



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss G Balcikoniene

**Respondent:** Sainsbury's Supermarkets Ltd

**Heard at:** Central London Employment Tribunal

**On:** 2 May 2024

**Before:** Employment Judge Keogh

## Representation

**Claimant:** In person, assisted by a Lithuanian Interpreter

**Respondent:** Mr M Montgomery, Counsel

# RECONSIDERATION JUDGMENT

1. The claimant's application for reconsideration is refused, and the claim remains struck out.

# REASONS

The claimant requested written reasons at the conclusion of the hearing on 2 May 2024. The reasons are as follows:

1. This is the claimant's application for reconsideration of a judgment striking out her claim made on 16 November 2023. The claimant attended in person and was assisted by a Lithuanian interpreter. The respondent was represented by Mr Montgomery, Counsel. I received a copy of the final hearing bundle, a bundle prepared for the reconsideration hearing, a Skeleton Argument from Mr Montgomery and a bundle of authorities. Time was given during the course of the hearing for the Skeleton Argument to be translated for the claimant. No reasonable adjustments were required for any health conditions.

2. This matter was listed for a four day final hearing commencing on 16 November 2023. In summary, the respondent had before that date applied more than once for the claim to be struck out on the basis that it was not actively being pursued. Disclosure was provided late contrary to an unless order, and although Employment Judge Khan declined to strike out the claim at that stage it was made clear that should the claimant fail to comply with the extended date given for exchange of witness statements then consideration may be given at the start of the final hearing to striking out the whole or part of the claim. The claimant emailed the Tribunal the day before the hearing indicating that she had a suspected virus. She did not attend. The respondent contended that the claimant had not complied with Employment Judge Khan's order to provide a witness statement and applied for the matter to be struck out on the basis that it was not being actively pursued and that there was intentional and contumelious default. The hearing was adjourned until 12pm to give the claimant the opportunity to indicate whether she would be fit to attend the following day and to provide a witness statement, however she was not contactable and did not respond. I determined that the matter should be struck out, for the detailed reasons given in the case management summary of the same date.
3. Following that hearing the claimant contacted the Tribunal during the afternoon of 16 November 2023 indicating that she had not received the hearing bundle as the copy sent could not be opened properly, and asking for the hearing to be rescheduled. The claimant was informed of the decision to strike out her claim and that a formal application for reconsideration would be required. An application was made beyond the 14 day limit on 8 December 2023. The claimant indicated that she had been unwell for the duration of the hearing, and also indicated that she had provided a witness statement along with her disclosure in October 2023. As the claimant had not yet had the opportunity to make submissions in relation to the strike out of her claim and there had been some difficulties in making the application, including a further allegation that the claimant had an underlying medical condition as a result of the respondent's conduct, I considered it was in the interests of justice to extend time for the application to be made and gave directions. Medical evidence was duly provided in relation to the hearing (though not in relation to any underlying condition). Having noted the respondent's objections to the application I considered it was in the interests of justice for this reconsideration hearing to be listed. Further directions were given for preparation for the hearing, including identification by the claimant of the document in the bundle or other disclosure provided by her that she says is the witness statement she provided.
4. In its Skeleton Argument for this hearing, the respondent contended that the claimant had not complied with that order and had not engaged in any correspondence in preparation for the hearing.
5. At the start of the hearing efforts were made to understand whether the claimant had in fact produced a witness statement. An email had been located dated 2 February 2024, forwarding an email to the respondent

dated 30 October 2023. The email chain contained a list of documents and 26 numbered paragraphs explaining the content of some of those documents. This includes some information about meetings and events in 2022 leading to dismissal, and the subsequent appeal. The claimant explained that it was only today that she realised she should also have commented on matters in 2021, including her suspension, which she says is relevant to the claims. She wanted the opportunity to add to the document.

6. In submissions, the claimant indicated that the same content as appeared in the email dated 30 October 2023 was physically handed to the respondent on 23 October 2023 along with her documents. She acknowledged that she should have prepared a separate document and should have included matters relating to 2021. She had difficulty preparing documents as she had no internet access at home and no smart phone, and had to get assistance from people at the library to prepare documents and send emails. From January 2023 she started new full time employment so her access to libraries was limited. She could not say why she had not complied with the order made on 21 February 2024 for her to identify which document in the bundle (or supplemental bundle if there were documents which had not been included) she says is her witness statement. That was due to be done by 5 April 2024. However she maintained that the document emailed on 30 October 2023 was the same document as was included with the pack provided to the respondent. She noted that there were not as many documents now in the bundle as were provided, these having been hand numbered.
7. The respondent noted that the original of the email sent on 30 October 2023 contained only the list of documents and not the explanations which now accompany it, which were added on 2 February 2024. Having taken instructions, the respondent maintains that all the documents provided by the claimant were scanned and all have been included in the bundle. It was noted that there were discrepancies in the hand written numbers, but everything was included. No document similar to that provided on 2 February 2024 was provided on 23 October 2023.
8. It was submitted by the respondent that it was not in the interests of justice for reconsideration to be granted. There was no evidence that a statement had been provided, what was provided on 2 February 2024 could not be described as a witness statement and was just a description of documents, and the claimant had continued to pick and choose which orders to follow. She had complied with the order to provide medical evidence, which suggested that she could comply with orders when she saw fit to do so, but had not complied with the order to identify where her witness statement was.

## **Law**

9. Rule 70 of the Employment Tribunals Rules of Procedure provides:

*“A Tribunal may, either on its own initiative ... or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ... may be confirmed, varied or revoked. If it is revoked it may be taken again.”*

10. The question whether reconsideration is necessary in the interests of justice was considered in **Ebury Partners Ltd v Acton Davis** [2023] EAT 40:

*“A central aspect of the interests of justice is that there should be finality in litigation. It is therefore unusual for a litigant to be allowed a "second bite of the cherry" and the jurisdiction to reconsider should be exercised with caution. In general, while it may be appropriate to reconsider a decision where there has been some procedural mishap such that a party had been denied a fair and proper opportunity to present his case, the jurisdiction should not be invoked to correct a supposed error made by the ET after the parties have had a fair opportunity to present their cases on the relevant issue. This is particularly the case where the error alleged is one of law which is more appropriately corrected by the EAT.”*

11. It is well recognised that strike out is a draconian measure. In **Weir Valves & Control (UK) Ltd v Armitage** [2004] ICR 371, it was held that, in considering whether to strike a case out on the basis of Rule 37(1)(c) in the context of breach of a Tribunal order, the guiding consideration is the overriding objective to do justice between the parties. The Tribunal should consider all the circumstances in determining whether strike out or lesser remedy would be appropriate, including whether a fair hearing is still possible.
12. However, even where a fair trial may be possible a claim may be struck out where failure to comply with an order amounts to ‘intentional and contumelious default’ (**Rolls Royce v Riddle** [2008] IRLR 873, applying **Birkett v James** [1978] AC 297). An example of this is shown in **Khan v London Borough of Barnet** UKEAT/0002/18, where a claim was struck out where a claimant failed to engage fully with proceedings and ‘showed a tendency to pick and choose which emails and requests to comply with’.
13. In **Carver v Newman** [2024] EAT it was found that it was not in the interest of justice to strike out a claim for non-compliance with orders where the claimant had belatedly complied.

## **Conclusion**

14. This hearing was listed firstly because the claimant had not had an opportunity to address me on strike out due to her ill health, and secondly because she indicated in her application for reconsideration that she had provided a witness statement to the respondent along with her documents on 23 October 2023 which, if correct, would have a significant bearing on whether she was actively pursuing her claim at that time and whether she had complied with the order of Employment Judge Khan to produce a witness statement.

15. A key dispute between the parties today is whether the claimant did in fact provide a statement on 23 October 2023 in similar terms to the document emailed to the Tribunal on 2 February 2024. The claimant has not persuaded me that she did this. The original of the email of 30 October 2023 shows only a list of documents numbered 1 to 65, and does not contain any of the explanatory paragraphs. On careful examination of the email of 2 February 2024, the explanatory paragraphs start at number 1 in the body of that email, in order to respond to the respondent's email of 1 February 2024 objecting to the application for reconsideration. Paragraph 2 says:

*'Respondent wrote, that he provided bundle own and my documents to ET, so I print list of my documents and added some attachments to my this email.'*

16. Paragraph 3 then appears after the numbered list of documents. I therefore accept the respondent's submission, that these explanatory paragraphs have been produced for the first time on 2 February 2024. It appears very unlikely that a document in similar terms was produced in October 2023. If that was the case, it would have appeared in the original email of 30 October 2023.

17. That means that even if the additional paragraphs could be considered to be a witness statement, they were not produced by the time of the hearing and the claimant was in breach of Employment Judge Khan's order as at the date of strike out.

18. This is supported by the assertions of the respondent's representatives that all documents provided were scanned and then sent back to the claimant. If such a document had been provided by the claimant, she would now have it back in her possession and could have shown it to the Tribunal today, but she has not. She indicated that she did receive the pack of documents back, but had not touched it and did not have it with her. If she had physically produced and provided a witness statement it should have been easy for her to bring it to the Tribunal or to send a copy at any time since the strike out took effect and at least in advance of the hearing.

19. Nor has the claimant given any satisfactory explanation why she did not write to the Tribunal as ordered to identify what her witness statement was, or even to indicate that she thought that what she had prepared was missing from the bundle prepared by the respondent.

20. In the circumstances, I find there is no new information which would have been available at the start of the hearing on 16 November 2023 had the claimant been fit to attend, nor even as at the time of the application to reconsider the claim.

21. That is not the end of the matter, as I still need to consider whether the document which has now been produced on 2 February 2024 is

sufficiently compliant with the orders for witness evidence that it would be in the interests of justice to allow the claim to proceed, bearing in mind the guidance given on belated compliance in **Carver**.

22. While it is correct that the document is in numbered paragraphs and in chronological order, and provides some brief explanation as to the circumstances surrounding the dismissal, even on the claimant's own case it is not a complete account of the evidence she would wish to give at a final hearing. She has indicated that there are also relevant matters in 2021 which would need to be covered. A reading of the document shows that it falls short of what might be expected to be contained in a statement, even from a litigant in person requiring assistance. There is no clear account of the matters which the claimant relies on as having led to an unfair dismissal, including any of the matters she now says took place in 2021, and no mention of her wages claim or claim for notice pay at all. It would be difficult for the respondent, reading this document, to know what the claimant's case was and prepare adequately to cross examine the claimant and to make submissions in response to the claim.
23. I do not consider it would now be in the interests of justice to give the claimant a further opportunity to produce a more detailed statement and have this matter proceed to trial. The claimant has not persuaded me that she is incapable of producing a witness statement in accordance with the Tribunal's orders. To the contrary, today she presented as an able and articulate individual. The respondent correctly identifies that the claimant is capable of compliance with orders, such as the order to produce medical evidence. While she has had a full time job since January 2023, which might have impacted on her ability to comply with the recent directions, this does not explain why she could not produce a fully compliant witness statement by the time of the hearing given the time available to do so, or instead to explain any difficulties to the Tribunal before that date. It is noted for example that the first time the claimant indicated she had any problem with the bundle was on the afternoon of 16 November 2023, such that there may have been difficulties in going ahead with the hearing even if the claimant had attended.
24. The finality of litigation is an important matter of public interest and the claimant has had ample opportunity to present her case. Despite repeated opportunities to provide a witness statement and warnings having been given as to the consequence of not doing so, to date the claimant has still not provided a statement which would enable this matter to proceed to a fair trial.
25. In the circumstances, having now given the claimant the opportunity to make submissions, I have determined it is not in the interests of justice to reconsider my decision to strike out the claim. The application for reconsideration is therefore refused.

Employment Judge Keogh

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3 May 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

21 May 2024

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FOR THE TRIBUNAL OFFICE