



## EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4108155/2021

Held in Edinburgh on 23 September 2022

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Employment Judge Sutherland

**Kirsty Thin**

**Claimant  
No appearance**

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**Scottish Water**

**Respondent  
Represented by  
Mr R Turnbull, Solicitor**

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### JUDGMENT

The Judgment of the Tribunal is that the claim is struck out in its entirety.

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### REASONS

#### Introduction

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1. The Claimant has presented a complaint of unfair dismissal.
2. A preliminary hearing was listed for today to determine the Respondent's application for strike out.

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#### Background

3. On 10 March 2021 the Claimant has presented a complaint of unfair dismissal.
4. The Claimant had the benefit of professional representation during the

period 29 June 2021 to 14 October 2021.

5. On 20 September 2021 a final hearing was listed to take place on 8,9, and 10 December 2021 having regard to parties' availability.
6. In October 2021 the Respondent sought to obtain a substantive response from the Claimant to the outstanding information, statement of facts and list of issues on a voluntary basis without success.
7. In October 2021 the Claimant failed to provide any documents for the joint bundle or confirmation that none were to be included as required by Order of 20 August 2021.
8. On 6 December 2021 the Claimant advised that she was unable to attend the final hearing "as I have been admitted to hospital and will be kept in for at least another week as a result of a serious car accident".
9. On 7 December 2021 the application was granted and the Claimant was ordered to provide written medical evidence from her GP or other treating physician certifying that she was admitted to hospital as a result of a car accident which rendered her unfit to attend the hearing and providing a progress of when she will be fit to attend. The Claimant did not respond and a reminder was issued on 14 January 2022. On 19 January the Claimant advised that her GP has been absent from work due to COVID but will be back tomorrow and she will sent the letter as soon as possible. No such letter was received and a reminder was issued on 9 February 22. A strike out warning was then issued on 24 February 2022 on grounds of non-compliance with the Order of 7 December 2021.
10. On 2 March 2022 the Claimant provided to the Tribunal what she described as a "confirmation letter from my GP" confirming the reason for her absence. The confirmation letter stated "On the weekend prior to the 8<sup>th</sup> of December Mrs Thin was involved in a serious car accident which resulted in her having too undergo surgery and she was therefore hospitalized for 10 days thereafter". On 3 March 2022 the Tribunal explained that the letter was not a valid medical certificate because was not on headed paper and was not signed. A further reminder was issued on 21 March 2022.
11. On 6 April 2022 the Respondent applied for strike out on the basis of

unreasonable conduct and a failure to actively pursue.

- 5 12. On 13 April 2022 the Claimant sought and was granted an additional week to respond. On 20 April 2022 the Claimant advised having accidentally deleted all related correspondence and seeking additional time to respond. The Claimant was granted a further week to respond. On 3 May 2022 the Claimant sought a further week to respond because of personal circumstances which was granted.
- 10 13. On 7 June 2022 a preliminary hearing was listed for today (23 September 2022), having regard to parties' availability, to determine the Respondent's application for strike out.
- 15 14. On 20 September 2022 the Claimant emailed the Tribunal to advise "I will not be able to attend the hearing on Thursday as I have tested positive for covid". The Claimant did not advise that she was unwell. The Claimant was directed to provide by return evidence of her positive Covid-19 test result. On 20 September 2022 the Claimant provided a picture of a lateral flow test result showing one red line and one black line. On 21 September 2022 the Tribunal wrote to the Claimant advising that according to UK Government guidance a positive lateral flow test result would show two black lines and that on the face of it she has not provided a positive test result. She was asked to explain as a matter of urgency what the photograph discloses and the basis on which she asserts that it is a valid test result.
- 20 15. By written reply, on 21 September 2022, the Claimant stated "I have just carried out another lateral test taken just after your correspondence. Please see attached photograph of my positive test clearly showing two red lines in line with the details set out your most recent correspondence. I tested positive yesterday which was the first day I tested positive as my test was negative. This test is a legitimate test..." The Claimant did not advise that she was unwell.
- 25 16. On 21 September 2022 the Tribunal wrote to the Claimant to advise:  
*"the accompanying photograph showed a left hand holding to camera a lateral flow test displaying 2 red lines at C and T. This is noted to be a positive lateral flow covid test. The serial number is LWD21118413. The*
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5 *photograph is attached. The photograph appeared to be professionally taken. An Internet search of “positive covid test picture” immediately brings up a photograph which is identical to that produced by the claimant. On close inspection, the test result carries a serial number of LWD21118413. The link is attached: Look familiar? How rapid tests changed the pandemic - BBC News. It is plain that the photograph produced by the claimant is not a lateral flow test result taken today, nor even a test taken by her, but a photograph downloaded from the Internet and sent to the tribunal to support the application for postponement. The claimants application for postponement is refused. On the face of it, the claimant has attempted to deceive the tribunal, and the respondent. She is invited to explain her actions by return. This matter will be considered at the strike out hearing due to take place on 23 September 2022”*

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15 17. On 21 September 2022 the Claimant replied stating: “I refute your last correspondence please see three photos attached showing a positive covid lateral test”. The Claimant did not advise that she was unwell.

18. On 22 September 2022 the Tribunal wrote to the Claimant stating: “Once more, there is nothing to identify the test as relating to her, nor is there any date on it or the photograph. Given the claimant’s correspondence of 20 21 September, she has continued to fail to provide convincing evidence that she has had a positive covid test. The hearing will proceed on 23 September at 10:00 am”.

## **Law**

### 25 Striking out

19. 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-
- 30 (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

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

20. 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*).

21. 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.

#### *Manner of proceedings*

22. In considering whether to strike out for manner of proceedings, a 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 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*

23. 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*).

24. 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, Court of Appeal*).

*Not actively pursued*

25. 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.

*Fair hearing no longer possible*

26. 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.
27. 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.
28. In exceptional cases, where there is 'deliberate and persistent disregard of required procedural steps', a claim may be struck out without the tribunal considering whether a fair trial is still possible (*De Keyser; Blockbuster*).

**Submissions**

29. The Respondent's submissions were in summary as follows –
- a. The tribunal must apply a two stage test to an application for strike out: consider whether the grounds have been established; if so, decide whether to exercise its discretion (*Hasan v Tesco Stores Ltd UKEAT/0098/16*)
  - b. The the Claimant has failed to comply with the Orders of 7 December 2021, 3 March 2022, 7 April 2022, and 22 April 2022. The Claimant

has failed to provide a medical certificate for over 9 months. She has not explained the photographs she sent despite being directed to do so.

- 5 c. The magnitude of the default is significant given both the length of time and the repeated default which resulted in a postponement of the final hearing.
- d. This default has caused significant disruption, delay and expense, significant correspondence in seeking to address each breach, and risk to witness recollection.
- 10 e. On multiple occasions the Tribunal has explained what is required, given additional opportunities to respond, and warned of the risk of strike out.
- f. Any lesser disposal is likely to be futile, will simply result in delay and wasted time and expense rather than adequate progress within in a reasonable timescale, and accordingly is contrary to the overriding objective.
- 15 g. The Claimant has been given repeated opportunities to provide a substantive response to the orders and/or to explain her delay but has failed to do so.
- 20 h. Her continuing failure is considered wilful and significant and this accordingly amounts to unreasonable and vexatious conduct. The Claimant has attempted to mislead the Tribunal by securing a postponement on medical grounds without ever providing a valid medical certificate, and by providing misleading letters and photographs.
- 25 i. Vexatious means little basis in law, putting the respondent to wholly disproportionate harassment and expense, an abuse of process (*Attorney General v Barker [2000] EWHC 453*).
- 30 j. Tampering with medical evidence relied upon in seeking a postponement justifies dismissal because the tribunal "lost trust in her veracity and there could therefore no longer be a fair trial" (*Sud v London Borough of Hounslow UKEAT/0156/14*).

- k. It is not possible to have a fair hearing where the Claimant refuses to specify her claim
- 5 l. It is not necessary to find that a fair trial is not possible at all; it is sufficient that a fair trial is not possible within the trial window and that an adjournment would be prejudicial (*Emuemukoro v Croma Vigilant (Scotland) Ltd and others [2021] 6 WLUK 699*)
- 10 m. A final hearing has already been postponed and significant delay has been caused to its relisting by the Claimant's failure to specify her claim and failure to provide a medical certificate. A fair trial is not possible at all and any further delay would be prejudicial to the Respondent given the material risk of a continuing failure to comply with orders of the tribunal.
- 15 n. The claim has not been actively pursued. The Claimant did not provide documents for the joint bundle or confirm that she did not have any. The Claimant has only engaged selectively by seeking extensions of time but has not provided substantive responses to voluntary request and Tribunal orders. A complete lack of engagement in any meaningful way and a tendency to respond selectively may be sufficient to justify strike out (*Khan v London Borough of Barnet UKEAT/0002/18*)
- 20 o. Failure to provide a valid or sufficient medical certificate in the context of a postponement may justify strike out (*Rolls Royce PLC v Riddle UKEATS/0044/07*)
- 25 30. The Claimant was invited to do so but did not provide any written submissions.

## **Discussion and decision**

### *Non-compliance with Tribunal order*

- 30 31. The Claimant has failed to provide medical evidence certifying her unfitness to attend the final hearing despite being ordered to do so on 7 December 2021, and 14 January, 9 February, 21 March, 13 April and 3 May 2022.
32. The Claimant secured a postponement of the final hearing without



provision of any medical evidence. The relisting of that hearing has been substantially delayed pending provision of medical evidence which has not been forthcoming. The magnitude of her default is therefore considered to be serious in the circumstances. Her continuing default put the Respondent to the inconvenience and expense of delays, repeated applications, preparation of written submissions and attendance at a hearing on strike out.

*Not actively pursued*

- 10 33. The Claimant has engaged in some correspondence with the Respondent and the Tribunal. However the Claimant has not provided a substantive response to the Respondent on the outstanding information, statement of facts and list of issues. She has not provided any documents for the joint bundle or confirmed that none were to be included. The Claimant has delayed relisting of the postponed hearing by not providing medical evidence justifying its postponement.
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34. It is apparent from these circumstances that the Claimant has not taken the required procedural steps and is not therefore actively pursuing her claim.

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*Manner of proceedings*

- 25 35. On 20 September 2022 the Claimant sought a postponement of today's hearing on the basis that she would be unable to attend because had tested positive for Covid. She was directed to provide evidence of her positive test result. She then provided a photograph of a lateral flow test result showing one red line and one black line. On 21 September 2022 the Tribunal advised that a positive lateral flow test result would show two black lines and that on the face of it she has not provided a positive test result. She was asked to explain as a matter of urgency the evidence she had provided. By reply she advised carrying out another lateral flow test and that she had enclosed a photograph of it. The Tribunal replied advising that this photograph was downloaded from the internet and was not therefore a lateral flow test taken by her. She was asked to explain
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her actions by return. By reply the Claimant simply provided further photographs of other tests whose provenance is unknown.

36. The Claimant has again attempted to secure the postponement of a hearing on medical grounds without provision of valid medical evidence.

5 Furthermore the Claimant has sought to rely upon evidence of highly dubious origin being an unsigned GP letter on unheaded paper, being a photograph of a lateral flow test with a black instead of a red second line, and being a photograph of a lateral flow test downloaded from the internet. The Claimant was called upon to explain this apparent dubiety but on each occasion she has failed to do so. In the circumstances the Tribunal has no reasonable alternative but to conclude that the Claimant has behaved unreasonably and scandalously in the conduct of her claim.

*Fair hearing no longer possible*

15 37. If her failures to actively and properly pursue her claim were as a result of oversight or neglect it would be necessary to consider whether a fair hearing is still possible. However if her failures were as a result of deliberate and persistent disregard it is not necessary to do so.

20 38. The Claimant has repeatedly failed to comply with orders and directions of the tribunal and failed to actively and properly pursue her complaints. She has done so without offering a satisfactory explanation or reasonable excuse. It is fully recognised that the Claimant is a litigant in person but these orders and directions have been in clear and explicit terms. It is considered in the circumstances that her continuing failure to comply with orders and directions, and to actively and properly pursue her claim, is not the product of oversight or neglect but instead amounts to intentional and disrespectful default.

25 39. The orders and directions were 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 her prior conduct that an unless order would not prompt the claimant to comply within a reasonable time frame, if at all. In the circumstances there does not appear to be a less punitive response

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available.

5 40. In any event, it is apparent that a fair trial is no longer possible. The Claimant has sought to rely upon evidence of highly dubious origin and has failed to provide any explanation for that dubiety. This materially and fatally undermines the Tribunal's trust in her ability to give credible testimony regarding her claim.

10 41. 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 her claim is struck out in its entirety under Rule 37(1)(b),(c) and (d) on grounds of failure to comply with orders of the Tribunal and that it has not been actively pursued in an appropriate manner.

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