



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss S McKenna  
**Respondent:** Miss L Murphy  
**Heard at:** Exeter Employment Tribunal  
**On:** 8 September 2025  
**Before:** Employment Judge Volkmer

## Representation

**Claimant:** did not attend  
**Respondent:** did not attend

# JUDGMENT

The Claim is struck out.

# REASONS

## Background

1. The Claimant was employed by the Respondent as a carer for the Respondent's son, H. The Claimant commenced the Early Conciliation process with ACAS on 23 April 2024. The Early Conciliation Certificate was issued on 29 April 2024. The Claim was presented on 15 May 2024.
2. A Preliminary Hearing took place on 5 December 2024 before Employment Judge Dawson. At the hearing, Employment Judge Dawson discussed the issues in relation to the claim with the parties. They are set out at the end of the Case Management Order from that hearing, sent to the parties on 9 December 2024 (I will refer to this as the "List of Issues").
3. The List of Issues sets out complaints of unfair dismissal, whistleblowing detriment, whistleblowing dismissal, direct disability discrimination, direct sexual orientation discrimination, harassment related to disability, and harassment related to sexual orientation. A five day final hearing was listed to take place from 8 to 12 September

2025 inclusive. A further preliminary hearing was listed for 15 January 2025 to confirm the list of issues and give directions. This was later postponed.

4. A further preliminary hearing took place on 27 March 2025 before Employment Judge O'Rourke. At this hearing the complaint of ordinary unfair dismissal was dismissed upon withdrawal. Case management directions were given as follows:
  - a. the Claimant was to prepare a schedule of loss by 17 April 2025;
  - b. mutual disclosure was to be given by 22 May 2025;
  - c. the Claimant was to prepare an agreed hearing bundle by 26 June 2026; and
  - d. witness statements were to be exchanged by 31 July 2025.
5. The Respondent wrote to the Tribunal on 6 August 2025 saying that the Claimant had not complied with the orders relating to disclosure, the hearing bundle or witness statements and had not been responding to correspondence from the Respondent.
6. On 18 August 2025 the Tribunal wrote to the parties making renewed case management orders as follows.

*"The Claimant must provide a copy of the agreed bundle to the Respondent on Monday 18 August 2025.*

*The parties must exchange witness statements by 25 August 2025.*

*Both parties must write to the Tribunal by 29 August 2025 to confirm that they are ready for the hearing or, if not, to explain why."*

7. The parties did not write to confirm that they were ready for the hearing. The Respondent stated by telephone that the Claimant had not complied with the case management orders. On 4 September 2025, a strike out warning was sent to the parties as follows.

*"Judge Pirani is considering striking out this claim because it has not been actively pursued and/or the Claimant has failed to comply with case management orders both in relation to disclosure and exchange of witness statements.*

*If you object to the proposal, you should email the tribunal with reasons or request a hearing at which you can present your reasons by 12 midday on 5 September."*

8. The Claimant wrote to the Tribunal on 4 September 2025 saying *"I have previously emailed the court on multiple occasions to explain that due to my autism/ PTSD I was struggling to fulfil this request and wanted to know if there was any help that could be provided. I do not qualify for legal aid nor have the money to get legal help."*
9. On 4 September 2025 the Tribunal wrote to the parties, as directed by Regional Employment Judge Pirani as follows.

*“This case has been the subject of two case management hearings which resulted into (sic) detailed orders.*

*The first took place on 5 December 2024 and the second on 27 March 2025.*

*The five-day hearing, commencing next week, has been listed since December 2024. In March 2025, further detailed directions were given including for the exchange of witness statements by 31 July 2025.*

*If either party was unable to comply with that date, as the Order explains, they should have written to the Tribunal explaining the situation.*

*Both the Claimant and Respondent had the opportunity to ask the judge on either occasion about how to prepare and what would happen at the final hearing.*

*All parties must now send in their statements, which deal with the issues set out in the case management order, as soon as possible.*

*The Claimant has had plenty of time to seek help with the preparation of that statement.”*

10. On 4 September 2025, the Respondent wrote to the Tribunal saying that she had been unable to comply with the case management orders because that Claimant had *“not only failed to supply the required documents, there has been no contact from the claimant or her representative Ms Dukes to either us or the courts”*.
11. On 5 September 2025, a letter was sent to the parties notifying them that Regional Employment Judge Pirani had postponed the final hearing and listed an in person hearing to start at 10 am in Exeter for three hours. The hearing was to decide whether to strike out the claim because it had not been actively pursued and/or the Claimant had failed to comply with case management orders both in relation to disclosure and exchange of witness statements.
12. The Claimant did not respond to the Tribunal, but the Respondent forwarded an email from her dated 5 September 2025, which stated the following.

*“Unfortunately I do not believe I can mentally withstand continuing this process by myself as I have no legal understanding.*

*Due to the distress of what I went through I’m currently receiving psychotherapy tier 4. My therapist does not think it’s a good idea me continuing.”*
13. Neither party attended the strike out hearing on 8 September 2025.

## **Strike Out**

14. Rule 38 of the Employment Tribunal Rules of Procedure 2024 (the “Tribunal Rules”) sets out the following in relation to strike out.

*"38.—(1) The Tribunal may, on its own initiative or on the application of a party, strike out all or part of a claim, response or reply 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, response or reply (or the part to be struck out).*

*(2) A claim, response or reply may not be struck out unless the party advancing it has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing."*

15. Although the following cases were decided in relation to previous versions of the Tribunal Rules, they remain applicable to the current rules in relation to strike out.

16. The Court of Appeal found in Evans and anor v Commissioner of Police of the Metropolis 1993 ICR 151, CA, that the power to strike out a claim where it has not been actively pursued must be exercised in accordance with the principles set out in Birkett v James 1978 AC 297, HL. This in turn found that it is only appropriate to strike out in circumstances where: (i) the Claimant's default has been "intentional and contumelious"; or (ii) where there has been inordinate and inexcusable delay which either gives rise to a substantial risk that it is not possible to have a fair resolution of the issues or has caused, or is likely to cause or to have caused, serious prejudice to the Respondent.

17. His Honour Judge Tayler stated the following in Leeks v University College London Hospitals NHS Foundation Trust 2024 EAT 134.

*"20. It is long established, and well known, that the question of whether a fair trial remains possible is generally relevant to an application for strike out pursuant to Rule 38(1)(b)(c) and (d) ETR as well as being expressly provided for by Rule 37(1)(e) ETR. That begs the question of why the rule provides specific grounds for strike out if a claim will generally not be struck out if a fair trial is possible – why not only have rule 37(1)(e) ETR? The answer may be that where there is conduct that falls within Rule 38(1)(b)(c) and/or (d) ETR the likelihood of recurrence is relevant to the possibility of a fair trial. A claim could be struck out under Rule 37(1)(e) ETR even where the party against whom the application is made has done nothing wrong. The ill health of a party could mean that "it is no longer possible to have a fair hearing in respect of the claim or response" although a party cannot be criticised for being unwell. Where a party has conducted proceedings in a manner that has been scandalous, unreasonable or vexatious, has failed to comply with the ETR or an Order of the Employment Tribunal or the claim has not been actively pursued, that may be relevant to the possibility of a fair trial because if there has been repeated*

default in the past it is common for it to be repeated in the future, particularly if the party in default does not persuade the Employment Tribunal that their approach will change.

21. It is also important to note how the possibility of a fair trial has been analysed after a determination that there has been default of the type provided for by Rule 38(1)(b)(c) and/or (d) ETR. In considering the issue of fair trial in the Employment Tribunal the EAT and Court of Appeal have often referred to the decision of the Court of Appeal, on appeal from the Chancery Division of the High Court, in **Arrow Nominees v Blackledge** [2000] 2 BCLC 167 CA, a case in which the question was whether the disclosure of forged documents should result in strike out of the claim. Chadwick LJ, stated that the test to be applied was that of whether there was a **significant risk that a fair trial could not take place.**"

18. In Mr O Emuemukoro v 1) Croma Vigilant (Scotland ) Ltd 2) Miss C Huggins and Others Data Cars Ltd: EA-2020-000006-JOJ (previously UKEAT/0014/20/JOJ) Choudary considered the authorities in relation to the question of the ability to conduct a fair trial.

"17. Ms Hunt submits that it was common ground in this case that a fair trial would not be possible at any point during the five-day allocation (see para. 6 of the Judgment). That is enough, she submits, to satisfy the second of LJ Sedley's cardinal conditions. She submits that it is quite clear from what he said in Blockbuster itself at para. 21 that it is a highly relevant question that strike-out is considered on the first day of the trial and that it is obvious that whether or not a fair trial was possible includes the consideration of more than merely whether a trial can be held after an adjournment to allow any procedural defects to be remedied. She referred me to the following passage in the case of Arrow Nominees Inc & Anor v Blackledge & Ors [2000] WL 775004:

"55. Further, in this context, a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court. The court does not do justice to the other parties to the proceedings in question if it allows its process to be abused so that the real point in issue becomes subordinated to an investigation into the effect which the admittedly fraudulent conduct of one party in connection with the process of litigation has had on the fairness of the trial itself. That, as it seems to me, is what happened in the present case. The trial was "hijacked" by the need to investigate what documents were false and what documents had been destroyed. The need to do that arose from the facts (i) that the petitioners had sought to rely on documents which Nigel Tobias had forged with the object of frustrating a fair trial and (ii) that, as the judge found, Nigel Tobias was unwilling to make a frank disclosure of the extent of his fraudulent conduct, but persisted in his attempts to deceive. The result was that the petitioners' case occupied far more of the court's time than was necessary for the purpose of deciding the real points in issue on the petition. That was unfair to the Blackledge respondents; and it was unfair to other litigants who needed to have their disputes tried by the court.

56. *In my view, having heard and disbelieved the evidence of Nigel Tobias as to the extent of his fraudulent conduct, and having reached the conclusion (as he did) that Nigel Tobias was persisting in his object of frustrating a fair trial, the judge ought to have considered whether it was fair to the respondents - and in the interests of the administration of justice generally - to allow the trial to continue. If he had considered that question, then - as it seems to me - he should have come to the conclusion that it must be answered in the negative. A decision to stop the trial in those circumstances is not based on the court's desire (or any perceived need) to punish the party concerned; rather, it is a proper and necessary response where a party has shown that his object is not to have the fair trial which it is the court's function to conduct, but to have a trial the fairness of which he has attempted (and continues to attempt) to compromise."*

## **Discussion**

18. *In my judgment, Ms Hunt's submissions are to be preferred. There is nothing in any of the authorities providing support for Mr Kohanzad's proposition that the question of whether a fair trial is possible is to be determined in absolute terms; that is to say by considering whether a fair trial is possible at all and not just by considering, where an application is made at the outset of a trial, whether a fair trial is possible within the allocated trial window. Where an application to strike-out is considered on the first day of trial, it is clearly a highly relevant consideration as to whether a fair trial is possible within that trial window. In my judgment, where a party's unreasonable conduct has resulted in a fair trial not being possible within that window, the power to strike-out is triggered. Whether or not the power ought to be exercised would depend on whether or not it is proportionate to do so.*

19. *I do not accept Mr Kohanzad's proposition that the power can only be triggered where a fair trial is rendered impossible in an absolute sense. That approach would not take account of all the factors that are relevant to a fair trial which the Court of Appeal in Arrow Nominees set out. These include, as I have already mentioned, the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court. These are factors which are consistent with taking into account the overriding objective. If Mr Kohanzad's proposition were correct, then these considerations would all be subordinated to the feasibility of conducting a trial whilst the memories of witnesses remain sufficiently intact to deal with the issues. In my judgment, the question of fairness in this context is not confined to that issue alone, albeit that it is an important one to take into account. It would almost always be possible to have a trial of the issues if enough time and resources are thrown at it and if scant regard were paid to the consequences of delay and costs for the other parties. However, it would clearly be inconsistent with the notion of fairness generally, and the overriding objective, if the fairness question had to be considered without regard to such matters.*

20. *Mr Kohanzad's reliance on Rule 37 (e) does not assist him; that is a specific provision, it seems to me, where the Tribunal considers that it is no longer possible to have a fair hearing in respect of a claim, or part of a claim, that may arise because of undue delay or failure to prosecute the claim over a very substantial length of time, or for other reasons. However, that provision does not circumscribe the kinds of circumstances in which a tribunal may conclude that a fair trial is not possible in the*

*context of an application made under Rule 37 (b) or (c), where the issue is unreasonable conduct on the part of a party or failure to comply with the tribunal's orders or the Rules.*

*21. In this case, the Tribunal was entitled, in my judgment, to accept the parties' joint position that a fair trial was not possible at any point in the five-day trial window. That was sufficient to trigger the power to strike-out. Whether or not the power is exercised will depend on the proportionality of taking that step."*

## **Discussion and Conclusions**

19. The Claimant has repeatedly failed to comply with case management orders in relation to disclosure, the final hearing bundle and the exchange of witness statements and has further stopped corresponding with the Respondent in order to facilitate preparation for the hearing. In these circumstances I consider that the threshold in relation to both Rule 38(c) and Rule 38(d) of the Tribunal Rules has been met. There has been both a failure to comply with the Tribunal's orders and a failure to actively pursue the claim.

20. I must now consider whether there is a significant risk that a fair trial cannot take place. The likelihood of recurrence is relevant to the possibility of a fair trial because if there has been repeated default in the past it is common for it to be repeated in the future, particularly if the party in default does not persuade the Employment Tribunal that their approach will change.

21. I take into account the following:

- a. the Claimant has repeatedly failed to comply with case management orders in relation to disclosure, preparation of a hearing bundle and exchange of witness statements;
- b. the Claimant has failed to object to the strike out warning;
- c. the Claimant has failed to attend the hearing, and has not contacted the Tribunal to explain her absence;
- d. although the Claimant has not written to the Tribunal withdrawing her claim, I take into account the email she sent to the Respondent on 5 September 2025 indicating that due to health reasons she was not intending to continue with the claim.

22. Taking these matters into account, I find that the likelihood of recurrence means that there is a significant risk that a fair trial can no longer take place.

23. I take into account the overriding objective when considering whether it is proportionate in the circumstances to strike out the claim. I have found that there is likely to be recurrence of the Claimant's conduct. This is likely to cause the undue expenditure of time and money for the Respondent in continuing to defend the claim. It will also take up judicial time which will have a negative impact on the ability to meet demands of other litigants and the finite resources of the Tribunal.

24. In the circumstances, I find that it is proportionate to strike out the Claimant's claim.

**Approved by**

**Employment Judge Volkmer**

**Date: 8 September 2025**

Sent to the parties on  
29 September 2025

Jade Lobb  
For the Tribunal Office