



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms S Burton

**Respondent:** Blair and West Limited

**Heard at Newcastle CFCTC**

**ON: 24 August 2023**

**BEFORE:** Employment Judge Loy

## REPRESENTATION:

**Claimant:** No appearance or representation

**Respondent:** Mr D Blair, CEO

# JUDGMENT

**Employment Tribunal (Constitution and Rules of Procedure)  
Regulations 13 Rule 37**

1. The claimant's claim for race discrimination is struck out under Rule 37(1)(a).

# REASONS

1. In a claim form presented on 30 September 2022, the claimant brought claims for:
  - 1.1. Age discrimination;
  - 1.2. Race discrimination;
  - 1.3. Notice pay;
  - 1.4. Commission payments.

2. The claimant did not attend this public preliminary hearing which was listed by Employment Judge Sweeney at the previous preliminary hearing on 19 June 2023. In that private case management hearing Employment Judge Sweeney, amongst other things, considered the claimant's case in relation to race discrimination. For the reasons which are referred to below, Employment Judge Sweeney held a public preliminary hearing to consider whether or not the claimant's claim for race discrimination should be struck out or, alternatively, made subject to a Deposit Order.
3. The first preliminary hearing in this matter was on 9 January 2023 before Employment Judge Arullendran. The claimant failed to attend that hearing.
4. The second preliminary hearing was on 17 April 2023 before Employment Judge McCluskey.
5. The third preliminary hearing was before Employment Judge Sweeney on 19 June 2023.
6. This was the fourth preliminary hearing in this matter. The claimant did not attend today's hearing. The hearing was attended on behalf of the respondent by Mr David Blair, the Chief Executive Officer of the respondent.
7. I considered Rule 47 which is in the following terms:

*"If a party fails to attend or to be represented at the 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 enquiries that may be practicable about the reason for the parties' absence."*
8. In the light of the claimant's failure to appear, I asked the administration to contact the Tribunal to enquire of the claimant's whereabouts and intentions regarding today's hearing. The administration attempted to contact the claimant by telephone. The claimant's telephone number, which was provided in the claim form, rang out twice and then had a busy tone. This meant that the administration were unable to leave a message. In any event, the efforts to contact the claimant were to no avail.
9. The notice of today's hearing was sent to the parties on 27 June 2023. The Tribunal had not heard in advance of today's hearing whether or not the claimant proposed to attend.
10. In the circumstances, I decided to proceed with the hearing.
11. Rule 37(1)(a) provides as follows:

*"Striking out*

*37(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."*
12. Employment Judge Sweeney on his own initiative listed this matter so that the claimant's claim for race discrimination could be considered against the threshold of strike out or the threshold or for a Deposit Order to be made.

**The claimant's position in relation to her claim for race discrimination**

13. The claimant's position in relation to her claim for race discrimination is set out at paragraphs 5 to 9 of Employment Judge Sweeney's case management summary dated 19 June 2023 and sent to the parties on 27 June 2023.
14. The claimant was ordered by Employment Judges Arullendran and McCluskey to provide further particulars of her claim of race discrimination.
15. The claimant identified four detriments which she said amounted to race discrimination:
  - 15.1. Mr Blair told her to leave immediately upon her resignation;
  - 15.2. Mr Blair did not inform the claimant's colleagues that she was leaving;
  - 15.3. Mr Blair did not allow her to say goodbye to her friends;
  - 15.4. Mr Blair closed the door to the boardroom so that she was alone with Mr Blair and shouted that "any agency on the high street would get security to escort you out, you can go now".
16. Those detriments are contested factually. However, in considering this matter today the Tribunal took the claimant's case at its highest and worked on the assumption that the claimant was able factually to prove to a Tribunal that those detriments took place.
17. The key issue for the claimant is whether or not on her own case she is actually advancing any evidence at all in support of the contention that there was any causal link between the detriments about which she complains and her race. As Employment Judge Sweeney's Case Summary notes, the claimant was reticent to confirm the racial group to which she identifies as belonging. Eventually, the claimant told Employment Judge Sweeney that she was prepared to be referred to as "mixed race".
18. In the claimant's further particulars of 2 May 2022 the claimant said this about her race discrimination claim,

*"there is nothing to say that this treatment was because of my race or appearance so I cannot really provide evidence to uphold this, I just know I felt I was treated differently throughout and none of my colleagues received this response when they handed in their notice."*
19. The claimant confirmed to Employment Judge Sweeney that she was not identifying an actual comparator and went on to say,

*"there is nothing to say that this treatment was because of her race or appearance"*
20. and that she was not pursuing this claim. However, the claimant was not prepared to withdraw her claim for race discrimination, in her own words, she,

*"was not in a position to "withhold" how she felt about matters."*
21. It was this that led Employment Judge Sweeney to list the case for consideration for a strike out or a Deposit Order to be made.
22. Given that the claimant did not attend today's hearing, it was not possible for me to explore further with the claimant how she intends to discharge even the initial burden of proof which is upon her in a race discrimination claim. The claimant's own case is that she has no evidence to prove her feeling that she was

discriminated against on the grounds of her race. It is plainly not possible to discharge a burden of proof, however light that burden, in the absence of any evidence whatsoever. It is settled law that a claimant must identify “something more” than a difference in treatment and a protected characteristic. The claimant’s own position is that she has nothing more that she can put to the Tribunal at a full hearing which would be capable of discharging the initial burden of proof.

23. The Tribunal reminded itself that, as a general principle, discrimination cases should not be struck out except in the very clearest of circumstances. The Tribunal is also mindful that many allegations of discrimination are fact sensitive and it will not often be appropriate to strike out such claims until witness evidence has been heard and cross-examination to test that evidence has been undertaken.
24. The Tribunal is also mindful of the public policy which supports the position that claim for discrimination should be examined on their merits or demerits only once particular facts have been discovered. The Tribunal also notes the risk of injustice is minimised if the answer to these questions are deferred until all the facts are determined. The Tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity.
25. Nevertheless, this is a case which the Tribunal does regards as truly exceptional. It is the claimant’s own case that there is no evidence in support of her claim for discrimination. It is simply not possible for the Tribunal to identify any circumstances in which a claim for race discrimination might succeed when that is the claimant’s own position. This Tribunal decides cases on their objective legal merit after hearing evidence and not on the basis or solely on the basis of the feelings of a particular party.
26. I have therefore come to the conclusion that the claim should be struck out since it has no reasonable prospect of succeeding at trial. I have also had regard to the needs to make sure that there is a proportionate and fair allocation of Tribunal resource amongst all of the case the Tribunal needs to consider. The overriding objective will not be furthered by taking up additional time in determining this case in respect of a cause of action which is bound to fail. Notwithstanding the high hurdle, the decision of the Tribunal is therefore to strike out the claimant’s claim of race discrimination.
27. The claimant’s claims of age discrimination; for notice pay; and for paid commission are unaffected by the strike out of the claimant’s race discrimination claim and those matters proceed to full hearing on **6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> December 2023**.
28. For the avoidance of doubt, the Case Management Orders in relation to the remaining claims as set out in Employment Judge Sweeney’s Case Management Orders of 9 January 2023 remain in full force and effect. Accordingly, the parties must comply with those Orders to ensure that the claim is properly prepared for a full hearing for the remaining claims on the listed dates.

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**Employment Judge Loy**

2 October 2023