EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr A Sobratee	Sheffield College

Heard at: **Leeds by CVP** **On: 20 June 2025**

Before: **Employment Judge Davies**

Appearances
For the Claimant: **Mr O Ogunyanwo (consultant Alpha Shindara legal)**
For the Respondent: **Mr N Wilson (solicitor)**

JUDGMENT having been given orally to the parties on 20 June 2025 and written reasons having been requested by the Claimant on 3 July 2025 in accordance with Rule 60 of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This was a preliminary hearing in public to decide whether the claim should be struck out because the Claimant has failed to comply with Tribunal orders.

2. The Claimant was represented at the hearing by Mr Ogunyanwo, a consultant with Alpha Shindara Legal. The Respondent was represented by Mr Wilson (solicitor). I was provided with a file of relevant documents by the Claimant, and I also considered documents on the Tribunal file that were in the possession of both parties.

Procedural history and factual background

3. The Claimant worked for the Respondent as a maths lecturer from September 2014 until 27 February 2023, when he was dismissed on ill health grounds, having been absent since June 2022. He undertook ACAS Early Conciliation from May to July 2023 and presented his claim in August 2023.

4. Employment Judge Miller conducted a preliminary hearing for case management in October 2023. The Claimant was represented by his trade union. The Judge identified complaints of unfair dismissal, direct age, race and disability discrimination, indirect disability discrimination and harassment related to disability. The Judge listed the claims for a final hearing lasting eight days in

September 2024 (there was a delay because the Claimant was going abroad for six months and the Judge allowed for that in his case management orders).

5. In late August 2024, the Claimant applied for a postponement of the hearing due to start 2 September 2024. He mentioned his frail mental and physical state and said that he had instructed a representative who was unable to attend the hearing on that date. The application was refused. The Claimant renewed it on 29 August 2024. He said that he was struggling to manage the challenges of representing himself with ongoing health issues. He provided medical evidence of stress related issues and low mood. The hearing was postponed and re-listed to start on 14 October 2024.

6. Alpha Shindara Legal came on the record on 5 September 2024. The Respondent had served its witness statements on the Claimant on 29 August 2024. The Claimant was ordered to serve his by 30 September 2024. He did not do so and on 1 October 2024 the Respondent applied for an unless order requiring him to serve his witness statement. An unless order was made, and the Claimant served his witness statement on the last day for compliance. The Respondent subsequently drew attention to the fact that it raised numerous new matters and did not address many of the matters that were at issue in the claim. Nonetheless, it was deemed to comply with the unless order.

7. On the first day of the final hearing on 14 October 2024 the Employment Judge raised concerns about the Claimant's capacity, which were shared by his representative from Alpha Shindara Legal, Mr Ogunyanwo. The Tribunal decided that the hearing must be postponed so that the Claimant's capacity could be assessed. The Judge ordered the Claimant's representative to obtain and send to the Tribunal and the Respondent a report on the Claimant's capacity to conduct the proceedings. This was to be done by **28 January 2025**. The Employment Judge gave some information about the test for assessing capacity and drew the attention of Mr Ogunyanwo to the guidance in the publication The Assessment of Mental Capacity: Guidance for Doctors and Lawyers published by the Law Society and the British Medical Association.

8. On 28 January 2025, at 23:35 hrs, Mr Ogunyanwo emailed the Tribunal applying for an extension of time for providing the report. He wrote, "*Our client's GP, who has been tasked with providing the necessary report on the Claimant's ability to conduct the proceedings, is yet to complete the assessment. This is due to the complexity of the matter and the need for further medical evaluations to accurately assess the Claimant's capacity*." He asked for a further 21 days to comply.

9. The Respondent raised some concerns. They requested that, if the Tribunal granted an extension of time, any further default should lead to a striking out of the claim. They pointed out that the Claimant had defaulted on a number of orders, that it was almost two years since his employment ended and that two substantive hearings had already been postponed.

10. On 1 February 2025 I ordered the Claimant's representative to send to the Tribunal and the Respondent, by 7 February 2025:

10.1 A copy of the letter of instruction sent to the GP requesting that they conduct a capacity assessment of the Claimant together with any information provided to the GP;
10.2 Copies of any correspondence, emails or file notes evidencing steps taken to chase the assessment since October 2024; and
10.3 Copies of any information obtained by the Claimant's representative about the expertise of the GP for the purposes of carrying out a capacity assessment.

11. On 7 February 2025 the representative wrote to the Tribunal explaining that there was a further delay in obtaining the capacity assessment, because of the need to pay a fee and problems with the Claimant collecting the letter. He did not provide any of the information required by the order of 1 February 2025.

12. On 10 February 2025 the Respondent's representative wrote to point out that the Claimant had failed to comply with my order of 1 February 2025. He also raised concerns about the suggestion that the assessment comprised a letter from a GP; surprise that the fee was as low as £50, given the nature of a capacity assessment; and concern that, contrary to what was said in Mr Ogunyanwo's letter of 28 January 2025, no further medical evaluations appeared to have taken place. They applied for the claim to be struck out.

13. On 11 February 2025, I put the Claimant on notice that I was considering striking out his claim for non-compliance with Tribunal orders. I gave him until 17 February 2025 to explain why his claim should not be struck out, and I repeated that the information ordered on 1 February 2025 must still be provided, together with the capacity assessment.

14. On 17 February 2025 the Claimant's representative sent the Tribunal a letter from the Claimant's GP. The representative said that the delay in providing the "capability statement" was "due to health challenges faced by the Claimant."

15. The letter from the GP thanked Mr Ogunyanwo for his "recent" letter requesting a "report/statement" confirming whether the Claimant had capacity to conduct Employment Tribunal proceedings. It contains one material paragraph:

    I have reviewed [the Claimant's] medical records, and he does not have a diagnosis that would deem him to be of unsound mind. He does not suffer with advanced dementia, autism, moderate to profound learning disabilities or severe brain injury. He did suffer with Depression in 2021, but he did not require any medications at the time. He has reported being forgetful at times however this has not affected his ability to make decisions.

16. The letter contained no reference to the GP having seen or spoken to the Claimant, so as to assess his capacity.

17. The final hearing of the claim was then re-listed for December 2025. It appears that the live strike out warning was overlooked at that stage. The Respondent's representatives wrote to the Tribunal on 17 March 2025 and 1 and 12 May 2025, following that up, and pointing out each time that the Claimant still had not

complied with the order. That led to a preliminary hearing in front of me today, to determine the Respondent's strike out application.

18. At 11pm last night, Mr Ogunyanwo emailed the Tribunal, providing for the first time some of the information required by my order of 1 February 2025. The information provided included attendance notes of telephone calls between Mr Ogunyanwo and the Claimant on 6 and 28 November and 19 December 2024. They discussed the Claimant's health, but they contain no reference to the need for a capacity assessment or any steps taken to obtain one. Mr Ogunyanwo said at the hearing today that the Claimant had promised to provide him with information about his past medical history. There was no basis for delaying in having the Claimant's capacity assessed simply in order to await such information.

19. The information provided also included a note of an email sent to the Claimant by Mr Ogunyanwo on 22 January 2025, saying that he needed to see his GP to "discuss the request for your Capability statement." He said that a response was required by 28 January 2025.

20. Mr Ogunyanwo also provided a copy of an email he sent to two of his colleagues at Alpha Shindara Legal on 10 January 2025. It attached a draft email, which Mr Ogunyanwo asked his colleagues to amend as necessary and send to the Claimant's GP "today without fail." The Tribunal was provided with a draft letter. It was not clear whether it was the document attached to the email or the final version sent to the GP. Mr Ogunyanwo said that it was the final version and I take that at face value. No evidence about the date on which it was sent was provided. I assume it was on or about 10 January 2025. The letter requested a "report/statement" confirming whether or not the Claimant had capacity to conduct Employment Tribunal proceedings. It went on to say, "*What is needed is a statement of fact confirming that your patient has a diagnosis which may impact their cognitive function."* The letter provided the very brief summary of the capacity test that EJ Brain had set out in his case management order. It went on to list "the types of conditions that GPs are asked to declare, including advanced dementia, autism, moderate to profound learning disabilities and severe brain injury (not an exhaustive list.)" The letter told the GP that they should confirm the diagnosis and unsoundness or impairment of mind. If the GP disagreed that the Claimant had a diagnosis that would "deem them to be of unsound mind", they were asked to contact Mr Ogunyanwo. The letter did not refer to any guidance, or draw the GP's attention to the guidance suggested by EJ Brain or any other guidance.

21. I pause to note that this was not a satisfactory letter of instruction. The GP was not asked to see and assess the Claimant to determine his capacity. They were not given any proper or accurate guidance, and the letter itself was misleading as to what was required. It steered the GP towards simply identifying whether the Claimant had any specific conditions. That is not an assessment of capacity.

22. It therefore appears:

    22.1 No steps were taken by the Claimant's representative to obtain a capacity assessment as ordered by EJ Brain between 14 October 2024 and 10 January 2025. There was no action for almost three months. Action was

taken just over two weeks before the deadline. No adequate explanation for that failure has been provided.

22.2 When steps were taken, the letter of instruction was wholly inadequate and no steps had apparently been taken to ascertain whether the GP was sufficiently expert to carry out a capacity assessment.

22.3 There was no compliance with my order to provide information apart from the capacity assessment until yesterday. Information that should have been provided by 7 February 2025, all of which must have existed and been in Mr Ogunyanwo's possession at that date, was not provided until 11pm the night before the strike out application was to be determined, more than four months later. I noted that Mr Ogunyanwo had suffered a bereavement, for which I expressed my condolences, and travelled overseas as a result during the period. But that does not justify the failure to provide the information in February or March and, in any event, arrangements should be made within Alpha Shindara Legal for these claims to be properly conducted in Mr Ogunyanwo's absence. There has been no satisfactory explanation for the failure to provide the information ordered on 1 February 2025 until yesterday.

22.4 When information was provided, it indicated that the letter written applying for an extension of time on 28 January 2025 was misleading. That letter suggested that the delay was caused by the GP, and that it was a result of the complexity of the case and the need for further medical evaluations. In fact the delay was substantially caused by the failure to take action for three months. Further, no medical evaluations took place either before or after the application. The very distinct impression is given that the reason for the failure to send the information ordered on 1 February 2025 was to avoid revealing these matters.

23. The GP's letter is not adequate. On the face of it no assessment has been carried out of the Claimant's capacity to participate in this litigation. The GP has checked the Claimant's medical records for specific diagnoses. That is not a capacity assessment. As a result of these matters, in late June 2025 the Tribunal is therefore no further forward than it was in October 2024.

Legal principles

24. The legal principles are uncontroversial. Under Rule 38 of the Employment Tribunal Procedure Rules 2024, the Tribunal can strike out all or part of a claim, among other reasons for non-compliance with a Tribunal order.

25. In deciding whether to strike out a party's case for non-compliance with a Tribunal order, the Tribunal must have regard to the overriding objective of seeking to deal with cases fairly and justly. The Tribunal must consider and weigh all relevant factors, including: the magnitude of the non-compliance; whether the default was the responsibility of the party or his or her representative; what disruption, unfairness or prejudice has been caused; whether a fair hearing would still be possible; and whether striking out or some lesser remedy would be an appropriate response to the disobedience: see *Weir Valves and Controls (UK) Ltd v Armitage* [2004] ICR 371, EAT.

26. The Tribunal must not strike out the claim unless it is also satisfied striking out is proportionate. That involves consideration of whether there is some step short of striking out the claim that will achieve the desired result. The first object of any system of justice is to get triable cases tried: see *Blockbuster Entertainment Ltd v James* 2006] IRLR 630, CA. The Court of Appeal in that case reminded Tribunals that the power to strike out is a draconian one, and should not be too readily exercised.

27. In *Harris v Academies Enterprise Trust* [2015] ICR 617, while rejecting the submission that the strict approach that is taken to striking out under the Civil Procedure Rules should be taken in the Employment Tribunals, the EAT nonetheless held that justice is not simply a question of the court reaching a decision that may be fair as between the parties in sense of fairly resolving the issues; it also involves delivering justice within a reasonable time. Indeed, that is guaranteed by Article 6 of the European Convention on Human Rights and Fundamental Freedoms. Overall justice also means that each case should be dealt with in a way that ensures that other cases are not deprived of their own fair share of the resources of the court. The EAT also observed that one relevant factor may be that a failure to comply with Tribunal orders over a period of time, repeatedly, may give rise to a view that if further indulgence is granted, the same will simply happen again.

Conclusions

28. Applying those principles, I have reached the following conclusions. First, there has been a failure by the Claimant to comply with Tribunal orders. That is a failure to obtain and provide a proper capacity assessment by 28 January 25 or at all, failure to provide some of the information ordered by the Tribunal at all, and failure to provide rest until 11pm yesterday. The failure to comply seems broadly to be the responsibility of the Claimant's representative.

29. This is a substantial failure. An assessment of the Claimant's capacity, in circumstances where the Judge and his representative both had concerns that he lacked capacity because of his behaviour/presentation at the previous hearing, is fundamental to a hearing going ahead. That matter should have been resolved by the end of January and either a hearing listed, or a litigation friend appointed. Instead, in June, eight months after the postponed hearing and five months after the capacity assessment should have been produced, no progress has been made. The doctor's letter does not answer the question whether the Claimant has capacity and was evidently written without the doctor seeing or assessing the Claimant. Whilst there is a presumption of capacity, there is no information before me to suggest a change since Employment Judge Brain and Mr Ogunyanwo had cause to question the Claimant's capacity last October. There is a hearing listed in December, but the litigation cannot be progressed towards that until this issue is resolved and, given the history set out above, the Tribunal can have no confidence that a hearing in December will be effective – there is not only a failure to comply with orders, but also a lack of transparency with, and apparent effort to mislead, the Tribunal about what was done and when. The failure causes delay and disruption to the Respondent and its witnesses. If the claim is struck out, obviously that causes significant prejudice to the Claimant, who will no longer be able to pursue his claims in the Tribunal, although he may have recourse to proceedings

against his representatives, who are providing services for a fee. The claims are complaints of unfair dismissal and disability discrimination and the first object of a system of justice is to get triable cases heard. Weighing all these factors I find, subject to questions of proportionality and a fair hearing, that it would be consistent with the overriding objective and in the interests of justice to strike out the claim. The high threshold is met, notwithstanding the impact on the Claimant. The impact on the Respondent and its witnesses, the uncertainty about whether and when progress may be made, and the lack of transparency with the Tribunal make that appropriate.

30. I turn therefore to the question whether a fair hearing remains possible. I have concluded that it does not. The failure to comply with Tribunal orders has led to significant additional delay. Although a hearing has been listed, progress cannot be made towards it while the question of capacity is unresolved, nor can steps be taken to appoint a litigation friend. Such delay is significant. Witnesses will be cross-examined and called on to remember events, and inferences may be drawn if they cannot provide answers and explanations. The delay must be considered in the context of the overall 3-month time limit. That impacts the fairness of the hearing. The Respondent and its witnesses have now been facing these serious allegations for two years. Twice the hearing has been postponed at very short notice. Whilst this delay alone might not prevent a fair hearing being possible as between the parties, the delay in the context of the broader considerations of justice – not only reaching a decision that may be fair as between the parties in the sense of fairly resolving the dispute, but also dealing with each case in a way that ensures other cases are not deprived of their own fair share of the resources of the court – does. That is particularly the case where there has been a history of non-compliance, failure to comply with recent orders and an apparent attempt to mislead the Tribunal about that. A fair trial is one within a reasonable timeframe, with a reasonable and proportionate amount of preparatory work, and with the commitment of a reasonable and proportionate share of judicial and administrative resources. I have concluded that the Tribunal can have no confidence that these matters will now be properly addressed so as to allow a fair hearing, so understood, to take place.

31. I considered whether some, lesser step could be taken, but concluded that it could not. Against the history set out above, the Tribunal can have no confidence that a further strike out warning would secure compliance with the Tribunal's orders. I do not consider it appropriate to make an unless order, given that the provision of a capacity assessment is also dependent on timely action by a medical professional.

32. Bearing in mind the overriding objective and the need to do justice to both sides, and to parties in other cases, for all these reasons I have concluded that a fair hearing is not possible and that it is proportionate and necessary to strike out these claims for non-compliance with orders.

Employment Judge Davies
18 July 2025