



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4101022/2022

Preliminary Hearing held by Cloud Video Platform on 3 May 2022

Employment Judge A Kemp

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Mr B Morris

**Claimant
No appearance**

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Kier Ltd

**Respondent
Represented by:
Ms Kate Annand,
Counsel
Instructed by:
Ms H Brannan,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Claim of age discrimination is struck out under Rule 37 as having no reasonable prospects of success.

REASONS

Introduction

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1. This was a Preliminary Hearing held remotely by Cloud Video Platform to address an application for strike out which had been made by the respondent. It follows an earlier Preliminary Hearing held by telephone on 11 April 2022, at which the claimant, who attended, was ordered to provide further particulars of his claim of age discrimination by 25 April 2022. The

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Note issued after that hearing referred to the present application. The

claimant withdrew a claim of unfair dismissal at that hearing, and it has been dismissed by separate Judgment under Rule 52. The only claim that remained before the Tribunal was for age discrimination, but no basis in fact for that claim was within the Claim Form.

5 2. The claimant has not complied with the order to provide further particulars of the claim he made, nor has he contacted the Tribunal in any way. He has not set out any detail on which the basis for a claim of age discrimination can be discerned.

10 3. Notice of the present hearing was sent to the parties. The claimant has been contacted by the clerk for the purposes of the hearing before me today as to his participation remotely, both last week and again this morning by telephone, without success on either occasion. I also understand that the respondent's solicitor attempted to contact him last week by telephone without success.

15 **Law**

4. 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:

20 **"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—

- 25 (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;
- (d) avoiding delay, so far as compatible with proper consideration
- 30 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.”

5. Rule 37 provides as follows:

5 **“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—

10 (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.....;

15 (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).

6. 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).

7. As a general principle, discrimination cases should not be struck out 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.”

5 8. 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.”

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9. In ***Ezsias v North Glamorgan NHS Trust [2007] IRLR 603*** the Court of Appeal considered that discrimination or similar cases such as for public interest disclosures, ought not, other than in exceptional circumstances, to be struck out on the ground that they have no reasonable prospect of success without hearing evidence and considering them on their merits. The following remarks were made at paragraph 29:

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“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.”

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10. In ***Tayside Public Transport Co Ltd (trading as Travel Dundee) v Reilly [2012] IRLR 755***, the following summary was given at paragraph 30:

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“Counsel are agreed that the power conferred by rule 18(7)(b) may be exercised only in rare circumstances. It has been described as draconian (***Balls v Downham Market High School and College [2011] IRLR 217***, para 4 (EAT)). In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the

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crucial facts, it is not for the tribunal to conduct an impromptu trial of the facts (*ED & F Man Liquid Products Ltd v Patel [2003] CP Rep 51*, Potter LJ, at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (*ED & F Man ... ; Ezsias ...*). But in the normal case where there is a 'crucial core of disputed facts', it is an error of law for the tribunal to pre-empt the determination of a full hearing by striking out (*Ezsias ...* Maurice Kay LJ, at para 29)."

10 11. In *Ukegheson v Haringey London Borough Council [2015] ICR 1285*, it was clarified that there are no formal categories where striking out is not permitted at all. It is therefore competent to strike out a case such as the present, although in that case the Tribunal's striking out of discrimination claims was reversed on appeal.

15 12. That it is competent to strike out a discrimination claim was made clear also in *Ahir v British Airways plc [2017] EWCA Civ 1392*, in which Lord Justice Elias stated that

20 "Employment Tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context."

25 13. If it is not possible for the claim to succeed on the legal basis put forward it may be struck out – *Romanowska v Aspiration Care Ltd UKEAT/0015/14*.

14. In *Mechkarov v Citi Bank NA [2016] ICR 1121* the EAT summarised the law as follows:

30 "(a) only in the clearest case should a discrimination claim be struck out;

- (b) where there were core issues of fact that turned on oral evidence, they should not be decided without hearing oral evidence;
- (c) the claimant's case must ordinarily be taken at its highest;
- (d) if the claimant's case was 'conclusively disproved by' or was 'totally and inexplicably inconsistent' with undisputed contemporaneous documents, it could be struck out;
- (e) a tribunal should not conduct an impromptu mini-trial of oral evidence to resolve core disputed facts."

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15. A further summary was provided by the EAT in ***Cox v Adecco and others [2021] ILEAT/0339/19***. At paragraphs 28 – 30 there was a further summary of the law.

Discussion

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16. The difficulty in the present claim is the complete absence of pleading for a case of age discrimination by the claimant. There is no core of disputed fact as he has not set that out. The factual basis for the claim made is not known. The claimant has been given the opportunity to do so, and has not taken that either within the time set out in the Order to do so, or later. There is no document before me which indicates to any extent what the claim might be. On the contrary, the respondent set out its position in the Response Form, which the claimant has not sought to dispute, and if the position set out there is correct the dismissal would not be one for age discrimination in any way at all.
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17. I am firstly satisfied from the foregoing that the claimant's case has no reasonable prospects of success, as he has not set out at all what facts it is based on, and has not responded at all to the pleadings in the Response Form.
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18. Secondly I am satisfied that it is in accordance with the overriding objective to strike out the claim. I am conscious that that is permissible only in rare circumstances, and that it is a draconian measure, but in the absence of any basis on which the claimant has put forward a claim, despite having what I consider to be a reasonable opportunity to do so, and that in the circumstance where he was aware of the respondent seeking a strike out and where what he required to do was set out in the Note following the
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earlier Preliminary Hearing, I consider that a strike out is proportionate and appropriate. The claim as it is before me does not have what could be described as any merit.

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Employment Judge: Sandy Kemp
Date of Judgment: 03 May 2022
Entered in register: 04 May 2022
and copied to parties

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