



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R Lavell

**Respondent:** Elior UK Plc

## JUDGMENT

The claim is struck out.

## REASONS

1. By a letter dated **11 October 2020** the Tribunal gave the claimant an opportunity to make representations or to request a hearing, as to why the claim should not be struck out because

- it has not been actively pursued.

The Tribunal received an email from the claimant dated 26 October 2020 explaining why he believed the claimant should not be struck out and providing medical evidence which he believed supported his arguments. The respondent provided their comments concerning the strike out warning on 12 January 2021. Before a decision was reached, I considered the case in detail and believe the following discussion is helpful.

### Background

2. The case was originally listed for a closed preliminary hearing on 20 February 2020, but this hearing was postponed due the claimant being unwell. Due to Covid 19, it was not possible to rearrange this hearing until 13 August 2020.

3. The Tribunal's letter dated 10 August 2018 informed the claimant that Employment Judge Postle ordered that the claimant must attend the hearing on 13 August 2018 in order that he can set out his claim, failing which he would be at risk of the claim being struck out due to his failure to actively pursue his claim.

4. The claim then made a further urgent application for a postponement which was considered by Employment Judge Laidler on 12 August 2020, rejecting the application and noting that the medical documentation that he provided did not demonstrate that he would be unable to participate in the hearing by telephone.
5. On 13 August 2020, I called the claimant when the hearing commenced using the mobile phone number that he had provided to the Tribunal administration shortly before the hearing. I made two attempts and although the number appeared to be correct, the claimant did not answer my the call. I was therefore unable to assess whether the claimant was fit enough to attend the hearing and it should be noted that this a telephone hearing, which could be made without the claimant having to leave the home.
6. I was particularly conscious of my duty under the overriding objective under Rule 2 of the Employment Tribunal Rules of Procedure and the need deal with this case fairly and justly. While I understood the need to ensure that parties were on an equal footing, I was aware of the importance of dealing with the case in a way which was proportionate and which avoided unreasonable delay, especially as this was the second attempt at listing this case for a closed preliminary hearing.
7. I did consider this case in the claimant's absence on 13 August 2020 and noted that his claim involved issues which arose in 2017 and 2018 and a claim that was presented almost a year ago. The claimant had been unwell and unable to attend the preliminary hearing in February this year and it was necessary to re-list this case for a further closed preliminary hearing today. The claim was unusual in that the claimant had identified no less than 6 possible protected characteristics which were the subject of alleged acts of discrimination as well as 3 forms of wages related claims. He had provided in his claim form and a separate document a series of lengthy incidents which while describing some perceived insults to him by his employer or his colleagues, did not specify how they amounted to claims of discrimination and to what protected characteristics they applied.
8. It is understandable that the respondent wished to be able to identify the precise forms of discrimination alleged, so that it could properly particularise its response. Moreover, the Tribunal needed to be able to identify the precise issues that would need to be considered at the final hearing and to make appropriate case management orders. It was still not possible to achieve this on 13 August 2020, despite it being almost 12 months after the proceedings had been commenced.
9. I was mindful that the claimant while apparently having some advice and assistance from his trade union Unite, appeared to remain unrepresented. I was also aware that apart from making applications to postpone the closed preliminary hearings, the claimant had not engaged with the respondent. This was despite them providing a request for further particulars to him on 28 February 2020. The claimant appears to have shown very little interest in progressing this case.
10. Accordingly, I did feel that it was necessary to give serious consideration to striking out the claimant's claims due to a failure on his part, to actively pursue these claims. The Tribunal's letter dated 10 August 2020, provided Employment

Judge Postle's comments which warned the claimant that if he did not attend the preliminary hearing on 13 August 2020, his claim could be struck out. As I mentioned in my Note of the Preliminary Hearing of 13 August 2020, when taking into account the limited medical evidence which he provided to Employment Judge Laidler on 12 August 2020, it seems surprising that the claimant was not even able to pick up my call to him on the day of the hearing explain why he could not participate or to allow me to make adjustments to ensure his participation.

11. Nonetheless, I did acknowledge that the claimant was unrepresented and there was a possibility that he was not well enough to answer my calls on the day of the preliminary hearing. I therefore issued a strike out warning letter, which informed the claimant of my intention to strike out his claim, but that in accordance with Rule 37(2), he would be allowed to make representations as to why I should not strike out his claim.

### **The strike out warning**

12. Unfortunately, it appears that my strike out order was not sent to the claimant until 11 October 2020 and there have been consequential delays with correspondence reaching me concerning this case during the last few months. I am sorry that this has happened, although I do not know precisely why these delays occurred.

13. The claimant replied by email on 26 October 2020 and referred to assorted reasons as to why he could attend the preliminary hearing and why his claim should not be struck out. He mentioned language issues, health issues, the stress caused by Covid 19 and issues with his family at home. He also provided some medical evidence including fit notes and a letter from Doctor Woods dated 26 August 2020.

14. Unfortunately, the fit notes related to absences from work and Dr Wood's letter, while referring to cervical spondylosis and medication being given, it did not explain why the claimant could not attend the preliminary hearing by telephone on 13 August 2020 and why he could not answer my calls on the day of the hearing. The claimant suggested in his email dated 26 October 2020 that he could not afford any further doctor's letters. However, the letter of 26 August 2020 from Dr Wood had been obtained after the preliminary hearing and following Employment Judge Laidler explaining that his medical evidence provided the day before the preliminary hearing was insufficient to support a postponement. As a consequence, the claimant could reasonably have been expected to understand that he needed to obtain appropriate evidence from Dr Wood confirming that he was unfit to participate from home in a telephone preliminary hearing. He clearly failed to do this and no medical evidence was available to suggest to me that he was unable to participate on 13 August 2020.

15. I did note that the claimant mentioned his domestic circumstances and also language issues as being something which I should consider. However, I was not aware that an interpreter had ever been requested or that language difficulties were a cause for concern. In any event, had the claimant requested this support prior to the preliminary hearing on 13 August 2020, the Tribunal would have provided it. I was aware of my duty under both the Equal Treatment Bench Book and the overriding objective and took into account the claimant's unrepresented status and possible difficulties he had might have with language.

16. However, I also noted that the claimant had been able to engage the Tribunal with applications to postpone hearings on several occasions by reason of ill health and had also provided correspondence which was sufficiently articulate to indicate to me that he understood what was required and expected of him in this case.

## Discussion

17. The decision to strike out a claim is a draconian step and not something to be taken lightly. I was conscious that the real issue that gave rise to issue a strike out warning was the claimant's apparent failure to actively pursue his case and not based upon my views concerning the prospects of success of the claim. However, by 13 August 2020, when I made the decision to issue a strike out warning, the claimant had simply not made any attempt to progress his claim. The respondent had tried to engage with him in the absence of a preliminary hearing, in order that the relevant issues and discriminatory acts could be identified. They had behaved appropriately and had tried to cooperate with the claimant in accordance with the overriding objective. The claimant had been active in these proceedings, but primarily in relation to his attempts to postpone hearings when they arose.

18. Although Covid 19 has been challenging from everyone across the Tribunal's jurisdiction since March 2020, one of the unexpected benefits has been the almost total use of remote hearings either by telephone or video conferencing. Prior to this date, most hearings in the South East Region had been taking place in person, with parties having to travel significant distances to Tribunal venues, often while subject to health issues. The hearing on 13 August 2020 being a telephone hearing, should have been something which the claimant could easily have participated in, even with his health issues.

19. Nonetheless, I did need to take into account the overriding objective and the need to ensure that the case was dealt with fairly and justly. However, this duty does not solely apply to the claimant, but also to the respondent too. They are faced with a significant claim which has not progressed in any real way since the proceedings were issued in August 2019 and which relates to incidents which allegedly took place in 2017 and 2018. The claimant has failed to engage with the respondent and cooperate with the respondent during this time.

20. The claimant was placed on notice by the strike out warning to explain why the claim should not be struck out and why it is incorrect to conclude that he has failed to actively pursue his claim. However, he has provided medical evidence which is out of date and not relevant to his failure to progress the case since 2020 and which has not explained why he could not attend the preliminary hearings. He was required to provide this evidence and failed to do so. He also failed to demonstrate that he was taking any steps to progress his claim by engaging with the respondents in advance of any hearing.

21. It is always difficult to make decisions to strike out, but taking into account the balance of prejudice between the parties under the overriding objective, the claimant's inaction has placed the respondent in a great deal of difficulty in being able to understand and prepare for the case which has been brought against it. No evidence has been provided by the claimant to justify why it would be in the

interests of justice not to strike out his claim and while his email of 26 October 2020 makes vague assurances that *'I will to [sic] my best to take the necessary steps to meet the court procedure in the next few months'*, no explanation had been given as to what would be done and when. While the claimant did allude to his being unrepresented and seeking legal support, there was no reason why the claimant could not have participated at the preliminary hearings and I was aware of my duty under the overriding objective and Part 1 of the Equal Treatment Bench Book to take account of these circumstances. As I have already mentioned, the claimant was able to engage with the Tribunal without legal representation in relation to the applications to postpone.

22. The claimant did indicate in his email dated 26 October 2020 that *'I ask adjourn [sic] a new hearing considering the exposed above'*. Under Rule 37(2), I am required to take into account the following:

*(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.*

23. I did consider whether it would be appropriate to list this case for a hearing in accordance with Rule 37(2) as I was concerned that the claimant had sufficient opportunity to make representations to me before a decision was made. I first of all noted that this strike out warning related to the claimant's failure to progress his case since the claim was presented and his failure to attend hearings due to medical issues. In many ways, the primary focus in considering this matter was therefore in relation to the medical evidence which supported an argument that the claimant was unfit to participate in the telephone hearing on 13 August 2020.

24. The claimant had provided not only his medical evidence, but also a lengthy email setting out his reasons why he had been unable to progress the case. In this respect, I was satisfied that he had been given a reasonable opportunity to make the representations under Rule 37(2).

25. I also needed to consider whether a hearing to consider any further representations would take place within a reasonable period of time. Listing is a judicial function and I was satisfied that if necessary, I could insist that a hearing date would be provided within a reasonable period of time. However, I had to take into account the way in which the claimant had behaved in relation to other previously listed hearings and that a further application to postpone would be highly likely, thus providing yet further delay in this case. Applying the overriding objective, I felt it would be in the interests of justice to behave flexibly and was able to properly consider the issues from the detailed information provided by the claimant in his email of 26 October 2020 and the attached documents. He had been given a reasonable opportunity to make representations under Rule 37(2) and had exercised this right, albeit by providing representations which were adequate in terms of the question of whether the claim had been actively pursued.

## **Conclusion**

26. Accordingly, the claimant has failed to make any sufficient representations, why this should not be done or to request a hearing. The claim is therefore struck out.

---

Employment Judge Johnson  
16 March 2021

JUDGMENT SENT TO THE PARTIES ON

.....

.....  
FOR THE TRIBUNAL OFFICE