



## EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4113838/2021

Held in Chambers in Edinburgh on 22 September 2022

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Employment Judge Sutherland

**Carlos Enrique Pastene Munizaga**

**Claimant  
Not present**

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**Nahid Akram and Sohail Akram  
(in partnership) t/a NSA Partnership**

**Respondents  
Not present**

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### JUDGMENT

The Judgment of the Tribunal is that the claim is struck in its entirety out on grounds of failure to comply with orders of the Tribunal and that it has not been actively pursued.

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### REASONS

#### Introduction

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1. The Claimant has presented complaints of sexual orientation discrimination, notice pay, holiday pay, failure to provide weekly rest and unlawful deduction from wages.
2. A hearing was listed for today to determine the Respondent's application for strike out.
3. The hearing was held in chambers and accordingly parties were not in attendance. Parties were invited to lodge written submissions.
4. On 20 September 2022 the Claimant made a further application for a

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postponement of today's hearing which was considered at the start of today's hearing and refused for the reasons noted herein.

### **Background**

- 5 5. A case management preliminary hearing was held on 7 March 2022 at which the Claimant was ordered to provide further written particulars of his claim by 21 March 2022 and provide a written statement of remedy by 4 April 2022.
- 10 6. The Claimant failed to comply with the orders of 7 March 2022. He had failed to obtain a written translation of the Orders. A further case management preliminary hearing was held on 5 April 2022. The Claimant made fully aware of the requirement to obtain a translation of any correspondence received from the Tribunal and from the Respondent and further of the requirement to respond to the Tribunal and to the Respondent in good time.
- 15 7. The Claimant was given a further 4 weeks in which to comply with the original orders. The Claimant was also ordered to provide a brief explanation as to why each of his witnesses were able to give evidence relevant to his complaints by 3 May 2022.
- 20 8. Having confirmed parties and witness availability, a final hearing on all issues was listed for 21, 22, 26 and 27 September 2022.
- 25 9. The Claimant failed to comply with the orders of 5 April 2022. On 20 May 22 an unless order was issued requiring the Claimant to provide a written statement of remedy by 17 June 2022. He was warned that failure to provide the relevant information would result in strike out of the relevant complaint without further notice.
- 30 10. On 2 June the Claimant provided a substantive response to the Order but failed to provide all details sought under paragraph f. On 20 June the Claimant was reminded to answer all paragraphs of the order in its entirety. On 28 June 2022 the Claimant was reminded to answer paragraph f specifically. A further reminder was issued on 11 July 2022 and was accompanied by a strike out warning. On 22 July 2022 an unless order was issued in respect of paragraph f only requiring compliance

within 2 weeks. The claimant failed to comply and his complaint of unfair dismissal was accordingly dismissed.

- 5 11. On 22 July 2022 the Respondent made an application for strike out of the entire claim for failure to comply with the orders. On 22 July the Claimant was asked to advise by return whether he objected to the application and whether he wished to make representations in writing or at a hearing.
12. On 25 August 2022 the Claimant was given further time to provide an explanation of the relevance of his witnesses to his complaints and was required to do so by 2 September 2022.
- 10 13. Documents were due to be exchanged on 10 August 2022 and witness statements were to be exchanged on 7 September 2022. (The Claimant's preference was for witness statements and did not seek variation of that order to be varied.) Given the proximity of the final hearing, and a growing concern that the Claimant was not progressing his complaint, on 25  
15 August 2022 the Claimant was ordered to confirm by 2 September 2022 that he had now exchanged all documents and that he would be ready to exchange witness statements by 7 September 2022.
14. The Claimant failed to comply with these orders. On 6 September 2022 the Respondent renewed their application for strike out.
- 20 15. On 6 September, and by way of a reply to that application, the Claimant in summary apologised for the delay, asked for an exact date "like 21 September" to appear with his witnesses, and explained that Jimmy Cunningham was the person who originated matters in revenge for not offering a permanent room. The Claimant did not however explain the  
25 relevance of each witness, explain why he wanted the hearing to take place on 21 September, and did not confirm that he has exchanged documents or that he was ready to exchange witness statements.
- 30 16. On 7 September 2022 a strike out warning was issued to the Claimant for failure to comply with the orders and failure to actively pursue his complaint. The Claimant was ordered to advise by 14 September 2022 whether he opposes strike out. If so, he was ordered to advise his reasons in writing or advise that he seeks to put forward his reasons at a hearing on 22 September 2022. The final hearing listed for 21,22,26, 27

and 28 September was postponed to allow time for the application for strike out to be determined.

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17. Having regard to the Claimant's emails of 8 and 9 September it was inferred that he opposes strike out, that he wishes to put forward his reasons in person rather than in writing, and that he seeks postponement of the hearing until October 2022 because he is travelling to Spain (for retirement procedures) or alternatively he wished to have that hearing in the morning of 21 September. On 14 September 2022 the application for postponement of the hearing was refused because the Claimant had
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- already confirmed his availability to attend a hearing on that date and had not given a reasonable and evidenced explanation of the need for a postponement. The alternative application to have that hearing in the morning of 21 September was refused because the relevant judge had been listed to sit in another hearing that day. It was determined that the
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- hearing on strike out would be held in chambers on 22 September 2022 (i.e. without attendance of the parties). Parties were given further opportunity to lodge written submissions by 20 September and any replies to those submissions by 21 September.
18. On 20 September 2022 the Claimant advised that the main reason for his
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- travel to Spain on 21 September is because of a very serious and sensitive family emergency (in additional to retirement procedures) which he had preferred to keep private, and it was inferred that he sought a postponement.
19. On 21 September 2022 the Claimant noted, in error, that his claim had
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- already been dismissed and provided a copy of his boarding pass.

## Law

### Striking out

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20. Under Rule 37(1) of the Employment Tribunal Rules of Procedure, a Tribunal may strike out all or part of a claim or response on various grounds including-
- (a)...

(b) that the manner in which the proceedings have been conducted by the Claimant has been scandalous, unreasonable or vexatious

(c) for non compliance with an Order

(d) that it has not been actively pursued

5 (e) that it is no longer possible to have a fair hearing of the claim.

21. In light of the severe consequences of strike out, such a decision is considered a draconian step which should only be taken on the clearest grounds and as a matter of last resort. Its purpose is not to punish the conduct but rather to protect the other party from the consequences of the conduct (*Bolch v Chipman* [\[2004\] IRLR 140](#), EAT).

22. Before making a strike out order, the tribunal must give the relevant party a reasonable opportunity to make representations, either in writing or, if requested by that party, at a hearing.

15 *Manner of proceedings*

23. In considering whether to strike out for manner of proceedings, tribunal must first consider whether a party has behaved scandalously, unreasonably or vexatiously when conducting the proceedings. In essence that there has been conduct which amounts to an abuse of process (*Bennett v London Borough of Southwark* [\[2002\] IRLR 407](#) Court of Appeal). A tribunal must then consider whether a fair trial is still possible. A tribunal must then also consider whether strike out would be an appropriate and proportionate response or whether a less punitive response (e.g. award of costs or partial strike out) would instead be appropriate and proportionate (*De Keyser Ltd v Wilson* [2001 IRLR 324](#), EAT).

*Non-compliance with Tribunal order*

24. In considering whether to strike out for non-compliance with an order, a tribunal must have regard to the overriding objective set out in Rule 2 of seeking to deal with cases fairly and justly. This requires a tribunal to consider all relevant factors, including: the magnitude of the non-compliance; whether the default was the responsibility of the party; what disruption, unfairness or prejudice has been caused; whether a fair

hearing would still be possible; and whether striking out or some less punitive response (e.g. further orders including deposit or an unless order) would be an appropriate and proportionate response (*Weir Valves and Controls (UK) Ltd v Armitage 2004 ICR 371, EAT*).

- 5 25. Where a claim has arrived at the point of a final hearing it would take something very unusual indeed to justify striking out (*Blockbuster Entertainment Ltd v James* [\[2006\] EWCA Civ 684](#), [\[2006\] IRLR 630](#), Court of Appeal).

10 *Not actively pursued*

26. A claim may be struck out where the failure to progress is either as a result of intentional and contumelious (disrespectful) default or alternatively has resulted inordinate and inexcusable delay giving rise to a substantial risk to the fairness of the process or serious prejudice to the other party.
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*Fair hearing no longer possible*

27. The possibility of a fair hearing is an important consideration under the other grounds for strike out and it is rarely used as sole justification for strike out.
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28. Where it is the sole justification, the factual basis of the assertion must be established and properly analysed. Where it is not the sole justification it should be considered in the context of the other ground.
29. In exceptional cases, where there is 'deliberate and persistent disregard of required procedural steps' or of tribunal order, a claim may be struck out without the tribunal considering whether a fair trial is still possible (*De Keyser; Blockbuster*).
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**Submissions**

- 30 30. The Respondent's submissions were in summary as follows –
- a. The Claimant had failed to comply with orders of the tribunal and has not actively pursued his complaint.
  - b. The Claimant has already been afforded a very significant degree of latitude by the tribunal

- c. The Claimant has failed to provide any explanation for failure to comply with the orders
- d. His failure to comply with essential orders regarding witness relevance, exchange of documents and witness statements puts the Respondent at significant prejudice in terms of their preparation, has caused postponement of the final hearing, and has wasted the time and resources of both the Respondent and the Tribunal.
- e. His failure to keep himself available for a hearing which was listed having regard to his availability supports the application for strike out.
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- 10 31. The Claimant was invited to do so but did not provide any written submissions.

### **Discussion and decision**

#### *15 Non-compliance with Tribunal order*

- 20 32. The Claimant failed to comply with the Orders of 7 March 2022 and 5 April 2022 to provide further particulars of his complaints, to provide a statement of remedy and to explain the relevance of his witnesses. The Claimant has not provided an explanation for his repeated failure to comply.
- 25 33. On 20 May 2022 an unless order was issued requiring him to address specified issues of remedy. On 2 June the Claimant provided a response but failed to address all issues. Despite reminders being issued on 20 and on 28 June and 11 July the Claimant failed to comply with the Order. On 22 July 2022 an unless order was issued. The claimant failed to comply and his complaint of unfair dismissal was accordingly dismissed.
- 30 34. The Claimant failed to comply with the Orders of 25 August 2022 to explain the relevance of his witnesses, and to confirm that he has provided all documents and that he is ready to exchange witness statements. The Claimant has not provided an explanation for his failure to comply.
35. The final hearing was due to take place on 21, 22, 26, 27 and 28 September 2022. Documents were due to be exchanged on 10 August

2022. Witness statements were due to be exchanged on 7 September 2022. The Claimant has not explained the relevance of his witnesses, has not confirmed that he has provided all documents (such that the joint bundle cannot be prepared), and has not confirmed that he is ready to exchange witness statements, despite being ordered to do so. His failure to comply with the Orders resulted in a postponement of the final hearing and accordingly in unnecessary delay. The magnitude of that default is therefore considered to be serious in the circumstances. His continuing default put the Respondent to the repeated inconvenience and expense of pressing him for a substantive response and making numerous related applications for deposit, unless orders and strike out.

*Not actively pursued*

36. The Claimant has engaged in some correspondence with the Tribunal and has provided a partial response to some Orders. However the Claimant has not explained the relevance of his witnesses, has not confirmed that he has provided all documents such that the joint bundle can now be prepared, and has not confirmed that he is ready to exchange witness statements, despite being ordered to do so.

37. On 7 September 2022 the hearing on strike out was listed for 22 September being a date on which the final hearing was due to take place. Despite having previously confirmed his availability to attend on that day, on 14 September the Claimant applied for a postponement of that hearing on grounds that he required to travel to Spain for retirement procedures. That application was refused on stated grounds. On 20 September the Claimant renewed his application for a postponement explaining that the main reason he required to travel to Spain was in fact because of a very serious and sensitive family emergency which he had preferred to keep private when making his original application on 14 September. It is therefore apparent that in early September the Claimant had made arrangements to travel to Spain on the evening of 21 September. When the Claimant made those arrangements he was fully aware that he was due to attend a tribunal hearing on 22 September. When he made those arrangements the Claimant was prepared to wait more than a week to



travel to Spain and it is therefore unclear why he could not delay his return by 1 day in order to attend the hearing on 22 September. Accordingly his further application for a postponement is not considered to be in furtherance of the overriding objective and is refused.

- 5 38. It is apparent from these circumstances that the Claimant has not taken the required procedural steps and is not therefore actively pursuing his claim.

*Fair hearing no longer possible*

- 10 39. If his failures to comply with the Orders and his failure to actively pursue his claim were as a result of oversight or neglect it would be necessary to consider whether a fair hearing is still possible. However if his failures were as a result of deliberate and persistent disregard it is not necessary to consider whether a fair hearing is still possible.

- 15 40. The Claimant has repeatedly ignored orders of the tribunal and failed to actively and properly pursue his complaints. He has done so without offering explanation or reasonable excuse. It is fully recognised that the Claimant is a litigant in person and that English is not his first language. However it was explained to the Claimant in clear and explicit terms at a  
20 Case Management Hearing, with the aid of an interpreter, that it was imperative that he obtained a translation of the Orders and that it was imperative that he comply. The Claimant confirmed his understanding of that direction. The Orders themselves were articulated in clear and explicit terms. It is considered in the circumstances that the failure to  
25 comply with the repeated orders, and the failure to actively pursue his claim, is not the product of oversight or neglect but instead amounts to intentional and disrespectful default.

- 30 41. The orders are considered reasonably necessary to ensure that there is a fair hearing. The time for compliance has already been varied to afford the Claimant additional opportunity to respond. It is inferred from his prior conduct that an unless order would not prompt the claimant to comply. The Claimant is understood to be without funds and an order for costs is not considered to be a viable alternative. In the circumstances there does not appear to be a less punitive response available.

42. In the circumstances, having regard to the overriding objective, and fully recognising the severe consequences of strike out, it is nevertheless considered that strike out would be an appropriate and proportionate response. Accordingly the claim is struck out in its entirety on grounds of failure to comply with orders of the Tribunal and that it has not been actively pursued.

Employment Judge: Michelle Sutherland  
Date of Judgment: 26 September 2022  
Entered in register: 29 September 2022  
and copied to parties