



# EMPLOYMENT TRIBUNALS

**BETWEEN**

**Claimant**

**AND**

**Respondent**

**MR D WRIGHT**

**OPENREACH LTD**

**Heard at:** London Central

**On:** 28 September 2020

**Before:** Employment Judge O Segal QC

## **Representations**

**For the Claimant:** Did not attend

**For the Respondent:** Ms A Greenley, counsel

## **JUDGMENT**

The Claimant's claim of unfair dismissal is struck out pursuant to r. 37(1).

## **REASONS**

1. Following a PH (by phone) on 5 May 2020, this case – now limited to an unfair dismissal claim – was set down for three days starting 28 September. Directions were given for inter alia disclosure and the exchange of witness statements “from parties and witnesses” on 16 June and 28 July respectively.
2. The Claimant did not comply with those directions and sought their adjustment. That was ordered by EJ Khan, disclosure now to be 28 August and witness statements by 14 September.

3. The Respondent disclosed its documents in compliance with that order. The Claimant did not. The Respondent prepared a trial bundle, which it sent to the Claimant electronically on 4 September.
4. The Respondent tried in vain to get confirmation from the Claimant that he would exchange witness statements as ordered on 14 September; and on that date it sent its own statements, password protected, to the Claimant. It informed the Claimant and the tribunal that if had not received the Claimant's statement(s) by 18 September it would apply to have his claim struck out.
5. The Claimant replied that day, copying in the tribunal, saying (somewhat aggressively) that he had made it clear that he can't provide any witness statements from others. He said nothing about his own statement
6. On 21 September the Respondent made a strike out application. The Claimant did not respond to that correspondence.
7. On 25 September the tribunal ordered the vacation of the listing for the three day final hearing and instead listed a one day hearing on 28 September "to consider and decide the respondent's application to strike out the claim".
8. Neither the Respondent nor the tribunal has received any communication from the Claimant since 14 September 2020.
9. At the hearing on 28 September, the Claimant did not attend. Nor could he be contacted by phone.
10. The relevant part of r. 37 provides:

*"—(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 ... on any of the following grounds—*

*(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; ...*

*(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.”*

11. In this case, the Respondent has made a proper and reasoned application by its letter of 21 September, supplemented orally by its counsel. It relies on the Claimant’s almost complete failure to comply with repeated orders of the tribunal, even up to the days before the scheduled final hearing, or to cooperate with the Respondent or to explain the non-compliance, as amounting to unreasonable or vexatious conduct of proceedings; non-compliance with orders of the tribunal; and not actively pursuing his case.

12. I agree with all of those submissions.

12.1. I was read samples of the Claimant’s correspondence before 14 September with the Respondent’s solicitors. It is at times intemperate and, I judge, abusive. In any event, failing repeatedly to provide any documentary or witness evidence to the Respondent, without any explanation, and finally not attending the hearing on 28 September without any explanation or contact is, I find, unreasonable conduct of these proceedings by the Claimant. To adopt one or the tests in *Blockbuster Entertainment Ltd v James* [2006] IRLR 630, CA, the Claimant’s conduct amounts to deliberate and persistent disregard of required procedural steps.

12.2. The same conduct satisfies 37(1)(c) also. I am mindful that in many cases, a less draconian sanction than striking out the claim is appropriate, such as (further) adjourning the final hearing with costs against the offending party (see e.g. *Armitage* [2004] ICR 371). However, in my view, this case falls the wrong side of that line for the Claimant.

12.3. As to 37(1)(d), the material issue in this case is whether I consider that the Claimant’s failure to pursue his case has been intentional (see *Evans* [1993] ICR 151). On the basis of what I know at this point (as set out above), that seems the appropriate inference to draw.

13. I therefore strike out this claim.

14. I was minded to make a costs order against the Claimant, at least in respect of the costs of the 28 September hearing (the Respondent sought its costs of the action, capped at something over £12,000). However, the Respondent fairly accepted that it had not given the Claimant notice it might make such an application at this hearing; and I therefore am not, pursuant to r. 77, in a position to make such an order. The Respondent noted that it reserved its position as regards a future application (within the time limit provided for in that rule).

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Employment Judge - Segal

30 September, 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON  
01/10/2020.

FOR THE TRIBUNAL OFFICE