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## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4109432/2021**

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**Held on 28 January 2022**

**Employment Judge: P O'Donnell**

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**Miss D Klukowska**

**Claimant  
In Person**

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**Bridge of Weir Leather Co Ltd**

**Respondent  
Represented by:  
Ms Wright –  
Solicitor**

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## **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Employment Tribunal is that the Claimant's application under Rule 37(1)(c) to strike-out the Respondent's ET3 is refused.

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## **REASONS**

### **Introduction**

1. The Claimant has brought various complaints against the Respondent, all of which are resisted by the Respondent. A final hearing of the claim has been listed to commence on 14 March 2022.

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2. During the course of the case management of the claim, the Claimant made an application under Rule 37(1)(c) to strike-out the response on the basis that it was alleged that the Respondent had failed to comply with an Order of the Tribunal. The application was opposed by the Respondent.
- 5 3. A hearing was listed to be heard in person on 25 January 2022 to determine the application. Unfortunately, the Claimant felt unwell on the morning of the hearing and a lateral flow test confirmed that she had Covid. The Claimant was, therefore, unable to attend and the hearing was discharged.
- 10 4. The Tribunal considered that the application was one which needed to be resolved in order that the position was clear in advance of the final hearing and was concerned at the potential delay in listing a further hearing in person to address the application. The Tribunal, therefore, decided that it would be in keeping with the Overriding Objective and the interests of justice to deal with the matter on the basis of the papers. The reasons for this were set out in  
15 correspondence to parties and the Tribunal does not intend to repeat these. Parties were given the opportunity to provide any further comments or submissions (beyond those already made in correspondence) which they both did.

### **Procedural history**

- 20 5. The Tribunal considers that a short summary of the relevant procedural history will assist in putting the discussion below in the proper context. The case has a long history and the Tribunal does not intend to set out this out in full.
- 25 6. The relevant Order was made on 11 August 2021. It was a series of “standard” Orders made by the Tribunal for parties to prepare for a final hearing to be heard in person. Call 3 of the Order directed the Claimant to provide information about her financial loss and the steps taken to mitigate her losses. Call 4 of the Order then required the Respondent to confirm whether it would argue that the Claimant had failed to mitigate her loss (and, if so, the basis of any such argument) and confirm that information provided by the Claimant  
30 regarding any pension scheme was correct.

7. The Claimant required to comply with Call 3 by 25 August 2021 and she did so by email of that date. The Respondent then had until 1 September 2021 to comply with Call 4.
8. By email dated 1 September 2021, the Respondent's agent indicated that the Respondent required further information from the Claimant to be able to confirm their position on mitigation. The email sets out the information sought and requests this from the Claimant. An application was made for a 7 day extension of time to comply with the requirement to confirm the position regarding the pension scheme.
9. The Claimant responded to this by email dated 2 September 2021 which enclosed the strike-out application that is the subject of this judgment. The Respondent set out its objections to the application by email dated 3 September 2021 and the Claimant made further comments regarding those objections by email dated 6 September 2021.
10. By email dated 6 September 2021, the Tribunal responded to this correspondence informing parties that, at that moment, Employment Judge Hoey had not struck-out the response as he did not consider it proportionate to do so. The Respondent was asked to confirm if it had now complied with the Orders and, if anything was outstanding, the Respondent was given a further 7 days to comply.
11. By two emails dated 13 September 2021 from its agent, the Respondent set out its position on mitigation and the information supplied by the Claimant in relation to the pension scheme. In summary, it was the Respondent's position that the information provided by the Claimant in relation to the jobs for which she had applied was not sufficient for it to fully confirm its position; it was acknowledged that the Claimant had, on the face of it, applied for a number of jobs but that the information provided did not set out the role applied for, the work involved and the salary as well as a comment that it was not clear whether some of the jobs listed were duplicates. The Respondent did go on to confirm that it would be arguing that there were failures to mitigate her losses by the

Claimant and setting out the basis on which that would be argued at the final hearing.

12. The Claimant did not consider that this complied with the Call 4 of the Order and subsequently confirmed that she insisted upon her strike-out application.

5 The hearing on 25 January 2022 was listed to determine that application.

### **Claimant's submissions**

13. The Claimant's submissions started by setting out the terms of the Order made in August 2021.

10 14. She acknowledges that an email was sent to the Tribunal on 1 September 2021 but suggests that, given how late in the day it was sent, the Respondent had, in fact, forgotten about the need to comply. She submits that the Respondent had not contacted her before that date to seek clarification and states that she is still not aware of what information is said to be required.

15 15. The submissions note that the Respondent was given an extension of time to comply with the Order and alleges that they did not contact her during this time.

16. The Claimant goes on to submit that, on 13 September 2021, the Respondent failed to comply with the Order. She states that they made a further unjustified and unrealistic request for clarification setting out the reasons why she says this is the case.

20 17. It is submitted that the Respondent has been legally represented and should be aware of the correct procedures but failed to follow these. It is pointed out that the Respondent did not make any application to vary or amend the Order or to seek an Order for the Claimant to provide the information the Respondent considered it needed.

25 18. Reference is made to matters which arose in the earlier stages of the case management process and an assertion made that the Respondent's tactic are to endlessly demand information and accuse the Claimant of not providing it when it is them who fails to do so.

19. The Claimant's submissions concludes by asking for the ET3 to be struck-out due to the Respondent's alleged failure to comply with the Order.

### **Respondent's submissions**

5 20. The Respondent relies on the submissions made in an email from their agent dated 3 November 2021.

21. It is submitted that the Respondent has complied with the Order by way of its correspondence in September 2021 and that it provided a detailed response on the mitigation issue in the email of 13 September 2021.

10 22. They gone on to state that the comments made about the information provided by the Claimant were valid. It is submitted that the Respondent is having to take issue with mitigation because the information provided by the Claimant is defective. The Claimant could have taken the logical step of providing the information sought.

15 23. It is submitted that the response by the Respondent on the mitigation issue has caused no delay to the proceedings and have not precluded a fair trial taking place.

20 24. In relation to the content of the strike-out application, it is said that this is mainly a challenge to the Respondent's comments on mitigation and the fact that a Claimant may not agree with those is not a basis for strike-out but, rather, a matter for evidence and submissions at the final hearing.

25. It is submitted that the application should be refused.

### **Relevant Law**

26. Section The Tribunal has power to strike-out the whole or part of claim under Rule 37:-

25 *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—*

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- (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;*
  - (c) *for non-compliance with any of these Rules or with an order of the Tribunal;*
  - (d) *that it has not been actively pursued;*
  - 10 (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).*

15 27. The process for striking-out under Rule 37 involves a two stage test (*HM Prison Service v Dolby [2003] IRLR 694, EAT; Hasan v Tesco Stores Ltd UKEAT/0098/16*). First, the Tribunal must determine whether one of the specified grounds for striking out has been established; second, if one of the grounds is made out, the tribunal must decide as a matter of discretion whether to strike out or whether some other, less draconian, sanction should be applied.

20 28. In considering an application under Rule 37(1)(c), the question for the Tribunal, in exercising its discretion on the second stage of the test, is whether there is a real or substantial or serious risk that, as a result of any non-compliance with an Order, a fair trial will no longer be possible (*National Grid Co Ltd v Virdee [1992] IRLR 555, EAT*).

### **Decision**

25 29. The first question for the Tribunal is whether or not the relevant ground under Rule 37 is made out. In this case, given that the applicable ground is Rule 37(1)(c), the issue is whether the Respondent failed to comply with Call 4 of the Order dated 11 August 2021.

30. Strictly speaking, it is correct to say that, at the original date for compliance with the Order, the Respondent did not provide the information required by Call of the Order. However, there are two important caveats to this.
31. First, this is not a case where the Respondent simply ignored the Order. On  
5 the original date for compliance, they did address the Order, setting out the further information they considered was required for them to be able to answer Call 4.
32. The Tribunal does not consider that this request from the Respondent was unreasonable or unjustified as asserted by the Claimant. It is important to look  
10 at what had been provided by the Claimant in respect of mitigation in Appendix 2 of her response to Call 3. It starts as a list of names, dates and an extract of text (which look like email subject lines or the first line of an email); some of the lines on the list give a job title but others give only a partial job title and some do not give any job title at all. The Claimant has not, therefore, provided  
15 a clear explanation of the jobs for which she applied. No information about salary or what the role involves is provided at all. The appendix then changes to a grid setting out job applications made by the Claimant which does contain job titles but some of these may, on the face of it, be duplicates of those which already appeared on the preceding list. The Tribunal can understand why the  
20 Respondent sought clarification of this.
33. Second, EJ Hoey subsequently amended the Order to revise the date for compliance to 13 September 2021. On that date, the Respondent's agent sent two emails which the Tribunal considers complied with Call 4 of the Order; the first email does, whilst accepting that the Claimant appears to have applied  
25 for a large number of jobs, maintain the Respondent's position regarding the information provided by the Claimant; it goes on to confirm that the Respondent will seek to argue a failure to mitigate in respect of a number of matters (albeit the Respondent indicates that it may revise its position on the issues if the Claimant provides further information in relation to those matters); the second  
30 email provides further detail of matters which the Respondent says amount to a failure to mitigate by the Claimant.

34. The Tribunal can understand why the Claimant has taken the view that this does not comply with the Order. The Tribunal bears in mind that she is a party litigant who will not be familiar with the nuances of litigation and may expect the Respondent to have presented an absolute response to the Order.
- 5 35. However, it is often the case that parties in litigation will set out a position that they intend to advance a particular argument with the caveat that they may drop any such argument if the other party is able to provide further information. This is exactly what has happened in this case and it does not mean that the Respondent has failed to comply with the Order.
- 10 36. The emails from the Respondent's agent do comply with the Order as they confirm that the Respondent will argue a failure to mitigate and the grounds on which such an argument will be advanced. The Tribunal considers that these emails give the Claimant fair notice of the case the Respondent will make on mitigation.
- 15 37. The fact that this is caveated to say that the Respondent may revise their position if further information is provided does not mean that the Respondent has not complied with the Order. If anything this gives the Claimant a clear indication of what evidence she would require to lead at the hearing to answer the Respondent's case on mitigation.
- 20 38. The Tribunal pauses to comment that the Claimant may wish to give consideration to providing the information set out in the email of 13 September 2021 in advance of the final hearing. This may allow these issues to be resolved between the parties and reduce the issues to be determined and the evidence needing to be heard at the hearing.
- 25 39. For the reasons set out above, the Tribunal does consider that the Respondent, as at the revised date for compliance, did not fail to comply with Call 4 of the August Order.
40. For that reason alone, the Tribunal would refuse the Claimant's application for strike-out. However, for the sake of completeness, the Tribunal will go on to



address the second part of the test and consider whether, if there had been a failure to comply, a fair trial was no longer possible.

41. The Tribunal cannot see any basis on which it can be said that, even if the correspondence from the Respondent did not amount to compliance with the Order, a fair trial was not possible in such circumstances. Indeed, it notes that the Claimant does not advance any argument that a fair trial is no longer possible.
42. The issue to which the relevant Call in the Order relates is one which is relevant to remedy only. It has absolutely no bearing whatsoever on the issues of liability as to whether or not the Respondent discriminated against the Claimant. There is no basis on which it could be said that a failure to comply with Call 4 would prejudice the Claimant in advancing her substantive case.
43. In such circumstances, even if there had been non-compliance, the Tribunal would not have granted any application to strike-out the whole of the Response preventing the Respondent from defending the substantive claim. This would be a wholly disproportionate sanction which would not be in keeping with the Overriding Objective or the interests of justice.
44. As stated above, Call 4 relates to an issue for remedy but the Tribunal would not have gone as far as striking-out the Response in relation to remedy as a whole as any non-compliance would not prejudice a fair trial on this issue as a whole.
45. The most the Tribunal may have considered to be a proportionate sanction would be to strike-out any argument relating to mitigation. However, this is entirely academic as the Tribunal has found that the Respondent has complied with the Order and has given the Claimant fair notice of their position on mitigation.
46. In these circumstances, even if the emails of 13 September 2021 had not complied with the Order, the Tribunal would not have struck-out the Response as any such non-compliance would not prevent a fair trial.

47. For all these reasons, the Claimant's application for strike-out is refused.

**Employment Judge: P O'Donnell**  
**Date of Judgment: 09 February 2022**  
5 **Entered in register: 09 February 2022**  
**and copied to parties**

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