



EMPLOYMENT TRIBUNALS

Heard at	Croydon (by video)	On 10 July 2026
Claimant	Miss Kandice Carr-Miller	
Respondent	Sage (UK) Limited	
Before	Employment Judge Eoin Fowell	
Appearances		
Claimant	In person	
Respondent	Gus Baker of counsel, instructed by Baker & McKenzie LLP	

JUDGMENT ON A PRELIMINARY ISSUE

1. The respondent's application to strike out the claim is refused, on the basis that such an order would be disproportionate.
2. The respondent's application for costs is also refused.
3. The claimant's remaining claims will proceed to a preliminary hearing to consider time limit issues on 11 August 2026 and, if appropriate, to a final hearing commencing on 19 January 2027.

REASONS

Background

1. These written reasons are provided at the request of the respondent, a request made at the hearing. As usual, some editing has taken place to avoid repetition and for the sake of clarity. Here and there some points are expanded, and these written reasons are will stand as the final version.
2. Miss Carr-Miller submitted her claim form on 29 January 2024 but it gave very few details. A one-page document was attached - a letter from her to the company stating that she had been signed off sick and did not want to work with Mr Thomas any more. From what is now known of her claim, Mr Thomas was

her manager and this letter must have been sent originally in 2022. She also ticked the boxes for unfair dismissal and discrimination on grounds of disability, race, age and sex.

3. But the next day she submitted another claim form, with the same boxes ticked, but this time with a three-page document attached setting out a timeline of events. (It may be that she had simply uploaded the wrong document the day before.) This new timeline document related how she went off sick in 2022, how Mr Thomas then had access to her personnel file, became aware of her salary - which was bigger than expected - and told other members of the team about it, how their attitude towards her changed, how she was criticised and excluded, so much so that she was moved to another team, how she unhappy about seeing black emojis used in a WhatsApp group and was then being removed from that group, how she raised a grievance about all this, endured a few unhappy months at work before going off sick in April 2023, how she returned in August 2023 when she was told that Mr Thomas had left the business but found the atmosphere was still strained, and finally about a dispute in October 2023 over a sale she had put through but for which she lost the commission because of the time taken to approve the deal, which was the final straw, resulting in her resignation.
4. The fact that there were two claim forms led to a certain amount of confusion. The respondent set out a response to each in turn, making no mention of the other, and in each case asking for further information about the claim.
5. Miss Carr-Miller made efforts to simplify matters. At one point she asked for those two claims to be consolidated, at another she asked for the second one to be withdrawn. That was acted on and the second claim was duly dismissed. An unattractive argument was then raised by the respondent to the effect that the other first claim should be dismissed too as the issues in the case had all been concluded by this dismissal judgment.
6. Miss Carr-Miller went on to provide the requested further and better particulars, in considerable detail. That gave rise to arguments about whether she needed permission to amend her claim to rely on these details, which in turn raised a time limit issue.
7. The first preliminary hearing was before Employment Judge Wright, on 31 January 2025. It was a floating case, assigned to a Judge after a delay, and she set out the history of the claim and the factual allegations. A further preliminary hearing was listed for case management and another to hear the respondent's strike out application.
8. The further case management hearing was on 5 January 2026, before Employment Judge Evans, who drew up a list of issues based on the timeline document. For the strike out application, he increased the length of the hearing

- to a full day. That was to allow time to deal with a question over whether Miss Carr-Miller needed to apply to amend her claim, if so whether to allow it, and if that hurdle was overcome, whether to strike it out as being out of time.
9. That third preliminary hearing was listed on 2 March 2026 before Employment Judge Ramsden. Unfortunately Miss Carr-Miller failed to attend. The tribunal had no telephone contact details for her but she was emailed at 10 asking her to attend the hearing and then again at 10.29. That email told her that the Judge intended to commence the hearing at 10.45 but still nothing was heard. The Judge then considered whether she could usefully proceed without Miss Carr-Miller and concluded she could not. There was nothing at all from Miss Carr-Miller on the time limit issue and the respondent agreed that they could not proceed. It was adjourned, with no progress made.
 10. The Judge noted that Rule 47 of the Employment Tribunal Rules of Procedure allows a claim to simply be dismissed in the absence of a claimant, although before doing so the tribunal must consider any available information, after any inquiries that may be practicable, about the reasons for the absence. She noted that Miss Carr-Miller had been in attendance previously so she knew about the hearing and had engaged with the contents of the bundle before the hearing. The respondent pointed out that Miss Carr-Miller had been emailing them three working days before the hearing. In short, it was a mystery as to why she was not there.
 11. Directions were therefore given for her to provide an explanation. She was ordered, within 14 days, to write to the tribunal and the respondent with a full and clear explanation, providing any evidence upon which she relied such as medical evidence as to the state of her health. The expectation was clearly that there were medical reasons for her non-attendance.
 12. All that was accompanied by a strike-out warning to the effect that the tribunal was proposing to strike out the whole of her claim, under Rule 38, on the basis that she had:
 - a) failed to comply with the orders of the tribunal, to attend the hearing
 - b) failed to comply with an order to set out her arguments on the time limit point
 - c) not actively pursued the claim, and
 - d) that it was no longer possible to have a fair hearing on the 11 to 14 August 2026, the final hearing dates.
 13. Pausing there, Miss Carr-Miller did not accept, in her submissions today, that it would not be possible to have a fair hearing on those dates, which are four weeks away, but given the plethora of applications and procedural points, no directions have yet been given for the exchange of evidence, the preparation of a bundle,

or the exchange of witness statements. We are still at the stage of agreeing the issues, so I approach matters on the basis that it will not be possible to have a fair hearing on those dates and if the claim is to proceed it will need to be adjourned.

14. Miss Carr-Miller did provide some explanation for her failure to attend. It is contained in an email, sent on Thursday 5 March 2026, three days after the abandoned hearing. (The case management order was sent out by email on 3 March 2026). She stated:

“I have only just managed to get into my emails as my emails were compromised again.

Therefore, I was unable to attend the hearing on Monday and get the link to attend.

I do not believe this was an accident and as previously stated, I believe the respondent is involved in this. I have mentioned throughout my case / my employment that I believe the respondent has been using illegal and malicious means to hack my devices.

Please can the courts confirm next steps for me as I have now been robbed of my ability to attend the hearing on Monday and get my points across.”

15. She sent a follow-up email on 25 May to say that her emails had been compromised once again but she wanted to pursue the claim and would be attending the hearing today.
16. She was questioned at this hearing about that explanation, which was to the effect that she was unable to make contact with the tribunal because her phone was out of action. Suffice to say, I cannot bring myself to accept it. There was no other evidence to support it and a marked lack of detail. She accepted that she knew of the hearing and she knew the importance of the hearing. For that reason she said that she woke up – her phrase - at least five to six hours beforehand to prepare but when she tried to log into her emails she was unable to do so. Her phone was telling her that it was off-line. She went on to say that she also had a laptop but she could not access her email account on it as she needed her phone to be working. As Mr Baker quizzed her about these difficulties she told him that she had been in Toronto at the time, staying with an aunt. But her aunt was away and there were no other devices she could use.
17. I cannot accept that the respondents were in any way responsible for hacking her phone or preventing her from joining. Apart from the unlikelihood of such an occurrence, there was (again) no supporting evidence of the claimed outage. She agreed that there was a five-hour time difference, so in Toronto the hearing

would have been at 5 am. If she had woken five or six hours earlier that would be midnight at the latest. She agreed with me that she had therefore been up all night. At one point she also agreed when it was put to her that she realised the problem at about 9.45 that morning. Overall, the account was simply not credible. The fact remains that she did not telephone the tribunal, either at the time or for several days afterwards and has not given a satisfactory explanation as to why not. Mr Baker suggested that she had simply forgotten about it because she was on holiday in Canada, and that certainly seems a possibility.

18. I have to consider whether, in the circumstances of such an unsatisfactory explanation, to allow the claim to go forward to a final hearing.
19. Rule 38 of the Employment Tribunal Rules of Procedure provides that:
 - (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).
20. The Court of Appeal considered the proper approach to applications based on unreasonable conduct in the case of **Blockbuster Entertainment Ltd v James** [2006] IRLR 630. In that case Lord Justice Sedley held that:

“5. This power [a reference to what is now the power to strike out for unreasonable conduct under [rule 38(1)(b)]] as the employment tribunal reminded itself, is a draconian power not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether,

even so, striking out is a proportionate response.” [Emphasis added]

21. So proportionality is the key issue, even (on a strict reading) where a fair trial is no longer possible.
22. Unreasonable conduct is only one basis for a strike out order. Rule 38(1)(e) (above) also includes where a fair trial is no longer possible.
23. I was referred to the decision of Mr Justice Choudhury, when President of Employment Tribunals, in **Emuemukoro v Croma Vigilant (Scotland) Ltd** [2022] ICR 327, where he decided that the reference to a fair trial meant a fair trial *within the trial window* set aside by the tribunal. Otherwise, it could almost always be said that a fair trial could be held eventually, regardless of the degree of failure by the party in default.
24. However, the fair trial point, like unreasonable conduct, is a threshold condition. In any case, whether either or both conditions are met (and they will often overlap), it is necessary to go on to consider whether a strike out is proportionate.
25. It is also important to touch briefly on the facts of those cases. In **Emuemukoro**, the respondent had done nothing at all to prepare for the hearing, they simply turned up and asked for an adjournment on the first day. There was no real explanation. They had put their head in the sand. But the claimant was ready. That was both unreasonable conduct on the part of the respondent and it meant that a fair trial, at least there and then, was impossible. The tribunal therefore had a choice between going ahead or allowing the respondent another opportunity to do what should have been done already, at the cost of further delay to the claimant. Unsurprisingly, the tribunal decided to go ahead with the hearing. In that case, although it could be said that a fair trial was eventually possible, that was not the proportionate response. It was not in the interests of justice.
26. Those circumstances are very different from those in **Blockbuster** case. There, Mr James turned up at the final hearing with 50 or 60 pages of new documents that had not been disclosed. He had also added sections to his witness statement after it had been exchanged. The employer was wrong-footed. They were not in a position to deal with that new evidence there and then. This ambush with new evidence was considered to be unreasonable conduct. So the choice was to adjourn to another occasion or, as was argued, to strike out the claim altogether. The Tribunal refused to do so, but they did adjourn, to allow the respondent the chance to respond.
27. The Court of Appeal upheld that decision and stated, at paragraph 18:

“The first object of any system of justice is to get triable cases tried. There can be no doubt that among the allegations made by Mr James are things which, if true, merit concern and adjudication. There can be no doubt,

either, that Mr James has been difficult, querulous and uncooperative in many respects. Some of this may be attributable to the heavy artillery that has been deployed against him But the courts and tribunals of this country are open to the difficult as well as to the compliant, so long as they do not conduct their case unreasonably. It will be for the new tribunal to decide whether that has happened here.

28. Hence, all relevant factors have to be weighed in the balance.

Factors against strike out

29. I have made enquiries about when this case could be relisted and there is space available on 19 January 2027, in six months' time. That would give enough time for the work to begin in earnest on both sides. And if that were to take place, there is no view material prejudice to the respondent. Memories do fade but usually after a few weeks, and then the passage of months makes little difference.

30. I take into consideration that the procedural tangles into which this claim has fallen are not due to Miss Carr-Miller, or at least there has been no desire on her part to confuse or frustrate matters. She has, as is often the case, put in some, outline details of her claim at the outset, there was then confusion following the withdrawal of one claim, she was asked to provide further details and has done so and has now been drawn into complicated applications about whether to allow that as an amendment and also in relation to time limits.

Factors in favour of strike out

31. Against all that, there are all the reasons set out by Employment Judge Ramsden: the lack of compliance with orders, the lack of compliance since that hearing with the provision of evidence in support of the non-attendance and most significantly, what I regard as incredible evidence about the reasons for that failure.

32. In considering whether it is proportionate to strike out a claim, the fact that a case is otherwise ready for hearing is also relevant, because where the parties have done a large amount of legal work, that work would otherwise go to waste. In the case of **Blockbuster** all the work had been done on both sides, apart from the ambush material, and the claim was adjourned. In **Emuemukoro** on the other hand, the party in default had not done any work at all, and the case was not adjourned. By contrast here, that work has not all been done by any means so the imperative to have the case heard is in fact lessened to a degree.

33. I bear in mind too the effect potential effect on other tribunal users. In **Harris v Academies Enterprise Trust and others** UKEAT/0097/14, Langstaff J, President said this:

..... Justice is a wide concept. It includes justice viewed from the perspective of the system of which the Tribunals are part in ensuring that

indulgence given to one party does not deprive another party of that justice to which they also are entitled.”

Conclusion

34. It would be very tempting, in circumstances where such an unsatisfactory explanation has been given for the failure to attend last time, simply to come down in favour of striking out the claim, but I have to remind myself of the overriding objective of dealing with cases justly and fairly. Dealing with cases involves hearing them, in all but the most exceptional circumstances. I also remind myself of the words quoted above from **Blockbuster**, that the first object of any system of justice is to get triable cases tried. That is the overriding consideration, only to be displaced in an exceptional case. The failure to attend last time was a serious lapse on the part of Miss Carr-Miller, one which is difficult to understand, but in all the circumstances I do not consider that it is sufficient to warrant such an outcome. It would not be in the interests of justice to strike the case out at this stage.

Application for costs

35. Because the hearing last time was adjourned, the respondent has also brought an application for its costs of the hearing on 2 March 2026. The sum claimed is £12,513.50, which includes a brief fee of £5,000, £2,162.50 for a Senior Associate to attend the hearing, £1,387.50 for a Junior Associate and £875 for a trainee, a total of over £9,000 for attendances.
36. Rule 74 provides:
- (2) The Tribunal must consider making a costs or order or a preparation time order where it considers that—
 - (a) a party ... has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;
 - (b) any claim or response had no reasonable prospect of success; ...”
37. This is very similar to the threshold tests for a strike out order, and in this case again the application is based on unreasonable conduct. For the reasons already given, I accept that that threshold test is met.
38. The obligation however is only to consider the award of costs. There is a discretion over whether to do so and if so over how much to award.
39. Rule 82 also provides that:
- ‘In deciding whether to make a costs order, preparation time order, or wasted costs order, and if so the amount of any such order, the Tribunal

may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.'

40. The respondent urged me to make an order without regard to Miss Carr-Miller's ability to pay, on the basis that this was not obligatory.
41. I do not consider that costs would be appropriate here. Like Mr James in the **Blockbuster** case, Miss Carr-Miller has come under heavy artillery fire since she first submitted the claim. The approach taken by the respondent to the duplicate claim forms and the withdrawal of the second, with arguments then raised about *res judicata*, to prevent her pursuing either claim, is an example. That approach has persisted into the disputes over the need for amendments. Similarly, the respondent has requested further and better particulars of each claim and then fought strongly to exclude them.
42. I bear in mind that the award of costs in this jurisdiction is an exceptional measure. To award costs part way through the process is even more unusual, and can potentially have a chilling effect on the willingness or ability of the claimant to bring matters to a hearing, something which I have concluded should be allowed to take place, in the interests of justice.
43. If I am wrong in that exercise of discretion, I will say a word about Miss Carr-Miller's means. She had not provided any details before this hearing but she told me that she had been unemployed since working for Sage, and over the last four years has been dependent on her parents. She has not qualified for benefits. She was a director of an online trading business but it has ceased trading. In those circumstances, if her means were ignored and a substantial sum in costs was awarded. it would be very difficult if not impossible to enforce. Any sum which took account of her means would be very modest indeed, and probably uneconomic to enforce. For those reasons the application for costs is refused.

Employment Judge Eoin Fowell
Date 13 July 2026

SENT TO THE PARTIES ON
17 July 2026

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