



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs A Flack

**Respondent:** Holiday Inn (R. Cambridge Propco Ltd)

**JUDGMENT** having been sent to the parties on the 3 December 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. In the Judgment it was set out that the complaints of sex discrimination, harassment and victimisation were struck out under Employment Tribunal Rule 37(1)(b) because the manner in which the proceedings had been conducted was scandalous, unreasonable or vexatious.
2. I apologise for the delay in providing these Written Reasons, which was caused by administrative pressures.

## Procedural History

3. On the 15th of June 2023 a preliminary hearing took place before Judge Tynan, but the Claimant failed to attend. However up to around one hour prior to this hearing the Claimant was corresponding with the Respondent by e-mail and these emails were copied to the Tribunal and so the Claimant was aware of the hearing. The Claimant then failed to attend the telephone hearing and Judge Tynan tried to telephone her four times, but she failed to pick up the phone.
4. Judge Tynan recorded in his order of the hearing of the 15th of June 2023 ('the Order') at paragraph 2 and 3 as follows: -

2.The Tribunal has seen an email from the Claimant to Ms Goodchild dated 9 May 2023 apologising for her delay in providing documents for the Preliminary Hearing and referring to her caring responsibilities and it was also copied by the Claimant into an email sent at 1.02pm on 15 June 2023 in which the Claimant wrote:

*Dear Melanie Even if you say my documents did not arrive ( and no one chased,) your documents could have been sent out and they have not been I too would rather settle this dispute as it is likely to be left unresolved and there may be further concerns for those post this employment as the Holiday Inn did not commit to the police investigation . I again reiterate the hearing should not go ahead with work still to be done and mental health grounds ( equality act 2010 ) Regards.*

The emails between the Claimant and Ms Goodchild seen by the Tribunal do not support the Claimant's critical comments directed at Ms Goodchild.

3. It is for the Tribunal to decide whether a hearing can go ahead or should be postponed. It is not for a party to act unilaterally in the matter. The Tribunal endeavoured to contact the Claimant at least four times, including leaving a message on her voicemail and delaying calling her again until she had had an opportunity to pick up the message. Unless there is a reasonable explanation for the Claimant's non-attendance at the Preliminary Hearing, including her failure to formally request a postponement and to clearly communicate that she would not be attending the Hearing, the Tribunal will give consideration to striking out her claim if she is conducting the proceedings unreasonably. However, as set out below, she will be given a reasonable opportunity to 'show cause' why this should not happen.

5. In the Order Judge Tynan said at paragraph 1.1 that: -

#### **1. Show Cause**

1.1 Within 14 days of the date that this Order is sent to the parties (see the final page of this Order for confirmation of that date) the Claimant must write to the Tribunal, and at the same time send a copy to the Respondent, to explain why she says that her claim should not be struck out on the grounds that the proceedings have been conducted unreasonably. She will need to explain both why she failed to attend the Preliminary Hearing and why she did not inform the Tribunal that she may be unable to attend or make a formal request for the hearing to be postponed. If the Claimant asserts that there are medical reasons why she did not attend, she must also provide a medical report or other evidence of any relevant medical issues.

6. The Claimant failed to provide a medical report or any other medical evidence by that date relevant to the medical issues as to why she did not attend the hearing on that date. Instead on the 23 July 2023 she forwarded an email of complaint that she had sent to a Robin Hutton at what appeared to be an email address of the Respondent, and she addressed him as 'Mr Hutton General Manager.' That email was a complaint about an incident on the 22 July 2023, which occurred when the Claimant used the leisure facilities of the Respondent as a member. It also referred to her allegation of sexual harassment when she was an employee, and she referred to a chef she alleged had sexually harassed her, meaning in her words that, *'I left my job as again immediate action was needed but not provided.'*

7. In that email she also made reference to her disability of anxiety and bulimia. She also referred to her physical disability which was said to be, *'ankylosing*

*spondylitis/arthritis of my spine.*’ The email ended by stating that *‘I attach my carers card and my letter explaining my current condition status so that you can see how this impacts me.’*

8. In her email of the 23 July 2023 to the Tribunal, she stated that the email she had forwarded of an incident that had taken place on the 22 July 2023, and I noted that this was three weeks after the hearing before Judge Tynan on the 15 June 2023, she said that it showed as follows:-

*‘some of the information you were requesting about my current mental health and evidences I am a carer with someone dependent on me and that 7 days before the hearing my mental health was severe and anxiety extreme. I hope you realised therefore that on the 15 June when the hearing was I was actually too ill to speak for myself and exhausted. Having severe depression on top of caring duties is just unbearable, I have had the condition for over 30 years and getting worse under periods of stress ( such as verbal assault from the chef and discrimination. I hope this letter and attachments helps you both look at the re trial and offers good reasons for why the hearing needs re consideration.’*

9. In the order of Judge Tynan it was said that if the Claimant asserts that there were medical reasons why she did not attend, she must also provide a medical report or other evidence of any relevant medical issues. The response from the Claimant was simply a description by her of her medical issues and was not of itself medical evidence. There was no medical evidence attached to this email, and in short this reference to her disabilities, was self-assertion and was not backed up by any medical evidence, as ordered by Judge Tynan, whatsoever.
10. During this preliminary hearing before me, after referring to a report dated the 8 June 2023, upon my request she accessed on her phone, and emailed to me and the representative for the Respondent, a letter from her rheumatologist dated the 8 of June 2023, which at point two referred to her having *‘severe depression and extreme anxiety.’* However, this letter was not medical evidence of her ill-health on the 15 June 2023.
11. During the hearing I asked her a number of questions about why she didn't attend the last hearing on the 15 June 2023. She stated that it was due to her previous representatives conduct of the claim, Mr Singh of Minster Law, and then gave an explanation about not attending the previous hearing in March 2023, and she said that he had given an explanation that he had a car accident but the explanation was not believable or words to that effect.
12. I pointed out to her that it was a serious allegation to make that a Solicitor had misrepresented to the Tribunal why he could not attend the hearing in March 2023, but that in any event I did not wish to focus on her previous representation by Mr Singh and Minister Law but on the events that took place when she failed to attend the hearing, and after the 15 of June 2023, and when she was ordered to provide medical evidence in relation to her non-attendance at the hearing on the 15 of June 2023.

13. However, the Claimant continued to continually refer to poor representation by Minster Law and said that they had paid a compensation as a result and that due to their poor representation she now represented herself. This however was not relevant to what had occurred when she failed to attend the preliminary hearing on the 15 June 2023 before Judge Tynan.
14. I asked her to explain how any of the previous representation by Minster Law was relevant to her noncompliance with Judge Tynan's 's Order. At this point she said she was leaving the hearing as she wasn't getting a fair hearing. She told me it was mental health day, and she could tell *that 'everyone was against her.'* I asked her if she wanted a break and on consideration, she decided to take a break and I asked her to return in ten minutes. A few moments after she left the court, she tried to re-enter to resume the hearing. I asked the Claimant to leave the courtroom because the Respondents representative, Mrs Pope who was attending remotely, had left the hearing on the screen, and I asked the Claimant to come back at 2.45 pm.
15. We resumed the hearing at 2:45. I asked the Claimant why she had not provided the letter from her rheumatologist of the 8 of June 2023 prior to today and she simply said she thought she had sent it to the Tribunal. I looked at the Tribunal file and could see no such letter on there.
16. I asked for a copy of the email she asserted that she had sent to her GP asking for a medical report about her non-attendance at the hearing before Judge Tynan. She said her GP had not provided this medical report despite requesting it. She then said she could not access this email on her phone despite being able to access the report from her rheumatologist dated the 8 June 2023 on her phone.
17. I concluded that the Claimant had not emailed her GP asking for a medical report about her ill-health on the 15 June 2023, as she was unable to produce any evidence she had done so, despite the clear terms of Judge Tynan's Order.
18. The Respondent explained that there had been various problems with the Claimant providing evidence of her disability from the outset of the claim and that an extension had been granted to her for to provide evidence of a disability but that the evidence had not been forthcoming. The claim for disability discrimination had then been withdrawn by the Claimant. At this juncture the Claimant then blamed Mr Singh of Minster Law once again for not sending in these documents to the Tribunal.
19. In summary she was only able to say that, in relation to failing to send any medical evidence or a report as to her non-attendance at the hearing before Judge Tynan, that this was due to her poor mental health and that she thought she had sent it but that perhaps she hadn't.
20. The Respondents submitted that as at the date of the hearing on the 15 of June 2023 the Claimant had her letter from her rheumatologists of the 8 June

2023, and she could have provided that to the tribunal within the 14 days as ordered by Judge Tynan and there was no explanation as to why she had not.

21. The Claimant did not satisfy me that her poor mental health had prevented her from sending the letter of the 8 June 2023 to the tribunal within 14 days as ordered by Judge Tynan. The Claimant during the hearing was able to quickly access the rheumatologist letter of the 8 June 2023 on her phone and this was the first time she had ever mentioned this medical evidence to the Tribunal.
22. It did not seem credible to me that despite her reference to her medical issues i.e., anxiety and depression, which I did not doubt that she suffered from, that she was not able to send an e-mail with this letter of the 8 June 2023 attached, in accordance with Judge Tynan's order, and instead left it until today in this hearing to e-mail it to the Tribunal and to the Respondent.
23. In any event, and in addition to her non-compliance with the Order of Judge Tynan, this medical evidence produced during the hearing did not in any event comply with Judge Tynan's Order as it did not provide evidence of her inability to attend the hearing on the 15 June 2023. It was simply a general report produced by her rheumatologist, one week prior to the hearing. The Claimant had not complied with Judge Tynan's order to provide specific medical evidence about her inability to attend on the 15 June 2023.
24. In addition, during the hearing itself the Claimants conduct was at times disruptive and unreasonable. As well as agreeing to take a short break, instead of leaving the hearing, after leaving the hearing for ten minutes so that she could compose herself, she then attempted to immediately re-enter the hearing, as referred to above. In addition, at the end of the hearing and while I was giving Oral Judgment, and prior to reaching the end of my Judgment, the Claimant shouted so loudly at me it was impossible to carry on reading out my Judgment and I had to stop speaking until she left the court room. This was also evidence of the Claimants unreasonable conduct of these proceedings.

## **The Law**

### **Strike out**

25. Pursuant to rule 37 of the ET Rules tribunals have jurisdiction to strike out claims in the following circumstances:

*“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;*

(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).*

(2) *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.”*

26. Pursuant to rule 2, Tribunals must apply the overriding objective when considering case management directions. Rule 2 provides as follows:

“Overriding objective

2. *The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*

(a) *ensuring that the parties are on an equal footing;*

(b) *dealing with cases in ways which are proportionate to the complexity and importance of the issues;*

(c) *avoiding unnecessary formality and seeking flexibility in the proceedings;*

(d) *avoiding delay, so far as compatible with proper consideration of the issues; and*

(e) *saving expense.*

*A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and shall co-operate generally with each other and with the Tribunal.”*

27. Tribunals are not bound by the strict rules of procedure found in the Civil Procedure Rules. However, whilst a more informal process may be appropriate for the Tribunal, which does not justify a more relaxed approach to compliance with directions. This was a case heard in the tax tribunal, but it

applies with equal force to this Tribunal. Per Ryder LJ in **BPP Holdings Ltd v HMRC** [2016] EWCA Civ 121 [2016] 1 WLR 1915 at [37]- [38]:

*“[37] There is nothing in the wording of the relevant rules that justifies either a different or approach in the tax tribunals of the FtT or the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in Mitchell and Denton. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and while I might commend the Civil Procedure Rule Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal’s orders, rules and practice directions are to be complied with in like manner to a court’s. If it needs to be said, I have now said it...*

*[38] Flexibility of process does not mean a shoddy attitude to delay or compliance by any party.”*

25 The relevant part of Judge Tynan’s order was as follows:-

*‘She will need to explain both why she failed to attend the Preliminary Hearing and why she did not inform the Tribunal that she may be unable to attend or make a formal request for the hearing to be postponed. If the Claimant asserts that there are medical reasons why she did not attend, she must also provide a medical report or other evidence of any relevant medical issues.’*

26. The Claimant provided no explanation to me during the hearing as to why she did not inform the Tribunal in advance that she was unable to attend the preliminary hearing or why she failed to make a formal request for the hearing to be postponed.

27. The Claimant did assert in her email to the Tribunal of the 25 July 2023 that she had been too unwell to attend due to anxiety but as set out above no medical evidence was provided as to why the Claimant was unfit to attend the hearing on the 15 June 2023 in particular despite Judge Tynan making an Order that she must also provide a medical report or other evidence of any relevant medical issues. His order was in accordance with the Presidential Guidance and Rule 30 (A) which states as an example in the guidance as follows: -

*Examples*

*1. When a party or witness is unable for medical reasons to attend a hearing. All medical certificates and supporting medical evidence should be provided in addition to an explanation of the nature of the health condition concerned. Where medical evidence is supplied it should include a statement from the medical practitioner that in their opinion the applicant is unfit to attend the hearing, the prognosis of the condition and an indication of when that state of affairs may cease.*

### Non-compliance with orders

- 26 Strike out for non-compliance with orders is appropriate where the Tribunal could “*reasonably extrapolate that the appellant’s conduct of the proceedings would continue in the same vein in the future*”, meaning that the Tribunal would not be able to deal with the case fairly or justly: **XG Concept Limited v HMRC** [2017] UKFTT 92 (TC). Whilst this is a tax case the principles apply with equal force to the employment tribunal.
- 27 In addition, in As the EAT explained in **Harris v Academies Enterprise Trust [2015] IRLR 208**, “*A party that does not observe an order is at the mercy of the tribunal. Though in many cases an unless order will be granted before there is a strike-out, it is not an essential prerequisite of an application to strike out and is no guarantee that one will not follow in an appropriate case.*”
- 28 In **Rolls Royce plc v Riddle** [2008] IRLR 873, EAT, Lady Smith pointed out that it is wrong for a claimant “*to fail to take reasonable steps to progress his claim in a manner that shows he has disrespect or contempt for the tribunal and/or its procedures*” (at [20]). She observed that whilst striking out a claim is the most serious of outcomes for a claimant, “*it is important to avoid reading the warnings in the authorities regarding its severity as indicative of it never being appropriate to use it*” (at [35]).
- 29 In that case, her Ladyship, on appeal, struck out the claimant's unfair dismissal claim on the basis of intentional and contumelious default on his part, in particular that he had misrepresented to the tribunal that he could not attend the hearing on medical grounds, causing it to be adjourned. This, along with other examples of non-compliance, indicated ‘*a persistent disregard for the tribunal, its procedures, and the respondents’ interests*’, making a strike out of the claim ‘*inevitable*’. That case had particular relevance to this case as in my Judgment the Claimant had failed to attend the hearing despite being able to email the Tribunal and the Respondent up to one hour before the hearing, had then failed to answer the phone when Judge Tynan called her four times, and had provided no medical evidence in advance, or thereafter, in accordance with his Order, that she was too unwell to attend. The evidence that she then tried to produce before me was inadequate, as it was not evidence of her ill-health on the 15 June 2023 as it predated the hearing and was dated the 8 June 2023. In addition the email of the 23 July was simply a recital of an incident on the 22 July 2023, and a reference to sexual harassment when she was an employee of the Respondent and was a description of her stated disabilities. It was not however medical evidence of any kind as ordered by Judge Tynan.
- 30 I therefore found that the Claimant had persistent disregard for the tribunal, and its procedures, and I also found that her conduct of the proceedings amounted to deliberate and persistent disregard of required procedural steps and so breached Rule 37(1) (c). I also found her breach of the Tribunal order to be ‘*intentional and contumelious default*’ in accordance with **Rolls Royce PLC**.



- 31 In **Blockbuster Entertainment Ltd v James** [2006] EWCA Civ 684; [2006] IRLR 630, the Court of Appeal held that striking out could only be justified if either the offending party has been guilty of deliberate and persistent disregard of required procedural steps, or the unreasonable conduct of the case by that party (not necessarily deliberately so) has made a fair trial impossible. It was made clear that these factors are only gateways to the exercise of the power; they do not necessitate the exercise of the power.

### Overriding Objective

- 32 When making case management decisions, pursuant to rule 2, Schedule 1 of the ET Rules the tribunal's overriding objective is to deal with cases fairly and justly. Rule 2 provides as follows:

*“Overriding objective*

*2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*

- (a) ensuring that the parties are on an equal footing;*
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and*
- (e) saving expense.*

*A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.”*

- 33 As held by the EAT in **Harris v Academies Enterprise Trust** [2015] IRLR 208, the tribunal should also have regard to cost:

*“It must also have regard to cost. Even if the employment tribunal is not in the same position as the civil courts because there is no cost-shifting regime, it was designed as a cost-free forum in so far as party-and- party costs were concerned.”*

## Conclusion

- 34 I find that the Claimants conduct of these proceedings has been unreasonable pursuant to Rule 37 (1)(b) and ( c) of the Rules of Procedure 2013 and her explanations given today did not satisfy me that they were due to problems with her mental health.
- 35 I found that she sought to rely on irrelevant reasons such as her previous representation by Mr Singh of Minster Law which predated the hearing of the 15 June 2023. She also sought to rely on non-specific medical evidence that predated the hearing and was not produced in accordance with the Order of Judge Tynan in any event. In particular the letter from her rheumatologist did not specify that she had been too unwell to attend on 15 June 2023 it simply referred to her longstanding health problems including anxiety and depression. I did not find that the evidence produced was in any way convincing of her ill-health on the 15 June 2023.
- 36 I found that the inability also to produce evidence of the email to her GP requesting a report about her ill-health on the 15 June 2023 to confirm my impression of the Claimant that she was dishonest in her explanations to me about her reasons for non-attendance on the 15 June 2023, and I found that she did not email her GP to obtain the medical evidence ordered by Judge Tynan in his Order. I found her breach of the Order to amount to deliberate and persistent disregard of the required procedural steps in Judge Tynan's Order in accordance with **Blockbuster**, and this amounted to a breach of Rule 37(1) (c) of the Rules of Procedure. I also did not find that the evidence she did produce during the hearing, this being the report of the 8 June 2023, to amount to sufficient evidence about her non-attendance on the 15 June 2023.
- 37 I also found that her conduct of the proceedings was unreasonable contrary to Rule 37 (1)(b) in that she failed to attend a hearing on the 15 June 2023 without advising the Tribunal she was too unwell to attend, and during the hearing before me she conducted herself in an unreasonable manner.
- 38 I do therefore, on the grounds of the Claimants unreasonable conduct of these proceedings, strike out all her claims of sex discrimination, sexual harassment, and victimisation pursuant to Rule 37 (1) (b) and (c) of the Employment Tribunal Rules of Procedure 2013.

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Employment Judge Brown

Date: 29 March 2024

Sent to the parties on: 2 April 2024

For the Tribunal Office