



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4101091/2022**

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**Preliminary hearing  
Held in Edinburgh  
On 31 January 2023**

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**Employment Judge A Jones**

**Mr C Oliveira**

**Claimant  
In person (for part)**

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**The City of Edinburgh Council and others**

**Respondents  
Represented by  
Ms Sutherland  
Solicitor**

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**JUDGMENT**

The claimant's claims are struck out in accordance with Rule 37 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

**Background**

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1. A preliminary hearing was listed in this case to consider two matters: 1) an application by the claimant to amend his claim which was opposed by the respondents, and 2) an application by the respondents for strike out of the claimant's claims or in the alternative deposit orders to be made in relation to his claims.

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2. The hearing had previously been listed for 2 December 2022 but this was postponed on the morning of the hearing because the claimant indicated he did not feel well enough to proceed.
3. In accordance with the Order of the Tribunal a bundle of documents was lodged by the respondents in advance of the hearing. A skeleton argument in respect of their applications had also been lodged in advance of the postponed hearing.
4. On the morning of the hearing, the respondents' agent produced a further bundle which included in the main authorities to which reference was to be made in the skeleton arguments which had been lodged. The bundle also included ACAS conciliation certificates which had been omitted from the original bundle. Finally, the respondent sought to lodge an email exchange between the claimant and the respondent which was said to be relevant to the claimant's application for amendment.
5. The claimant refused to accept any of these documents from the clerk in advance of the hearing.
6. At the commencement of the hearing, I outlined what I understood to be the issues to be determined. I asked the claimant to clarify if he had refused to accept documents from the clerk. While initially the claimant appeared to deny he had done so, he acknowledged that he did not have the documents in front of him and after a number of attempts to understand by me his position on the matter, he confirmed that he did wish to have the documents. The respondent's agent then provided him with the documents.
7. The claimant then informed me that he had a number of issues he wished to raise. I reiterated that the hearing was listed to consider the issues I had outlined. The claimant had additional documentation he wished to lodge. I asked the claimant to clarify to which application the documentation related. The claimant explained that while some of the documentation related to his ability to pay any deposit order, he also wished to raise two separate matters.

8. In the first instance, he sought to make allegations that he was being intimidated by the respondents and their agents. He referred to an email which had been sent to him on 19 January by a recruitment agency with whom he worked, who he referred to as clients of the respondent. I indicated that the email exchange did not involve any of the respondents to this claim or their representative, it appeared only to attach a policy which was said to be applicable to him and therefore I had some difficulty in understanding what he was alleging. I asked the claimant what he was seeking from the Tribunal in relation to this matter. He said he wanted it noted that he was being intimidated by Ms Sutherland and the respondents. I reiterated that the email did not involve Ms Sutherland or the respondents but confirmed that I would note his position.
9. The claimant then suggested that the respondents' agents, Harper Macleod LLP were going to be involved in the Judicial Inquiry into the Covid 19 pandemic and that this was a conflict of interest. Again, I asked the claimant to clarify what he was asking the Tribunal to do in this regard. He said that he wanted the respondents' agents removed from representing the respondents. He said that this amounted to a conflict of interest as he was going to give evidence at the Inquiry. I explained that the Tribunal did not have the power to remove representatives of parties in this manner. I indicated that I would note his position, that he could raise any concerns at the Inquiry itself, but that I wished to turn to address the issues for determination.
10. At this point the claimant stood up and said that he was leaving and he would not be taking part in the hearing. His demeanour was somewhat aggressive towards the respondents' representative and I had already been required to ask him to stop pointing at Ms Sutherland when he was referring to her. The claimant continued standing despite my request that he sit down and address me. He said that he would not be intimidated by the respondents and that he would leave. I explained that if he left, I would continue the hearing in his absence and that I would not have the benefit of hearing from him. He went on to say words to the effect of "I'm too busy for this, I've got other cases and a case at the EAT. I've got family in Brazil who are unwell and where there is

unrest and I need to go there. I am not well and I have an appointment at the doctor this afternoon.'

11. I indicated that he had not asked for a postponement of the hearing and he then suggested that he was going to do so. I again asked him to sit down if he was going to request a postponement and I would listen to his application. I explained that the hearing had been set down for a full day and expressed some surprise that he had arranged a doctor's appointment on the day. He said that in his experience hearings set down for a full day did not last that long. I explained that the hearing had been set down for a full day because there were two issues for determination and I may be able to give an oral judgment in respect of either or both these matters. The claimant reiterated that he was not staying and would leave. He said he could pay a deposit order and had provided evidence of his earnings. He said he had intended to give evidence but would not now do so. The claimant then left.

15 Respondent's submissions

12. I asked Ms Sutherland whether she was in a position to continue. I asked her some questions regarding the claimant's application to amend and to clarify the respondents' position. The respondent's position was essentially that the amendment was a new claim, it did not have prospects of success, it had not been lodged timeously and the claimant had not advanced any reason why the it would be just and equitable for the Tribunal to consider the claim.
13. The respondent then went over the written submission in relation to the application for strike out and indicated that if that application was not successful then a deposit order was sought in relation to each allegations made by the claimant. In addition, it was said that the claimant's conduct today in refusing to participate in the hearing, while consistent with his refusal to answer questions in a way which provided specification of his claim, was unreasonable and/or vexatious conduct.

## Application to amend

14. In the first instance, I considered the claimant's application to amend his claim. The claimant had initially raised the issue set out in his application to amend in a response to a request for further particulars. The respondent had indicated that this was not further particulars, but was a new claim. The claimant was then ordered to make any application to amend his claim by 31 October 2022. Although the claimant did correspondence with the Tribunal on 31 October, he was informed that this did not meet the requirements of the Tribunal's order that he make an application to amend his claim as it did not set out the exact terms of the amendment sought. The claimant then submitted an application to amend on 14 November 2022. That application did not include any reference to the basis on which it might be just and equitable to extend any time limit which might have applied. The incident referred to in the application was said to have taken place 'between 24/11/21 and 24/12/21 and then in December 2021'. The application did not specify the statutory provisions relied upon. It made reference to complaints having been made against him by colleagues 'as members of women sex group'. The claimant's original claim had been lodged on 17 February 2022.
15. It is well established that any application to amend a claim must be clearly expressed (see for instance *Scottish Opera Ltd v Winning EATS 0047/09* and *Chief Constable of Essex Police v Kovacevic EAT 0126/13*). The claimant's amendment does not meet that test. It does not explain the nature of the claim made. It appears at least on the face of it to be out of time and the claimant has not set out on what basis it would be just and equitable to extend the time limit. The claimant has been given a number of opportunities to set out in clear terms any amendment sought. He has failed to do so. As currently drafted, the amendment has no reasonable prospects of success. The application for amendment is therefore refused.

## Application for Strike Out

16. Rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 provides that:

5 (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds —

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

10 (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;

15 (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 or response (or the part to be struck out).

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

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

17. The respondent's application for strike out was set out in an email of 13 September. The respondent relied on both Rule 37 a) and b). In particular, it  
25 was said that the claimant in his response to request for further particulars had simply raised lots of claims in relation to the same set of circumstances in the hope that one might be successful. This was said to amount to unreasonable conduct and further it was clear that his claims had no reasonable prospects of success.

30 18. The respondent had lodged a detailed written submission which was also provided to the claimant in advance of the hearing setting out the basis for its application.

19. I will deal with each claim in turn.

20. The claimant had made the following claims:

He had been subjected to a detriment/s in terms of section 47B Employment Rights Act 1996.

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21. The protected disclosure on which the claimant relied was not at all clear to me. His claim form did not set out the nature of a protected disclosure in any manner which was understandable. His concerns appeared to relate to a colleague who worked alongside him who was also said to work in a bar and whom the claimant was concerned posed a risk of infecting others with COVID-19. While the claimant made some reference to emails having been sent and a letter dated 9 December 2021 which was attached to his claim form, it was very difficult to discern from that information the nature of the protected disclosure or to whom it was said to have been made. As the claimant did not attend the hearing on the matter, he could not provide any clarification or further information.

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22. It was also difficult to discern what detriment the claimant said he had been subjected to or by whom or in what way it related to a protected disclosure. At best it appeared that the claimant said that he had not been paid his full sick pay. The respondent's position, which did not appear to be contradicted, was that the claimant erroneously thought that entitlement to sick pay was calculated on the basis of the annual leave calendar rather than absences which arose on a rolling year basis.

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23. The Tribunal had sympathy with the respondent's position that the claimant simply repeated various factual matters alleging that this amounted to unlawful conduct under various heads of claim.

#### **Unlawful deduction from wages**

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24. The claimant claimed that he had not been paid the appropriate level of sick pay. The claimant did not point to a contractual provision which he said had been breached.

## Disability discrimination

25. The claimant claimed that the respondent had discriminated against him on various statutory bases on the grounds of a disability. The respondent does not accept that the claimant was a disabled person at the material times and/or they did not know and could not reasonably have known that he was a disabled person. For present purposes I will assume that the claimant was a disabled person at the material times.

10 Section 15 claim, discrimination arising from a disability.

26. The claimant complains of the respondent's failure to rearrange a job interview for him after 'infecting/exposing me with COVID-19 at their Balgreen potential outbreak of COVID-19 at the nursery at which he worked. It is understood the claimant was then absent on grounds of illness from 6 December. An interview was due to take place on 7 December. The respondent's position was that it was not at the time aware of any request by the claimant to reschedule the interview, that interviews took place on 7 December, and someone else had been nominated for the position. The claimant in his further particulars did not make any reference to the disability he says he had at the material time, what the something arising from the disability was, or in what way he alleged that a failure to reschedule an interview arose in any way from a disability.

Sections 20 and 21 claim - a failure to make reasonable adjustments

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27. The claimant's claim appears to be that he was required to work at schools 'Infected with COVID-19' and that the job interview referred to above was not rearranged. He has not set out what the provision criterion or practice he relies upon was or how it put him at a substantial disadvantage because of an alleged disability. He also alleges that adjustments ought to have been implemented before he was signed off sick (even though the interview was listed before he was signed off sick). He does not offer to prove any facts from

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which it could be established that any disability was in any way related to these matters.

Section 13 and 15 ~ Direct and Indirect discrimination because of a disability and/or religion

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28. The claimant appears to claim that the failure to rearrange the interview referred to above and asking him to work in nurseries which he says were infected with COVID-19 amounted to indirect discrimination or direct discrimination. He says that this was either because of a disability or his religion. He is Roman Catholic. He has not set out any facts he offers to prove from which an inference of direct discrimination either on the basis of a disability or religion could be drawn. He has not set out on what basis the allegations could amount to indirect discrimination.

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Section 26 Harassment - on grounds of disability, age, religion, sex and race

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29. The claimant repeats the allegations in relation the interview and working in workplaces said to be infected with COVID-19 and says that these allegations also amount to harassment on the various grounds. He does not offer to prove any facts from which a Tribunal could conclude that such treatment amounted to harassment or that it was in any way related to any of the alleged protected characteristics.

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Section 27 - Victimisation.

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30. The claimant suggests that he brought discrimination proceedings against the respondent and that this amounted to a protected act. He also says that the failure to rearrange the interview was a detriment because of the protected act. The claimant raised the Tribunal proceedings after the alleged detriment.

Discussion and decision on strike out

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31. It is well established that strike out of a claim is a draconian step. Particular caution should be used by a Tribunal where the claimant is a litigant in person (see for instance *Mbuisa v Cygnet Healthcare Ltd* EAT 0119/18 and *Cox v*

Adecco and ors 2021 ICR 1307). In particular, where there are factual issues in dispute, strike out should rarely be appropriate. A Tribunal needs to understand the nature of the claim before it in order to understand whether it has reasonable prospects of success. A claimant ought to be given an opportunity to set out the particulars of a claim and not be required to provide that detail during the stresses of a hearing. The test as to whether a claim has no reasonable prospects of success is a high test (see for instance **Balls v Downham Market High School and College 2011 IRLR 217**).

32. In the present case, the Tribunal has borne in mind that the claimant is unrepresented. It has also taken into account that there have been two preliminary hearings in this case as well as today's hearing and the hearing which was adjourned in December 2022. The claimant was asked specific questions of the respondent in order to seek to clarify his claim. His answers appear, on the whole, to reiterate the same allegations under different heads of claim without any attempt to specify on what basis the specific allegation will be proved. The Tribunal is satisfied that the claimant has been given sufficient opportunity to set out his case. He has known since September that the respondent was of the view that his claim was hopeless. He received the skeleton argument in advance of the hearing which was adjourned in December. He was given the opportunity to put forward his position before the Tribunal today but chose not to do so. He has been given every opportunity to address the respondent's clear concerns. He has failed to do so. No material facts have been identified as being in dispute. Even at its highest, each of the claims set out above have no reasonable prospects of success. On that basis the Tribunal is satisfied that all claims should be struck out on the basis that they have no reasonable prospects of success. The Tribunal is satisfied that the claimant has had a reasonable opportunity to make representations in this regard.

Claimant's conduct at preliminary hearing

33. However, even if the Tribunal is wrong in relation to the striking out of any or all of the claimant's claims as having no reasonable prospects of success, the Tribunal, is of the view that the entire claim should be struck out on the basis of the claimant's conduct in not participating in the hearing today. The Tribunal is of the view that the conduct of the claimant was unreasonable in terms of Rule 37 (1) (b) and/or that his failure to participate in the hearing today amounts to a failure to actively pursue his claim in terms of Rule 37 (1)(d).
34. The claimant said that he had come to the hearing prepared to give evidence on his means (in relation to the application for a deposit order) and in relation to why his amendment should be accepted even if out of time. The Tribunal did not accept that the claimant was genuine in that regard. It appeared to the Tribunal that the claimant did not intend to participate in the hearing. In particular, the Tribunal took into account the claimant's refusal to accept the additional bundle of documents from the clerk in advance of the hearing. Further, while the claimant said that he was not going to be intimidated by the respondent on the basis that he had been sent an email by a recruitment agency, that email was dated 19 January. If the claimant had genuinely been of the view that he was being intimidated (and the Tribunal could not see on what basis an email from a different organisation from the respondent enclosing an Information and Communications Technology Acceptable Use Policy of the City of Edinburgh Council which included agency staff, could be intimidation by the respondent) could amount to intimidation), he would have raised this before the hearing itself.
35. Moreover, the claimant's conduct in suggesting he was 'too busy' for this and that he had arranged a doctor's appointment for the afternoon during which this hearing was listed amounted to unreasonable conduct and/or a failure to actively pursue his claim in terms of Rule 37(1) (b) or (d). While the Tribunal appreciated that representing oneself in Tribunal proceedings is a stressful matter, his conduct in for instance pointing at the respondent's solicitor when he was referring to her, refusing to sit down when asked by the Tribunal and

standing in front of the bench indicating he was leaving but continuing to make allegations against the respondent was contumelious conduct,

36. Moreover, refusing to take part in the hearing, while failing to make an application for a postponement of the hearing, was unreasonable conduct.
- 5 37. The claimant displayed disrespect and contempt for the Tribunal and the Tribunal was satisfied that the claimant's conduct in that regard was deliberate.
38. Therefore, for all these reasons the claimant's claims fall to be struck out.

**Employment Judge: A Jones**  
**Date of Judgment: 02 February 2023**  
**Entered in register: 06 February 2023**  
**and copied to parties**