



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000182/2022

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Held in Chambers on 14 November 2023

Employment Judge P O'Donnell

10	Ms Mou Banerjee (Via email)	Claimant
	Archangel Seven Limited	First Respondent
	Carrick Mcllelland	Second Respondent
20	Alistair Tait Snowie	Third Respondent

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The judgment of the Employment Tribunal is:

1. The respondents' application to strike-out the claim is refused.
2. The final hearing listed to commence on 27 November 2023 is postponed.
3. A case management preliminary hearing is to be listed to be held remotely by Cloud Video Platform (CVP). Parties are directed to provide their availability in January and February 2024 to attend this hearing. In respect of any day on which a party is not available then they must confirm the reason for their non-availability. This should be provided within 14 days of the date this judgment has been sent to the parties.

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REASONS

Introduction

1. By way of an ET1 lodged on 14 December 2022, the claimant brought a range of complaints against the respondents. The respondents resist all the claims brought by the claimant.
- 5 2. The present hearing in chambers has been listed to determine an application by the respondents to strike-out the claim. There is also an application by the claimant to postpone the 5 day final hearing listed to start on 27 November 2023.

Procedural history

- 10 3. The Tribunal considers that a short summary of relevant procedural matters will assist in putting the matters to be decided in context.
4. A case management hearing in this case was held before Employment Judge Kemp on 12 May 2023. The Note of that hearing records the claimant as indicating an intention to travel to India for a number of months later in the year for Diwali and other family matters but giving no specific dates. This
15 accords with the recollection of the respondent's agent.
5. The claimant states that she did provide the specific dates of travel at the 12 May hearing. The Tribunal prefers the terms of the Note prepared by EJ Kemp; it is highly unlikely that he would have listed the final hearing on the
20 dates on which he did if he had been informed that those were dates when the claimant had already arranged to be out of the country.
6. A number of directions were made at the 12 May hearing for parties to take steps to prepare for the final hearing. Of particular relevance, there was a direction that parties were to exchange documents on which they would rely
25 at the final hearing by 1 September 2023 with the respondent producing a joint bundle by 8 September 2023.
7. A Notice of Hearing listing the final hearing on 27-30 November & 1-2 December 2023 was sent to parties on 24 May 2023. In his Note, EJ Kemp

had directed that any application to postpone this hearing should be made no later than 8 September 2023. No such application was made by this deadline.

- 5 8. A preliminary hearing was listed for 15 September 2023 to consider the respondents' application for strikeout or deposit order based on the merits of the claim.
9. In the event, the respondents withdrew that application. The preliminary hearing was converted to a case management hearing (and postponed to 28 September 2023 at the claimant's request) on the basis that the
10 correspondence from the parties indicated that there were outstanding case management issues that needed to be addressed to ensure that the final hearing could proceed as planned.
10. The preliminary hearing took place before Employment Judge Beyzade on 28 September 2023. During this hearing, the claimant indicated that she had made an application to postpone the final hearing although she could not
15 locate it during the hearing nor had the Tribunal any record of any such application. She was directed to produce the application by 5 October 2023.
11. EJ Beyzade went on to make further directions for the preparation for the final hearing. This included a revised timetable for the preparation of the joint
20 bundle, directions for parties to confirm whether they sought the use of witness statements and the preparation of a list of issues. There was also an indicative timetable for the evidence and submissions. It is worth noting that, in this timetable, the only witness being called by the claimant was herself although a direction was made for parties to provide the details of any witnesses and the relevance of their evidence by 31 October 2023.
- 25 12. On 5 October 2023, the claimant made an application for the final hearing to be postponed on the basis that she was going to be out of the country from 18 October 2023 until 17 January 2024. The Tribunal notes that this is a first application and not an application which the claimant had made earlier as she had suggested at the 28 September hearing. The application has been
30 refused and renewed on a number of occasions due to matters such as the adequacy of the supporting evidence and compliance with Rule 92. The

current application, which is still to be determined, was made on 6 November 2023.

Application for strike-out

13. On 24 October 2023, the respondent made an application for strike-out. The
5 application states that the claimant has not complied with the direction to
provide documents for inclusion in the joint bundle despite the fact that this
direction was first made at the May hearing and then revised at the September
hearing. It also states that the claimant has not complied with the direction
to confirm whether she sought the use of witness statements. It is submitted
10 that the claimant's conduct is delaying the preparation for the final hearing
and that she is not actively pursuing her claim.

14. The application was supplemented by an email of 31 October 2023 setting
out what the respondents say are further failures by the claimant to comply
with the directions of the Tribunal; they state that documents for the joint
15 bundle have still not been provided; the claimant has not set out her position
in relation to a transcript of a recording supplied by the respondent; there has
still been no comment from the claimant in relation to witness statements; the
claimant has not provided a list of witnesses she intends to call at the final
hearing as directed; the claimant has not replied to the draft list of issues.

20 Claimant's position

15. The claimant has sent a number of pieces of correspondence to the Tribunal
during the period since the strike-out application was made. This
correspondence has dealt with both the claimant's postponement
applications, the strike-out application and other matters. Much of the
25 correspondence is repetitive and seeks to re-open issues which have already
been determined.

16. The Tribunal has reviewed the correspondence and identified the following
points made by the claimant relevant to the strike-out application:

a. The claimant confirmed her position on the use of witness statements
30 in an email dated 31 October 2023.

- 5 b. In an email dated 6 November 2023, the claimant identifies that she wishes to call 11 witnesses in addition to herself. This number has never been identified previously. The claimant has not set out what relevant evidence any of these witnesses will give and some are not identified by name being described, for example, as “*defamation and data breach expert*” or “*Glasgow Film Council/local Glasgow film official*”.
- 10 c. In the same email, the claimant states that she provided “some” of the documents she wishes to rely upon when she provided the further and better particulars ordered by EJ Kemp. However, she goes on to state that she will have more documents to be included in the joint bundle.
- d. In the same email, she declines to comments on the transcript provided by the respondent and the draft list of issues.
- 15 17. The claimant sent an email to the Tribunal received at 1.05am on 14 November 2023 purporting to make further comments in relation to the strike-out application and case management. The Tribunal has noted this email but bears in mind that the respondents have had no opportunity to comment on this given that it has been provided at the very last minute. In any event, the Tribunal does not consider that this email provides much assistance; it simply repeats much of what is said in the previous correspondence and does not provide a clear position of whether the claimant has now complied with all outstanding directions. In particular, it is not clear that the claimant has now provided the respondent’s agent with all the documents which she wishes to include in the joint bundle and, rather, is talking about producing her own
- 20
25 bundle.

Relevant Law

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

“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) ...

5 (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;*

10 (d) *that it has not been actively pursued;*

(e) ...”

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

20. A Tribunal should be slow to strike-out a claim where one the parties is a
20 litigant in person (*Mbuisa v Cygnet Healthcare Ltd EAT 0119/18*) given the draconian nature of the power.

21. The question of what amounts to scandalous, vexatious or unreasonable
conduct is not be to construed narrowly. It can be matters which amount to
abuse of process but can involve consideration of wider matters of public
25 policy and the interests of the justice (*Ashmore v British Coal Corpn [1990] IRLR 283*).

22. Rule 37(1)(b) was considered in *Bennett v London Borough of Southwark [2002] IRLR 407* and a number of principles can be identified:

- a. The manner in which proceedings are conducted by a party is not to be equated with the behaviour of the representative but this can provide relevant evidence on this point.
- b. Sedley LJ observed that the Rule was directed to the conduct of proceedings in a way which amounts to abuse of the tribunal's process.
- c. It can be presumed that what is done in a party's name is done on their behalf but this presumption can be rebutted and so a party should be given the opportunity to distance themselves from what the representative has done before a claim or response is struck-out.
- d. The word 'scandalous' in the rule is not used in the colloquial sense that it is 'shocking' conduct. According to Sedley LJ, it embraces both *'the misuse of the privilege of legal process in order to vilify others'*, and *'giving gratuitous insult to the court in the course of such process'* (para 27).
- e. Fourth, it must be such that striking out is a proportionate response to any scandalous, vexatious or unreasonable conduct. The Tribunal needs to assess whether, in light of any conduct found to fall into the relevant description, it is still possible to have a fair trial (see also *De Keyser Ltd v Wilson [2001] IRLR 324*).
23. The approach to be taken by the Tribunal in addressing the issue of strike-out under Rule 37(1)(b) was summarised by Burton J, in *Bolch v Chipman [2004] IRLR 140*:
- a. The Tribunal must reach a conclusion whether proceedings have been conducted by, or on behalf of a party, in a scandalous, vexatious or unreasonable manner.
- b. Even if there is such conduct, the Tribunal must decide whether a fair trial is still possible.

c. If a fair trial is not possible, the Tribunal must still consider whether strike-out is a proportionate remedy or whether a lesser sanction would be proportionate.

d. If strike-out is granted then the Tribunal needs to address the effect of that and exercise its case management powers appropriately.

24. In considering an application under Rule 37, the question for the Tribunal, in exercising its discretion on the second stage of the test, is whether there is a real or substantial or serious risk a fair trial will no longer be possible (*National Grid Co Ltd v Virdee* [1992] IRLR 555, EAT).

10 **Decision – strike-out**

25. It is quite clear that the claimant has not complied with the directions of the Tribunal by the deadlines set. Further, a number of matters (such as the provision of documents and the relevance of the witness evidence) remain outstanding as at the present date. These are all matters which need to be resolved before the claim can proceed to a final hearing and there is little prospect of that being achieved (and certainly not achieved in the immediate future) whilst the claimant is out of the country until the middle of January 2024.

26. The Tribunal considers that the claimant's conduct of the proceedings has gone beyond a simple failure to comply with Orders or directions and that, for the following reasons, the conduct of the proceedings by the claimant has been unreasonable:

a. The claimant has been aware that she was to be absent from the country for an extended period of time since May 2023. In particular, she was aware that she would be absent on the dates of the final hearing from the moment she received the Notice of Hearing.

b. Despite this, she made no application for postponement until 5 October 2023. The claimant's explanation for this delay is that she had been told by EJ Kemp that she could make such an application no

later than 8 September 2023. The Tribunal considers that this explanation is inadequate:

5 i. The direction from EJ Kemp was that any application for postpone should be made “*no later than*” and this did not preclude an earlier application.

ii. The Tribunal considers that a reasonable person would realise the need to make a postponement application as soon as possible especially where they are aware of an issue with their availability from an early stage.

10 iii. In any event, no application was made by the date in question and the prospect of such an application was not raised until the hearing on 28 September 2023 with the application being made for the first time on 5 October 2023. No explanation for this further delay has been advanced by the claimant.

15 c. As a result of the matters set out below, it is not simply a case of relisting the final hearing due to the claimant’s absence but, rather, there will be the need for further case management before the hearing can be listed. This will cause further delay in progressing the case given the length of time the claimant is out of the country.

20 i. The claimant has indicated a difficulty with complying with directions as a result of being absent from the country but, despite this, did not take steps to ensure she complied with the timetable set by EJ Beyzade before her departure.

25 ii. Even the matters with which the claimant has now complied raise new issues. For example, despite the fact that there have been two case management hearings in this case, the claimant did not previously indicate that she intended to call 11 witnesses. This impacts on the potential length of the hearing.

27. The Tribunal does bear in mind that the claimant is a party litigant. However,
30 the need to make applications in early course or ensure that directions are

complied with timeously are matters of common sense rather than something which only lawyers or those with experience of the Tribunal process would be familiar.

- 5 28. In these circumstances, the Tribunal considers that there are potential grounds under Rule 37(1)(b) and (c) for the claim to be struck out.
29. The question is whether a fair trial is no longer possible and/or whether strike-out is the appropriate sanction.
- 10 30. The Tribunal can see why the respondents consider that there is an unfairness to them; they have complied with the Tribunal directions in expectation that the case would be proceeding to a final hearing in the near future. Any delay to the resolution of the case means that it remains hanging over their heads for a further period involving more time and expense.
- 15 31. However, this does not mean that a fair trial is not possible. Other than the inevitable impact which the passage of time will have on the recollection of any witnesses (which will also impact on the claimant's evidence), there is nothing to indicate any prejudice to the respondents' ability to defend the case caused by any delay in the proceedings. There is not, for example, any suggestion that the respondents have lost contact with any relevant witnesses.
- 20 32. Further, the Tribunal considers that a less draconian method of dealing with the manner in which the claimant has conducted the case would be robust case management of the proceedings in which there will be limited scope for extensions of time to comply with directions and postponements in only the most exceptional circumstances.
- 25 33. For these reasons, the Tribunal refuses the application for strike-out of the claim.
34. However, the claimant should be in no doubt that the manner in which she has been conducting the proceedings falls well below what is expected of parties engaged in Tribunal proceedings even if they are party litigants. If the

claimant continues to conduct the proceedings in the same manner then she may find a more serious sanction is imposed by the Tribunal in the future.

35. The claimant should also bear in mind that she is only delaying the resolution of her own case which cannot possibly be in her interests.

5 **Postponement of the final hearing**

36. In light of the decision in respect of the strike-out application, the claim remains live and remains listed for a final hearing commencing on 27 November 2023.

- 10 37. The claimant insists on her application to postpone the hearing due to her absence.

- 15 38. The Tribunal had considered whether the claimant could attend the hearing remotely but the UK Government does not presently have an agreement with the Indian Government for people in India to give evidence remotely to a UK court or Tribunal. This is a matter which, had the claimant made an early application for postponement, could have been pursued sufficiently far in advance for a decision to have been made. The delay by the claimant in making an application for postponement has effectively prevented this option from being pursued.

- 20 39. The Tribunal notes the criticism of the claimant's supporting evidence made by the respondents. The claimant had been directed to provide evidence of when she made her travel arrangements and has provided the text of an email from the airline showing when her flights had been booked. The Tribunal agrees with the respondent that simply embedding text from an email in other correspondence is not the same as producing the actual email (or a copy thereof) especially where, as in this case, the text has been altered (to remove the flight number).

- 25 40. The Tribunal is prepared to accept the evidence provided by the claimant at face value given that there is nothing to contradict this. However, going forward, any evidence provided by the claimant in support of any application or as documentary evidence relied upon to support her claim must be a copy
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of the actual document. Text which has been copied and pasted into another document will not be accepted.

41. In light of the fact that the claimant is absent from the country and given the evidence provided by the claimant, the Tribunal considers that it would be in keeping with the Overriding Objective. The Tribunal has taken account of the prejudice to the respondents arising from a delay in the final hearing but this does not outweigh the fact that proceeding in the claimant's absence effectively prevents her from pursuing her case and denies her access to justice.
42. Again, however, the claimant needs to be very clear that the same position will be unlikely to apply in the future. This is a case where she has sought a number of postponements, often at the last minute, and this cannot continue. It is not in the interests of any party for the resolution of the case to be delayed any further. Future applications for postponement will only be granted in the most exceptional circumstances.

Further procedure

43. The Tribunal considers that a case management hearing to be held remotely by CVP should be listed to deal with the following matters:
- a. Review the compliance with the current directions;
 - b. Make directions regarding which witnesses the claimant will be permitted to call;
 - c. Timetable the witness evidence and submissions (which may involve the exercise of the Tribunal's power under Rule 45 to limit the length of evidence and submissions);
 - d. List the final hearing; and
 - e. Make any other directions necessary for the final hearing to proceed as listed.
44. The Tribunal considers that three hours are required to deal with these issues.

45. Parties are directed to provide their availability in January and February 2024 to attend this hearing. In respect of any day on which a party is not available then they must confirm the reason for their non-availability in order that the Tribunal can assess whether the party in question should be giving greater priority to the Tribunal proceedings than other commitments. This should be provided within 14 days of the date this judgment has been sent to the parties.
46. If either party does not provide their availability within this deadline or does not fully comply with the information to be provided then the case management hearing will be listed without further consultation and it will only be postponed in exceptional circumstances.

Employment Judge: P O'Donnell
Date of Judgment: 15 November 2023
Entered in register: 15 November 2023
and copied to parties