

THE INDUSTRIAL TRIBUNALS

CASE REF: 1944/16

CLAIMANT: Pawel Majszyk

RESPONDENT: Kelly Pot Plants & Floral Sundries Ltd

DECISION

The unanimous decision of the tribunal is that the claimant's claims should be struck out.

Constitution of Tribunal:

Employment Judge: Employment Judge Crothers

Members: Mr B Heaney
Mr I O'Hea

Appearances:

The claimant did not appear and was not represented.

The respondent was represented by Mr G Doherty, Barrister-at-Law instructed by Worthingtons Solicitors.

BACKGROUND AND REASONS

1. (i) At a Case Management Discussion on 18 August 2017, the matter was listed before the tribunal to consider the following issues:
 - (1) the respondent's strike-out application, and application for costs;

- (2) in the event of the case not being struck out, to proceed to hear oral evidence which was to include any application by the claimant to amend his claim.
 - (ii) The tribunal hearing had to be postponed on 28 November 2017 in the circumstances outlined in the record of proceedings appended to this decision.
 - (iii) The claimant had presented a claim to the tribunal on 7 September 2016 alleging unfair dismissal, breach of contract, and failure by the respondent to provide written reasons for his dismissal.
 - (iv) The case has a long history of Case Management Discussions, the records of which, together with other records of proceedings; are appended to this decision for ease of reference.
 - (v) The claimant did not comply with the further directions given by the tribunal at the hearing on 28 November 2017. The claimant did not contact the tribunal subsequent to that date nor did he appear at the hearing on 25 January 2018. The case had effectively not moved beyond the claimant's claim and suggested amendment. Mr Doherty indicated to the tribunal, if it acceded to the respondent's application for a strike out of the claimant's claims, that the respondent would not pursue an application for costs against the claimant.
 - (vi) The respondent's application to strike out was based on two grounds:-
 - (a) the claimant had failed to comply with multiple tribunal orders, including an Unless Order; and
 - (b) the claimant's conduct of proceedings had been unreasonable.
2. The tribunal carefully considered the written submissions made on behalf of the respondent which refer to the relevant legislative provisions and Rules, together with relevant authorities, and set out the background history.
 3. The tribunal had afforded the claimant considerable flexibility consistent with its overriding objective and, insofar as relevant, the principles laid down in the case of **Galo v Bombardier (2016) NICA 25**.
 4. In correspondence dated 10 November 2017 the claimant was advised as to the availability of certain sources for assistance in preparation for the hearing of the case. That correspondence also referred to the tribunal arranging for an interpreter to attend any hearing to assist the claimant and forwarded a copy of Practice Note 3 (2012), which applies in Civil and Family Courts relating to the role of a McKenzie friend. The correspondence also referred to the claimant's application for a postponement of the hearing on 28 November 2017 and again addressed the question of medical evidence being made available. This is set out in paragraph (5) of the correspondence as follows:-

“(5) In your letter you have made an application for a postponement of the hearing on 28 November 2017 on the grounds you are not ‘physically and psychologically’ ready for the process at the present time due to your health condition. The Employment Judge is not prepared to postpone the hearing on the basis of the limited medical evidence before him, namely a number of statements of fitness for work. To enable the Employment Judge to further consider your application to postpone the hearing you must:-

- (i) provide from your doctor/consultant a detailed medical report (not a statement of fitness for work) –
 - (a) stating your precise medical condition;
 - (b) why you are unfit to attend and participate in the tribunal hearing on 28 November 2017;
 - (c) the prognosis for your medical condition; and
 - (d) in light of the prognosis, when the doctor/consultant considers you are likely to be medically fit to attend and participate in the hearing on 28 November 2017, which, at most, will be a one day hearing and probably shorter.

Such a report must be provided no later than 10 days from the date of this letter.

Yours sincerely”

No such medial evidence was provided to the tribunal, and there was therefore no evidence of any actual disability before the tribunal. The tribunal, however, is satisfied that strenuous efforts were made to provide the claimant with every opportunity to effectively participate in proceedings.

5. The tribunal’s Pre-Hearing Review record of a Pre-Hearing Review held on 24 February 2017 ordered the claimant to:-

“set out the particular details of the proposed amended claims in relation to each of the said paragraphs. He is required to do so **by no later than 5.00 pm on 24 April 2017.**”

Paragraph 7 of the Pre-Hearing Review record of proceedings relating to a hearing on 16 June 2017 stated that:-

“consequently, **unless** the claimant complies with the Order made in paragraph 6 of the record of Case Management Discussion dated 1 March 2017, a further copy of which is annexed to this record of proceedings, the tribunal may strike out the claimant’s claim without further warning or delay, in the absence of reasons being provided by the claimant **on or before 30 June 2017**”.

6. The claimant had still not complied with the Unless Order by the time of the hearing on 25 January 2018.
7. Schedule 1 to Rule 13 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 provides as follows:-

“Compliance with orders and practice directions

13.-(1) If a party does not comply with an order made under these Rules, under rule 7 of Schedule 4 or a practice direction, a chairman or tribunal –

- (a) may make an order in respect of costs or preparation time under rules 38-47; or
- (b) may (subject to paragraph (2) and rule 19) at a pre-hearing review or a hearing under rule 26 make an order to strike out the whole or part of the claim or, as the case may be, the response and, where appropriate, order that a respondent be debarred from responding to the claim altogether.

(2) An Order may also provide that unless the order is complied with the claim, or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice under rule 19 or hold a pre-hearing review or a hearing under rule 26”.

8. Schedule 1 Rule 18 deals with the conduct of Pre-Hearing Reviews. It provides that:

“... a chairman or tribunal may make an order –

- (c) striking out any claim or response (of part of one) on the grounds 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;
- (e) striking out a claim or response (or part of one) for non-compliance with an order or practice direction;

Relevant authorities are adequately recited and set out in paragraphs 22-28 of the respondent’s submissions annexed to this decision, and the tribunal finds it unnecessary to replicate them.

9. Having considered the foregoing paragraphs together with the content of the records of the Case Management Discussions and other records of proceedings attached to this decision, together with the relevant tribunal Rules and authorities,

the tribunal is satisfied, in the circumstances of the current case, that the claimant has conducted the proceedings before the tribunal in an unreasonable manner so as to make a fair trial impossible. He has also been guilty of deliberate and persistent disregard of required procedural steps.

10. In relation to non-compliance with the Unless Order the tribunal considered its overriding objective. The tribunal also considered all the circumstances, including the magnitude of the default, whether the default was the responsibility of a Solicitor or the party, what disruption, unfairness or prejudice had been caused and whether a fair hearing was still possible. The tribunal is again satisfied that a fair hearing is not possible.
11. Any prejudice to the claimant in striking out his claim, is outweighed by substantial prejudice to the respondent in having to continue proceedings in the context already described in this decision and in the records attached thereto.
12. The tribunal concludes that the claimant's claims should be struck out, that it is proportionate to do so, and in accordance with the tribunal's overriding objective.

Employment Judge:

Date and place of hearing: 28 November 2017 and 25 January 2018, Belfast.

Date decision recorded in register and issued to parties:

THE INDUSTRIAL TRIBUNALS
CASE MANAGEMENT DISCUSSION
TELEPHONE CONFERENCE

CASE REF: 1944/16

CLAIMANT: Pawel Majszyk
RESPONDENT: Kelly Pot Plants Limited
DATE OF HEARING: 16 December 2016

REPRESENTATIVES OF PARTIES:

CLAIMANT: The claimant appeared in person and was not represented.
RESPONDENT BY: Ms Eileen Bickerstaff, office manager of the respondent on telephone link.

Case Management Discussion
Record of Proceedings

1. The parties were invited to this Case Management Discussion by letter dated 23 November 2016. Due to a misunderstanding the respondent's representative did not realise that she was required to attend the hearing in person. However, she agreed to participate in the Case Management Discussion by telephone conference, as referred to above.

It was agreed, and I so ordered, that the title of the respondent be amended to:

Kelly Pot Plants and Floral Sundries Limited.

- 2.1 The purpose of this Case Management Discussion was to identify the issues to be determined by the tribunal, to make appropriate Case Management Orders and to list the case for Hearing.
- 2.2 The parties agreed that, having regard to the claimant's claim form, the claimant was making a claim of unfair dismissal and a claim relating to the failure of the respondent to provide the claimant with written reasons for his dismissal. In addition, the claimant had made a claim for breach of contract in respect of notice pay.

During the course of discussion, and before I had made any relevant case management directions/Orders to enable the substantive hearing in this matter to be listed for hearing, the claimant informed me that he wished to be allowed to make a claim for failure of the respondent to pay him the relevant national minimum

wage and/or, in relation to any such failure, a claim for unauthorised deduction from wages. In addition, he stated that he also wished to be allowed to make a claim of race discrimination on the grounds that he had been treated less favourably, on the grounds of his race, namely that he is Polish, in relation to his dismissal and/or the failure to give him written reasons for dismissal and/or the failure to pay him the national minimum wage and/or the unauthorised deductions from wages in relation to same, as referred to previously.

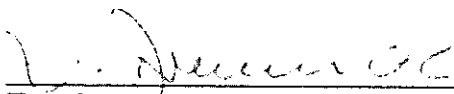
- 2.3 The claimant acknowledged that the said claims, which he now wished to make, in relation to the alleged discrimination and/or the alleged failure to pay him the national minimum wage/unauthorised deduction of wages were not expressly set out in the claimant's claim form. I pointed out to the claimant that, in the circumstances, he would therefore have to make an application to the tribunal for an Order to grant him leave to amend his claim form to include any or all of the above further claims referred to by him at this hearing, as set out above. I further pointed out to the claimant that, in making the said application, he would have to set out in writing the proposed amendments to the claim form which he wished to make.

The claimant indicated that he was presently seeking to obtain alternative representation and/or further advice. In the circumstances, I referred him to the tribunal's procedural booklet and the names and addresses of persons and/or bodies who might be in a position to give him further advice and/or assistance in relation to such matters.

- 2.4 In the circumstances, it was agreed, and I so directed, that if the claimant wishes to make an application to amend his claim form, as referred to above, then he must make the application in writing to the tribunal, with copy to the respondent's representative by **20 January 2017**, setting out the precise claims and terms of the amendments which he wishes the tribunal to allow. I emphasised to the claimant that it will then be a matter for the tribunal to consider and determine any such application.
- 2.5 At the next Case Management Discussion, as referred to below, the tribunal will consider the terms of any such application and, in particular, whether the respondent's representative consents or objects to the said application. In the event that the respondent consents to the respondent's application to amend his claim form, the subject matter of the application, then the tribunal, if it considers it appropriate, can make an Order granting leave to the claimant to amend his said claim form at that hearing. However, if the respondent objects to the claimant having leave to amend his claim form, then a Pre Hearing Review will be required to be arranged to determine the said application.
- 2.6 If no such application is made by the claimant, then, at the next Case Management Discussion, the tribunal will give such relevant case management directions/Orders as may be necessary and appropriate for the determination of the claims, the subject matter of the claimant's claim form, before any amendment, as set out above; and which I would have given at this Case Management Discussion but for the intervention of the claimant referring to the wish to make amendments to his said claim form, as set out above.
- 3 In light of the foregoing, I therefore directed that a further Case Management Discussion will be held in this matter on **3 February 2017 at 9.45am** to consider the

way forward and to make such further relevant case management directions/Orders as may be appropriate in the circumstances. The representatives must attend this hearing in person. For the purposes of this next Case Management Discussion I am satisfied that the claimant's level of English is sufficient, even if he is not represented by the time of the next Case Management Discussion and an interpreter is not necessary. If a Pre Hearing Review is required to be arranged and/or a substantive hearing for the determination of any issues in this matter, the issue of whether an interpreter is required can be further considered at the Case Management Discussion on **3 February 2017**, in light of any directions given at that hearing for any further hearings in this matter.

3. I also indicated to the respondent's representative that she may also wish to consider, in light of the matters set out above, seeking such further advice and/or assistance as she considers necessary in the circumstances and she should do so in advance of the next Case Management Discussion.



Employment Judge Drennan QC

Date: 16 December 2016

Notice

1. If any party fails and/or is unable to comply with any of the above Orders, any application arising out of such failure or inability to comply must be made promptly to the tribunal and in accordance with the Industrial Tribunals Rules of Procedure 2005.
2. Failure to comply with any of these Orders may result in a Costs Order or a Preparation Time Order or a Wasted Costs Order or an Order that the whole or part of the claim, or as the case may be, the response may be struck out and, where appropriate, the respondent may be debarred from responding to the claim altogether.
3. Under Article 9(4) of the Industrial Tribunals (Northern Ireland) Order 1996, any person who, without reasonable excuse, fails to comply with a requirement to grant discovery and inspection of documents under Rule 10(2)(d) of the Industrial Tribunals Rules of Procedure 2005 shall be liable on summary conviction to a fine not exceeding Level 3 on the standard scale - £1,000 at 3 September 2007, but subject to alteration from time to time.
4. A party may apply to the tribunal to vary or revoke any of the above Orders in accordance with the Industrial Tribunals Rules of Procedure 2005.

THE INDUSTRIAL TRIBUNALS

CASE MANAGEMENT DISCUSSION

CASE REF: 1944/16

CLAIMANT: Pawel Majszyk

RESPONDENT: Kelly Pot Plants Ltd

DATE OF HEARING: 3 February 2017

REPRESENTATIVES OF PARTIES:

CLAIMANT: In person and was not represented.

RESPONDENT BY: Mr J Kelly, Solicitor, of Worthingtons, Solicitors.

Case Management Discussion Record of Proceedings

1. This hearing was arranged, following the Case Management Discussion on 16 December 2016, as set out in the Record of Proceedings dated 16 December 2016, to consider what further or other case-management directions/orders should be made in this matter, including whether a pre-hearing review requires to be arranged to consider the claimant's application to amend his claim, as referred to by him at the last Case Management Discussion. Since the date of the last Case Management Discussion, the respondent's representative, Mr Kelly, has now come on record for the respondent. Further, the claimant has set out in a letter dated 19 January 2017, the terms of the amendments which he wishes to make the subject of an application for an order for leave to amend his claim. On the basis of that letter (see later) the respondent's representative indicated that the respondent objects to the claimant's application for an order for leave to amend his claim. In these circumstances, it was agreed that a pre-hearing review would require to be arranged in this matter to consider and determine the claimant's application for leave to amend his claim to the tribunal. During the course of this hearing, it became clear that, at any pre-hearing review, a Polish interpreter would be required to assist the claimant at the pre-hearing review. **Subject** to the availability of such an interpreter, it was agreed, and I so directed, that a pre-hearing review would be arranged on -

24 February 2017 at 12.00 pm

to consider and determine the claimant's application for an order for leave to amend his said claim. Relevant Notice of Hearing will be issued in due course

2. Although the claimant has a sufficient level of English to appear in person, at this Case Management Discussion, it became necessary, at this hearing, to seek to clarify with him the precise applications for leave which he was seeking to make.

There was no dispute that the claimant has already made a claim for unfair dismissal and also a claim relating to the failure of the respondent to provide the claimant with written reasons for his dismissal; and, in addition, the claimant has made a claim for breach of contract in respect of notice pay.

The claimant, at this hearing, also confirmed that he was no longer seeking to make a claim for breach of the terms of the National Minimum Wage Act 1998, as amended. He accepted he has been paid the relevant minimum wage.

However, the claimant confirmed that he wished to make an application to amend his claims to the tribunal to include the following claims, namely:-

- "(1) A claim that he has been unlawfully discriminated against, on the grounds of his race in relation to –
- (i) the pay which he has received from the respondent during the course of his employment;
 - (ii) his dismissal;
 - (iii) requiring him to work in breach of the terms of the Working Time Regulations (Northern Ireland) 1998 in relation to rest periods and/or breaks and/or paid annual leave, pursuant to the said Regulations; and
 - (iv) not permitting him to have his birthday off, upon his request."
- (2) Failure of the respondent to provide the claimant with an itemised pay statement.
- (3) A claim that he was treated less favourably than a permanent employee, as a fixed-term employee, in contravention of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2002.
- (4) Failing to provide the claimant with a statement of initial employment particulars and, in connection therewith, a claim pursuant to Article 27 of the Employment (Northern Ireland) Order 2003 ('the 2003 Order'), arising from any such failure.

In relation to the proposed claim, pursuant to Article 27 of the 2003 Order, I noted that this may not require to be the subject of any such application for leave as it is not a freestanding claim' requiring to be expressly pleaded by a claimant (see **Scott Davies v Redgate Medical Services [UKEAT/0273/06]** and **Advance Collection Systems Ltd v Goltekin [UKEAT/0377/14]** If necessary

and appropriate whether such leave is required in the circumstances can be further considered at the pre-hearing review.

3. I urged the claimant to seek such assistance and advice as he was able to obtain in advance of the pre-hearing review as some of the claims referred to above, may require further clarification at the hearing of the pre-hearing review and which was not able to be done at this hearing and, in particular, in the absence of any interpreter and/or advice/assistance having been given to the claimant in advance of this hearing. However, doing the best that I can in the circumstances, the above would appear to be the applications made by the claimant for an order for leave to amend his claim.


Neil Drennan QC
Employment Judge

Date: 8 February 2017

Notice

1. If any party fails and/or is unable to comply with any of the above Orders, any application arising out of such failure or inability to comply must be made promptly to the tribunal and in accordance with the Industrial Tribunals Rules of Procedure 2005.
2. Failure to comply with any of these Orders may result in a Costs Order or a Preparation Time Order or a Wasted Costs Order or an Order that the whole or part of the claim, or as the case may be, the response may be struck out and, where appropriate, the respondent may be debarred from responding to the claim altogether.
3. Under Article 9(4) of the Industrial Tribunals (Northern Ireland) Order 1996, any person who, without reasonable excuse, fails to comply with a requirement to grant discovery and inspection of documents under Rule 10(2)(d) of the Industrial Tribunals Rules of Procedure 2005 shall be liable on summary conviction to a fine not exceeding Level 3 on the standard scale - £1,000 at 3 September 2007, but subject to alteration from time to time.
4. A party may apply to the tribunal to vary or revoke any of the above Orders in accordance with the Industrial Tribunals Rules of Procedure 2005.

THE INDUSTRIAL TRIBUNALS

CASE REF: 1944/16

Record of Proceedings of a pre-hearing review sitting at Belfast on 24 February 2017.

CLAIMANT: Pawel Majszyk

RESPONDENT: Kelly Pot Plants and Floral Sundries Ltd

Constitution of Tribunal: Employment Judge (sitting alone) Employment Judge Drennan QC

Representation of Parties:

	Name	Capacity
Claimant:	In person and was not represented	Assisted by an interpreter Mr M Mazur
Respondent by:	Mr S Doherty Barrister-at-Law	Instructed by Worthingtons Solicitors

Record of Proceedings

1. At the commencement of the hearing it became apparent, following further discussion that, in essence, the claimant was seeking an adjournment of this pre-hearing review, which had been arranged to determine whether or not the proposed claims, set out in the Notice of Hearing, should be permitted to be included by the tribunal, on foot of an order for leave to amend his claim. The claimant explained that, following the last Case Management Discussion on 3 February 2017, having regard to Paragraph 3 of the Record of Proceedings, he had sought assistance from the Equality Commission for Northern Ireland, at an unidentified date, soon after that hearing. I understand that he had provided to the Equality Commission various documents relating to his said claims but including his claim form, the response form and the Records of Proceedings dated 8 February 2017 and 16 December 2016. I further understand that he was informed by someone in the Equality Commission that he would be contacted by the Equality Commission and would be invited to have an interview about his case and the possibility of assistance/representation. It would seem that it was likely that a 'case worker' would be allotted to the case by the Equality Commission, who would then arrange the said interview. Despite various telephone calls by the claimant to the Equality Commission it would appear that he has not been contacted by anyone at the Equality Commission, albeit it is possible there may have been someone allotted to deal with his case but that person had then gone on holiday and with no interview arranged. The net result is that the claimant, who it must be emphasised has some

limitation in relation to his English, has been left unsure about what is happening in relation to his application to the Equality Commission. Clearly, aware that he had not heard back from the Equality Commission and that the pre-hearing review was listed on 24 February 2017, I understand that he visited the Equality Commission on 23 February 2017 and obtained copies of the documents, with an acknowledgement slip, which he had previously lodged with the Equality Commission. It is most unsatisfactory that the claimant has **not** been provided in writing in a letter/memo by the Equality Commission, in the intervening period, with any relevant information in relation to his application, how it is to be dealt with and any relevant timescales, in particular, having regard to his limited English. Despite the fact that it must have been known by the Equality Commission that this hearing was due to take place on 24 February 2017, such a letter/memo, which he could have produced at this hearing, would have been of considerable assistance both to him, the tribunal and the respondent's representative. I fully appreciate, as does the claimant, that the Equality Commission cannot give assistance and/or representation to every person who attend their offices. I also understand that decisions in relation to whether to give assistance and/or representation cannot be given immediately and no doubt will require relevant investigation by a case worker before, ultimately, decisions are made by the relevant Authorisation Committee.

2. The Equality Commission were not represented at the hearing to respond to what the claimant informed me, as set out below. However, on the basis of what I was informed by the claimant, I find it unsatisfactory, in these circumstances, given the assistance role of the Equality Commission, that no letter/memo to the claimant detailing what was happening and/or what he required to do, has ever been given to him. Mr Doherty, on behalf of the respondent, emphasised to the tribunal that, if this matter was to be adjourned, there clearly would be wasted costs for the respondent. Indeed, he suggested that, if the respondent's representative had been informed by the claimant about the above matters, prior to this hearing and, **in particular**, that the claimant was wanting an adjournment of this hearing pending the outcome of his application to the Equality Commission, the probability is that the respondent's representative would have agreed, in the circumstances, to an adjournment with the consequential saving of costs. Clearly, it would have been much better if the claimant had given notice of an application for an adjournment prior to this hearing. However, I think equally, it is difficult to be too critical, given the claimant's limited English and, in particular, that he is a litigant-in-person. Further, I think in judging his actions I have to take into account the failure on the part of the Equality Commission, as referred to above, to inform him in writing of what was happening, as referred to above, which might, depending on its terms, have led to an earlier application to the tribunal.
3. Of course, as both the claimant and the respondent's representative recognise, even if the Equality Commission are given time to consider whether to assist/represent the claimant, the Equality Commission may decide not to do so and, subject to what is set out below, the tribunal will be no further on than it is today. However, equally, it was recognised by the claimant and the respondent's representative that, if the Equality Commission decide to assist and/or represent the claimant, then it may greatly assist the claimant in the conduct of this pre-hearing review.
4. Having considered all the above matters in great detail, I came to the conclusion that, having regard to the terms of the overriding objective and in the interests of justice, I should grant the claimant's application for an adjournment **on this occasion** subject to the matters set out below. I further agreed that the respondent's representative would have leave to renew any application for costs at the pre-hearing review, in

relation to the adjournment of this matter, if he considered it appropriate and necessary in the circumstances.

I emphasised to the claimant that in fixing a 'new' date for this pre-hearing review, as set out below, I have given a lengthy period to enable him to obtain such assistance and/or representation from the Equality Commission. However, I am not prepared, **without good reason**, to further adjourn this matter, and, in particular, if, **by the date of the pre-hearing review**, the claimant is still unaware of whether or not he is obtaining assistance/representation from the Equality Commission.

- 5 In relation to the issues for determination at the pre-hearing review, attached to the Notice of Hearing, *dated 13 February 2017*, the claimant, at this hearing, confirmed that he was **no** longer seeking to amend his claim to include a claim, as set out in *Paragraph 2* of the said Notice:-

"Failure of the respondent to provide the claimant with an itemised pay statement."

It was further agreed, by the respondent's representative, that in relation to *Paragraph 4* of the said Notice:-

"Failing to provide the claimant with a statement of initial employment particulars and, in connection therewith, a claim pursuant to Article 27 of the Employment (Northern Ireland) Order 2003 arising from any such failure."

No such application for leave to amend was required, for the reasons set out in the Record of Proceedings dated 8 February 2017. However, for the avoidance of doubt and without prejudice to the foregoing, the respondent's representative agreed that the proposed amended at Paragraph 4 of the said Notice was consented to by the respondent's representative.

6. In the circumstances, therefore, the claimant confirmed that he was still seeking to make an application for an order for leave to amend *Paragraphs (1) and (3)* of the issues attached to the Notice of Hearing *dated 13 February 2017*.

In relation to this application for leave to amend the claimant's claim, on foot of the said paragraphs referred to above, and in deciding to grant the adjournment of this hearing, I made an order that the claimant **must** set out the particular details of the proposed amended claims in relation to each of the said paragraphs. He is required to do so **by no later 5.00 pm on 24 April 2017**. As I explained to the claimant the issues set out in *Paragraphs 1 and 3* of the said Notice are in limited/general terms give **no** specific detail, which he **must** now give, in relation to the amendments sought. I am satisfied that in seeking such detail/particulars of each proposed said claim is consistent with the terms of the overriding objective but also with case law (see *Remploy v Abbott [UKEAT/0405/14]* and *Scottish Opera Ltd v Winning [UKEAT/0047/09]*).

I have given therefore the claimant a considerable period of time in which to provide these details/particulars. I have done this so that, if appropriate, he can obtain assistance/representation from the Equality Commission in relation to such matters. However, I made it clear to the claimant that, regardless of whether the Equality Commission provide him with the said assistance/representation these replies **must** be provided to the respondent's representative, with copy to the Office of the Tribunals.

7. During the course of discussion and, in particular, in relation to the matters set out in *Paragraph (1)(iv)* of his claim for **race discrimination** on the grounds that the respondent had **not** permitted him to have his birthday off, upon his request, I reminded the claimant that, at all times, he had insisted that this allegation of less favourable treatment related to his race. However, during the course of this discussion, at this hearing, he appeared to indicate that this allegation of discrimination was on the grounds that he was a Catholic. He therefore appeared to be suggesting that he was now attempting to bring a claim of religious discrimination rather than race. I pointed out to the claimant that no such application has been made to the tribunal that he had been unlawfully discriminated against on the grounds of his religious belief in relation to this allegation relating to his birthday. In this context, the respondent's representative pointed out, during the course of discussion, that other employees of the respondent, who were also Catholic, were not given time off on *1 November – All Saints Day*. If the claimant is seeking to make an application to make a claim for religious discrimination, pursuant to the Fair Employment and Treatment (Northern Ireland) Order 1998, then he **must** make this application, in writing, and in accordance with the relevant Rules of Procedure and further **must do so**, including **all** relevant details of any such claim, **before 24 April 2017**. Again, I urged the claimant to consider carefully whether or not he wishes to make any such application, having regard to the matters referred to above.

8. In light of the foregoing, it was agreed, and I so ordered, that the pre-hearing review, adjourned *from 24 February 2017*, will now be re-listed on:-

4 May 2017 at 10.00 am

An amended Notice of Hearing will be issued in due course, **excluding Paragraphs 2 and 4 of the present Notice**.

9. Finally, I urged the claimant to provide to the Equality Commission a copy of this Record of Proceedings and he should emphasise to the Equality Commission the dates set out for the further matters to be attended to and/or new dates for hearing, as referred to above.

10. **By on or before 2 May 2017** if either party is intending to rely on any documents for the purposes of the said hearing, then a paginated indexed bundle of documents **must** be provided to the Office of the Tribunals. If the parties can agree, following liaison, on one **agreed** bundle of documents, then this should be done. The bundle of documents should include copies of any legal authorities/text book extracts, to be relied upon by either party at the pre-hearing review.

Neil Drennan QC
Employment Judge

Date: March 2017

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 **Notice**

1. **If any party fails and/or is unable to comply with any of the above Orders, any application arising out of such failure or inability to comply must be made promptly to the tribunal and in accordance with the Industrial Tribunals Rules of Procedure 2005.**
2. **Failure to comply with any of these Orders may result in a Costs Order or a Preparation Time Order or a Wasted Costs Order or an Order that the whole or part of the claim, or as the case may be, the response may be struck out and, where appropriate, the respondent may be debarred from responding to the claim altogether.**
3. **Under Article 9(4) of the Industrial Tribunals (Northern Ireland) Order 1996, any person who, without reasonable excuse, fails to comply with a requirement to grant discovery and inspection of documents under Rule 10(2)(d) of the Industrial Tribunals Rules of Procedure 2005 shall be liable on summary conviction to a fine not exceeding Level 3 on the standard scale - £1,000 at 3 September 2007, but subject to alteration from time to time.**
4. **A party may apply to the tribunal to vary or revoke any of the above Orders in accordance with the Industrial Tribunals Rules of Procedure 2005.**

THE INDUSTRIAL TRIBUNALS

CASE REF: 1944/16

Record of proceedings of an industrial tribunal sitting at Belfast on 16 June 2017.

CLAIMANT: Pawel Majszyk

RESPONDENT: Kelly Pot Plants & Floral Sundries Ltd

Constitution of Tribunal: Employment Judge: Employment Judge Crothers

Representation of Parties:

Claimant by: The claimant did not appear and was not represented. A Polish interpreter, Ewa Dominska, was present.

Respondent by: The respondent was represented by Mr S Doherty, Barrister-at-Law instructed by Worthingtons Solicitors.

Record of Proceedings

1. This case has a considerable history of Case Management Discussions. On 1 March 2017 a 50 minute Case Management Discussion was held which included an Order, at paragraph 6, ordering the claimant to set out the particular details of the proposed amended claims by no later than 5.00 pm on 24 April 2017. The claimant failed to do this. A Pre-Hearing Review to deal with the proposed amendments was listed for 4 May 2017, but was postponed by consent, following a sick note received from the claimant, dated 24 April 2017, received by the tribunal on 2 May 2017. The medical note referred to anxiety and to the claimant's unfitness for work for four weeks from 17 April 2017.
2. The respondent's Solicitors, in correspondence of 24 April 2017 had applied for an Unless Order and referred to the issue of costs.
3. In detailed correspondence to the claimant dated 5 May 2017, bearing upon medical evidence and the listing of the Pre-Hearing Review, it was pointed that:-

"Although, the respondent's representative properly consented to the adjournment of the pre-hearing review, in light of the said statement of fitness for work and the provision of same so close to the hearing, any further applications for any adjournment will require a detailed medical report from your General Practitioner.

In this context, the Employment Judge would remind the parties of the Court of Appeal decision in the case of **Andreou v Lord Chancellor's Department [2002] IRLR 728** and **Riley v The Crown Prosecution Service [2013] IRLR 966**, to obtain a postponement of the hearing and/or extension of time, a party **must** provide a detailed medical report, setting (out) the precise details of the illness and prognosis for the medical condition; and, in light of that prognosis, when the medical expert considers the claimant is likely to be medically fit to attend any relevant hearing".

4. The above correspondence of 5 May 2017 also notified the claimant that the Pre-Hearing Review was being relisted on 16 June 2017 at 10.00 am.
5. The claimant did not appear at 10.00 am on 16 June 2017 and the tribunal delayed the commencement of the hearing to see if he would either make contact or appear at the tribunal. In or around 10.10 am-10.15 am, the claimant contacted the tribunal office pointing out that he had attended a psychologist on 15 June 2017 and that he would not be attending the tribunal hearing due to mental health problems. He stated that he would try to fax a sick line to the tribunal. A sick note arrived at the tribunal at 10.26 am. It was similar to the previous note and referred to anxiety/depression and the fact that the claimant was not fit for work. It was dated 8 June 2017 and signed by Dr A R McFarland. The claimant was certified as being unfit for work for eight weeks from 7 June 2017. The certificate was shown to the respondent's representative. Both sides had also received an amended Notice of Hearing dated 30 May 2017. An Employment Judge also directed that the respondent's Solicitor's correspondence requesting an Unless Order, and referring to costs, should be considered at the outset of the Pre-Hearing Review, insofar as appropriate and necessary.
6. Mr Doherty also applied for costs of £500.00, taking into account the fact that the claimant is unemployed. However, no award of costs was made as the tribunal would wish to consider any representations from the claimant before ordering costs, also taking into account his means.
7. In all the circumstances the tribunal was satisfied that an Unless Order should be made. Consequently, **unless** the claimant complies with the Order made in paragraph 6 of the record of Case Management Discussion dated 1 March 2017, a further copy of which is annexed to this record of proceedings, the tribunal may strike out the claimant's claim without further warning or delay, in the absence of reasons being provided by the claimant **on or before 30 June 2017**, as to why his claim should not be struck out.
8. A formal Strike-Out Notice is also appended to this record of proceedings.

Employment Judge:



Date: 16th June 2017

1944/16IT DM

THE INDUSTRIAL TRIBUNALS

CASE REF: 1944/16

CLAIMANT: Pawel Majszyk

RESPONDENT: Kelly Pot Plants & Floral Sundries Ltd

To: Pawel Majszyk

TAKE NOTICE that **UNLESS** you comply with the Order made in paragraph 6 of the record of Case Management Discussion dated 1 March 2017, a further copy of which is annexed to this record of proceedings, the tribunal may strike out the claimant's claim without further warning or delay, in the absence of reasons being provided by the claimant on or before 30 June 2017, as to why this claim should not be struck out.

The address to which any communication in relation to this matter should be sent is:-

Office of the Industrial Tribunals and the Fair Employment Tribunal
Killymeal House
2 Cromac Quay
Ormeau Road
Belfast
BT7 2JD



For the Secretary of the Tribunals

Date: 17.1.2017

THE INDUSTRIAL TRIBUNALS

CASE MANAGEMENT DISCUSSION

CASE REF: 1944/16

CLAIMANT: Pawel Majszyk
RESPONDENT: Kelly Pot Plants & Floral Sundries Ltd
DATE OF HEARING: 31 July 2017

REPRESENTATIVES OF PARTIES:

CLAIMANT BY: The claimant did not appear and was not represented.
RESPONDENT BY: Mr J Kelly, Solicitor of Worthingtons, Solicitors.

Case Management Discussion Record of Proceedings

1. This matter has been the subject of a number of Case Management Discussions. For ease of reference a copy of the last Pre Hearing Review Record of proceedings, dated 16 June 2017, is attached. The claimant's sick note of eight weeks from 7 June 2017 will expire soon. He did not write to the tribunal or make any contact prior to this Case Management Discussion.
2. Having considered paragraphs 6 and 7 of the Case Management Discussion record of 1 March 2017 and correspondence to the claimant dated 5 May 2017 (further copy annexed), and the submissions made by Mr Kelly on behalf of the respondent, I was satisfied, on balance, that the strike out notice should be reconsidered at a further Case Management Discussion to be listed (by telephone conference) at **9.45am on 18 August 2017**. In addition, and on the basis that the claimant has not complied with the Order in relation to an amendment application, the tribunal will proceed to timetable the substantive hearing based on the existing registered claims of unfair dismissal, right to written reasons for dismissal, and breach of contract. Mr Kelly made clear the respondent's frustration in relation to the matter and reiterated that an application for costs is still being made. This will be further considered at the Case Management Discussion listed for **18 August 2017**
3. In light of the claimant's failure to furnish written reasons as to why the claim should not be struck out, and his failure to communicate further with the tribunal, he must be aware of the extreme importance of his participation in the further

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Case Management Discussion, and the implications of not doing so, including the real possibility of his claim being struck out, and a further application for costs being made at that stage. The claimant has been afforded considerable flexibility by the tribunal in light of the sick notes produced. However the tribunal, in advance of the Case Management Discussion arranged for 18 August, would expect the claimant to explain the reason for his absence and provide, at the very least, a detailed medical report from his general practitioner should his medical condition be the reason for his failure to participate in this or the next Case Management Discussion. The tribunal noted in the record of proceedings of the Pre Hearing Review listed for 16 June 2017 that the claimant contacted the tribunal office at 10.10-10.15am and furnished a sick note from Dr A McFarland at 10.26am (also on the morning of the PHR hearing), certifying that he was unfit for work for eight weeks from 7 June 2017. The claimant must also contact the respondent's representative in advance of the forthcoming Case Management Discussion to agree the relevant issues and the timetable for any substantive hearing. A draft timetable together with agreed issues must be presented to the tribunal by not later than **3.00pm on 17 August 2017**, and any medical evidence to be relied on by the claimant must be lodged with the tribunal by not later than **10.00am on 16 August 2017**.



Employment Judge Crothers

Date: 27 July 2017

Notice

1. If any party fails and/or is unable to comply with any of the above Orders, any application arising out of such failure or inability to comply must be made promptly to the tribunal and in accordance with the Industrial Tribunals Rules of Procedure 2005.
2. Failure to comply with any of these Orders may result in a Costs Order or a Preparation Time Order or a Wasted Costs Order or an Order that the whole or part of the claim, or as the case may be, the response may be struck out and, where appropriate, the respondent may be debarred from responding to the claim altogether.
3. Under Article 9(4) of the Industrial Tribunals (Northern Ireland) Order 1996, any person who, without reasonable excuse, fails to comply with a requirement to grant discovery and inspection of documents under Rule 10(2)(d) of the Industrial Tribunals Rules of Procedure 2005 shall be liable on summary conviction to a fine not exceeding Level 3 on the

standard scale - £1,000 at 3 September 2007, but subject to alteration from time to time.

4. A party may apply to the tribunal to vary or revoke any of the above Orders in accordance with the Industrial Tribunals Rules of Procedure 2005.

**THE INDUSTRIAL TRIBUNALS
CASE MANAGEMENT DISCUSSION
REVIEW BY TELECONFERENCE**

CASE REF: 1944/16

CLAIMANT: Pawel Majszyk
RESPONDENT: Kelly Pot Plants & Floral Sundries Ltd
DATE OF HEARING: 18 August 2017

REPRESENTATIVES OF PARTIES:

CLAIMANT BY: The claimant participated by telephone link.
RESPONDENT BY: The respondent was represented by Mr J Kelly, Solicitor of Worthingtons Solicitors. (By telephone link).

Record of Proceedings

1. This record of proceedings must be read alongside the various records of proceedings dated 16 December 2016, 1 March 2017 (and particularly paragraphs 6 and 7), 16 June 2017, (together with correspondence from the tribunal dated 5 May 2017), and 31 July 2017.
2. The claimant who had been advised at a very early stage about the various resources available to assist him, explained that he was consulting with his Clinical Psychologist, Dr Brian McKee, on 22 August 2017, and meeting with his General Practitioner on the same date. He stated that he had already requested the Clinical Psychologist to provide him with a medical report and that he would ensure that medical evidence was provided to the tribunal as soon as possible. Furthermore, in relation to the amendment issue, which is relevant to the Unless Order and the Strike-Out application, the claimant must comply with the directions given by Employment Judge Drennan QC in the record of proceedings dated 1 March 2017.
3. I was satisfied, on balance, that the tribunal should not proceed to strike out the claimant's entire claim at this stage. In order to accommodate an improvement in any medical condition, and to facilitate in the preparation for a hearing, I decided to list the case for **10.00 am on 28 November 2017** to deal with:-
 - (1) The respondent's Strike-Out application, and application for costs;
 - (2) In the event of the case not being struck out, to proceed to hear oral evidence which will include any application by the claimant to amend his claim.

4. In preparation for the hearing, the parties must agree one bundle of documents by not later than 14 November 2017. Furthermore, should the claimant require any reasonable adjustments or special arrangements due to any medical condition, this must be referred to in any medical reports produced to the tribunal.
5. I explained to the claimant that an interpreter would be arranged for the hearing on **28 November 2017** and that he should use every endeavour, with whatever available assistance in the meantime, to read all of the records of proceedings and the directions/orders given. The claimant had indicated that he had difficulty in reading English. The claimant had also telephoned the tribunal office at 2.40 pm on 17 August 2017 stating that he was unable to attend the Case Management Discussion as he was unwell. He stated that he had seen his doctor and had a sick note which he could provide later. However no such sick note arrived with the tribunal office. Mr Kelly had also emailed the tribunal on 17 August 2017 reiterating the respondent's application for a strike-out and costs against the claimant.
6. I was satisfied that the claimant understood the Case Management proceedings and what was expected of him. The tribunal decided to proceed, in the circumstances, by telephone link. An interpreter had been retained at the Pre-Hearing Review on 16 June 2017, which the claimant failed to attend. Again, on 31 July 2017 the claimant did not write to the tribunal or make any contact prior to that Case Management Discussion, which he failed to attend. The tribunal considers that it has afforded the claimant considerable flexibility in all the circumstances.

Employment Judge: 

Date: 2nd August 2017

Notice

1. If any party fails and/or is unable to comply with any of the above Orders, any application arising out of such failure or inability to comply must be made promptly to the tribunal and in accordance with the Industrial Tribunals Rules of Procedure 2005.
2. Failure to comply with any of these Orders may result in a Costs Order or a Preparation Time Order or a Wasted Costs Order or an Order that the whole or part of the claim, or as the case may be, the response may be struck out and, where appropriate, the respondent may be debarred from responding to the claim altogether.
3. Under Article 9(4) of the Industrial Tribunals (Northern Ireland) Order 1996, any person who, without reasonable excuse, fails to comply with a requirement to grant discovery and inspection of documents under Rule 10(2)(d) of the Industrial Tribunals Rules of Procedure 2005 shall be liable on summary conviction

to a fine not exceeding Level 3 on the standard scale - £1,000 at 3 September 2007,
but subject to alteration from time to time.

4. A party may apply to the tribunal to vary or revoke any of the above Orders in accordance with the Industrial Tribunals Rules of Procedure 2005.

THE INDUSTRIAL TRIBUNALS

CASE REF: 1944/16

Record of proceedings of an industrial tribunal sitting at Belfast on 28 November 2017.

CLAIMANT: Pawel Majszyk

RESPONDENT: Kelly Pot Plants and Floral Sundries Ltd

Constitution of Tribunal: Employment Judge: Crothers

Members: Mr B Heaney
Mr I O'Hay

Representation of Parties:

Claimant by: The claimant appeared and represented himself, assisted by a Polish Interpreter, Anna Pietrzak

Respondent by: The respondent was represented by Mr S Doherty, Barrister-at-Law, instructed by Worthingtons Solicitors.

Record of Proceedings

1. This case has a considerable history of Case Management Discussions and postponed hearings. For ease of reference, the Case Management Discussion record dated 23 August 2017 is appended together with copy correspondence dated 10 November 2017 to the claimant in relation to medical evidence.
2. At the outset of the hearing, Mr Doherty clarified that the respondent was still applying for a strike-out of the claimant's claim and for costs.
3. Mr Doherty was afforded time to perfect written submissions on the strike-out application in order for the claimant to be made fully aware of the grounds for such an application and to have the opportunity of understanding the nature of the strike-out proceedings.
4. It transpired, through the interpreter, that he was not in a position to assist the claimant in reading the submissions except in relation to one A4 page. Further enquiries were made to ascertain whether anyone from the interpreter's organisation would be in a position to assist the claimant to understand the written submission. It transpired that this type of service is not offered and that it is necessary for the written submissions to be translated into Polish and given to the claimant. I directed that the written

submissions should be translated as soon as ever possible and provided to the claimant.

5. In these circumstances, the tribunal had little option other than to postpone the hearing until **10.00 am on 25 January 2018**, on the basis that the claimant provides any written submissions he wishes to rely on in relation to the respondent's strike-out application. These submissions must be lodged with the Tribunal Office by not later than **12 noon on 16 January 2018**.
6. The claimant referred to his medical condition and whether he may be fit to attend the reconvened hearing. I referred the claimant to the correspondence annexed to this record of proceedings, dated 10 November 2017 including paragraph 5 which must be complied with in the event of an application for postponement with the date in that letter being changed from **28 November 2017 to 16 January 2018**.
7. In the decisions in **Belkovic v Dr Toal and Another [2016] NIQB48**, and **Caoimhin Mac Giolla Kathain v The Northern Ireland Court Service [2010] NICA24**, it was pointed out that the language of the Court in these tribunals is English and correspondence/notices between the parties must be in English. The tribunal does not have power to require such correspondence to be in Polish, as suggested by the claimant.
8. It was stated by Longmore LJ at paragraphs 27 and 28 **Riley v The Crown Prosecution Service [2013] IRLR966** that:-

"It is important to remember that the overriding objective in ordinary civil cases (and employment cases are in this respect ordinary civil cases) is to deal with cases justly and expeditiously without unreasonable expense. Article 6 of the European Court on Human Rights emphasises that every litigant is entitled to "a fair trial within a reasonable time". That is an entitlement of both parties to litigation. It is also an entitlement of other litigants that they should not be compelled to wait for justice more than a reasonable time. It would be wrong to expect tribunals to adjourn hearing cases, which are fixed for a substantial amount of court time many months before they are due to start (or in this case not to list for many months), merely in the hope that a claimant's medical condition will improve. If doctors cannot give any realistic prognosis of sufficient improvement within a reasonable time and the case itself deals with matters that are already in the distant past, striking-out must be an option available to a tribunal".
9. The need for medical evidence in these circumstances was highlighted in detailed correspondence to the claimant dated 5 May 2017 (copy of which is annexed to this record of proceedings), and in paragraph 3 of the record of Case Management Discussion dated 16 June 2017.

10. The claimant also informed the tribunal that he was seeking guidance/advice from a number of sources. The postponement of the strike-out hearing until **25 January 2018** affords him considerable time to engage advisors.

Employment Judge: 

Date: 29/11 November 2017

IN THE OFFICE OF THE INDUSTRIAL TRIBUNALS
AND THE FAIR EMPLOYMENT TRIBUNAL

BETWEEN:

PAWEL MAJSZYK

CLAIMANT

AND

KELLY POT PLANTS AND FLORAL SUNDRIES LIMITED

RESPONDENT

WRITTEN SUBMISSIONS ON BEHALF OF THE RESPONDENT

Introduction

1. The Respondent applies to strike out the Claimant's claim on the grounds that:
 - a. The Claimant has failed to comply with multiple tribunal orders, including unless order; and
 - b. The Claimant's conduct of proceedings has been unreasonable.

The Tribunal Rules

2. The Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 provide the Tribunal with the power to strike out proceedings. Schedule 1 Rule 13 provides:

Compliance with orders and practice directions

13.—(1) If a party does not comply with an order made under these Rules, under rule 7 of Schedule 4 or a practice direction, a chairman or tribunal –

(a) may make an order in respect of costs or preparation time under rules 38 to 47; or

(b) may (subject to paragraph (2) and rule 19) at a pre-hearing review or a hearing under rule 26 make an order to strike out the whole or part of the claim or, as the case may be, the response and, where appropriate, order that a respondent be debarred from responding to the claim altogether.

(2) An order may also provide that unless the order is complied with the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice under rule 19 or hold a pre-hearing review or a hearing under rule 26

3. Schedule 1 Rule 18 deals with the conduct of Pre-Hearing Reviews. It provides that:

... a chairman or tribunal may make an order –

(c) striking out any claim or response (or part of one) on the grounds 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;

(e) striking out a claim or response (or part of one) for non-compliance with an order or practice direction;

The Present Case

4. The Claimant's ET1, which can be found at [1-12] was lodged on the 7th September 2016. The Claimant contains a claim for unfair dismissal and notice pay. There is no claim for any form of discrimination nor are there any facts pleaded which could ground such a claim.
5. The case was first case managed on 16 December 2016. The CMD records is at [21-23]. On that date the Claimant indicated he wished to amend his claim form. At paragraph 2.4 he was ordered to set out the details in writing of any amendment by 20 January 2016.
6. The next CMD was held on 3 February 2017. The CMD record is at [24-26]. On that date it was directed that a PHR be held on 24 February 2017. The issues for determination are set out at [27-28].
7. The PHR record is at [30-33]. At the commencement of the PHR the Claimant sought an adjournment as he was seeking support from the Equality Commission. The PHR was adjourned by not before the Employment Judge made a clear and unequivocal order that:

"the Claimant **must** set out the particulars details of the proposed amended claims in relation to each of the said paragraphs. He is required to do so by **no later 5.00pm on 24 April 2017.**" [Emphasis in Original Record]
8. The PHR was listed to be reconvened on 4th May 2017. On the 24th April 2017 the Respondent emailed to the Tribunal, and copied the said email to the Claimant by post, to advise that the Claimant had failed to comply with the orders made at the previous PHR. The full email is at [43].

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"the Claimant **must** set out the particulars details of the proposed amended claims in relation to each of the said paragraphs. He is required to do so by **no later 5.00pm on 24 April 2017.**" [Emphasis in Original Record]
8. The PHR was listed to be reconvened on 4th May 2017. On the 24th April 2017 the Respondent emailed to the Tribunal, and copied the said email to the Claimant by post, to advise that the Clamant had failed to comply with the orders made at the previous PHR. The full email is at [43].

9. On 27 April 2017 the Claimant sought a postponement of the PHR on medical grounds. The Claimant attached a Statement of Fitness For Work in support of that application. See [48-49]. The Respondent consented to that application. See [50].
10. On 5 May 2017 the Tribunal wrote to the Claimant, granted the adjournment and re-listed the matter for 16 June 2017. Crucially the Tribunal informed the Claimant that any further application to adjourn on medical grounds must be supported by a detailed medical report. See [52—53].
11. The PHR proceeded on 16 June 2017. The record is at [55-56]. The Claimant did not appear. The Tribunal delayed the commencement of the PHR and contacted the Claimant who informed a Tribunal clerk he was not fit to attend. The only evidence provided in support of that assertion was a further Statement of Fitness For Work certify the Claimant as unfit to work, but which did not deal with whether or not the Claimant was fit to give evidence, pursue his claim or when he would be in a position to do so. At paragraph 7 of the record the Tribunal clearly records that it made an unless order stating that:

“Consequently, unless the Claimant complies with the Order made in paragraph 6 of the record of Case Management Discussion dated 1 March 2017, a further copy of which is annexed to the records of proceedings, the Tribunal may strike out the Claimant’s claim without further warning or delay, in the absence of reasons being provided by the Claimant on or before 30 June 2017.”
12. The Claimant did not comply with that unless order.
13. On 30 June 2017 the Respondent’s solicitor emailed the Tribunal in respect of the unless order noting that no correspondence had been received by the Claimant as required by the unless order. The Respondent’s solicitor request that the Claimant’s claim be struck out in accordance with the unless order. The Respondent also renewed its application for costs. See [58].
14. A CMD was held on 31 July 2017. The CMD record is at [60—61]. The Claimant did not attend. No reason was provided for his non attendance. He had not wrote to the Tribunal or make any contact. The parties were ordered to agree a draft timetable by 17 August 2017.
15. On 17 August 2017 the Respondent’s solicitor emailed the Tribunal to advise that no further correspondence had been received from the Claimant and noting that the Claimant had once again failed to comply with the unless order. See [63].
16. The CMD proceeded on 18 August 2017. The record is at [64-66]. The Claimant participated by telephone link. The Claimant explained that he was consulting with his clinical psychologist to provide him with a medical report. At paragraph 3 it is noted by

the Tribunal that, on balance, it would not strike out the claim in order to accommodate an improvement in any medical condition. The matter was listed for hearing on 28 November 2017 but at paragraph 2 the Claimant was again ordered that he must comply with the unless order granted at the CMD on 24 February 2017, as reflected in the record dated 1 March 2017.

17. The Claimant to date has not complied with the unless order.
18. On 10th October 2017 the Respondent's solicitor again wrote to the Tribunal to advise that the Claimant has still failed to comply with the unless order. See [76-77].
19. On 2nd November 2017 the Tribunal received correspondence from the Claimant, dated 31 December 2017, in which the Claimant sought an adjournment of the 18 November 2017 hearing as he did not feel physically or psychologically ready for the process. See [95-96]
20. On 10th November 2017 the Tribunal wrote to the Claimant and stated, inter alia, that any application for postponement must be grounded upon a detailed medical report. See [93-94].
21. No such medical report has been produced. The unless order has not been complied with. The Claimant's case has not been progressed beyond the issue of the ET1 and a request for amendment.

The Legal Principles

22. The Tribunal will be familiar with the case of *Galo v Bombardier* [2016] NICA 25. That case provides an important reminder to the Tribunal of the need to make adjustments for disabled litigants and of the need to ensure that the parties to litigation receive a fair hearing. At paragraph 47 the Court of Appeal stated:

"We are satisfied at the outset that the issues in this case are governed by the obligation of every tribunal and court to act fairly.

23. The Court went on to quote from the case of *R (Osborn) v Parole Board and Others* [2014] AC 1115 and recorded that

"Equally, it is also important to remove wherever possible feelings of resentment aroused if a party to proceedings is placed in a position where he finds it impossible to influence the result.

Procedural requirements that decision-makers should listen to persons who have something relevant to say promote congruence between the actions of decision-makers and the law which had governed their actions "

24. The Court went on to consider the rights of litigants with disabilities. At paragraph 53 it listed a number of principles, including:
- “(1) It is a fundamental right of a person with a disability to enjoy a fair hearing and to have been able to participate effectively in the hearing.
 - (2) Courts needs to focus on the impact of a mental health disability in the conduct of litigation. Courts must recognise the fact that this may have influenced the claimant's ability to conduct proceedings in a rational manner.
25. The Court also encouraged Tribunals to advise personal litigants as to the availability of pro bono assistance/McKenzie Friends/voluntary sector help.
26. The EAT has held that the striking out requires a two-stage test (see *HM Prison Service v Dolby* [2003] IRLR 694, EAT, at para 15). The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim.
27. As noted above one such ground is the unreasonable conduct of a claim. It has been held that there are two 'cardinal conditions' for the exercise of the power to strike out for unreasonable conduct. They are, that the unreasonable conduct has taken the form of a deliberate and persistent disregard of required procedural steps, or it has made a fair trial impossible (see *Blockbuster Entertainment Ltd v James* [2006] EWCA Civ 684, [2006] IRLR 630, at para 5, per Sedley LJ). Where these conditions are fulfilled, it is necessary for a tribunal to go on to consider whether striking out is a proportionate response to the misconduct in question. In *Blockbuster Entertainment Ltd* Sedley LJ put it, the power to strike out under [r 37(1)(b)] is 'a Draconic power, not to be readily exercised'.
28. The guiding consideration, when deciding whether to strike out for non-compliance with an order, is the overriding objective (*Weir Valves and Controls (UK) Ltd v Armitage* [2004] ICR 371, EAT;). This requires the judge or tribunal to consider all the circumstances, including '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 possible'. Whether a fair hearing is still possible is to be judged objectively by the judge or tribunal, and the feeling of unfairness of one or other of the parties is not in itself a decisive factor.

Submissions

29. As is apparent from the long history of this case, as recorded in CMD records, PHR records and correspondence. the Claimant has been provided with multiple

opportunities to progress his case. An unless order was first made on 16 June 2017. 5 months later it has still not been complied with.

30. Whilst the Claimant is a personal litigant, he has on multiple occasions been advised of the various sources of advice and assistance. He has been continually, and clearly, advised in writing of the Tribunals orders. He has continually, and without excuse failed to comply with such orders.

31. Whilst there is some suggestion of health difficulties, there is no evidence of any actual disability before the Tribunal. However, it is clear, that the Tribunal has made every effort to make all adjustments that could reasonably be made. In short, the Claimant has been given every opportunity to effectively participate in proceedings.

32. The overriding objective states:

The overriding objective of these Regulations and the rules in Schedules 1, 2, 3, 4, 5 and 6 is to enable tribunals and chairmen to deal with cases justly.

(2) Dealing with a case justly includes, so far as practicable –

(a) ensuring that the parties are on an equal footing;

(b) dealing with the case in ways which are proportionate to the complexity or importance of the issues;

(c) ensuring that it is dealt with expeditiously and fairly, and

(d) saving expense.

(3) A tribunal or chairman shall seek to give effect to the overriding objective when it or he –

(a) exercises any power given to it or him by these Regulations or the rules in Schedules 1, 2, 3, 4, 5 and 6; or

(b) interprets these Regulations or any rule in Schedules 1, 2, 3, 4, 5 and 6.

(4) The parties shall assist the tribunal or the chairman to further the overriding objective

33. The Tribunal has done everything within its power to place the parties on an equal footing. However, due to the Claimant's failure to engage in the process and comply with orders this case has not been dealt with in a manner that is proportionate to the issues at stake. The Claimant resigned in the face of disciplinary proceedings for

unauthorised absence in circumstances where he had already received a warning and final written warning. The Respondent has incurred the cost of legal representation, and the time of dealing with this case. It is entirely unfair and unjust to subject the Respondent to these proceedings when the Claimant has abjectly failed to comply with Tribunal orders aimed at progressing the case to a final hearing.

Sean Gerard Doherty
Counsel for the Respondent
28th November 2017