



EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 4111529/2021 Preliminary Hearing by Cloud Video Platform on 1
June 2022**

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Employment Judge: M A Macleod

Dr A Kerr

**Claimant
Represented by
Ms R Jiggins
Paralegal**

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University of St Andrews

**Respondent
Represented by
Mr A Brown
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**The Judgment of the Employment Tribunal is that the respondent's
application for strike out of the claimant's claims is refused.**

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REASONS

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1. This case, which has a significant procedural history, came before me on 1 June 2022 by Cloud Video Platform (CVP) in order to determine whether or not the claimant's claim should be struck out on the grounds that she has failed to comply with an Order of the Tribunal and failed to pursue her claim.
2. The claimant attended at the Hearing, and was represented by Ms Jiggins. Mr Brown appeared for the respondent.

3. Parties presented short submissions to the Tribunal and I was referred to certain documents in the process. I record below the submissions made, and set out my decision, with the reasons therefor.

Submissions

- 5 4. For the respondent, Mr Brown opened by making clear that the Hearing was converted to an Open PH at the instigation of Employment Judge McFtridge. He set out the history of the case, referring to the PH which took place before Employment Judge Sutherland in November 2021, in which it was agreed that further specification of the claim was required and would be provided within 14 days. No such specification was provided by the claimant, and accordingly an application was made by the respondent for an Order, and such an Order was issued by Employment Judge Kemp on 29 December 2021.
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- 15 5. A further case management PH was listed to take place in February 2022, but again the respondent highlighted the fact that the claimant had not responded to the Order. The claimant, he said, suggested in correspondence with the Tribunal that what was contained in several different documents amounted to compliance with the Order. Essentially, said Mr Brown, the claimant's representative referred to the claim form, the agenda for the PH and a list of issues with amendments, and said that the information was all there, so "go and find it". The respondent proposed that what was required for compliance was a single document answering the questions posed by the Order, and, Mr Brown asserted, Employment Judge McFtridge wrote to the claimant agreeing with that proposition.
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- 25 6. The claimant, he said, has persistently said that before she can comply with the Order she requires further information from the respondent. The respondent disagrees with that, and, he said, so did Employment Judge McFtridge.
- 30 7. Mr Brown said he undertook a lengthy and complex exercise to try to find out what information the claimant was actually seeking, and set that out to

her at the start of February in order to understand whether or not he had discerned it correctly. The claimant's representative did not reply.

8. At the PH on 21 February, which was converted into a Hearing to determine whether or not the claim should be struck out, Mr Brown expressed the view that the claimant had still failed to comply with the Order of 29 December. He submitted that the claim should be struck out on the basis that the claimant's representative was not being either constructive or cooperative, but was being argumentative. Employment Judge Meiklejohn decided that the claim had not reached the stage where it should be struck out. He said that he was not yet "accepting defeat".
9. Mr Brown said that he reiterated his willingness to retrieve information from the respondent, but he wanted to be sure precisely what information the claimant was seeking. The Employment Judge directed the parties to agree a list of documents to be provided by the respondent, within 14 days of that PH. Eventually, he said, the claimant's representative reverted to him on 30 March to provide some clarifications as to what was to be provided. Mr Brown then sought that information and provided it within the 3 week deadline set down by the Tribunal.
10. He then explained that because a full statement of claim had not yet been provided by the claimant the Tribunal converted this PH into an Open PH in order to determine the question of strike out. Finally, the claimant's representative provided a response on the Friday evening before this Hearing. Mr Brown said that he was away for the weekend and was therefore unable to pick up the email on Monday morning prior to the Hearing. He said that it became clear that the claimant had not provided what was sought on 29 December in the Order, and that she had not provided the information in a single document as directed by the Tribunal in correspondence.
11. He pointed out that the claimant had included information within the List of Issues as well as an updated Schedule of Loss, together with an annotated version with responses to the original Order. The respondent has required

to consider all of these documents in order to review the claimant's purported compliance with the Order. He asserted that the response to the Order is contained within 5 separate documents, which cannot reasonably be said to amount to compliance with the Order.

5 12. He criticised the claimant's representative for her suggestion that the delay had only been a short one of 2 weeks. He said that even as at the date of this Hearing, the respondent is not in possession of a single document which sets out the claimant's claim, and the documents do not correlate with each other.

10 13. He did refer to an email received from the claimant's representative on the previous evening in which she had withdrawn one of the claims made, but he maintained that there is still a lack of clarity as to the claims being pursued.

15 14. Mr Brown's submission is that the Order of 29 December has not yet been complied with in the manner directed. He went on to submit that there has been considerable time and expense wasted in seeking to clarify the basis of the claims made, and that as yet there is no indication that the claimant's representative has gained the insight into the issues or a willingness to comply with the Tribunal's Orders. It is now time to draw a line under this case. The claimant has had ample time to comply with the Orders and has repeatedly failed to do so, and has also suggested that any problems arising are the fault of the respondent's representative. The explanations about the claimant's representative's ill health, or the office move, or her lack of administrative support, are all red herrings, he argued.

25 15. Mr Brown therefore submitted that the claim should be struck out owing to the impossibility of complying with the overriding objective of the Employment Tribunals Rules of Procedure. He confirmed that the sanction of strike out is proportionate, and that the basis of the application is Rule 37(1)(b) (unreasonable conduct), (c) (failure to comply with an Order) and
30 (d) (failure to actively pursue the claim).

16. For the claimant, Ms Jiggins proposed a different narrative to that given by Mr Brown.
17. She argued that at the first PH she had requested information from the respondent, which was only provided for the first time on 20 April 2022. She accepted on behalf of both parties that there had been some delays in dealing with information but they were “on an equal footing”.
18. The Order dated 29 December 2021 required the claimant to provide information which was already within the respondent’s possession and knowledge. Because of the timing of the Order, she submitted that the claimant did not have the “functional time” to reply to it within the deadline. She argued that the respondent’s complaints about delays were misleading by placing the blame entirely on the claimant.
19. There was no direction by the Tribunal that the information should be provided in a single document. The purpose of the Tribunal, she asserted, was to reach the point where a final hearing could be fixed and directions issued for that hearing at this PH, and she argued that this was still achievable.
20. She described the respondent’s argument that the claims were not understood to be “clearly nonsense”.
21. Ms Jiggins confirmed that the claim of less favourable treatment on the grounds of fixed term status under the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 was now withdrawn.
22. She pointed out that the respondent is not arguing that the claim of ordinary unfair dismissal is not understood. She said that the claim is that dismissal on the grounds of redundancy is not a fair dismissal when there were fixed term posts in respect of the same kind of work at that point; and that they failed to follow their own redundancy policy and failed to offer the claimant suitable alternative employment. She argued that the burden of proof is on the respondent to prove that the dismissal was reasonable.

23. Ms Jiggins argued that the respondent clearly understands the basis of the automatically unfair dismissal claim, founded on the argument that the dismissal followed the claimant's seeking to exercise rights under the 2002 Regulations. The Equality Act claims are founded on the claimant having raised a claim of sex discrimination, which the respondent does not dispute was raised.

24. With regard to the sex discrimination claims, she argued that the claims are clearly set out by the claimant, under section 19, section 26 and 27 of the 2010 Act. She submitted that the recruitment processes to the Department of Philosophy are plainly discriminatory against women. The failure to explain clearly to the claimant the bad news about the redundancy process was an example of benevolent sexism, a paternalistic act plainly related to sex. She also argued that the fact that more women than men are recruited on fixed term contracts clearly demonstrates the inherently discriminatory nature of the practice. It is open to the respondent to justify their actions as a proportionate means of achieving a legitimate aim.

25. Ms Jiggins submitted that any lack of clarity is in no small part due to the actions of the respondent. Strike out would be grossly disproportionate in this case. The core argument is that the claims should be struck out by way of punishment, on the basis that it is not possible to have a fair hearing. In this case, she said, it is quite possible to have a fair hearing.

26. The claimant has substantially complied with the Order of the Tribunal, albeit not perfectly. The Order did not require a single document. She said that she suffers from a visual impairment so that drawing information from different sources is very difficult. Ms Jiggins fully accepted that her own conduct in the past couple of months had not been ideal. She said that she was not a solicitor and should therefore be judged by a lower standard. She represents disabled people, and due to the need to prioritise other clients during a mental health crisis in England and Wales, it would not be in the interests of the overriding objective to deny her client access to justice on this matter.

27. She insisted that something which arises in consequence of her disability should not be seen as unreasonable conduct by the claimant. She said that as well as moving home and office, she was under extreme pressure dealing with a client who was in mental health crisis, and remains so, for
5 some time. She has been affected in her ability to carry out all tasks requiring concentration, and this has been particularly challenging for her. She asked for the Tribunal to display compassion in response to a situation which she was “not alone in the legal profession” for experiencing. There are good public policy reasons for adopting a compassionate approach
10 towards people in the legal profession supporting others.

28. She also pointed to a long vein of authorities in discrimination cases saying that such claims should not be struck out except in the most clear and obvious of cases.

Discussion and Decision

15 29. This is an application by the respondent for strike out of the claimant’s claims under Rule 37 of the Employment Tribunals Rules of Procedure 2013, on 3 grounds: that the claimant has failed to comply with an Order of the Tribunal, that the claimant or her representative have been guilty of unreasonable conduct in the manner in which they have conducted the
20 proceedings, and that the claimant has failed to pursue the claim actively.

30. The well-known case of **Ezsias v North Glamorgan NHS Trust 2007 ICR 1126 CA** provides helpful guidance in considering whether to strike out a claim involving whistleblowing allegations, and said that the same approach should be taken in such cases as requires to be taken in discrimination
25 claims, which require an investigation to be conducted into why an employer acted in a particular way. It was stressed that only in an exceptional case will a case be struck out as having no reasonable prospect of success where the central facts are in dispute.

31. In **Blockbuster Entertainment Ltd v James 2006 IRLR 630 CA**, the Court of Appeal found that for a Tribunal to strike out a claim based on unreasonable conduct, it has to be satisfied that the conduct involved deliberate and persistent disregard of required procedural steps or has
5 made a fair trial impossible; and in either case, striking out must be a proportionate response.

32. The court went on to say (paragraph 21): *“The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the
10 fact – if it is a fact – that the tribunal is ready to try the claims; or – as the case may be – that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for
15 which it and its procedures exist.”*

33. This is a case in which the claimant seeks to advance a number of complaints to the Employment Tribunal, and the history of the proceedings from November 2021 until the date of this Hearing has essentially been taken up with attempts to ensure that the claimant’s case is clearly and
20 comprehensibly states, so as to give the respondent fair notice of the allegations which they must defend.

34. In particular, on 29 December 2021, an Order was issued to the claimant requiring her to respond to a number of questions, and it is the respondent’s position, as I understand it, that although some attempts have been made to
25 comply with the Order, these are inadequate and therefore the claim should be dismissed because it would not be possible to have a fair trial of the issues.

35. The claimant's representative has placed before the Tribunal a number of explanations for the delays in this case, though primarily suggests that there was only a 2 week period during which she did not engage with the Tribunal in correspondence owing to illness on her own part. Ms Jiggins has made a strong plea for compassion on the part of the Tribunal in dealing with this application.

36. In my judgment, this is not a question of whether or not compassion should be exercised by the Tribunal. Essentially, it is a matter of justice. The interests of each party require to be balanced by the Tribunal, and the questions before me must then be answered.

37. The first issue is whether or not the claimant has failed to comply with the Order of 29 December 2021. In my judgment, it cannot be said that the claimant has failed to comply with this Order. The respondent acknowledges that there has been an attempt to comply with the Order, but maintains that it is inadequate.

38. In my view, the claimant's approach to this Order, through her representative, has been casual and unhelpful, notwithstanding the undoubted difficulties which Ms Jiggins has encountered during this time. She has insisted that there is no Order requiring her to answer the points in a single document, as if that might justify her approach. The reality is that while the Ms Jiggins is not, as I understand it, legally qualified, she holds herself out to have a degree of expertise in employment law and in Employment Tribunal practice, and referred to herself as part of the legal profession. It is my view that an Order requiring answers set out in the clear terms of this Order is seeking a single, coherent response. What Ms Jiggins has provided, without clear explanation, is a series of different documents comprising that response, including, uniquely in my experience, a copy of the Order with tracked changes attached.

39. It is impossible to know why this approach has been taken. Ms Jiggins did say that her medical conditions, including ADHD and visual impairment, make it difficult for her to draw together information from different sources. However, she has now sought to place her case in a number of different locations, which will, it appears, make it much more difficult for her to draw together the claim when the Hearing is due to begin.

40. Her attitude during this Hearing was very hostile towards the respondent's representative. She spent a good deal of the time given to her for submission in criticism of Mr Brown. It appears to me that her criticisms were misdirected and inappropriate, and I sought to remind her of the need to address her own, and her client's own, actions, which are the subject of scrutiny in this application. She may have been seeking to deflect attention from the shortcomings in her own response to the Order, but it was unhelpful for her to do so in the context of an application for strike out of her client's claims.

41. I have come to the conclusion that while the responses to the Order are unhelpful and diffuse, it cannot be said that there has been such a substantial failure to comply with the Order that it would justify strike out of the claim. It would not be in the interests of justice to prevent the claimant from proceeding with her claims simply because of the way in which it has suited her representative to present them. I accept that there is now material available to the respondent (whose representative has plainly worked valiantly to try to understand that material fully) to allow them to consider the nature of the claims being put forward by the claimant.

42. It is clear that Mr Brown has acted entirely reasonably in the face of hostile and obstructive conduct by his opponent, by seeking to act in accordance with the overriding objective to assist the Tribunal in the proceedings.

43. Ms Jiggins has rather sought to obscure the simple issue at the heart of this matter: whether she has complied with the Order of the Tribunal. She seemed to suggest that the Order issued on 29 December 2021 required her client to produce information already in the hands of the respondent. If

5 this were intended to be a criticism of the respondent or indeed of the Tribunal, it was ineffective. The claimant did not oppose the application for an Order when it was made, and did not seek to revoke or vary the terms of the Order after it was made. The Order required her not to produce information as such but to clarify, for the benefit of the Tribunal and of the respondent, precisely what criticisms she wishes to make of them and their allegedly unlawful conduct. The respondent may have been aware, from correspondence or internal proceedings, that the claimant had certain criticisms to make of them, but that is not the point: the claimant is now seeking to bring serious allegations of unlawful conduct to an Employment Tribunal, and it is those allegations of which greater specification is justifiably sought by the respondent, and, in the Order, by the Tribunal.

10 44. However, leaving those observations aside, it is my conclusion that it cannot be said that there has been a substantial failure to comply with the Order. The responses provided have been provided in a diffuse and unhelpful manner, but they can be discerned from the different documents provided. This is a matter to which I will return, however.

15 45. The second issue for me is whether the conduct of the proceedings by the claimant or the claimant's representative has been unreasonable. I have concluded, after some hesitation, that it has not reached the point of unreasonableness. It appears to me that the claimant's representative has adopted an argumentative and hostile approach to these proceedings. I appreciate that this can amount to a matter of style, but in this case, Ms Jiggins has repeatedly sought to blame the respondent for its failures to provide information to her, while actually failing to clarify to the respondent what precise information she is seeking. It might be inferred that this is no more than a delaying tactic, but I am unable to reach a firm conclusion about that, simply because the respondent has been sincerely attempting to provide the claimant with the information sought, and therefore it is not clear that that exercise was a fruitless one.

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46. Again, perhaps as a result of a misapprehension on the part of the claimant's representative, she has, in effect, applied a condition to the Order issued on 29 December 2021 which was not contained within its terms; namely, that the Order was to be complied with only once the claimant had received certain documents from the respondent. No such condition was attached to the Order. As a result, if she considered that the Order required such a condition, she should have made an application for variation of the Order rather than simply hold off until it suited her to reply to it.

47. It is absolutely essential that a representative before this Tribunal takes seriously their obligation to comply with an Order by the Tribunal. To do otherwise seeks to undermine the authority of the Tribunal. This is precisely why sanctions such as the power to strike claims out is given to Tribunals.

48. However, notwithstanding that Ms Jiggins is a representative with some experience and qualification before the Tribunal, I am prepared to recognise that she herself has encountered some difficulties in her approach to this Order, and in particular her health issues described in the letter by Dr Matthew Bailey of the Beckington Family Practice dated 26 May 2022, in which he said that her symptoms of ADHD and depression had been particularly bad over the "last few weeks", where she had been suffering from low mood, poor concentration and disturbed sleep, requiring her to restart anti-depressant medication which would take some time to have full effect upon her.

49. Ultimately, therefore, I do not consider that her failings in relation to the conduct of this case amount to unreasonable conduct.

50. The third issue before me is whether the claim has been actively pursued. By the time this matter reached me, it is clear that the claim is being actively pursued. I understand that there have been periods where Ms Jiggins has, by her own admission, been unable to engage properly with the Tribunal and respond to correspondence. It is plain from the submissions made before me, and by the attendance of the claimant herself to this Hearing, that she does wish to pursue this claim.

51. Overall, I have been unable to conclude that this is one of those rare and exceptional cases in which strike out of a discrimination claim would be appropriate or in the interests of justice prior to a hearing of the facts in the case. There is plainly a dispute between the parties, about the unfairness of the decision to dismiss the claimant and its allegedly discriminatory impact upon the claimant as a woman, which require to be litigated and heard by a full Tribunal with evidence led by both parties. It is not clear to me that it is not possible for a fair trial to take place in this case. I am persuaded in that by the fact that at this stage there is no assertion by the respondent, notwithstanding their criticism of the responses to the Order, that the claim lacks any reasonable prospect of success. If the respondent considered that the claim, or any part of it, was incomprehensible, I would anticipate that such an application would have been made.

52. Accordingly, I am not prepared to grant the application for strike out by the respondent in this case.

53. However, it is not unfair to suggest that the pleadings as currently constituted are confusing and diffuse, and that some work still requires to be carried out in order to ensure that there is no further confusion about what the basis for each of the heads of claim actually is.

54. It is my direction that this case be listed for a 2 hour Preliminary Hearing (Closed) for the purposes of case management, and that that Hearing should take place in person rather than by telephone conference or by CVP. In preparation for that Preliminary Hearing, the claimant must pull together her claim, as currently set out in the various documents to which allusion has been made, into one single document, setting out in a logical form the allegations which belong under each statutory claim relied upon, so that there is simply no longer any doubt about the basis of the claim.

55. At the Preliminary Hearing proposed, the Employment Judge will take the parties through that document, and by the conclusion of the Hearing, will have identified and focused upon the specific claims to be made, so as to ensure that no further confusion arises. If the claimant fails to provide such

a single document to the Tribunal and to the respondent prior to the Preliminary Hearing, the Employment Judge will take account of any submissions made by both parties but will place particular weight upon the submissions already made by the respondent about the confusing and unhelpful nature of the pleadings, and will determine what issues are to be considered at a Hearing on the Merits based on what has been provided.

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	Employment Judge:	M MacLeod
	Date of Judgment:	23 June 2022
15	Date sent to parties:	27 June 2022