



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Johnson

**Respondents:** (1) Ms E Shaw  
(2) Ms E Faucoeur  
(3) Mr L Lowrie  
(4) The Red Balloon Foundation  
(5) Ms K Piper

**Heard at:** East London Hearing Centre (by video, CVP)

**On:** 28 November 2023

**Before:** Employment Judge J Jones

## Representation

For the Claimant: In person

For the Respondents: Mr Lowrie (CEO of The Red Balloon Foundation)

# JUDGMENT

## ***The Claim is struck out because:-***

- (1) The Claimant misled the Tribunal at the hearing on 20 March 2023 and that amounted to unreasonable conduct.***
- (2) The Claimant failed to comply with the orders of EJ Massarella in his letter dated 27 July 2023.***
- (3) The Claimant failed to attend a hearing on 11 October and failed to provide evidence supporting any reason for his absence. He subsequently provided a fit note confirming absence from work due to work-related stress.***
- (4) The Claimant has conducted this claim unreasonably.***
- (5) It is not possible to have a fair hearing in this matter.***
- (6) There are no other appropriate sanctions for this unreasonable conduct.***

***The hearing dates, 13, 14 and 15 February 2024 are vacated.***

# REASONS

1. This was an open preliminary hearing listed by EJ Crosfill to consider the following: (1) whether the Claimant misled the Tribunal as to his means at the preliminary hearing in this case on 20 March 2023; and (2) whether that amounted to unreasonable conduct of the proceedings. The Tribunal also had to consider whether (3) the Claimants failure to comply with the orders of Employment Judge Massarella made by him in his letter of 27 July 2023 and/or his failure to attend the hearing on 11 October 2023 amount to unreasonable conduct of the proceedings and/or a failure to actively pursue the claims and (4) if the answer to the questions in the above paragraphs are in the affirmative, whether the Claimant's claim should be struck out on the grounds that (1) he has conducted proceedings unreasonably and/or (2) he has failed to comply with orders of the tribunal, or (3) the claims are not being actively pursued.

2. Today's hearing was listed as an in-person hearing. The Claimant wrote to the Tribunal yesterday, 27 November, to ask for today's hearing to be heard over CVP. He attached a fit note from his GP which confirmed that he has been signed off sick from 2 October to 15 January 2024.

3. The Tribunal agreed and today's hearing was held by CVP.

4. The Claimant gave sworn evidence today. The Tribunal considered EJ Massarella's case management minutes and orders from the hearing dated 20 March 2023, the Claimant's witness statement and the copies of 16 bank statements which he attached to it. The Tribunal looked at the ET1 in the Claimant's other litigation in this region, Case Number 320553/2023 (and others). The parties were told that I was going to look at those ET1 because the Tribunal needed to consider whether the Claimant had alleged that he was working with those respondents on a voluntary basis, was being paid, or that whether a failure to pay wages was one of the allegations made in one or both of those claims. The Claimant had an opportunity to comment on the information seen by the Tribunal in a brief look at the ET1s.

## **Law**

5. Rule 37(1) of the Employment Tribunals Rules of Procedure 2013 states that 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 prospects 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).

6. Today's hearing was not to consider an application by the Respondent to strike out the claim. The Tribunal listed this hearing of its own motion. The Respondent confirmed in its submissions today that it considered that there were grounds to strike out the claim.

7. In considering whether to strike out the claim, the Tribunal was mindful of the 4 matters to be addressed, as set out in this Rule. The first matter is whether there has been scandalous, vexatious or unreasonable conduct of the proceedings. The second matter is whether a fair trial is no longer possible. If that is fulfilled, the third matter is whether strike out would be a proportionate response to the conduct in question and finally, the fourth matter is if the claim is struck out, what consequences might follow that (*Blockbuster Entertainment Ltd v James* [2006] IRLR 630).

8. The Tribunal was also conscious that the Claimant's claim is of race discrimination. It had in mind the decision in the case of *Mecharov v Citibank NA* [2016] ICR 1121 in which the following points were made "(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the claimant's case must ordinarily be taken at its highest; (4) if the claimant's case is 'conclusively disproved by' or is 'totally and inexplicably inconsistent' with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct impromptu mini trial of oral evidence to resolve core disputed facts".

#### Findings of Fact

9. The Tribunal came to the following conclusions on the evidence it considered. Taking each issue as numbered above.

- (1) *Whether the Claimant misled the Tribunal as to his means at the preliminary hearing on 20 March 2023*

10. At a case management hearing on 20 March EJ Massarella made deposit orders because he considered that some of the Claimant's complaints had little reasonable prospects of success. At paragraph 42 of his case management minutes and orders from the hearing, EJ Massarella recorded the following:

*In setting the order at this level I have had regard to the Claimant's means. He told me that he is in receipt of universal credit between £283 and £320 per month. His rent is paid automatically. He has no other income or savings. His outgoings are £200 for food, travel and data for his phone; he tells me that the rest goes on electricity and gas. I consider that a maximum of £90 is a proportionate sum to order in the circumstances. The Claimant may have to prioritise the pursuit of these claims over other expenditure: I note that he is able to afford to pay for mobile phone data and for travel. I have also given him a generous 28 days to pay the deposit, which I consider gives him ample time to raise the sum, if necessary, whether from family, friends or otherwise. I*

*do not consider that it is set at so high a level as to impede his access to justice.*

11. EJ Massarella ordered the Claimant to pay a deposit of £5 each (£90 in total), by no later than 21 April 2023, in order to be able to continue with 18 complaints of discrimination which he considered had little reasonable prospects of success. The Claimant chose not to pay the deposit, which meant that from 21 April, those allegations were no longer part of the case.

12. EJ Massarella noted that in answer to questions on his means, the Claimant said that he was not working and that he had done no work other than voluntary work. He told the Tribunal that he was in receipt of Universal Credit of between £283 and £320 per week and that he had no savings and no other income.

13. In the Claimant's other claims in this region, Case Numbers 320553/2023, 3200568/2023, 320555/2023 and 3200609/2023, the corporate Respondent is JA Nailah Ltd. There are also individual named Respondents in both claims. The Claimant's claims in those cases relate to a period of employment between 14 February 2023 and 21 March 2023. The claims were presented on 22 March 2023. The corporate Respondent confirmed in its response that the Claimant had been employed by it and reference was made to the Claimant submitting invoices for payment.

14. Case Numbers 3200726/2023 and 3200727/2023, relate to the Claimant's employment at Newark Youth London Ltd. The allegations in those claim form relate to a period of employment between 3 January 2023 and 25 April 2023. Claim number 3200726/2023 was issued on 18 April 2023. The response to those claims also confirm that the Claimant was employed and that he was paid all monies due to him.

15. Therefore, on 20 March 2023, when the Claimant attended the hearing before EJ Massarella, he was employed by both JA Nailah and Newark Youth Ltd. The Claimant's clear statement to EJ Massarella in open court that he was not employed at the time and only doing voluntary work, was incorrect.

16. The Claimant wrote to the Tribunal to ask that his claims should be consolidated and heard together. That application was referred to EJ Massarella who noticed the difference in the information presented in those claims to the sworn evidence the Claimant gave to him at the hearing on 20 March.

17. The Tribunal wrote to the Claimant on 27 July to notify him of the open preliminary hearing listed for 11 October at which the Tribunal intended to consider whether he misled the Tribunal on 20 March, if so whether that amounted to unreasonable conduct of the proceedings and lastly, if so, whether his claims should be struck out on the grounds of unreasonable conduct of proceedings. The Claimant was ordered to prepare a bundle of documents, evidencing his income from both Newark Youth London Ltd and JA Nailah, including contracts, payslips and banks statements, as well as evidence of benefits received by him, including Universal Credit or any benefits related to housing. The Claimant was also ordered to prepare a witness statement in which he was to explain why he gave the information that he did on 20 March. The Claimant was given dates by which these documents were to be sent to the Respondent and the Tribunal.

18. A Notice of Hearing for the open preliminary hearing on 11 October was sent to the parties on 31 July 2023. That hearing was ineffective as neither party attended. EJ Crosfill noted that the Claimant had not complied with EJ Massarella's orders and that there was no bundle of documents or witness statement from the Claimant. EJ Crosfill noted that a failure to comply with Tribunal orders is unreasonable conduct and could suggest that the Claimant is not actively pursuing his claim. He decided to list the hearing again and made a series of unless orders to ensure that the hearing is effective on the next occasion.

19. The orders were that Unless the Claimant writes to the Tribunal by 22 November 2023 to provide an explanation of his failure to attend the 11 October hearing, his claim would be struck out. The Claimant was also to comply with EJ Massarella's orders and failure to do so would also cause his claim to be struck out. The Tribunal at the resumed hearing would also consider whether the Claimant's failure to comply with EJ Massarella's orders and to attend the 11 October hearing was unreasonable conduct of the proceedings whether the claim should be struck out.

20. On 1 November 2023, the Claimant provided some documents for today's hearing. He provided a copy of a fit note confirming that he had been assessed on 2 October as suffering from '*work-related stress*' and deemed unfit for work between 2 October and 15 January 2024. The Claimant is employed at present but is off sick. The Claimant also provided the Tribunal with copies of his bank statements from January 2022 to April 2023.

21. The Claimant did not provide the Tribunal with copies of his contracts, letters of appointment or any evidence related to his work with Newark or JA Nailah, as ordered by EJ Massarella. He did provide a witness statement. In his witness statement the Claimant complained about what he saw as unfavourable treatment by judges in other regions. He also complained about EJ Massarella's decision to list the open preliminary hearing on 11 October and stated that he had been unable to attend that hearing as he was not '*medically fit*'. Apart from the fit note, no further information was provided. Today, the Claimant stated that he suffers from stress, anxiety and panic attacks and that he is not comfortable attending a hearing in person in the Tribunal. He stated that he had refused medication and that he was attending counselling. The Claimant asked to be allowed to attend today's hearing remotely and this was allowed. The rest of his witness statement deals with the list of issues for the final hearing in his claim against Red Balloon.

From the Claimant's evidence today and from the documents, the Tribunal draws the following conclusions:-

22. The Claimant's evidence was that the payments of Universal Credit from the Department of Work and Pensions (DWP) was made to him, monthly, directly into his bank account. The Claimant began his employment with the Respondent in this case, the Red Balloon Foundation, on 6 September 2022. The Claimant received payments from the DWP in respect of Universal Credit on 1 July 2022, 2 September 2022, 3 October 2022, 10 November, 2 December 2022, 3 January 2023 and 3 February 2023. There are no payments of Universal Credit into this bank account for March and April 2023. That accords with the ET1 claim forms submitted in the other cases where it is alleged that the Claimant worked for those organisations

between March and April 2023. It is unlikely that he had an active Universal Credit claim at that time.

23. Having considered the evidence, this Tribunal concludes that it is unlikely that the Claimant's statement to EJ Massarella, on 20 March, that at that time he was on Universal Credit, was true. It is more likely that at the time, the Claimant was in receipt of income from two other jobs. Both of those jobs ended after the hearing on 20 March. Even if he had not yet been paid by either employer, as he submitted today - which seems unlikely since he was not in dispute with either at the time - he was clearly in expectation of salary from both.

24. The Claimant submitted today that he has an ongoing dispute with at least one of the corporate Respondents in those other cases as he has not been paid the full amount owed to him. That was not an issue for this Tribunal. However, in saying so the Claimant confirmed that he was in employment and not simply doing unpaid voluntary work. It is likely that he had been paid some money but is in dispute over whether that was the accurate amount due to him. That is not what he told EJ Massarella at the hearing on 20 March.

25. The cessation of payments of Universal Credit after 3 February 2023 confirms that it is likely that the Claimant closed his benefits claim after he received his first month's pay from JA Nailah. The Claimant was not in receipt of benefits in March or April 2023. The Claimant was at JA Nailah for 3 months, beginning February 2023. It is highly unlikely that he would have remained in employment for that length of time if he was not being paid. Also, if he was not being paid, it is more likely that he would have resurrected his Universal Credit claim, which he did not do.

26. It is reasonable for this Tribunal to conclude from this evidence that on 20 March 2023, the Claimant deliberately misled EJ Massarella and the court when he said that he was not working and only doing voluntary work and that he was at that time, in receipt of Universal Credit. He was in employment and did not have a live Universal Credit claim on or around 20 March 2023.

(2) *Was that unreasonable conduct?*

27. The Claimant submitted today that this was not unreasonable conduct because neither his claim against JA Nailah nor that against Newark are for outstanding wages and that as they are complaints of race and sex discrimination, they are therefore unrelated to the issue. He stated that JA Nailah paid him in April or May and therefore his evidence at the 20 March hearing was true as he had not yet been paid. He submitted that Newark still owes him some wages.

28. The Tribunal noted that neither of those cases contain complaints of unlawful deduction of wages. They are discrimination complaints.

29. The Claimant was not mistaken about whether or not he was in employment or in receipt of wages. These are facts that he would have known on 20 March 2023. It is highly likely that the evidence he gave to EJ Massarella on 20 March was intended to deliberately mislead the court in order to affect the level of the deposit orders set by EJ Massarella.

30. That was unreasonable conduct. It demonstrates that the Claimant is prepared to mislead the Tribunal in order to benefit himself. It is highly likely that the Claimant is prepared to and would have no issue with misleading the court in these proceedings. The Claimant conducted his claim on 20 March unreasonably and misled the Tribunal as to his means.

(2) *Whether the Claimants failure to comply with the orders of Employment Judge Masseralla made by him in his letter of 27 July 2023 and/or his failure to attend the hearing on 11 October 2023 amount to unreasonable conduct of the proceedings and/or a failure to actively pursue the claims*

31. As stated above, the Tribunal wrote to the Claimant on 27 July to notify him of the hearing on 11 October. A notice of hearing was also sent to the parties on 31 July. The Claimant has not stated that he was not aware of the hearing. He was clearly fully aware of it but failed to attend.

32. The Claimant has referred to being medically unfit but has not given the Tribunal any details of this and it is therefore not possible to ascertain the level of unfitness he was experiencing around 11 October in comparison to the level of unfitness he was experiencing when he requested leave to attend today's hearing remotely. The Claimant attended today's hearing, gave evidence, articulated his position and was clear and coherent. The Tribunal had no evidence from which it could conclude that the Claimant was unable to do so on 11 October. The Claimant's fit note addresses his ability to attend work but not his ability to attend a short preliminary hearing. Also, it covers both the hearing on 11 October and today's hearing, yet the Claimant attended one and not the other.

33. The Claimant's failure to attend the hearing meant that this matter had to be relisted and assigned to another judge. The Respondent did not attend on 11 October but as it is the Claimant's case, it was more important that he attended.

34. The Claimant failed to provide the witness statement or the documents, as ordered by EJ Massarella, for the 11 October hearing. He provided some documents for this hearing. He has still not provided copies of the documents – contracts, letters of appointment, payslips – from his employment with Newark and JA Nailah; as ordered by the Judge.

### Conclusion

35. It is this Tribunal's judgment that the Claimant has conducted this claim unreasonably. He deliberately misled EJ Massarella as to his means and he did so in order to benefit by either having no deposit ordered at all or to get the Tribunal to reduce any deposit order. When he attended the hearing on 20 March, the Claimant would have known that he was in employment and that he was either being paid or had a reasonable expectation of being paid at the end of March. He kept that information from EJ Massarella.

36. The Claimant failed to attend the hearing on 11 October. Although he stated today that he was medically unfit to attend that hearing, he also stated that he is presently medically unfit, yet was able to attend today's hearing. It is difficult to

understand the Claimant's health situation and what bearing, if any, that had on his failure to attend the last hearing.

37. At the start of today's hearing, the Claimant stated that he thought that this was a re-hearing of the preliminary hearing conducted by EJ Massarella on 20 March 2023. He stated that he thought that because he had submitted a complaint about EJ Massarella, which included allegations of racism, that meant that the Tribunal would automatically list the matter for a re-hearing. The Claimant had not had any correspondence from the Tribunal notifying him that there would be such a re-hearing. He had also not had any communication from the Tribunal notifying him of an outcome to any complaint that he submitted about EJ Massarella. There is a copy of the Claimant's appeal to the EAT on file but no complaint against EJ Massarella. This was another attempt to mislead the Tribunal.

38. The Claimant failed to comply with EJ Massarella's orders in terms of the documents he was to prepare for the hearing on 11 October.

39. It is this Tribunal's judgment that the Claimant readily misrepresents his communication with the Tribunal. Also, he is prepared to mislead/deceive the Tribunal, if he believes that it would be to his benefit.

40. In today's hearing, the Claimant refused to accept that he had misled the Tribunal on 20 March. Instead, he stated that it did not matter as he had decided not to pay the deposit order anyway and that EJ Massarella had not right to list the hearing on 11 October. This gave the Tribunal cause for concern about whether a fair hearing is possible in this matter. There could have been an explanation for the evidence given on 20 March and the fact that it is contradicted by the allegations in the other two claims. Instead of providing an explanation today, the Claimant continued to present a situation to the Tribunal – that although he was working at these two jobs, had closed his claim for Universal Credit and had not made claims for wages in those cases; he was not being paid by them on 20 March – which was patently and obviously untrue. The Claimant chose to double down on the untrue statements he made to EJ Massarella.

41. The Tribunal has to have confidence in the Claimant's ability to present his case fully to the Tribunal, in the preparation of documents and in the evidence given at the final hearing. In the case of *Chidzoy v British Broadcasting Corporation* UKEAT/0097/17 (5 April 2018, unreported) a tribunal had also relied on the conduct of the proceedings being such that its trust in the claimant was 'irreparably damaged' when striking out the claim. In the same way, this Tribunal's trust in the Claimant has been irreparably damaged.

42. In the case of *Bolch v Chipman* [2004] IRLR 140, the EAT described the reasoning behind the '*no fair trial*' factor by stating that a striking out order is not, first and foremost, a tool to punish scandalous, unreasonable or vexatious conduct of proceedings. Rather, it is to protect the other party (and the integrity of the judicial system) from such behaviour which results in it no longer being possible to do justice. This Tribunal judgment is that this is the situation in this case.

43. In this Tribunal's judgment, the Claimant gave misleading, false evidence to the Massarella Tribunal on 20 March and reinforced that today, for the sole purpose of benefitting himself in relation to the deposit orders. This was not about a material



fact in his case or an issue in dispute between the parties. If the Claimant was prepared to mislead or deceive the Tribunal about this matter, it is highly likely that he would be prepared to do so in relation to the issues in the main litigation in this case. The Tribunal considered that it is appropriate, reasonable and just to conclude that a fair hearing is not possible in this case. The Tribunal also considered that it is highly likely that the Claimant could have attended the hearing on 11 October but simply chose not to do so. He could have asked to attend remotely, as he did today, but decided not to do so and not to inform the Tribunal that he was not going to attend. This would have saved the Tribunal time and expense.

44. The Tribunal lastly considered whether strike out would be a proportionate response to the conduct in question. The Tribunal was mindful of the fact that these are complaints of race discrimination. EJ Massarella's Tribunal judged that some of complaints have little reasonable prospects of success and so appropriately made deposit orders in respect of those. The Claimant has decided not to pursue those complaints. The Claimant still has a number of allegations of race discrimination against this Respondent which were scheduled for hearing in February 2024. The Tribunal is cautious about the draconian act of striking out a complaint of race discrimination when it has heard no evidence and can make no judgment on it.

45. The Tribunal considered that these were serious allegations of race discrimination. The Tribunal would not want to strike out such a claim unless this was a clear case of unreasonable conduct by the Claimant and there was a likelihood of such misconduct being repeated in the life of the case.

46. The Tribunal concluded that this was not a situation where another deposit order would assist in addressing the issue of the Claimant misleading the Tribunal. Even though the notice of hearing for today and the hearing on 11 October, informed the Claimant that there was a possibility of strike out of his claim, he attended today's hearing and continued to submit that he had not misled the Tribunal and that he had done nothing wrong and should be allowed to continue with his claim because it is a complaint of race discrimination. The Claimant had not taken the time to reflect and change his position, given the evidence.

47. The Tribunal concluded that this Claimant had conducted his claim unreasonably when he deliberately told untruths/misled EJ Massarella on 20 March and in his decision since then to continue to hold that those statements were true and that he had not been in employment or in receipt of income at the time. The Tribunal also took into account the Claimant's failure, without sufficient explanation, to attend a scheduled court hearing, where he had received the notice of hearing well in advance or to comply with the court orders and disclose relevant documents to the court.

48. For all those reasons, this Tribunal considers that this as a clear case of unreasonable conduct by a Claimant which means that there can no longer be a fair hearing in this matter. The Claimant has deliberately misled the Tribunal in circumstances that suggest that it is likely that he will continue to do so in this litigation. The Tribunal is under a duty to protect the other party and the integrity of the judicial system from such behaviour, which results in it no longer being possible to do justice.

49. In the circumstances, it is appropriate, just and reasonable to strike out the Claimant's claim.

50. The claim is struck out. The hearing dates in February 2024 are vacated. All other case management orders are cancelled.

**Employment Judge J Jones**

**22 December 2023**