



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Lennox

**Respondent** Marston's Trading Limited

**HELD AT:** Manchester Employment Tribunal **ON:** 24<sup>th</sup> November 2021

**BEFORE:** Employment Judge Cronshaw (sitting alone)

## REPRESENTATION:

For the Claimant: Did not attend

For the Respondent: Mr Lawrence (Counsel)

## JUDGMENT

The claim is struck out

## REASONS

1. This case was originally listed for final hearing of the claimant's unfair dismissal claim on 24<sup>th</sup> November 2021.
2. The Tribunal received, by email on the 12<sup>th</sup> November 2021, an application for strike out from the respondent on the basis of the claimant's continued failure to engage, and non-compliance with case management orders.
3. The Tribunal therefore converted the final hearing into a public preliminary hearing to consider the respondents application for strike out, if the claim

survived strike out, to progress the case by way of further case management orders. The parties were informed of this by email on the 22<sup>nd</sup> November 2021.

4. The hearing took place with attendance of the respondent by video conference using the Tribunal's CVP video platform. Attendance by parties was not practicable due to Covid-19 restrictions and no-one requested the same.

#### Procedure

5. I was assisted by a 195-page bundle of documents provided by the respondent as well as both written and oral submissions from Counsel for the respondent.
6. The claimant did not attend the hearing. The Tribunal had received no correspondence from him and no request for a postponement. Contact via telephone on the morning of the hearing was unsuccessful. The Tribunal also received no response to the email sent at the time of the hearing with a reminder and direct contact number to the Clerk so the claimant could make contact if he was having technical difficulties.
7. Proceeding with a case if a party fails to attend is covered under Rule 47 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013:
  - a. *If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence*
8. Having read the Tribunal file I was satisfied that the claimant had been notified of the hearing via email to the address from which he had emailed the Tribunal most recently on the 17<sup>th</sup> November 2021.
9. The claimant was aware of the nature of the hearing, and the application to strike out by the respondent, as it had been emailed to him on the 12<sup>th</sup> November 2021 – and he had responded on the 17<sup>th</sup> November 2021. I was also satisfied that all practicable enquiries had been made today and the claimant had been given every opportunity to attend should he wish to do so.

10. The hearing began at 10.30am with the claimant not in attendance. I had read the Tribunal file and the skeleton argument on behalf of the respondent dated 23<sup>rd</sup> November 2021 prior to the hearing. I heard brief oral submissions from Counsel for the respondent. I considered the claimant's direct response to the application to strike out contained within the email from him dated 17<sup>th</sup> November 2021 (p195 of the bundle).
11. Conscious that the claimant was not present and written reasons would be appropriate, I gave very brief oral reasons for the decision to strike out the case. These written reasons contain more detail.
12. Counsel for the respondent, invited me to consider dismissal under Rule 47 following the claimant's failure to attend, however, as is set out below I was satisfied that the claimant's persistent failure to comply with court orders throughout the course of these proceedings justified the case being struck out.

### The Law

13. The power to strike out a claim is contained in Rule 37 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 as follows:
  - (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).

(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.

14. The relevant considerations in this case are Rule 37(1)(c) and (e).

15. In deciding whether to strike out a party's case for non-compliance with an order under Rule 37(1)(c), the Tribunal must 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:

- a. the magnitude of the non-compliance,
- b. whether the default was the responsibility of the party, or their representative,
- c. what disruption, unfairness or prejudice has been caused,
- d. whether a fair hearing would still be possible, and
- e. whether striking out or some lesser remedy would be an appropriate response.

16. The power must be exercised in accordance with reason, relevance, principle and justice (*Williams v Real Care Agency Ltd* 2012 ICR D27, EAT)

17. Where a Tribunal is considering a strike out on the ground of non-compliance it must consider whether to do so is a proportionate response. This is the same consideration applied when considering a strike out pursuant to rule 31(1)(b) for unreasonable, vexatious, or scandalous conduct.

18. In the leading case on striking out for unreasonable conduct *Blockbuster Entertainment Ltd v James* [2006] IRLR 630 the Court of Appeal made clear that for a claim to be struck out on this basis the Tribunal must be satisfied either; the conduct involved deliberate and persistent disregard of required procedural steps, or the conduct has made a fair trial impossible. In either case striking out the claim must be a proportionate response and is not appropriate if there is any other way of securing a fair trial. The same considerations must apply here.

19. The extent and magnitude of the claimant's non-compliance is a key concern for the Tribunal and striking out orders are neither automatic nor punitive. (*Baber v Royal Bank of Scotland plc* EAT 0301/15). The power to strike out is therefore, effectively, a last resort.

Background

20. The claimant's claim for unfair dismissal was received by the Tribunal on 1<sup>st</sup> July 2021.

21. On 16th July 2021, the Tribunal issued Case Management Orders which required the claimant to do the following:

- a. Send to the respondent the details of the remedy sought by no later than 27th August 2021;
- b. Send to the respondent copies of all the documents in his possession relevant to the claim by no later than 10th September 2021;
- c. Send to the respondent copies of all his witness statements by no later than 8th October 2021.

22. The Case Management Orders contained a warning that if any of these orders are not complied with the Tribunal may strike out the claim.

23. On 3rd September 2021 the respondent reminded the claimant that he had failed to send to the respondent the details of the remedy sought. There was no response from the claimant.

24. On 9th September 2021 the respondent made an application to the Tribunal for an Unless Order in respect of the outstanding remedy information. The respondent forwarded its application to the claimant.

25. On the same date the respondent's representative spoke to the claimant by telephone and explained to him where he could find the Case Management Orders, what details he had to provide in respect of the remedy sought, and that disclosure was due the following day. The claimant was encouraged to seek legal advice or speak with ACAS.

26. On 10th September 2021, the deadline for disclosure, the respondent sent copies of its documents to the claimant. There was no response from the

claimant. On 24th September 2021, the respondent sent a copy of the final hearing bundle to the claimant.

27. On 7th October 2021, the respondent wrote to the claimant, disclosing additional documents relevant to the claim which it had recovered recently, reminding the claimant that the deadline for the exchange of witness statements was the next day. The claimant replied, querying his obligation to provide a witness statement, and stating that he would provide the respondent with his documents on the day of the hearing.
28. On 8th October 2021, the respondent wrote to the claimant to say that it was ready to exchange witness statements. There was no response. The respondent therefore made an application to the Tribunal for an Unless Order in respect of the claimant's witness statement and his documents. The application was forwarded to the claimant.
29. On 12th October 2021, Employment Judge Dunlop wrote to the parties asking for an update as to whether the parties had been in contact with each other about the preparation of the case. The parties were required to reply to the Tribunal by 19th October 2021.
30. The respondent replied the same day informing the Tribunal that the claimant had failed to comply with all of the case management orders to date. The claimant replied to the Tribunal on 14th October 2021, stating that the respondent was "*asking for things that have no relevance to the case*". The claimant stated, within the email, that he was actively pursuing the case and will bring any letters and screenshots on the day of court.
31. On 1st November 2021, Employment Judge Buzzard ordered the following:
  - a. *The claimant to confirm that he has sent the respondent all the following:*
    - i. *Any documents they are relying on, including screenshots*
    - ii. *A schedule of loss*
    - iii. *A witness statement.*
  - b. *If any have not been sent, the claimant needs to explain why – and then do so as a matter of urgency. The claimant will need a witness statement explaining everything he wants to Tribunal to know. The claimant will be asked questions about it's contents. Please reply urgently by 4<sup>th</sup> November 2021.*

32. No response was received from the claimant.
33. On 12th November 2021, the respondent made an application for a judgment that the claim be struck out. The respondent copied the claimant into its application.
34. On 17<sup>th</sup> November 2021 the claimant replied and stated that he had responded to the Tribunal but didn't copy the respondent in. Within this email the claimant states *'I have provided yourself and the Tribunal with enough evidence to demonstrate that the company failed on many things during their process of dismissal'*.
35. On 19th November 2021, the Respondent sent its witness statements to the Claimant in preparation for the final hearing listed for 24th November 2021.
36. On the 22<sup>nd</sup> November 2021 the Tribunal gave notice to the parties that the hearing on the 24<sup>th</sup> November 2021 would no longer be a final hearing as there had not been satisfactory exchange of evidence or witness statements and, instead, the case would be listed for consideration of the respondent's application to strike out the claim. The Tribunal has not received any response from the claimant and, as outlined above, the claimant did not attend the hearing.

### Conclusions

37. As is evident in the above chronology of the case the claimant has failed, throughout these proceedings to comply with any case management orders, despite multiple opportunities and two separate Employment Judges writing to him to ask for an explanation, with specific instructions.
38. I have given careful consideration to whether striking out the claim would be a proportionate response, or whether there is any other way of securing a fair hearing through case management orders.
39. The claimant has been given more than sufficient opportunity to address his non-compliance and provide a response to the respondents' application for strike out. Whilst I have noted the contents of the email dated 17<sup>th</sup> November 2021 which purports to be a response to the application, the claimant has still failed to provide any explanation for his continued lack of engagement with the Tribunal's process.

40. It is not sufficient for the claimant simply to say that he wishes to pursue his claims – he must also act to demonstrate this by compliance with the Tribunal's orders and responding appropriately to the reasonable and necessary enquiries of the Tribunal.
41. The non-compliance in this case by the claimant is significant, and of some magnitude, and the failure to respond to direct questions from Employment Judges is unacceptable. I acknowledge that the claimant is unrepresented but that does not excuse his conduct.
42. I am of the view that this is deliberate, persistent disregard of the required procedural steps. The steps that were clearly set out to the claimant in the first case management order, subsequently by the respondent, and finally by direct request from the Tribunal. The claimant has failed to respond or engage, and that is compounded by his non-attendance today.
43. I have also concluded that, given the persistent failure to engage by the claimant a fair hearing is not possible. Both sides need to engage with Tribunal requests and Case Management Orders, whether they agree with them or not, if the overriding objective of dealing with a case fairly and justly is to be met. Where only one side engages, a fair hearing is not possible and that is the situation in this case.
44. Having regard to all this I have concluded that there is no appropriate lesser sanction than strike out, as there is no way of securing a fair hearing in this case.
45. For these reasons, the claim is struck out under rule 37(1)(c) due to the claimant's persistent non-compliance with case management orders.

Employment Judge Cronshaw

Date: 8<sup>th</sup> December 2021



JUDGMENT SENT TO THE PARTIES ON:

22 December 2021

FOR THE TRIBUNAL OFFICE

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