# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Q Hu.

**Respondent:** Recroot Ltd (1)
Seachill UK Limited T/A Hilton Seafood UK (2)

# AT A PRELIMINARY HEARING

**Heard in public at:** Lincoln, in person **On:** 7 November 2022

**Before:** Employment Judge Clark (sitting alone)

**Appearances**
**For the claimant:** Did not attend and was not represented
**For the 1st respondent:** Mr D Brown of Counsel
(Ms. Redfearn Solicitor also in attendance)
**For the 2nd respondent:** Mr M Bloom, Solicitor

# JUDGMENT

1. The claims of discrimination in any way in connected with the protected characteristic of Religion are **struck out** against both respondents as having no reasonable prospect of success.

2. The claims of detriment for making a protected qualifying disclosure are **struck out** against both respondents as having no reasonable prospect of success.

3. The claim of automatic unfair dismissal (on the ground of making a protected qualifying disclosure) is **struck out** against both respondents as having no reasonable prospect of success.

4. All remaining claims are **struck out** against both respondents on the ground that the claimant has failed to comply with a case management order and a fair trial is no longer possible.

# REASONS

**Introduction to today's hearing**.

1) This is the third preliminary hearing to deal with case management. On two previous occasions the judge conducting the hearing has been unable to isolate from the claimant's narrative the matters of fact and law necessary for the specific claims to be understood, responded to and case managed. Orders were made by EJ Butler for Mr Hu to provide the further particulars sought by the respondents without success. Orders were then made by EJ Adkinson and sent to the parties on 29 July 2022. That required Mr Hu to answer a series of focused questions on the facts of the potential claims intimated. EJ Adkinson's orders identified the following issues to be determined at today's hearing:-

> ***"63.1. Compliance with my orders:***
>
> ***63.1.1. Has the claimant has provided the information I have ordered him to provide?***
> ***63.1.2. If not, should the Tribunal strike out some or all of them?***
>
> ***63.2. Clarification of issues.***
>
> ***63.3. No reasonable prospect of success or deposit orders: Assuming the claims are clear:***
>
> ***63.3.1. Should any of them be struck out because they have no reasonable prospect of success?***
> ***63.3.2. If not, are there any allegations that have little reasonable prospect of success that means the Tribunal should order the claimant to pay a deposit if he wants to pursue that allegation?***
>
> ***63.4. General case management and progression."***

2) Subsequent to that order being sent to the parties, other events led to further applications by the second respondent. On 20 September 2022, it made an application for strike out on the ground that the claimant has failed to comply with the tribunal's order. More recently, various accusations by Mr Hu towards solicitors for the respondent and the judiciary managing the case has led it to renew its previous application that the claim is being conducted scandalously.

**Preliminary Matters.**

3) The claimant did not attend today. A late application of sorts had been put before me on Friday 4 November 2022. In reality it was a repeat of the points raised in two previous applications to postpone today's and then to stay the claim for a period of 6 – 12 months. Each of those applications had been refused by other judges. Insofar as Friday's correspondence from Mr Hu was a further application to postpone, it fell to be considered under rule 30A of Schedule 1 to the Employment Tribunals (Constitution and Rules of procedure) Regulations 2013 ("the rules"). I refused it. It referred to the claimant's health, which had been the subject of other recent applications to postpone or

stay and which had also been refused and again included reference to a further clinic appointment this afternoon as part of his ongoing therapy. That appointment was not said to be the reason for the postponement and I note the appointment appears to have been arranged after the date of this hearing.

4) Faced with Mr Hu's absence today, I caused my clerk to make any reasonable enquiries that could be made to ascertain if he was simply running late or intending not to attend. This was around 10:05. I was told that he did answer a telephone call. He said he was driving, he said he was not attending as he was on his way to a doctor's appointment at 10 am. He did not give any further details and the phone line was disconnected on the clerk. Of the repeated applications to vacate today, the claimant has not referred to that particular doctor's appointment and has not sought to renew the application based on any different medical grounds.

5) In view of where this case has got to, the recent history of refused applications to postpone and the interests of justice of all parties, I decided it was appropriate and just to proceed in Mr Hu's absence.

**The Parties' Positions on Strike Out**

*The Respondents' position*

6) Both respondents make a joint application to strike out the claims. The grounds are that Mr Hu has not complied with a case management order, that a fair trial is no longer possible and/or that Mr Hu's conduct of the claim is scandalous. They say the claimant has had six chances for the claim to be clarified without making any real progress. It has now reached the stage where it is proportionate to strike out the claim.

7) Both rely on the chronology and assistance given to Mr Hu at the last hearing to understand what was required. In essence they repeat and expand the arguments they raised before EJ Adkinson (summarised at paragraphs 37.5 of his judgment). Both remind me it is not for me to go behind the case management position reached by two previous judges and the consequential orders they made. They say I am bound by them and can only determine the issues their previous decisions now put before me.

8) Both refer to the evidential prejudice they face in support of the proportionality of a strike out. The claim itself is now 11 months old. It is now around 20 months since the start of the relationship with the claimant and 14 since it ended. The final hearing that was listed for 2023 has already been lost because of the non-compliance with orders meaning any final determination of this matter is unlikely before 2024. In itself that is concern enough but in this case the respondent's point to the transient nature of the workforce and those engaged with the agency. People come and go relatively quickly. Many are international workers. The respondents say they have attempted to identify any potentially relevant witnesses referred to in the ET1 by a single given name and they "have no idea who they are". As things stand, they say they are fundamentally disadvantaged in being able to secure any evidence of fact to defend whatever claims Mr Hu might clarify.

9) Both refer to the detailed discussions conducted by EJ Adkinson at the previous 3-hour preliminary hearing and the apparent simplicity of clarifying the facts sought which

amount to little more than what was actually said, by whom and when. They say progress has at times appeared possible when the claimant has sought extensions to comply. Two were agreed to by the respondents, the third extension happened by default as a result of EJ Heap's order, which was itself granted on a statement from the claimant that he needed just another 10 days to finish his response.

10) In addition to non-compliance with orders, both respondents also invite me to consider the claimant's scandalous behaviour. An extempore application had been made at the hearing before EJ Adkinson in response to the claimant calling Mr Bloom a liar. EJ Adkinson found it was scandalous behaviour but was neither persistent nor did it render a fair trial impossible. Mr Hu was warned he should moderate his language and that a repeat may not be tolerated again. Since then, he has continued to assert the respondents' solicitors are dishonest and lying and misrepresenting the position in their submissions. He has asserted that the respondents' solicitors and the Judges are in collusion and his written applications have openly accused EJ Heap as being a racist.

11) Mr Brown added that it was also open to me to dismiss the claims in any event under rule 47 of the rules on the ground of his failure to attend today's hearing. He also submitted that even if it was ever theoretically possible that the claim could be sufficiently clarified, the future complexity of dealing with employment status, the relationships between the two respondents and questions time limits to name a few, meant there was likely to be a number of difficult preliminary points in issue in respect of which he could only foresee a further repeat of the difficulties of Mr Hu engaging in the future.

*The Claimant's Position*

12) Obviously, Mr Hu is not present to make any oral submissions. He has not submitted anything in writing for the purpose of today to be considered in his absence. Nevertheless, it goes without saying that his position is to oppose the application and I have taken the approach of pressing and testing both respondents' submissions as they have been made. I have considered what written information Mr Hu has previously submitted and I have also considered of my own motion whether alternative courses to strike out could fairly be taken.

**The Background and Procedural Chronology.**

13) The claimant was employed by the first respondent agency and deployed to provide work as an operator on production lines for the second respondent's fish processing site. He was engaged on that basis for about 6 months, between 15 March and 20 September 2021.

14) An ET1 claim form was presented on 19 December 2021, following early conciliation between 11 October and 21 November 2021. By virtue of the boxes ticked in the form it seems that the claimant intended to present claims of unfair dismissal, discrimination relying on the protected characteristics of disability, race, age, and religion or belief; notice pay, a statutory redundancy payment; unauthorised deductions from wages. It also purported to bring claims for "other payments" and "privacy harm" and referred to various pieces of legislation for which the Employment Tribunal does not have a direct jurisdiction to determine. It was accompanied by a narrative in general terms within which it is assumed the basis of the claims being alleged would be found.

15) In their ET3's, the respondent's pleaded to the difficulty in responding to detail, as opposed to the abstract. They set out blanket denials and raised the need for clarity, specifically for further and better particulars of the claims actually being brought. On 14 February 2022 the second respondent applied to convert the first telephone preliminary hearing to an attended hearing to assist in that purpose.

16) As a result, the hearing was in fact conducted by CVP instead of telephone and came before EJ M Butler. Mr Hu was unable to join due to technical difficulties. By then the respondents had, across their respective case management agendas, set out a list of specific questions seeking further and better particulars of the discrete claims. EJ Butler ordered the claimant to provide the answers to those questions by 16 June 2022 to be considered further at a relisted preliminary hearing which would be held in person. The respondents were also ordered to provide any amended ET3 responses in reply.

17) Mr Hu submitted a further narrative in response to that order. It was largely a repeat of the existing narrative attached to the ET1. It disclosed some extensive legal research but did nothing to further the need for clarity of the facts of the potential claims for them to be understood. For my part, I note by this time the protected characteristic of religion or belief appeared to have disappeared from both his own case management agenda and those subsequent further narrative responses.

18) As a result, the respondents applied to vary the order, raising the additional cost of attempting to amend their responses when the claims remained unknown. On 28 June 2022, the respondents applied for the claim to be struck out on the ground the claimant had failed to comply with the order of EJ Butler. The preliminary hearing listed for 7 July 2022 was therefore converted to an open preliminary hearing.

19) The preliminary hearing took place before EJ Adkinson on 7 July 2022. He found the ET1 narrative to be "muddled and unclear" and "not clearly identifying which legal rights he relies on relate to which bit of the narrative". He considered that clarity was needed for the tribunal and the respondents to understand the claim. He considered that the further narratives provided in response to EJ Butler's order were almost identical and also failed to give that necessary information. It is clear to me that state of affairs led him to discuss the issues in the case with the parties before him as, to a limited extent, he was able deal with some matters falling outside the tribunal's jurisdiction for one reason or another and he did so with Mr Hu's agreement. He struck out those claims that were outside the tribunal's jurisdiction including ordinary unfair dismissal and the claim for a redundancy payment. Otherwise, it is clear he was unable to obtain the clarification needed at the time and made the detailed orders in the form of a list of simple and direct questions to be answered. The respondents describe to me today how EJ Adkinson gave a detailed and patient explanation of the matters needed from Mr Hu. That is not a one-sided view. It accord's with the detailed record of that hearing provided by EJ Adkinson and, whilst Mr Hu would initially complain that more time was given to the respondents' submissions, he himself would later record "EJ Adkinson's fairness and impartiality in fulfilling his duties".

20) EJ Adkinson refused the respondent's application for strike out for non-compliance. He also refused the extended ground for strike out based on the claimant's scandalous conduct in the course of that hearing. Whilst refusing strike out, at paragraph

55 of his judgment and reasons he set out a specific warning to Mr Hu that future repeats may not be tolerated again.

21) Within his record, EJ Adkinson reached a number of conclusions and made other observations about the conduct of the claim including: -

a) rejecting Mr Hu's account of not receiving a bundle in advance of the hearing;
b) that the claims remained unclear;
c) that the tribunal could not sensibly manage them;
d) that he doubted giving Mr Hu a further chance would result in any clarity.
e) Recognising his order this would further increase cost and delay.
f) But that at that stage it was, nevertheless, appropriate that a further chance was given to Mr Hu to provide the clarity.

22) I note EJ Adkinson's concern whether, despite being given another opportunity to provide the information, Mr Hu would ever be able to provide clarity. That appears to have been a conclusion reached after attempting to extract the details in the hearing itself.

23) In order to accommodate the consequences of that order, the final hearing listing then set down for February 2023 had to be lost. At that time, EJ Adkinson anticipated a relisted hearing would not be before August 2023. This is a Lincoln case with specific listing limitations. In my view that date is likely now to be well into 2024.

24) Immediately following that hearing, Mr Hu submitted a document headed "grievance and reporting" within which made various allegations that the representatives had made dishonest statements to the tribunal. EJ Adkinson dealt with it in an addendum to his reasons at least insofar as it appeared to seek his recusal from the case.

25) The respondents then say the claimant now had his third chance to provide the clarity in the information ordered by EJ Adkinson. The order expressed the deadline as being "4 weeks from the date the order was sent to the parties". It was sent on 29 July 2022 giving a deadline of 26 August 2022.

26) On or around 1 August 2022, the claimant sought a reconsideration of the judgment setting out the detail of issues within Judge Adkinson's observations and conclusions that he took issue with. Within that, he again referred to the respondents' representatives' being dishonest.

27) On 15 August 2022 Mr Hu applied for an extension of time to provide the response to the questions asked by EJ Adkinson in his order. As with all the claimant's correspondence, I note it is detailed and well drafted, even allowing for the language issues. This particular one is succinct as opposed to lengthy. He applied to extend the deadline from the original 4 weeks to 8 weeks. The respondents agreed and proposed a revised case management timetable as a consequence meaning the deadline became 9 September 2022 (although in proposing that date they appear to have overlooked the original deadline had been set by reference to the date the order was sent to the parties, not the date of the hearing). Nevertheless, the E J Hutchinson granted the extension and adopted the timetable proposed by the respondents. That order was sent to the parties on 22 August 2022. The respondents characterise this extension as the fourth opportunity to provide the information.

28) On 5 September 2022 the claimant again applied to extend the deadline for compliance. He did so again clearly and succinctly in advance of the deadline. He explained how : -

> "***the order is basically ready, I need more time to sort it out***".

Again, the respondents agreed, largely it seems because it they were being told it was nearly complete and proposed 13 September as the new deadline as a date that would permit today's hearing to proceed. They noted how it meant the claimant would have had by then 10 weeks from the previous case management hearing to consider his claim.

29) The respondents characterise this as the fifth chance to set out the claim.

30) On 9 September 2022 the claimant applied once again, this time for a "stay of claim and hearing". In detailed arguments, he set out why he was not able to meet the deadline including language, health and lack of legal knowledge. Whilst initially suggesting a stay and cancellation of the hearing, his application concluded by requesting: -

> ***"If the court and the parties agree to a 10 day extension, the claimant will work to complete the court order to continue the hearing"***

31) This application came before EJ Heap who refused the application to stay and vacate the hearing on the ground that the claimant had himself said a modest further extension of time to comply would enable the hearing to proceed. She therefore granted the extension sought to "19 September 2022, but no later" and made consequential extensions for compliance with the related orders.

32) The respondents characterise this as the sixth chance to provide the clarification.

33) On the day of the latest deadline of 19 September 2022, the claimant applied again for a stay of claim and hearing. He set out the issues he was having with completing the order as he had previously, this time specifically referencing the difficulty with the PCP. He attached some answers to the questions set out in paragraphs 23 and 24 of EJ Adkinson's orders. In those answers he identified his religion as Chinese Taoism and gave abstract answers to the particulars asked of his alleged protected qualifying disclosure(s).

34) On 20 September 2022, the application was opposed by both respondents who renewed the application for strike out. The claimant restated his ill health and accused the respondents of misleading the judges and being motivated to get their lawyer's fees as soon as possible. In a further email of 28 September, itself attaching a different email from the claimant dated 21 September, Mr Hu set out further details for what was then said to be a request for a "moratorium of 6 -12 months" but also indicating that the claimant had now made an appointment with a lawyer.

35) The application was refused by EJ Heap and sent to the parties on 1 October 2022 with reasons. She saw no medical evidence to support the contention he could not provide the clarification and that the previous extension was granted to a date specifically

requested by the claimant. Notice was given to the parties that the respondent's strike out application would be heard at today's hearing.

36) On 17 October 2022 the claimant sent a document to the tribunal and parties entitled "Grievances and Complaints". Within that he criticised EJ Heap's decision and accused her of various forms of bias stating her decision was: -

> ***"fully demonstrating [she] made a prejudicial and discriminatory decision and represents the demands demanded by the defendant".***

37) On 31 October 2022, EJ Adkinson refused the further application to postpone, noting none of the medical information showed the claimant was unable to prosecute the claim he has presented and that the language difficulties have been allowed for.

38) Over the weekend of 29 and 30 October 2022, the solicitor for the first respondent sent the bundle for today's hearing by email. She also physically attended the claimant's home address and was able to meet Mr Hu and discuss matters with him including giving information on suitable public transport to and from Lincoln, albeit he had a car and had driven to the previous attended hearing. She notified the tribunal of the same, including the intention to bring a further hard copy of the bundle for his use to the hearing, no doubt as a result of the allegations that arose at the July hearing that he had not been given a bundle.

39) On Thursday, 3 November, the claimant wrote to the tribunal again with a document and attachments headed "Requests and Complaints (3)". It was a repeat of the matters previously raised in the refused applications. Strictly, that application had already been dealt with but I treated as a renewed application to vacate today's hearing. It came before me on Friday 4 November 2022 in the middle of other work, the case having by then been allocated to me. The document is again highly critical of EJ Heap, alleging: -

> ***"Under the leadership of the Employment Judge Heap, they had a "gang fight" against me."***
>
> ***"there is only one reason to believe that Employment Judge Heap and the parties are in the same league";***
>
> and that
>
> ***"I can only suspect that Employment Judge Heap has a discriminatory hobby, or is a racist".***

40) As already stated, I refused that application. It was, in substance, an application that had already been refused twice before on the same evidence. When renewed before me, it fell within the scope of rule 30A of the 2013 rules and was not exceptional. I was, however, alert to the fact that the essential reason for this hearing was case management and that I was confident I could conduct today's hearing in a manner that assisted the claimant's participation. In short, I hoped to be able to resolve the difficulties he said he faced in clarifying his claims. That, of course, required his attendance.

## Has Mr Hu Complied with EJ Adkinson's order?

41) The starting point has to be the precise terms of the order itself. It is not for me to rewrite it or interpret it beyond what it clearly says. If there is ambiguity, it is to be resolved in the claimant's favour.

42) The relevant part of the order for today's purpose is found at paragraphs 23 to 39. These paragraphs set out a series of specific questions for the claimant to answer. They are questions seeking minimal facts in the nature of what happened, when and by whom etc. They flow from the general narrative in the ET1 and the discussions at the hearing on 7 July 2022. If any of the potential claims are engaged within Mr Hu's general narrative, it is reasonable to expect Mr Hu knows at least some sense of the factual answer to the questions posed and is able to provide it.

43) In the main, there is no doubt that Mr Hu has not complied with the order. It is not right, however, to say there has been a complete failure. On 19 September 2022 there was partial compliance insofar as Mr Hu has given answers to questions posed at paragraphs 23 and 24. The content and quality of those answers so far as they do or do not help to clarify the claim raises other questions which I consider elsewhere but, strictly, those answers must stand as compliance with the order and it is wrong to conflate providing information with the quality of it.

44) Other than those two questions, the order has not been complied with.

## Should the claim be struck out?

45) The power to strike out is set out in rule 37(1) of the 2013 rules which provides:-

> ***(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—***
>
> ***(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;***
> ***(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).***
>
> ***(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.***

46) This, as with all rules, has to be applied with the overriding objective in mind. The concept of dealing with cases justly and fairly includes; -

> ***(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 of the issues; and***
> ***(e) saving expense.***

47) So far as the application engages with rule 37(1)(c), and non-compliance with an order, the key authority is **Weir Valves and Controls (UK) Ltd v Armitage [2004] ICR 371 EAT;** and, so far as there is found to have been material non-compliance, whether a fair trial remains possible **Baber v Royal Bank of Scotland plc EAT 0301/15**). The guiding principles are to consider all the relevant factors, including: -

a) the magnitude of the non-compliance
b) whether the default was the responsibility of the party or his or her representative
c) what disruption, unfairness or prejudice has been caused
d) whether a fair hearing would still be possible, and
e) whether striking out or some lesser remedy would be an appropriate response to the disobedience

48) I approached this question with some degree of hesitation. Were I conducting a first case management discussion with Mr Hu in attendance before me, there are matters within Mr Hu's ET1 narrative that would prompt me to ask questions that I would hope might lead to some better understanding of the claim. Even if that was not achieved, that may be good ground to limit the claim as clarification is achieved as much by understanding what is not alleged as a discreet claim as it is by understanding what is. Different judges take different approaches. My approach may be criticised for potentially leading to a limitation of the claim in a way that giving time for the claimant to reflect and provide the further particulars after a discussion at a preliminary hearing does not. In any event, I am unable to rewrite what has already happened and have to accept the Respondents' submission that I am not at the first preliminary hearing and have to deal with this application against the background of the various case management decisions, conclusions and orders that other judges have already made on the information before them at the time. Nothing has changed since then and I have no basis to go behind those orders. In any event, it is clear that something like my approach was attempted by EJ Adkinson when he engaged with the potential claims at the July hearing for the later comments and questions to be posed as they were. Twice the narrative has been found to be unclear and twice, directions have been given to clarify them. The date for compliance with the latest orders has been extended on three further occasions.

49) Even against that limitation, EJ Adkinson included in today's list of issues "Clarification of issues". If Mr Hu had attended this hearing, I would have at least had the opportunity to attempt to obtain some clarification of the claims without putting the respondents to yet further delay and cost. As he has not attended, that opportunity has been lost. I am alert to what he says was the reason he wanted today's hearing postponed but that application had been refused on two occasions before the matter came before me last Friday. That is another case management decision that I am bound by as other judges had already determined the circumstances did not justify a postponement and there was nothing new in the most recent renewed application. My intention to conduct today's hearing in a way that facilitated Mr Hu's engagement with the issues cannot happen in his absence.

50) Strike out is an extreme order to make. It is rightfully labelled as draconian but it is a valid order to make in appropriate cases. I keep in mind that whilst the focus of analysis starts with the claimant's non-compliance and the consequences of it, an order striking out a claim is not to be thought of as punitive. The reason is because it is not imposed to punish a party for their non-compliance but because it is the only order

remaining that can do justice between the parties. Whether it is appropriate depends on the specific factors which I now consider.

51) ***Magnitude***. The claimant has not complied save for identifying his religion and answering the questions in respect of a protected disclosure. I consider that the magnitude of the non-compliance is significant when measured in terms of the time and steps taken to obtain that information. Mr Hu has known that on two occasions the tribunal has made orders expressing the view that neither the respondents nor the tribunal can properly understand the claims in order to dispose of them fairly. EJ Adkinson removed any risk of ambiguity there could possibly have been about the information that was required from EJ M Butler's previous order to answer the requests made by the respondents. At the hearing in July he went to lengths to set out specific simple questions in his own detailed order. The claimant appeared to engage with that at times.

52) ***Whose failure?*** The claimant is acting in person. The failure to comply is his and not that of any representative. However, that poses different considerations to that which apply when there is non-compliance by a representative acting on behalf of a party. I have to consider Mr Hu's ability to do what has been asked of him. First, I recognise that whilst he is acting without representation he appears to have some advantage over the average "litigant in person" as the documents before me today show he obtained a degree in jurisprudence when in China and, in 2010, a Masters in European Union Law. Those qualifications do not at all mean that his ability to conduct proceedings is to be measured against the standard of a qualified English Lawyer, but it is clear from his correspondence, such as that on 17 October 2022, that his command of the range and nature of civil disputes that the Employment Tribunal can determine is beyond that of the average litigant in person.

53) The nature of the orders made has always been principally about identifying the facts alleged in each type of claim and not matters of law, although I accept the orders seek to organise those facts within their respective legal framework. It is important not to lose sight of the simplicity of those facts. Whilst the claims vary in their constituent legal elements, the measure of simplicity can be seen in the deduction from wages claim. What was required was an explanation of no more than the pay he says he should have received on a certain date, what was actually paid on that date and, therefore, the shortfall he claims to be owed. I have no explanation as to why providing that information has been so difficult. One explanation is that there is in fact no shortfall and no deduction.

54) Had there been some compliance with the order that would have been enough, at least in respect of this particular application. Moreover, it is highly unlikely that any tribunal would then not allow some ironing out of the information provided (such as an erroneous description of a PCP). The essence of the order was principally to make sense of the lengthy chronology to understand what part of it was context and what was alluding to a specific allegation.

55) I also have to have regard to the fact Mr Hu clearly does suffer with a range of impairments to his health and that this will have some effect on him. He also speaks English as a second language which again is a potential barrier. Some of those health conditions are clearly serious in nature and likely to have some effect on anyone. However, I am unable to accept that his health and/or language barriers have been obstacles in him identifying the facts of his claim that he relies on. It is abundantly clear

to me that on numerous occasions those matters have not been an obstacle to him drafting lengthy and detailed applications, often articulating fine arguments and quoting law. He has equally not experienced any barriers in writing criticisms of earlier judicial decisions often within a day of the decision suggesting the need for extended time to consider a response is not necessary. In any event, insofar as Mr Hu's circumstances may have demanded a longer timescale to provide the answers than other claimants might have required, the timetable for compliance has been extended substantially resulting in a period of over 10 weeks. I am not satisfied that the reason for the failure is that insufficient time was available. Moreover, the later applications from Mr Hu now seek a stay or other "moratorium" in the region of another 6-12 months. They were rejected but, insofar as they indicate the sort of further delay to proceedings that is now being sought before any clarity is likely, that in itself needs to be factored into the test and the interests of justice. It is also a relevant factor for me to weigh in terms of alternatives to strike out. Realistically, any further opportunity given to Mr Hu will have to allow for that sort of timescale for compliance.

56) ***Disruption, unfairness and prejudice***. We are now 11 months from the presentation of the claim and over a year past the time the parties were in any form of economic relationship. There have been three preliminary hearings and numerous applications and interlocutory matters to deal with which have all added to the respondents' costs. Some of that I can discount as there is always an unrecoverable cost, even when successfully defending a claim. This, however, has not only already reached a disproportionate level, but it has no sign of returning to the sort of costs in the phases of litigation that might reasonably be expected was necessary to incur in defending claims such as this.

57) There is always an inherent prejudice in delay in any case and that has a negative impact on justice for all concerned. In this case, I accept that the respondents' prejudice goes further and that they have genuine and material concerns about a very real evidential prejudice. That has a particular weight over the mere fact of delay that might arise in any case. The particular prejudice comes from the relatively transient nature of the agency workforce and the reality that they are still unable to identify and secure relevant evidence. I am told that even those few names that have been identified in the ET1 are apparently meaningless to the respondents. That is the concern after 11 months of this claim. It is only going to become more acute as time goes on.

58) Clearly there is prejudice to the claimant if the claim is struck out but the default is his. I have to consider and weigh the effect of that factor within any alternative orders that might be available.

59) ***Is a fair hearing possible***? It may be said that a fair hearing could always be possible in every case of default if unlimited resources were put into the matter, costs were irrelevant, time were of no concern and there were no other cases waiting for justice before this tribunal. Some of the prejudice to the respondents already begs the question whether a fair hearing could be possible but fairness applies to both parties. I have to consider that question first by asking whether the claimant has had a reasonable opportunity to clarify his claim? If not, then a fair opportunity may still have to be given. I am satisfied he has as, indeed, I am bound to conclude by the decisions of the previous judges whose decisions I have no power to undo. Employment Judge Adkinson clearly harboured some concerns that there may have been scope for ambiguity in EJ Butler's

original order to answer the request for further and better particulars and sought to resolve it in the claimant's favour by spelling out a further opportunity to clarify the claims. He did that, however, at a time when his face to face enquiries with Mr Hu also led him to doubt that any further clarity would be forthcoming.

60) I then consider the question from the other perspective. Is there a reasonable prospect of future compliance within a further reasonable period, the consequences of which the respondent's ought reasonably to incur? I am not satisfied that there is. There is nothing to suppose the claimant will be able to comply if given in any further period of time that I might think reasonable. Even if it had been open to me to clarify aspects today had he attended, he has not attended and the prospect of postponing for such enquiries to take place face to face not only flies in the face of the case management orders already made but has to be ruled out as Mr Hu has himself very recently sought a stay of proceedings suggesting a further 6-12 months during which there will not be any progress made. The original date for a final hearing has already been lost and could not now realistically take place until 2024. The respondents' evidential prejudice has already reached an unacceptable level and is only going to deteriorate further. I am of a view that a fair hearing is no longer possible.

61) ***Alternative, lesser orders?*** There is a limited range of orders available to me. That is partly due to the orders that have already been made and partly because of the practical reality. As already stated, I have ruled out simply postponing today's hearing as this will (a) add to the already growing costs and (b) those costs and delay cannot be justified as there is no realistic prospect of achieving the clarification at a future date within a reasonable period.

62) I also rule out revisiting the claimant's previous application to stay proceedings for 6-12 months for the same reasons even if such a route were open to me. (i.e. if it had not already been considered and judicially determined)

63) I have considered if I can rebalance the relative prejudice to the parties with an order that Mr Hu pays the costs incurred by the respondents by virtue of the failures to date and to allow Mr Hu some further brief time to re-engage. Prejudice to a party based on costs alone clearly can sometimes be remedied by a costs order and may tip the balance of prejudice in favour of the defaulting party being given a further chance. In this case, I have to rule out any costs orders as viable options for various reasons. First, it would be beset with the same reality that nothing was likely to happen for a further 6-12 months which I have already concluded undermines fairness of the process. Secondly, the respondent's prejudice is not limited to their legal costs. Thirdly, and in any event, the claimant's financial means has previously been identified as being limited to the extent that such an order would serve no practical purpose. Mr Hu is not here to tell me that anything has changed for the better in respect of his means and the previous record remains the best information I have. I would add that I would be gravely concerned about the effect that making such a financial order would be likely to have on Mr Hu and the pressure it would add to his personal circumstances. I cannot see that would be in anyone's best interests.

64) An unless order is always an option to strike out but, in this case, I have to ask for what purpose? The issue is not that the claimant just needs another week or two to comply. I have no confidence that it will have any greater effect on the situation that any

of the further opportunities given in the various extensions already ordered over the previous 4 months. It will continue the past trend of delay, costs and prejudice.

65) A deposit order is not appropriate at all in the absence of a clear understanding of the factual and legal issues. To attempt it at this stage would be to speculate on the claims.

66) For the sake of completeness, I do not see any justice in the tribunal simply making no order. Strike out is the only just order available to me, at least insofar as the claimant has not provided any response to the orders made by E J Adkinson.

67) Finally, I should add that whilst I have including consideration of the prospects of Mr Hu complying with the need to clarify his claim, I have not considered the first respondent's fear that other future stages of the case would generate their own non-compliance. Even if that were the case, that would be a matter to deal with at the time and is not sufficiently a concern to factor into the present non-compliance.

**Prospects of Success**

68) In two respects, the claimant has complied with EJ Adkinson's order. He has identified his religion. He has answered, albeit in the abstract, questions aimed at identifying the protected disclosures alleged. Those claims are not struck out for non-compliance as he has provided answers but they fall to be considered under the further issue identified by EJ Adkinson at paragraph 63.3 of his case management orders. That is, whether to make orders flowing from an assessment of the reasonable prospects of success of any claims identified.

69) Rule 37 of the 2013 rules permits a tribunal to strike out a claim or part of it where it has no reasonable prospect of success. There are numerous cases reciting the caution that should be exercised before reaching this conclusion particularly where there are facts in dispute or otherwise in fact sensitive cases such as those alleging unlawful discrimination. (see **Anyanwu v. South Bank Student Union and Commission For Racial Equality [2001] UKHL 14**) That will often mean that strike out is not available unless it can properly be said that the claim as it is put cannot succeed.

70) Rule 39 permits a deposit to be ordered to be paid as a condition of continuing with any issue of contention that is found to have little reasonable prospect of success.

71) I assess these questions from the information before me in the sense that this is all there is. It is clear to me that the information provided by Mr Hu does not identify complete and viable claims in respect of any discrimination, detriment or dismissal. I am satisfied that, insofar as this information means he is intimating claims of discrimination in some way connected with[1] his religion and detriment or dismissal for making a protected qualifying disclosure, it is appropriate that those claims are struck out as having no reasonable prospect of success.

[1] I use "connected with" deliberately. At this stage it is still not known whether the allegation depends on a test of "because of" or "related to" or raises a "particular disadvantage".

72) Religion has been missing from all but the first ET1 where it arose only because the box was ticked at section 8.1 of the form. It did not feature in the later narratives, nor the claimant's case management agenda nor any other information submitted by Mr Hu subsequently. It was clearly properly included in the questions posed by EJ Adkinson because of being ticked on the ET1 and it features now only to the extent that Mr Hu has identified the detail of the protected characteristic he possesses, namely Chinese Taoism. There is still no allegation that any detriment or dismissal was in anyway because of that protected characteristic or other basis to understand how this protected characteristic engages with any of the relevant forms of prohibited conduct.

73) The information provided in respect of making a protected characteristic does not identify the disclosure itself. It is still not possible to understand the information actually said to have been conveyed which in his reasonable belief tended to show one of the relevant failures and was reasonably believed to have been made in the public interest. Without that, there is no reasonable prospect of Mr Hu establishing that he made a protected qualifying disclosure on the case as it has now been alleged. Without a protected qualifying disclosure, any claim of detriment or dismissal cannot succeed. In addition, Mr Hu has not alleged any detriment as a result of any disclosure. Any such claim is incomplete on the current allegation and cannot, therefore, succeed.

74) It appears to me that EJ Adkinson previously struck out only the unfair dismissal claim insofar as it was based on ordinary principles of fairness under s.98(4) of the Employment Rights Act 1996. That is because his order was explicitly in the context of the requirement for a claimant to have 2 year's qualifying service. It therefore left open the claim of automatic unfair dismissal which does not require qualifying service. Whilst it appears to me on the information that that is a claim that could only be brought against the first respondent and not the second respondent, for completeness it will be struck out against both respondents.

75) For those reasons, both potential claims fall within the assessment of having no reasonable prospect of success.

**Scandalous Conduct**

76) The power to strike out a claim being conducted in a scandalous, unreasonable or vexatious manner is stated in rule 37(1)(b) above. The authorities make clear that "scandalous" in this context does not carry its every day meaning of something that is shocking. It means simply irrelevant and abusive (**Bennett v Southward London Borough Council 2002 ICR 882, CA.**)

77) A claim conducted in a scandalous manner will in most, if not all, cases be a claim that is being conducted unreasonably. The former may be a specific example of the latter. The broader legal landscape therefore applies. A claim will not be struck out unless the scandalous conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible and, in either case, the order must be a proportionate response. (**Blockbuster Entertainment Ltd v James 2006 IRLR 630, CA** and also **De Keyser Ltd v Wilson 2001 IRLR 324, EAT.**)

78) EJ Adkinson had to deal with a spontaneous extension of the strike out application on 7 July 2022 to include scandalous conduct when the second respondent's solicitor

was accused of lying. He concluded it was irrelevant and abusive and therefore scandalous but that it was a one off and had no effect on the conduct of the proceedings such that it did not make a fair trial impossible. He did, however, make clear that this sort of conduct should not be repeated and may not be tolerated again.

79) This application comes before me orally today. I cannot see that this particular ground for the application has been made on notice. Whilst Mr Bloom's submissions relate to repetition of the attack on his own integrity and honesty, the gravamen of the conduct referred to is principally founded on conduct attacking the judiciary. I will return to the procedural implications of this application.

80) Since Mr Hu was rebuked and warned by E J Adkinson on 7 July 2022 for scandalous conduct, the claimant has repeated his accusations of dishonesty at the respondents' representatives in correspondence. He has also accused the tribunal judiciary, EJ Heap in particular, of being in collusion with the respondents' representatives to achieve a particular outcome. Of particular concern has been his more recent accusations on 17 October and 3 November 2022 that E J Heap's case management decisions have been motivated by discriminatory or even racist objectives.

81) Mr Hu is entitled to disagree with any decision made in his case. He is entitled to seek reconsideration and, in any event, is entitled to appeal where it discloses an error of law. He is not entitled to unfounded and gratuitous accusations of misconduct in public office. I have had to considered further whether this can be explained by the language or even a cultural barrier. There is a real possibility that references to "dishonest" could be lost in translation and if the intention was to convey the fact the statement was simply wrong, may not carry the accusatory meaning it does in English. Moreover, I consider his use of the word alleging "misleading" statements may, for that same reason, require even greater caution before concluding it has been used in a way which may meet the definition of scandalous. However, much of that caution can be put to one side as a result of the warning given by EJ Adkinson in July to tone down his accusations of the conduct of others in the litigation. That was not simply a warning. EJ Adkinson explained the context of parties disagreeing with each other on the facts and foresaw many occasions in the future of the case where Mr Hu may find it difficult to hear the positions of fact advanced by the other parties.

82) All that aside, the accusations are now also levelled at Judges conducting the case as well as the lawyers for the respondents. Absent any reconsideration, appeal or a complaint, it is wholly inappropriate to express dissatisfaction with a decision still less in the manner he has. I have again considered the language barrier but dismiss that as relevant as on the occasions that he has labelled the representatives dishonest or EJ Heap a racist, he has sought to qualify it with a request to excuse any inappropriate statements. Someone using those terms who genuinely does not appreciate the force of the accusations they contain in English would not offer such an apology. Considered against EJ Adkinson's earlier warning, I have to conclude they were used intentionally and purposefully in their offensive and accusatory tone.

83) I am satisfied that this conduct is both intentional, irrelevant to the proceedings and abusive. I am satisfied these accusations are significant in that they are serious accusations, particularly the idea of collusion between judiciary and solicitors based on a racist motivation. It goes beyond the issues between the parties and strikes at the

administration of justice itself. In fact, the accusations levelled at EJ Heap go even further. Unlike the situation EJ Adkinson faced in July 2022, I have to conclude that Mr Hu's conduct has taken on a persistent quality as it has been repeated on a number of occasions against different individuals. I am also satisfied it can no longer be regarded as insignificant to the future conduct of the case. It affects the availability of judiciary to deal with cases where they may reasonable be concerned to recuse themselves from future conduct. That in itself does nothing to improve the prospects of a swift and fair trial. It also affects the way the parties can constructively cooperate with each other in the way they are required bringing them immediately in conflict with the overriding objective. That much does challenge the extent to which a fair trial remains possible and undoubtedly undermines it.

84) I have some reservation about scandalous conduct extending to inappropriate comments and conduct directed at the tribunal and judiciary itself, but it remains unreasonable conduct of the proceedings and a form of contempt. It goes further than the unfounded insult to a judge and accuses the parties of being in collusion to corrupt the justice process. It would result in the judge in question having to at least consider recusing herself from future participation in the case.

85) Despite that analysis of serious scandalous and unreasonable conduct, if this matter were considered in isolation it is not one which would have led me to strike out the claims, at least today, for the following reasons: -

a) The Judge concerned had been involved only in interlocutory case management decisions. Her recusal diminishes the pool of available judges but not to a point likely to interfere with the just administration of justice.
b) This has not reached the point that the tribunal would contemplate a referral for contempt of its own motion. The respondents have not intimated any application under CPR 81.12(1)(d) either in respect of the accusations levelled at their representatives.
c) Other warnings and sanctions could still do justice to mean a fair trial remained possible.
d) This is not a matter that was formally identified as an issue for determination today. Even had Mr Hu attended, I would have had to consider how to deal with these new matters fairly. The fact he has not attended only adds to that sense of caution.

**Rule 47**

86) Within his submissions, Mr Brown added rule 47 as a further basis of dismissing Mr Hu's claims as a result of his non-attendance today.

87) Rule 47 provides that: -

> ***Where a party fails to attend or be represented at a hearing, the tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reason for the party's absence.***

88) I have already referred to the enquiries that were made at the start of the hearing and the limited further information that generated. I agree with the respondent's that Mr Hu's absence appears intentional if only from the point of view that for some weeks he

has been seeking to postpone today's hearing. As far as I can see, no judge has rejected the fact that he has genuine health issues, only that the evidence did not show that he could not attend today's hearing. I also note that Mr Hu has not sought to renew a postponement on the basis of what appears to be a new medical appointment this morning or otherwise explain his non-attendance and there is nothing more before me about that.

89) However, were his non-attendance the only issue, I would not have struck out the claim for that reason alone. Rule 47 gives the tribunal a power and expressly identifies two options. Whichever option is taken may depend on which party is not in attendance and other issues in the case in question. In any case, the exercise of that power has to be in line with other considerations including the overriding objective.

90) In the event, the practical reality is that we have been able to proceed with today's hearing. It is always more acceptable to fairness in any judicial process that determinations are reached on the substance of the disputes. So far as the substance for today's hearing were those issues identified by EJ Adkinson, they have been determined.

Employment Judge Clark
14 November 2022