



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss B Lock

**Respondent:** Wm Morrison Supermarkets plc

**Heard at:** Watford Employment Tribunal

**On:** 13 September 2023

**Before:** Employment Judge McTigue

## Representation

Claimant: Litigant in Person

Respondent: Mr. O Holloway, Counsel

**JUDGMENT** having been sent to the parties on 23 October 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. Before providing my substantive reasons, I wish to apologise for the delay in providing these reasons. The reason for the delay is as follows. I heard Ms Lock's case against her former employer, Wm Morrison Supermarkets plc, at the Watford Employment Tribunal on 13 September 2023. I gave judgment that all of Ms Lock's claims were to be struck out under rule 37(1) of the Employment Tribunals Rules of Procedure 2013. I also gave oral reasons for my judgment to both parties at the hearing on the day. Neither party requested written reasons of my judgment during the course of the hearing on 13 September 2023.
2. On 14 September 2023 I wrote up my judgment and sent it to the South-East promulgation's inbox. The judgment was then sent out by the Tribunal to both parties on 23 October 2023.
3. Unfortunately, due to an oversight by the Tribunal's administration team, it was only on 9 January 2024 that I was made aware that Ms Lock has requested written reasons in respect of this matter. Again, I can only apologise for the delay in providing these reasons which has been occasioned by matters beyond my control.

**The Proceedings**

4. The claimant initially presented two claims. They were initially consolidated by EJ R Lewis. Case number 3320511/2021 was however struck out by EJ Hyams on 10 February 2023. As a consequence of this, I was only required to consider the claimant's claims under case number 3315918/2021. The claims made in this case were for:
  - 4.1. unpaid wages,
  - 4.2. breach of contract, and
  - 4.3. a failure to provide properly itemised statements of the claimant's pay contrary to section 8 of the Employment Rights Act 1996.
5. It is necessary to set out of the history of the case management orders made in respect of this proceedings. On 11 July 2022 a preliminary hearing took place for case management purposes. The respondent attended, the claimant did not. At this hearing EJ Hyams made an order that the claimant must by 5 September 2022 provide the Tribunal and the respondent with further information with regard to her whistleblowing claim. That claim was part of case number 3320511/2021. The claimant did not comply with this order. Information about non compliance with that order is provided for the sake of completeness and I must stress that I have not taken the claimant's non compliance with that order into account when reaching my decision in this claim. That would be unfair. I am only concerned with whether the claimant complied with the orders relevant to her claims presented under case number 3315918/2021.
6. On 11 November 2022 EJ Hyams again held a preliminary hearing with the parties in order to make case management orders. Both parties attended. EJ Hyams made a number of case management orders. Of note, is the order made in respect of disclosure. It read as follows:

**"Disclosure and inspection**

2 The parties must send to each other copies of all documents in their possession or control which are relevant to the claim for unpaid wages made in case number 3315918/2021. They must both do that so that the documents arrive on or before 4.00 pm on **Friday 6 January 2023**. This order is not conditional on compliance by the other party with the order: so both parties have an obligation to comply with this order, and the fact that one party has not done so does not mean that the other party need not comply with it. The claimant's documents must include all of her bank statements for the period during which she says wages to which she was entitled were not paid to her. She can in providing copies of those documents redact (i.e. blank out) all entries other than those showing the payments made by the respondent to her.

3 The word "documents" in order number 2 above includes recordings, emails, text messages, social media and other electronic information. You must send all relevant documents you have in your possession or control even if they do not support your case. A document is in your control if you could reasonably be expected to obtain a copy by asking somebody else for it.

4 If despite the parties' best efforts documents come to light (or are created) after the date for disclosure and inspection, then those documents must be disclosed as soon as practicable in accordance with the duty of continuing disclosure."

7. On 10 February 2023 EJ Hyams held a third preliminary hearing with the parties. Again, both parties attended. EJ Hyams made further case management orders in order to progress the matter to a final hearing. Of note are the following orders:

**"Schedule of loss**

1 The claimant must, **by 4.00pm on Monday 17 April 2023**, send to the respondent and the tribunal a statement of the sums which she claims are owed to her by the respondent and the amounts which she claims by way of damages for breach of contract. That statement should be in the form of a properly itemised schedule of loss, which must include a statement of how the amounts claimed have been calculated.

...

**Disclosure and inspection**

3 The parties must **by 4.00pm on Tuesday 9 May 2023** send to each other copies of all documents in their possession or control which are relevant to the claims made in this case in so far as they have not already been disclosed. The documents should be described in a list, which may refer to the documents disclosed in summary form. However, if the provenance (or origin) of a document is not apparent from the document itself, then it must be described in that list. This order is not conditional on compliance by the other party with the order: so both parties have an obligation to comply with this order, and the fact that one party has not done so does not mean that the other party need not comply with it.

4 The word "documents" in order number 3 above includes recordings, emails, text messages, social media and other electronic information. You must send all relevant documents you have in your possession or control even if they do not support your case. A document is in your control if you could reasonably be expected to obtain a copy by asking somebody else for it.

5 If despite the parties' best efforts documents come to light (or are created) after the date for disclosure and inspection, then those documents must be disclosed as soon as practicable in accordance with the duty of continuing disclosure.

...

**Witness statements**

10 The claimant and the respondent must prepare witness statements for use at the hearing. Everybody who is going to be a witness at the hearing, including the claimant, needs a witness statement.

...

14 The claimant and the respondent must send each other copies of their witness statements by **4.00 pm on Tuesday 11 July 2023**. This order is not conditional on compliance by any other party with the order: so both parties have an obligation to comply with this order, and the fact that one party has not done so does not mean that the other party need not comply with it.

15 The parties must send their witness statements in digital form to the tribunal and the respondent must send to the tribunal a digital copy of the hearing bundle **by 4.00pm on Friday 8 September 2023.**"

8. On 12 July 2023 the respondent's solicitors made an application to strike out the claimant's case or, in the alternative, an unless order. The matter was considered by EJ Hyams who declined to strike out the claimant's case. He stated:

"...I have concluded that the claims with the above case number should not be struck out under rule 37 of the Employment Tribunals Rules of Procedure 2013 or be the subject of an "unless" order under rule 38 of those rules, and that they should be determined at the hearing commencing on 13 September 2023.

That is for the following reasons.

1. An "unless" order under rule 38 would be unlikely to achieve finality in the circumstances of this case.
2. The striking out of a claim is a draconian step which is not to be taken lightly.
3. The claimant would be entitled to ask for a hearing at which she would be able to make representations against a proposed striking-out of her claim under rule 37 of the Employment Tribunals Rules of Procedure 2013.
4. If the claimant has by the start of the hearing on 13 September 2023 been unable to state her case with sufficient precision to enable the judge conducting the hearing to find in her favour, then the claim will liable to be dismissed. That is because, in order to succeed in a claim for unpaid wages or damages for breach of contract, the claimant must satisfy the tribunal on the balance of probabilities not only that wages are owed but also their amount."

9. The matter came before me for a final hearing on 13 September 2023. At the start of the hearing, it was apparent to me that the claimant had still been unable to state her case with sufficient precision. Notwithstanding that, I was conscious of the overriding objective and the fact that the claimant was a litigant in person. Consequently, I spent the entire morning attempting to ascertain with the claimant what precise sums she alleged were due to her. Despite doing so, the claimant was still unable to clarify with sufficient precision her claim for unpaid

wages. She stated that a sum of £1069.92 was owed to her but was unable to provide an adequate explanation as to how she arrived at that figure.

10. After the lunch break, the respondent made an application to strike out the claimant's case in accordance with Rule 37(1)(b) and/or (c). I was conscious that as the claimant was a litigant in person, she needed to have a reasonable opportunity to make representations and it was important that she understood the terms on which the strike out application was being made. Consequently, I read out verbatim the wording of Rule 37(1)(b) and (c). Upon doing so, the claimant accused me of bias and said that I had accused her of acting unreasonably. I explained to the claimant that this was the wording used by the Rules but the claimant again accused me of bias. I asked her whether she wished me to treat her allegation as an application to recuse myself from the case. She indicated that she did.
11. After hearing from both parties, I adjourned to consider both the strike out and recusal applications.

## **Law**

### **Striking out**

12. Under Rule 37(1) of the Employment Tribunal Rules of Procedure, a Tribunal may strike out all or part of a claim or response on various grounds including-
  - (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;**
13. In light of the severe consequences of strike out, it is considered a draconian step which should only be taken on the clearest grounds and as a matter of last resort. Its purpose is not to punish the conduct but rather to protect the other party from the consequences of the conduct (**Bolch v Chipman [2004] IRLR 140, EAT**).
14. Before making a strike out order, the tribunal must give the relevant party a reasonable opportunity to make representations, either in writing or, if requested by that party, at a hearing.
15. When considering whether to strike out a claim, the tribunal must first consider whether any of the grounds set out in rule 37(1) have been established; and then, having identified any established grounds, it must decide whether to exercise its discretion to order strike-out. This two-stage approach was confirmed in **Hasan v Tesco Stores Ltd EAT 0098/16, EAT**.

### **Manner of proceedings**

16. In considering whether to strike out for manner of proceedings, the tribunal must first consider whether a party has behaved scandalously, unreasonably or vexatiously when conducting the proceedings. In essence that there has been

conduct which amounts to an abuse of process (**Bennett v London Borough of Southwark [2002] IRLR 407, CA**). A tribunal must then consider whether a fair trial is still possible. A tribunal must then also consider whether strike out would be an appropriate and proportionate response or whether a less punitive response (e.g., award of costs or partial strike out) would instead be appropriate and proportionate (**De Keyser Ltd v Wilson 2001 IRLR 324, EAT**).

#### Non-compliance with Tribunal order

17. In considering whether to strike out for non-compliance with an order, 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: the magnitude of the non-compliance; whether the default was the responsibility of the party; what disruption, unfairness or prejudice has been caused; whether a fair hearing would still be possible; and whether striking out or some less punitive response (e.g. further orders including deposit or an unless order) would be an appropriate and proportionate response (**Weir Valves and Controls (UK) Ltd v Armitage 2004 ICR 371, EAT**).
18. Where a claim has arrived at the point of a final hearing it would take something very unusual indeed to justify striking out (**Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684, [2006] IRLR 630, CA**).
19. When considering whether a fair trial is still possible, it is sufficient that a fair trial is not possible within the allocated trial window, rather than not possible at all, for the Tribunal to exercise its power to strike out (**Emuemukoro v Croma Vigilant (Scotland) Ltd 2022 ICR 327, EAT**).

#### Bias

20. The leading case on the test for bias is the House of Lords' judgment in **Porter v Magill 2002 2 AC 357, HL** there it was stated that the test to be applied when considering such a contention is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased.

#### Conclusions

21. In respect of the claimant's recusal application, having reminded myself of the test for bias and having taken all relevant matters into account I was satisfied that the test for bias was not made out and continued to hear the matter. A fair minded and informed observer would not conclude that I was biased on account of me having read out verbatim the wording of Rule 37(1)(b) and (c).
22. In respect of the respondent's strike out application under Rule 37(1)(c), it was apparent to me that the claimant had not complied with the orders relating to disclosure made on 11 November 2022 and 10 February 2023. The only disclosure undertaken by the claimant was her provision of a bundle of documents which she sent to the Tribunal and the respondent at 2.30am in the morning of the day of the final hearing i.e. less than eight hours before the start of the final hearing.

23. The claimant had also not provided a witness statement as she was required to do so by the order made on 10 February 2023. There was also no properly itemised schedule of loss detailing how the amounts claimed by the claimant had been calculated; again the claimant had been ordered to provide this means of an order made on 10 February 2023.
24. Even though the claimant had failed to comply with four orders, I was conscious that it did not follow that a strike out order should be granted. I needed to consider all the circumstances and the guiding consideration was the overriding objective. I now turn to the relevant factors.
25. In respect of the magnitude of non-compliance there had been, in my opinion, no real attempt made by the claimant to comply with the relevant orders. By way of example, not only had the claimant failed to comply with the orders made in respect of disclosure but she also informed the Tribunal at the final hearing that she still had some documents relating to the case in her possession but did not want to disclose these to the respondent. This indicated to me that not only had the claimant not complied with the disclosure requirement, she had little intention of complying with her obligation in respect of disclosure in the future. In addition, there was no witness statement or schedule of loss provided by the claimant. There was therefore significant non-compliance with the Tribunal's orders.
26. It was also apparent that the default was the responsibility of the claimant. Although she was a litigant in person, the orders had been set out in clear terms and she was responsible for ensuring compliance with the orders.
27. I now consider the disruption, unfairness or prejudice caused. There was clear prejudice caused to the respondent in this matter. Due to the claimant's failure to provide a witness statement, full disclosure or a schedule of loss, the respondent was expected to participate in the final hearing despite not having knowledge of what the alleged case against it was or indeed what sums the claimant alleged were due and owing to her.
28. In my opinion, a fair hearing was now not possible. The respondent was unable to understand the case being made against it. The claimant had failed to disclose relevant documents in her possession and also indicated to the Tribunal that she was not prepared to disclose these documents. This indicated that the claimant's non-compliance with the Tribunal's orders was both intentional and contumelious. Even had I made new orders in respect of disclosure, the claimant's conduct indicated she had no intention of complying with the same.
29. I was not satisfied that a lesser remedy than strike out would be an appropriate response to the claimant's disobedience in this case. The claimant had wilfully disregarded four orders of the Tribunal and displayed no intention of complying with future orders. The respondent had also been put to considerable time and expense in respect of this matter. Even though this was the final hearing, the claimant's non-compliance with Tribunal orders was so serious that strike out was warranted. Strike out was therefore an appropriate response.
30. As it was clear to me that the threshold conditions for strike out under Rule 37(1)(c) had been established, I considered whether I should exercise my

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discretion to strike out the claimant's case. Given the circumstances of the claimant's non-compliance with the Tribunal's orders, as set out in paragraphs 22 to 29 above, I was satisfied that this was a case where I should exercise my discretion. The claimant's non-compliance was significant, intentional and prolonged. It had caused prejudice to the respondent and it was clear that the claimant had no intention of complying with orders of the Tribunal, particularly in relation to disclosure of documents. I therefore decided to strike out the claimant's case under Rule 37(1)(c).

31. As the case for strike out under Rule 37(1)(c) was made out, I did not make any conclusions in respect of the respondent's application for strike out under Rule 37(1)(b).

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Employment Judge McTigue

Date: 11 January 2024

REASONS SENT TO THE PARTIES ON

17 January 2024

FOR THE TRIBUNAL OFFICE