



# EMPLOYMENT TRIBUNALS

## Claimant

Mr Mackenzie Linden

v

## Respondent

ASDA Stores Limited

**Heard at:** Huntingdon (by CVP)

**On:** 11 January 2024

**Before:** Employment Judge M Ord

## Appearances

**For the Claimant:** In person

**For the Respondent:** Mr S Gittins, Counsel

## JUDGMENT on APPLICATION to STRIKE OUT

In the circumstances of this case, although it is a marginal decision, I am not satisfied that Strike Out is the appropriate sanction. The matter can still be fully heard and therefore Unless Orders are the appropriate sanction.

## REASONS

1. This matter came before me for the purposes of a Preliminary Hearing to determine the Respondent's Application to Strike Out the Claimant's claim, on the basis that it had not been actively pursued and the Claimant had failed to comply with the Orders of the Tribunal.
2. The Claimant was employed by the Respondent from 8 January 2021 until 11 January 2023 as a Customer Delivery Driver. The Claimant's employment ended without notice on 11 January 2023 on the ground of misconduct. After commencing Early Conciliation through ACAS on 6 February 2023 the Claimant received an Early Conciliation Certificate on 8 February 2023 and on the same day presented his claim to the Tribunal complaining that he had been unfairly dismissed and dismissed in breach of contract.

3. All the Claimant's complaints are resisted. The Respondent says the Claimant was guilty of gross misconduct and that that misconduct occurred in circumstances when he was already subject to a Final Written Warning for other conduct aspects.
4. On 7 July 2023, the Tribunal issued Notice of Final Hearing for 11 and 12 January 2024, together with directions for the Hearing. The directions required the parties to carry out the following steps:-
  - 4.1. By 28 July 2023, the Claimant to provide a Statement of Remedy including documents relating to financial losses and any attempts to obtain new work;
  - 4.2. On 11 August 2023, the parties to exchange lists of documents with permission to obtain copies;
  - 4.3. On 25 August 2023, the Respondent was to prepare a Bundle and copy it to the Claimant;
  - 4.4. On 29 September 2023, the parties were to exchange Witness Statements; and finally
  - 4.5. On 4 January 2024, the Respondent was to upload the Bundle to the Document Upload Centre.
5. On 14 July 2023, copies of the documents addressed to the Claimant were returned marked "gone away". The Claimant's new address was subsequently obtained and the documents were forwarded to him.
6. The Claimant said today that he thought the Employment Tribunal would do all the necessary things to prepare for the Hearing. I cannot accept that. The Notice clearly states that the parties must take certain steps and indeed the Claimant could see that the Respondent was doing so.
7. On 9 October 2023, the Claimant wrote to the Tribunal and the Respondent's Solicitors, he had received the Bundle and said he had spoken to one of the Respondent's Witnesses who he says had provided a Statement under duress.
8. It was clear therefore that the Claimant was actively engaging in at least some aspect of the case, albeit not complying with any of the Orders made by the Tribunal.
9. The Respondent complained that the Claimant had not at any time taken the steps required and on 21 November 2023 a Strike Out Warning was issued to the Claimant on the basis he had not complied with the Tribunal Orders and was not actively pursuing his claim.
10. The Claimant's reply was that he was

*"actively objecting to the claims made by the Respondent"*

and said he was

*“unaware that I needed to be in constant conversation with you”.*

11. The Respondent repeated its request for Strike Out and on 9 January 2024, Employment Judge Quill Ordered the postponement of the Final Hearing due to start today for two days and listed today’s Hearing to consider the Respondent’s Application for Strike Out.
12. The Claimant attended today’s Hearing and the Respondent was represented by Mr Gittins of Counsel.
13. Mr Gittins recited the history of the case. He confirmed that the Claimant had taken no steps to comply with any of the Case Management Orders.
14. The Claimant said that he did not understand what he had to do, but confirmed that he did not tell the Respondent that he did not understand what they wanted from him. Although the Claimant said he spoke to the Employment Tribunal Office, when asked about this the only times he referred to were when he was required to reply to the Strike Out Applications or Warnings. I took Mr Linden through the Case Management Orders.
15. He accepted that he understood what was required by each Order. He maintained that he thought that the Tribunal would do these things, despite the Order clearly stating that,

*“the parties are required to comply with the following Case Management Orders and timetable...”*

16. I have considered the facts carefully.
17. Under Rule 37 of the Employment Tribunal Rules of Procedure 2013,
  - (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. ...
    - 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. ...

18. I have to consider whether it is appropriate to Strike Out the Claimant's complaint or whether some other sanction is more appropriate.
19. I have reminded myself of the decision of the Employment Appeal Tribunal in Harris v Academies Enterprise Trust [2015] IRLR 208,  

*"A party who does not comply with the Orders of the Tribunal is at the mercy of the Tribunal and that while an Unless Order may be made before a Strike Out, it is not a pre-requisite."*
20. Here there has been a Strike Out Warning and the Claimant has been aware of two Applications for Strike Out, yet still he has taken even today, no steps to comply with the Tribunal Orders and has taken no steps to prepare his case.
21. In relation to the Application to Strike Out for not actively pursuing the claim I am guided by the case of James v Blockbuster Entertainment Limited [2006] EWCA Civ.684 and the overriding objective set out in Rule 2 of the Employment Tribunals Rules of Procedure 2013.
22. There has been no suggestion that a fair trial is no longer possible. The Respondent had fully prepared for the Hearing.
23. In the circumstances of this case, although it is a marginal decision, I am not satisfied that Strike Out is the appropriate sanction. The matter can still be fully heard and therefore Unless Orders are an appropriate sanction.
24. The Claimant must understand, however, that if he fails to comply with any of the Orders made today, his case will be Struck Out without the need for any further Application and without the need for any further Order. The Claimant must comply with the Orders which are being made today, on time, or his Claim will be Struck Out and lost.
25. Any Application for the Costs of today is reserved to the Final Hearing.

18 January 2024

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Employment Judge M Ord

Sent to the parties on:

19 January 2024 .....

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For the Tribunal Office.

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