



EMPLOYMENT TRIBUNALS

Claimant: Ms B Noah

Respondent: British Airways Plc

Heard at: Reading Employment Tribunal (by video)

On: 29 January 2025

Before: Employment Judge Annand

Representation
Claimant: Ms Noah, in person
Respondent: Ms Hendrick, solicitor

JUDGMENT

1. The Respondent's application to strike out the Claimant's claims is refused.
2. The Respondent's application for an Unless Order is granted.

REASONS

1. On 17 September 2024, the Respondent wrote to the Tribunal to make an application requesting that the Claimant's claims be struck out. I heard that application at a preliminary hearing, held by video, on 29 January 2025. Before I set out my reasons for refusing the strike out application and granting the application for an Unless Order, I shall set out the background to this case.

The background

2. The Claimant worked for the Respondent as a Baggage Tracing Specialist. She was employed between 16 April 2013 until her dismissal on 16 August 2023. The Claimant contacted Acas for early conciliation purposes on 30 October 2023 and the certificate was issued on 10 November 2023. The Claimant submitted a claim to the Employment Tribunal on 11 November 2023. The Claim Form referred to a claim of unfair dismissal and disability

discrimination. The Claimant had been dismissed under the Respondent's absence management policy and the Claimant's position was that her mental health had frequently been the cause of her absences.

3. On 7 March 2024, Employment Judge Antsis sent the parties a list of Orders. The Claimant was ordered to provide a Schedule of Loss by 21 March 2024, the Claimant was ordered to inform the Respondent what disabilities she was relying on by 4 April 2024 and was ordered to provide a Disability Impact Statement and medical records by the same date. The Respondent was ordered to provide a response setting out whether disability was conceded by 18 April 2024.
4. On 16 April 2024, the Claimant wrote to the Tribunal saying that by the time she was sent the Tribunal's Orders the deadlines had passed. The Respondent's solicitor, Ms Kendrick, responded agreeing the dates had passed by the time the Tribunal had sent out the Order but asked for a Schedule of Loss by 2 May 2024, which was the same date that a preliminary hearing had been listed, and asked for the medical evidence and Disability Impact Statement by 14 May 2024.
5. On 2 May 2024, a preliminary hearing was held by Employment Judge Forde. The final hearing was listed on 26, 27 and 28 March 2025 at Reading Employment Tribunal. It was clarified that the Claimant was bringing claims of unfair dismissal, discrimination arising from disability and a failure to make reasonable adjustments.
6. Employment Judge Forde ordered the Claimant to provide a Schedule of Loss by 31 May 2024. It was confirmed at the hearing the Claimant was saying she was disabled over the relevant period by virtue of having anxiety and depression. The Claimant was ordered to provide the Respondent with medical evidence and a Disability Impact Statement by 31 May 2024. The parties were ordered to provide disclosure of documents by 5 July 2024, the Respondent was ordered to prepare a file of documents by 9 August 2024 and send a copy to the Claimant by 23 August 2024. Witness statements were ordered to be exchanged on 13 September 2024. At the preliminary hearing, the Claimant said to the Judge she was seeking reinstatement and not financial compensation. She also confirmed she had started a new full-time role in April 2024.
7. On 6 June 2024, the Claimant received her medical records from her GP surgery.
8. On 17 June 2024, Ms Kendrick emailed the Claimant asking when they would receive her medical evidence and her Disability Impact Statement. The Claimant replied saying that on 11 June 2024, her balcony had caught fire. The fire went into the rooms. She noted thankfully no one was hurt but since then it had not been safe to return. She noted her family had been moved to temporary accommodation until things settle down. She noted she was not in the right mindset to go back to work and may hand in her notice. She said she had received her medical records but trying to get representation was taking longer than expected. Ms Kendrick said she was sorry to hear this but thanked the Claimant for letting her know.

9. On 5 July 2024, Ms Kendrick wrote to the Tribunal. She noted they were very sympathetic to the Claimant's position but asked the Claimant to provide a date by which they would receive the medical evidence and the Disability Impact Statement.
10. On the same day, the Respondent provided its disclosure to the Claimant.
11. On 8 July 2024, the Claimant forwarded her medical records to Ms Kendrick. Ms Kendrick replied and noted she was still waiting for the Disability Impact Statement. The Claimant replied on the same day, 8 July 2024, asking to be reminded when it was due. Ms Kendrick replied stating it was due on 31 May 2024 but said that if the Claimant could send it by the end of the week that would be fine. On the same day, the Claimant replied saying she did not think that she would be able to produce it by the end of the week. She said she had to resign from her current role due to the fire on the balcony. She explained that she had been relocated, along with her family, to a location which was two hours away from her previous address. She noted she had not been allowed back into her flat and barely had any clothes with her. She also noted she was in the process of getting legal assistance and was waiting to hear back. Ms Kendrick said she was sorry to hear this and thanked the Claimant for letting her know.
12. On 12 August 2024, Ms Kendrick wrote to the Claimant again asking for an update and when they could expect to receive her documents. Ms Kendrick did not receive a response. She wrote again on 19 August 2024 asking the Claimant to respond to her earlier email, and again on 27 August 2024.
13. On 3 September 2024, Ms Kendrick wrote to the Tribunal and the Claimant. She set out the chronology as set out above and noted she had not heard from the Claimant in response to the three emails sent in August. She noted that a number of the Tribunal's Orders were now overdue.
14. On 17 September 2024, Ms Kendrick wrote to the Tribunal and the Claimant again. Ms Kendrick applied to strike out the Claimant's claims or, in the alternative, asked the Tribunal to make an Unless Order. It was noted that in the two weeks since the Respondent had last written to the Tribunal, they had not received a response from the Claimant. The Respondent still had not received a Disability Impact Statement (due on 31 May 2024). The Respondent had therefore not set out its position on whether disability was conceded, which was supposed to have taken place by 28 June 2024. The Claimant had not provided disclosure which was due on 5 July 2024 and the parties had therefore not been able to agree a bundle which should have been done by 9 August 2024. Witness statements had been due to be exchanged by 13 September 2024, but this had also not taken place. The Respondent applied for the claims to be struck out on the basis that they were not being actively pursued or in the alternative, asked for an Unless Order.
15. On 11 November 2024, Ms Kendrick wrote to the Tribunal and the Claimant again saying that since her previous email to the Tribunal she had not heard anything from the Tribunal or the Claimant.

16. On 12 November 2024, the Claimant responded to Ms Kendrick's email. She apologised for not getting back to her and noted she still had not been able to get legal representation. She noted she was considering carrying on with the claims herself. She asked to be reminded what needed to be submitted and said she would get back to Ms Kendrick as soon as possible. On the same day, Ms Kendrick wrote back stating that the Disability Impact Statement was overdue (31 May 2024) and the Claimant's disclosure was still outstanding (5 July 2024).
17. On 13 December 2024, the Tribunal listed a preliminary hearing on 29 January 2025. The purpose of the hearing was to decide if the Claimant's claims should be struck out on the ground that the Claimant has failed to comply with an Order of the Tribunal or because the Claimant is not actively pursuing her claims, and in the alternative, whether an unless order should be made.
18. On 15 January 2025, Ms Kendrick sent a preliminary hearing bundle to the Claimant and the Tribunal in preparation for the hearing on 29 January 2025.
19. At the preliminary hearing today, Ms Kendrick attended for the Respondent. Ms Kendrick confirmed that the Claimant had still not complied with the Orders of the Tribunal to provide a Disability Impact Statement by 31 May 2024 and had not provided disclosure. Ms Kendrick also confirmed that the last communication she had received from the Claimant was the email of 12 November 2024.
20. The Claimant explained that the reason for the delay was that she had been through a very difficult period since the fire in her previous accommodation. She explained she lives with her elderly mother and her son. She said she wishes to proceed with the claim and is now feeling a little better. She explained that she had struggled without representation to continue with the claim herself. She had difficulty taking the first step. If an unless order was granted said she would try her best to comply with the order and if she did not, then she understood the claim would be struck out.

The law

21. Rule 38(1) of the Employment Tribunals Rules of Procedure 2024 provides that the 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.
 - (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 claim or response (or the part to be struck out).
22. The power may only be exercised if the claimant has been given a reasonable opportunity to make representations, either in writing or, if requested by the claimant, at a hearing (Rule 38(2)).
23. When considering whether to strike out a claim, a tribunal must adopt a two-stage approach. First, it must consider whether any of the grounds set out in rule 38(1)(a)–(e) have been established, and then, having identified any established grounds, it must decide whether to exercise its discretion to order strike-out (*Hasan v Tesco Stores Ltd* EAT 0098/16).
24. In deciding whether to strike out a party's case for non-compliance with an order under rule 38(1)(c), a tribunal will 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 or his or her representative, what disruption, unfairness or prejudice has been caused, whether a fair hearing would still be possible, and whether striking out or some lesser remedy would be an appropriate response to the disobedience. In *Weir Valves and Controls (UK) Ltd v Armitage* [2004] ICR 371, EAT, the EAT held that a Tribunal must consider if strike out is a proportionate response.
25. In *Otehtubi v Friends in St Helier* EAT 0094/16 Mrs Justice Laing stressed that, because of the very severe consequences that flowed from a decision to strike out, the power should only be exercised on the clearest grounds and as a matter of last resort. It should never be exercised in a rush or be based on inadequate information.
26. In *Evans and anor v Commissioner of Police of the Metropolis* [1993] ICR 151, CA, the Court of Appeal considered an employment tribunal's power to strike out a claim for want of prosecution (this was the language used in the Tribunal Rules 2001). It held a tribunal can strike out a claim where: (1) there has been delay that is intentional or contumelious (disrespectful or abusive to the court), or (2) there has been inordinate and inexcusable delay, which gives rise to a substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the respondent.

Reasons for decision

27. I am satisfied that two of the grounds set out in rule 38(1)(a)–(e) have been established in this case. The Claimant failed to comply with an Order of the Tribunal in that she failed to provide a Disability Impact Statement by 31 May 2024, and she failed to provide disclosure of documents by 5 July 2024.
28. In terms of the magnitude of the non-compliance, these are serious acts of non-compliance. The Orders have not been complied with to date. They have prevented the Respondent from being able to progress the preparations for the final hearing. A joint bundle has not been prepared and witness statements have not been exchanged. Other than providing her

medical records, the Claimant has done nothing else to prepare for the final hearing since July 2024. This has undoubtedly caused considerable disruption and has the potential to jeopardize the final hearing date, which is now just 2 months away.

29. In addition, I am satisfied that the Claimant has failed to actively progress her claims for the same reasons given above. She has also failed to respond to Ms Kendrick's numerous emails since August 2024, except for sending one email on 12 November 2024. In that email she said she would take the necessary steps as soon as possible and then failed to do so.
30. I find in this case that there has been inordinate delay. The Claimant was to provide the Disability Impact Statement by 31 May 2024, which is 9 months ago. She was to provide disclosure by 5 July 2024, which is over 6 months ago. While the Claimant provided an understandable explanation for her failure to comply in June and July 2024, there has been an on-going failure to comply since then. She has failed to respond to Ms Kendrick's emails, has repeatedly been reminded of what steps she needed to take and still has failed to progress her claim at all since this date.
31. I have however decided not to exercise my discretion to strike out the Claimant's claims. I am mindful of the guidance in the case law that this power should only be exercised as a matter of last resort. In reaching my decision I have born in mind that while disability is not conceded by the Respondent, the Claimant is asserting that is disabled by virtue of suffering with depression and anxiety. I have seen some medical evidence relating to this, as was submitted with the Claimant's Claim Form, and while I obviously make no findings of fact about whether the Claimant was disabled at the relevant period, I have born in mind what is contained within those medical documents when reaching this decision.
32. I have decided to make an Unless Order, which will require the Claimant to provide the Disability Impact Statement and her disclosure within 7 days. If she fails to do so, her claims will be automatically struck out. It is also highly likely that if the Claimant fails to meet any of the other future Orders set by the Tribunal, that the Respondent will apply again to strike out her claims.
33. If the Claimant complies with the Unless Order, I am of the view that there is still sufficient time to prepare for the final hearing which starts on 26 March 2025. I accept the Respondent is placed under additional pressure to take the necessary steps to prepare for the final hearing within just 8 weeks, and in the event that the Claimant complies with the Unless Order but fails to comply with any further Orders set by the Tribunal to prepare for the final hearing, then that will of course be taken into account by the Tribunal should any future strike out application be made.
34. For these reasons, I have decided not to strike out the Claimant's claims but instead to grant the Respondent's application for an Unless Order.

Approved by:

Employment Judge Annand
Date: 29 January 2025

JUDGMENT SENT TO THE PARTIES ON

29 January 2025

FOR THE TRIBUNAL OFFICE

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