RESERVED JUDGMENT

Case No. 1301200/2018

EMPLOYMENT TRIBUNALS

Claimant:	**Mr Joseph Kuyembeh**
Respondent:	**Careview Services Limited**
Heard at: **Birmingham**	**On:** **13 August 2019**
Before:	**Employment Judge Gilroy QC**

Representation

Claimant: **In person Respondent:** **Mr J Braier**
(Counsel)

JUDGMENT

The judgment of the Tribunal is as follows:

1. The Claimant's claim for unlawful deductions from wages stands struck out pursuant to the Unless Order made by the Tribunal on 28 August 2018.

2. The Claimant's remaining claims are hereby struck out pursuant to r.37(1) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

REASONS

(1) The Claimant was formerly employed by the Respondent as a Support Worker. The Respondent is concerned in the business of providing residential care services for adults with learning disabilities, elderly care and domiciliary care in the West Bromwich and Stoke-on-Trent areas. The Claimant was employed by the Respondent from 19 September 2017 until 11 December

2017. It is the Respondent's case that the Claimant was dismissed for persistent unauthorised absence during his probation period. By a claim form lodged with the Tribunal on 12 March 2018, the Claimant pursued claims of race discrimination, unfair dismissal, whistleblowing-related detriment and unlawful deductions from wages against the Respondent. At a Case Management Preliminary Hearing on 24 August 2018, it was directed that the substantive hearing of this matter would be listed on Monday 12 August 2019 for four days. The directions timetable issued by the Tribunal at the August 2018 preliminary hearing was substantially not complied with, culminating in the Tribunal, by letter dated 6 August 2019, confirming to the parties that the four day hearing listed for 12 August 2019 was postponed and that instead there would be a Preliminary Hearing to consider whether the claim should be struck out.

(2) That Preliminary Hearing took place on 13 August 2019. There were essentially two issues for the Tribunal to consider at that Preliminary Hearing, namely:

(a) whether the Claimant was in breach of an Unless Order made on 28 August 2018 in respect of his unlawful deductions claim with the consequence that that claim stood struck out, and

(b) whether the Claimant's remaining claims should be struck out pursuant to rule 37(1) of the Tribunal rules.

(3) For the purposes of the Preliminary Hearing conducted on 13 August 2019, the Tribunal was provided with an agreed bundle [**R1**], a witness statement dated 12 August 2019 of Mr David Singh, the Respondent's Managing Director [**R2**], a skeleton argument on behalf of the Respondent [**R3**] and a list of authorities from the Respondent [**R4**].

(4) The Tribunal heard oral evidence from the Claimant. Counsel for the Respondent made oral closing submissions at the conclusion of the evidence and thereafter the Claimant made short oral submissions.

(5) The Claimant was notified by the Tribunal by letter dated 4 June 2018 that an Employment Judge had directed that he should provide further and better particulars by 25 June 2018 in respect of his race discrimination, whistleblowing and unlawful deduction claims.

(6) The Claimant did not comply with the above Order and by letter dated 29 June 2018, the Respondent's solicitors applied to the Tribunal for an Unless Order specifying that if the Claimant did not comply with the Order of 4 June 2018 within 14 days, the claim would be dismissed without further Order.

(7) By an Order dated 8 August 2018 the Tribunal, rather than making the Unless Order requested, made a further Order requiring the Claimant to provide same

further and better particulars as he had been directed to provide in the Order/letter of 4 June 2018 to be provided, this time by 19 August 2018.

(8) The Respondent did not hear from the Claimant by the deadline of 19 August 2018, but on 20 August 2018 the Claimant provided the Respondent with what he described as a *"Statement in response to the grounds of defence submitted by the Respondent"*. That document was not compliant with the Orders of either 4 June 2018 or 8 August 2018. The Claimant's 20 August 2018 document, as its heading suggested, was a response to the Respondent's Grounds of Resistance, and made no mention of numerous of the matters required under the Orders of 4 June and 8 August 2018.

(9) As stated above, a Preliminary Hearing for the purposes of case management was conducted on 24 August 2018. In its case management agenda prepared for the purposes of that Preliminary Hearing, the Respondent flagged up that the Claimant remained in breach of the Orders issued on 4 June and 8 August 2018. The Employment Judge conducting the preliminary hearing on 24 August 2018 observed as follows (at paragraph 5 of his Case Management Summary):

"… The Claimant had twice been ordered by the tribunal to provide better particulars of his case, but these orders had not been complied with, but a letter was sent to the Respondent only on 20.8.18 (out of time). I obtained a copy of this letter at the outset of the hearing. It appeared to me more a commentary on the ET3 than adequate particularisation of the case. Therefore the parties and tribunal honed down what the actual issues would be. This was not a straightforward process as the Claimant had not worked out the particulars of his allegations until the hearing itself. However, I was satisfied that by the end of the hearing we had a complete list and I was careful to ensure that there was nothing more to be added".

The Tribunal then set out a detailed list of the substantive issues the tribunal would be required to determine at the final hearing. The Employment Judge also made an Unless Order requiring the Claimant by 21 September 2018 to send to the Respondent a full calculation of what he contended were the outstanding sums owed for sleep-in nights, failing which his claim for unpaid wages would be struck out with further order. The Employment Judge also directed that by 21 September 2018 the Claimant was to provide a properly itemised statement of the remedy sought, essentially a Schedule of Loss. The remaining directions made by the Employment Judge including disclosure, and the preparation of a bundle of documents and witness statements were all designed to ensure that the matter would be ready for a final hearing commencing on 12 August 2019.

(10) On 21 September 2018, the Claimant wrote to the Respondent, purportedly in relation to the Unless Order, but failed to provide either a full calculation of what

he contended were the outstanding sums owed for sleep-in nights or a Schedule of Loss.

(11) On 24 September 2018, the Respondent's solicitors notified the Claimant by e-mail that he was in breach of the Tribunal's Case Management Orders but nevertheless sought his confirmation that he would be able to provide his Schedule of Loss by no later than 28 September 2018.

(12) On 27 September 2018, the Respondent's solicitors wrote to the Tribunal, applying to strike out the Claimant's claim in relation to the Orders relating both to the Schedule of Loss and the unlawful deduction from wages claim.
Given the apparent breach of the Unless Order, it would appear that the application to strike out the unlawful deductions claim was otiose.

(13) Having not heard from the Tribunal in response to the above application, the Respondent's solicitors e-mailed the Claimant on 12 October 2018, enquiring when they could expect to receive his Schedule of Loss as per the Tribunal's Case Management Orders, and also when he would be providing his calculation of the alleged unlawful deduction claim. The same day, the Claimant replied by e-mail, stating as follows:

"Hello!

Thanks for your correspondence received today in regards for me to fulfil the requirements of the Case Management Order. However I'll let you know by next week through my solicitor the required information that you have requested for. Thanks for the prompt, the issue will be addressed accordingly.

Kind regards,

Joseph Kuyembeh".

(14) Nowhere in his e-mail did the Claimant acknowledge that he was in breach of Orders of the Tribunal nor did he seek to excuse that failure. As matters transpired, the Claimant provided the Respondent's solicitors with nothing the following week.

(15) On 31 October 2018, the Claimant provided the Respondent with a document purporting to be a Schedule of Loss but, contrary to the Order of the Employment Tribunal the Claimant's 31 October document did not *"properly itemise"* the Claimant's claim.

(16) On 20 November 2018, the Respondent applied to the Tribunal for a strike out of the Claimant's unlawful deductions claim due to the Claimant's failure to comply with the Order to provide a calculation of that claim. The application was made on the grounds that the manner in which the proceedings had been

conducted by the Claimant had been unreasonable and on the basis that the Claimant had not actively pursued the claim insofar as he had failed to comply with the Unless Order to provide the Respondent with a calculation of what he contended was due to him in respect of his sleep-in wage. Again, on the face of it given the apparent failure of the Claimant to comply with the Unless Order, the Respondent's application of 20 November 2018 appears to have been otiose. The fact that that application was made, however, was explained by the fact that the Respondent's solicitors had yet to receive confirmation from the Tribunal by way of written notice pursuant to r.38(1) that that claim had indeed been dismissed.

(17) Given that the Respondent's solicitors had yet to hear back from the Tribunal in relation to the strike out application, and given that the parties had fallen behind the disclosure directions, on 11 January 2019, the Respondent's solicitors wrote to the Claimant observing that the Case Management Orders had not been complied with, and making suggestions for a revised timetable in order to progress matters. The Respondent's solicitors indicated that absent a response from the Claimant they would apply unilaterally to the Tribunal for a revision of the timetable.

(18) The Claimant did not respond to the Respondent's solicitors' e-mail of 11 January 2019 and the Respondent's solicitors chased the matter on 7 February 2019. The Claimant responded the same day, apologising for the delay, stating that he was suffering from depression, his eldest daughter having died the previous month. The Respondent's solicitors immediately replied by e-mail, expressing their condolences and indicating that an application would be made to the Tribunal seeking an amendment of the Case Management Orders if that was easier for the Claimant. The Claimant responded immediately in a positive manner, and on 18 February 2019 the Respondent's solicitors sent the Claimant a draft letter to the Tribunal proposing a revised timetable and seeking the Claimant's comments. The Claimant provided his suggested amendments to the timetable, and by letter dated 27 February 2019, the Respondent's solicitors applied to the Tribunal for directions to be given for a revised timetable, setting out the dates suggested for the various stages thereof.

(19) By letter dated 21 March 2019, the Claimant confirmed to the Tribunal that he was in agreement with the revised timetable but simultaneously he sent a further letter to the Tribunal making an application for specific disclosure.

(20) By 12 April 2019, the Claimant had still not provided disclosure to the Respondent and accordingly, on that date, the Respondent's solicitors, applied to the Tribunal by e-mail for an Unless Order in terms that the Claimant's claim be struck out unless within seven days he provided disclosure and confirmation of the documents he wanted included in the final hearing bundle.

(21) By letter dated 21 May 2019, the Tribunal wrote to the parties seeking confirmation as to whether the Respondent still wished to pursue its application for an Unless Order. On 23 May 2019, the Respondent's solicitors confirmed to the Tribunal that it did indeed wish to pursue that application. By letter dated 6 July 2019, the Tribunal notified the Claimant that Regional Employment Judge Monk was considering striking out the claim because the Claimant had not complied with the Order of the Tribunal dated 28 August 2018, and/or that his claims had not been actively pursued. The Claimant was required to provide any objections to this proposal by 22 July 2019.

(22) On 22 July 2019, the Claimant sent the Tribunal a letter, essentially blaming his failures to comply with Tribunal Orders on depression, which had been diagnosed on 21 August 2018 and a subsequent vasovagal attack. By e-mail sent on 24 July 2019 to the Tribunal, the Respondent's solicitors noted the Claimant's failure to provide medical evidence in support of this assertions relating to his stated medical condition, the lack of any communication from the Claimant's since 26 March 2019, the Claimant's failure to date to provide disclosure, and the inevitable loss of the four day hearing which had been listed to begin on 12 August 2019. The Respondent's solicitors concluded their e-mail of 24 July 2019 by intimating that they wished to apply once more to strike out the Claimant's claim.

(23) On 24 July 2019, the Claimant provided certain medical evidence to the Tribunal. From that evidence it was apparent that since the diagnosis of depression, the Claimant's only evidence of treatment appeared to be a prescription for Sertraline, an offer of counselling, and some blood tests and further, the vasovagal incident upon which the Claimant relied as excusing his failures to comply with Tribunal Orders was a fainting episode in October 2018 at the sight of blood on having a finger prick test, from which the Claimant had fully recovered and which had happened previously when he was having bloods taken.

(24) By letter dated 6 August 2019, the Tribunal notified the parties that Employment Judge Findlay had ordered that the hearing fixed for 12 to 15 August 2019 be postponed and that a preliminary hearing be listed instead on 13 August 2019 to consider whether the claim should be struck out and if applicable to give further directions.

(25) As indicated above, Mr Braier for the Respondent provided a written skeleton argument and made oral closing submissions, essentially speaking to that document. Those submissions are not repeated here. By way of brief reply, the Claimant observed that he had found complying with the Tribunal directions very difficult because of his depression. He said that he had thought that there would be joint collaboration between the parties as to what steps were required in terms of the Tribunal's procedural timetable. He did not specify any particular

steps the Respondent should have taken but failed to take. He said that there had been no intentional default on his part.

(26) R.37 of the Tribunal Rules ("Striking out") provides as follows:

"(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, or

(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)".

(27) R.38 ("Unless Orders") provides as follows:

"(1) An Order may specify that if it is not complied with by the date specified the claim or response, or part of it, shall dismissed without further Order. If a claim or response, or part of it is dismissed on this basis the Tribunal shall give written notice to the parties confirming what has occurred".

(28) In relation to strike out, the Respondent contended that (i) the manner in which the proceedings had been projected by the Claimant was unreasonable, and on (ii): that the Claimant had failed to comply with a Tribunal Order, and (iii) that the claim had not been actively pursued.

(29) The following cases cited by the Respondent are authority for the following propositions:

(a) Striking out a claim is a draconian power not to be readily exercised and there are two *"cardinal conditions"* for its exercise, namely:

(i) deliberate and persistent disregard of required procedural steps, or

(ii) it has made a fair trial impossible.

See ***Blockbuster Entertainment Limited v James [2006] IRLR 630.***

(b) The strike out power can be exercised in such circumstances where the default is *"intentional and contumelious"* or where there has been inordinate and inexcusable delay either giving rise to substantial risk and is not possible to have a fair trial or causing serious prejudice to the other party.

See ***Evans v Commissioner of Police of the Metropolis [1993] ICR 151; Birkett v James [1978] AC 297.***

(c) There are two problems of which failure to actively pursue a claim may be indicative:

(i) It is wrong for a Claimant to fail to take reasonable steps to progress his claim in a manner that shows disrespect of contempt for the Tribunal and/or its procedures and that in such circumstances the question arises whether it is just to allow the Claimant to continue to have access to the Tribunal for his claim, and

(ii) Separately, where there is an inordinate and inexcusable failure to pursue a claim to the extent that it gives rise to a risk of real prejudice to the other party, and in such circumstances a question arises as to whether or not there can be a fair trial and if that is in doubt the question arises whether the claim should be prevented from going further.

See ***Rolls Royce v Riddle [2008] IRLR 873.***

(d) The threshold required to establish that a claim has not been actively pursued can be surprisingly low - see ***Khan v London Borough of Barnet [2018] (UK EAT/0002/18)***. In that case the EAT upheld a decision to strike out a claim on grounds that it had not been actively pursued where the Claimant's defaults were limited to failure to attend a Preliminary Hearing (informing the Tribunal that the failure was due to illness) and failure to respond with reasons on being given notice by the Tribunal that it was minded to strike out the claim.

(e) There are four governing principles when a Tribunal is considering striking out a claim for non-compliance with a Tribunal Order:

(i) There must be a finding that the party is in default of some kind, falling within r.37(1).

(ii) If so, consideration must be given to whether a fair trial is still possible and save in exceptional circumstances, if a fair trial remains possible, the case should be permitted to proceed.

(iii) Even if a fair trial is unachievable, consideration must be given to whether strike out is a proportionate sanction or whether there may be a lesser sanction that can be imposed.

(iv) If strike out is the only proportionate and fair course to take, reasons should be given why that is so.

See ***Baber v Royal Bank of Scotland [2018] (UKEAT/0301/15)***.

(f) The following factors should be considered in applying the above guiding principles:

(i) the magnitude of the default;

(ii) whether the default is the responsibility of the party or their representative;

(iii) the disruption, unfairness or prejudice caused;

(iv) whether a fair hearing is still possible, and

(v) whether striking out or some lesser remedy would be an appropriate response to the disobedience.

See ***Weir Valves & Controls (UK) Ltd v Armitage [2004] ICR 371***.

(g) The overriding objective is not merely concerned with the cost as between the parties but also the costs of the Tribunal itself and that cases should be dealt with in a way that ensures that other cases are not deprived of their own fair share of the Tribunal's resources. It is right for the Tribunal to consider whether a breach is an aberration or whether it will simply happen again if the Tribunal gave the party further indulgence.

See ***Harris v Academies Enterprise Trust [2015] IRLR 208***.

(h) In addition to striking out following an Unless Order, the EAT has recently reviewed the relevant power in ***Uwhibetine v NHS Commission Board England [2019] (UK EAT/0264/18)***. There are three key points for consideration, namely:

(i) making the Unless Order;

(ii) determination of whether the Order has been complied with and therefore whether there should be automatic dismissal, and

(iii) the determination of any application for relief from sanction.

(30) An Unless Order was made on 28 August 2018. I am entirely satisfied that the Claimant acted in breach of that Order, which required him to provide a *"full calculation of what he contends are the outstanding sums owed for sleep-in nights"* by 21 September 2018. The automatic consequence of that noncompliance is that the claim was struck out and this judgment shall stand as written notice to the Claimant in accordance with r.38(1) that his unlawful deduction from wages claim has been automatically struck out. There remains the issue of relief from sanction in relation to that matter. That is not a matter for this judgment.

(31) In relation to the application for strike out for unreasonable conduct, noncompliance and/or failure to actively pursue the claim, I entirely accept the Respondent's submission that the Claimant has acted in wanton disregard of the Tribunal's Orders.

(32) I have regard to the fact that the Claimant's actions led to the long standing fixture of the hearing which was due to commence on 12 August 2019 being lost. As of the date of the latest Preliminary Hearing (which is the subject of this judgment), enquiries of listing indicated that a four day hearing could not be accommodated by the Tribunal until 23 June 2020. That would be an unacceptable delay. I have little if any confidence that the Claimant would comply with any future orders in any event, or that any future trial date would be met.

(33) I am informed and accept that two of the Respondent's witnesses have left the business during the course of proceedings including one potential witness, Mr Paul McDonald. The Respondent has no contact details for Mr McDonald.

(34) Where there has been compliance by the Claimant with orders of the Tribunal, it has been compliance conducted out of time and incompletely. The medical evidence, such as it is, of depression and the vasovagal attack does not afford the Claimant with sufficient explanation for his conduct.

(35) I have no hesitation in concluding that this case comes within the *"intentional and contumelious"* category identified in ***Birkett v James***, ***Evans v Commissioner of Police of the Metropolis***, and ***Rolls Royce v Riddle***.

(36) I am also satisfied that the threshold required to establish that a claim has not been actively pursued has been met in this case.

(37) In my judgment, the Claimant has substantially failed to take reasonable steps to progress his claim and in doing so has shown disrespect or contempt for the Tribunal and/or its procedures, and the inordinate and inexcusable failure to pursue this claim has given rise to a risk of real prejudice to the Respondent (see paragraph (33) above), with the consequence that I have serious reservations whether there can now be a fair trial.

(38) In the circumstances, and for all of the above reasons, it is appropriate to strike out the claims (other than the claim for unlawful deductions) in their entirety.

(Employment Judge Gilroy QC)

_______________________________________ Date
23.09.2019