



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Q Islam

**Respondent:** Tesco Stores Ltd

**Heard at:** Cambridge Tribunal (by video)    **On:** 12 January 2024

**Before:** Employment Judge Dobbie

## **Representation**

**Claimant:** Did not attend

**Respondent:** Ms H Ifeka (Counsel)

# RESERVED JUDGMENT

1. The Claimant's claims are struck out.

# REASONS

## **Introduction**

2. The matter was listed for an open preliminary hearing to determine whether the Claimant's claims should be struck out under Rule 37 of the Employment Tribunal Rules of Procedure 2013 (the Rules) or subject to a deposit order under Rule 39 of the Rules.

## **Findings of fact and process**

3. The Claimant brought claims for unfair dismissal, notice pay, holiday pay and redundancy pay in a claim form presented on 4 September 2022, arising from his employment as a Customer Assistant from 4 November 2016 to 15 June 2022. The Respondent defended all claims in an ET3 form presented on 18 October 2022.
4. The matter was case managed on 2 January 2023 (and listed for a hearing from 29 April to 1 May 2024). The Claimant attended the case management hearing. At that hearing, the Respondent confirmed it had paid £1,537.50 gross to the Claimant in respect of notice pay (accepting it had not in fact been fully paid) and a sum for holiday pay of £965.28 gross. Directions were made for the Respondent to confirm how those sums were calculated and for the Claimant to indicate if such claims were

withdrawn by 3 March 2023. If he did not accept them, he was ordered to set out what he believed to be still owing and how it was calculated. He was also ordered to provide a schedule of loss by 31 March 2023, with calculations of the sums claimed. Disclosure was mutually ordered for 26 May 2023. The bundle was to be agreed by 21 July 2023 and witness statements exchanged by 27 October 2023.

5. On 2 March 2023, the Claimant sent an email to the Respondent and tribunal stating that the holiday and notice had not been fully paid but failing to set out how much he says was still due and failing to provide any calculations.
6. On 8 and 20 March, the Respondent sent chaser emails seeking this information from the Claimant such that it would be able to reply to the claims in its amended reply due on 31 March. The Claimant did not reply to either email.
7. On 26 and 30 March 2023, the Claimant submitted a schedule of loss and indicated that he maintained that his notice and holiday pay had been under-paid, providing calculations.
8. On 24 May, the Respondent sent the Claimant a further email stating he had not replied to their emails nor provided the required information. The Respondent also sought to agree a date and time for exchange of documents.
9. On 1 June 2023, the Respondent again wrote to the Claimant seeking his reply on the claims, asserting he had not communicated with the Respondent since 8 March and again chasing an agreed date for disclosure. Of course he had communicated on 26 and 30 March in respect of his schedule of loss.
10. On 21 June 2023, the Respondent applied to the tribunal for an unless order / deposit order. It acknowledged having received a schedule of loss on 26 March but stated that the Claimant had not otherwise replied to its correspondence.
11. On 6 October 2023, the Respondent chased the tribunal for a reply on its application. Also on 6 October 2023, at 14:46, the Claimant was sent a strike out warning letter from Employment Judge Tynan seeking the Claimant's reply by 20 October 2023. In that Order, he was required to provide any objection to strike out in writing or request a hearing. At 21:24, the Claimant replied stating that he had provided a schedule of loss on 26 and 30 March 2023 and indicating he had received the case management order. He did not reply / object to the strike out in any greater detail nor request a hearing.
12. On 19 October, the Respondent further replied to the Claimant explaining that whilst he had indeed provided a schedule of loss, he had not otherwise complied with directions or replied to correspondence and asserted that the schedule of loss was deficient.
13. On 23 October 2023, the Respondent applied to the tribunal for its earlier application for strike out to be determined on the papers. In a letter dated

13 November 2023, Employment Judge Brown listed the matter for a two-hour video hearing (on 12 January 2024 at 2pm) to hear the Respondent's application. There was no further correspondence from the Claimant other than that narrated above.

14. The Claimant failed to attend the video hearing on 12 January 2024. The clerk called the Claimant on his telephone, but he did not answer. The clerk sent him an email, encouraging him to join, but he did not answer that day or subsequently. The clerk called him again, but the Claimant did not answer. Enquiries were made of counsel for the Respondent as to recent communications between the parties and informed the tribunal there were none, other than those in the bundle of documents. The hearing proceeded under Rule 47 after 20 minutes had elapsed since contacting the Claimant, in the hope that he might join.
15. Counsel for the Respondent submitted that the claims had not been actively pursued, and that all claims (or at least the notice and holiday pay claims) should be struck out for breach of tribunal orders. As an alternative, she sought an unless order to clarify basis on which the Claimant maintained he was entitled to £1800 notice pay and the legal basis of his claim to holiday pay. She stated that it would not be possible to have a fair trial for the dates currently listed, but she did not suggest it would not be possible to have a fair trial in the future.
16. I decided to provide the Claimant with an opportunity to explain why he had failed to attend the hearing. On 12 January 2024, he was sent a strike out warning letter, requiring him to explain: (1) his failure to attend the hearing (along with any supporting evidence); (2) his failure to comply with tribunal orders (along with any supporting evidence); and (3) his response to the Respondent's application to strike out his claim.
17. The Claimant replied on 15 January 2023, stating he had not been informed of the hearing on 12 January 2024, that he believed the hearing was listed for 29 April 2024 and that he requested that the claim not be struck out. He attached only the case management order. He did not provide any other documents or explanation.
18. Enquiries were made of the tribunal staff who provided me with a copy of the notice of hearing sent to the parties on 13 November 2023, listing the strike-out hearing for 12 January 2024. The email was timed at 15:43 that day and was sent to the Claimant at a Gmail email address he had been using throughout the proceedings, including in his correspondence on 15 January 2024. Accordingly, he did receive the notice of hearing. Whether he read the email or not is another matter.

## **Law**

19. In Weir Valves & Control (UK) Ltd v Armitage [2004] ICR 371 the EAT set out the principles for tribunals to apply when considering whether to strike out a claim for non-compliance with the Rules or tribunal order (Rule 37(1)(c)). In that case it states that if the unreasonable conduct does not involve breach of an order, the crucial and decisive question will generally be whether a fair trial of the issues is still possible. However, even if a fair trial as a whole is not possible, the question of remedy must still be considered to ensure that the effect of a strike-out is not disproportionate.

For example, it may still be just to allow a defaulting party to take some part in the remedies hearing. When an order has been breached, the tribunal must be able to apply a sanction in response to wilful disobedience of an order. However, it does not always follow that disobedience should mean a strike-out. The guiding consideration is the overriding objective to do justice between the parties. A tribunal should therefore consider all the circumstances when deciding whether to strike out or whether a lesser remedy would be an appropriate sanction.

Relevant factors will include:

- (a) the magnitude of default;
- (b) whether the default is that of a party or their representative;
- (c) what disruption, unfairness or prejudice has been caused; and
- (d) whether a fair hearing is still possible.

20. Tribunal should also consider whether striking out or some lesser remedy would be an appropriate response to the disobedience. The tribunal must always guard against allowing any indignation to lead to a miscarriage of justice.
21. In Essombe v Nandos Chickenland Ltd UKEAT/0550/06 it was noted that as a matter of public policy, orders are there to be obeyed, otherwise cases cannot be properly case-managed and fairness achieved between the parties.
22. In T v Royal Bank of Scotland Plc [2023] EAT 119, the EAT explained that if a claim (or response) is to be struck out on account of conduct or non-compliance with orders, notwithstanding that a fair trial is still possible, that requires a specific conclusion to that effect and some account of why the tribunal has concluded that the breach of order or other conduct is so serious as to merit strike-out. In the absence of such a clear finding, strike-out would not be possible.
23. Under rule 37(1)(d) of the Rules, a tribunal can also strike out a claim or response that has not been actively pursued. In Birkett v James [1978] AC 297, the House of Lords, looking at the similar provision from the earlier rules, distinguished between two types of case:
  - (a) Where, through intentional and contumelious default, the claimant has failed to comply with an order and it has been made clear that their claim would be struck out unless they complied with the order within the time allowed; and
  - (b) Where inordinate and inexcusable delay on the part of the claimant or their representatives 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.

## **Conclusion**

24. In the present case, the Claimant has failed to provide any convincing or adequate explanation for his failure to attend the preliminary hearing on 12 January 2024. He did receive the notice of hearing to the same email address he has been using both before and after that communication. He has failed to explain why he did not read / check that email (if indeed he failed to do so) or why he ignored it (if that is what happened).

25. The Claimant has further failed to explain his non-compliance with orders. He has breached earlier tribunal orders and the order of 12 January 2024. I am minded to hold that he complied with the broad requirement of the orders to provide information in respect of his holiday and notice pay claims given that he did detail the calculations in a schedule of loss and stated that he wished to continue with such claims. However, he did not explain the basis for the different sums. He has further failed to comply with orders for disclosure, agreement of a bundle, and exchange of statements. The Respondent has been proactively chasing him on various directions.
26. A fair hearing is still possible, but not on the dates currently listed. Nonetheless, the Respondent has been put to prejudice and disadvantage having to chase the Claimant to comply with orders and apply for and attend the hearing on 12 January. The Claimant's conduct has also wasted tribunal time and resources which could have been made available to cases that were actively pursued. He has provided no good explanation for all of his failures.
27. As a matter of public policy, orders are there to be obeyed, otherwise cases cannot be properly case-managed and fairness achieved between the parties. If the case were to continue, there is nothing to suggest that the Claimant would be any more pro-active. It is not, for example, a case where he suffered a period of sickness absence and can now tend to the case. He has provided no explanation for his failure to comply with directions and no convincing explanation for his failure to attend on 12 January 2024.
28. In all the circumstances, whilst striking-out claims has a Draconian effect, in this case, it is in the interests of justice for the claims to be struck out. The hearing listed for 29 April to 1 May 2024 will be vacated.

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Employment Judge Dobbie

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Date 9 February 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON  
13 February 2024

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FOR EMPLOYMENT TRIBUNALS

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**Recording and Transcription**

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**Case No: 3311170/2022**

recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

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