

# Strike force (3)

Mark Whitcombe concludes his examination of the employment tribunal's approach to striking out



## IN BRIEF

- ▶ Striking out pursuant to an "unless order".
- ▶ Future developments under the new Employment Tribunal Rules of Procedure 2013.

The express power to issue an unless order was first introduced in the Employment Tribunal Rules of Procedure 2004. In several cases including *Scottish Ambulance Service v Laing* [2012] UKEAT 0038/12/1710 and *Richards v Manpower Services Ltd* [2013] UKEAT 0014/13 the Employment Appeal Tribunal (EAT) has explained that unless orders are conditional judgments. They should not be confused with the various powers to strike out under r 18(7), and very different considerations arise.

A failure to comply with an unless order will lead to an automatic strike out under r 13(2). In the event of non-compliance, tribunals do not have discretion to do anything other than confirm dismissal of the claim. Partial compliance will not suffice to avoid the consequences of the unless order (*Royal Bank of Scotland v Abraham* [2009] UKEAT 0305/09/2608). Since an unless order is a conditional judgment it is both susceptible to review under r 34 and also appealable to the EAT. Findings of fact may be necessary in order to resolve disputes about compliance with an unless order, but the issue for that pre-hearing review will not be whether claim should be struck out, but whether it has been struck out. In *Neary v Governing Body of St Albans Girls School* [2009] EWCA Civ 1190, [2010] ICR 473, [2010] IRLR 124 it was held that on an application for review of a decision striking out a claim it was not necessary to consider each of the factors in CPR r.3.9, which sets out the factors relevant to an application for relief from sanctions in the ordinary courts.

## Rules of Procedure 2013 Striking out

The power to strike out is contained in r 38 of the draft new rules, whereas it was formerly buried within r 18 of the 2004 Rules. The provisions are otherwise broadly similar. The powers contained in the draft r 38 will be exercised in accordance with the redrafted overriding objective set out in the draft r 1.

As before, orders striking out all or any part of a claim or response may be made either on the tribunal's own initiative or on the application of a party, and may be made at any stage of the proceedings. The power to strike out a claim that is not being actively pursued now applies equally to responses.

The power to strike out where it is no longer possible to have a fair hearing expressly refers to a hearing of the claim, the response, or the part struck out, and therefore recognises that that the appropriate response may be to strike out part of the claim or response rather than the whole of it. As under the 2004 Rules, draft r 38(2) provides that a claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by that party, at a hearing.

Where a response is struck out then the consequences will be as if no response had been presented, as set out in draft r 20. Those consequences are that a judgment may be issued if it appears to an employment judge that a determination may properly be made (including on the basis of further information supplied by the parties), and if not there will be a hearing before a judge alone. The respondent may only participate in the hearing to the extent permitted by the judge.

## Unless orders

The power to issue unless orders is contained in draft r 39, which expressly empowers a tribunal to specify that unless an order is

complied with by a certain date the claim or response, or part of it, will stand dismissed without further order. As with draft r 38, the consequences of dismissal of a response for failure to comply with an unless order will be as if no response had been presented, as set out in draft r 20. A failure to comply with such an order will also result in a written "notice" to the parties confirming what has occurred. Although that notice can be contrasted with a judgment susceptible to reconsideration under rr 68 to 71, draft r 39(2) provides a similar mechanism by which the order may be set aside. A party whose claim or response has been dismissed as a result of such an order may apply to the tribunal in writing within 14 days of the date that the notice was sent to have it set aside on the basis that it is in the interests of justice to do so. The application may be determined on the basis of written representations unless the application includes a request for a hearing.

## Dismissal upon initial consideration of claim & response

The 2013 Rules also provide for an initial consideration of the claim (draft r 26) and the response (draft r 27). Although not strictly speaking an example of the power to strike out discussed in this series of articles, the effect in practice is that there will be a new power to bring weak claims or responses to an end well in advance of a hearing. If an employment judge considers that there is no jurisdiction to consider the claim or part of it, or that the claim or response, or part of it, has no reasonable prospect of success, the tribunal will send a notice to the parties setting out the judge's view and the reasons for it and ordering that the claim or the part in question will stand dismissed on such date as is specified in the notice unless before that date the party concerned has presented written representations to the tribunal explaining why it should not be dismissed. If no such representations are received by the specified date then the tribunal will write to the parties to confirm dismissal. If written representations are received in the specified period then the judge will either permit the claim to proceed or fix a hearing for the purpose of deciding whether it should be permitted to do so. The other party is permitted but not required to attend and participate in that hearing.

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For pts one and two of the series see NLJ, 3 May 2013, p 11 & 10 May 2013, p 11. The series is also available to read in full at [www.newLawjournal.co.uk](http://www.newlawjournal.co.uk)

**Mark Whitcombe**, barrister, Old Square Chambers ([whitcombe@oldsquare.co.uk](mailto:whitcombe@oldsquare.co.uk); [www.oldsquare.co.uk](http://www.oldsquare.co.uk))