



EMPLOYMENT TRIBUNALS

Claimant: Mr A Nevin

Respondent: Mears Ltd

Heard at: Bristol

On: 18 September 2025

Before: Employment Judge Livesey

Appearances

For the Claimants: Did not attend

For the Respondent: Ms Shields, counsel

JUDGMENT

The Claimant's claim is struck out under rule 38

REASONS

The relevant background

1. By a claim form presented on 4 April 2024, the Claimant brought complaints of discrimination on the grounds of race and unlawful deductions from wages in relation to his employment with the Respondent as a plumber between November 2021 and December 2023.
2. The Claim Form did not make it easy to understand the nature of the allegations of discrimination which he was seeking to advance. In short, he claimed that he had been bullied and harassed and 'pushed out' of the company because he had been blamed for work which had not been carried out by him and had been forced to accept disciplinary sanctions.
3. Because of the lack of clarity and in light of the contents of the response, the Claimant was asked to provide further information in relation to the complaints of discrimination. He purported to comply with that direction by an email dated 8 October but the contents did not make it easier to understand precisely what he was complaining about in terms of discrimination. The Respondent then made an application to strike the claim out.
4. The case proceeded to an initial Case Management Preliminary Hearing before Employment Judge Bax on 13 November 2024. The Claimant told

the Judge that he was speaking to his trade union and they would help him to frame his claim (paragraph 39 of the Case Summary). The Judge recorded that the explanations from him about his claim at that point “*were confused*” (paragraph 40). Some discussions were held in relation to a complaint of unfair dismissal, which had not been but a claim identified within box 8.1 of the Form but was said to have been part of his complaint. In other respects, the Judge gave directions for further, specific information to have been provided (paragraph 43 and paragraph 4 of the Order). He then listed a further hearing on 8 January 2025 which was mainly intended to determine the Claimant’s amendment application (if necessary) and to finally identify the issues in the case.

5. That Order prompted lengthy documents from the Claimant in December and on 2 January 2025. Unfortunately, they did not provide the clarity that had been hoped for.
6. The Claimant then failed to attend the Preliminary Hearing which had been listed for 8 January. He emailed the Tribunal subsequently to say that he had had difficulty connecting and Employment Judge Dawson relisted the case to consider a number of matters including the Respondent’s fresh application to strike out the claim dated 13 December 2024, the issues in the case, further directions and listing.
7. The next hearing, the third such hearing, was conducted by Employment Judge Bowen on 25 February 2025. The Judge then had a further attempt to clarify the issues in her Case Summary and a direction was issued for the Claimant to identify any inaccuracy within 14 days of the Order (paragraph 9). He did not do so.
8. The Respondent had complained that some of the further information provided by the Claimant which fed into the issues listed in the Case Summary was new and required an amendment application to be made. It was required to indicate whether that remained its stance following the hearing (paragraphs 10 and 11 of the Order). It did on 4 April 2025.
9. The Order then provided for the Claimant to make an amendment application and provide certain information as to why the original claim had omitted such matters (paragraphs 11 and 12 of the Order). No such application was made.
10. Nothing further was received from him until Monday of this week (15 September) when he sent through a new version of his original Claim Form with more information in it, some of which could not be read (it appeared that box 8.2 on page 7 contained more information which could not be accessed since the document had been submitted as a pdf file).
11. Judge Bowen listed this hearing to consider, amongst other things, the Respondent’s application to strike the claim out.

Claimant’s non-attendance

12. The Claimant did not attend the hearing. Sometime after 9.00 am, he left a message with the Tribunal administration to indicate that he was

experiencing difficulties with the level of traffic. When he had not arrived at 10:00 am, further telephone calls to him were made. Repeated calls were made until 10:30 without success. On each occasion, his telephone appeared to have been turned off.

13. Judge Bowen's order had required him to attend by 9:30 am (paragraph 2) and, by 10:30 am, I decided to start the case in the absence of any further information from him as to his whereabouts or any likely arrival time.
14. The hearing concluded soon after 11:00 am. Not long after that, the administration took a further message from the Claimant in which he asserted that he had suffered a flat tyre. He was then told that a Judgment and Reasons would follow.

Respondent's application

15. The Respondent had prepared a bundle for the hearing, pages to which have been referred to below in square brackets.
16. The application to strike out was made on 13 December 2024 [88], following an earlier one which had been made on 21 October [40]. It was then made on the basis that the Claimant had failed to comply with Tribunal orders (rule 37 (1)(c), which ought to have been cited as 38 (1)(c)) and/or that a fair trial was no longer possible (38 (1)(e)). At the hearing, Ms Shields broadened the grounds somewhat by claiming that all 5 limbs of rule 38 applied to the situation.

Legal principles

17. Under rule 38 (1)(a) of the Employment Tribunal Procedure Rules 2024, a tribunal could strike a claim out if it appeared to have no reasonable prospect of success. In other words, that it was "*bound to fail*" (*Twist DX-v-Armes* UKEAT/0030/20/JOJ). It was a two-stage process; even if the test under the rules was met, a judge also had to be satisfied that his/her discretion ought to have been exercised in favour of applying such a sanction (*HM Prison Service-v-Dolby* [2003] IRLR 694).
18. Striking out a claim was a draconian step and numerous cases had reiterated the need to reserve such a step for the most clear and exceptional of cases (for example, *Mbuisa-v-Cygnat Healthcare Ltd* UKEAT/0119/18). The importance of not striking out discrimination cases save in only the "*most obvious and plainest cases*" had been reinforced in a number of cases, particularly *Anyanwu-v-South Bank Students Union* [2001] UKHL 1764 and, more recently, in *Xie-v-E'Quipe Japan Ltd* [2024] EAT 176 in which the public interest in determining such cases at final hearings was reiterated. In *Balls-v-Downham Market School* [2011] IRLR, Lady Justice Smith made it clear that "*no*" in rule 37 meant "*no*". It was a high test.
19. In *Ezsias-v-North Glamorgan NHS Trust* [2007] EWCA Civ 330, the Court of Appeal stated that it would only have been in exceptional cases that a claim might have been struck out under the rule where there was a dispute between the parties on the central facts. In such a case, the Claimant's contentions must ordinarily have been viewed at their highest. The

approach, was considered in detail in *Mecharov-v-Citibank* [2016] ICR and *Xie*, above, as follows;

- (a) Only in the clearest case should a discrimination claim have been struck out;
- (b) Where there were core issues of fact that turned to any extent on oral evidence, they should not have been decided without hearing oral evidence;
- (c) The claimant's case must ordinarily have been taken at its highest, not only in relation to the facts, but the reasonable inferences that might have been drawn from them (*Xie* above);
- (d) If the claimant's case was "*conclusively disproved by*" or was "*totally and inexplicably inconsistent*" with undisputed contemporaneous documents, it may have been struck out;
- (e) A tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.

- 20. Discrimination claims were not however, immune from the possibility of being struck out under the rule. In such cases, it was not sufficient for a claimant to demonstrate that there was a difference in treatment and suggest that that alone could have been because of his protected characteristic (see *Chandok-v-Tirkey* [2015] ICR 527 at paragraph 20). The court in *Igen-v-Wong* [2005] EWCA Civ 142 expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal *could* have concluded that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicated a possibility of discrimination. They were not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent *had* committed an unlawful act of discrimination. Referring to the Court of Appeal's decision in *Ezsias*, the EAT (Langstaff P) in *Romanowska-v-Aspirations Care Ltd* UKEAT/0015/14 the EAT observed that: "*Sometimes it may be obvious that, taking the facts at their highest in favour of the claimant, as they would have to be if no evidence were to be heard, the claim simply could not succeed on the legal basis on which it has been put forward.*" In *Community Law Clinics Solicitors Ltd & Ors-v-Methuen* UKEAT/0024/11, it was stated that "*the time and resources of the ET's ought not be taken up by having to hear evidence in cases that are bound to fail.*"
- 21. Striking out a case as a result of the behaviour of a party under rule 38 (1)(b) needed to have been proportionate to the offence (*Bennett-v-Southwark LBC* [2002] IRLR 407 and *Bolch-v-Chipman* [2004] IRLR 140). Even if unreasonable conduct had been demonstrated, a judge still had to consider whether striking out the claim was a proportionate sanction and, in a case where a fair trial was still possible, that would rarely have been the case (see, also, *Arriva London-v-Maseya* UKEAT/0096/16/JOJ).
- 22. Where the conduct had resulted in a fair trial no longer being possible, the power to strike a claim out arose under rule 38 (1)(b) and/or (e) (*Emuemukoro-v-Cromo Vigilant (Scotland) Ltd* [2022] ICR 327). In some cases, the Tribunal may properly conclude that the damage done by the defaulting party had rendered the possibility of a fair trial irreparable (*Chidzoy-v-BBC* UKEAT/0097/17). In others, there may have been an

alternative solution which enabled the trial to proceed as long as it was fair to both sides.

23. Commentators have queried whether the a freestanding provision in rule 38 (1)(e) ought to exist in the rules, given that considerations in relation to the fairness of the trial ought to feed into every assessment under each limb of rule 38 (1). Generally, the cases which were focused upon that subgroup have concerned the protracted illness of a party or key witness. But before concluding whether that test had been met, a tribunal had to first determine what evidence would have been necessary to determine the claim and whether it had diminished (or would diminish) such that a fair trial would no longer have been possible (see *McMahon-v-Axa Icas Ltd* [2025] EAT 8).
24. Striking out the claim or a response for non-compliance with an order under rule 38 (1)(c) was a which the Court of Appeal had indicated should not have been too readily exercised (*James-v-Blockbuster Entertainment Ltd.* [2006] EWCA Civ 684). Again, such a decision clearly needed to have been proportionate to the offence because it was a terminal ruling and the common law and article 6 required it (*Bharaj-v-Santander UK plc* [2023] EAT 152).
25. In *Blockbuster*, the Court of Appeal held that striking out could only be justified if the offending party had been guilty of deliberate and persistent procedural disregard or unreasonable conduct which had made a fair trial impossible. More recently, in *Emuemukoro* (above), Choudhury J stated that that test was not absolute; if a fair trial was not possible within the trial window listed, “*the power to strike-out is triggered*” (paragraph 18). The fairness of a trial also had to be assessed with regard to the parties’ expenditure and the finite resources of the court (*Arrow Nominees-v-Blackledge* [2000] EWHC Ch 177 at paragraph 55). It might have been possible to have a fair trial if enough resources were deployed and the case took precedence over others in a list, but that would have been “*inconsistent with the notion of fairness generally*” (*Emuemukoro*, paragraph 19).
26. Even if the gateway tests under any one of rules 30 (1)(a) to (e) were met, it did not follow the claim *had* to be struck out. A tribunal was always left with a discretion (the use of the word ‘*may*’ at the start of rule 38). The guiding principle was the overriding objective (rule 3) which I kept at the forefront of my mind during the course of the hearing; I had to consider all of the relevant factors, including the prejudice caused by the conduct or breaches, whether the nuclear option of striking the case out was proportional, whether a lesser sanction would do and, critically, whether a fair trial was still possible.

Discussion and conclusions

27. In my judgment, the Claimant had not done everything that he reasonably ought to have done to clarify and/or advance his case in accordance with Tribunal orders;
 - His initial Claim Form appeared to have been written as if he considered it to have been a document which was simply designed to start the ball rolling and which he could have added to subsequently as

he chose. It was certainly insufficient to have enabled the Respondent to understand the nature of the claims that were being advanced;

- He then failed to comply with the initial direction (14 September [36]) to clarify his claim. His email of 8 October 2024 did not answer the specific questions that had been raised [38-39]. The Tribunal's letter had been structured in such a way so as to have enabled him to focus upon the key questions of when, what and who. He did not do so;
- Judge Bax's Order of 13 November 2024 was also very specific about the information that was required (paragraph 4 [55]). His first reply, in December [62-81], was late and did not address the questions directly and his second reply of 2 January 2025 was a month late and did not address them either [82-7];
- Judge Bowen's Order of 25 February made it very clear that, if the Respondent had indicated that he was required to make an amendment application, he was supposed to have complied with paragraphs 11 and 12 and to have supplied the information that was sought [104-5]. The Respondent repeated its stance; that all of the new allegations which had come forward in further particulars were not further details of the complaints originally raised in the Claim Form but, rather, were new allegations for which amendments would have been required. Despite that position having been reiterated, he did not comply with paragraphs 11 or 12;
- In fact and as stated above, he did nothing until Monday of this week when he sent through a further version of his original claim form but with the box for unfair dismissal ticked. Although there was a lot more information in box 8.2, it still did not provide names, dates or sufficient details which would have enabled the Respondent to have responded effectively.

28. This was the fourth preliminary hearing in the case. The Claimant had had his chance to clarify his case and had failed. Despite those hearings, the Respondent was still no nearer to having an understanding of the nature of the claims which it had to meet. Those which had been discussed at the last hearing, were still the subject of dispute. In a draft List of Issues which the Respondent had prepared for this hearing, it was still unknown whether many elements, including the unfair dismissal claim, were proceeding as part of the case and what the essential elements of other allegations included. For example, in paragraphs 2.4.4 and 3.3.1 of that List; who was involved, when did those matters occur and why had they been caused by or related to his race? No comparators had been identified either.
29. In respect of some of the other allegations which were better understood (paragraphs 2.4.2 and 2.4.3 of the List), the Claimant had, over time, suggested that different people had been to blame for the alleged comments; either Ms Sam Neil or Mr Neil Fox. I was told that Ms Neil had now left the Respondent and her whereabouts were not known.
30. In respect of the money claims, the Claimant had been required to provide a breakdown of the calculations back in October [36], and then in the

February Order he had been directed to file a schedule of loss (paragraphs 14 to 17 [105]). He had simply failed to comply with either direction. In box 9.2 of the new version of the Claim Form which had been supplied this week, he stated that he was seeking compensation in the sum of £45,000 for *“loses relationship breakdown lose of my place of stay behind on bill payments and being left with debt and stress and depression and not feeling safe when working for other companies not being able to see my kids due to snapping and being upset for no reason..[sic]”*. Needless to say, that did not enable the Respondent or the Tribunal to have a better understanding of precisely what was being sought and/or how.

31. As indicated by the dicta from the appellate courts referred to above, the nuclear option of striking out a claim ought to have been reserved for the minority of cases in which a judge was left saying that enough was enough. This case had reached that point. Many of the allegations were old. Those for which the Respondent had been given dates (2.4.2 and 2.4.3 referred to above) were said to have occurred in February 2023 and the Claimant faced significant jurisdictional time issues. He had failed to comply with a number of Tribunal directions and I could not sense that, if the case continued, his level of engagement would have improved. The Respondent had been put to the time and expense of attending four hearings, yet it was no nearer in understanding the case that it had to meet such that it was in a position to make disclosure and/or take witness statements. That meant that the Tribunal could not hope to list the case, despite the fact that it was already 18 months old.
32. Ms Shields referred to the case of *Khan-v-London Borough of Barnet* UKEAT/0002/18/DA in which Her Honour Judge Tucker had given a judgment in circumstances which were strongly resonant to those here (paragraphs 34 and 36);

34... *“the reality was that the Claimant was not engaging with the process. At most, he would do just enough at each juncture to avoid potentially strike out, but not, in my judgment enough to demonstrate a real intention to progress his claim....I considered that the Employment Judge was entitled to conclude that the Claimant had engaged in such a way that it is no longer just to continue to allow the Claimant to have access to the Tribunal for his claim.*

36... *The impression given from the documents which were before the Employment Tribunal was that the Claimant showed a tendency to pick and choose which emails and requests to comply with.”*
33. For all of those reasons, enough was indeed enough. The Claimant had had his last opportunity to clarify his case and have it advanced a little closer to a final hearing. There were a large number of cases in the Tribunal system involving litigants in person who were prepared to comply with directions and they did not deserve to have their cases delayed behind claimants who wasted a disproportionate amount of the tribunal's resources.
34. I did not consider the arguments under rule 30 (1)(a) to have been particularly compelling but the claim was dismissed under rule 38 (1)(b), (c), (d) and/or (e); the manner in which the proceedings had been conducted had been unreasonable, the Claimant had actively pursued his

case and had not complied with Tribunal orders and the Respondent had suffered prejudice as a result such that a fair trial was no longer possible. In all of the circumstances it was appropriate and proportionate to strike out the claim.

Employment Judge Livesey
Date: 8 September 2025

JUDGMENT SENT TO THE PARTIES ON
16 October 2025

Jade Lobb
FOR THE TRIBUNAL OFFICE

Notes

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>
written record of the decision.