



## EMPLOYMENT TRIBUNALS

**Claimant**  
Miss J Capewell

v

**Respondent**  
British Airways Plc

## PRELIMINARY HEARING

**Heard at:** Bristol

**On:** 1 July 2019

**Before:** Employment Judge O'Rourke

### Appearances

For the Claimant: In person

For the Respondent: Miss G Hirsch - counsel

## JUDGMENT

The Claimant's claim of disability discrimination is struck out, subject to Rule 37(1)(b) and (c) of the Employment Tribunal's Rules of Procedure 2013.

## REASONS

### Background and Issues

1. Following a strike-out application by the Respondent, that matter was listed for Hearing today, resulting in the vacating of the previously-listed three-day substantive hearing of this claim, due to commence today.
2. I heard submissions from the Claimant and Miss Hirsch, the latter of whom also provided a skeleton argument. A bundle of documents was also provided, prepared by the Respondent and in respect of which it was not disputed the Claimant had been consulted. The Claimant also independently brought various uncopied documents, which will be referred to below, as considered relevant.
3. There have been three telephone case management hearings listed in this matter, two of which did not proceed. Employment Judge Livesey conducted the one hearing that did, on 15 February 2019 and to which reference is made, by way of further background into this matter [40-47]. Suffice to say in respect of the claim that on 7 August 2017, the Claimant was informed by the Respondent that the assessment of her application for

the position of cabin crew had been successful and an offer of employment was made, contingent on receipt of satisfactory references and her satisfying pre-employment checks [88-89]. Subsequently, that offer was withdrawn, by email of 19 March 2018 [114]. As a consequence, the Claimant brought this claim on 22 May 2018, alleging direct discrimination and discrimination arising from her disability. The Claimant asserts that her disability was the reason for the withdrawal, whereas the Respondent asserts that it was due to a combination of unexplained, or inconsistently explained gaps in her CV and rudeness to their recruitment staff. The issue as to whether or not she was or is disabled, subject to s.6 Equality Act 2010, was not for consideration at this Hearing and she herself was anxious that as little personal detail as possible as to her medical condition was disclosed and therefore no further reference is made to such detail.

4. The Respondent sought to rely on the Claimant's alleged failure to comply with Tribunal orders, her unreasonable conduct of these proceedings and her prospects of success.

### **The Law**

5. Rule 37(1) of the Employment Tribunal's Rules of Procedure 2013 ('the Rules') states that:

*'An employment judge or tribunal has power, at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on any of the following five grounds:*

*(a) that it is scandalous or vexatious or has no reasonable prospect of success (r 37(1)(a));*

*(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or respondent (as the case may be) has been scandalous, unreasonable or vexatious (r 37(1)(b));*

*(c) for non-compliance with any of the Rules or with an order of the tribunal (r 37(1)(c));*

*(d) that it has not been actively pursued (r 37(1)(d));*

*(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).'*

6. Rule 2 states that:

#### ***'Overriding objective***

**2.** *The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*

*(a) ensuring that the parties are on an equal footing;*

- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and*
- (e) saving expense.*

*A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.'*

7. Case Law. The following case law is of relevance:

- a. **Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330** and **Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] CSIH 46**, both of which indicate that claims should not, as a general principle, be struck out on the ground of being scandalous, vexatious, or having little reasonable prospect of success (Rule 37(1)(a)), when the central facts are in dispute. This is particularly applicable when the claim is one of discrimination (**Anyanwu v South Bank Students' Union [2001] IRLR 305 HL**).
- b. Miss Hirsch sought to rely on the case of **Ahir v British Airways plc [2017] EWCA Civ 1392**, which indicates that, when relying on this ground, the fact that there are disputed facts should not, of itself, deter the tribunal from striking out the claim. (However, I nonetheless consider that as there are central facts in dispute, about which I have not heard evidence that accordingly therefore the Respondent cannot rely on Rule 37(1)(a), to have this claim struck out.)
- c. In respect of whether the conduct of the proceedings has been 'scandalous, unreasonable or vexatious' (Rule 37(1)(b)), the Rule's purpose is to provide a means for dealing with litigants who conduct their cases in a disruptive and unruly manner, or refuse to obey the directions of the employment judge, but whose cases could not be struck out on either of the other two grounds. It is not directed solely to conduct at the hearing but may apply to conduct at any stage of the proceedings. It has been held that there are two 'cardinal conditions' for the exercise of the power, namely that the unreasonable conduct has taken the form of a deliberate and persistent disregard of required procedural steps, or it has made a fair trial impossible (**Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684**). Where these conditions are fulfilled, it is necessary for a tribunal to go on to consider whether striking out is a proportionate response to the misconduct in question.
- d. In respect of non-compliance with Tribunal orders (Rule 37(1)(c)), **Farmah v Birmingham City Council [2017] IRLR 785 EAT** gave guidance on the exercise of the discretion to strike out, namely that the

factors that should be considered, in addition to the Overriding Objective, are: (a) the seriousness of the breach; (b) the circumstances in which the breach comes about; (c) whether.... (not relevant in this case); (d) any prejudice to the claimants and respondents in striking out the claim; (e) any other relevant factors.

8. History of the Claim. A largely-uncontested history of the progress of this matter is as follows (where there are differing views, I set them out, reaching conclusions, as appropriate):
  - a. The Claimant filed her claim on 22 May 2018, at the Watford Tribunal.
  - b. On 7 June 2018, the Tribunal sent Notice of a Case Management Preliminary Hearing, to take place on 6 December. As recorded by Judge Livesey, in his case management summary, the Claimant was aware of that hearing date, because, on 30 November, she sent an email regarding her case, referring to the fact that it was going to be heard '*next week*'.
  - c. However, on 4 December, two days before the Hearing, the Respondent's solicitors wrote to the Tribunal, to indicate that the Claimant had informed them that the Hearing had been cancelled and the case moved to Bristol, of which apparent orders they were unaware. No such orders had been made and it was confirmed to the Parties that the Hearing was proceeding, as listed. The Claimant did not attend and sent an email later that day, stating that it was too far for her to travel and that she had been *trying* to have the case moved to Bristol (where she lives). The Claimant had no reasonable explanation for such behaviour, which I consider was deliberately deceitful, in the hope of avoiding the Hearing.
  - d. The case was then subsequently moved to Bristol and on 8 January 2019 (all dates hereafter 2019, unless otherwise stated), the Tribunal ordered the Claimant to provide a disability impact statement (setting out the usual description of what such a statement consisted of) and any medical evidence upon which she sought to rely, by 31 January and also listed the Telephone Case Management Hearing before Judge Livesey, on 15 February [29]. By 5 February, the Claimant not having complied with that Order, the Tribunal sent a strike out warning, by email, to the Claimant, requiring a response by 13 February. The Claimant wrote to the Respondent the same day, stating that she had already sent the medical evidence to the Respondent '*recorded delivery and signed for*' [32] and again later that day, asking '*why have I not been made aware of this telephone hearing*' and '*I've received no letters or correspondence from the tribunal and neither have my legal team*' [33]. Dealing with the latter point first, this is the first of several references by the Claimant to her 'legal team' or legal advisors, or 'we'. However, as she accepted in this Hearing, she has never, in fact, had any legal advisor on record, having merely, at some point, via a union, consulted with a solicitor, who did not take on her case. This reference lead to nugatory correspondence from both the Tribunal and the Respondent as to the

identity and involvement of such non-existent legal advisors [34 and 37] and was designed by the Claimant, I consider, to somehow attempt to bolster the apparent strength of her claim and to intimidate the Respondent. It was also clear that she was in possession of the Notice of Preliminary Hearing [29], as it had been sent to the email address she had provided to the Tribunal and which she was using at the same time to communicate with the Respondent and I consider her denial on that point to be an attempt to '*muddy the waters*' as to the requirement to comply with the Order for provision of the disability impact statement and medical evidence. The reference to having already provided the medical evidence to the Respondent created considerable discussion in this Hearing, but suffice to say, I am confident that in fact the Claimant has never provided such evidence (at least not in any detail) to the Respondent and which subject I shall deal with in more detail below. The Respondent, at the time, challenged the asserted provision of such evidence, asking for confirmation of the asserted recorded delivery details [34], but which was not provided by the Claimant (until, to some extent, at today's Hearing).

- e. The Claimant replied the same day [35], stating that '*we sent the medical evidence in October 2018 as told to do so by the Watford Tribunal (in fact no such orders had been made by that Tribunal). I was under the impression this is what you were referring to, so please don't try and twist my emails into a way of saying I have received correspondence from Bristol Tribunal.*' This is the first of several assertions of bad faith against the Respondent solicitors.
- f. In respect of her non-provision of the disability impact statement, she said that '*we have not done this because we have not been made aware and it's irrelevant the medical records explained everything.*
- g. The Tribunal wrote again to the Claimant, on 7 February, reiterating that she must deal with the points raised by the Respondent [37], with 24 hours. She did not do so.
- h. The case management hearing proceeded on 15 February, with the Claimant in telephone attendance and the claim was listed for hearing on 1 to 3 July. Judge Livesey noted her previous non-compliance with Tribunal orders and '*made it clear that the Tribunal's Orders had to be complied with in the future and that further instances of non-compliance were unlikely to be tolerated. The Claimant accepted that guidance.*' [42]. He also ordered that by 1 March, the Claimant was to provide the previously ordered medical evidence and impact statement.
- i. By 4 March, the Claimant not having complied, the Respondent informed the Tribunal [49]. The Claimant wrote on 6 March [50] stating that she had been '*advised*' by the Judge to provide the impact statement. The use of this word is, I find, symptomatic of the Claimant's approach to this process, when it must have been clear to her by then that she had been (twice) '*ordered*' to do so, and also been in receipt of a related strike-out warning. She clearly did not take such '*orders*' (in their plain English

meaning), as such, but as somehow optional. She went on to apply for a Restricted Reporting Order (RRO) in respect of such matters.

- j. On 14 March, the Tribunal refused the application and at the same time asked her to comment, by return, as to the Respondent's assertion that she had not complied with the Order [51]. No reply was received and the Respondent confirmed, on 18 March that the Claimant had still not complied [52].
- k. On 25 March, the Tribunal issued a second strike-out warning to the Claimant, requiring any objections to strike-out by 1 April [54]. The Claimant replied the same day, stating that the claim was being actively pursued and that '*I wrote in having received the email that the Restrictive Reporting Order will not be granted and explained I will not be providing any medical information without it' and 'I will only give medical information if a Restrictive Reporting Order is granted'. (my emphasis) [55].*
- l. The Tribunal responded on 28 March [57], again refusing the RRO, but stressing that the medical evidence and impact statement would not, until any public hearing, be accessible by the public and would be provided to the Respondents on the basis that they would not be disclosed to any third party, without further order of the Tribunal. In the event of a public hearing, further consideration could be given, at that hearing, to any RRO. She was reminded that she had until 1 April to comply with the Order, or her claim would be struck out.
- m. On 2 April, the Respondent confirmed that the order had not been complied with [58]. On 8 April, the Tribunal reiterated the guidance given in its correspondence of 28 March, giving the Claimant until 29 April to comply with the Order [59].
- n. On 25 April, the Claimant wrote to the Respondent, asking for the address to which she should send the medical evidence and impact statement and the Respondent's solicitors confirmed their address [61-62].
- o. On 29 April, the Claimant emailed the Respondent, stating '*please find attached photographs of the documents sent to your office*'. Attached were two photographs, listing a summary of conditions suffered by the Claimant, with dates [64-66]. It was apparent, from subsequent sight of the 'summary sheets' from the Claimant's medical records that these photographs had been taken, selectively by the Claimant, of some elements of those sheets.
- p. On 30 April, the Respondent wrote to the Claimant, stating that as she had not disclosed her medical records, she was not in compliance with the Order [67]. She replied the same day, stating that she '*will send another copy out tomorrow if I have to, as I'm in Blackpool celebrating my birthday tomorrow night, until May 7<sup>th</sup> and will not be available for contact.*' [68]. She also stated that her schedule of loss (which was also

overdue by some month and a half by that point) was ‘£3000 cost of accommodation for training. This was spread out from 5 accounts of my training dates being changed. Plus nearly 2 years of salary from not being able to work due to the affects (sic) what British Airways have caused me from their actions’.

- q. The Tribunal having been informed of this correspondence by the Respondent, it, on 3 May, listed an urgent telephone preliminary hearing, for 14 May, at 12:00 pm, to discuss it [71]. However, the Claimant indicated, on 14 May that she would be unable to attend that Hearing. Following the adjournment of that Hearing and due to the proximity of the substantive hearing, listed for approximately six weeks’ later, the Respondent applied on 15 May for strike out of the claim [73].
- r. On 15 May the Claimant wrote to the Respondent, stating that the medical evidence ‘has been sent out not once but twice. Once by myself and once by my doctors. They will be writing a statement to confirm this (no such evidence was ever provided). I have not sent it recorded delivery as I’m not paying the charges’. She said that she would ‘send the doctor’s letter into the tribunal themselves this week’ (but did not) [75]. Separately, on the same day, she wrote again, stating the Respondent solicitors had ‘received photos of my medical evidence, even if the copies have not arrived and confirmed she had those photos, so she is aware of what conditions I have been diagnosed with.’ [77].
- s. On 30 May, the Tribunal postponed the final hearing and listed this Preliminary Hearing in Person [79].
- t. On 20 June, the Respondent sought clarification from the Claimant as to the precise nature of what medical records she asserted that she had already provided to them and when. They also referred to an email from her of 10 May, in which she stated that she had sent audio recordings of conversations with British Airways recruitment staff and her medical documents to the Tribunal, asking for her confirmation in that respect [83]. She didn’t reply to that email and the Tribunal has never received such documents or recordings.
9. Claimant’s Demeanour at this Hearing. The Claimant was extremely emotional during much of this Hearing. Right from the outset, she was in tears and about forty-five minutes into the Hearing, stood up, stating that she couldn’t go on and despite being offered a break to consider her position, refused and walked out of the Tribunal room. The Tribunal clerk intercepted her before she could leave the building and she was persuaded to return, which she did, after about fifteen minutes. The Hearing proceeded (to include a one-hour lunch break), but during which the Claimant was frequently tearful, sometimes angry (on one occasion having to be told not to shout) and on occasion, incoherent.
10. Medical Evidence and Impact Statement. I make the following findings in this respect:

- a. The Claimant asserted that she had, in fact, provided an impact statement, which the Respondent denied. She said that she should be able to locate over the lunchtime and after lunch provided a copy of an email from her to the Respondent, dated 29 April 2019 (the last possible date by which she could comply with the latest order), in which she made brief reference to the impact her disability had upon her. Miss Hirsch accepted that this email constituted the basis for such a statement and apologised for the Respondent's oversight in this respect.
- b. It is absolutely clear to me that the Claimant has never provided the full extent of her medical records to the Respondent's solicitors and that therefore she is serial breach of Tribunal orders. I find this for the following reasons:
  - i. She doesn't wish to do so, as is evident from her outright refusal to do so, unless an RRO was granted.
  - ii. The tone of her email of 15 May clearly indicates that all she was prepared to do, by way of compliance, was to merely take some highly selective photographs of the summary sheets of her medical notes and send those to the Respondent. She was thus, deliberately, flouting the Tribunal orders.
  - iii. Apart from her own assertions to that effect, there was no corroborative evidence that she, or her doctors, had ever sent more comprehensive records to the Respondent, or the Tribunal. The Tribunal file reveals no such documentation and the Claimant provided no covering letters/emails from either she or her doctors, enclosing such documents. At the Hearing, for the first time and despite such being requested by the Respondent nearly five months ago, she provided a proof of postage of correspondence to the Respondent direct (not via their solicitors), on 19 March 2018. There was no description on the document as to what any such correspondence might have contained and as it pre-dated her claim by some two months, was clearly not sent in compliance with any tribunal orders. *Even if* she had sent such medical evidence at that point, it must have been clear to her subsequently that the Respondent solicitors had not seen it and that to comply with the Tribunal orders, she should have re-sent it.
  - iv. She had brought to this Hearing, but not copied for the Respondent, or the Tribunal, what she said was a copy of her GP's notes. She was asked as to when she had obtained such notes and said that she had done so that morning. This further indicated to me that her assertions as to previous disclosure were untrue and that it was only when faced with attendance at this Hearing that she apparently sourced these notes.

11. Non-Compliance with Tribunal Orders. As should be clear from the history of this case, as set out above, the Claimant has been a serial non-complier with Tribunal orders and strike-out warnings. She has failed to comply with



two orders (of 8 January and 15 February), failed to react within time to two strike-out warnings (of 5 February and 25 March) and failed to comply with two directions from the Tribunal as to responses to correspondence (7 February and 8 April). Not only, however, has she not complied, but her stance in doing so has been positively defiant, with her considering that the provision of an impact statement was '*irrelevant*' and stating in bold terms that she '*will not be providing any medical evidence*' unless the Tribunal acceded to her demand for an RRO. Applying (**Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684**), I find that such behaviour is unreasonable conduct, taking the form of a deliberate and persistent disregard of required procedural steps. On that basis, I consider strike out proportionate, particularly bearing in mind the Overriding Objective, for the following reasons:

- a. The Claimant has had, to date, well over a year to advance her claim, but has failed to do so, with only two substantive Tribunal directions partially complied with, the very brief impact statement and entirely inadequate schedule of loss she has provided. She has still failed to comply with orders to both disclose her documents generally and her medical evidence and to exchange witness statements, the deadlines for which are long past. To get to this very unsatisfactory state has taken the listing of four preliminary hearings, only two of which have proceeded, with two being postponed, entirely due to the fault of the Claimant. I do not consider that such constitutes proportionate use of the Tribunal's resources, when many other cases await progressing and hearing.
- b. The requirement to deal with a case fairly and justly applies to both parties, not just to the Claimant. It cannot be fair or just to expect the Respondent to suffer the delay and expense it has, to date, in particular by preparation for and attendance at four hearings (two of them abortive), but with three of them resulting in no real advance of the case to hearing. There is also potentially the question, over time, bearing in mind any likely future listing of any substantive hearing extending well into 2020 and that much of the events in this matter having taken place well over two years prior to any such hearing, that the cogency of evidence will be affected and crucial witnesses may no longer be available.
- c. Bearing in mind the Claimant's demeanour at this Hearing and her past behaviour, I consider it unlikely that even if her claim were not struck out that she would, between now and any newly-listed substantive hearing, be any more compliant than she has been to date. Instead, it seems more likely than not that her behaviour will continue as before, with yet more preliminary hearings and strike out warnings, culminating, if one is reached, in yet another substantive hearing, in perhaps nine months or so's time, for which her case will be unprepared and which she will be incapable of conducting. This Hearing today did not include any cross-examination, but yet the Claimant's demeanour was as described above. I consider it likely, in that event that she would either be unable to

conduct cross-examination, or withstand it herself, thus rendering fair trial potentially impossible.

- d. While I note that the treatment of non-compliance by a party with Tribunal orders is not dealt with in the same severity as in the Civil Courts, there must nonetheless be some sanction to continued non-compliance, if such orders, particularly when reiterated in strike-out warnings, are deliberately ignored. In **Harris v Academies Enterprise Trust [2015] IRLR 208 EAT** Langstaff J (as he then was) stated that:

*"Rules are there to be observed, orders are there to be observed, and breaches are not trivial matters; they should result in careful consideration whenever they occur. ... Tribunal judges are entitled to take a stricter line than they may have taken previously, but it remains a matter to be assessed from within the existing Rules and the principles in existing cases."*

- e. I am conscious of the guidance in **Farmah** and consider that these breaches are serious, range over at least six months and are deliberate. I am also conscious that in striking out her claim, the Claimant will suffer the prejudice of being unable to pursue it further, but I balance that against the requirements of the Overriding Objective and fairness and justice due to the Respondent and consider that the balance falls in favour of the latter.

12. **Manner of Conduct of Proceedings being Unreasonable.** There is some overlap in this respect, with my findings above as to non-compliance with Tribunal orders, but I consider also that there has been unreasonable behaviour by the Claimant, supporting my decision to strike-out her claim, for the following reasons:

- a. The Claimant deliberately sought to mislead the Respondent solicitors at to the first case management hearing proceeding and then did not, without good reason, attend it.
- b. She has misled both the Tribunal and the Respondent as to the existence of legal advisors, resulting in wasted consideration and correspondence by both.
- c. She has consistently, in breach of the Overriding Objective's requirement that she be under a duty to co-operate with both the Tribunal and the Respondent, either failed to respond to correspondence at all, or to do so comprehensively, or in a timely fashion: by way of example, in respect of whether or not she had in fact disclosed her medical records previously, to whom and when, or in the alternative, if she had done so and they were missing, to do so again.
- d. She failed to attend the 14 May telephone hearing. She said that this was because she had entered into new employment on 9 May and effectively didn't wish to ask for the time off from a new employer. However, it would have been perfectly feasible for her to have said, when offered the job that she had 'a prior appointment' on 14 May, for

which she would need to take an hour off, or have an extended or early lunch break. It seems inherently unlikely that any potential employer would have been so unreasonable as to have refused such a request and it seems more likely to me that this is in fact an excuse on her part for non-attendance.

- e. Her assertion that she had sent documents to both the Tribunal and the Respondent, when she clearly had not.
  - f. Her entirely selective disclosure of just two short sections of the summary pages of her medical notes.
  - g. Her failure to in any way adequately address the requirement for a detailed schedule of loss.
  - h. Her rather arbitrary comment that she would re-send her medical evidence 'if she had too', but would be uncontactable for a week, merely due to being in Blackpool.
  - i. Her conduct necessitating the vacating of a three-day substantive hearing.
13. Conclusion. For these reasons, therefore, I find that subject to Rule(1)(b) and (c) the Claimant's claim of disability discrimination should be struck out.

**Employment Judge C H O'Rourke**

Bristol

Dated 4 July 2019