



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Wickham

**Respondent:** Kiko Milano Stratford

## JUDGMENT

The claims brought by the Claimant are struck out

## REASONS

1. The Claimant had brought claims of unfair dismissal, discrimination, based on sexual orientation and race. The matter was listed for a preliminary hearing to consider case management orders on 26 September 2022 by telephone.
2. On 25 May 2022 Regional judge Taylor made an order that the Claimant provide a schedule of loss before 6 July 2022 and that an agreed schedule of issues be sent to the Tribunal by 6 July 2022. On the same date the Claimant was asked to show cause why his unfair dismissal claim should not be struck out as he had less than 2 years qualifying service (on his own account) and in those circumstances Section 108 of the Employment Rights Act 1996 prevented him pursuing a claim of unfair dismissal unless the reason for the dismissal was one where the ordinary 2-year qualification did not apply.
3. The Claimant has not filed a schedule of loss.
4. On 6 July 2022 the Respondent sent the Tribunal an e-mail attaching a list of issues. They complained that despite attempts to contact the Claimant the Claimant had not engaged in agreeing a draft list of issues the Respondent had prepared.
5. On 6 September 2022 EJ Burgher sent a letter to the Claimant asking him to show cause why his claim should not be struck out on the basis that he had failed to comply with the order of the Tribunal made on 25 May 2022 and/or that his claim was not being actively pursued.
6. On 16 September 2022 EJ Reid struck out the Claimant's unfair dismissal claim. That judgment was sent to the parties on 17 September 2022.

7. At 10am on 26 September 2022, at my instruction, a Tribunal Clerk telephoned the Claimant on the number he had provided on his ET1 to give him details of how to access the telephone conference. The telephone was answered by a female who informed the Clerk that the Claimant was in a meeting and could not be disturbed. She asked for details in order that the Claimant could return the call. The Clerk explained that the hearing was due to start and that the Employment Judge would need to speak with the Claimant. The person who answered the Claimant's telephone maintained the position that he could not be disturbed. The Clerk sent the parties an e-mail with contact details for the telephone conference with instructions to join ten minutes later. He had informed the person he spoke to that he would be sending that e-mail. When I started the telephone conference Mr O'Brian, a Solicitor for the Respondent was in attendance but the Claimant was not. We waited a further 5 minutes (about 15 minutes after the e-mail was sent). The Claimant did not attend the hearing.
8. The Claimant has not corresponded with the Tribunal at all despite 2 warnings that parts of his claims might be struck out. He has not produced a schedule of loss and has not engaged with the Respondent who has prepared a fair and sensible list of issues.
9. The Claimant has failed to attend a hearing apparently attending a work meeting instead. I have carefully read the notices of hearing sent to the Claimant and asked myself whether they are unclear for a lay person. I do not believe they are. It is quite clear from the orders that there was to be a preliminary hearing on 26 September 2022 as well as a final hearing at a later date.
10. Rule 37 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (hereafter 'the rules') provides as follows:

**Striking out**

*37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a 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).*

*(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.....*

11. In circumstances where the Claimant has done nothing to progress his claim for several months and has failed to provide any explanation or correspond with the Respondent or the tribunal, I am satisfied that I can properly hold that the Claimant is not actively pursuing his claim.
12. It is clear that the Claimant has failed to comply with the orders of REJ Taylor made on 25 May 2022.
13. Given that the Claimant was sent a warning that an Employment Judge was contemplating striking out his claims on 6 September 2022 I am satisfied that the requirements of Rule 37(2) have been met. The Claimant had 19 days to make representations of to request a hearing.
14. I was prompted to consider the issue of whether the Claimant's claims should be struck out by the fact that I was assigned the hearing on 26 September 2022 prior to that a referral made by the administrative staff to consider striking out the claim was not dealt with. I recognise that the hearing on 26 September 2022 was a private hearing and had not been listed for consideration of any issue under rule 37. Whilst I was unable to make any order at the hearing itself I am entitled to consider the matters on the papers in circumstances where the Claimant has had reasonable notice and has had an opportunity to request a hearing. The Claimant did not request a hearing. I have therefore considered the matters on the papers taking into account the failure of the Claimant to attend the preliminary hearing.
15. When considering whether I should strike out the claims on the basis of a failure by the Claimant to comply with the orders I need to consider whether some lesser sanction is capable of ensuring that there can be a fair trial see **Weir Valves and Controls UK Ltd v Armitage [2004] ICR 371, EAT** where at paragraph 17 the EAT said:  
  
*'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.'*
16. Had the failure of the Claimant been limited to a failure to supply a schedule of loss I consider that any default could have been met with an unless order made under rule 38. However, the failure to engage in agreeing a list of issues is altogether more serious. That failure is magnified when coupled with the failure to explain the default failure (in response to the strike out warning) and the failure to attend a preliminary hearing. The list of issues provides the foundation for all further directions in the case.

17. Where the Claimant has not actively pursued his case I need to make a finding as to whether the failure was as a result of 'intentional and contumelious default' by the Claimant. If I am so satisfied then I might strike out the claim even if a fair trial is possible - ***Rolls Royce plc v Riddle* [2008] IRLR 873, EAT**. If I am not so satisfied I need to consider whether a fair trial is still possible and in either case I should consider whether any lesser sanction would suffice.
18. I find that the Claimant's failure to progress his case has been intentional and contumelious. I pay no heed to the fact that he did not respond to the warning that his unfair dismissal claim might be struck out. He could quite properly have taken the stance that he should not attempt to resist the inevitable.
19. The Claimant has failed to correspond with the Respondent's solicitors. I am told, and accept, that having prepared a draft list of issues the Respondent's solicitors sent a reminder to the Claimant. It is probable that those e-mails came to the attention of the Claimant. The Claimant has not responded to the strike out warning issued by EJ Burgher. That warning was sent to the Claimant at the e-mail address he gave the tribunal.
20. The notice of hearing for the hearing on 26 September 2022 was clear. The Claimant was sent an agenda which he has failed to complete. He had not asked for a postponement but, on the information I was given, was in a meeting when the hearing was due to start.
21. On the information before me I am satisfied that the failures of the Claimant to progress his case have been intentional and contumelious in the sense that the Claimant has been scornful and insulting in failing to correspond with the Respondent's solicitor and the Tribunal and has deliberately chosen not to attend a hearing. Two hours of court time has been wasted in circumstances where the Tribunal has very limited resources and parties are waiting for over a year for a final hearing.
22. Where a party gives an assurance that they will make good any past breaches and where it is possible to reset the trial timetable without any serious prejudice to the other party, or the other court users, generally it would be inappropriate to strike out a claim. Here the Claimant has breached two orders of the tribunal and has failed to give any explanation for that. He has given no reassurance that he will remedy the situation. In those circumstances I have no evidence that he intends to comply with any further orders.
23. I am not obliged to strike out the claims but must consider whether it is in the interests of justice to do so. I consider that it is in the interests of justice to strike out the claims and that no lesser sanction than an order under rule 37 is appropriate in this case. The Claimant has had an opportunity to remedy his past breaches and to show that he wishes to progress this claim. He was aware that his claims might be struck out. He has failed to engage at all.
24. In the circumstances, I shall not make any further record of the preliminary hearing that took place on 26 September 2022 as no orders were made at

that hearing (although an explanation of the steps I intended to take was given).

**Employment Judge Crosfill  
Date: 27 September 2022**