



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Kealaher

**Respondent:** Wilko Retail Limited

## JUDGMENT

**UPON a reconsideration** of the judgment striking out the claimant's claim dated 22 October 2021 on the Tribunal's own initiative under rule 73 of the Employment Tribunals Rules of Procedure 2013, and without a hearing, the judgment is revoked.

## REASONS

1. On 14 October 2021 Judge Jenkins issued a strike out warning to the claimant. The order stated that Judge Jenkins was considering striking out the claim for failing to comply with an order of the Tribunal and it was not being actively pursued. The claimant was given until 21 October 2021 to object.
2. On 22 October 2021 the file was referred to Judge Moore on the basis there had been no such objection to the strike out received from the claimant. Judge Moore directed that the claim be struck out and signed a judgment to that effect on the same date.
3. On 25 October 2021 the file was referred back to Judge Moore as a letter had been received from the claimant dated 20 October 2021 received on 21 October 2021. The strike out judgment was not on the file. Judge Moore considered the letter and decided that it was not in the interests of justice to strike out the claim and advised the parties a such by email the same date.
4. On 26 October 2021 the Respondent applied for a reconsideration of what they reasonably understood to have been a reconsideration of the judgment dated 22 October 2021, as set out in Judge Moore's email of 25 October 2021. Judge Moore wrote to the Respondent without the benefit of the strike out judgment on the file to advise there had not been a judgment striking out the claim and as such it could not be reconsidered.
5. The Respondent then wrote again and advised there had been a strike out judgment issued on 22 October 2021. The respondent were therefore

entitled under the Rules of Procedure to have an opportunity to make representations.

6. At the preliminary hearing before Judge Jenkins on 28 October 2021 both parties confirmed they agreed for Judge Moore to reconsider the strike out judgment without a further hearing and based on the written representations of the parties.
7. In reaching my decision I have had regard to the correspondence on the file, the claimant's letter dated 20 October 2021 and the Respondent's letter dated 26 October 2021.
8. In deciding whether to strike out a party's case for non-compliance with an order under rule 37(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 extent of the non-compliance, 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. (Weir Valves and Controls (UK) Ltd v Armitage 2004 ICR 371, EAT).
9. It is acknowledged that there has been a series of failures by the claimant to comply with case management orders and that this may have put the respondent to unnecessary time and expense. In considering the magnitude of the failure I have balanced the earlier non compliance against the compliance with the order to set out reasons as to why his claim should not be struck out. The claimant did comply with this order but these were not matched with the file before the strike out judgment was issued.
10. I have also taken into account the claimant's explanation regarding his health since July 2021. The respondent submits that although they accept the claimant was in hospital there has been a three month period where he was not hospitalized and simply failed to engage.
11. The claimant had also sent an email to the Tribunal (not copied to the respondent) on 9 September 2021. This was not placed on the file. I direct a copy of that letter be sent to the respondent. The claimant explained he had been admitted to hospital in July but continued to experience balance problems and symptoms of vertigo and is on a waiting list. This was not before the Judge who decided to issue a strike out warning.
12. I have considered whether a fair hearing is still possible and have concluded that it must be so. A case management hearing has taken place and the orders have been varied to enable the claim to be prepared for a hearing.
13. I have not received any representations as to why a fair hearing is no longer possible. I consider that it would be disproportionate to strike out the claim. For these reasons I revoke the strike out judgment.

Employment Judge **S Moore**

**17 November 2021**

JUDGMENT SENT TO THE PARTIES ON 17 November 2021

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FOR THE TRIBUNAL OFFICE Mr N Roche