



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 8000012/2023

Judgment on Strike-out Application

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Employment Judge: M A Macleod

Mariana Nijloveanu

Claimant
In Person

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Next Level Security Services Ltd

Respondent
Represented by
Ms T Carling
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:

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- (1) That the claimant's claim of unfair dismissal is dismissed for want of jurisdiction; and
- (2) That the respondent's application for strike out for non-compliance with Orders of the Tribunal is refused.

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REASONS

1. In this case, the claimant has sought to present a number of complaints to the Employment Tribunal. The Tribunal has attempted on a number of occasions to clarify with the claimant the nature and substance of her

claims. This culminated in the respondent's application for strike-out of the claimant's claims.

2. This Judgment addresses that application, and the claimant's opposition thereto. It was agreed by parties that the application could be dealt with on the basis of written submissions alone.
3. I set out below the background, the application, the parties' respective positions, the relevant law and the Tribunal's decision.

Background

4. There have been a number of Preliminary Hearings in this case. It is useful to track the progress made through these Hearings.
5. The first Preliminary Hearing took place on 8 March 2023. However, the Tribunal had not received a copy of her agenda for that Hearing, and without it the claimant indicated that she was unable to explain her claims in detail. As a result, the Hearing was adjourned to allow her to present her agenda and give the respondent and Tribunal notice of the scope of her claims.
6. The second Preliminary Hearing took place on 5 April 2023. It was noted that in the agenda, which she had now produced, she had identified 4 claims:
 - (1) Unjustified dismissal, unfair dismissal and wrongful dismissal;
 - (2) Non-assignment of work to her, amounting to discrimination on the grounds of age;
 - (3) Unlawful deductions from wages (holiday pay); and
 - (4) Unlawful deductions from wages (notice pay).
7. The Note which followed that Preliminary Hearing set out an Order in which the claimant was required, by no later than 3 May 2023, to answer certain questions with a view to clarifying and further specifying her claim.

8. No response to that Order having been received by 11 May 2023, the Tribunal issued an Unless Order confirming that the claimant was directed to comply with the Order of the Tribunal by 18 May 2023. The Order specifically stated that “Unless this Order is complied with by the date
5 specified, the claim shall be dismissed on the date of non-compliance without further order.”
9. That Order was made following application dated 11 May by the respondent’s agent, by Employment Judge Jones.
10. At the same time, I was invited by the Tribunal administration to direct them
10 as to further action. As a result, a letter dated 15 May 2023 was sent to the claimant to remind her that she must provide a response as a matter of urgency, and that if she did not do so or explain the delay, the Tribunal may consider rescheduling the next arranged Preliminary Hearing or take further action against her. At that time, I was unaware that the Unless Order had
15 been issued.
11. On 16 May 2023, the claimant sent an email to the Tribunal enclosing a document entitled “Response for the Claimant”. That document ran to 11 pages. It was set out in a confusing manner, asking questions which had not been put to the claimant and providing answers which were very general
20 and at times appeared to be extracted from employment law advice sites from the internet. There were references to irrelevant pieces of legislation (for example, the Transfer of Undertakings (Protection of Employment) Regulations 2006), and the text appeared in different fonts in different pages of the document.
- 25 12. There was no direct answer to the questions asking the claimant to specify the basis upon which she asserted that, lacking 2 years’ continuous employment with the respondent, she had the right to make an unfair dismissal claim.
- 30 13. She did seek to answer questions relating to indirect discrimination. She stated: “I consider that it was indirect discrimination because a the person who discriminates generally does not advertise their prejudices, indeed they

may not be aware of them.” She then referred to “EU Legislation on changing the burden of proof in cases of direct and indirect discrimination.” She sought to give examples of conduct, but without any details, as follows: “talking to me in a raised tone, coercion, refusing to take shifts, contacting
5 me at any time; that is, as soon as I came from the night shift - disturbing my rest, unfounded accusations.”

14. She pointed to “Article 2(1)(a)”, without advising what document or authority this was drawn from.

15. In setting out a question relating to direct discrimination, the claimant made
10 reference to “the plaintiff”, which made clear that she had not quoted from the Order sent, but from some other, unknown, source. However, in seeking to identify the less favourable treatment which she was subjected to on the grounds of her Romanian citizenship, the claimant said that there was a failure to offer her work shifts, but that shifts were given repeatedly to the
15 same people on the roster.

16. She said that the reasons she complained that this treatment was on the grounds of her nationality were “Because this is what I noticed, it is what I experienced, how else can you explain that when we requested the work shift, it was given to another employed person, even though I drive...”

20 17. When asked to whom she compared her treatment, she answered that “This was applied to me.”

18. She then set out some figures in relation to the payments claims she was making.

19. On the next page, in a different font, the claimant stated that “Forced
25 dismissal is also a type of unfair dismissal.” She followed this with a number of general statements apparently drawn from another source, using language which did not reflect the terms of the Order and referred to her, again, as the plaintiff.

20. She made reference to the right to a statutory redundancy payment, not a
30 claim which she had identified she wished to make, according with “Legal

act Mandatory Law 539/45... Article 16 of Law 3896/2010". She did not identify the source of such provisions or how they could be relevant to the Tribunal's determination of the issues in this case.

5 21. The claimant went on to seek to benefit from respect for the right to a fair trial under the European Convention on Human Rights.

22. There then appeared what seemed to be an extract from an advice letter or document to the claimant, or possibly to another party in other proceedings, which did not advance matters.

10 23. The remainder of the document repeated some of the entries previously set out, in a further variety of fonts, with a considerable lack of clarity as to the meaning of the information provided or any indication as to how this represented an answer to the Order issued to her.

15 24. A further Preliminary Hearing took place on 24 May 2023, at which the claimant's responses were discussed. As a result, the claimant was required to answer more questions in order to identify precisely what claim she is making. She explained that her previous response included some information about international law which she had downloaded from the internet.

20 25. The claimant was ordered to provide answer to those additional questions by no later than 3 June 2023 (though the Order itself incorrectly set the deadline as 3 May 2023).

26. On 6 June 2023, the claimant emailed the Tribunal to attach a 2 page document seeking to answer the questions put.

25 27. She complained again that she was unhappy that her contract of employment had been terminated without notice, and without her having been at fault. She did not address the jurisdictional issue which had been raised with her on several occasions.

28. She complained about a lack of pay which she had received, associated, it is understood, with a lack of shifts being allocated to her.

The Application and Parties' Respective Positions

- 5 29. The respondent had already raised its concerns about the claimant's claim, and her responses to the previous Orders. On 7 June 2023, the respondent's solicitor wrote to the Tribunal to make application for strike-out of the claim.
30. The respondent's solicitor set out her responses to the claimant's points made in reply to the Order and Unless Order.
- 10 31. With regard to the unfair dismissal claim, she argued that the claimant was continuing to insist on making a claim for unfair dismissal on the basis of flexible working, but that she had not made a flexible working request, there was no jurisdiction to allow her to pursue that claim, in the absence of her having 2 years' continuous service with the respondent. The respondent argued that this claim should be struck out on the basis that it lacks any reasonable prospect of success.
- 15 32. The respondent went on to submit that the claimant had failed to answer the questions at (c)(i) to (iv), about her claim of discrimination on the grounds of age. As a result, they are argued that there was no reasonable prospect of this claim succeeding.
- 20 33. With regard to the claimant's claim of race discrimination, the respondent argued that the basis of the claim was that the respondent did not offer her work shifts, but that she only questioned this once. Also, there was nothing to indicate that the treatment received by the claimant was on the grounds of race. Accordingly, this claim lacks any reasonable prospect of success and should be struck out. In the absence of details (such as the identity of a
25 comparator, the name of an individual alleged to have been guilty of the discriminatory conduct) the burden of proof cannot be shifted.
- 30 34. So far as the claimant's payments claims are concerned, the respondent argued that the wage elements of this case were resolved on 23 December 2022 after conversations with ACAS. In any event, the claimant did not set out the amount of notice pay which she received, and therefore how much

she is now due; and similarly she has not confirmed the amount of holiday pay which she has received, nor what she is now due.

35. The respondent therefore argued that the claimant had materially failed to comply with the Unless Order of 11 May. When asked about this at the Preliminary Hearing on 24 May, she suggested that she had answered all the questions put to her. As a result, there was no attempt to clarify or explain matters further at all. The respondent submitted that there was no answer clearly set out by the claimant, but that she has instead sought to scour the internet to justify her claims without any consideration for what the Tribunal has requested.

36. The respondent's primary position is that the claim should be struck out on the basis of non-compliance of the Unless Order, under Rule 38; and their alternative position is that the claim should be struck out in its entirety for having no reasonable prospect of success. The claimant has had ample opportunity to present her claim but has failed to do so.

37. The claimant sought to amend the terms of the respondent's submission by inserting comments thereon. She made it clear that she disputed some of the assertions contained in the respondent's submission. For example, she asked the respondent to prove that she had declined to work her notice, as it was not true.

38. She also said that she lacked legal knowledge and needed tolerance and time to deal with these matters.

The Relevant Law

39. Rule 37(1)(b) of the Employment Tribunals Rules of Procedure 2013 provides:

"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-

...(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..."

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40. Rule 37(2) provides:

"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."

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43. The well-known case of *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126 CA provides helpful guidance in considering whether to strike out a claim involving whistleblowing allegations, and said that the same approach should be taken in such cases as requires to be taken in discrimination claims, which require an investigation to be conducted into why an employer acted in a particular way. It was stressed that only in an exceptional case will a case be struck out as having no reasonable prospect of success where the central facts are in dispute.

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44. In *Blockbuster Entertainment Ltd v James* [2006] IRLR 630 CA, the Court of Appeal found that for a Tribunal to strike out a claim based on unreasonable conduct, it has to be satisfied that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible; and in either case, striking out must be a proportionate response.

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45. The court went on to say (paragraph 21): "*The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact - if it is a fact - that the tribunal is ready to try the claims; or - as the case may be - that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality*

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would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist.”

5 46. Sedley LJ, in *Bennett v Southwark LBC* [2002] ICR 881, considered the question of proportionality in the context of that appeal: *“But proportionality must be borne carefully in mind in deciding these applications, for it is not every instance of misuse of the judicial process, albeit it properly falls within the descriptions scandalous, frivolous or vexatious, which will be sufficient to justify the premature termination of a claim or of the defence to it. Here, as elsewhere, firm case management may well afford a better solution....”*

10 47. The case of *Faron Fariba v Pfizer Limited & Others* UKEAT/0605/10/CEA was a case in which the EAT found that an Employment Judge was entitled to strike out claims by a claimant who had demonstrated by her disregard for Tribunal orders and the allegations made in correspondence against the respondent, their solicitors and the Tribunal that she was incapable of bringing her complaints to a fair and orderly trial.

15 48. In reviewing the claimant’s conduct, Mr Justice Underhill noted: *“Dr Fariba said at this hearing that the Tribunal was being distracted from dealing with her employment claim. I entirely agree with that statement, but in my judgment it is Dr Fariba who has not been focussing upon the specific legal claims that she wishes to have the Tribunal determine, but has consistently sought to divert attention from them by raising peripheral issues and making extensive and excessive allegations.”*

20 49. At a later stage in the judgment, Mr Justice Underhill said: *“This is not... a case of the (not uncommon) kind where a litigant in person fails to meet deadlines and/or behaves unreasonably or offensively but is nevertheless doing his or misguided best to comply with the directions set by the tribunal in order to get to trial. Instead, the scatter of allegations of misconduct, the applications for a stay, the pursuit of other proceedings, the threats of resort to criminal or regulatory sanctions, clearly indicated that the Appellant’s focus was entirely elsewhere and that if the case remained live she would, if I may use my own language, continue to thrash around indefinitely. That is*

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why, and the sense in which, the Judge concluded that a fair trial was impossible.”

50. In Rule 38(1), it is provided that *“An order may specify that if it is not complied with by the date specified the claim or response, or part of it, shall be dismissed without further order. If a claim or response, or part of it, is dismissed on this basis the Tribunal shall give written notice to the parties confirming what has occurred.”*

51. It should perhaps be pointed out, however, that Rule 38(2) provides that *“a party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations.”*

15 **Discussion and decision**

52. In this case, the application made by the respondent is for the most draconian sanction available to the Tribunal to be imposed upon the claimant on the basis that she has failed to comply with the Tribunal's Orders, initially for further and better particulars and then in terms of an Unless Order.

53. What makes this case difficult is that the claimant has not ignored the Orders issued by the Tribunal, and indeed in one sense has made considerable efforts to respond to those Orders, at some length.

54. I take into account the fact that the claimant is an unrepresented claimant, and has no legal qualifications nor the benefit of legal advice or assistance. I also take into account that the respondent is entitled to have fair notice of the claims made against them in order to be able to make preparations to defend themselves against those claims.

55. The claimant's responses have been, in many ways, perplexing. She has recited questions which were not asked of her, and, it appears, quoted from

documents of uncertain provenance. She has referred the Tribunal to legal provisions whose source has not been clarified, other than being part of European or international law.

56. While these speak of a claimant who is trying to find the right answers to the Tribunal's questions, they do not amount to clear and helpful responses to the Tribunal Orders.

57. Having reflected carefully upon the parties' respective positions, it appears to me that the claimant has broadly set out a number of complaints to the Tribunal, of which the respondent has notice. I must consider whether or not those complaints are discernible from the documents provided, and if so, whether a fair trial remains possible.

58. The basic complaints made by the claimant are of unfair dismissal, discrimination on the grounds of race or age, and unlawful deductions from wages.

59. I address each of these in turn.

60. The claimant's unfair dismissal claim relates to her employment with the respondent from August 2022 until December 2022, a period of some 4 months at most. Accordingly, the claimant lacks the necessary minimum continuous service of 2 years with the respondent upon which to found a claim of unfair dismissal.

61. The claimant has been asked on a number of occasions to specify why she should be allowed to proceed with such a claim, in light of the lack of qualifying service. She has not been able to identify a reason why the Tribunal could be said to have jurisdiction in such a claim. There is good reason why she has failed to do so, namely that the facts do not support such a claim.

62. As a result, it is plain that the claimant, lacking 2 years' qualifying service under section 108 of the Employment Rights Act 1996, has no right or title to present such a claim to the Tribunal, and the Tribunal lacks jurisdiction to hear it.

63. The claimant's claim of unfair dismissal is therefore dismissed, for want of jurisdiction.

64. Secondly, the claimant complains that she was treated less favourably on the grounds of age and/or race.

5 65. The claimant was born on 23 June 1969, and is, at the date of this Judgment, 54 years of age. That is the age upon which she relies in this case. In addition, her race is Romanian.

66. Her complaints are of direct discrimination under section 13 of the Equality Act 2010.

10 67. With regard to age, the claimant complains that she was treated less favourably than younger men (whose ages she cannot identify), who were awarded shifts more frequently than she was. She does not know exactly who these men are, but is convinced that she was discriminated against on the grounds of her age.

15 68. With regard to race, she maintained that she was treated less favourably on the grounds of her Romanian nationality in that she was not awarded as many shifts as "people of other nations", by which I understood that she meant British people, though I accept that she was unclear about this. In addition, she maintained that her supervisor used a different tone when
20 speak to her as a Romanian citizen that was adopted with others. The claimant did not know why this was, and recognised that there was nothing definite upon which she could rely, simply that she felt this to be the case.

69. I am reluctant to strike out a claim of discrimination on either ground simply because it is vague and perhaps difficult to prove. The evidence will either
25 support the claimant's assertions or it will not. However, it appears to me that the claimant has identified, in very simple terms, a complaint that she was treated less favourably by the respondent in the allocation of shifts, in comparison to younger staff, and to staff of other nationalities.

70. I have decided, with considerable hesitation, that that is a relatively simple
30 claim to understand. By contrast, it seems to me that it will be a relatively

difficult claim to prove, and the claimant must be ready to bring evidence which supports her assertions, rather than simply relying upon her sense that something was being done unfairly or wrongly, but for reasons which she could not fathom.

5 71.1 am of the view that the respondent's criticisms are valid and carry
considerable weight. However, I also take the view that the claimant's
claims are understandable and can be brought to proof, so that the claimant
is permitted to present evidence in support of her assertions. It does not
10 appear to me that the claimant has conducted herself in such a manner as
to attract a finding that she has acted unreasonably in the advancement of
her claim, nor that it can be said that on the face of it her claims are
completely hopeless or misconceived. In other words I do not conclude that
the claimant's claims of discrimination on the grounds of race or age are so
15 lacking in any reasonable prospect of success as to fall into the extreme
and exceptional case where it is not possible to see that a fair trial could
take place.

72. It is also an important factor that the claimant is unrepresented, and that she
has tried, albeit ineptly, to answer the Tribunal's Orders. She has not
20 ignored or dismissed the authority of the Tribunal, but has tried to act in
compliance with it. It is necessary on occasions to grant an unrepresented,
unqualified claimant a greater degree of latitude than one might permit a
qualified solicitor in pleadings, so as to ensure that the claimant has access
to justice and is able to put forward their claim. If she can prove that she
25 was treated less favourably on the grounds of either age or race, then she
has before her the possibility of success. As I have said, I consider that she
may face considerable difficulty in proving her case, but that is a matter for
an evidential hearing, in my view.

73. As a result, I am not prepared to strike out the claimant's claims of
discrimination on the grounds of age or race at this stage in the
30 proceedings.

74. Finally, the claimant complains that she has been unlawfully deprived of holiday pay and notice pay. Those claims are reasonably clear and I am not prepared to dismiss them at this stage.

5 75. While this is not a well presented claim, there are, it seems to me, reasons why that is so, and I am not prepared, at this stage, to find that the claimant has wholly failed to comply with the Unless Order. Essentially, I have concluded that the claimant has not done so well, but has done so, and should be allowed to continue to pursue her claim without further steps being required.

10 76. I did give consideration to whether a further Order should be issued to the claimant to give her the opportunity to clarify her complaints, but concluded that this would not be likely to advance matters, and indeed could complicate the case to the extent that an unrepresented party might struggle to understand.

15 77. It is my conclusion therefore that the claimant's claim of unfair dismissal should be dismissed, but that the remaining claims should be allowed to continue to a hearing on the merits, in order to determine the factual disputes between the parties. The respondent's application for strike out, and for Judgment based on non-compliance with an Unless Order, is
20 therefore refused.

25 **Employment Judge: M Macleod**
Date of Judgment: 28 June 2023
Entered in register: 29 June 2023
and copied to parties

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I confirm that this is my Note and Orders in the case of Nijloveanu v Next Level Security Services Ltd and that I have signed the Note and Orders.