



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000132/2023

Preliminary Hearing held in Glasgow on 28 August 2023

Employment Judge D Hoey

Mr F Waddell

**Claimant
In person**

Long Lane Deliveries Limited

**Respondent
Represented by:
Mr R Milvenan –
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The respondent's application to have the claim struck out in terms of rule 37(1)(c) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 is refused. The claim shall proceed to a hearing.

Discussion and reasons

1. The claimant has raised claims for whistleblowing detriment and unfair dismissal. A three day in person hearing before a full Tribunal was scheduled to proceed following a telephone case management preliminary hearing that had taken place on 5 June 2023.
2. The respondent had asked last week for an order striking out the claim as the claimant had not actively pursued his claim and Orders had not been followed. The claimant had said he had just instructed new solicitors and wanted the hearing to proceed at a late date.
3. This hearing had been fixed to consider strike out and any case management issues.

4. This judgment deals with the strike out application.

The respondent's strike out application and the claimant's response

5. The respondent's position was that the claimant had failed to comply with two orders of the Tribunal and that accordingly the claim should be struck out. While the original application had relied upon other grounds for strike out, the respondent was relying solely on the claimant's failure to comply with two orders.
6. The first was the claimant's failure to comply with the order in the Note following a case management preliminary hearing of 5 June 2023 at paragraph 11 which was to progress a statement of agreed facts. A detailed draft had been sent to the claimant's former solicitor. The respondent's agent said no response had been provided. A further message had gone directly to the claimant and the respondent still had no detail as to the position.
7. The claimant's position was that he had told his solicitor by email that the statement was agreed, and the claimant was not clear why this was outstanding. He undertook to provide the email to the respondent's agent and the Tribunal showing that the statement had been agreed.
8. The second order that the respondent's agent said the claimant had not complied with was the order at paragraph 6 of the Note of 5 June 2023 as the claimant had not provided an updated Schedule of loss. This was due on 14 August 2023 and despite a reminder the claimant had not updated the respondent's agent as to precisely what was being sought and the up to date position regarding seeking other income.
9. The claimant's position was that an original schedule had been produced and he was unsure as to what else he needed to do, and his now current solicitor would attend to this within 14 days.
10. The respondent's agent argued that as the claimant had failed to comply with both Orders, it was reasonable and necessary to exercise discretion and strike out the claim. The claimant argued the claim should be allowed to proceed.

Strike out – the law

11. Rule 37 provides 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— ...

(c) for non-compliance with any of the ET Rules or with an order of the tribunal”

12. The Employment Appeal Tribunal held that the striking out process requires a two-stage test in *HM Prison Service v Dolby* [2003] IRLR 694, and in *Hassan v Tesco Stores Ltd* UKEAT/0098/16. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the Tribunal to decide as a matter of discretion whether to strike out the claim. In *Hassan* Lady Wise stated that the second stage is important as it is ‘a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit’ (paragraph 19).

13. Striking out is not automatic and care is needed given the draconian nature. In *Hasan* the Employment Appeal Tribunal held that relevant factors in the exercise of that discretion that might have weighed heavily included the early stage of the proceedings, the ability to direct that further and better particulars of each claim be specified, and the absence of any application on the part of the respondent for striking out.

14. In considering failure to comply with orders, the Tribunal should ensure the decision is proportionate. Hence in *Ridsdill v D Smith and Nephew Medical* UKEAT/0704/05 it was held to be disproportionate to have struck out a claim for failure to provide witness statements and schedules of loss where a less drastic means of dealing with the non-compliance was available, such as unless orders and costs orders.

15. The guiding consideration, when deciding whether to strike out for non-compliance with an order, is the overriding objective (*Weir Valves and Controls (UK) Ltd v Armitage* [2004] ICR 371) which requires the Tribunal to consider

all the circumstances, including '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 possible' (see paragraph [17]). The Tribunal must consider the matter objectively and weigh the factors in the balance on an assessment of fairness. A sanction short of strike out may be appropriate.

16. In *Harris v Academies Enterprise Trust* [2015] IRLR 208, the Employment Appeal Tribunal (at [26]) referred to the fact that 'A failure to comply with orders of a tribunal over some period of time, repeatedly, may give rise to a view that if further indulgence is granted, the same will simply happen again. Tribunals must be cautious to avoid that', but the Employment Appeal Tribunal noted that if the failure was an 'aberration' and unlikely to re-occur, that would weigh against a strike out. At [33] the Employment Appeal Tribunal described another relevant principle as 'each case should be dealt with in a way that ensures that other cases are not deprived of their own fair share of the resources of the court. If a case drags on for weeks, the consequence is that other cases, which also deserve to be heard quickly and without due cost, are adjourned or simply are not allotted a date for hearing'.
17. Consideration of a striking out order under rule 37(1)(c) must include consideration of whether a fair hearing is still possible.
18. Proportionality, and consideration of whether there are alternative orders to a strike out that would better address the breach of Rules or orders, will be a necessary consideration before the power under r 37(1)(c) is exercised by a Tribunal.

Decision

19. The Tribunal considered the respondent's application carefully in light of the authorities. Each aspect is dealt with in turn.

Had the claimant failed to comply with a Tribunal Order?

20. The Tribunal is satisfied that the respondent's agent had not been told as to whether the statement of agreed facts that they had produced had been

agreed. The claimant had not engaged with the respondent's agent following his solicitor withdrawing and he was seeking and has now secured alternative representation. The order had not been complied with.

21. The claimant had also failed to provide the respondent with an up to date schedule of loss (although an initial schedule had been provided).
22. The grounds with regard to the application had been established as the claimant had failed to comply with the orders. However, the Tribunal must then consider whether strike out should follow.

Is it appropriate to strike out the claim?

23. Having considered matters the Tribunal has decided that it would be contrary to the interests of justice to strike out the claim for the claimant's failures. While it is important to take into account the additional cost the respondent has incurred and the lack of progress, a fair hearing is clearly still possible. In fact, as a result of today's hearing the respondent now has confirmation that the lengthy statement of agreed facts has been accepted the claimant and the schedule of loss would be updated within a short period. The Tribunal concluded that it would be disproportionate to strike out the claims on the facts.
24. There was no suggestion from either party that a fair hearing could not now proceed. Any impact upon the respondent has been minimised by robust case management and moving matters forward. While there has been prejudice to the respondent, in all the circumstances it would not be just to dismiss the claims, particularly given the context and the claimant's solicitor withdrawing and the circumstances he faced. The prejudice to the respondent is not such as to justify the draconian step that strike out would achieve.
25. The claimant has found himself in a situation that he is having to instruct new solicitors. The claimant has confirmed that his new solicitors are able to represent him and conduct his case, thereby moving matters forward.
26. The respondent understands the basis of the claim and key facts have now been agreed. The failure to comply with the orders did not affect the respondent's understanding of the basis of the claims or any material issues.

The bases for the claims are clear and now fully understood. While some issues remain outstanding, they are not such as to prevent matters from proceeding and it is in the interests of justice that the claim be allowed to proceed and matters dealt with at a final hearing.

27. It is important that rules and orders are followed and the parties are reminded of the significance of such matters. On the facts of this case at this juncture it is not just or proportionate to strike out the claim.
28. The hearing shall proceed with alacrity and the parties should ensure they work together to ensure the hearing proceeds on the dates fixed.
29. Case management matters are dealt with in a separate Note. It is important the parties consider the terms of that Note and progress matters without any further delay.

Employment Judge: D Hoey
Date of Judgment: 29 August 2023
Entered in register: 31 August 2023
and copied to parties