EMPLOYMENT TRIBUNALS

Claimant: **Mr Richard Godfrey**
Respondent: **Towers Watson Ltd**

PRELIMINARY HEARING

Heard at: London Central Employment Tribunal **On:** 14th February 2024
Before: Employment Judge Gidney

Appearances
For the Claimant: Mr Richard Godfrey (in person)
For the Respondent: Mr James Green (Counsel)

JUDGMENT

IT IS THE Judgment of the Tribunal is that:

1. No Order is made on the Respondent's application to correct the Case Management Order dated 30th May 2023 following withdrawal of the application by the Respondent;

2. The Respondent's application for an Order striking out the Claimant's claim is granted and the Claimant's claim is hereby dismissed.

3. No Order is made on the Respondent's application for an Unless Order in light of the Judgment striking out the Claimant's claim.

4. The Respondent's application for its legal costs caused and/or occasioned by the Claimant's failure to comply with the Tribunal's Orders is granted in the sum of

£4,000.00.

REASONS

Procedural background to the Claims.

1. The Claimant presented a Claim Form on 30th July 2022 [4][1] without having first notified ACAS of a dispute. Accordingly the Claim Form was rejected by the Tribunal. The Claimant applied for a reconsideration of the rejection on 5th January 2023. The Claimant's application for reconsideration was successful.

2. On 16th February 2023 the Claimant was notified that Employment Judge Gilbert had accepted the Claim in full, but as the original decision to reject had been correct and the defect that led to the rejection had since been rectified the Claim Form would be treated as having been received on 5th January 2023. The Claim Form presented the following claims:

    2.1. Direct discrimination contrary to S.13 Equality Act 2010 ('EqA');
    2.2. Discrimination arising from disability contrary to S.15 EqA;
    2.3. Failure to make reasonable adjustments, contrary to S. 20-21 EqA;
    2.4. Victimisation contrary to S. 27 of the EqA.

3. The Claimant notified ACAS of a dispute on 17th September 2022 and received an ACAS Early Conciliation certificate on 20th September 2022. The Claimant submitted an appeal against the decision of Employment Judge Gilbert that the Claim Form be treated as having been received on 5th January 2023. On 23rd October 2023 the EAT (Ms A Kerr) rejected that appeal on the grounds that it had been submitted out of time.

4. The matter was Case Managed by me on 30th May 2023 **[46]**. The Claims and Issues for trial were identified at that hearing, and directions were given to ensure that all necessary preparation was completed by the final hearing. The Claimant's claims were discussed. The Claimant identified three written protected acts in support of his victimisation claim, namely a written complaint made to Ernst & Young ('EY') in December 2019 and June 2020 and a Tribunal Claim Form presented against EY in June 2020. I ordered the

[1] Numbers in square brackets refer to page numbers with an Agreed Preliminary Hearing Bundle.

Claimant to send a copy of his written protected acts to the Respondent by 5th June 2023. Whilst that Order was made orally, it was omitted from the written Case Management Order and was subject to an application from the Respondent to rectify the written Order so that it reflected what was stated at the hearing.

5. On 27th June 2023 the Tribunal sent out a Notice of Hearing which listed the Final Hearing to take place in person at the London Central Employment Tribunal between 11th-18th March 2024.

6. On 3rd October 2023 the Respondent made an application for the Claimant's claim to be struck out on the grounds that the Claimant continued to fail to comply with the case management directions and/or the claim was not being actively pursued. The Respondent also sought its legal costs of the application. On 24th November 2023 the Tribunal sent out a Notice of Hearing for the determination of the Respondent's application, to be listed today, on 14th February 2024 **[88]**.

7. At the hearing on 14th February 2024 there was insufficient time to deliver full oral reasons on the day. As the final hearing was listed to start on 11th March 2024, approximately 4 weeks later, the parties needed to know the decision on the strike out application as soon as possible. I proposed, with the agreement of the parties, to give an oral decision on the application and then provide full written reasons for it. This would have the benefit of the parties leaving Tribunal on that day knowing for sure whether the case was proceeding on 11th March 2024. After a period of deliberations I gave a judgment (without reasons) striking out the Claimant's claims.

Factual summary to the Claims.

8. The Claimant was employed in the Insurer Investment Team of Ernst & Young (EY) between 2018 and 2020. In 2021 he applied to the Respondent for the position of Investment Associate Director. He was offered the position with a limited time for acceptance. The Claimant asserts that he did accept the offer. In any event it was withdrawn. The Claimant asserts that he was notified of the withdrawal in September 2021 and it was confirmed again in March 2022. Broadly speaking the Claimant claims that the withdrawal / revocation of a job offer was disability discrimination by the Respondent.

The Respondent's application to Strike Out.

9. At the hearing on 14th February 2024, which was conducted by the Cloud Video Platform ('CVP') the Claimant attended in person. The Respondent was represented by James Green, Counsel. Three other members of the Respondent's legal team joined the hearing. The Tribunal was provided with the following documents:

   9.1. A preliminary hearing bundle and index provided by the Respondent (104 pages);
   9.2. A 'continuation bundle' and index provided by the Claimant (which added a further 26 pages);
   9.3. A letter from Kieth Crane of the PCS Union, undated but sent in October 2023, written on behalf of the Claimant (2 pages);
   9.4. A written skeleton argument on behalf of the Respondent;
   9.5. A Schedule of Costs on behalf of the Respondent.

10. As at the date of the of the Respondent's strike out application on 14th February 2024, the final hearing was less than 4 weeks away, having been listed for 11th March 2024.

11. The Claimant's default of the prior Case Management Orders as at 14th February 2024 was as follows:

Order/Direction	**Compliance Date**	**Period of Default**
Disclosure of the written protected acts.	5th June 2023	Still outstanding after 8 months
Claimant to provide an Impact Statement.	30th June 2023	Still outstanding after 7½ months
Claimant to provide GP and medical records.	30th June 2023	Still outstanding after 7½ months
Claimant to provide a Schedule of Loss.	30th June 2023	Inadequate version provided 11th November 2023 4½ months late
Claimant provide copy documents (including remedy documents).	19th September 2023	Still outstanding after 5 months
Claimant provide witness statement.	15th January 2023	Still outstanding after 1 month.

Activity between the Case Management Order and the Strike Out hearing.

12. On 8th June 2023 the Respondent wrote to the Claimant asking for a copy of his written protected acts, that he had been asked to produce by 5th June 2023 **[63]**.

13. On 3rd July 2023 the Respondent asked for the written Case Management Order to be rectified to include the Order to produce the written protected acts and applied for an Unless Order **[67]** requiring compliance with the directions, in an attempt to require the Claimant's prepare his case in accordance with the Case Management Order.

14. On 18th September 2023 the Claimant asked if the Respondent had received his Schedule of Loss and asked for a link to which he could send his disclosed documents **[83]**.

15. On 19th September 2023 the Respondent's solicitor wrote to the Claimant attaching the Respondent's disclosed documents for the hearing **[81]**. He noted that the Claimant, in breach of the Case Management Order, had not provided his written protected acts (due on 5th June) and his impact statement, medical and GP records and Schedule of Loss (all due on 30th June 2023).

16. On 3rd October 2023 the Respondent made its application for the Claimant's claim to be struck out for non-compliance with the Tribunal's Orders **[77]**. It identified the non-compliance as follows:

    16.1. Failure to provide written protected acts (due on 5th June 2023);
    16.2. Failure to provide an impact statement, medical reports and GP records (due 30th June 2023);
    16.3. Schedule of Loss (due 30th June 2023); and,
    16.4. Disclosed documents (due 19th September 2023).

17. On 7th November 2023 the Respondent told the Claimant that it would prepare the Trial Bundle, based on its disclosed documents, as no documents had been sent to it by the Claimant **[80]**. On 8th November 2024 the Respondent recited the Claimant's non-compliance to him and said its ability to prepare was being prejudiced by his non-compliance with the Tribunal's Orders **[79]**.

18. On 18th November 2023 the Claimant sent to the Respondent a copy of his Schedule of Loss **[85]**. It claimed lost salary in the sum of £156,432 and Injury to Feelings / Personal

Injury in the sum of £15,000.00. The losses claimed were not adequately explained or particularised by the Claimant.

19. On 12th December 2023 the Respondent asked the Claimant to further explain / particularise his Schedule of Loss and to provide all of the documentation that he relied on in support of his losses **[90]**. On 15th January 2024 the Claimant provided a link to his payslips and P60s **[93]**.

20. On 8th February 2024 the Respondent provided its witness statements to the Claimant. They were password protected on the understanding that the password would be provided once the Claimant had exchanged his witness statements **[98]**. The Claimant confirmed that he would exchange his statements later that day **[97]**. That evening the Claimant disclosed, for the first time, the documents that he stated were relevant to the issues and in his possession or control. His disclosure amounted to 12 pages of medical documents **[101]**. He also served a password protected witness statement, which was said to include his Impact Statement. At the date of the hearing before me, six days later on 14th February 2024, the Claimant had not provided the password to unlock his witness statements.

The relevant law in relation to striking out a claim.

21. Rule 37 of the **Employment Tribunal (Constitution and Rules of Procedure Regulations) 2013** ("ET Rules") provides:

> *"(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-*

> *(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant… 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;*

22. Claims should not be struck out unless there had been an intentional and contumelious default or an inordinate and inexcusable delay leading to a substantial risk that a fair trial is not possible or is such to cause serious prejudice. Refer to **Birkett v James** [1978] AC 297.

23. The correct approach to strike out for the scandalous, unreasonable or vexatious conduct of proceedings was set out in **Blockbuster Entertainment Ltd v James** [2006] EWCA Civ 684, at [5]:

> *"The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response…"*

24. Strike out does not require that a fair trial is impossible in an absolute sense. Fairness must also be judged by reference to the undue expenditure of time and money, the demands of other litigants and the finite resources of the court: **Emuemukoro v Croma Vigilant** [2022] ICR 327, at [19]. Further, the question under consideration is whether a fair trial is possible in the existing trial window. In other words, whether, given the Claimant's various failures to comply with the Rules and directions of the Tribunal, a fair hearing is still possible for the dates that the trial is listed. The test does not require determining whether a fair trial will ever be possible.

25. The question of proportionality must address whether there is a less

drastic means to an end for which the strike-out power exists. That answer must take account of the duration and character of the unreasonable conduct in question: **Blockbuster** at [21]. Where there has been non-compliance with a tribunal order, the guiding consideration is the overriding objective. This requires the Tribunal to consider all of the circumstances, including the magnitude of the default, the disruption, unfairness or prejudice that has been caused, whether a fair hearing is still possible, and whether striking out or some lesser remedy would be an appropriate response to the non-compliance: **Weir Valves & Controls (UK) Ltd v Armitage** [2004] ICR 371.

26. Guidance was also given in **Harris v Academies Enterprise Trust** [2015] IRLR 208 at [26]:

> *"A judge may wish to ask why [the party in breach] has behaved as he has. He will wish to consider the nature of what has happened. 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…"*

27. The EAT considered strike out for a failure to actively pursue a claim in **Rolls Royce PLC v Riddle** [2008] IRLR 873 at [19]-[20]; [35]:

a. A failure to actively pursue a claim will fall into one of two categories. The first is where there has been intentional and contumelious default by the claimant. The second is where there has been inordinate and inexcusable delay such as to give rise to a substantial risk that a fair trial would not be possible or where there would be serious prejudice to the respondent.
b. In respect of the first category it is quite wrong for a Claimant, notwithstanding that he has, by instituting a claim, started a process which he should realise affects the Employment Tribunal and the use of its resources, and affects the Respondent, to fail to take reasonable steps to progress his claim in a manner that shows

he has disrespect or contempt for the tribunal and/or its procedures. In that event a question plainly arises as to whether it is just to allow the Claimant to continue to have access to the tribunal for his claim.

c. Strike out is the most serious of outcomes for a Claimant. It is nevertheless important to avoid reading the warnings in the Authorities regarding its severity as indicative of it never being appropriate to use it.

28. In **Rolls Royce v Riddle** (referred to above) Lady Smith pointed out that it is quite wrong for a Claimant '*to fail to take reasonable steps to progress his claim in a manner that shows he has disrespect or contempt for the tribunal and/or its procedures*'. Where there is inordinate and excusable delay on the part of the Claimant and/or their representatives, which has created a substantial risk that serious prejudice has been, or will be suffered by the Respondent or that it is no longer possible to have a fair trial of the issues, the claim should be struck out (**Elliott v Joseph Whitworth Centre Ltd** [2013] UKEAT/0030/13). At paragraph 16: '*[On prejudice] what the court is looking for is something more to do with the case itself, such as memories fading, documents and witnesses going missing, the business going insolvent, a change of representation and cost*'.

Conclusions on Strike Out.

29. In determining the Respondent's application, and in applying the legal principles set out above, the Tribunal was required to consider, as at 14th February 2024, in the event of inordinate and inexcusable delay on the part of the Claimant, the delay had given rise to a substantial risk that it will not possible to have a fair trial on 11th March 2024, less than 4 weeks later. I have identified in paragraph 11 above the Case Management Directions that the Claimant was still in breach of at the date of the hearing of the strike out application. At paragraphs 12 to 20 above I have recited the conduct of the Claim since my Case Management Order and the steps taken by the Claimant.

30. In my Judgment the failures set out above can fairly be described as intentional and contumelious default by the Claimant. Every single Order for the directions issued by the Tribunal has been breached by the Claimant. In my Judgment the Claimant made an intentional decision not to comply with the Orders of the Tribunal, in order to frustrate and degrade the Respondent's ability to defend his claim. The only step taken by the Claimant in 2023 was to serve an inadequate Schedule of Loss, itself some 5 months late. The Claimant failed to respond to the Respondent's application for an Unless Order, dated 3rd October 2023. I accept the Respondent's submissions that the Claimant is sophisticated party with a history of working at prominent financial institutions. Further, an examination of the public register of tribunal decisions, reveals that the Claimant is an experienced litigant. He has commenced a number of claims against different respondents since 2018 (DEFRA, PWC, Nat West Markets, SSE and Wallsly) and was the subject of an Unless Order in different proceedings in 2023. He successfully represented himself at a hearing on the 30th of November 2023 when he sought relief from sanctions and respect of that Unless Order. The Claimant knows and understands the significance of compliance with Tribunal Orders.

31. It is then necessary to determine whether a fair trial, listed within three weeks, was still possible. At that point all of the documents and all of the statements should have been exchanged, and the parties case on each point should have been well understood. However, the Respondent did not have the Claimant's Impact Statement or medical records. The Claimant had not provided the protected acts that he relied on. The Respondent was unable to assess those claims and/or prepare for them. Only a very small number of disclosed documents had been provided, and none of those related to remedy or evidenced his alleged losses. The Claimant had failed to provide his witness statements in a form that the Respondent could access.

32. There was no indication that the Claimant would engage with what was required of him in the last three weeks before trial. In my Judgment there

was a real risk that a fair trial on 11th March 2024 would not be possible, in circumstances in which so much of his claim was opaque. The Claimant, by his actions, had denied the Respondent the opportunity collate the evidence to properly meet the claims against it and that rendered a fair trial impossible. Litigation simply cannot be conducted in that fashion.

33. Finally I have considered whether any lesser sanction could be imposed. Given the proximity of the Final Hearing I do not think that any lesser sanction would be effective. It would not be proportionate or consistent with the overriding objectives of dealing with cases in ways that are proportionate to the complexity of the issues, avoiding delay and saving expenses to vacate the trial window. The hearing was listed for 6 days. On enquiry with Listing an alternative 6 day hearing window would not come available until January 2025. In my Judgment an Unless Order made on 14th February 2024 would have been ineffective as a means of ensuring a fair hearing on 11th March 2024. Some period of additional time would have had to be given to the Claimant for compliance, which would have then cut into the remaining time for the Respondent to prepare. I had already considered the four remaining weeks too short a period of time to do that. In my Judgment a fair trial could not have been achieved by the imposition of any lesser sanction.

34. Accordingly the Claimant's claims are struck out. In the circumstances it is not necessary to consider the application to amend the Case Management Order nor is it necessary to consider the Respondent's application for an Unless Order. It is however now necessary to consider the Respondent's application for its legal costs, I do so as follows:

<u>The Application for Legal Costs</u>

35. Rule 76 of the Employment Tribunal Rules 2013 provides:

"A Tribunal may make a costs order or a preparation time order,

and shall consider whether to do so, where it considers that-
(1) A party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;
(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party."

36. Pursuant to Rule 84, the Tribunal may (but is not required to) have regard to the paying party's ability to pay. There are three stages involved in the determination of a costs application. First, the Tribunal needs to determine whether or not its jurisdiction to make a costs award is engaged. Second, it must consider whether or not it considers it appropriate to make an award of costs in that case. Only then would it turn to the third stage, which is to determine how much it should award: **Daly v Newcastle Upon Tyne Hospitals NHS Foundation Trust** [2018] UKEAT/0107/18 at [42].

37. The fact that a party is unrepresented is a relevant consideration in the exercise of the Tribunal's discretion. However, it is well-established that lay people are not immune from costs orders, particularly where the basis on which the costs threshold was crossed was not any conduct which could readily be attributed to a lack of experience as a litigant: **Vaughan v London Borough of Lewisham** [2013] IRLR 713, at [25].

38. The Respondent seeks an Order for its costs on the following basis. It asserts that the threshold to make such an order is engaged, namely that the Claimant's failure to comply with Tribunal orders was unreasonable and/or rule 76(2) applies.

39. As to the discretion to make an award of costs, the Respondent asserts that this is a case where (i) the Claimant's breaches are extensive and unexplained, and (ii) the costs arising from his conduct can be clearly identified and separated out from the general costs of the litigation. This hearing was listed to address the Claimant's failure to comply

with Tribunal orders, and the costs incurred in respect of it are inherently bound up with Claimant's conduct. As to the amount of any costs award, the Respondent observes that understands that the Claimant remains employed on a salary of approximately £54,000 per annum, and thus likely to be in a position to pay for legal costs.

40. In my Judgment the Tribunal's jurisdiction to make a costs award is engaged. The Claimant has been in breach of the Case Management Orders, pursuant to Rule 76(2) and his conduct of the litigation can fairly and properly be categorised as unreasonable, pursuant to Rule 76(1)(a). In my Judgment it is appropriate to make an award of costs in that case. As I have found, I delay was both intentional and unreasonable and so extensive that the Respondent still did not know key aspects of the Claimant's case with only 3 weeks remaining to the trial. The Claimant told me that he was overwhelmed by the case and could only engage with it at discreet points in time and had found it difficult to deal with more than one thing at a time, however, his failure to engage was so extreme that the Respondent could not fairly defend the claims and it had been put to additional costs.

41. Accordingly I move on to consider the assessment of the sums to be paid in costs.

42. The Respondent sought £6,916.36 in legal costs. The Claimant confirmed that his net monthly pay amounted to £4,300.00. Whilst it was not required to do so, the Respondent did limit its costs to the legal costs that it asserts were caused by the Claimant's failure to comply with the directions of the Tribunal, including the costs of its applications to the Tribunal to seek compliance by the Claimant, its Unless Order applications, the costs of preparing for the Preliminary Hearing on 14th February 2024, and liaising with Counsel. The only disbursement was Counsel's fees. The total Solicitor costs claimed amounted to £3,265.30 and total Counsel costs amounted to £2,500.00, amounting to £5,765.32. To that figure £1,153.06 VAT had been added, however the Respondent accepted that as it could reclaim the VAT it was inappropriate to claim it

from the Claimant as well. Doing the best that I could on a summary assessment, and noting the extent of the time spent by various fee earners hours and time spent liaising with Counsel, and taking into account the Claimant's means, I assessed the appropriate quantification of the Respondent's costs to be paid by the Claimant in the sum of £4,000.00.

Employment Judge Gidney

19th March 2024

JUDGMENT SENT TO THE PARTIES ON

9 April 2024

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