EMPLOYMENT TRIBUNALS

Claimant: Mr M Haroon Ayub

Respondent: Ministry of Defence

Heard at: Watford Employment Tribunal **On:** 25 -28 June & 1 July 2024

Before: Employment Judge Young
Non Legal Members: Mr P Maclean
Ms A Telfer

Representation
Claimant: Mr Mohammed A. Sadiq (the Claimant's father, a qualified practising solicitor appearing for the Claimant but not in the capacity of a solicitor)- did not appear on 28 June & 1 July 2024 and neither did the Claimant.

Respondent: Mr N Fetto KC (Counsel)

JUDGMENT

1. The Claimant's claim is dismissed under rule 47 ETR for non attendance

2. The claim is not struck out under rule 37(1) (b) or rule 37(1) (c) ETR.

REASONS

Introduction

1. The Claimant joined the Royal Air Force ('RAF') as a basic recruit trainee from 28 October 2020. The Claimant applied for voluntary withdrawal from the RAF on 18 November 2020. The Claimant's voluntary withdrawal was subject to a 14 day cooling off period and would not take effect until after the cooling off period. Within that cooling off period the Claimant rescinded his voluntary withdrawal which was accepted. On 26 February 2021, the Claimant applied for voluntary withdrawal again. The Claimant's cooling off period was due to expire on 12 March 2021. The Claimant applied to rescind his voluntary withdrawal again on 12 March 2021 however, the Claimant's voluntary withdrawal took effect and the Claimant's

employment terminated on 12 March 2021. The Claimant started ACAS Early Conciliation on 7 January 2021. The ACAS Early Conciliation Certificate was issued on 18 February 2021. The Claimant presented his claim form on 28 February 2021.

Hearing

2. The Claimant did not attend either on 28 June or 1 July 2024. On Friday 28 June 2024 the Claimant was contacted by email and phone multiple times and did not respond to phone calls. The Claimant did respond to the Employment Tribunals emails ordering the Claimant's attendance and requiring him to explain his absence. The Claimant's explanation was that he was trying to comply with an order to provide WhatsApp messages in chronological order and he chose to use the time to draft his amendment. The Claimant had applied for a postponement at 16:19 on Thursday 27 June 2024. That postponement application was rejected by email 12:36 on Friday 28 June 2024.

3. The Employment Tribunal the wrote to the Claimant on the evening of Friday 28 June 2024

"The Claimant has failed to attend the Employment Tribunal on Friday 28 June 2024. The Claimant has failed to provide any explanation of his absence in attending the hearing. The Claimant is put on notice that if he does not attend the hearing on Monday 10am with a reasonable explanation for his absence on Friday 28 June 2024 and or does not attend the hearing on Monday 1 July 2024 or any other day of the hearing as listed without good excuse, the Employment Tribunal will consider striking out the Claimant's entire claim whether the Claimant attends the hearing on Monday or not. The strike out application will be heard in the Claimant's absence if he does not attend.

The Claimant must be ready to proceed with cross examination of the Respondents witnesses on Monday 1 July 2024. The Claimant is put on notice that Mr Okojie, Ms Perkes, Mr Spruce, Mr Williams and Mr Blythe are the witnesses who will attend on Monday. The Claimant must be prepared to cross examine any one of those witnesses on Monday."

4. On Sunday 30 June the Claimant wrote to the Employment Tribunal by email 19:38 explaining that he did not want to proceed with his claim as he was overwhelmed, and he was not prepared to deal with a strike out proposal on 1 July.

5. The Claimant's 30 June email was not before the Employment Tribunal until approximately 13:19. Prior to seeing the Claimant's 30/0624 13:19 email, the Employment Tribunal wrote to the Claimant by email with urgent in the subject line at approximately 12:04 setting out the following:

"*The Claimant is invited to make written representations by 2pm today if he is not to attend the employment tribunal by 2pm today on the following matters:*

1.Why his claim should not be struck out (rule 37 of the Employment Tribunal rules of procedure ('ETR')
2.Why his claim should not be dismissed for his non- attendance and failure to provide reasons as to his non attendance (rule 47 ETR)

3.Why the Claimant should not have a costs award in respect of the Respondent's costs made against him on the basis of the Claimant's unreasonable behaviour in his conduct of the proceedings (rule 75 ETR)
4.In any written response to the Employment Tribunal, the Claimant is required to explain his absence at the Employment Tribunal and if the Claimant is to rely on any written representations or emails whether he wants the Employment Tribunal to consider his written representations (identify them) in his absence in coming to their decision in respect of points 1-3 above. The Employment Tribunal will make a decision in respect of all these matters no later than by 2pm. Any correspondence received by the Employment Tribunal after this time may not be taken into consideration."

6. Mr Sadiq responded to the Employment Tribunal's emails at 12:11 stating:

> *" Dear Judge*
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> *I am at work and I have not been able to speak to my Son properly about this but from what I can gather the Judge threatening to strike out the case whether or not he attended the Tribunal today has not been helpful. He is saying he did nothing wrong. I will hopefully have more information after work.*
>
> *I certainly won't be be able to help my Son with any drafting until the weekend."*

7. The Claimant provided written representations in respect of the Respondent's application to strike out the Claimant's claim or dismiss the claim because of the Claimant's lack of attendance.

8. In summary the Respondent's submissions were: the basis of the Respondent's application for a strike out is the Claimant's non attendance – 28/06/24 and 01/07/24. The prospect of the strike out application was communicated to Claimant no later than Friday. This application covers the same footprint as the warning the Employment Tribunal gave the Claimant.

9. It was the Claimant decision not to attend which was a knowing and direct breach of the Employment Tribunals orders and requirements expressly required of him. The reason for non attendance on Friday was compliance with EJ French's order. There was no waiver by the Employment Tribunal for the purposes of such compliance. The Claimant's deadline was the Claimant's own proposed deadline. The Claimant had already been required to attend the Employment Tribunal with the redacted messages for the FMH (EJ McNeill's acknowledgement of correspondence 03/06/24). The only thing required of the Claimant by the Employment Tribunal was to put the emails into sequence. Whatever extra work the Claimant had to do to screenshot, resulted in non compliance with EJ Neill's 3 June 2024 order.

10. The exchanges with EJ French which led to the Claimant proposing the midday deadline, was on the basis that parties required the WhatsApp messages the following day as the matters were ongoing. That is consistent with the Claimant's own correspondence. In the Thursday 27 June 16:51 email, the Claimant requested a postponement so that he had time to complete his amendment application until the afternoon on Friday and that was consistent with him knowing that he needed to attend. The Claimant presumed and acted that his application for a postponement would be granted even though it was not. He should have known to

prepare to deal with the possibility that postponement would not be granted as he already had made a postponement application that had been refused. The exchange with the Employment Tribunal regarding witness statements was that the Claimant was told that he must prepare for his application to fail. But the Claimant treated it as a fait accompli. The Claimant's email at 16:51 suggested that he would be in attendance no earlier than 3pm but he did not attend after 3pm. Curiously the Claimant has said in his written representations that the Respondent did not tell him that start time was on Friday. That is a complaint that there was a burden on the Respondent that the timetable would be as normal. But there was no suggestion to the contrary by the Respondent, he only had to confirm it with the Respondent.

11. The Claimant complained that he needed more time as the work was greater than anticipated. The Respondent granted an extension and would have considered a longer extension if the Claimant had asked, but it does not justify non attendance. It was unreasonable for the Claimant not to attend on Friday. The Employment Tribunal ordered the Claimant to attend on Monday 1 July 2024, but the Claimant decided not to. The basis of the Claimant's non attendance is inadequate. The correct approach is to comply and to make application in person. There is no suggestion that the Claimant was unfit to attend. In the respect that the Claimant describes himself as overwhelmed and not ready, for the reasons set out in the Respondent's application postponement application and the Employment Tribunal's decision, a lack of preparedness is not a reason, particularly when it is not due to circumstances beyond the Claimant's control. This is unreasonable conduct. The effect is as described in previous submissions on postponement is that there is a lack of respect for the administration of justice which has hindered the Employment Tribunal and wasted time. The Employment Tribunal already has stretched resources, and the Claimant has wasted witnesses time and work. The Claimant has had more than his fair share of Employment Tribunal resources and a fair opportunity to use them. It was proportionate and just to strike out the claim.

12. Mr Sadiq's email did not explain the Claimant's non attendance. The correspondence is consistent with a disregard of the Employment Tribunal clear requirements and clearly stated reasons for them: that is to come and attend the hearing of his own case. The email from Mr Sadiq assumes a written response, but there was no requirement. The Employment Tribunal asked for an explanation and the Claimant had done that and so there was no further requirement. In response to the Claimant's submission that he had had not had adequate opportunity to deal with Employment Tribunal correspondence, the Claimant did have adequate notice and the correct response was to attend. Mr Fetto submitted that all the reasons set out in respect of the strike out application under rule 39 also applied to be considered in respect of rule 47 ETR.

13. The Claimant's submissions were contained in his email correspondence with attachments of (letter to ET01 07 24, letter to ET 06024 and EJ French's order dated 27.06.24) dated 1 July 2024 at 13:19. In summary the Claimant's representations were: that he made his representations at speed, and he had less than 1 hour to respond. Therefore, the response had been made urgently without full opportunity. The Claimant said that he

did not attend today because he was unable to respond to the strike out proposal made by the Judge on Friday. He was also unable to cross examine the Respondents witnesses at the speed required of the Judge. The Claimant referred the Employment Tribunal to his email dated Sunday 30 June 2024.

14. The reason why the Claimant's claim should not be dismissed for his non-attendance and failure to provide reasons as to his non attendance (rule 47 ETR) was because of the reasons that apply to the strike out and the matters set out in the Claimant's email dated Sunday 30 June 2024.

15. The Claimant said that he had not acted unreasonably because he did everything, he could do on Friday to comply with the Order of Judge French and that was not possible within the time available to him. But by the time he heard that the application to delay the start of the hearing had been refuse, he could not get to the Tribunal by 2pm nor could he complete the work required to make the amendment application. He chose to use the time to complete the amendment application, which he did. By that time, he was told the Tribunal would now start to hear the Respondent's evidence and he was overwhelmed by all of those events. It was the reason why he wrote he could not go on with the claim. He received the Respondent's email from the Respondent's lawyers saying they put the WhatsApp messages in chronological order. The Claimant stated that was his point. He needed all weekend to do that, he didn't have time to do it all and make the amendment application and start to cross examine the Respondent's witnesses by 2pm on Friday. The extension of time offered by the Respondent was no use because it came too late and was not enough time anyway. The Respondent needed all weekend, so that was why it was unreasonable to expect the Claimant to have done it any quicker. The Respondent did not tell Employment Judge French that they expected the Claimant to be in Employment Tribunal at 10am on Friday.

16. The Claimant stated that he was not able to continue with his claim because he was overwhelmed with the amount of work which he said he could not do. The Claimant was asking for an adjournment in order to properly bring his claim against the Respondent with enough time needed. The Claimant wrote he did not understand why witnesses could not give evidence by video link nor is there an explanation why listing cannot take place around holidays, as it was his understanding that the Respondent was saying that their witnesses would not be available after 1 July 2024. The Respondent has been singled out for over and above special treatment whilst he has been forced to meet unreasonable deadlines and expectations. If the Employment Judge does not grant his adjournment, then he has already accepted that the Tribunal will strike out his claim.

The Applicable Law

Non attendance

17. Rule 47 of the Employment Tribunal rules of procedure ('ETR') states:

"*47 Non- attendance*
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 any enquiries that may be practicable, about the reasons for the party's absence.

Strike out

18. Rule 37 of the ETR gives the Tribunal the power to strike out all or part of a claim:

> *"37.— 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 [……]*
>
> *(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;[…….]*
>
> *(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."*

19. The EAT has held that the striking out process requires a two-stage test in HM Prison Service v. Dolby [2003] IRLR 694 EAT, at paragraph 15. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid.

20. In Hassan v. Tesco Stores UKEAT/0098/19/BA at paragraph 17 the EAT observed: *"There is absolutely nothing in the Judgment to indicate that the Employment Judge paused, having reached the conclusion that these claims had no reasonable prospect of success, to consider how to exercise his discretion. The way in which r 37 is framed is permissive. It allows an Employment Judge to strike out a claim where one of the five grounds are established, but it does not require him or her to do so. That is why in the case of Dolby the test for striking out under the Employment Appeal Tribunal Rules 1993 was interpreted as requiring a two stage approach."*

Analysis & Conclusion

21. As well as the Claimant's written representations and the Respondent's oral submissions, we considered all the emails we had received from the Claimant and his father since Thursday 27 June 2024. We also took into account in our decision and all that had taken place in the proceedings since 25 June 2024.

Strike out

22. We considered that the threshold for unreasonable conduct has been reached in that all that was being asked of the Claimant was to prepare to present his case to the Employment Tribunal, which was something the Claimant knew about for 2 years, and yet the Claimant appeared to be refusing to attend the proceedings because he had chosen not to prepare. Furthermore, the Claimant clearly breached Employment Judge French order as he did not at any point put the WhatsApp messages in chronological order. The Claimant did not explain why he did not attend on Friday afternoon after 3pm, when he had requested a postponement until then. We could have taken action to dispose of the proceedings on Friday. However, we were keen to give the Claimant an opportunity to explain his conduct and considered that he would have the weekend to prepare the case. So, we did not take any action on Friday, with the view that the Claimant would attend on Monday 1 July 2024. Whilst we agree with the Respondent's submissions, we are concerned that the Claimant had misunderstood the relevant circumstances in operation. The Claimant seemed to be under the impression that he was required to cross examine 11 witnesses on Monday 1 July- Wednesday 3 July 2024 even though it had been made clear to the Claimant on 25 & 26 June 2024 that we were likely to go part heard and due to the applications that the Employment Tribunal had to hear before hearing evidence we were not going to get through hearing 11 witnesses by the end of Wednesday 3 July 2024. Furthermore, we are concerned that the Claimant's father had returned to work when he previously was assisting his son at the hearing before us. We do not understand why this is the case. We are concerned about the amount of notice the Claimant has had to deal with the strike out application as the Claimant was not specifically told the grounds that the Respondent is relying on in respect of the strike out application. Although the threshold for strike out has been reached in respect of both r37(1) (b) & (c) ETR, we do not think that it is in interests of justice to strike out the Claimant's claim.

Non attendance

23. In considering the rule 47 application, the Claimant was written to on Friday making it clear that he should attend on Monday. The Claimant's lack of preparation is not a reason for non attendance. We called the Claimant multiples times on and since Friday and he did not respond to any phone calls. We emailed the Claimant and although we have received representations by email which we have considered in detail, we do consider the reasons for non attendance on Friday and Monday are wholly inadequate. There has been no medical grounds put forward or evidence before us. We were conscious that we could have taken action on Friday afternoon to dispose of the proceedings. But we were keen to hear from the Claimant and considered that he would have the weekend to complete further preparation work.

24. We considered the Claimant's written representations and that the Claimant said that he only had an hour to respond in writing. But we do not accept that. The Claimant had notice on Friday that he would have to respond to a strike out application and explain why he was absent on Friday. Furthermore, we consider that the Claimant could have attended

the proceedings as he was required to. It appears he made no effort to do so and gave no explanation as to why he could not attend and make submissions in person. The Claimant wrote that he was not able to continue with the proceedings, which meant he was not going to attend the proceedings on Tuesday 2 July and Wednesday 3 July 2024 and so a further adjournment would have been wholly pointless as any further postponement would have meant the proceedings would not be able to start until 2026. We considered the Claimant's father's email which suggested that the Claimant was still being assisted by his father who is legally qualified. The father wrote that he had not spoken to his son properly, not that he had not spoken to his son at all and if Mr Sadiq were able to email the Employment Tribunal, he could have emailed his son regarding attendance at the hearing and the implications of his non attendance. In those circumstances we dismiss the proceedings for the Claimant's non attendance.

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Employment Judge Young

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Dated 11 July 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON
11 July 2024

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