



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Waclawczyk

**Respondent:** Matt Digby (2)  
Urbaser Ltd (3)

## JUDGMENT

The claim is not struck out against either respondent.

## REASONS

1. By a letter dated **21 November 2022**, the representatives for Urbaser Ltd made an application for all the claims and complaints against their client to be struck out. The letter referred to their client as “second respondent”. I will refer to it as R3.
2. The letter sought strike out on the basis of no reasonable prospects only. In other words, a reference to Rule 37(1)(a) of the tribunal rules of procedure. Although the letter referred to the Claimant’s failure to supply documents, this was not in the context of alleging that rules 37(1)(b), (c), or (d) might apply. The suggestion was that the Claimant had not supplied certain documents because he did not have them (and nor did the respondents) and – therefore – the final hearing (if the claim was not struck out) would proceed in the absence of such documents. These comments were in support of the application – as set out in full detail in the letter – that the claims were all bound to fail (against R3).
3. A follow up email of 29 November chased a reply but contained no new information.
4. On 30 November, the Claimant sent a brief email which said “I will send you all information to the end of the week”. In fact, as mentioned, the 21 November letter had not alleged that the Claimant had relevant documents and had failed to supply them.
5. A further follow up email was sent by the representatives at 16:09 on 5 December 2022.
6. The Claimant sent a more detailed reply than his previous one in response, at 14:07 on 6 December 2022. He did not directly engage with the contents of the 21 November letter, but made clear that he objected to strike out. He did not request a hearing for R3’s application to be considered.
7. In his response, the Claimant suggested that Matt Digby (whom I will call R2) was aware of his “complaints”. He did not specifically say why this supported

the claims identified in the list of issues, but it is part of the Claimant's case that R2 was previously employed by Kier and subsequently by R3.

8. R3's representative replied on 6 December 2022 at 17:38, suggesting that the Claimant's objection to strike out appeared to make allegations of discrimination, as opposed to addressing directly the prospects of success of his victimisation complaints.
9. The Employment Tribunal Rules of Procedure Regulation 37 deals with strike out.
  - 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—
    - (a) that it is scandalous or vexatious or has no reasonable prospect of success;
10. Striking out a claim is considered to be a draconian step because it means that the claim is dismissed without evidence having been heard. Generally it should only be done in clear cases and should not necessarily be done in cases where there is a dispute of fact between the parties. Having a mini trial to decide disputed of fact is not usually appropriate on strike out applications
11. When there is a strike out application by the respondent against the claimant, it is appropriate to take the claimant's case at its highest. Generally speaking that means assuming that the claimants will be able to prove any disputed facts which they need to prove. At the very least, there would need to be reliable and unambiguous contemporaneous documents contradicting the claimant's case before it was decided to strike out a case on the basis that the claimant had no reasonable prospect of proving a disputed fact, once disclosure had taken place, and evidence heard, etc.
12. If the employment judge's decision is that there are no reasonable prospects of success, it does not automatically follow that the claim should be struck out. It is still a matter of discretion. When exercising discretion, it is appropriate to consider (along with all other relevant factors) that the tribunal system does not exist so that hopeless cases can carry on all the way to be heard at a final hearing. It is appropriate to take account the needs of other users who also need the resources of the tribunal in order for their cases to reach a final hearing. It is appropriate to take into account the effects on the respondent of allowing a claim to continue if it in fact has no reasonable prospects of success.
13. When a strike out application is made against a litigant in person it is important for the judge to take into account (if relevant) the equal treatment bench book and - in any event - to make sure to understand the claimant's case as fully as possible from all the available material.
14. In this case, I note that the Claimant required an interpreter at previous hearings.
15. I note that an agreed list of issues is attached to orders from the 18 March 2022 hearing. Amongst other things, it is clear that the respondents do not admit that the items set out in paragraph 1 of that list were protected acts. Paragraph 2 also makes clear that both respondents do not admit knowledge of the alleged protected acts.
16. In effect, R3's application simply asserts that the Claimant will not be able to prove either (i) that there were protected acts or (ii) that, if there were, R3 had knowledge of them. (It also asserts that the Claimant will be unable to prove that there was any connection between the alleged acts and the alleged detriments).

17. However, the fact that the Claimant lacks documentation does not inevitably mean that his claim will fail. His assertion of fact appears to be that he did do these acts and that his employer ought to have had records of them. He might fail to prove this assertion, but I must take his case at its highest.
18. To the extent, if at all, that the Claimant does prove that R2 and/or R3 knew about the protected acts (if any) then that will be highly relevant to his assertion that the alleged detriments were motivated by the protected acts. If the actual decision-makers are not available as witnesses, then that will be a matter which the Tribunal has to take into account when assessing the evidence. However, in itself, it does not mean that the Claimant has no reasonable prospects of success. If the Tribunal does not find facts from which it might infer that the detriments (if any) were motivated by the protected acts (if any) then the claim will fail. However, it is not necessarily the case that the Claimant has no reasonable prospects of establishing such facts in the event that the respondents are unable to call the (alleged) decision-makers as witnesses.
19. The grounds for strike out are not made out. In any event, exercising my discretion, given the proximity of the final hearing, and the length of time the litigation has been on-going, it seems to me that it is in the interests of justice for this matter to be resolved at a final hearing before a tribunal at which the evidence is assessed.
20. Nothing in this judgment or reasons prevents an application for strike out being made if there is a failure to comply with the case management orders. Amongst other things, witness statements were supposed to be exchanged in October. If there are any outstanding directions, all parties must be sure to co-operate with each other and to comply in good time before the hearing.
21. The final hearing remains due to take place as scheduled.

**Employment Judge Quill**

Date: 13 December 2022

JUDGMENT SENT TO THE PARTIES ON

14 December 2022

FOR THE TRIBUNAL OFFICE