



## EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4107627/2021

Held in Chambers in Edinburgh on 31 March 2022

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Employment Judge Sutherland

**Jaz Jagdeo**

**Claimant  
Not present**

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**Trip Air Ticketing (UK) Ltd**

**Respondents  
Not present**

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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 and race discrimination. He relies upon the racial group of being of British nationality. 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 and the Claimant

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## Background

4. The Claimant asserts his effective date of termination was 26 October 2021. The Respondent asserts that it was 28 September 2021 and that his claim is time barred. He commenced ACAS Early Conciliation on 17  
5 December 2020 and the certificate was issued on 11 January 2021. The ET1 claim was submitted on 12 February 2021. The ET3 was submitted on 8 March 2021.
5. On 12 April 2021 this claim was conjoined with that of Jennifer Gardiner ('the First Claimant'). For ease of reference the Second Claimant will be  
10 referred to in this judgment as the Claimant.
6. On 20 April 2021 a Case Management Preliminary Hearing ('CMPH') was held at which both Claimants attended and were directed to complete Scott Schedules.
7. On 16 May 2021 the Claimant provided a completed Scott Schedule.
- 15 8. Having regard to his ET1 claim and his Scott Schedule, his claim is understood to be in summary as follows –
  - a. Constructive dismissal –
    - i. Much of his role as HR Business Partner was transferred to  
20 colleagues in HR Shanghai. His job title was changed to HR Manager of UK and not of Europe and Middle East ('EME')
    - ii. he was discriminated against (see below)
  - b. Discrimination (reference to "Item" indicates Number of item in Scott  
Schedule)–
    - i. Only HR Manager not reporting directly to Director of HR  
25 (ET1)
    - ii. Inappropriate questions during recruitment process in September 2018 and various dates (Items 1 and 20)
    - iii. Required to respond to emails within 1 hour in October 2018 (Item 2)
    - 30 iv. Not included within workday project in November 2018 (Item 3)
    - v. Limit on travel spend in March 2019 (Item 4)
    - vi. No corporate travel insurance in April 2020 (Items 5 and 15)

- vii. Instructions issued in Chinese in June 2019 (Item 6)
  - viii. National holidays in October 2018 and 2019 (Items 7 and 9)
  - ix. Meetings conducted in Chinese September 2019 and rude behaviour on various dates (Items 8 and 21)
  - 5 x. Salary disparities in December 2019 (Item 10)
  - xi. Implementation of payroll provider in December 2019 (Item 11)
  - xii. Gift in January 2020 (Item 12)
  - xiii. Return to work during COVID March 2020 (Item 13)
  - 10 xiv. Lack of recognition re COVID in March 2020 and at HR Summit in April 2020 (Items 14 and 16)
  - xv. Change to HR Manager UK not EME in August 2020 (Item 17)
  - xvi. Contact during stress absence in September 2020 (Item 18)
  - xvii. Travel to meet teams on various dates (Item 19)
  - 15 xviii. Engagement budget on various dates (Item 22)
9. On 7 June 2021 the Respondent submitted further and better particulars of its response.
  10. On 31 August 2021 a CMPH was held at which both Claimants attended and undertook to provide additional specification in response to the  
20 Respondent's further request. An open preliminary hearing was fixed for 31 October 2021 to determine whether the Claimant's claims were time barred.
  11. In September 2021 the Respondent sought additional specification from the Claimant on a voluntary basis without response.
  - 25 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 concerned –
    - a. Item 1 –the recruitment process
    - 30 b. Item 5 –the corporate travel insurance
    - c. Item 9 –the Golden Week
    - d. Item 10 – general disparity
    - e. Item 11 – payroll
    - f. Item 18 – sick leave

## g. Item 20 – recruitment activity

- 5 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 of the tribunal of 13 October 2021.
- 10 14. On 26 October 2021 the open preliminary hearing on time bar was postponed on the ground that the Claimant was unfit to attend the CVP hearing because of symptoms of COVID. The Claimant was ordered to provide, within 7 days, medical evidence confirming his health condition and that he was unfit to attend the hearing.
- 15 15. On 29 October the First Claimant advised that the Claimant (Mr Jagdeo) was admitted to hospital following breathing complications from COVID.
- 16 16. On 29 November 2021 the Tribunal issued a strike out warning to the Claimant (on grounds of unreasonable conduct, non compliance with orders and impossibility of fair hearing) and directing that should he disagree he should set out his reasons in writing by 14 December 2021 or advise the Tribunal that he seeks a hearing so he can put forward his reasons in person.
- 20 17. On 10 December 2021 the First Claimant advised that the Second Claimant had not yet been released from hospital.
- 25 18. On 23 December 2021 the Tribunal required the Claimant to advise the tribunal within 14 days when he will be fit to provide a substantive response to the strikeout warning of 29 November and separately to provide medical evidence explaining his prior failure to provide that response.
19. On 19 January 2022 the Tribunal required a reply to the correspondence of 23 December 2021 within 7 days. No response was received.
- 30 20. On 21 February 2021 the Tribunal issued a strike out warning to the Claimant on the grounds that his claim has not been actively pursued having failed to respond to Tribunal correspondence of 29 November and 23 December 2021 and 19 January 2022.
21. On 14 March 2022 parties were advised: that a hearing on strike out had be listed in chambers on 31 March 2022; that parties must provide their written submissions by 24 March 2022; and that the Claimant must also

provide the medical evidence previously sought explaining why he has been unfit to participate in these proceedings in the period since October 2021.

22. On 17 March 2022 the Claimant contacted the Tribunal for the first time since 26 October 2021 providing dates of availability for a case management hearing. He did not provide the medical evidence previously requested and he did not provide any explanation for his failure to make prior contact.

23. On 29 March 2022 the Claimant made an application to sist the proceedings on health grounds and undertook to provide medical evidence in due course. That application was refused in summary because it would have resulted in a postponement of today's hearing in circumstances where the Claimant has been aware of the need to obtain and provide medical evidence since October 2021.

## Law

### Striking out

24. 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

(d) that it has not been actively pursued

(e) that it is no longer possible to have a fair hearing of the claim.

25. 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).

26. 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.

*Manner of proceedings*

27. 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).

*Non-compliance with Tribunal order*

28. 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).

29. 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).

*Not actively pursued*

30. A claim may be struck out where the failure to progress is either as a result of intentional and contumelious (disrespectful) default or alternatively has resulted inordinate and inexcusable delay giving rise to a substantial risk to the fairness of the process or serious prejudice to the other party.

*Fair hearing no longer possible*

31. 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**

32. 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 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 (*Weir Valves*).
- e. A claim may be struck for failure to actively pursue over a period of 5 months in exceptional circumstances of a complete lack of meaningful engagement and a tendency to pick and chose when to engage (*Khan v London Borough of Barnet UKEAT/0002/18*).
- f. 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 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*).

- g. Whilst the Claimant is a litigant in person he is also a mid/ senior HR Manager with a working knowledge of employment law. Being unrepresented does not exempt him from compliance with tribunal procedures or engaging with the process (per *Khan*).
- 5 h. The Claimant has failed to comply with orders of the Tribunal and failed to communicate with the Tribunal. This is scandalous behaviour and unreasonable conduct.
- 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.
- 10 j. The Claimant's repeated refusal to comply with the order, having previously agreed to do so voluntarily, is clearly unreasonable conduct.
- 15 k. 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. Given the lack of specification the Respondent cannot identify all of the witnesses and it is likely that at least some will have left by the time of the final hearing.
- 20 l. Strike out would not be a disproportionate response.
- m. The Claimant is non-communicative on substantive matters and appears to be picking and choosing when he communicates (per *Khan*). E.g. the Claimant failed to carry out CVP tests with the tribunal clerks in advance of the preliminary hearing.
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33. The Claimant did not provide any written submissions.

### **Discussion and decision**

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#### *Manner of proceedings*

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



Claimant has failed to comply with the Order of 26 October 2021 to provide medical evidence regarding his failure to attend the preliminary hearing despite reminders to do so. The Claimant has failed to comply with the Orders of 23 December 2021 and 14 March 2022 to provide medicate evidence explaining why he has been unfit to participate in these proceedings since October 2021. The Claimant has failed to participate in these proceedings since October 2021 as yet without explanation.

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- 35.
- The issue of whether the Claimant has behaved scandalously, unreasonably or vexatiously when conducting the proceedings turns on whether the Claimant has been unfit to participate in these proceedings (including updating the tribunal) because of a long term health condition. It is considered in the circumstances that an unless order regarding the provision of medical evidence would be a more appropriate proportionate response than strike out at this stage. Whilst the Claimant is in control of seeking that medical evidence, assuming he is fit to seek that, he is not in control of when and how that medical evidence will be provided. Accordingly an unless order will be issued requiring the Claimant to provide within 14 days a copy of an email or letter from him to his GP (or hospital doctor) asking his GP (or hospital doctor) to give a professional opinion in writing on –
- a. Whether he was unfit to participate in tribunal proceedings (including engaging in correspondence and/or attending a tribunal hearing (in person or by video)) at any time during in the period October 2021 to date. If so, what health condition rendered him unfit, why and on what dates
  - b. If he is currently unfit to participate in tribunal proceedings, when is it reasonably expected that he will be fit to participate.
36. If the Claimant fails to comply with that unless order his claim will be dismissed (i.e. struck out) without further procedure.

*Non-compliance with Tribunal order*

37. The Claimant has failed to comply with the Order of 13 October 2021 to

provide further specified information despite reminders to do so and has failed to comply with the Orders of 26 October 2021 and subsequently to provide medical evidence explaining why he has been unfit to participate in these proceedings since October 2021.

- 5 38. Again the issue turns on whether the Claimant has been unfit to comply with or seek variation of those Orders. It is considered in the circumstances that an unless order regarding the provision of medical evidence would a more appropriate proportionate response than strike out at this stage.

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*Fair hearing no longer possible*

- 15 39. The Respondent asserts that there has been unreasonable delay in progressing this claim and that it cannot be foreseen when the claim will proceed to a final hearing. The Respondent notes that many of their witnesses are (or are likely to be) either based in China and/or ex-employees. This claim was raised just over 1 year ago in February 2021 and would ordinarily expect to be heard by 2022. In the absence of further information either regarding the reason for the delay, or any likely future  
20 delay, it cannot at this stage be said that there has been unreasonable delay and that a fair hearing is no longer possible. If following receipt of medical evidence (or otherwise) it is apparent that this claim is unlikely to proceed to a final hearing in say 2022 it would be open to the Respondent to resubmit their application for strike out.

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40. 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 at this stage when the less punitive response of an unless order regarding the medical evidence may remedy matters. If the Claimant does not comply with the unless order his claim will be dismissed without further procedure. If he does comply with the unless order consideration will then require to be given as to whether the medical evidence subsequently provided explains his failure to participate in these proceedings in the period since October 2021. If it does not there remains the risk of strike out. If it does the Claimant should be in no doubt of the need to actively pursue his claim, to cooperate with the Tribunal and to comply with orders of the Tribunal (or apply for a variation thereof), and to adequately focus and specify his complaints. Should he then fail to take these steps this may ultimately result in strike out of his claim.

Employment Judge: Michelle Sutherland  
Date of Judgment: 01 April 2022  
Entered in register: 01 April 2022  
and copied to parties