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Insights

WHEN DOES STRIKE-OUT BECOME A REALISTIC OPTION IN TRICKY EMPLOYMENT TRIBUNAL LITIGATION?

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Summary

Significant delays in the system are making employment tribunal claims increasingly difficult to navigate. This puts additional pressure on employers and the HR teams managing claims, as well as on employees. If a party's conduct adds to these difficulties, at what point does strike-out become a realistic possibility?

A Tribunal may strike out all or part of a claim or response on several grounds, including (i) a party's conduct; (ii) non-compliance with a Tribunal order; and (iii) the Tribunal's view that a fair hearing is no longer possible. The Tribunal will not consider the issue in isolation, but will also assess whether the problem can be remedied, taking into account the impact on the other party and the Tribunal's resources.

The recent decision in *Byczko v Manchester University NHS Foundation Trust* is a reminder that, although striking out an employment tribunal claim is unusual and should be a last resort, it can be appropriate where attempts to get proceedings back on track have failed. We consider that decision alongside three other cases illustrating when strike-out may be relevant.

Vague or confusing claims

In *Byczko v Manchester University NHS Foundation Trust*, a Tribunal determined that a fair trial was no longer possible because the Respondent could not determine the case it had to answer and therefore struck out the claim on this basis. After several preliminary hearings to try and determine what the Claimant's claims were about, the Tribunal helpfully prepared a draft list of issues and ordered the Claimant to fill in the blanks. The Claimant did not engage with it as ordered, despite warnings that her claim could be struck out if she failed to do so. Instead, she produced a lengthy document, expanding on her original particulars of claim.

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The EAT upheld the Tribunal's decision, finding that (i) the Tribunal went beyond what was expected in preparing a draft list of issues, and repeating this exercise would be a "disproportionate use" of resources; (ii) there was unfair prejudice to the Respondent; and (iii) an Unless Order (i.e. a final order to comply otherwise the claim would be struck out) "would have been pointless" as the Claimant had already ignored previous warnings of strike-out. The EAT concluded that "there was no way forward to get to a fair trial when the Claimant would not cooperate in accordance with the overriding objective."

Missed deadlines and unfair prejudice to the other party

In *Emuemukoro v Croma Vigilant (Scotland) Ltd*, the Tribunal struck out the Respondent's response because of its failure to comply with any directions issued after a preliminary hearing. The Tribunal noted that the Respondent's failure to provide witness statements or include key documents in the final hearing bundle meant that a fair trial was not possible during the five-day listing. A rescheduled hearing would not have been available for many months. That delay would have unfairly prejudiced the Claimant, who had lost their job nearly two years before the final hearing.

Conduct of the parties

In *Smith v Tesco Stores*, a Tribunal struck out the case because the Claimant's conduct was "scandalous, unreasonable or vexatious" and he had not complied with the rule requiring parties to "cooperate generally with each other and with the tribunal". The EAT agreed with the Tribunal's finding, noting that the Claimant had repeatedly refused to cooperate with both the Respondent and the Tribunal.

Ill-health-related delays: is there a realistic way forward?

In *D v Greater Glasgow Health Board*, the ongoing proceedings adversely affected the Claimant's health. The medical evidence before the Tribunal suggested that, despite adjustments, there was no realistic prospect of the Claimant participating in a final hearing in the foreseeable future. The Tribunal considered that a stay was unlikely to help and that a hearing on the papers would not have allowed the parties to test the disputed facts. The EAT upheld the Tribunal's decision.

Should you consider applying for strike out?

Strike-out is not a shortcut around difficult case management. Before applying, respondents should:

- **Identify the ground and scope.** Explain which strike-out ground is relied on, the evidence supporting it and whether the application should target the whole claim or only part of it.

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- **Document the history and assistance offered.** Keep a clear record of missed orders, warnings, attempts to clarify the issues and steps taken to assist an unrepresented claimant. Address any relevant disability-related difficulties and reasonable adjustments.
- **Explain the practical impact.** Show how the problem affects preparation or the prospect of a fair hearing. Address the likely delay if a hearing is lost, the effect on witnesses and evidence, and any resulting prejudice. Do not rely on frustration, cost or delay in the abstract.
- **Address proportionate alternatives.** Explain why clarification, further directions, reasonable adjustments, a stay or an unless order would not resolve the problem. Where appropriate, give a clear warning before applying and explain why further opportunities to comply would be ineffective.

Employers are reminded that these powers apply to responses too, as *Emuemukoro* demonstrates. Respondents should keep their own compliance and conduct under review: an application is no substitute for being ready to defend the claim.

If you have any questions about this development or its implications for your business, please contact Jemima Rawding or another member of BCLP's UK Employment team.

Related capabilities

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Meet the team



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