



# THE EMPLOYMENT TRIBUNALS

**Claimant** Mr A Gray

**Respondent** Asda Stores Limited

**Heard at** Newcastle upon Tyne Hearing Centre

**On** 12 February 2024

**Before** Employment Judge Langridge  
**Members** Ms A Tarn  
Mr S Moules

## **Representation:**

**Claimant** No attendance

**Respondent** Mr S Gittins, Counsel

## **JUDGMENT**

### **Rule 37 Employment Tribunals Rules of Procedure 2013**

The claimant's unfair dismissal and disability discrimination claims are struck out on the following grounds:

- (a) under Rule 37(1)(b) due to the claimant's unreasonable conduct of the proceedings; and/or
- (b) under Rule 37(1)(c) for non-compliance with the Tribunal's orders; and/or
- (c) under Rule 37(1)(d) because the claims have not been actively pursued.

# REASONS

## Introduction

1. In his application to the Tribunal the claimant alleged that the respondent treated him unfavourably by requiring him to attend welfare meetings and by dismissing him following a period of long-term sickness absence. Those were both disability discrimination claims under section 15 Equality Act 2010. In addition, he claimed that his dismissal was unfair under section 98 Employment Rights Act 1996. The respondent accepted that the claimant was a disabled person but disputed that it had discriminated against him or dismissed him unfairly.

## The conduct of the claims

2. Since these claims were brought, the claimant has done virtually nothing to take them forward. On 9 October 2023 a preliminary hearing took place but the claimant did not attend or give any explanation for his absence. In the case management orders which followed, the claimant was made aware of the date of the final hearing listed for 3 days from today. He was ordered to take several steps to get his case ready for hearing, including providing a calculation of his losses, giving the respondent copies of any documents he wished to rely on, and preparing a witness statement of his evidence. The Tribunal also directed the claimant to provide an explanation, if he felt that his poor mental health might prevent him from complying with orders or taking part in the final hearing. At no time did the claimant reply to say he had any such difficulty.
3. Over the course of many months, the Tribunal has received only five emails from the claimant, sent in October and November 2023, and in January 2024. Each email contained only a line or two. None of them said anything about the claimant's failure to engage with the process, and he gave no reasons why he could not comply with orders. He simply stated that he wished to proceed with his claims and would be attending the final hearing.
4. During this period, the respondent wrote to the claimant several times pointing out that he had not complied with the Tribunal's orders. On 19 October 2023 it made an application for an order striking out the claims on the grounds that the claimant had not complied with orders or taken any steps to pursue his claims. The application was not granted at that time.
5. On 13 December 2023 the Tribunal ordered the claimant to comply with its previous orders, and stated that a judge may well consider striking out the claims if he failed to do so. The respondent made a further strike out application on 21 December on the grounds of the claimant's ongoing failure to comply. A formal warning of a possible strike out was issued to the claimant on 28 December. He replied on 17 January 2024 to say he did not have any witness statements and would be representing himself at the hearing. That was the last contact the claimant made with the Tribunal. A further strike out warning was issued on 31 January but the claimant did not respond to this either. The Tribunal wrote to the parties saying it was not prepared at that stage to strike out the claims, and directed that the claimant could attend the final hearing but not give evidence.

6. Today's final hearing was listed for three days. The respondent came prepared with a bundle of documents, witness statements and the two witnesses it wished to give evidence. The claimant did not attend and did not contact the Tribunal to explain his absence. The Tribunal attempted to contact him by phone but was unsuccessful. An email was sent to the claimant at 10:39am, directing him to reply by 11:30am, failing which the hearing may go ahead in his absence or the claims may be struck out on the grounds of his non-attendance. The claimant again made no contact.
7. When the hearing resumed at 11:40am the respondent renewed its application to strike out the claims on the following grounds:
  - a. Under Rule 37(1)(b) due to the claimant's unreasonable conduct of the proceeding; and/or
  - b. Under rule 37(1)(c) for non-compliance with orders; and/or
  - c. Under rule 37(1)(d) for not actively pursuing the claims.

Relevant law

8. There are a number of key principles and authorities which the Tribunal took into account in reaching its decision, including the overriding objective under Rule 2 of the Employment Tribunal Rules of Procedure 2013. This provides as follows:

“The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

- (a) ensuring that the parties are on an equal footing;
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and
- (e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.”

9. In the case of Blockbuster Entertainment Ltd v James [2006] IRLR 630 the Court of Appeal held that a tribunal should not be too quick to consider striking out for any non-compliance with its order, which is a Draconian power and not to be exercised too readily. The question is one of proportionality. The question should preferably

be addressed well before the trial takes place. The court held that a tribunal should make a structured examination in order to see whether there is “a less drastic means” of achieving the aim, short of an order striking out the claims. There may be an overlap between a mere failure to comply and unreasonable conduct of the proceedings. It is also relevant to consider whether a failure to comply is a one off minor breach, or a wilful and repeated one: Ridskill v D Smith and Nephew Medical UKEAT/0704/05

10. The importance of the overriding objective was discussed in Weir Valves and Controls (UK) Ltd v Armitage EAT/0296/03, where the court said the tribunal should 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”.
11. In Harris v Academies Enterprise Trust [2015] IRLR 208, the EAT said 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”. The EAT noted that if the failure was an aberration and unlikely to re-occur, that would weigh against a strike out.
12. In the case of Emuemukoro v Croma Vigilant (Scotland) Ltd 2022 ICR 327, the EAT held that the requirement for exercising the power to strike out under rule 37(1)(b) on the ground of unreasonable conduct, was either that the unreasonable conduct had taken the form of a deliberate and persistent disregard of required procedural steps or that it had made a fair trial impossible.
13. The recent authority of T v Royal Bank of Scotland plc 2023 EAT 119 emphasises the importance of considering alternatives to striking out claims. The EAT held that a tribunal should make clear in its reasoning why it felt that the claimant's conduct was so serious as to warrant striking out the claims. Features of that case included the fact that the substance of the claims was reasonably clear; adequate further information had been provided; some disclosure of documents had taken place; witness statements had been prepared in draft, even though not finalised; and the claimant's conduct had not been wilful or deliberate, being affected in part by mental health problems.

### Conclusions

14. The Tribunal was required under rule 37(2) to consider whether the claimant had a reasonable opportunity to make representations about the proposal to strike out the claims. We are satisfied that this was the case, given that at least two previous strike out warnings were issued, and a third was sent through the Tribunal's email of today. The claimant could have been in no doubt from the correspondence he received from the Tribunal and the respondent, that there were serious concerns about his failure to engage in the process.
15. The overriding objective requires Tribunals to deal with cases fairly and justly, in a proportionate manner, exercising a degree of flexibility, avoiding delay and saving expense. The Rule also imposes an obligation on the parties to cooperate with the Tribunal and with each other. Applying Weir Valves and Controls (UK) Ltd v

Armitage, we considered the magnitude of the claimant's default in this case, as well as the question of prejudice and whether a fair hearing was still possible.

16. It is clear that the claimant's non-compliance has been deliberate and repeated conduct, per Ridskill. Applying Emuemukoro, this is unreasonable conduct in the form of a "deliberate and persistent disregard of required procedural steps". It is clearly also unreasonable for the claimant not to attend the hearing of his own claims. In our judgment, the claimant's conduct was sufficiently serious as to warrant consideration of striking out his claims. Although it cannot be said that a fair trial is not possible, there is prejudice to the respondent. It has repeatedly been put to additional effort and cost by the need to manage the claimant's defaults. There has been undue expenditure of time and money on the part of the respondent and additional demands have been placed on the Tribunal, given its finite resources and the need to be available to other users.
17. Before concluding that these claims should be struck out, we considered the alternatives available. We noted that the Tribunal had already made orders permitting the claimant to attend and take part in the hearing, but without being able to give evidence himself, due to the absence of a witness statement. There is no further modification we could reasonably be expected to make today. Another option would have been to postpone the hearing and warn the claimant of the risk of paying the costs of that postponement. However, nothing in the claimant's conduct of his claim before now gave us any confidence that he would attend a hearing on any later date. His correspondence makes clear he was aware of the hearing date and, while he stated his intention to attend, he made no contact with the Tribunal to say he was prevented from doing so. For completeness, it was apparent that an unless order would not have assisted here, because the obstacle to the hearing going ahead was not the lack of evidence from the claimant, but his absence.
18. Where a claimant's conduct has been deliberate and persistent, as opposed to an aberration which was unlikely to recur, this weighs in favour of a strike out, following Harris v Academies Enterprise Trust. In this case the claimant's non-compliance has been longstanding. It has been accompanied by an unreasonable failure on his part to cooperate with the Tribunal or the respondent or indeed to engage with these claims at all. For these reasons, we are satisfied that the appropriate outcome in this case is to strike out the claimant's claims in their entirety.

SE Langridge  
Employment Judge Langridge

13 February 2024