



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss M Willis

**Respondent:** Morrison Data Services Limited

**Heard at:** Newcastle CFCTC                      **On:** 14 December 2021

**Before:** Employment Judge Arullendran

***Representation:***

**Claimant:** In person

**Respondents:** Ms D Henning (solicitor)

## RESERVED JUDGMENT ON STRIKE OUT AND DEPOSIT ORDER

The Judgment of the Tribunal is as follows:

1. The Claimant's claims are not struck out and shall proceed to a full merits hearing.
2. The Respondent's application for a deposit order is refused.

### REASONS

#### The Hearing

1. The issues to be determined by the Employment Tribunal were set out in the case management order of Employment Judge Sweeney on 22 November 2021 as follows:
  - i. Whether any part of the claim should be struck out under Rule 37 of the Employment Tribunal Rules of Procedure, on the grounds that it has no reasonable prospect of success; alternatively

- ii. Whether any part of the claim has little reasonable prospect of success and, if so, whether to make a deposit order in accordance with Rule 39 of the Employment Tribunal Rules of Procedure, in respect of any particular allegation or argument;
  - iii. Whether any part of the claim should be struck out under Rule 37 of the Employment Tribunal Rules of Procedure, on the grounds that the manner in which the proceedings have been conducted by the Claimant has been unreasonable.
2. I was provided with a bundle of documents by the Respondent consisting of 72 pages, a chronology, the Respondent's skeleton argument and copies of the case of A v B [2021] UKEAT 0042/19 and Cox v Adecco and others UKEAT/0339/19. The Claimant brought copies of her letter of grievance and occupational health report, however, as these documents were already in my possession, I instructed the clerk to return the Claimant's documents to her.
3. I asked the Claimant at the beginning of the hearing whether there were any reasonable adjustments the Tribunal could make to assist her in effectively taking part in this hearing today. She told me that no reasonable adjustments were required and I explained that I would like the Claimant to tell me immediately if she needed a break or did not understand anything.
4. The Claimant received the Respondent's skeleton argument late last night and told me that she had not had sufficient time to prepare her arguments in response. The Respondent's representative very helpfully agreed that the Claimant should be given time to read the Respondent's skeleton argument and formulate her own response and we took a break of 30 minutes after the Respondent had concluded their submissions so that the Claimant could prepare her arguments.
5. This hearing was listed with a time estimate of 2 hours and was due to finish at 12 noon. However, the parties did not complete their closing submissions until 12.25pm and it was agreed I would reserve the decision.

### The Facts

6. The Claimant was dismissed on 5 April 2021 and she submitted her ET1 form to the Tribunal on 1 June 2021. The Claimant attended a preliminary hearing on 9 August 2021 and was required to provide further particulars of her claims and details of her disability. The Claimant failed to provide the necessary information by the deadline of 25 August 2021 and a further preliminary hearing was arranged to take place on 6 October 2021.
7. The Claimant did not dial into the telephone preliminary hearing on 6 October 2021 and she was required to explain why she did not attend the hearing. The Claimant sent an email to the Tribunal on 12 October 2021 explaining that she had forgotten to attend the hearing because her mother was very ill and in hospital and it had been a stressful time for her. It is common ground that the Claimant has poor mental health and has been receiving treatment for it.

8. A further telephone preliminary hearing was arranged to take place on 8 November 2021. The Claimant made enquiries with the Tribunal on 1 November 2021, asking for details of the time of the hearing and the duration. The Tribunal wrote to the parties on 1 November 2021 and explained that the hearing was due to commence at 11:30 AM and would last approximately 90 minutes. The Claimant did not dial in to the preliminary hearing at 11:30 AM on 8 October 2021. She sent an email to the Tribunal at 11:40 AM stating that she could not find the dial-in details and the Tribunal replied at 11:45 AM with the telephone number and access code in reply. Employment Judge Sweeney brought the preliminary hearing to an end at 11:50 AM because the Claimant had not joined.
9. The Claimant has explained today that she had to attend a telephone appointment with her counsellor on 8 November 2021 and the timing and duration of this call can be seen at page 49 of the bundle. The call log shows that the Claimant spoke to her counsellor at 11:45 AM for almost 16 minutes and then she made two attempts to dial in to the preliminary hearing at 12:04 PM. The Claimant says that her pin number was not working and she was unable to connect to the hearing at 12:04 PM. The Claimant understands now that the reason why she was unable to connect to the call was because the Employment Judge had already brought that hearing to an end.
10. The explanation given by the Claimant today is that her mental health has been so poor because of various events in her life, including unrelated court proceedings and her mother's health, that she initially forgot to attend the hearing on 8 November 2021 and, when she did remember, she was so stressed that she panicked. She also explained that she believed the hearing would last 90 minutes and therefore that she would have been able to join the hearing when she attempted to dial in at 12:04 PM.
11. The Respondent asked for the claims to be dismissed at the hearing on 8 November 2021, however this was not granted. The Respondent made a further application to strike out the Claimant's claims on 16 November 2021 on the grounds that the Claimant had failed to adequately reply to the question set out in the order is made by Employment Judge Sweeney on 8 November 2021.
12. Employment Judge Sweeney required the Claimant, in his order dated 8 November 2021, to say why the warning issued by the Respondent in December 2020 was given to her because of her disability or because of something arising in consequence of the disability. He also required the Claimant to say whether she was alleging she was dismissed because of her disability or something arising in consequence of it and, if so, why she says this. The Claimant replied by email on 12 November 2021, stating that the mistake she made, for which she received the final warning, arose because of her disability as her mental state was impaired because she had been furloughed for six months and then required to work from home without any support when the Respondent knew about her poor mental health. The Claimant also stated that she was dismissed because of her disability and something arising in consequence of it (although, I note the Claimant has not said what the "something" was) because the Respondent failed to follow the advice in the occupational health report and failed to take into account how her illness was affecting her as the Respondent had removed her work telephone which meant that she could not contact them in accordance with the sickness absence policy.

13. The Claimant has said today that she had found it very stressful working from home (as she had been told to self-isolate because the person she sat next to at work, Laura Denham, had tested positive for Covid and the office had been closed for a deep clean) without any support from the Respondent and she was caused extra stress when the manager turned up at her home outside her normal working hours and she was very upset and crying about this at the time, which her managers saw. The Claimant says that the Respondent knew she would be caused extra pressure by not being able to log onto her work computer, but the Respondent failed to take into account the effect all of these things had on her mental health and proceeded to dismiss her.

### Submissions

14. The Respondent made submissions by reference to a written skeleton argument, the contents of which I have not reproduced here but have been taken into account in their entirety.
15. The Respondent submits that it accepts the Claimant is a disabled person, but this does not excuse unreasonable behaviour in terms of the manner in which she has conducted this litigation. The Respondent submits that the Claimant already had a final written warning on her record when there was a further act of misconduct in March 2021 which led to her dismissal. The Respondent submits that the Claimant gave differing accounts of the reasons why she had been absent from work without reporting her sickness absence in accordance with the sickness absence policy and, therefore, she was dismissed for gross misconduct.
16. The Respondent asks for the Claimant's claims to be struck out, in their entirety, under Rule 37 of the Tribunal Rules and refers to the cases of Cox v Adecco. In particular, the Respondent refers to paragraph 28 of that Judgment and submits that the Claimant's case falls into one of the exceptions as she does not dispute the facts alleged but asserts that the end result was unfair because she is disabled. The Respondent also submits that the Claimant has failed to explain how being dismissed for a further act of gross misconduct was because of her disability or arose from her disability.
17. In respect of the conduct of these proceedings, the Respondent submits that the Claimant thinks the rules do not apply to her and that she has provided conflicting explanations for her non-attendance at two preliminary hearings. The Respondent refers to pages 40 and 42 of the bundle which show that the Claimant was engaged on another telephone call at the time that she should have called into the Tribunal hearing on 8 November 2021 and that she only dialled into that hearing at 12:04 PM, instead of 11:30 AM when it was scheduled to start.
18. The Respondent submits that the Claimant has not been honest in relation to her financial status because the bank statements she has disclosed show that she had received the sum of £3357 into her account (pages 56 and 57 of the bundle) whereas her email to the Tribunal setting out her income and expenditure at page 58 of the bundle states her total monthly income is £1100.
19. The Respondent relies on the case of A v B, particularly paragraphs 29 onwards of that Judgment, and submits that, although Tribunal should be slow to strike out discrimination

claims as they are generally fact sensitive, in the current case the facts are not in dispute and the low prospect of success should be taken into account under this head.

20. In the alternative, the Respondent asks for a deposit order to be made against the Claimant in respect of all of her claims.
21. The Claimant made oral submissions dealing with the points raised by the Respondent. She submits that she did not pursue her appeal against the original final written warning because she was advised by Unison and HR that there was a possibility the sanction would be overturned and she could be dismissed as an alternative. The Claimant also submits that she was not deliberately absent from work without leave and that she had tried to contact her manager by telephone to inform her of her sickness absence but, when the call was not answered, she sent a text message instead.
22. The Claimant's submits that she provided different explanations for the reasons why she had not been in contact with the Respondent when she was on sick leave because it was the Respondent who was raising different questions about why she did not use her car and why she did not go to her parents' house, which is not within walking distance of her own home. The Claimant submits that the Respondent knew that she reacted more distressed than anyone else because of her anxiety and mental health, but the Respondent failed to take this into account when they contacted her outside her working hours.
23. The Claimant submits that she forgot to dial in to the preliminary hearing in October 2021 because her mother had undergone surgery and had not recovered properly and had to be readmitted around this time. The Claimant's mother was readmitted to hospital on 8 October 2021 and she submits that she forgot to dial into the hearing as her mother was very unwell and this had a negative effect on the Claimant's mental health as she was "all over the place".
24. The Claimant submits that the Respondent is discriminating against her further by implying that she is a liar and that this is indicative of how the Respondent has conducted itself throughout the disciplinary process in that they have failed to take into account the Claimant's mental health and the effect the language they use has on her.
25. In terms of her bank account, the Claimant submits that she does not have two accounts, as suggested by the Respondent representative. She explained that she transfers money between a savings account and current account for security reasons. The Claimant was unable to explain why the total amount of money into her account was over £3000 and we discussed the possibility of the amount of several returned direct debits adding to the total money going into her account that month.
26. The Claimant submits that she disputes the facts relating to the misconduct in respect of the events leading to the final written warning as the comments came from two other colleagues and she merely wrote the comment down on the Respondent's system. The Claimant submits that she had never worked from home before and found it hard because there were issues taking place in her personal life which were causing poor mental health and that she genuinely made a mistake on her return to work. The Claimant also submits that she was under increasing pressure by receiving unwanted

welfare contact from the Respondent when what she really needed was time away from work on sick leave.

27. The Claimant submits that she had to take a telephone call from the counselling service on 8 November 2021 in order to carry out the initial assessment so that she could receive counselling for her mental health and that she does not have a landline and could not take part in two telephone calls. The Claimant submits that she was very stressed at the time and had forgotten that she had to telephone the Tribunal and thought that, as the hearing was listed to last 90 minutes, that she would still be able to join the hearing after 12 PM.

### The Law

28. The Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, Schedule 1, provides at Rule 37

“(1) at any stage of the proceedings, either on his own initiative or on the application of a party, a Tribunal may strike out all part of claim or response on any of the following grounds –

- (a) 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 claims or response (or the part to be struck out).

29. The Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, Schedule 1, provides at Rule 39

- “(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument.
- (2) the Tribunal shall make reasonable enquiries into the paying party’s ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.”

30. The Tribunal retains a discretion in the matter and the power to make orders under Rules 37 and 39 and that discretion has to be exercised in accordance with the overriding objective, i.e. to deal with cases fairly and justly having regard to all of the circumstances of the particular case.

31. I refer to the case of Anyanwu and anor v South Bank Student Union and anor [2001] ICR 391 in which the House of Lords held that, as a general rule, discrimination issues should be decided only after hearing the evidence and that this approach applies to both applications for striking out and deposit orders.

32. I refer to the case of Mbusia v Cygnet Healthcare Ltd EAT 0119/18 in which the EAT noted that strike out is a Draconian step that should be taken only in exceptional cases and that particular caution should be exercised if the case is badly pleaded, for example by a litigant in person. Further guidance has been given in the case of Cox v Adecco, which the Respondent has referred to and provided a copy of at this hearing. The EAT said in that case that, if the question of whether a claim has reasonable prospects of success turns and factual issues that are disputed, it is highly unlikely that strike out will be appropriate. The Claimant's case must ordinarily be taken at its highest and the Tribunal must consider what the claims and issues are before considering strike out or making a deposit order. It was also said in that case that the claim should not be ascertained by only requiring the Claimant to explain it while under the stress of hearing and that reasonable care must be taken to read the pleadings and any key documents in which the Claimant sets out the case. The careful reading of the documents may show that there is a claim, even if it might require amendment. The EAT noted that Respondents have a duty to assist the Tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person and they must aid the Tribunal in identifying the relevant documents in which the claims are set out.
33. I refer to the cases of Ezsias v North Glamorgan NHS Trust [2007] ICR 1126 and Balls v Downham Market High School and College [2011] IRLR 217 in which the Courts have advised taking a cautious approach to striking out claims and this stems from the proposition that it is unfair to strike out a claim where there are crucial facts in dispute and there has been no opportunity for the evidence in relation to those facts to be considered.
34. I refer to the case of Mechkarov v Citibank NA [2016] ICR 1121 in which it was noted that almost all unfair dismissal claims are fact sensitive and that, where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute between the parties, it is not for the Tribunal to conduct an impromptu trial of the facts.
35. In considering whether a claim should be struck out on the grounds of unreasonable conduct, a Tribunal must consider whether a fair trial was still possible: De Keyser Ltd v Wilson [2001] IRLR 324. Further, in the case of Blockbuster Entertainment Ltd v James [2006] IRLR 630 the Court of Appeal confirmed that it would take something very unusual indeed to justify striking out on procedural grounds a claim which had arrived at the point of trial.

### Conclusions

36. The Claimant has brought claims of unfair dismissal and disability discrimination. Whilst the Respondent has argued today that the facts are not in dispute and that the only matter in dispute is the harshness of the sanction imposed by the Respondent, I find that I cannot agree with this assessment of the case. The Claimant has made it clear that she does not agree with the Respondent's version of events, both in relation to the final written warning and in relation to the events leading to the dismissal. Whilst I have much sympathy with the Respondent's position in that the claims are not clearly pleaded thus far by the Claimant, the facts are in dispute and I find, applying the relevant law, that the

only way those disputes can be resolved is for the matter to proceed to a full merits hearing and for a full Tribunal panel to make relevant findings on the disputed facts after hearing all the relevant evidence.

37. Taking the Claimant's claims at their highest, I cannot say at today's hearing that there is no reasonable prospect of success on either the unfair dismissal claim or the disability discrimination claim because there are disputed facts which must be resolved by the Tribunal after hearing all the relevant evidence. Applying the guidance given in the cases of Cox, Anyanwu, Ezsias and Mechkarov, as set out above, I find that there are insufficient grounds to strike out the Claimant's claims and the Respondent's application is refused. I accept that more work needs to be done by the Claimant to clarify her claims and that is a matter which will require a further case management preliminary hearing.
38. I note that the Respondent has not made a particularly forceful argument for a deposit order to be made in this case. The only reference to a deposit order is the very last sentence of the Respondent's skeleton argument which states "If the Tribunal is not with the Respondent on strike out then for all the above reasons a Deposit Order should be made."
39. The test for making a deposit order is whether the claims have little reasonable prospect of success. However, applying the guidance in the case of Cox v Adecco, it is necessary to consider all of the claims and issues before considering making a deposit order. In this case, it has not been possible to conclude the pleadings because the Claimant has not attended the preliminary case management hearings and it is impossible for this Tribunal to say, with certainty, what the claims and issues are. In the circumstances, applying the overriding objective to deal with cases fairly and justly, I cannot say that the Claimant's claims have little reasonable prospect of success at this stage. Therefore, it would be premature to make a deposit order and, thus, the Respondent's application for a deposit order is refused. This does not mean that the Claimant's claims will definitely succeed at a final hearing and the Claimant may be wise to seek specialist advice and assistance from Citizens Advice, a Law Centre or through the ELIPS scheme (details of which can be obtained from the Tribunal office) before proceeding further.
40. I accept the Claimant's explanations as to why she has failed to attend the previous two preliminary case management hearings, although I have much sympathy with the Respondent's position in that they have incurred costs by attending those hearings. The Claimant has a serious mental health disability which appears to have affected her ability to manage her time and attention and this has resulted in her failing to attend to preliminary hearings. I do not accept the Respondent's submission that the Claimant thinks the rules do not apply to her or that she feels she can do as she pleases. I am satisfied that the Claimant's actions in not attending the hearings was not deliberate and was not intended to be disrespectful to the Tribunal. I accept that the Claimant has many issues which are affecting her mental health, including her mother's ill health, unrelated court proceedings, attending work and caring commitments.
41. I have considered the submissions made by both sides carefully and I am satisfied that it is still possible to have a fair hearing, although I must stress to the Claimant that she must not miss any further hearings or deadlines set by the Tribunal as such actions lead to an unnecessary waste of public cost and cost to the Respondent which cannot be



tolerated. Applying the guidance from the cases of De Keyser and Blockbuster Entertainment, as set out above, I find that there are insufficient grounds to strike out the Claimant's claims for unreasonable conduct and the Respondent's application for a strike out is refused.

**Employment Judge Arullendran**

**JUDGMENT SIGNED BY EMPLOYMENT  
JUDGE ON**

**.....15 December 2021.....**

**Public access to employment Tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-Tribunal-decisions](http://www.gov.uk/employment-Tribunal-decisions) shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.