

THE INDUSTRIAL TRIBUNALS AND FAIR EMPLOYMENT TRIBUNAL

CASE REF: 355/19

CLAIMANT: Jason McPhilomey

RESPONDENT: Department for Communities

JUDGMENT ON A PRELIMINARY ISSUE

The judgment of the tribunal is that the claimant's claim is struck out pursuant to Rule 32(1) of the Industrial Tribunal and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020 for the reasons set out below.

CONSTITUTION OF TRIBUNAL

Employment Judge (sitting alone): Employment Judge Orr

APPEARANCES:

The claimant did not appear and was unrepresented.

The respondent was represented by Mr C Summers, Barrister-at-Law, instructed by Departmental Solicitor's Office.

REASONS

1. The purpose of this Preliminary Hearing was to consider the following:-
 - (i) Whether the claimant's claims should be struck out on any of the following grounds
 - That the claimant's claim has no reasonable prospect of success as the claim form contains no claim(s) within the jurisdiction of the tribunal;
 - That the claim has not been actively pursued; and/or
 - That the tribunal considers that it is no longer possible to have a fair hearing.

BACKGROUND

2. This claim has a long and protracted history. The relevant chronology of which is set out below.
3. The claimant presented a claim form to the tribunal on 28 November 2018 naming nine respondents. At Section 7 of the claim form entitled – “*Details of the claimant’s claim*” the claimant did not tick or complete any of the boxes to identify the type of complaint he was bringing. Attached to his claim form was a 32 page document entitled “*Form ET1 (NI) continued – Jason McPhilomey*”, the first paragraph contained the following statement:-

“My claim pertains to a series of work related events/issues and how certain NICS policies relating to some of these events/issues were not implemented/adhered to resulting in my being subjected to unfair and unjust actions, behaviours and outcomes.”

4. In summary, this lengthy 32 page document contained complaints relating to maladministration and alleged failures to comply with NICS (Northern Ireland Civil Service) policies arising from the respondent’s decision to issue the claimant with a written warning under its Inefficiency Sickness Policy in May 2016. The claimant appealed this warning and thereafter raised a number of grievances and further appeals in respect of alleged failures to comply with the above mentioned policies. The words ‘victimisation’ and ‘discrimination’ are mentioned in the 32 page attached document, however the claimant does not identify the grounds or the type of discrimination anywhere within his claim form or the attached documents.
5. A response was submitted on behalf of the respondents on 13 March 2019. This denied the claimant’s claim and specifically pleaded that the claimant’s claims are “*significantly out of time*”. It contained the following paragraphs:-

“The matters contained within the Claimant’s claim form relate largely to the issuance of a written warning letter due to sickness absence. The warning letter, issued on 16 May 2016, is now expired. The Respondents contend that the issuance of the letter was carried out in accordance with the Inefficiency Sickness Policy. In accordance with the Policy, the Claimant was afforded the right to appeal. The Claimant’s appeal was duly considered however was unsuccessful.

The Respondents robustly deny that the Claimant was subjected to victimisation or discrimination. As stated at paragraph 5 above, the Respondents are not aware of the precise nature of the claims that are the subject of this case. However for the avoidance of doubt, the Respondents intend to strenuously defend all claims made by the Claimant.”

Case Management Hearing – 14 August 2019

6. A Case Management Discussion took place on 14 August 2019 at which the claimant appeared and was self-representing. He was accompanied by Mrs Rogers from USEL (Ulster Support Employment Limited). At this Case

Management Discussion the claimant withdrew his claims against the second to ninth-named respondents and they were dismissed as respondents to these proceedings.

7. At this hearing the claimant indicated to the tribunal that he was claiming disability discrimination. He stated that his disability was a mental impairment – anxiety and depression and that his claim related to a failure on the part of the respondent to make reasonable adjustments during the following periods:-
 - July to October 2012,
 - October 2012 to February 2013 and
 - September 2016 to August 2017.
8. The claimant confirmed to the tribunal that he was not bringing claims for failure to make reasonable adjustments in respect of any treatment or allegations postdating August 2017.
9. The claimant also stated to the tribunal that he was bringing a claim of direct disability discrimination and victimisation in relation to the following:-
 - (A) *the warning issued under the respondent's inefficiency, sickness absence policy in May 2016;*
 - (B) *the conduct and outcome of the claimant's grievance dated October 2017;*
 - (C) *the conduct and outcome of the uniform appeal dated 19 April 2018.*
10. The Employment Judge informed the claimant that the above claims (set out at paragraphs 8 and 9 above) were not contained within his claim form and on the face of it appeared to be presented outside the relevant statutory time limits. The claimant was ordered to confirm in writing to the tribunal and the respondent's representative if he was pursuing those claims.
11. The respondent at this hearing raised the issue of jurisdiction, specifically that the tribunal does not have jurisdiction to hear the claimant's claims as they have been brought outside the statutory time-limits.
12. The Record of Proceedings records the following:-

"The claimant indicated that he would be seeking assistance and/or advice. He was referred to a number of sources in this regard including the Labour Relations Agency/the Citizen's Advice Bureau and/or legal advice."
13. The tribunal issued normal case management orders in respect of the service of Notices of Additional Information and Discovery and the lodgement of an agreed list of legal and factual issues. The tribunal arranged a further Case Management Discussion to take place on 16 October 2019 to consider any applications on behalf of the respondent for a Pre-Hearing Review on jurisdiction and/or an application for a Deposit Order.

Case Management Discussion – 22 November 2019

14. A further Case Management Discussion took place on 22 November 2019 at which the claimant appeared and was self-representing accompanied by Ms Rogers of Employment USEL (Ulster Support Employment Limited).
15. The purpose of this Preliminary Hearing was to consider the claimant's failure to comply with the following orders of the tribunal:-
 - Failure to reply to the respondent's Notices for Additional Information and Discovery.
 - Failure to respond to the draft document of legal and factual issues.
16. The Record of Proceedings specifically records the following:-

"The claimant was reminded that the allegations set out under the Issues at Paragraph (i) A-C in the Record of Proceedings dated 20 August 2019 are claims that are not claims within his claim form to the tribunal, accordingly the tribunal has no jurisdiction to determine matters which are not contained within the claimant's claim form. The claimant is at liberty to make an application to amend his claim form. The claimant was reminded of the statutory three month time limit for bringing claims and informed that on the face of his claim form and the specific nature of the allegations it appears that his claims have been lodged outside the statutory time limit. The claimant was directed to various sources of assistance, namely Citizen's Advice Bureau and the Labour Relations Agency in this regard.

The respondent's representative made an application for a Pre-Hearing Review to strike out the claimant's case on the basis that it has no reasonable prospects of success. She asserts that his claim form contains allegations of maladministration and misapplication of policies which are not claims within the jurisdiction of the tribunal."
17. The Employment Judge ordered a Deposit Pre-Hearing Review to take place on 15 January 2020 to consider:-

"Whether the claimant's claims of disability discrimination have little reasonable prospects of success and if so, whether the claimant should be required to pay a deposit not exceeding £500.00 as a condition of being permitted to pursue his claims and/or each of them under Rule 20 of Schedule 1 to the Industrial Tribunals (Constitution and Rules of Procedures) Regulations (Northern Ireland) 2005."
18. The respondent was ordered to set out the legal and factual basis of their application for a Deposit Order in writing to the claimant given his status as a self-litigant.
19. The claimant was again reminded by the Employment Judge to seek assistance and/or legal advice in relation to the specific remit of the Deposit Pre-Hearing

Review. The Deposit Pre-Hearing Review was listed at 11.00 am to allow the claimant adequate time to travel and prepare.

20. The claimant emailed the tribunal on 9 January 2020 attaching a copy of the 32 page attachment to his claim form and providing two medical reports from his Mental Health Practitioner dated 20 November 2017 and 8 October 2019. In his email he stated:-

“Please accept this is an application to amend my claim form as appropriate/required”.

He stated that he was resubmitting some evidence and clarifying issues in his claim. He further stated:-

“My mental ill-health is ongoing and continues to be exacerbated by these work-related issues. If it were not for the support of my Mental Health Practitioner and the assistance of Ulster Support Employment Ltd I likely would not have remained in work to date which, considering the importance of work in my life, does not bear thinking about.”

21. The claimant did not specify the nature of his amendment application or provide any details of his proposed amendments. He stated that he had submitted an application for assistance to the Equality Commission for Northern Ireland and he further stated:-

“Within my claim form I had mentioned all aspects of my claim and have also explained why in relation to certain aspects of my claim it was inappropriate to divulge specific details within the claim form, I have since divulged the relevant details and provided relevant documents/evidence.”

Pre-Hearing Review – 15 January 2020

22. The Pre-Hearing Review listed on 15 January 2020 did not proceed as a Deposit Pre-Hearing Review. The day before the Deposit Pre-Hearing Review the claimant emailed the tribunal to advise:-

“Due to ill health it is unlikely that I will be able to attend the hearing scheduled for 15 January 2020/tomorrow.”

23. The claimant provided no medical evidence in support of his application for a postponement. In the Record of Proceedings dated 15 January 2020 the Vice President records as follows:-

“4. The parties are reminded that it is imperative that this litigation progresses and that parties attend at hearings as specified by the tribunal. If there is any medical reason why a party cannot attend, that matter must be supported by the provision of medical evidence.

5. In the circumstances, progressing with the Pre-Hearing Review in relation to a Deposit Order was pointless. The claimant had lodged an application to amend his claim form on 9 January 2020. That application does not specify satisfactorily the nature of the

amendment sought. It simply states that the claimant wants the email treated as “an application to amend my claim form as appropriate/required.”

6. *The original claim form submitted by the claimant in this matter does not contain, on its face, any claim that is within the statutory jurisdiction of this tribunal. It appears to be simply a complaint of alleged maladministration and alleged failure to conform with internal Civil Services procedures. Neither matter is a matter which is within the jurisdiction of this tribunal.*
7. *It appears that in a Case Management Discussion on 14 August 2019, the claimant indicated that he was making a claim of disability discrimination. That claim was not within the initial claim form and would have required an amendment application by the claimant. That amendment application was not received until 9 January 2020.*
8. *The costs of today’s hearing will be reserved until the determination of this matter.*
9. *The claimant is directed to provide to the respondent’s solicitor and to the Secretary of the Tribunal in writing by first class post or by email **no later than 5.00 pm on 7 February 2020:***
 - (i) *The precise amendment or amendments that he seeks permission to make to his original claim form. The wording of any proposed amendment must be provided.*
 - (ii) *Explain why the matters in respect of which he now seeks amendments were not included in the original claim form or in any application to amend before 9 January 2020.*
 - (iii) *Medical evidence in relation to his failure to attend the Pre-Hearing Review on 15 January 2020.*
10. *A Pre-Hearing Review will be heard **at 10.00 am on 19 February 2020** to determine whether the claimant will be permitted to amend his claim form in the manner clarified by the claimant in response to the above Direction.*

24. The claimant forwarded an email to the tribunal office, copied to the respondent’s representative on 7 February 2020 entitled “Response to the Record of Proceedings” dated 15 January 2020. Attached to this was a seven page typed document in which the claimant stated he was applying to amend his claim form “*to include information and evidence specific to my claims of discrimination and victimisation*”. The amendment application related to a failure to make reasonable adjustments and victimisation during the period July 2015 until June 2016.

Case Management Preliminary Hearing - 19 February 2020

25. A Preliminary Hearing was arranged to take place on 19 February 2020 to consider the claimant’s application to amend his claim form.

26. The claimant attended the Preliminary Hearing on 19 February 2020. This was converted to a Case Management Preliminary Hearing by the Vice-President. The Record of Proceedings records as follows:-

- “3. *In the event, it proved impossible to proceed to a determination of that preliminary issue. The nature of the claimant’s original claim and the nature of the proposed amendments are difficult to follow. The original claim appeared to be a series of complaints about maladministration and series of complaints that various internal procedures had not been followed, or had not been correctly followed. The proposed amendments did not satisfactorily clarify what types of claim under the Disability Discrimination Act were proposed to be included in the claim.*
4. *I stressed repeatedly to the claimant that he had to clarify what claims he was making to the tribunal, which were within the jurisdiction of the tribunal. I stressed that the tribunal had no jurisdiction to determine whether or not maladministration had occurred, or to determine whether or not internal procedures had been followed, or properly followed. I stressed repeatedly to the claimant that he was not being asked at this stage to provide evidence or information supporting those claims, or to make a submission in relation to those claims; at this stage, the claimant is required to identify the nature of those claims and to identify the statutory jurisdiction under which the tribunal can hear those claims.*
5. *Given the lack of clarity about the original claim and about the proposed amendments, the Preliminary Hearing could not properly proceed and I directed that the claimant should provide the following information, in another effort to clarify the nature of the claim or claims brought before this tribunal.*
6. *The claimant is therefore directed to provide in writing to the tribunal and to the solicitor for the respondent, no later than **5.00 pm on 3 April 2020**, the following:-*

“Category 1 (Alleged Failure to Make Reasonable Adjustments)

Specify in separate numbered paragraphs (one numbered paragraph for each separate alleged failure to provide reasonable adjustments):

- (a) *the dates or dates on which the alleged failure to make reasonable adjustments occurred;*
- (b) *the brief nature of that failure to provide reasonable adjustments and, if appropriate, the nature of the reasonable adjustment sought;*
- (c) *the request (if any) made by the claimant for an adjustment;*
- (d) *the result of any such request for an adjustment;*

(e) *the date or dates on which the alleged failure ended;*

Category 2 (Direct Disability Discrimination)

Specify in separate numbered paragraphs (one numbered paragraph for each separate alleged act of direct disability discrimination):-

(a) *the date or dates on which the alleged act of direct disability discrimination occurred;*

(b) *the alleged act of direct disability discrimination;*

(c) *the details of any complaint or grievance made by the claimant in relation to each alleged act of direct disability discrimination;*

(d) *the result of any such complaint or grievance;*

(e) *the date or dates on which each alleged act of disability discrimination ended.*

Category 3 (Alleged acts of victimisation)

Specify in separate numbered paragraphs (one numbered paragraph for each separate alleged act of unlawful victimisation):-

(a) *the date or dates on which any such alleged act of unlawful victimisation occurred;*

(b) *the alleged act of unlawful victimisation;*

(c) *the protected act (the complaint of disability discrimination) which is relevant to each alleged act of unlawful victimisation;*

(d) *any complaint or grievance made by the claimant in relation to each alleged act of unlawful victimisation;*

(e) *the result in any such complaint or grievance;*

(f) *the date or dates on which any such alleged act of unlawful victimisation ended.”*

27. The Record of Proceedings also records the claimant confirming to the Vice-President that he was seeking assistance from the Equality Commission.

28. By email dated 3 April 2020, the claimant made an application for an extension of time to comply with the Orders of the tribunal:-

“To whom it may concern,

I attended a Preliminary Hearing on 19 February 2020 and was directed to provide a further written response by 5.00 pm today.

The purpose of this email is to inform you that due to the current circumstances I am unable to provide the required written response by 5.00 pm to day.

Since receiving the record of proceedings, when I have been well enough to do so, I had been preparing my response however my efforts have been significantly obstructed by the "Coronavirus Pandemic".

My existing mental ill health has been exacerbated which has significantly impacted my ability to prepare my response and even if I was well enough the libraries are now closed and they can't visit anyone so I do not have currently access to a computer.

I am considered a key worker and do have access to a computer at work however I am only attending work on a rota and when at work it has been so busy I have not been able to take breaks so have not had any time to work on my response. Today is not a work day although I am unwell and I am very worried about my health I came to work to send this email.

Your attention and understanding is appreciated."

29. The respondent consented to the claimant's application for an extension and the Vice-President granted an eight week extension to the time limit to comply with the Orders set out above. The claimant did not comply with the Tribunal Orders and as at the date of today's hearing has not complied with these Tribunal Orders.

Case Management Preliminary Hearing – 30 September 2020

30. A Preliminary Hearing for the purposes of Case Management was arranged for 30 September 2020. The claimant did not attend and was not represented. The clerk attempted to contact the claimant for the purposes of the Preliminary Hearing by telephone. The claimant advised the clerk that he had not received notification of the Preliminary Hearing. The Record of Proceedings issued by the Employment Judge records as follows:

"The tribunal is also conscious of the extent of the case management history of this case. The parties are reminded that it is imperative that this litigation progresses and that the parties comply with all orders of the tribunal and participate in hearings as specified by the tribunal. It is the respondent's position that the claimant has failed to comply with the orders of the Vice-President which were set out in the record of proceedings of the most recent Preliminary Hearing on 19 February 2020. That matter and any associated application the respondent may wish to make in relation to same, including any application for an Unless Order, will be considered at the forthcoming Preliminary Hearing.

*If there is any medical reason why a party cannot participate in the next Preliminary Hearing or indeed any future hearings, then that party must notify the tribunal in good time before the Preliminary Hearing and any such notification **must** be supported by the provision of medical evidence.*

*Should either party require reasonable adjustment or special measure to facilitate their participation in the future Preliminary Hearing, **they** must notify the tribunal in advance of the Preliminary Hearing and, if possible provide supporting medical evidence”.*

Preliminary Hearing - 12 November 2020

31. A further Case Management Preliminary Hearing was arranged for 12 November 2020. The claimant did not appear and was not represented. The Employment Judge directed that the Preliminary Hearing proceed in the absence of the claimant. The respondent’s representative made an application for an Unless Order. The Employment Judge made the following Orders:-

*“4. Accordingly, I order that an Unless Order should issue to the claimant directing him to provide to the tribunal and the respondent’s representative by no later than **5pm on 17 December 2020**:-*

- (i) A full and final satisfactory explanation for his failure to take part in the Preliminary Hearing on 12 November 2020.*
- (ii) A full response to each of the following:-*

“Category 1 (Alleged Failure to Make Reasonable Adjustments)

Specify in separate numbered paragraphs (one numbered paragraph for each separate alleged failure to provide reasonable adjustments):-

- (a) the dates or dates on which the alleged failure to make reasonable adjustments occurred;*
- (b) the brief nature of that failure to provide reasonable adjustments and, if appropriate, the nature of the reasonable adjustment sought;*
- (c) the request (if any) made by the claimant for an adjustment;*
- (d) the result of any such request for an adjustment;*
- (e) the date or dates on which the alleged failure ended;*

Category 2 (Direct Disability Discrimination)

Specify in separate numbered paragraphs (one numbered paragraph for each separate alleged act of direct disability discrimination):-

- (a) the date or dates on which the alleged act of direct disability discrimination occurred;*
- (b) the alleged act of direct disability discrimination;*
- (c) the details of any complaint or grievance made by the claimant in relation to each alleged act of direct disability discrimination;*

- (d) *the result of any such complaint or grievance;*
- (e) *the date or dates on which each alleged act of disability discrimination ended.*

Category 3 (Alleged acts of victimisation)

Specify in separate numbered paragraphs (one numbered paragraph for each separate alleged act of unlawful victimisation):-

- (a) *the date or dates on which any such alleged act of unlawful victimisation occurred;*
- (b) *the alleged act of unlawful victimisation;*
- (c) *the protected act (the complaint of disability discrimination) which is relevant to each alleged act of unlawful victimisation;*
- (d) *any complaint or grievance made by the claimant in relation to each alleged act of unlawful victimisation;*
- (e) *the result in any such complaint or grievance;*
- (f) *the date or dates on which any such alleged act of unlawful victimisation ended.”*

32. After the Preliminary Hearing on 12 November 2020 the Employment Judge was provided with a copy of a handwritten note dated 6 November 2020 from the claimant. This had not been provided to the Employment Judge or the respondent’s representative in advance of the Preliminary Hearing held on 12 November 2020. It stated as follows:-

“I am writing to notify you that due to ongoing ill-health I will be unable to participate in the Preliminary Hearing listed for Thursday 12 November 2020.

As required I have enclosed supporting medical evidence.”

This was accompanied by a letter from the claimant’s Mental Health Practitioner Ms McGovern dated 5 November 2020 which stated that the claimant was currently unfit to participate in the hearing and he was currently unfit for work by reason of a mental health assessment.

33. The Unless Order issued on 12 November 2020 was set aside by the Employment Judge of her own motion in light of the medical evidence provided by the claimant.

Case Management Preliminary Hearing – 11 June 2021

34. A Preliminary Hearing was listed to consider the best way forward on 11 June 2021. The claimant did not appear and was not represented. At this hearing, the Employment Judge ordered a Preliminary Hearing to take place on 29 July 2021 to consider the respondent’s application to strike out the claimant’s claims on the

following grounds:-

- that the claimant's claim has no reasonable prospect of success on the grounds of the claim form contains no claim within the jurisdiction of the tribunal;
- it has not been actively pursued and/or
- that the tribunal considers it is no longer possible to have a fair hearing of the claim.

35. The claimant was also ordered to provide all relevant medical evidence and/or medical reports specifically addressing the following:

- (i) details of the claimant's medical condition;
- (ii) confirmation of the claimant's ability to pursue his tribunal proceedings;
- (iii) an indication of when the claimant is likely to be able to participate and to pursue these tribunal proceedings;
- (iv) identify any reasonable adjustments the claimant requires for the purposes of participation in the Preliminary Hearing listed for 29 July 2021.

36. The Record of Proceedings specifically records:-

"The claimant's claim was lodged in the tribunal in November 2018. It is the claimant's responsibility, in accordance with the overriding objective, to assist the tribunal by avoiding delays, saving expense and dealing with his case in ways which are proportionate to the complexity and importance of the issues. Furthermore it is the claimant's responsibility to ensure that his correct contact details are provided to the Tribunal Office. This case has now been the subject of seven Preliminary Hearings for the purposes of Case Management of which the claimant has only participated in three. This is unsatisfactory."

37. The tribunal office received a handwritten letter from the claimant on 28 July 2021. It stated that the claimant was unable to attend the Preliminary Hearing scheduled for 29 July 2021 as it was *"detrimental to my wellbeing"*. The claimant also stated:

"You are already aware of my ongoing ill-health so it is unnecessary for me to provide further information about my ill-health but you will not be aware that the mental health practitioner, to whom I was assigned, recently retired. I have subsequently had to attend several screening appointments, it was determined that I do require further treatment but when I will be assigned to another mental health practitioner and/or when this treatment will recommence has not yet been determined."

Within my complaint form I detailed the events and the parties involved. I then provided further information/clarification and supporting evidence as requested which was returned to me without being considered. I may not have used the expected terminology or numbered the paragraphs but this

does not change what happened, or who was involved nor the detrimental impact the events had on my wellbeing.

...

“Thinking about, recalling and/discussing these events significantly exacerbates my ill-health resulting in profoundly negative thoughts and feelings.

I depend upon the support of mental health practitioners to ensure these negative thoughts and feelings do not come to fruition so to participate in these proceedings without having the necessary support in place would be detrimental to my wellbeing.”

38. The Preliminary Hearing listed on 29 July 2021 was postponed by the Employment Judge by reason of the claimant’s application and the claimant was directed as follows :-

“The Employment Judge has directed that the Preliminary Hearing listed on 29 July 2021 is adjourned and relisted on 26 August 2021 at 10.00 am to permit you, [the claimant] time to secure medical evidence in support of your recent correspondence.

This must be evidence in the form of a report or letter from a registered medical practitioner, such as your GP or other person treating you. This medical evidence must set out any reasons why you, the claimant, are unable to take part in the tribunal proceedings at this time.

It must also provide a timescale for or when if you, the claimant will be able to take part in hearings going forward.

If such evidence is not received by the tribunal before the new hearing date the matter will proceed on that date.”

39. The claimant failed to comply with the directions of the tribunal, he did not provide any medical evidence, nor did he submit any documents or written submissions in respect of the issues to be determined at the Preliminary Hearing.
40. The Preliminary Hearing was listed at 10.00 am. The tribunal, with the consent of the respondent postponed the commencement of the hearing until 10.30 am to allow for attendance of the claimant. The claimant did not appear and was not represented. In light of the history of this claim, as set out above and the claimant’s failure to attend previous Preliminary Hearings, engage with the tribunal or the respondent in advance of the hearing; and in balancing the hardship and prejudice to the respondent in not proceeding, taking into consideration the overriding objective, the Employment Judge determined that the Preliminary Hearing proceed in the absence of the claimant.
41. The respondent in compliance with the tribunal Orders submitted written submissions and legal authorities. These had also been served on the claimant in advance of the Preliminary Hearing.

RELEVANT LAW

42. The respondent's representative referred the tribunal to the following legal authorities:-

- (1) **Cox v Adecco UK EAT 0339/19 [9 April 2021]**
- (2) **Hasan v Tesco Stores Ltd UK EAT 0098/16 [22 June 2016]**
- (3) **Anyanwu v South Bank Student's Union [2001] IRLR 305**
- (4) **Mechkarov v Citi Bank NA UK EAT 0041/16 [2016] ICR 1121**
- (5) **Block Buster Entertainment Limited v James [2006] EWCA Civ 684**
- (6) **Bolch v Chipman [2004] IRLR 140**
- (7) **Rolls Royce PLC v Riddell [2008] IRLR 873**
- (8) **O'Shea v Immediate Sound Services Limited [1986] ICR 598**
- (9) **Reilly v Crown Prosecution Service [2013] EWCA Civ 951**
- (10) **Harvey on Industrial Relations and Employment Law Division P1 Practice and Procedure, Part 1 Employment Tribunals, T, Striking Out, Paragraphs 629FF.**

43. The relevant provisions in respect of strike out are contained within Rule 32 of Schedule 1 of the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020 and state as follows:

"32-(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 any claim or response on any of the following grounds —

- (a) *that it is frivolous 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 frivolous, 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) *that the tribunal considers that it is no longer possible to have a fair hearing of the claim or response (or the part to be struck out).*
- (2) *A claim or response may not be struck out unless the party in question has been given the opportunity to make representations, either in writing or, if requested by the party or ordered by the tribunal, at a hearing.*
 - (3) *Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 19."*

44. The overriding objective is set out in the aforementioned Rules at Rule 2:-

“The overriding objective of these Rules is to enable tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable –

- (a) *ensuring that the parties are on an equal footing;*
- (b) *dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
- (c) *avoiding unnecessary formality and seeking flexibility in the proceedings;*
- (d) *avoiding delay, so far as compatible with proper consideration of the issues; and*
- (e) *saving expense.*

A tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the tribunal.

No Reasonable Prospects of Success

45. ***Harvey on Industrial Relations and Employment Law, Division 1 Practice and Procedure - ‘Striking Out’, paragraphs 631-646*** sets out the relevant authorities on a tribunal’s power to exercise its discretion to strike out a claim on the ground that it has no reasonable prospects of success.

- (i) The power to strike-out a claim on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances ***Tayside Public Transport Company Limited (t/a Travel Dundee) v Reilly [2012] CSIH 66.***
- (ii) Claims should not as a general rule, be struck out when the central facts are in dispute. ***Ezsias v North Glamorgan NHS Trust [2007] ICR 1122.***
- (iii) The correct approach for a tribunal to adopt is to take the claimant’s case at its highest, as it is set out in the claim, ‘unless contradicted by plainly inconsistent documents’. ***Ukegheson v London Borough of Haringey [2015] ICR1285 EAT.***
- (iv) “Employment Tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context.” As per Lord Justice Underhill in ***Ahir v British Airways PLC [2017] EWCA1392*** (at paragraph 16).

- (v) As a general principle, discrimination cases should not be struck out except in the very clearest circumstances. In this regard Lord Steyn in ***Anyanwu & Another v South Bank Student Union & Another [2001] ICR391HL*** made the following statement at paragraph 24:- “for my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of process except in the most obvious and plainest of cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest.”

46. In ***Cox v Adecco UKEAT 0339/19 [9 April 2021]*** HHJ Taylor summarised the general legal propositions in respect of strike out applications at paragraph 28:-

- “(1) No one gains by truly hopeless cases being pursued to a hearing;*
- (2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;*
- (3) If the question of whether a claim has reasonable prospects of success turns on factual issues that are in dispute, it is highly unlikely that strike out will be appropriate;*
- (4) The Claimant’s case must ordinarily be taken at its height;*
- (5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can’t decide whether a claim has reasonable prospects of success if you don’t know what it is;*
- (6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings in any other documents the claimant seeks to set out the claim;*
- (7) In the case of a litigant-in-person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including Additional Information) and any key documents on which the claimant sets out the case. When pushed by a Judge to explain the claim, a litigant-in-person may be become like a rabbit in the headlights and fail to explain the case they set out in writing;*
- (8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;*

- (9) *If the claim would have reasonable prospects of success if it had been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances."*

47. At paragraph 29 HHJ Taylor continued:-

"This does not mean that litigants-in-person have no responsibilities. So far as they can, they should seek to explain their claims clearly even though they may not know the correct legal terms. They should focus on their core claims rather than trying to argue every conceivable point. The more prolix and convoluted the claim is, the less a litigant-in-person can criticise an Employment Tribunal for failing to get to grips with all the possible claims and issues. Litigants-in-person should appreciate that, usually, when a Tribunal requires Additional Information it is with the aim of clarifying, and where possible, simplifying, the claim, so that the focus is on the core contentions. The overriding objective also applies to litigant's-in-person, who should do all they can to help the Employment Tribunal clarify the claim. The Employment Tribunal can only be expected to take reasonable steps to identify the claims and issues. But respondents, and Tribunals, should remember that repeatedly asking for Additional Information and particularisation rarely assists a litigant-in-person to clarify the claim. Requests for Additional Information should be limited and clearly focussed as possible."

Claim Not Actively Pursued

48. ***Harvey on Industrial Relations and Employment Law, Division 1 Practice and Procedure, Paragraphs 656-666*** sets out the relevant authorities on a tribunal's power to strike out on the ground that a claim has not been actively pursued.

49. In ***Evans and Another v Commissioner of Police of the Metropolis [1993] ICR 151*** the Court of Appeal held that an Employment Tribunal's power to strike out a claim for want of prosecution must be exercised in accordance with the principles that govern the equivalent power in the High Court as set out by the House of Lords in ***Birkett v James [1978] AC 279HL***.

50. A tribunal can strike out a claim where:-

- There has been delay that is intentional or contumelious, or
- There has been inordinate or inexcusable delay, which gives rise to a substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the respondent.

51. In ***Rolls Royce PLC v Riddle [2008] IRLR 873*** the EAT held:-

"Where a motion is made under this rule, the tribunal requires, accordingly, to begin by asking itself whether the claimant has failed to actively pursue his claim. It would not usually be difficult to conclude that where a claimant has failed to appear at a full hearing of which he has been notified, that amounts to a failure to actively pursue his claim. Then, the tribunal requires to ask

itself whether, taking account of the whole circumstances, it ought to exercise its discretion so as to strike out the claim. The rule provides for a general discretion to strike out if the tribunal is satisfied that there has been a failure to actively pursue a claim (paragraph 18).

*The rule is not drafted so as to fetter the discretion that is conferred by any particular considerations. However, as with all exercises of discretion, it will be important to take account of the whole facts and circumstances including the fact that strike out is the most serious of sanctions. That being so, as commented in **Harvey** it is usually considered appropriate to take account of the principles laid down by the High Court in England prior to the introduction of the current Civil Procedural Rules. Those show an expectation that cases of failure to actively pursue a claim will fall into one of two categories. The first of these is whether there has been ‘intentional or contumelious’ default by the claimant and the second is where there has been inordinate and inexcusable delay such as to give rise to a substantial risk that a fair trial would not be possible or there would be serious prejudice to the respondent ...” (paragraph 19).”*

A Fair Hearing is No Longer Possible

52. As per **Harvey** at paragraph 663.02 the authorities are clear that:-

...

“ ... before a tribunal strikes out a claim under 32(1)(e), it should carefully analyse the reasons why it is alleged that a fair hearing is not possible, and ensure that there is a proper factual justification for those reasons, however long the delay.”

53. In **Abegaze v Shrewsbury College of Arts and Technology [2009] EWCA Civ 96**, the Court of Appeal confirmed that where there is overlap between the two grounds (claim not actively pursued and a fair hearing not possible) it is permissible for the tribunal to consider them both together.

The Respondent’s Submissions

54. The respondent’s application can be summarised as follows:-

- (1) The claimant’s claim form and 32 page appendage contains no claims within the statutory jurisdiction of the Industrial Tribunal and Fair Employment Tribunal. The allegations relate solely to maladministration and misapplication of the respondent’s inefficiency policies. The respondent specifically refers to paragraph 4 of the claimant’s 32 page appendage to his ET1:

“My claim pertains to a series of work related events/issues and how certain NICS policies relating to some of these events/issues were not implemented/adhered to resulting in my being subjected to unfair and unjust actions, behaviours and outcomes. My being subjected to unfair and unjust actions, behaviours and outcomes as a consequence of certain NICS policies not being implemented/adhered

to is certainly maladministration however this is not the only aspect of my claim.”

- (2) The claimant purports to bring a claim of disability discrimination, however he has not done so in his claim form and has not pursued his amendment application. Any claims pursuant to the Disability Discrimination Act 1995, even on the claimant’s own case are significantly out of time as they predate August 2017.
- (3) The claimant has failed to particularise his claim, as ordered by the tribunal and failed to provide replies to Notices for Additional Information and Notices for Discovery.
- (4) The claimant has repeatedly failed to comply with Tribunal Orders and directions including providing medical evidence and particularise his claim or amendment application.
- (5) The claimant has failed to attend Preliminary Hearings and Pre-hearing Reviews.
- (5) The claimant has provided no cogent reason or reasons either to the tribunal or the respondent for his lack of engagement in these proceedings throughout 2019 to 2021 or his failure to attend today’s hearing.
- (6) The respondent is specifically prejudiced in having to defend a claim which relates to historic matters that considerably predate the lodging of the claimant’s claim form by a number of years therefore rendering it no longer possible to have a fair hearing in this case.

CONCLUSIONS

55. In considering the submissions of the respondent and after careful consideration of the contents of the claimant’s claim form, together with his appended documents and subsequent documentation submitted, the tribunal finds that there are no claims pleaded within the claim form or the appended documents falling within the tribunal’s jurisdiction that stand any reasonable prospects of success. The claimant’s claim is therefore struck out in its entirety pursuant to Rule 32(1)(a) on the grounds that it has no reasonable prospects of success taking into consideration the following:-

- (1) This is not a case where the claim has been badly pleaded by a litigant-in-person. The claimant has articulated at length his complaints and criticisms of the respondent and the application of the respondent’s policies to him. Therefore taking the claimant’s claim as pleaded, at its height and giving a liberal approach to the contents of the claimant’s claim form and appended documents, the tribunal is unable to identify a claim within the jurisdiction of the tribunal which has any reasonable prospects of success.
- (2) The claimant had indicated at an initial case management hearing and in some documents submitted thereafter that his complaint is one of disability discrimination and victimisation. The tribunal has gone to considerable lengths to assist the claimant as a litigant-in-person. The tribunal issued very

specific case management orders to assist the claimant in particularising his claim and his amendment under the relevant heads of claim for disability discrimination – specifically on 19 February 2020 and 12 November 2020. His failure to do so has resulted in the respondent and the tribunal being unable to identify a claim within the jurisdiction of the tribunal.

- (3) The purported amendment of his claim to include disability discrimination claims, on the claimant's own case, relates to allegations in 2016 and 2017 which are, on the face of it, significantly out of time.
- (4) The tribunal acknowledges that strike out is the most serious of sanctions. However taking into account the entirety of the circumstances of this claim, the tribunal concludes that the claim contained within his claim form relates to maladministration and internal procedures which are not complaints within the jurisdiction of the tribunal and despite a number of attempts to assist the claimant in identifying potential claims within the jurisdiction of the tribunal, the claimant has failed to do so.

56. Had the tribunal not struck out the claimant's claim under Rule 32(1)(a) the tribunal would have struck his claim out for failure to actively pursue his claim under Rule 32(1)(d). The tribunal again recognises that striking out a claim is a draconian step, however on balance, the tribunal concludes, in all the circumstances of this case that the claimant has not actively pursued his claim taking into account the following:-

- (1) The history of case management and the claimant's failure to participate.
- (2) The claimant's persistent and repeated failures to comply with tribunal orders in respect of the provision of medical evidence.
- (3) The claimant's consistent failure to attend Preliminary Hearings
- (4) The claimant's failure to particularise his claims in breach of tribunal orders.
- (5) The claimant's failure to engage with the respondent or the tribunal office.
- (6) The claimant's failure to progress his claim or his amendment application.
- (7) The claimant's failure to attend this Preliminary Hearing and/or to provide reasons or submissions in writing as to why his claim should not be struck out.

57. The tribunal is satisfied by reason of all the above failures that a fair hearing is no longer possible. For the avoidance of doubt the tribunal has considered the content of the three letters from the claimant's Mental Health Practitioner as referred to above. The tribunal notes that the claimant has been attending appointments with the Mental Health Practitioner and has been working at various periods during the currency of these proceedings. The tribunal finds that there is no medical evidence that satisfactorily explains the claimant's lack of engagement in his tribunal proceedings and no evidence to explain the current state of the claimant's health or evidence as to when he is likely to be able to engage in these tribunal proceedings, despite being specifically ordered to provide same.

58. The tribunal determines that the claimant has failed to engage actively with the tribunal in progressing his claims to the extent that both the tribunal and the respondent are at a loss as to the heads of claim the claimant wishes to advance. In addition given the passage of time and the considerable latitude that the claimant has been granted throughout by the tribunal, the tribunal is satisfied that the delay is both inordinate and inexcusable and overall the claimant's conduct and lack of active engagement results in a fair hearing no longer being possible. The tribunal finds there is considerable prejudice to the respondent in having to defend a claim, in circumstances in which the claimant repeatedly fails to particularise his claim and where the allegations are historic and do not identify any claims within the jurisdiction of the tribunal.
59. In respect of the respondent's application to strike out on the basis that a fair hearing is no longer possible under Rule 32(1)(e), as per the authorities referred to above, the tribunal has determined that a fair hearing is no longer possible by reason of the claimant's failure to actively pursue his claim under Rule 32(1)(d). Therefore the tribunal makes no Order under Article 32(1)(e).
60. The claimant's claims are struck out in their entirety.

Employment Judge:



Date and place of hearing: 26 August 2021, Belfast.

This judgment was entered in the register and issued to the parties on: