



# THE EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Nayeem

**Respondent:** Co-operative Group Limited

**Heard at:** East London Hearing Centre      **On:** 1 November 2023

**Before:** Employment Judge W A Allen KC (sitting alone)

## Representation

**Claimant:** did not attend

**Respondent:** Ms Greening (counsel)

# JUDGMENT

**The Claimant's claim for unfair dismissal is struck out.**

# REASONS

1. Today's hearing was listed, initially for one day on 1 November 2023, by notice dated 30 August 2023, subsequently expanded to 2 days 1 and 2 November 2023, by notice dated 2 October 2023 to hear the claimant's claim for unfair dismissal, presented on 18 April 2023.

2. Case management orders had been sent to the parties on 30 August 2023. These included an order that the Claimant send a document to the Respondent by 6 September 2023 setting out how much compensation he was claiming; and that by 18 October 2023, he send a copy of his witness statements to the Respondent. The Claimant did not comply with these directions – albeit that he did on 17 October 2023 send some emails from former co-workers protesting against his dismissal. There was no witness statement from the Claimant himself. The case management order concerning witness statements had made it clear that “Everyone who is going to be a witness at the hearing, including the claimant, needs a witness statement”. The Respondent did comply with the case management orders and did send its witness statements to the Claimant.

3. The Claimant did not attend today at the tribunal. The tribunal clerk attempted to call the Claimant – but his phone went to answerphone. The tribunal clerk also emailed the Claimant. The tribunal delayed starting the hearing until 11am but there was no response from the Claimant by 11am.

4. Given the failure of the Claimant to comply with the case management orders, the Respondent had applied on 24 October 2023 for strike out of the Claimant's case under rule 37(1)(c) of the 2013 ET Rules (non-compliance with an order of the tribunal). That was sent to the Claimant by email on 24 October 2023. There was no response from the Claimant.

5. The tribunal sent a strike out warning notice to the parties by email dated 26 October 2023, informing the parties that the tribunal was considering whether to strike out the Claimant's claim for non-compliance with previous directions and asking for an explanation from the Claimant to be sent by 4pm on 27 October 2023 explaining the extent to which the Claimant had complied and if not, why not. The Claimant was also asked to explain whether he considered that he is ready to present his unfair dismissal claim at a Final Hearing starting on 1 November 2023. The notice stated that 'A failure to respond will be taken as potential evidence that the claim is not actively pursued'.

6. The Claimant did not respond to the tribunal by that deadline or at all.

7. Today, the Respondent indicated that it wished to pursue that application under rule 37(1)(c) and also rely on rule 37(1)(d) (that the case has not been actively pursued); and as a back up on rule 37(1)(a) (no reasonable prospect of success).

8. Strike out on the basis of failure to comply with case management orders; and / or failure to have actively pursued a case is very much dependent on the tribunal's assessment of whether a fair trial is still possible on the date listed despite any defects in compliance with Tribunal orders.

9. The Court of Appeal in the case of *Blockbuster v James* [2006] EWCA Civ 684 [2006] I.R.L.R. 630 emphasised that it would be unusual to strike out on procedural grounds if a claim was ready for final hearing.

10. Strike out on the basis of no reasonable prospects of success requires a tribunal to form a view on the merits of the case and conclude that it is satisfied that all or part of a claim has no reasonable prospect of succeeding. The test is not whether the claimant is likely to fail. It is a higher test than that. Strike out is usually inappropriate where there is contested evidence on relevant core matters.

11. The tribunal's focus should be on achieving a fair trial of the issues between the parties rather than punishing any defect, no matter how inexcusable.

12. I had before me today: the trial bundle; 4 witness statements from the Respondent; no witness statements from the Claimant and no attendance from the Claimant. The Respondent and its witnesses were in attendance.

13. The claim was for unfair dismissal. The Claimant was a manager of a Coop store who claimed to have been unfairly dismissed on 1 March 2023 following an interaction with a known shoplifter and an internal disciplinary process.

14. I will address first the Respondent's application for strike out on the basis of non-compliance with case management orders and a failure to actively pursue the claim.

15. The claimant did not comply with the tribunal's case management orders. Those orders were set out clearly in the notice dated 30 August 2023 and the Claimant corresponded by email with the Respondent after that date – most recently on 17 October 2023. The Respondent's emails to the Claimant including on 15 September 2023, 2 October 2023, 3 October 2023 and 18 October 2023 are clear and helpful and set out what it was that the Claimant had been required to do and what he had failed to do and gave him opportunities to comply (albeit late) with the case management orders.

16. Strike out is a draconian sanction and the key test for me is whether a fair hearing is possible on the dates listed (today and tomorrow). I consider that the claimant's conduct in failing to comply with the case management orders is blameworthy and without explanation. He had been informed by the tribunal that it was considering strike out. He did not respond to the tribunal. He had been informed that a failure to respond would be taken as potential evidence that the claim is not actively pursued. Participation by the Claimant at a hearing brought about by his claim is essential to a fair trial in this case. Participation goes beyond mere attendance and includes compliance with case management orders – in particular the order to produce a witness statement and exchange it with the Respondent in advance of the hearing. Strike out is therefore a proportionate sanction for me to apply at this hearing.

17. Therefore, I will strike out under rule 37(1)(c) and (d) which in this case are alternative and overlapping routes to the same decision today.

18. I will not strike out under rule 37(1)(a) (no reasonable prospect of success) because I have not read the Respondent's evidence and from the claim form and response, I can see that the claim is clearly one that would have involved contested evidence, if it had proceeded today with compliance by the Claimant.

**Employment Judge W A Allen KC**  
**Dated: 1 November 2023**