success. Alternatively, she submitted

that the claim should be struck out on the basis of non-compliance with Tribunal orders and/or that the claims were not being actively pursued.

21 If the claims are not struck out Miss Wookey submitted that a deposit ought to be ordered for the Claimant to proceed with his claims and such an order should be made notwithstanding the fact the Claimant was not in attendance to give evidence as to his means and ability to pay any deposit.

22 In view of the factual background outlined above, I conclude that it is appropriate to strike out the Claimant's claim on the basis that there has been non-compliance with Tribunal orders and it has not been actively pursued. The Claimant has failed to attend two separate hearings and has not complied with Tribunal orders or provided any medical evidence why he cannot do so. There is no indication that he would engage in the litigation in future in order for me to have confidence that a less prejudicial step and alternative to strike out would be productive in progressing the case.

23 Had it been necessary to consider separately, I would not have struck out the Claimant's race discrimination and harassment complaints. Whilst they are lacking particulars, these are fact sensitive enquiries and the Tribunal is charged to be cautious in striking out such claims for public policy reasons (see Anyanwu)

24 However, I would have struck out the Claimant's unlawful victimisation complaint on the basis that there was no identifiable protected act to base such a claim.

25 In view of the claims being struck it was not necessary to consider a deposit order.

26 The full merits hearing on 11 and 12 February 2021 is vacated.

**Employment Judge Burgher  
Date: 5 November 2020**