



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Nigel Burbeck

**Respondent:** CPFC Limited

**Heard at:** London South Employment Tribunal (by CVP)

**On:** 23 February 2024

**Before:** Employment Judge Abbott (sitting alone)

## Representation

**Claimant:** not in attendance

**Respondent:** Mr Adam Melling, solicitor of Walker Morris LLP

# JUDGMENT

1. The name of the respondent is amended to CPFC Limited.
2. The claim is struck out under Rule 37(1)(d).
3. The hearing listed for 29, 30, 31 July and 1, 2 August 2024 is vacated.

# REASONS

## Background

1. The claimant brought a claim against the respondent for disability discrimination and constructive unfair dismissal. The ET1 claim form was presented on 17 April 2023. A response was presented, in time, on 23 May 2023. It explained that the claimant's employer was 'CPFC Limited' rather than 'CPFC 2010 Limited' and I accept that 'CPFC Limited' is therefore the proper respondent and accordingly order that the proper respondent be substituted for the named respondent.
2. A Notice of Hearing was sent on 27 June 2023 in respect of a preliminary hearing for case management scheduled to take place by video on 28 November 2023. That letter stated to both parties that "You or a representative must take part in the hearing." It also directed that each

party must fill in and return to the Tribunal an agenda for the hearing, in the form attached to that letter.

3. The preliminary hearing went ahead on 28 November 2023 before Employment Judge D Wright. Neither party attended, nor provided agendas. In respect of the respondent (at that time unrepresented), a late application to adjourn had been received on the afternoon prior to the hearing but had been refused by Acting Regional Employment Judge Khalil. No communication had been received from the claimant prior to the hearing, nor did he respond to attempts by the Tribunal clerk to contact him on the morning of the hearing.
4. In the circumstances, Employment Judge D Wright adjourned the hearing and listed a further preliminary hearing for today to discuss case management matters (including clarification of the claims) but also whether or not the claim and/or response (or any part of them) should be struck out under rule 37(1)(a) or 37(1)(d). The Judge gave specific directions requiring both parties to write to the Tribunal and the other side by 19 December 2023 (i) confirming whether are still pursuing the claim/response, (ii) why they did not attend the hearing, and (iii) why no agenda had been completed. The Order made clear that this information would be considered by the Tribunal at today's hearing when deciding whether to strike-out the claim/response under rule 37(1)(d). In addition, the claimant was ordered to provide a Schedule of Loss by 19 December 2023.
5. The respondent duly provided the information required of it by an email dated 12 December 2023. The claimant has not complied with either of Employment Judge D Wright's orders, despite prompting from the respondent by email on 4 January 2024. Indeed, as far as I can see from the Tribunal file, there has been no communication from the claimant since the claim was presented on 17 April 2023. The respondent's representative confirmed today that the respondent has also had no contact from the claimant regarding his claim since it was presented.
6. By an email dated 13 February 2024, the respondent (now represented) made a written application to strike-out the claim under rule 37(1)(d).
7. Today's hearing was listed to commence at 10:00am. The claimant was not in attendance at that time. The Tribunal clerk attempted to call him and, on my instructions, sent him an email informing him that the hearing would commence at 10:30am, that the respondent was seeking to strikeout his claim, and that if he wished to say anything in opposition to that application, he would need to join the hearing by that time. He did not do so. I therefore commenced the hearing at 10:35am and heard from the respondent's representative regarding the strike-out application. I gave a brief oral judgment striking out the claim, but explained to the respondent that, since the claimant was not present, I would set out my full reasons in writing.

The law

8. Rule 37(1) of the Employment Tribunals Rules of Procedure 2013 provides that the Tribunal may strike out all or part of a claim or response on any of the following grounds-
  - (a) that it is scandalous or vexatious or has no reasonable prospect of success.
  - (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) 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.
  - (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
9. The power may only be exercised if the claimant has been given a reasonable opportunity to make representations, either in writing or, if requested by the claimant, at a hearing (Rule 37(2)).
10. The respondent advanced its application on the basis of ground (d) above. In respect of this ground, in *Evans and anor v Commissioner of Police of the Metropolis* [1993] ICR 151, CA, the Court of Appeal held that an employment tribunal's power to strike out a claim for want of prosecution (this was the language used in the Tribunal Rules 2001, but the substance of the power to strike out has remained the same under Rule 37(1)(d)) must be exercised in accordance with the principles that, prior to the introduction of the Civil Procedure Rules 1998, governed the equivalent power in the High Court, as set out by the House of Lords in *Birkett v James* [1978] AC 297, HL. Accordingly, a tribunal can strike out a claim where:
  - (1) there has been delay that is intentional or contumelious (disrespectful or abusive to the court), or
  - (2) there has been inordinate and inexcusable delay, which gives rise to a substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the respondent.
11. The respondent's representative drew my attention to the decision of the EAT (Lady Smith) in *Rolls Royce plc v Riddle* [2008] IRLR 873, which refers to the decisions mentioned above, and in particular her Ladyship's comments at paragraph 20 of the judgment:

"These principles appear to have been identified because of there being justifiable cause for concern about two problems of which a failure to actively pursue a claim may be indicative. The first is that 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, given such conduct, it is just to allow the claimant to continue to have access to the Tribunal for his claim. That is a distinct and different matter from the second problem which is that if a claimant has failed to actively pursue his claim to an inordinate and inexcusable extent so as to give rise to a risk of real prejudice to the respondent if the claim were to carry on, then a question arises as to whether or not there can still be fair trial and if there is doubt about that whether the claim should then be prevented from going any further.”

12. The respondent’s representative also directed me to the decision of the EAT (HHJ Tucker) in *Khan v London Borough of Barnet* [2018] UKEAT/0002/18/DA which he described as having similar facts to the present case save that, whereas Mr Khan did engage to some degree in his case, here the claimant has not engaged at all in the Tribunal process since the claim was presented.

### Discussion

#### Rule 37(2) safeguard

13. There is no doubt, and I find, that the claimant has had a reasonable opportunity to make representations as to why the claim should not be struck-out, both in writing and at a hearing, as required under Rule 37(2). Employment Judge D Wright’s Orders make very clear that the question of strike-out under Rule 37(1)(d) was on the agenda for today’s hearing. The claimant was ordered to provide written information relevant to this consideration by 19 December 2023 but failed to do so, in time or at all. He failed to attend today’s hearing. He has had a reasonable opportunity to make representations but has not taken advantage of that opportunity.

#### Application of Rule 37(1)(d)

14. In my judgement, it is very clear that the claim has not been actively pursued. As set out above, the claimant has not had any communication with the Tribunal or with the respondent regarding his claim since it was presented on 17 April 2023. He did not complete and return the case management agenda attached to the Tribunal’s letter of 27 June 2023. He did not attend the preliminary hearing on 28 November 2023. He did not comply with Employment Judge D Wright’s orders requiring the provision of certain information and a schedule of loss by 19 December 2023. He did not respond to prompting from the respondent to comply by email of 4 January 2024. He did not respond to the respondent’s strike-out application of 13 February 2024. He did not attend the hearing today.
15. The question is therefore whether I should exercise my discretion to strikeout the claim on that basis. I am satisfied that it is appropriate and in the interests of justice, and in furtherance of the overriding objective, to do so. The remarks of Lady Smith in *Rolls-Royce* (see above) are apposite in

this case. I find that the claimant's failure to take reasonable steps to progress his claim (including failing to comply with Tribunal directions and orders) shows he has disrespect or contempt for the tribunal and/or its procedures. In my judgement, in view of the claimant's complete lack of engagement with the Tribunal process since presenting his claim, it is no longer just to allow him to continue to have access to the Tribunal.

16. I do not consider a lesser sanction such as an Unless Order is appropriate. The claimant has had clear notice since the Order of Employment Judge D Wright that he was at risk of strike-out but has nonetheless not complied with any of the Judge's directions, nor made any contact with the Tribunal or the respondent and has for the second time failed to attend a hearing without any explanation. He has not engaged with the Tribunal process at all since presenting his claim. In my judgement, the interests of justice do not require that he be afforded any further opportunity.
17. For the above reasons, the claim is struck-out.

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**Employment Judge Abbott**

**Date: 23 February 2024**

JUDGMENT SENT TO THE PARTIES ON

26 February 2024

FOR THE TRIBUNAL OFFICE

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