



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4110423/2021

**Preliminary Hearing held remotely by Cloud Video Platform on
21 April 2022**

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Employment Judge A Kemp

Ms B Burgyan

**Claimant
In person**

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20 **Nexus Workforce Ltd t/a Flow Logistics**

**Respondent
Represented by:
Mr J Meehan
Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Tribunal grants the respondent's application under Rule 37 for a strike out of the Claims as to unfair dismissal and breach of contract, but refuses the application in respect of the claims of discrimination under sections 13 and 26 of the Equality Act 2010.

REASONS

Introduction

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1. This is a claim for discrimination and for notice pay.

E.T. Z4 (WR)

2. The present hearing was arranged firstly to address an application by the respondent for strike out under Rule 37, and secondly if not struck out for case management. This Judgment deals with the first matter.
3. The hearing took place by Cloud Video Platform. The claimant in the most recent Preliminary Hearing had stated that she did not need an interpreter, and has not sought one for the present hearing. She is a Hungarian national, and conducted the hearing from Hungary. She acts for herself. Mr Meehan, Director of the respondent, acts for it. Neither party is represented accordingly.
4. Attempts had been made to arrange a test of equipment with Mr Meehan in advance of the hearing, but he did not respond to messages with regard to that. An attempt was made to contact him at the time the hearing was due to commence, at 10am. It did not succeed at that stage. The hearing commenced initially with the claimant alone. He eventually joined the hearing after a number of abortive attempts, with assistance from the clerk. When he did so, I brought him up to date with the matters discussed with the claimant, so that he had an opportunity to know what the claimant's position was, and to comment on it. I was satisfied that the hearing had been conducted in accordance with the overriding objective in Rule 2.

Background

5. There have been three Preliminary Hearings held prior to the present hearing, to seek to identify the nature of the claims made. The first was on 1 October 2021, after which parties were sent, and then completed, agendas. The second was on 24 November 2021, after which the claimant ought to have produced particulars of her claim by 22 December 2021. That was on the basis of a direction rather than an order. She did not do so timeously, a strike out warning letter was issued on 10 January 2022, after which the claimant provided a reply with some information in an email and document sent on 25 January 2022. The third was on 28 February 2022, after which both parties were ordered to provide particulars, and supporting documents by 28 March 2022.

6. The respondent did so on 28 March 2022, but the claimant did not. The respondent sought a strike out by email dated 29 March 2022. The claimant replied that day stating her apologies and that she would “finish today or tomorrow very early morning.” The Tribunal emailed her on 5 29 March 2022 stating that a response by 4pm on 1 April 2022 would be considered, but that if she did not do so the Tribunal may consider a strike out of her claims without further reference to her.
7. No reply was provided by the claimant by 4pm on 1 April 2022. She emailed on 4 April 2022 stating that she had had difficulties, and also on 10 4 and 5 April 2022 sent further messages and documents. The Tribunal emailed her on 4 April 2022 with regard to the same, and then on 5 April 2022 to state that the questions in the orders from the Preliminary Hearing dated 28 February 2022 had not been answered, and setting out that that should be done in numbered answers. No such answers have been 15 provided.

Submissions

8. Mr Meehan argued that the claimant had not responded to the Orders, and was in breach of them. She had not within the time allowed sought an extension, but only did so after the period had expired. She then said that 20 she would do so within a day, time for that was allowed, but she still did not do so. He argued that it was not fair for the claimant to be given further time, and that the claims should be struck out. In response to comments by the claimant as to some matters related to status, he denied that what was said was accurate.
- 25 9. The claimant’s position in general terms was that she had responded to the points in the Orders issued after the hearing on 28 February 2022 in her document sent in on 25 January 2022. She argued that responding to the questions just repeated what she had said. She argued that she had sent in the documents which set out her position. She had sought advice 30 from the Law Clinic at Edinburgh University but it had been difficult to obtain an appointment. She set out the advice she had been given by them. She argued that the claims should not be struck out.

The law

10. A Tribunal is required when addressing such applications as the present to have regard to the overriding objective, which is found in the Rules at Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 which states as follows:

“2 Overriding objective

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

- 10 (a) ensuring that the parties are on an equal footing;
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
- 15 (d) avoiding delay, so far as compatible with proper consideration of the issues; and
- (e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.”

(i) *Strike out*

11. Rule 37 provides as follows:

“37 Striking out

(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—

.....

- 30 (c) for non-compliancewith an order of the Tribunal.....”

12. The EAT held that the striking out process requires a two-stage test in ***HM Prison Service v Dolby [2003] IRLR 694***, and in ***Hassan v Tesco Stores***

Ltd UKEAT/0098/16. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim. In **Hassan** Lady Wise stated that the second stage is important as it is 'a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit' (paragraph 19).

13. As a general principle, discrimination cases should not be struck out on the grounds of no reasonable prospects of success except in the very clearest circumstances. In **Anyanwu v South Bank Students' Union [2001] IRLR 305**, a race discrimination case heard in the House of Lords, Lord Steyn stated at paragraph 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."

14. Lord Hope of Craighead stated at paragraph 37:

" ... discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."

15. The Tribunal requires to consider all the material available to it when assessing the issue of strike out. As the EAT explained in **Balls v Downham Market High School and College [2011] IRLR 217**:

5 “I would add that it seems only proper that the Employment Tribunal should have regard not only to material specifically relied on by parties but to the Employment Tribunal file. There may, as in the present case, be correspondence or other documentation which contains material that is relevant to the issue of whether it can be concluded that the claim has no reasonable prospects of success. There may be material which assists in determining whether it is fair to strike out the claim. It goes without saying that if there is relevant material on file and it is not referred to by parties, the
10 Employment Judge should draw their attention to it so that they have the opportunity to make submissions regarding it but that, of course, is simply part of a Judge's normal duty to act judicially.”

16. The EAT more recently emphasising the need for a tribunal when considering an issue of strike out on the basis of no reasonable prospects
15 of success 'roll up its sleeves' to interrogate the papers and determine whether an arguable case exists even if not clearly pleaded, **Cox v Adecco [2021] ICR 1307**. Whilst that concerned the issue of no reasonable prospects of success, similar considerations do I consider arise when assessing the issue of breach of orders, in particular the
20 second stage as to the exercise of discretion.

Discussion

17. There are a number of competing factors. The claimant is a party litigant, for whom English is not a first language. It is not clear that she has always a full understanding of the legal tests that apply to such claims, which is
25 perhaps unsurprising given that she is not a lawyer and that the issues are not simple ones. That is exemplified by her argument that the document of 25 January 2022 answers all of the points in the Orders. It does not. It does give some measure of specification, and of notice to the respondent, but the detailed answers to all of the questions that have been ordered to be answered is not apparent from that document of 25 January 2022.
30 Putting matters very simply, the claimant ought to have gone through the questions one by one and answered them, even if that meant repeating some of what had been said earlier. That is what she was ordered to do.

18. It has not been easy to discern from the 25 January 2022 document the material facts on which she will seek to rely for each of the claims. The claimant has been provided with assistance by the Tribunal in the two most recent earlier Preliminary Hearings which led to a series of matters which required specification, set out in detail in the orders themselves. It required a reply by 28 March 2022, but there was no reply in time, then an email suggesting that there would be one within two days, and further time was allowed within the timeframe the claimant suggested. The claimant did not reply in time but did so on 4 April 2022. She then produced documents, but no pleading. She did not respond to the email of 5 April 2022. That is all against the background of her failure to respond to a direction made at the second Preliminary Hearing, and a strike out warning letter having been sent to her on 10 January 2022.
19. I have considerable sympathy for the respondent given that background. They have complied with orders, but the claimant has not. It appears to me that the claimant is in breach of the orders made. But that is not the end of the consideration. I require to assess whether strike out is proportionate for each of the claims.
20. In so far as the claim of unfair dismissal is concerned, the questions the claimant did not answer included the basis on which she argued that she had the necessary two years of continuous service, even assuming for the moment that she is an employee. In discussion, she accepted that she did not have that. It follows that the Tribunal does not have jurisdiction to consider a claim of unfair dismissal. I consider that it must be struck out.
21. The second claim is for breach of contract. That is a claim under the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994, which gives the Tribunal jurisdiction over that claim. To make it, the claimant must be an employee. She was required to specify, by the Orders granted, the basis on which she contends that she was an employee. She did not do so. She sent some documents, but that does not provide any specification nor fair notice of her position. In discussion at the hearing, she alleged that she was under the respondent's control such that she was an employee. That however is not the test in law. She accepted, after some questions, that the contractual relationship was with a limited

company she had set up, she stating that that was what the respondent had required. That is a material fact that excludes employment status. It is inconsistent with employment status. The claimant is both in breach of the order, and I consider that there is little if any realistic prospect of her being able to establish employment status for such a claim. I consider that it is appropriate to strike out the claim for breach of contract.

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22. The third claims are for discrimination. They are made under sections 13 and 26 of the Equality Act 2010 on the protected characteristics of race and sex, as was set out in the third Preliminary Hearing. I did not consider that a claim of indirect discrimination under section 19 of the Act remained before the Tribunal, although it had been referred to as a potential claim earlier. In the event that it was before the Tribunal, I would have struck it out as the claimant had not set out the essential basis for such a claim in her 25 January 2022 document, or otherwise. It was not a claim that could proceed in the absence of any basis for it being set out, as the respondent did not know what it was and what it had to respond to. As I consider that the claim is not before the Tribunal it does not require to be struck out in my opinion, but in the event that it is, I would have done so.

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23. The public policy is in favour of having the discrimination claims that are made determined on their facts. This is not a strike out application on the prospects of success, but on the question of breach of orders. The claimant is in breach of the orders, as she has not provided all answers to all questions whether in the document of 25 January 2022 or otherwise, but I do require to take into account that she is someone for whom English is a second language, her knowledge of the law is limited, she sought assistance from a Law Clinic which was partly forthcoming but not easy to access for her, and that she thought that she had provided the detail sought in her document sent on 25 January 2022. She is wrong in that in at least some of the questions but overall I consider that there is sufficient detail given that it would not be proportionate or in accordance with the overriding objective in Rule 2 to strike those claims out.

24. To pursue such claims, the claimant must establish a number of matters. One is that she was an employee for the purposes of the Equality Act 2010. There is however a specific definition for employment in section

83(2) that includes “a contract personally to do work”. That is not the same test as for an employee more generally, including for a claim of breach of contract. It is I consider arguable that the claimant meets that test, although the respondent will argue the contrary as it is entitled to. There may be arguments presented over what the documents state, and the extent to which they truly reflect the arrangements between the parties, on which there is authority from the Supreme Court.

25. The factual basis of the claims is disputed. I consider that the public interest in having such discrimination cases determined, which can include ascertaining both whether they are justified, and whether they are not justified, is a factor to consider in the exercise of discretion. Despite therefore the breach of the orders that did take place, I do not strike out those claims as I do not consider that to do so is in accordance with the overriding objective. They are therefore to proceed, and a separate Note addresses their case management.

Employment Judge:	A Kemp
Date of Judgment:	22 April 2022
Date sent to parties:	22 April 2022