



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4107779/2020

Held in Chambers in Edinburgh on 4 March 2022

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Employment Judge Sutherland

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Jennifer Gardner

Claimant

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Trip Air Ticketing (UK) Ltd

Respondents

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JUDGMENT

The Judgment of the Tribunal is that the application for strike out is refused.

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REASONS

Introduction

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1. The Claimant has presented complaints of constructive unfair dismissal, race discrimination, notice pay, holiday pay, breach of contract and unlawful deduction from wages. She relies upon the racial group of being non-Chinese. The complaints are resisted by the Respondent.
2. A hearing was listed for today to determine the Respondent's application for strike out.
3. The hearing was held in chambers and accordingly parties were not in attendance. The Respondent lodged written submission but the Claimant

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did not.

Background

4. The ET1 claim was submitted on 8 December 2020. The ET3 was submitted on 11 January 2021.
- 5 5. On 29 January 2021 the Respondent wrote to the Claimant asking her to provide further specification in response to a number of specific questions. On 12 April 2021 the Claimant provided a very detailed response to each of those specific questions.
6. On 12 April 2021 this claim was conjoined with that of Mr Jaz Jagdeo.
- 10 7. On 20 April 2021 a Case Management Preliminary Hearing ('CMPH') was held at which both Claimants were directed to complete Scott Schedules.
8. On 14 May 2021 the Claimant provided a completed Scott Schedule.
9. Having regard to her ET1 claim, her further specification provided on April 2021, and her Scott Schedule, her claim is understood to be in summary as follows –
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 a. Constructive dismissal –
 - i. Much of her role as Head of HR Europe was transferred to colleagues in HR Shanghai and her role was backfilled by a Chinese colleague with no European experience
 - 20 ii. she was given unrealistic performance goals to answer emails within 1 hour
 - iii. she received no recognition for her flawless work
 - iv. she was severely underpaid in the market
 - v. she was discriminated against (see below)
- 25 b. holiday pay – she is due 10 days accrued but unused holiday pay
- c. notice pay - She was unable to work 8 weeks of her notice due to stress. Other colleagues have received full pay in these circumstances. She is therefore due 8 weeks' notice pay.
- d. Breach of contract – she is due stock options
- 30 e. Discrimination (reference to "Item" indicates Number of item in Scott Schedule)–
 - i. being provided insufficient meal allowance in March 2018 (Item 2)

- ii. being excluded from project roll out of workday because she did not speak Chinese in June 2018 (Item 1)
- iii. meetings being regularly conducted in Chinese throughout her employment when she does not speak Chinese (Items 18 and 19)
- iv. communications being sent in Chinese which she does not read Chinese (e.g. email re workday in June 2018 – Item 2)
- v. her complaints regarding discrimination of candidates resulted in her removal from interview process in September 2018 (Item 22)
- vi. being required to be contactable during national holidays when Chinese colleagues were not in October 2018 (Item 3)
- vii. being required to reply to emails within 1 hour when Chinese colleagues were not in October 2018 (Item 4)
- viii. receiving no recognition for her flawless work when Chinese colleague received recognition in December 2018 (Item 6)
- ix. being unable to access her work new year gift because she was not a Chinese resident in January 2019 (Item 9)
- x. being unable to access her work birthday gift because she was not a Chinese resident in May 2019 (Item 7)
- xi. being require to meet objectives that were unachievable in July 2019 (Item 5)
- xii. being required to be contactable during national holidays when Chinese colleagues were not in October 2019 (Item 8)
- xiii. the engagement budget for overseas work was far less than for Chinese colleagues in October 2018 and 2019 (Item 20)
- xiv. Chinese colleagues were paid market value when she was not in December 2019 (Item 10)
- xv. Chinese colleagues relocation packages were better than non-Chinese colleagues in January 2020 (Item 14)
- xvi. Chinese colleagues received recognition for their support for working from home which non-Chinese colleagues did not in March 2020 and during the annual team meeting in June 2020 (Items 16 and 17)

- xvii. her advice to Chinese management team was ignored but the same advice from Chinese HR colleagues would not have been ignored in April and July 2020 (Items 11, 21 and 23)
- xviii. Corporate travel insurance focused solely on Chinese colleagues traveling internationally in April 2020 (Item 24)
- xix. being instructed to consider and hire only Chinese candidates and being removed from the recruitment process as a consequence of her complaint about this in August 2020 (Items 12 and 13)
- xx. Chinese colleagues received better support when dealing with COVID in March to August 2020 (Item 15)
- xxi. her duties were transferred to Chinese colleagues (see above)
10. On 31 August 2021 a CMPH was held at which the Claimants undertook to provide additional specification in response to the Respondent's further request.
11. On 12 October 2021 the Claimant sought to rely upon without prejudice correspondence with ACAS. The tribunal determined the without prejudice correspondence to be inadmissible.
12. On 13 October 2021 the tribunal ordered both Claimants to provide the additional specification within 7 days in the terms sought by the Respondent. The additional specification sought by the Respondent was in summary as follows –
- a. Item 3 – regarding Golden Week, give specific examples of being fully contactable
 - b. Item 6 – regarding year end performance review, identify this colleague in Asia and to what degree the roles are similar
 - c. Item 8 – regarding Golden Week, give specific examples of being fully contactable
 - d. Item 11 – who, when and how were Chinese candidates treated more favourably and what less favorable treatment did Claimant suffer?
 - e. Item 12 – which candidates refused, when, how and to whom did she question this activity and what less favourable treatment did she suffer?

- f. Item 23 – give examples of being ignored and why does she believe Chinese colleagues would not be ignored?
13. On 25 October, and again on 22 November 2021, the Respondent made an application for strike out on grounds (b), (c) and (e) of Rule 37(1) in respect of the Claimant's failure to comply with the order.
14. On 29 November 2021 the Tribunal issued a strike out warning to the Claimant directing that should she disagree she should set out her reasons in writing by 14 December 2021 or advise the Tribunal that she seeks a hearing so she can put forward her reasons in person.
15. On 7 December 2021 the Tribunal reminded the Claimant to provide a response to the 29 November strike out warning.
16. On 10 December 2021 the Claimant objected to the strike out warning advising that: she has had no opportunity to discuss or elaborate on any of the points contained within the Scott schedule; she considered that the application for strike out was premature; and she was unaware of any outstanding information that the Respondent has asked her to disclose.
17. On 6 January 2022 the Claimant confirmed that she was content for the strike out hearing to be considered in chambers without her attendance.
18. On 22 February 2022 the Claimant was reminded to the need to provide written submissions.

Law

Striking out

19. Under Rule 37(1) of the Employment Tribunal Rules of Procedure, a Tribunal may strike out all or part of a claim or response on various grounds including-
- (b) that the manner in which the proceedings have been conducted by the Claimant has been scandalous, unreasonable or vexatious
- (c) for non compliance with an Order
- (e) that it is no longer possible to have a fair hearing of the claim.
20. In light of the severe consequences of strike out, such a decision is considered a draconian step which should only be taken on the clearest grounds and as a matter of last resort. Its purpose is not to punish the conduct but rather to protect the other party from the consequences of the

conduct (*Bolch v Chipman* [\[2004\] IRLR 140](#), EAT).

21. Before making a strike out order, the tribunal must give the relevant party a reasonable opportunity to make representations, either in writing or, if requested by that party, at a hearing.

5 *Manner of proceedings*

22. A tribunal must first consider whether a party has behaved scandalously, unreasonably or vexatiously when conducting the proceedings. In essence that there has been conduct which amounts to an abuse of process (*Bennett v London Borough of Southwark* [\[2002\] IRLR 407](#) Court of Appeal). A tribunal must then consider whether a fair trial is still possible. A tribunal must then also consider whether strike out would be an appropriate and proportionate response or whether a less punitive response (e.g. award of costs or partial strike out) would instead be appropriate and proportionate (*De Keyser Ltd v Wilson* 2001 IRLR 324, EAT).
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Non-compliance with Tribunal order

23. In considering whether to strike out for non-compliance with an order, a tribunal must have regard to the overriding objective set out in Rule 2 of seeking to deal with cases fairly and justly. This requires a tribunal to consider all relevant factors, including: the magnitude of the non-compliance; whether the default was the responsibility of the party; what disruption, unfairness or prejudice has been caused; whether a fair hearing would still be possible; and whether striking out or some less punitive response (e.g. further orders including deposit or an unless order) would be an appropriate and proportionate response (*Weir Valves and Controls (UK) Ltd v Armitage* 2004 ICR 371, EAT).
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24. Where a claim has arrived at the point of a final hearing it would take something very unusual indeed to justify striking out (*Blockbuster Entertainment Ltd v James* [\[2006\] EWCA Civ 684](#), [\[2006\] IRLR 630](#), Court of Appeal).
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Fair hearing no longer possible

25. The possibility of a fair hearing is an important consideration under the other grounds for strike out and it is rarely used as sole justification for strike out. Where it is the sole justification, the factual basis of the

assertion must be established and properly analysed. Where it is not the sole justification it should be considered in the context of the other ground.

Submissions

- 5 26. The Respondent's submissions were in summary as follows –
- a. "Scandalous" does not have its colloquial meaning but instead means misuse of process or giving insult to the court (*Bennett*)
 - b. "Vexatious" means having little or no basis in law, proceedings which subject the other party to inconvenience, harassment and expense
10 out of all proportion to any gain to that party, or an abuse of process of the court (*Attorney General v Barker [2000] EWHC 453*)
 - c. Repeated and unreasonable refusal to comply with a tribunal order may justify strike out of discrimination claims (*Itulu v London Fire Commissioner UKEAT/098/18*)
 - d. Wilful disobedience of an order does not necessarily mean strike out
15 (*Weir Valves*).
 - e. It is unlikely that a fair hearing no longer being possible would provide the sole ground but this has been so utilised in the context of lengthy delays. A claim was struck out four years after the claim was
20 raised because the Tribunal could not foresee when the claim would be tried (*Peixoto v British Telecommunications PLC UKEAT/0222/07*). A claim was struck out three years after the claim was raised because again the Tribunal could not foresee when the claim would be tried (*Riley v The Crown Prosecution Service [2013] EWCA Civ 951*).
 - f. Whilst the Claimant is a litigant in person she was a senior HR manager with the Respondent with relevant skills and experience.
 - g. It is scandalous for the Claimant to state that she is "unaware of any outstanding information that the response has asked for me to
25 disclose" in light of the terms of the order of 13 October 2021.
 - h. For the Claimant to submit such weak claims which she herself does not know the detail of, subjects the Respondent to inconvenience, harassment and expense out of all proportion to any likely gain and is
30 therefore an abuse of process.

- 5 i. The information sought is not minor or peripheral but pertains to major aspects of the substantive discrimination claims and it necessary to enable the Respondent to know and respond to the claim it is facing.
- 5 j. The Claimant is in clear and wilful breach of the order.
- k. The Claimant's repeated refusal to comply with the order, having previously agreed to do so voluntarily, is clearly unreasonable conduct.
- 10 l. There have been significant delays due to the inaction of the Claimant and a fair hearing is no longer possible due to these delays. Many of the Respondent witnesses are based in China and some have left the Respondent's employment.
- m. Strike out would not be a disproportionate response.
- 15 n. There is still no indication when the Claimant will comply with the order and accordingly the claim should be struck out because of delay.
27. The Claimant did not provide any written submissions beyond her letter of 10 December 2021 responding to the strike out warning.

Discussion and decision

Manner of proceedings

- 20 28. The Claimant has failed to comply with the Order of 13 October 2021 to provide further specified information despite reminders to do so. This failure should be considered in the context of having previously provided a very detailed response to the Respondent's specific questions on 12
- 25 April 2021 and providing a Scott Schedule on 20 April 2021. When issued with a strike out warning in respect of that failure to comply the Claimant stated in response that: she has had no opportunity to discuss or elaborate on any of the points contained within the Scott schedule; she considered that the application for strike out was premature; and she was
- 30 unaware of any outstanding information that the Respondent has asked her to disclose. The Respondent submits that this calls into serious question her motives, credibility and reliability in submitting such a scattergun ET1 with wide-ranging allegations that she herself does not know the detail of.

29. Nothing in that response suggests that the Claimant does not know the detail of her claim rather it appears she considers she has already provided that detail. It is accepted that her ET1 is wide-ranging covering events in 2018, 2019 and 2020, and is insufficiently focused. Whilst the Claimant is an HR professional she remains a litigant in person who cannot without clear direction be expected to provide focused pleadings. Her approach to date does not amount to an abuse of process but would instead merit clarification at a further Case Management Preliminary Hearing subject to the undernoted considerations. Whilst it is frustrating that the Claimant did not elect to attend this hearing in person or to provide written submissions, it cannot be said that the Claimant has behaved scandalously, unreasonably or vexatiously when conducting the proceedings.

Non-compliance with Tribunal order

30. The Claimant has failed to comply with the Order of 13 October 2021 to provide further specified information despite reminders to do so.

31. Having regard to the overriding objective it is noted that the Respondent has the benefit of professional legal representation but the Claimant, although an HR professional, does not have professional legal representation. The Respondent is entitled to fair notice and adequate specification of the complaints against them and has undertaken significant steps to obtain that specification from the Claimant by asking specific questions, by seeking a Scott schedule and by seeking an order for specified information. The Claimant had prior to that Order provided very detailed responses to those requests for specification. It appears the Claimant considers she has already provided sufficient detail. The Claimant appears to have considered this Order as a request by the Respondent rather than recognising that it was Order of the Tribunal to which she was required to respond (or to seek variation thereof).

32. The Tribunal must consider the magnitude of the non-compliance and the prejudice caused. In respect of Item 3 and 8 the Claimant was asked to give specific examples of being fully contactable. Having regard to the terms of her complaint the question appears to be misplaced and the Claimant should have been instead asked to specify who required her to

be fully contactable and what did that mean in practical terms. The Claimant should therefore be given further opportunity to provide relevant specification.

5 33. In respect of Item 6 the Claimant was asked to identify the colleague in Asia to whom she had referred. The Claimant failed to do so and this information is not apparent from the specification previously provided. The Respondent is entitled to fair notice of an actual comparator relied upon.

10 34. Items 11, 21 and 23 are understood to be related and in summary pertain to ignoring her advice to Chinese management team when the same advice from Chinese HR colleagues would not have been ignored. The Respondent is entitled to know what advice was ignored and the basis for her inference that the Chinese HR colleague would not have been ignored. The proximity of these events and their relevance to her claim for
15 constructive dismissal is noted.

35. In respect of Item 12 the Respondent is entitled to know in when, how and to whom did she question this activity. The proximity of these events and their relevance to her claim for constructive dismissal is noted.

20 36. In the circumstances it is considered that instead of strike out at this stage, a further Case Management Preliminary Hearing and associated orders may result in her complaints being properly focused around the period leading to her resignation such that a fair hearing is still possible but subject to the undernoted considerations regarding delay.

Fair hearing no longer possible

25 37. The Respondent asserts that there has been unreasonable delay in progressing this claim and it cannot be foreseen when the claim will proceed to a final hearing. The Respondent notes that many of their witnesses are based in China and some are ex-employees. This claim was raised 1 year ago in February 2021. It is reasonably anticipated that
30 this claim will proceed to a final hearing in 2022 after a further case management hearing. There has not therefore been unreasonable delay and it is understood that the issue of Respondent witness attendance would in any event have affected a final hearing listed within a year of her claim being made. It cannot be said that a fair hearing is no longer

possible on account of unreasonable delay.

38. In conclusion the application for strike out is refused. Having regard to the above, it is not considered that strike out would be an appropriate and proportionate response when the less punitive response of a further case management preliminary hearing and associated orders may remedy the difficulties faced by the Respondent. The Claimant should be in no doubt of the need to adequately focus and specify her complaints and that should she fail to do so this may ultimately result in strike out of all or part of her claim. The Claimant is also reminded that she is required to comply with orders of the Tribunal (or apply for a variation thereof) and her failure to do so any again risk strike out.

Employment Judge: Michelle Sutherland

Date of Judgment: 07 March 2022

15 Entered in register: 08 March 2022
and copied to parties