



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case Number: 4105931/2019**

5

**Held in Glasgow on 7 October 2019**

**Employment Judge: R King**

10 **Mr D J Morgan**

**Claimant  
Not present and  
Not represented**

15 **Poundland Ltd**

**Respondent  
Represented by:  
Mr J Anderson -  
Counsel**

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

20 The Judgment of the Tribunal is that the respondent's application to strike out the claimant's claim is dismissed.

**ORDER**

Within 28 days of the date of this Judgment the claimant shall send to the respondent and to the Tribunal the following information in relation to his claim –

25 (i) With regard to his complaint of unfair constructive dismissal, the matters relied upon which are said to amount to a breach of the implied term of trust and confidence (the claimant may find it helpful to provide this information in a list format);

30 (ii) With regard to the complaint of disability discrimination, the claimant is required to clarify whether the disability relied on is depression and anxiety, or whether it is depression anxiety and personality disorder;

(iii) Section 13 Equality Act (direct discrimination) states that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

5 (a) list the instances of less favourable treatment which he says occurred and give dates when they occurred, the names of those involved and whether there were any witnesses

(b) does he compare his treatment with the treatment of another actual person and, if so, provide the name of the person, and,

(c) why does he say this treatment occurred because of his disability;

10 (iv) Section 19 Equality Act (indirect discrimination) states that a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. A provision, criterion or practice is discriminatory in relation to a protected characteristic of B's if (i) A applies, or would apply,  
15 it to persons with whom B does not share the characteristic; (ii) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it; (iii) it puts, or would put, B at that disadvantage and (iv) A cannot show it to be a proportionate means of achieving a legitimate aim.

20 (d) What provision, criterion or practice (PCP) does he say was applied by the respondent and when was it applied;

(e) Why does he say the PCP put people who have depression and anxiety at a particular disadvantage when compared with persons who do not have it;

25 (f) How was he put at this disadvantage;

(v) Section 20 Equality Act (reasonable adjustments) states that where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison

with persons who are not disabled, A must take such steps as it is reasonable to have to take to avoid the disadvantage

(a) What PCP was applied and when was it applied?

(b) Why does he say this put disabled persons at a disadvantage?

5 (c) What reasonable adjustments does he say the respondent should have made

(d) If those adjustments had been made, would they have enabled him to remain at work, or return to work;

10 (vi) Section 26 Equality Act (harassment) states that a person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity or creating a hostile, intimidating, degrading, humiliating or offensive environment.

15 (a) List the instances of unwanted conduct which he says occurred and state when they occurred, who was involved and whether there were any witnesses and

(b) Explain why he says these instances had the effect of violating his dignity or creating a hostile, intimidating, degrading, humiliating or offensive environment;

20 (vii) Section 27 Equality Act (victimisation) states that a person (A) victimises another (B) if A subjects B to a detriment because B does a protected act or A believes that B has done, or may do, a protected act. A protected act includes bringing proceedings under the Equality Act.

(a) What is the protected act he says he did

25 (b) Does he say his employer was aware of this act and if so, specify the basis upon which he says this, and.

(c) List the instances (including dates and names of those involved) when he says he was subjected to a detriment because of the protected act.

**In accordance with Rule 38 (1) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, unless the Order is complied with by the date specified, the claim shall be dismissed without further order and the Tribunal shall give written notice to the parties confirming what has occurred.**

5 Within 21 days of receipt of the claimant's response to the Order, the respondent shall, if required, reply to the claimant's response.

## **REASONS**

### **Preliminary issues**

1 The case called for a Preliminary Hearing on Monday 7 October 2019 in order  
10 to determine whether the claim ought to be struck out.

2 The claimant was not in attendance and was not represented. Mr Anderson represented the respondent.

3 Attempts were made to contact the claimant on the telephone number the  
Tribunal held for him but those attempts were unsuccessful. The Tribunal  
15 nevertheless determined that it was in the interests of justice and consistent with the over-riding objective to proceed with the Preliminary Hearing in his absence.

4 On behalf of the respondent Mr Anderson submitted that it sought strike out  
of the claimant's claim on two separate bases, namely; (a) for his non-  
20 compliance with the Tribunal's Case Management Order of 3 July 2019 ('the Order') and (b) on the ground that the claim had not been actively pursued.

5 Mr Anderson referred to the Judge's Note dated 3 July 2019 following the  
Preliminary Hearing on 28 June 2019. He submitted that the Order had not  
been made in a vacuum. Rather, the Judge had made it after careful  
25 consideration and, furthermore, had sought to make an Order that did not impose too onerous a burden on the claimant.

6 Mr Anderson referred the Tribunal to the relevant procedural history of the claim. The initial date by which the claimant ought to have complied with the Tribunal's Order of 3 July was 22 July 2019. However, the claimant had failed

to comply by 22 July and had instead, on 22 July, requested an extension of time for compliance on the ground that he had been *“unable to finish it on time due to work and health”*. In the circumstances he requested that the deadline for compliance be extended to *“no later than the 29th July 2019”*.

5 On 26 July the Tribunal wrote to the claimant granting his application for an extension of time until 29 July to comply with the Tribunal’s Order.

7 Despite the claimant having proposed 29 July 2019 for compliance he did not comply by that date. The Tribunal therefore wrote to him on 30 July 2019, this time requesting that he comply with the Tribunal’s Order by 6 August 2019.

8 On 30 July at 8.35 p.m. the claimant sent a lengthy email to the Tribunal. This email was not in compliance with the Tribunal’s Order, but instead asserted that the respondent had thus far also failed to comply with its obligations in terms of that Order.

15 9 On 2 August 2019 the Tribunal wrote to both parties; in respect of the claimant, reminding him of the undertaking he had given on 22 July 2019 to comply with the Order by 29 July 2019 and now directing that he should comply with the Order by 6 August 2019 and in respect of the respondent, directing that it comply with the Order by no later than 9 August.

20 10 As neither party had complied with the Order by 12 August 2019 the Tribunal wrote again to both parties on 12 August, directing that should either or both parties fail to comply with the Order by 19 August 2019 the Tribunal would consider issuing a strike out warning letter to the relevant party or parties.

11 On 12 August 2019, the respondent also made an application for an Unless  
25 Order requiring the claimant to comply with the Order by 19 August 2019 failing which his claim should be dismissed without further Order.

12 In response to the respondent’s application for an Unless Order the Tribunal wrote to the claimant on 14 August 2019 requesting his comments on the application by 21 August 2019. That letter also advised that a strike out  
30 warning would be issued under separate cover.

13 On 19 August 2019 the claimant sent an e-mail to the Tribunal explaining that  
"The Order under paragraph 4 of the Preliminary Hearing Note dated the 28th  
June 2019 is far more complicated and takes a significant amount of time and  
effort than just obtaining or producing a document that already exists. I am  
5 still in the process of completing the document as there is a significant number  
of relevant instances that need to be included as well as categorising all the  
instances into a relevant section/type of claim of discrimination

It has been exceptionally difficult and on the boundary of being unreasonable  
to be able to have fully completed the document by this time in my current  
10 situation for the following reasons

The number of significant events that have occurred and relevant in this case  
that need to be included in this document as I have been asked to expand  
and categorise and detail all of this which will be even longer than the original  
ET1 Claim Statement.

15 I was originally unsure about what was being asked under the Order in  
question but now believe I am doing what has been asked. I am trying to be  
as detailed with clarity and as presentable as possible as to have a smooth  
hearing with clear points that may be contested by the respondent.

My new employer requires me to travel a significant number of miles each day  
20 and I am usually only at home for 8 hours each day, which is needed to eat  
sleep and get ready to go the next morning and requires being away from  
home for several days at a time. I can be working in any location throughout  
Scotland and have done several days in England as well. When I am away  
from home there is no possibility to continue with the document and on the  
25 days off I get I put all my time into completing the document required.

Tomorrow I am away working in Glasgow before travelling up to Forres for  
working the next day and then Fort William the day after. This is a typical  
working week and have been unable to read messages, e-mails and  
documents while away and am not expected to return home until Thursday  
30 night or Friday.

*Based on my patterns and nature of work it has been harder to plan and work to specific dates.*

...

5 *As part of a symptom of my depression in recent years I have struggled greatly with deadline dates and cut-offs and has been evident on my studies with the Open University being greatly affected as well and as a result am no longer enrolled and withdrawn my studies for the time being.*

10 *I also believe the recent actions of the respondent to be unreasonable and had taken time away from completing the Orders required to be completed by me. I was sent a bundle of documents but there was a significant number of documents that I had never asked for, in duplicate, as well as a substantial number of things missing from what I did ask for. It was completely disorganised and in no order or reasonable condition to know what was included and in what order...*

15 *I have planned time off work to complete my Personal Statement for the case by 16th September and will have been able to scan in all of the documents required to make the bundle for the hearing on the week I have planned to take off work."*

14 By letter of 20 August 2019 the Tribunal acknowledged the claimant's 19  
20 August e-mail. The Tribunal's letter also noted that he had still failed to comply with the Order and that in the circumstances a strike out warning would now be issued to him under separate cover.

15 On 20 August 2019 the Tribunal wrote to the claimant, advising that the  
25 Tribunal was considering striking out his claim in terms of Rule 37(1)(c) of the Rules contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 because of his failure to comply with the Order.

16 In that letter the Tribunal directed the claimant that if he disagreed with his claim being struck out he should set out his reasons in writing by 27 August

2019 or tell the Tribunal by 27 August 2019 that he wanted an Employment Judge to fix a Hearing where he could put forward his reasons in person.

17 On 27 August 2019 the claimant e-mailed the Tribunal advising that he felt it  
5 would be *“appropriate to have a postponement to the case with revised dates given for all the Orders made at the Preliminary Hearing that was held on 28 June 2019”*.

18 In that e-mail he stated that:

10 *“Since the dates were set at the Preliminary Hearing there had been no considerations given to my new employment when setting out the dates for the Orders and the extent of the amount of work being asked for by the Orders. As mentioned in my last message I have faced significant challenges in completing the Orders by the dates set and even with the dates being extended.*

15 *My mental health still has a significant effect on everyday tasks despite it being improved to what it has been in past but has still had some restrictive effect in being able to fulfil the Orders set and am still unsure about what I’d have been able to be considered a reasonable adjustment of the Employment Tribunal to assist in meeting the dates set by the Orders.*

20 *It has been extremely difficult in going over all of the instances of discrimination that happened during my employment with the respondent and as a result I have needed to do little parts at a time, every time I can, while producing the document and information asked for by the respondent and the Order.*

25 *It wouldn’t be in the interests of justice to penalise a claimant that has managed to secure another form of employment where they have been restricted in completing the Orders due to the nature of work and the type of contract with the new employer. I have now built up enough holidays to take time off to complete the Orders set and hasn’t previously been*



*possible as I have needed to work for the money to cover basic living costs that without would result in homelessness.”*

19 On 30 August 2019 the Tribunal wrote to the claimant, acknowledging his  
email of 27 August 2019 and directing that the case should be listed for a  
5 Preliminary Hearing to consider whether the claim should be struck out on the  
bases that the claimant had failed to comply with Tribunal Orders and had not  
been actively pursuing the claim.

20 In that letter the Tribunal also directed, in recognition of the claimant’s  
difficulties as set out in his 27 August e-mail, that the claimant should provide  
10 such specification in compliance with the Order that he was able to and that  
the issue of reasonable adjustments would be discussed at the Preliminary  
Hearing.

21 On 9 September 2019 the Tribunal wrote to the parties informing them that  
the case would be listed for a Preliminary Hearing to consider strike out of the  
15 claim and postponing the Final Hearing previously listed on 7-10 October  
2019.

22 In that letter the Tribunal also set aside meantime any Orders requiring the  
respondent to comply with the Tribunal’s 3 July Order. On 18 September  
2019 the Tribunal issued a formal notice that there would be a Preliminary  
20 Hearing on 7 October 2019 to determine strike out of the claim.

### **The respondent’s submissions**

#### **Non-compliance with Orders – Rule 37(1)(c)**

23 On the respondent’s behalf, Mr Anderson submitted that the claim should be  
struck out because of the claimant’s non-compliance with the Tribunal’s Order  
25 of 3 July 2019. He referred to the case of ***Blockbuster Entertainment Ltd  
v James [2006] EWCA Civ 684*** in which the Court of Appeal held that:-

*“The power of an employment tribunal under Rule 18(7) to strike out a  
claim on the grounds that an applicant has conducted his side of the  
proceedings unreasonably is a draconian power, not to be too readily*

exercised. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these two conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response. This requires a structured examination. The question is whether there is a less drastic means to the end for which to strike-out power exists. The answer has to take account of the fact, if it is a fact, that the Tribunal is ready to try the claims, or that there is still time in which orderly preparation can be made.”

24 Mr Anderson conceded that he could not advance an argument that a fair trial was impossible, albeit he did not believe a fair trial was possible ‘at the moment’. His principal submission was that the other ‘cardinal condition’ referred to in **Blockbuster** had been satisfied because the claimant’s failure to comply in the first place with the Tribunal’s Order and his subsequent failure to respond to its subsequent correspondence had amounted to deliberate and persistent disregard of the Tribunal’s required procedural steps.

25 The claimant’s failure had also been deliberate, which was evident from the terms of his e-mails of 19 and 27 August 2019, in which he explained that the reasons for his failure to comply with the Order were his health and the fact that he had a new job. In Mr Anderson’s submission these e-mails were sufficient evidence that the claimant’s failure to comply had been deliberate. He knew the Order was in place, but he had made no attempt to comply, even when matters had reached a stage where the Tribunal had, in its letter of 30 August 2019 effectively invited the claimant to “do what you can”. Yet he had failed to supply any sort of response whatsoever. In the circumstances the threshold for deliberate conduct had been met.

26 His failure had also been a persistent one. On a ‘charitable view’, he had received two warnings since the Order was made but arguably he had received three or four.

27 In all the circumstances, Mr Anderson submitted that strike out on this particular ground would be proportionate.

28 It would not be appropriate for the Tribunal to make an Unless Order because the time for that had passed. An Unless Order would not be proportionate unless there was some indication that the claimant was actually going to comply with it. In this case the claimant had given no such indication having regard to his failure to comply with the Tribunal's Order despite repeated warnings.

29 Furthermore, it would not be appropriate to make an Order in relation to expenses. The claimant's e-mail to the Tribunal of 27 August had indicated that he was effectively living 'hand to mouth'. It was evident that he had no financial means and that an Order for expenses would not be an adequate remedy.

**The claim has not been actively pursued - Rule 37(1)(d)**

30 The respondent's alternative submission was that the claim should be struck out on the basis that the claimant had not actively pursued it. Mr Anderson referred to the guidance in *Executors of Evans and Another v Metropolitan Police Authority [1992] IRLR 570* where the Court of Appeal had held that:

*"The power of an industrial tribunal to strike out an application for want of prosecution must be exercised in accordance with the principles laid down by the House of Lords in Birkett v James in respect of the striking out of applications in the High Court. Those principles require that, if the default is not intentional and contumelious, it is necessary to show (a) that there had been an inordinate and inexcusable delay on the part of the claimant or his lawyers and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues or is such as is likely to cause or to have caused serious prejudice to the respondent."*

31 It was submitted that there had been an inordinate and inexcusable delay on  
the part of the claimant and that the respondent had suffered substantial  
prejudice as a result. The claimant's last correspondence to the Tribunal had  
been on 27 August 2019, despite there having been further correspondence  
5 from the Tribunal to parties since then, which he had not replied to. The  
claimant's absence from today's preliminary hearing only added weight to the  
respondent's submission that he had failed to actively pursue his claim.

32 The prejudice suffered by the respondent included financial prejudice  
because of the legal expense that it had incurred because of the claimant's  
10 failures, which were estimated at between £1,800 and £2,000 plus VAT. That  
loss would likely ultimately be irrecoverable. The respondent had also lost a  
listed hearing, because the full hearing had been replaced by the hearing on  
strike out. The loss of the original hearing dates had also been prejudicial.

33 It was also prejudicial to the respondent that the case should be allowed to  
15 'drag on' when the claimant had failed to set out even basic responses to the  
Tribunal's Order. The Tribunal had attempted to engage with the claimant  
and had given him various opportunities to comply but he had failed to do so.  
There had been inaction from the claimant since 27 August 2019 even though  
the Tribunal had, on 30 August, invited him to provide such specification, as  
20 he was able to. His inaction was compounded by his non-appearance at  
today's Preliminary Hearing. Strike out was reasonable and proportionate in  
those circumstances.

## Relevant Law

### ***Rule 37(1)(c) – Strike out for non-compliance with the Tribunal's Order***

25 34 In ***Weir Valves and Controls (UK) Ltd v Armitage [2004] ICR 371*** the EAT  
held that the principles that Tribunals should apply when considering whether  
to strike out a claim on this ground were as follows: -

30 *“... it does not follow that a striking-out order or other sanction should  
always be the result of disobedience to an order. The guiding  
consideration is the overriding objective. This requires justice to be*

done between the parties. The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is still possible. It should consider whether striking out or some other lesser remedy would be an appropriate response to the disobedience.”

35 In **Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684** the Court of Appeal held that the power to strike out a claim: -

10 “... is a draconian power, not to be too readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If 15 these two conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response.

...

20 It is not only by reason of the Convention right to a fair hearing vouchsafed by Article 6 that striking out, even if otherwise warranted, must be a proportionate response...

25 The particular question... is whether there is a less drastic means to the end for which to strike-out power exists. The answer has to take account the fact - if it is a fact - that the Tribunal is ready to try the claims, or that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist”

**Rule 37(1)(d) Strike-out on the ground that the claim has not been actively pursued**

36 ***In Rolls-Royce Plc v Riddell [2008] IRLR 873*** the EAT, dealing with an application to strike out under Rule 18(7)(d) of the 2004 Employment Tribunal Rules, held that: -

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*“The rule is not drafted so as to fetter the discretion that is conferred by any particular considerations. However, as with all exercises of discretion, it will be important to take account of the whole facts and circumstances including the fact that strike out is the most serious of sanctions. That being so, as commented in Harvey, it is usually considered appropriate to take account of the principles laid down by the High Court in England prior to the introduction of the current Civil Procedure Rules. Those show an expectation that cases of failure to actively pursue a claim will fall into one of two categories. The first of these is whether there has been “intentional and contumelious” default by the claimant and the second is where there has been such inordinate and inexcusable delay such as to give rise to a substantial risk that a fair trial would not be possible or there would be serious prejudice to the respondent.”*

20 **Discussion and Decision**

**Failure to comply**

37 The claimant’s failure to comply with the Tribunal’s Order despite repeated warnings is not in doubt. The Tribunal must however determine whether his failure has been deliberate and persistent or has made a fair trial impossible.

25 38 On 22 July 2019 the claimant e-mailed the Tribunal to say that he had been unable to comply with the initial deadline due to ‘work and health’. In his 19 August e-mail he explained that he was struggling to deal with the Order because of work commitments and because, as a symptom of his depression, he struggled with deadline dates and cut offs. On 27 August he repeated to  
30 the Tribunal that his health had affected his ability to comply. In recognition

of his difficulties the Tribunal at that stage directed that he *'should provide such specification in compliance with the Tribunal Orders that he is able to'*.

39 While the claimant has clearly been in default, the Tribunal does not find that his conduct has amounted to *'deliberate and persistent disregard'* of required procedural steps. Although he has not yet complied with the Order the claimant has nevertheless engaged with the Tribunal about the reasons for his non-compliance, which relate to his challenging workload and the health difficulties that he has repeatedly referred to.

40 Furthermore, the Tribunal does not find that the claimant's failure to comply has made a fair trial impossible. The respondent's own submission was not that a fair trial was impossible, but simply that it would not be possible at the moment until the Order had been complied with. There is no question of the claimant's delay having resulted in witnesses becoming unavailable or evidence becoming unreliable as a result.

#### 15 **Failure to actively pursue the claim**

41 Having regard to the principles set out in ***Rolls Royce v Riddell***, the Tribunal is satisfied that the claimant's failure to comply with the Tribunal's Order has been because of his challenging workload and health difficulties and is not persuaded that his failure has been intentional and contumelious. He has not disengaged from the proceedings and it is clear from his correspondence with the Tribunal that he is well aware of his obligation to comply, albeit his workload and health have prevented him thus far from doing so.

42 Nor is the Tribunal persuaded that there has been an inordinate and inexcusable delay. He has repeatedly informed the Tribunal of his difficulties in complying and they are not inexcusable. Indeed the Tribunal has already excused the claimant from full compliance in its correspondence of 30 August when it permitted him to comply as far as he was able.

43 While it is accepted that the respondent has suffered a measure of prejudice as a result of the claimant's delay, its own submission is that the prejudice suffered so far has been mostly financial. It does not advance any argument

that there is a substantial risk to a fair trial, merely that as matters stand that would not be possible.

44 The Tribunal recognises the draconian nature of a strike out decision and the importance of not too readily exercising its strike out jurisdiction. It also  
5 recognises the need to consider whether the sanction of strike out is a proportionate response in the particular circumstances of the case, including by reference to the question whether a fair trial remains possible, or a lesser sanction is available.

45 In all the circumstances and having regard to the overriding objective the  
10 Tribunal finds that there is still time in which orderly preparation can be made and that there is a more proportionate and less drastic means to take matters forward than to strike out the claim, which is still at a relatively early stage.

46 It is clear that the claimant has had difficulty articulating his claim. This is largely because of his health and also because he is representing himself in  
15 a complicated and technical area of employment law.

47 However, there is no doubt that the respondent is entitled to greater clarity of the case against it and that the claimant must provide due notice of his claim before the case proceeds to a final hearing.

48 In all the circumstances the Tribunal finds that in accordance with the  
20 overriding objective the claimant is entitled to a final chance to articulate the basis of his claim and that it is reasonable and proportionate to make an Unless Order in the terms set out.

49 In reaching its decision, the Tribunal has taken account of the terms of the claimant's e-mails to the Tribunal in which he describes the steps he has  
25 taken so far towards compliance and the time he says he has set aside for that purpose.

50 As a party litigant the claimant is encouraged to seek legal advice prior to complying with this Order and its terms permit him an adequate opportunity to do so.



51 For all these reasons, the respondent's application for strike out is dismissed.

Employment Judge:

R King

Date of Judgement:

13 November 2019

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Entered in Register,

Copied to Parties:

13 November 2019

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