



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Dickinson

**Respondent:** Nuffield Health

**Heard at:** Manchester

**On:** 4 September 2023

**Before:** Employment Judge McDonald

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr Frew, Counsel

# JUDGMENT

The judgment of the Tribunal is that:

1. The respondent's application to strike out the claimant's claim under Rule 37 (1)(c) of the Employment Tribunal Rules 2013 ("the ET Rules") is refused. The claimant did not fail to comply with case management orders.
2. The respondent's application to strike out the claimant's claim under Rule 37 (1)(d) of the ET Rules succeeds. The claimant's claim is struck out in its entirety because he did not actively pursue his claim.

# REASONS

1. This was the respondent's application to strike out the claimant's claim. The basis of the application is that the claimant has failed to comply with case management orders and/or has failed to actively pursue his claim.
2. I gave oral reasons for my judgment at the hearing on 4 September 2023. The claimant asked for those reason in writing. I have set out the full terms of the judgment and the reasons in this document. As I explained to the claimant, these written reasons set out the relevant law in more detail than I did in giving my oral reasons. The claimant has indicated that he will want these reasons in writing, because of the time allowed I will not set out all the relevant law and what happened at the hearing but will focus on my decision and the reasons for it in brief as set out

in my previous judgment refusing the application that the respondent made in July 2022.

## Relevant Law

### Strike out for non-compliance/unreasonable conduct and failing to actively pursue

3. Rule 37 of the Employment Tribunal Rules of Procedure 2013 (“the ET Rules”) gives the Tribunal the power to strike out all or part of a claim:

#### “37. — Striking out

- (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).”

4. Rule 37(2) says that 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.

5. The process for striking-out under Rule 37 involves a two stage test (**HM Prison Service v Dolby [2003] IRLR 694, EAT; Hasan v Tesco Stores Ltd UKEAT/0098/16**). First, the Tribunal must determine whether one of the specified grounds for striking out has been established; second, if one of the grounds is made out, the tribunal must decide as a matter of discretion whether to strike out or whether some other, less draconian, sanction should be applied. That means that if any of 37(1)(a) to (e) apply, a tribunal "may" strike out, but is not obliged to do so. In deciding whether to exercise the power the tribunal must have regard to the overriding objective and what is fair and just to both sides (**T v Royal Bank of Scotland [2023] EAT 119, para 38**).

6. Even in a case where the impugned conduct consists of deliberate failures in relation, for example, to disclosure, the fundamental question for any Tribunal considering the sanction of a strike out is whether the parties' conduct has rendered a fair trial impossible: see **Bolch v Chipman [2004] IRLR 140 EAT**. In **Bolch**, Burton P set out guidance for Tribunals when determining whether or not to make a strike out order, as follows:

- (i) There must be a finding that the party is in default of some kind, falling within Rule 37(1).
- (ii) If so, consideration must be given to whether a fair trial is still possible and save in exceptional circumstances, if a fair trial remains possible, the case should be permitted to proceed.
- (iii) Even if a fair trial is unachievable, consideration must be given to whether strike out is a proportionate sanction or whether there may be a lesser sanction that can be imposed.
- (iv) If strike out is the only proportionate and fair course to take, reasons should be given why that is so.

7. In **James v Blockbuster Entertainment Ltd [2006] IRLR 630 CA** Sedley LJ recognised the draconian nature of the strike out power and said that it is not to be readily exercised.

Striking out for non-compliance with the Employment Tribunal Rules or an order of the Tribunal (Employment Tribunal Rules 2013 rule 37(1)(c))

8. The leading authority on striking out for non-compliance is **Weir Valves and Controls (UK) Ltd v Armitage (2004) ICR 371**. At paragraph 17 in that case the Employment Appeal Tribunal said that:

"It does not follow that a striking-out order or other sanction should always be the result of disobedience to an order. The guiding consideration is the overriding objective. This requires justice to be done between the parties. The court should consider all the circumstances. It should consider 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 still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience.'

Repeated non-compliance is to be deprecated, and it may give rise to a view that if further indulgence is granted, the same will simply happen again: see Harris at paragraph 26."

Striking out because a case has not been actively pursued (Employment Tribunal Rules 2013 rule 37(1)(d))

9. In **Abegaze v Shrewsbury College of Arts & Technology [2010] I.R.L.R. 238** the Court of Appeal confirmed that strike out for failing actively pursue a case raises some different considerations to a strike-out for non-compliance under 37(1)(c). It approved what the Court of Appeal said in **Evans Executors v Metropolitan Police Authority [1993] ICR 151**. In **Evans** the Court of Appeal held that the general approach should be akin to that which the House of Lords in **Birkett v James [1978] AC 297** considered was appropriate when looking at the question whether at common law a case should be struck out for want of prosecution. (The position in civil actions has altered since the advent of the Civil Procedure Rules). That requires that there should either be (i) intentional or contumelious default, or (ii)

inordinate and inexcusable delay such that there is a substantial risk that it would not be possible to have a fair trial of the issues, or there would be substantial prejudice to the respondents.

10. The first category is likely to include cases where the claimant has failed to adhere to an order of the tribunal. As such, it overlaps substantially with the tribunal's power under rule 37(1)(c) to strike out for non-compliance with tribunal rules or a tribunal order. The second category requires not only that there has been a delay of an inordinate and inexcusable kind, but that the respondent can show that it will suffer some prejudice as a result. The Court of Appeal in **Evans** held that it is necessary for a Tribunal to consider that issue of prejudice separately - prejudice is not necessarily inherent in the failure to actively pursue a case.

## **Facts**

### Background

11. Dealing very briefly with the background to the application. This is a case which was brought by the claimant in 2018 relating to alleged acts of disability discrimination in 2017. The incidents to which it relates are therefore already some 6 years old. The claimant is a disabled person by reason of Autistic Spectrum condition.

12. The final hearing in the case had been listed for 8 days to start today, 4 September 2023. However, that final hearing has been converted to a Preliminary Hearing to hear the respondent's strike out application. When I checked with the Tribunal's Listing Office on the morning of the hearing it confirmed that as it stands today the earliest availability for a re-listed final hearing of 8 days will be 10-19 February 2025. That means by the time the hearing takes place if those dates are the earliest are allocated to this case the events giving rise to the claim will be some seven, possibly eight years old.

13. The context for this hearing is a number of previous Preliminary Hearings dealing in particular with production of the bundle of documents for the hearing. Unusually, the claimant rather than the respondent was ordered to take responsibility for the preparation of the final hearing bundle in this case. The Tribunal ordered that approach in this case because of the claimant's disability. The intention was that putting together the Final Hearing Bundle in a way which enabled him to navigate through it more easily would enable the claimant to more fully participate in the Tribunal process and at the Final Hearing.

### The 13 October 2022 Case Management Order

14. I conducted a previous preliminary hearing on 11 October 2022 which resulted in a Case Management Order dated 13 October 2022. In summary, that Case Management Order provided for the respondent to send to the claimant by 1 November 2022 documents which the claimant said were missing from the draft final hearing bundle or had been redacted unnecessarily. The claimant was then by 6 December 2022 to write to the Tribunal either to confirm that all documents had now been received or to set out what documents remained outstanding or clarify why he did not accept the respondent's sworn evidence that any documents were no longer available in whole or in part. The claimant was also by that date to write to the

Tribunal and respondent to say whether or not he objected to any application by the respondent to redact any of the emails at that point in the bundle.

15. I ordered that if the claimant was not satisfied that all documents had been provided or that there was a need to consider an application from the respondent to redact documents there would be a further Preliminary Hearing on 13 February 2023. If the parties had been able to resolve all remaining issues relating to documents by then they were to write to the Tribunal to confirm that that hearing was no longer necessary.

The hearing on 13 February 2023 and the claimant's disengagement from the Tribunal process in December 2022

16. The hearing on 13 February 2023 did go ahead. The claimant did not attend. The next step necessary to prepare the case for the final hearing if the issue of the documents had been resolved was for the parties to exchange witness statements on 7 April 2023.

17. On 7 April 2023 the respondent's then representatives (they have since changed solicitors) wrote to the Tribunal to ask for the date for exchange of witness statements to be varied to 21 April 2023. There was no indication in that letter that there were any unresolved issues relating to the Tribunal bundle following the hearing on 13 February 2023.

18. Having heard from the claimant today I find that following complying with the requirement to respond to the respondent's documents on 6 December 2022 the claimant disengaged from the Tribunal process. Disengaged is the word that he used. He explained that he purposely disengaged with the process for two weeks over the Christmas period and did not subsequently re-engage.

19. The claimant explained to me at the hearing using the metaphor of spoons that he only had a certain amount of energy and concentration which he could devote to matters. At times he has to make conscious decisions how to use that limited energy and concentration. He might have to choose between using those limited resources for going to work and ensuring that he could get through the working day or to use it instead in dealing with the Tribunal case. It was plain in his submissions that he made the decision to devote his energy and concentration, his "spoons" to dealing with his day-to-day life and working life rather than to addressing matters relating to the Tribunal case.

20. The impact of the claimant's disengagement from December 2022 was that the Tribunal did not know as at the hearing on 13 February 2023 that there were any outstanding issues with the contents of the Final Hearing bundle. The further knock-on effect was that witness statements were not exchanged as required either on 7 April 2023 or on the amended date of 28 April proposed by the respondent 2023. As I have said, the claimant did not attend the hearing on 13 February 2023 and did not respond to the respondent's application for an extension of time for exchange of witness statements.

21. In terms of the claimant's situation during this time he explains that he had found it extremely difficult for him to read Tribunal emails because of their impact on him. He had reached the point where he was not even able to open emails where it

was clear that they related to the Tribunal process or to the case. He referred to receiving an email received in June 2023 which referred to the case being closed. He said that email had a serious effect on his mental health and that he had suicidal thoughts. On balance I suspect, as Mr Frew submitted, that the email the claimant referred to was a letter from the respondent's former solicitors to say that they were closing their file on the case because they were handing it over to their current solicitors. It was not an email from the Tribunal saying the case was closed.

#### The claimant's re-engagements with the Tribunal process from August 2023

22. The claimant's next engagement with the Tribunal was to respond to the respondent's application to strike out, more specifically the strike out warning issued by the Tribunal on 26 July 2023. The claimant responded in writing on 9 August 2023 to say that he did want to attend a hearing to contest the proposed striking out. He set out his reasons for that in a document and supplemented that in a further document sent on 3 September 2023 i.e. the day before today's hearing.

#### The Application to Strike Out

23. The strike out application is brought on 2 grounds. The first, which I will call the "non-compliance application" was based on non-compliance with Tribunal orders (rule 37(1)(c)). The second, which I will call the "not actively pursuing application" is based on a failure to actively pursue the claim (rule 37(1)(d)).

#### *The Non-compliance application*

24. When it came to the non-compliance application, there was some uncertainty about what order the respondent was saying the claimant had failed to comply with. I find that he had complied with the orders that I made sent in the Case Management Order of 13 October 2022. There was some confusion as to whether or not the draft agreed final hearing bundle had been supplied by the claimant to the respondent. Based on what Ms Percival told Employment Judge Johnson at the hearing on 13 February 2023 (recorded in his case management summary) it seems to me that he had done so.

25. I find that from the claimant's point of view there will still some unresolved issues relating to the documents in the Final Hearing Bundle. It was still the claimant's view that the respondent has not fully complied with its disclosure obligations. In those circumstances, as I put it to him, it could be expected that he would contact the Tribunal to alert it of the fact that he still needed to pursue that matter. Alternatively, he could have attended the hearing on 13 February 2023 which I had specifically listed to deal with any unresolved matters.

26. In fairness to the claimant, he was very candid that during the period from January to June 2023 he had consciously disengaged from the Tribunal process. He had in essence made a decision that it was more important to prioritise keep his then current job and use his limited energy and concentration for that rather than for the Tribunal process.

27. When it comes to compliance with the Case Management Orders I find there is no clear evidence that the claimant has failed to comply with Case Management Orders. Mr Frew confirmed that the respondent's position was that it did not rely on failure to exchange witness statements as a breach of a case management order. In

terms of the non-compliance application it is not clear to me that there has been a failure to comply with Case Management Orders on the claimant's part. The strike out application based on rule 37(1)(claimant) fails.

*The not actively pursuing application*

28. By the claimant's own admission, there was a period of time when he disengaged from the Tribunal process. I find that he did fail to actively pursue the claim after he sent the document on 6 December 2022 until he objected to the strike out application on 9 August 2023.

29. The impact of that period of disengagement was that any outstanding disputes regarding the Final Hearing bundle were not resolved in February as they otherwise would have been. The knock-on effect of that was that witness statements were not exchanged in April/May 2023 as they would otherwise would have been. The knock-on effect of that was that the case was not ready for final hearing so that the 8 day final hearing in September 2023 had to be postponed. Ultimately, that means the final hearing of the claim will be knocked back by a further 18 months or so and will take place 8 years after the events giving rise to the claim.

30. The claimant has explained why he disengaged. He explained that due to the impact of his disability on his executive function he has to choose when, how and where to use the "spoons" of energy and concentration that he had available.

31. I considered a previous strike out application by the respondent on 18 July 2022. I refused that application. In my judgment from that hearing dated 21 July 2022 I voiced the concern that the claimant was not engaging sufficiently with the Tribunal process to ensure that the claim did progress to a final hearing which would be fair to both parties. At that previous strike-out hearing, the claimant assured me that he would "put his nose to the grindstone" as he put it and engage with the Tribunal process in priority to other matters. It is clear to me that in fact he has not done that.

32. The claimant was very eloquent about the impact on him of the Tribunal process and spoke very clearly and articulately about the importance of his being able to enforce to his rights under the Equality Act 2010. I agree with that. However, it is also incumbent upon a party to the Tribunal case to progress their claim, even if that takes the form of writing to the Tribunal to ask for more time or to ask for a Preliminary Hearing to be postponed, e.g. because of the impact on them of mental health or other issues. The claimant in this case did none of that.

33. I do find that in this case there has been an "intentional or contumelious default" by the claimant when it comes to pursuing his claim. If I am wrong about that (for example if the impact of the claimant's Autistic Spectrum condition means that the default on his part should not be regarded as contumelious) I also find that there has been inordinate and inexcusable delay on his part. I do find that has given rise to a substantial risk that a fair trial would not be possible and to serious prejudice to the respondent.

34. In considering whether a fair trial is possible, it does seem to me that the delay until the final hearing in this case means that there is likely to be a significant impact on the quality of the evidence. The claimant has already explained that he is

in a position where he is not certain whether one of his witnesses will be attending to give evidence. The respondent has already lost one of its witness who has moved on from its employment. If the hearing is not to take place until 2025 then it does seem to me there is a risk that further witnesses may be lost to the process. Even if they are not there is a clear and significant risk that the delay will impact their recollection of events.

35. The legal authorities I have referred to above make it clear I need to consider whether any steps short of striking out the claim would be appropriate. I need to decide the extent to which, if I decided not to strike out the claim, the claimant would be likely to comply with and take steps to actively progress matters to a final hearing. I have a great deal of sympathy for the claimant in terms of the challenges he faces, in marshalling his energies and concentration to balance a day to day working life, relationships and the Tribunal process. Ultimately, though I agree with Mr Frew's submission that in my last judgment I made it very clear that matters could only progress if the claimant now (which was in July 2022) prioritised the Tribunal hearing. It is clear to me that he has not done so. It seems to me that that means that there is a significant risk that he will not do so in the future.

36. We discussed at the last Strike out hearing in July 2022 the support networks that the claimant had which might assist him in taking matters forward. They involved his brother and his partner providing assistance including potentially providing funding for legal advice. The claimant explained at this hearing that none of that has been forthcoming although his brother has agreed to provide limited assistance to the claimant.

37. I have considered carefully my judgment from the previous strike out hearing, I have taken into account the very eloquent points that the claimant has made about the importance of disabled people being able to obtain justice from a Tribunal. I have also taken into account the duties which a Tribunal clearly has to ensure that adjustments are made to the Tribunal process to enable a disabled person to fully participate in such processes. In this case, however, I am satisfied that what has happened is that the claimant, for valid reasons so far as his day to day life is concerned, has taken a conscious decision to disengage with the Tribunal process and prioritise other aspects of his life. The result of that has been a postponement of the final hearing. That has in itself led to a significant prejudice to the respondent and, in my view, to an inability to hold a fair hearing given that the delay until the new listing date. In those circumstances, the not-actively pursuing strike out application succeeds.

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Employment Judge McDonald

Date:14 November 2023



JUDGMENT AND REASONS SENT TO THE PARTIES ON

16 November 2023

FOR THE TRIBUNAL OFFICE

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