



EMPLOYMENT TRIBUNALS

Claimant:

- (1) Ms Barnsley
- (2) Ms Derrick
- (3) Ms Hanna
- (4) Ms Hopkin
- (5) Ms Pattenden
- (6) Ms Smith
- (7) Ms Vousden
- (8) Ms Wardle
- (9) Ms Welch
- (10) Ms Tolhurst
- (11) Ms Russell

Respondents:

- (1) Group Momentum (Salons) Ltd
- (2) Graham Webb (Salons) Ltd

JUDGMENT

1. The response of Group Momentum (Salons) Ltd is struck-out pursuant to rule 37(c) and/or 37(d). It has persistently failed to comply with tribunal orders and has failed to actively pursue the litigation.

REASONS

1. This litigation has a long and unfortunate history that I explained in brief in my case management orders of 24 January 2022. The claims were presented at different times but in the main they date from as long ago as November 2020.
2. The only respondent that currently has a response to the claims is Group Momentum (Salons) Ltd ('Group Momentum').

3. One of the characteristics of the history of the litigation is a persistent failure by Group Momentum to comply with tribunal orders or to actively pursue the litigation. This both pre-dates and post-dates my case management orders of 24 January 2022 when I consolidated the claims into a single multiple.
4. Prior to 24 January 2022 there were a variety of case management orders in the individual claims. Group Momentum has a history of non-compliance with those orders and has never, for example, made disclosure. My decision to consolidate the claims was painful for some of the Claimants because it meant further delay being heaped on existing delay. For instance, in Miss Barnsley's case alone:
 - a. The Respondents failed to attend a case management hearing in October 2021.
 - b. The Final Hearing was listed to take place on 28 February 2022 and directions given.
 - c. The Respondents did not comply with the directions. Ms Barnsley understandably wanted the Final Hearing to proceed.
 - d. However, I considered consolidation to be the right thing to do overall as it was highly undesirable for so many claims by different Claimants arising out of the same facts to be heard separately.
 - e. 28 February 2022 was used as a PH for case management and reset the timetable for case preparation.
5. Another matter of background is that until I consolidated them the claims were proceeding seemingly randomly (such are the vagaries of the system) at different speeds. One claim, *Soffe v Group Momentum (Salons) Limited and Graham Webb (Salons) Limited* reached its final hearing. The tribunal in that case was satisfied that the Respondents were well aware of the final hearing but chose not to attend. The claims succeeded.
6. I sought to bring some good order to the litigation commencing with my orders of 24 January 2022. In those orders I asked the Respondents to state whether or not they would henceforth actively pursue a defence to the proceedings. In answer to that question, in correspondence, Group Momentum assured the tribunal that it would do so. It did not give any indication that it would be unable to comply with basic case management orders.
7. As noted a PH was held on 28 February 2022. The Respondents did not attend. Group Momentum did have the courtesy to indicate in advance that it would not attend. However, it did not offer a cogent reason for non-attendance.
8. At the PH I made case management orders that included, in the context of how stale this litigation had become, very generous and workable timeframes for things to be done. Those things included disclosure of documents, making a bundle, exchanging witness statements. The Respondents have not complied with any of these orders.
9. The Respondents were sent the orders in the usual way and did not raise any concerns about their ability to comply with them.

10. The Claimants have done what they can to comply with the orders. They have also regularly written to the tribunal to point out that the Respondents have not complied. They are, quite understandably, increasingly frustrated with the delay.
11. In light of this, on 26 May 2022 I made the following orders (which were sent to the parties on 9 June 2022):

The ... Respondents must within 14 days of the date of this letter failing which I will consider striking out the responses without further reference to the parties:

- a. State what if anything they have done to comply with the case management orders I made following the Preliminary Hearing of 28 February 2022;*
- b. If they failed to comply in any respect with my orders state why and what has been done to rectify the position;*
- c. State why I should not strike their response out for non-compliance with my orders and/or failure to actively pursue the defence of the claims.*

12. On 23 June 2022, Mr Watts on behalf of Group Momentum wrote to the tribunal and stated that the company was not in a position to comply with the orders for “*various business and personal*” reasons. He stated that there were no employees and no funds to appoint legal representatives and that for the past two years he had been caring for his wife who was terminally ill.

13. Miss Pattenden, the only claimant who is legal represented, applies through her solicitors for Group Momentum’s response to be struck-out.

Law

14. Rule 37 provides as follows:

Striking out 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—

[...]

(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.

15. Striking a response out is a draconian power that should be used as a matter of last resort and then only if the applicable tests for striking out are met. The leading case, in the context of breach of tribunal orders, remains *Blockbuster Entertainment Ltd v James* [\[2006\] EWCA Civ 684](#), [\[2006\] IRLR 630](#). Sedley LJ said this:

5. *This power, as the employment tribunal reminded itself, is a draconic power, not to be 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 these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response. The principles are more fully spelt out in the decisions of this court in *Arrow Nominees v Blackledge* [2000] 2 BCLC 167 and of the EAT in *De Keyser v Wilson* [2001] IRLR 324, *Bolch v Chipman* [2004] IRLR 140 and *Weir Valves v Armitage* [2004] ICR 371, but they do not require elaboration here since they are not disputed. It will, however, be necessary to return to the question of proportionality before parting with this appeal.*

16. Sedley LJ went on to say this:

19. *In deciding this, the tribunal needs to have in mind that the application before it is one that was made, in effect, on the opening day of the six days that had been set aside for trying the substantive case. The reasons why this happened are on record and can be re-canvassed; but it takes something very unusual indeed to justify the striking out, on procedural grounds, of a claim which has arrived at the point of trial. The time to deal with persistent or deliberate failures to comply with rules or orders designed to secure a fair and orderly hearing is when they have reached the point of no return. It may be disproportionate to strike out a claim on an application, albeit an otherwise well-founded one, made on the eve or the morning of the hearing.*

17. Much the same approach is required in the context of a failure to actively pursue the litigation. In *Evans and anor v Commissioner of Police of the Metropolis* 1993 ICR 151, CA, the court held that the tribunal must apply the same principles when exercising the power to strike-out, as apply in the civil courts. Balcombe LJ said

*These principles require that, if the default is not intentional and contumelious, it is necessary to show, quoting from *Birkett v. James* [1978] A.C. 297 , 318:*

“(a) that there has been inordinate and inexcusable delay on the part of the plaintiff 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 in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiffs or between each other or between them and a third party.”

18. *Where a motion is made under this rule, the Tribunal requires, accordingly, to begin by asking itself whether the claimant has failed to actively pursue his claim. It would not usually be difficult to conclude that where a claimant has failed to appear at a full Hearing of which he has been notified, that amounts to a failure to actively pursue his claim. Then, the Tribunal requires to ask itself whether, taking account of the whole circumstances, it ought to exercise its discretion so as to strike out the claim.*

The rule provides for a general discretion to strike out if the tribunal is satisfied that there has been a failure to actively pursue a claim.

19. *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 [CPR](#) . 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 where there has been “intentional and contumelious” default by the claimant and the second is where there has been 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: [Birkett v James \[1977\] 3WLR 38](#) . The Birkett principles were applied in the [Industrial Tribunal context in the case of Executors of Evans and anr v Metropolitan Police Authority \[1992\] IRLR 570](#) .*

20. *These principles appear to have been identified because of there being justifiable cause for concern about two problems of which a failure to actively pursue a claim may be indicative. The first is that it is quite wrong for a claimant, notwithstanding that he has, by instituting a claim, started a process which he should realise affects the Employment Tribunal and the use of its resources, and affects the respondent, to fail to take reasonable steps to progress his claim in a manner that shows he has disrespect or contempt for the Tribunal and/or its procedures. In that event a question plainly arises as to whether, given such conduct, it is just to allow the claimant to continue to have access to the Tribunal for his claim. That is a distinct and different matter from the second problem which is that if a claimant has failed to actively pursue his claim to an inordinate and inexcusable extent so as to give rise to a risk of real prejudice to the respondent if the claim were to carry on, then a question arises as to whether or not there can still be fair trial and if there is doubt about that whether the claim should then be prevented from going any further.*

Discussion and conclusions

18. It is plain that there has been a persistent and deliberate disregard for required procedural steps. Group Momentum has, essentially, done close to nothing by way of case preparation despite the litigation commencing in most cases in November 2020.

19. I am of course sorry to hear of the personal and other circumstances that Mr Watts reports. I have also noted from the files that Group Momentum has suffered serious financial problems as a result of the pandemic. However, I do not accept that these matters provide anything like a complete excuse for failing to comply with the tribunal’s orders and/or to actively pursue the defence to the litigation.

- a. In response to my question in January 2022, whether it would actively pursue the defence to the claims Group Momentum assured the tribunal it would.
- b. The timeframe I put on my orders were generous. They followed previous like orders in most of the claims, prior to the claims being consolidated, that had also been reasonably generous.
- c. It would probably only have taken a matter of a few hours work to gather together documents for disclosure. Yet nothing has been disclosed. Likewise it may have taken a few hours work to put together a basic witness statement explaining Group Momentum's position. This has not been done or if it has, has not been served.
- d. No request for an extension of time was made in respect of my orders.
- e. No contact was made with the tribunal or the Claimants prior to the deadlines in my orders passing, stating that there was any difficulty with compliance.

20. I therefore have no hesitation in finding that there has been deliberate and persistent breach of the tribunal's orders and a failure to actively pursue the claim.

21. I also of the view that the time has come at which it is accurate to say that a fair trial of these claims on the merits is no longer possible and that striking-out the response is proportionate:

- a. The essential defence that Group Momentum wishes to run involves allegations that there was a TUPE transfer passing responsibility for the Claimants elsewhere. In order for that defence to be fairly tried disclosure of documents by Group Momentum is essential.
- b. All reasonable and proper efforts for case preparation have already been made.
- c. There has already been a strike-out warning:
 - i. the response to it was unsatisfactory and as explained above did not satisfactorily answer the default;
 - ii. the response did not give any indication that the default would be remedied in short order or at all;
 - iii. the default even now has not been remedied.
- d. One course might be to give yet another opportunity to comply with the tribunal's orders with fresh deadlines. I do not think that would be the right course here because in light of the history of this litigation I do not believe the orders would be complied with.

22. I therefore consider that the time has come to strike-out Group Momentum's response.

CASE MANAGEMENT

23. The position now is that the claims are undefended (there no longer being any respondent with a response).

24. I have considered whether to issue default judgments in relation to some or all of the claims but I am satisfied that it is necessary and preferable for there to be a final hearing in order to determine the claims. There is already a listing for a final hearing. The listing is now overly lengthy and can be reduced to two days. The final hearing will now take place on 26 – 27 September 2022. The third day, 28 September 2022 is not needed and is vacated.
25. The Claimants should continue to comply with the case management orders as between themselves so that the hearing is effective. I note that some of the Claimants have delayed serving a witness statement in light of the Respondents' failure to disclose documents. Where that has happened the deadline for serving a statement is extended to two weeks from the date of this order.
26. The Respondents remain entitled to notice of any hearings and decision of the Tribunal, but will only be entitled to participate in any hearing to the extent permitted by the Judge.

Employment Judge Dyal

Date 14.07.2022

Schedule of claims

Claim number	Date claim presented	Claimant (surname, first name)
2307651/2020	19/11/2020	Barnsley, Chelsey
2307727/2020	23/11/2020	Derrick, Natalie
2305545/2021	17/11/2021	Derrick, Natalie
2305604/2021	22/11/2021	Derrick, Natalie
2307598/2020	15/11/2020	Hanna, Sarah
2307753/2020	24/11/2020	Hopkin, Kyla
2307548/2020	13/11/2020	Pattenden, Lisa
2307877/2020	30/11/2020	Russell, Michelle
2300129/2021	11/01/2021	Russell, Michelle
2307842/2020	28/11/2020	Smith, Chelsie
2307497/2020	09/11/2020	Smith, Chelsie
2308205/2020	11/12/2020	Smith, Chelsie
2305630/2021	24/11/2021	Tolhurst, Cara
2307605/2020	16/11/2021	Vousden, Natalie
2305603/2021	22/11/2021	Vousden, Natalie
2307844/2020	28/11/2020	Wardle, Rebecca
2307495/2020	09/11/2020	Wardle, Rebecca
2308206/2020	11/12/2020	Wardle, Rebecca
2307843/2020	28/11/2020	Welch, Jenny
2307496/2020	09/11/2020	Welch, Jenny
2308204/2020	11/12/2020	Welch, Jenny