EMPLOYMENT TRIBUNALS

Claimant: Ms N Makande

Respondent: Qualitcare 24-7 Ltd

Heard at: By video **On:** 2-4 June 2025

Before: Employment Judge Danvers
Ms G Meehan
Ms R Clarke

REPRESENTATION:

Claimant: In person
Respondent: Mr Treston, Litigation Consultant

JUDGMENT

1. The Claimant's application to strike out the Response is refused.

2. The complaints in respect of redundancy pay and holiday pay are dismissed following withdrawal by the Claimant.

3. The final hearing is postponed, and the Claimant's remaining claims will proceed to a final hearing (liability only) on 26-29 August 2025.

REASONS

Following oral judgment being given with reasons, written reasons were requested by the Claimant and are provided as follows:

Introduction

1. By claim forms submitted on 21 June 2023 and 28 June 2023 the Claimant is pursuing claims of automatic constructive unfair dismissal due to public interest disclosures, discrimination on the grounds of religion or belief, detriment on the grounds of public interest disclosures, breach of contract and unlawful deductions from wages. The Claimant confirmed at the outset

of this hearing that she was not pursuing claims for redundancy or holiday pay. She agreed those claims could be dismissed upon withdrawal.

2. The final hearing was listed to take place over 6 days starting on 2 June 2025 to deal with liability only. The hearing was shortened to 4 days by the Tribunal. On Day 1 of the hearing, it became clear that the Claimant did not have access to the version of the bundle that the Tribunal and the Respondent were using. She was unable to work electronically because she was using her phone to take part in the video hearing and did not have a separate device on which to download and view an electronic bundle. The final version of the bundle had not been provided to her in hard copy by the Respondent's representatives.

3. The Claimant indicated she was keen to proceed and that if she received a hard copy of the final version of the bundle that evening or the next morning, she would be able to continue. It was arranged for a hard copy to be couriered to her by the Respondent's representatives and to reconvene after lunch on Day 2. The parties and Tribunal considered it would be possible for the evidence and submissions to be heard in the 2 ½ days remaining. The Tribunal used the intervening time to read the statements and documents.

4. However, by an email to the Tribunal of 1.14pm on Day 2 the Claimant made an application to strike out the Respondent's Response (and thereafter grant her default judgment on her claims). In her application she stated that the index of the bundle she had been provided with did not match the contents and wrote:

   "I received the bundle mid morning today the 3rd of June 2025. I had agreed to adjust the previous bundle details to the current one I realised it was going to be impossible as the respondents representatives had placed a misleading index of the new file".

5. The Claimant provided an illustration of the issues with the bundle and index, a history of her attempts to get the bundle finalised with supporting emails and applied for strike out on the grounds that the Respondent had failed to comply with case management orders. If the application was granted, she also sought default judgment on her claims.

6. The Tribunal flagged to the Claimant that hearing this application was likely to lead to a postponement of the final hearing due to the tight timetable and the Claimant indicated she understood and wished to proceed. She said that in any event she would need further time to update her questions for the Respondent's key witness given the change in bundle she was working from. In those circumstances the Tribunal considered that the time available would not be sufficient to hear the case in a way that was fair and just to both parties (particularly the Claimant) and that the final hearing would have to be postponed. This was not objected to by the Respondent. The Tribunal proceeded to hear the Claimant's application in the afternoon of Day 2 and gave judgment on it in the morning of Day 3.

Findings

7. At a Case Management Preliminary Hearing ('CMPH') in front of EJ Gray on 29 July 2024, the parties were ordered to agree an index to the bundle by 2 December 2024. By the 9 December 2024, the Respondent was to send the Claimant an e-version of the bundle.

8. A further hearing took place on 20 November 2024 at which EJ Midgley varied the orders of EJ Gray and provided for the index to be agreed by 20 December 2024 and (at para 13) ordered (own emphasis):

   *"From the agreed index, the Respondent must prepare a file of those documents with an index and page numbers (which is referred to as 'the Hearing Bundle') and provide a **hard** copy to the Claimant by 10 January 2025."*

9. On 2 January 2025 the Respondent's representative agreed a variation to when the Clamant provided her disclosure and suggested a consequent variation to the final hearing bundle to 21 February 2025, which appears to have been agreed.

10. On 5 February 2025 the Claimant provided her disclosure.

11. On 24 February 2025 the Claimant wrote to the Respondent's representative to remind them of the date for the bundle.

12. On 4 April 2025 the Respondent's representative emailed the Claimant saying she would add the Claimant's documents to the bundle by the end of the next week (which would have been 11 April) and send it to her to agree and then, once agreed, would send the Claimant a paper copy.

13. On 24 April 2025 the Claimant sent the Respondent's representative a further reminder about the bundle.

14. On 25 April 2025 the Claimant wrote to the Tribunal and the Respondent's representative raising that she had still not received a copy of the updated bundle.

15. The same day the Respondent's representative replied saying she had agreed she would provide a copy of the final bundle by 23 April 2025, but that because of the two bank holidays she was unable to do so and that she would provide it to the Claimant by 28 April. As an aside, by this time exchange of witness statements was also overdue (having been ordered to take place on 2 April 2025) and the Respondent's Representative suggested 14 May 2025.

16. A further CMPH took place in front of EJ Cadney on 1 May 25. At para 3 he ordered:

   "Hearing Bundle – The bundle is complete except for the inclusion of the CMO from the hearing on 20th November 2024 (see below) and the CMO from this hearing.

The following directions are agreed:

i) The bundle page limit is increased to 535 pages (the current length) together with such further pages as are necessary to include the CMOs from November 2024 and this hearing when they are received by the parties.

ii) The respondent is to supply a copy of the bundle in its existing form to the claimant no later than 4.00pm Friday 2nd May 2025."

17. On 6 May 2025 the Claimant sent an email to the Respondent's representative, saying:

"*I have received the draft list of issues but I do not see any evidence of my evidence that I sent you attached in the bundle. I am not sure if the tribunal has access to that as we had been ordered to exchange it between ourselves and my understanding is no further documents outside the hearing bundle can be reference during final hearing. I will resend and copy the tribunal too the evidence I feel you continue leaving out*".

18. It appears to us that it is likely that at least an electronic version of the bundle had therefore been provided to the Claimant by that date, but the Claimant was flagging that there were documents that she wanted included in the bundle that were not in there. She then sent a copy of those documents to the Tribunal and the Respondent's representatives on the same day.

19. A hard copy of the bundle was subsequently sent to the Claimant which arrived on or around 21 May 2025. The Claimant's position is that this still did not include all the documents she had requested to be included. It was 520 pages long.

20. On the working day before the hearing started (Friday 30 May) at 4.30pm, the Respondent's representative sent an electronic copy of a bundle to the Claimant and the Tribunal. This bundle was 547 pages long although the index was still for the previous version of the bundle that was 520 pages long. It was not made clear in the course of the hearing what additional insertions had been made. Nor was it obvious on the face of the bundle because it did not appear to be the case that extra documents had just been added at the end: the earlier page numbers in the bundle did not match the page numbers in the bundle the Claimant had. In short, there had been additions inserted and the bundle had been entirely repaginated so the page references the Claimant had prepared, for example, for her questioning of the Respondent's witnesses, did not match the pages in the bundle the Tribunal and Respondent were using.

21. The Claimant said she had been unable to access the electronic bundle that was sent on the Friday. The Respondent's representative suggested that based on an email sent by the Claimant on Saturday 31 May 2025, the Claimant *had* been able to access it because she referred to it being in excess of the CMO page limit. However, in the email of 31 May 2025 the Claimant said: "*I noted they [the Respondent's representative] said the bundle was in excess of the case management orders"*. We do not accept this reference meant she had been able to open the bundle: as she asserted orally, she was simply taking that information from what had been said to

her. In the body of the email the page references she used suggests she was still referring to an old version of the bundle. She also reiterated a request for a paper version, which she said had been promised, and explained she had struggled to use the computer lately due to her mental wellbeing. The Claimant was very keen for the hearing to go ahead and if she had been able to access and could have used an electronic bundle, we find she would have. We accept that in the circumstances she had been unable to access the electronic bundle sent to her. Even if she had been able to access it, that would not have assisted her at the hearing itself because she only had her phone available to use.

22. Following discussion of the situation on Day 1, as already explained above, it was agreed that the Respondent would courier a hard copy to the Claimant ideally that afternoon, but certainly within 24 hours of the request being made by the Tribunal (which was made at around 12.20pm on Day 1).

23. The hard copy was signed for at 9.30am on Day 2. Due to a medical appointment the Claimant was unable to look at it until mid-morning. We accept she tried her best to prepare, but ultimately felt unable to do so in the time available, because the bundle did not have an index which matched the contents (it still having the index of the old version of the bundle). This meant she could not easily update her cross-referencing. We recognise to do so would be a big ask for any litigant in person, let alone someone who suffers from anxiety which affects her processing time when under pressure, as is the case for the Claimant.

24. The Claimant then felt forced to make the application to strike out the Respondent's response. We note the criticism of the Respondent's representative that this application was not made until 1.14pm on Day 2 (ahead of the hearing reconvening at 1.30pm). We considered such criticism to be unfounded and unfair given the timeline of events that ran up to that point. The Respondent's representative was given further time to consider the application while the Tribunal read it and confirmed that period would be sufficient. We are content he was given a reasonable opportunity to make representations on the application and no further time was requested.

The law

25. Rule 38 Employment Tribunal Procedure Rules 2024 provides that the Tribunal may, on its own initiative or on the application of a party, strike out all or part of a claim, response or reply on various grounds which include at (1)(c) non-compliance with any of those Rules or with an order of the Tribunal. Where a response is struck out, the effect is as if no response had been presented, as set out in rule 22 (effect of non-presentation or rejection of response, or case not contested).

26. In ***Blockbuster Entertainment Ltd v James*** *[2006] EWCA Civ 684*, it was stated that there were two key conditions for the exercise of the power to strike out:

"5. ... 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."

27. If there has been a deliberate and persistent failure to comply with orders of the Tribunal then it will be entitled to give less weight to the effect of that non-compliance: this will be more important in non-deliberate or excusable non-compliance *(**Governing Body of St Albans Girls' School v Neary** [2009] EWCA Civ 1190, [2009] IRLR 124*).

28. However, even where there has been a deliberate failure it will be relevant whether a fair trial is still possible, and a claim or response must only be struck out if to do so is a proportionate response. The overriding objective to deal with cases fairly and justly must be applied.

29. In ***Weir Valves & Controls (UK) Ltd v Armitage*** [2004] ICR 371 HHJ Richardson said:

"16. ... The Tribunal must be able to impose a sanction where there has been wilful disobedience to an order... 17. But 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."

Conclusions

30. We have concluded that in this case the Respondent's representatives (Peninsula) did fail to comply with orders of the Tribunal.

31. The order of EJ Midgely was to provide a hard copy of the bundle to the Claimant by 10 January 2025. We recognise there appears to have been an agreement between the parties to vary that date to 21 February 2025. However, the Respondent did not provide the bundle by that date.

32. This was compounded by a further breach of the order of EJ Cadney, which provided that the CMOs of that day and November 2024 were to be added to the bundle and the final version sent to the Claimant the next day. The orders were not inserted into the bundle and the Claimant was not sent the final bundle by that date.

33. It was not until 4.30pm the working day before the hearing started that the Claimant was sent a copy of the final bundle. Even then, it was in electronic form, rather than hard copy as ordered by EJ Midgely, the CMOs had not been inserted as ordered, and the index was the index for the previous bundle.

34. The Claimant repeatedly and proactively reminded the Respondent's representative about the need for the bundle and the documents she wanted included. The various dates that it was promised by the Respondent's representatives came and went. The Respondent's representative today made no suggestion that there was some mis-apprehension or mistake on the part of the Respondent's representatives. Peninsula is an experienced organisation, as the Claimant pointed out, who is aware of what is required. The only reference to an excuse given in the correspondence we were taken to was the existence of 2 bank holidays, which does not begin to explain the delay. We therefore find that the failure to comply was wilful rather than mistaken or excusable.

35. We have gone on to consider whether it would be in the interests of the overriding objective to strike out the Response.

36. We took into account the Respondent's representative's submission that the Respondent has a 'real' defence to the claim, and it would cause the Respondent significant prejudice to lose that defence.

37. We also considered the following:

38. The magnitude of default. The magnitude was great. Despite two orders and numerous reminders by the Claimant, a final bundle was sent extremely late in the day, without explanation for that delay and still with an index that did not match the bundle and still not including the CMOs as ordered. The Respondent's representative said the short timeframe in sending the bundle to the Claimant in hard copy meant the index could not be updated. This did not explain why the version sent electronically on Friday had the wrong index.

39. Responsibility for the default. The default appeared to be squarely on the part of the Respondent's representatives. There was no suggestion that delay was caused by the Respondent itself. That therefore factored into our decision, as striking out the Response would ultimately prejudice the Respondent (who was not responsible for the default itself), even if it were to then pursue their representatives for any consequences.

40. The extent of disruption, unfairness and prejudice. The disruption and unfairness that has been caused is high. The failure to provide the bundle in good time has effectively led to this hearing having to be postponed because the Claimant reasonably cannot be expected to cope with the late provision of the final bundle. We explored with the Claimant whether she could make do with assistance from the Tribunal / Respondent's representative in helping her with page references, but she felt she could not. We accept that it is not reasonable to expect her to manage by way of the Tribunal / Respondent representative assisting her with updated page references in the course of her cross-examining the Respondent's witnesses. She does not know what the additional pages are in this bundle, needs to be able to feel confident navigating it herself, and it would heighten her anxiety to have to do it in that way. The effect of the necessary postponement is that it will extend a process for the Claimant that has already been very stressful notwithstanding her attempts to get the bundle finalised and make the best of a bad situation. The default on the part of the

Respondent's representatives has wasted the Tribunal's time, the Claimant's time and, indeed, the time of the Respondent itself.

41. We also considered prejudice in the context of deciding whether a fair hearing is still possible. Our view is that it is still possible to have a fair hearing. The Claimant herself said that she could continue if she had sufficient time to prepare. She acknowledged that while she did not want it to happen, the hearing could be postponed and a fair hearing could take place then. However, we did note (in terms of prejudice) that she said that a postponement would cause her stress and upset. It would further lead to a continuation of her life being, as she described it, 'on hold' while there was a lack of certainty as to how this matter would be determined.

42. In conclusion, we were extremely concerned about the Respondent's representative's conduct and sympathetic to the Claimant's position. However, taking all those matters into account we ultimately concluded that while there was a significant breach of the Tribunal orders, given that it appeared to be the representatives' default (rather than the Respondent itself) and given that a fair hearing was still possible with a relatively short delay, it would not be in the interest of justice to strike out the Respondent's Response to the claim.

43. We were of the view that the prejudice and unfairness caused to the Claimant could be more proportionately reflected by noting that the Tribunal has the power, under Rule 78 Employment Tribunal Rules of Procedure 2024, to make a 'wasted costs' order against a representative in favour of any party where that party has incurred wasted costs. Under Rule 80, such an order can be made for a party whether or not they are represented, and may also be made in favour of a representative's own client. A party may apply for a wasted costs order at any stage up to 28 days after the date on which the judgment finally determining the proceedings is sent to the parties.

44. We therefore consider the appropriate course of action is to draw Rules 78-80 of the Employment Tribunal Rules of Procedure 2024 in respect of wasted costs to the attention of both the Claimant and the Respondent (https://www.legislation.gov.uk/uksi/2024/1155/part/13/made).

45. Further, to explain that if either party wishes to make an application for wasted costs against Peninsula due to the postponement of this hearing, they should write to the Tribunal making such an application no later than 28 days after the date of the judgment finally determining these proceedings is sent to the parties. They should include in their application(s) the costs they claim, or if there were no costs incurred, a record of the hours they say they spent preparing for or attending this hearing which have been wasted. Peninsula will then have a reasonable opportunity to make representations in response to that application and may put forward evidence on its ability to pay if relevant. We noted that if that application were to be made in good time prior to the final hearing, it may be possible for it to be determined at the final hearing. Otherwise, it would be considered and determined thereafter.

46. We also note that further failure to comply with any rules or orders by the Respondent or its representatives, is likely to give rise to a risk of the Response being struck out.

47. The final hearing was relisted and orders made for final preparation by way of separate Case Management Orders.

Employment Judge Danvers

4 June 2025

JUDGMENT SENT TO THE PARTIES ON
17 June 2025

FOR THE TRIBUNAL OFFICE