RM

EMPLOYMENT TRIBUNALS

Claimant:	**Mr C Bereanu**
Respondents:	**(1) Core Atlantic Limited** **(2) Liquid Friday Limited**
Heard at:	**East London Hearing Centre**
On:	**21 May 2019**
Before:	**Employment Judge Russell**

Representation

Claimant:	**Did not attend**
1st Respondent:	**Mrs J Smeaton (Counsel)**
2nd Respondent:	**Mr C Ludlow (Counsel)**

JUDGMENT

The judgment of the Tribunal is that:

(1) All of the Claimant's claims are struck out pursuant to Rule 37(1)(c) and (d) of the Employment Tribunal Rules of Procedure 2013.

(2) There is no order as to costs.

REASONS

1 By a claim form presented to the Tribunal on 12 October 2017, the Claimant brought complaints of automatically unfair dismissal and for unpaid wages. Initially there were three Respondents to the claim. Employment Judge Jones struck out the claims against the original First Respondent as early as 22 January 2018. The Claimant was being greatly dissatisfied with the decision of Employment Judge Jones and sought to appeal it. He did so outside of the required time limit and the EAT declined to hear the appeal.

2 Since that time, the Claimant has continued to be unhappy with the decision of Judge Jones and has made several applications that she recuse herself from proceedings. The most recent at a Preliminary Hearing on 30 January 2019 before Employment Judge Moor. Judge Moor's Summary of the hearing records the claims brought by the Claimant, the procedural history of the case to date, a list of the issues to be decided and includes Case Management Orders to ensure that the case was properly

prepared for the final hearing listed for 25 and 26 April 2019. These were:

2.1 disclosure of documents by 14 February 2019,
2.2 the Claimant to provide a statement of loss of wages by 28 February 2019;
2.3 the parties to liaise and agree a final hearing bundle by 21 March 2019;
2.4 exchange of witness statements by 28 March 2019.

3 As recorded by Judge Moor at paragraphs 11 to 13 of her Summary, the Claimant was unhappy with the conduct of the hearing by Judge Moor and decided to leave before its conclusion. I am told that this was before the Case Management Orders were made. However, the Summary containing the Orders was sent to the parties on 2 April 2019 and I am satisfied that the Claimant was aware of the procedural steps required and the dates for compliance.

4 Since the Preliminary Hearing on 30 January 2019, the Claimant's only engagement with this litigation has been to communicate with the Employment Tribunal in pursuant of his request for an Order the Employment Judge Jones recuse herself.

5 On 2 April 2019, the Tribunal sent a letter to the parties in which Employment Judge Jones set out her decision not to recuse herself and provided her reasons for such decision. Included at the conclusion of the letter was the decision of Employment Judge Moor to postpone the exchange of witness statements until 4 April 2019 and to re-list the final hearing for 21 and 22 May 2019. I am satisfied that this letter was sent to the Claimant at the correct email address, this being the previous method of correspondence agreed and used by the Claimant in this litigation.

6 The formal Notice of Hearing was not sent until 10 May 2019. However, it did nothing more than confirm the hearing dates given in the Tribunal's letter dated 2 April 2019. In the circumstances, I am satisfied that the Claimant has had proper notice of today's hearing.

7 Both Respondents have complied with Case Management Orders. The Claimant has not. He has taken no active step in the preparations for the hearing, providing no disclosure, no statement of loss of wages, no input into an agreed bundle and no witness statement. The Claimant has not responded to contact from ACAS and he has neither attended today's hearing nor sent any message to indicate a good reason for his absence.

Law

8 The Employment Tribunal Rules of Procedure 2013, rule 37 provides that:

> **37.—(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;**
>
> **(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).

9 The factors to be taken into account in an application under rule 37(1)(c) to (e) largely overlap. In **Blockbuster Entertainment Ltd v James** [2006] IRLR 630, the Court of Appeal emphasised that strike out was a draconian power not to be too readily exercised. The cardinal conditions for its exercise must be present; either that the unreasonable conduct is taking the form of a deliberate and persistent disregard of required procedural steps or that it has made a fair trial impossible. If these two conditions are fulfilled it is still necessary to consider whether striking out is a proportionate response or whether there is a less drastic solution which may be adopted. A strike out application should not be made at the point of trial, rather the time to deal with persistent or deliberate failure to comply with rules and orders designed to secure a fair and orderly hearing is when they have reached the point of no return.

10 In **Harris v Academies Enterprise Trust & others** [2015] IRLR 208, Langstaff P reviewed the rules applicable in the Employment Tribunal and the approach to be adopted in determining a strike out application. Relevant factors will include consideration of why the party in default had behaved as he had and the nature of what has happened. Repeated failure to comply with orders of the Tribunal over some period of time may give rise to a view that if further indulgence is granted the same will simply happen again; equally, what has happened may be an aberration and unlikely to reoccur. Justice is not simply a question of the court reaching a decision that may be fair as between the parties, in the sense of fairly resolving the issues, but it also involves delivering justice within a reasonable period of time. The Tribunal must also have regard to costs and overall justice which means that each case should be dealt with in a way that ensures that other cases are not deprived of their own fair share of the resources of the court. Accordingly it is relevant in an appropriate case for a court to exercise its powers to ensure that the case is heard promptly. Although in many cases an Unless Order will be granted before strike out, it is not an essential prerequisite of an application to strike out and there is no guarantee that one will not follow in an appropriate case. At paragraph 40, Langstaff P held that Orders are made to be observed, breaches are not mere trivial matters and should result in careful consideration whenever they occur. Tribunal judges are entitled to take a stricter line than they may have taken previously but whether or not to strike out a claim should be decided applying rule 37 and existing principles in cases such as **Blockbuster**.

11 The overriding objective in ordinary civil cases, including employment claims, is to deal with cases justly and expeditiously without unreasonable expense. Article 6 of the ECHR emphasises that every litigant is entitled to "a fair trial within a reasonable period". This is an entitlement of both parties to litigation.

Conclusions

12 Having had regard to the history of the proceedings and having heard the submissions of Mrs Smeaton and Mr Ludlow, I am satisfied that the Claimant has not complied with the Orders made on 30 January 2019 and has not actively pursued his claim since that hearing. The claim was initiated in October 2017 and has benefitted from a considerable amount of Tribunal attention. The Claimant has previously corresponded by the Tribunal by email yet has not done so for almost four months, despite use of the

same email address. At this final stage of the process, the Claimant has not attended and has not engaged to ensure that his claims could be fairly and justly heard. There has been no attempt to comply with Case Management Orders or application for more time and/or a postponement of this hearing. In the circumstances, I conclude that there has been a deliberate and persistent failure to comply rather than a single, justifiable default.

13 Having decided that there was a failure to comply with Orders and a failure actively to pursue the claim, I considered whether or not the hearing should be postponed to afford the Claimant a further opportunity to attend and/or allied with any other form of Order (such as an unless order). In the circumstances of the case, I concluded that neither were in accordance with the overriding objective or the interests of justice to do so. A re-listed hearing could not take place for some months and there is considerable pressure upon the Tribunal's stretched resources, with many other cases awaiting hearing. A further delay would increase the costs of both Respondents who were ready, willing and able to proceed today. In the absence of any evidence to the contrary, I have concluded that the Claimant has chosen to disengage from prosecuting his claim and has absented himself today. If further indulgence is granted, I have reached the conclusion that the Claimant will simply continue to fail to comply. In the circumstances, and mindful of the draconian nature of the order, I am satisfied that the appropriate course of action is to strike out all of the claims.

Costs

14 After announcing my decision to strike out, both Respondents made an application for their costs incurred in defending these proceedings. Core Atlantic Limited made their application for costs generally, without providing a specific figure. Liquid Friday Limited relied upon a schedule of costs seeking in total some £11,019 including VAT.

15 Rule 76 of the Employment Tribunal Rules of Procedure 2013 provides that:

> **"A Tribunal may make a costs order or a preparation time order and shall consider whether to do so where it considers that:**
>
> **(a) a party or that party's representative have acted vexatiously, feasible, disruptively or otherwise unreasonably in either the bringing of the proceedings or part or the way that the proceedings or part have been conducted; or**
>
> **(b) any claim or response had no reasonable prospect of success."**

16 The making of a costs order therefore requires a two-stage approach: has the threshold been passed and, if so, is a costs order appropriate. In exercising this latter discretion, I bear in mind that costs do not ordinarily follow the event in the Tribunal and that I may take into account the Claimant's means if I consider it appropriate.

17 The lead authority in deciding whether to award costs in the Employment Tribunal is **Yerrakalva v Barnsley Metropolitan Borough Council** [2011] EWCA CIV 1255, in particular the judgment of Mummery LJ. The Tribunal should consider the whole picture of what had happened in the case and ask whether there had been unreasonable conduct by the Claimant in bringing and conducting the case. If so, it should identify the conduct, what was unreasonable about it and the effect it had. The Tribunal should also

take into account any criticisms made of the employer's conduct and its effect on the costs incurred.

18 Dealing with the question of conduct, I am satisfied that the conduct of proceedings since 30 January 2019 has been unreasonable. The Claimant has completely disengaged and to all intents and purposes has withdrawn from the litigation without notifying the Tribunal or the Respondents. However, that is not to say that it was unreasonable of the Claimant to have brought or pursued his claims at all. Indeed, by letter dated 18 September 2018, Core Atlantic accepted that some of the monies claimed were due and owing to the Claimant and made an offer of payment (albeit the Claimant did not provide the necessary details for the payment to be made). This letter contained the only costs warning given to the Claimant throughout proceedings.

19 During the period from 30 January 2019 to date, neither Respondent contacted the Tribunal to complain about the Claimant's failure to comply with the Orders required to prepare for this hearing. Had they done so, it is likely that an Unless Order or a letter warning of the risk of strike out would have been sent to the Claimant. If this in turn prompted no action, and I think it would not have done, the claim could have been disposed of without the need for this hearing or much of the preparatory work for which costs are claimed.

20 Whilst it is regrettable that the Respondents having incurred cost in defending the claims and preparing for a hearing which has not proceeded, in all of the circumstances I am not satisfied that it is appropriate to award costs against a litigant in person who is neither here nor on notice that his conduct since 30 January 2019 may result in a significant costs order against him.

Employment Judge Russell

18 June 2019