EMPLOYMENT TRIBUNALS

Claimant: **Mrs T Curran**

Respondent: **St Vincent de Paul Society (England and Wales)**

Heard at: **Via CVP (Croydon)** **On: 20/9/2022**

Before: **Employment Judge Wright**

Representation:

Claimant: **Ms L Taleb - counsel**

Respondent: **Ms A Jervis - advocate**

JUDGMENT

The respondent's strike out application was successful. The respondent's application for wasted costs against the claimant's representative fails.

REASONS

1. Oral reasons were provided at the hearing and the claimant's representative requested written reasons.

2. The power to strike out a claim or response is found in Rule 37. The grounds for a strike out are set out in Rule 37 (1) and the ones which are relevant here are Rule 37 (1) (b) the manner in which the proceedings have been conducted by or on behalf of the claimant has been unreasonable; (c) non-compliance with any of these Rules or Order of the Tribunal; and (d) it has not actively been pursued.

3. The claimant has had a reasonable opportunity to make written representations and made oral representations at this hearing.

4. The claimant's employment terminated on 19/9/2019 and she engaged in Acas early conciliation between 2/10/2019 and 2/11/2019. The ET1 form and 11-page particular of claim was presented on 23/12/2019. The claimant was legally represented throughout. Although it appeared some claims were out of time, it became clear during the case management discussions, that no issue was taken with jurisdiction in respect of time.

5. The case followed the normal course of action with the usual timings, in that a case management discussion was listed for 19/6/2020 on 3/1/2020 and a case management agenda was sent to the parties at the same time and in advance of the preliminary hearing. One of the questions the case management agenda asks: is 'is there any application to amend the claim or response? If yes, write out what you want it to say'. The case management agenda also asks the parties to set out the issues which the ET will be asked to decide. If the claimant identified deficiencies in her case, then this was the point in time at which she should have been addressing her mind to how the claim was pleaded and if in fact there were any errors or mislabelling of claims, then it should have been identified before the first preliminary hearing.

6. There is no rational explanation as to why the mislabelling of the harassment claim as victimisation, was not highlighted at this stage (noting there was no protected act identified in the original ET1). There is a reference to the grievance and the claimant pursued a claim that the respondent failed to deal with her grievances in a fair and transparent process. There is no reference to victimisation or indeed to any other form of discrimination or prohibited conduct in relation to this.

7. There was reference to the fact that the conditions upon which the claimant relies as a disability were referred to in the occupational health report. It is not the case and it cannot be right that the respondent is expected to discern for itself which condition(s) the claimant relies upon as a disability. It cannot be simpler for the claimant to set out which conditions she relies upon.

8. Words were used to the effect that the claimant's case is set out 'in essence' and that there are no new facts pleaded. The problem with that is that it is not the respondent's responsibility to work out for itself what claims the claimant wishes to advance from the narrative the claimant has set out. There was no explanation as to why it took the claimant so long to identify the errors in her pleading.

9. The failings in the claimant's pleadings were pointed out at the first preliminary hearing on 19/6/2020. Employment Judge Tsamados clearly expected that he could trust legal professionals, once the further information required was pointed out to them, to provide that information.

10. Dismayingly that that was not so. Contrary to the position for many cases in this region, a preliminary hearing was held within a reasonable amount of time following the presentation of the ET1 (within about six months) and a final hearing was listed then for the following July 2021. Due however to the claimant's failures, or those of her legal representatives, that hearing did not take place. Due to the backlog caused by the pandemic, that resulted in a final hearing being listed for February 2023. No criticism is accepted from the claimant in respect of listing the final hearing, when one had been listed within a reasonable amount of time and which was not viable due to her failure to follow the Tribunal's Orders or to pursue her claim.

11. There is still not, even today, a written application to amend. It is not therefore clear what precisely the claimant now wishes to claim or to pursue. If as according to Ms Taleb it is all clear from the pleadings and merely a change of legal labels, then why has that not been done? It can only be concluded that there is some sort of wilful disregard of what is required; if it is all 'in there' and so straight-forward, why has it not been done? The claimant had a sixth opportunity to set out her precise case once she was on notice of the respondent's application of 3/9/2021 and the Tribunal's response of 27/4/2022. If as Ms Taleb says, it's all there and it just needs tidying up, why has that not been done?

12. The claimant contends for a further opportunity to provide the outstanding information, she has had six previous opportunities (when preparing for the 1st preliminary hearing, following that preliminary hearing, further to Employment Judge Ferguson's Order of 21/1/2021, then following the final hearing which was converted to a further preliminary hearing, when the respondent made its strike out application in September 2021 and even in advance of this hearing); and she still has not done so. That is unreasonable conduct, a failure to follow the Tribunal's Orders and is also a failure to actively pursue the claim (the claimant says the information is there, but has done nothing to put it into the correct and required format). There comes a point when it is open to the Tribunal to say, enough is enough and not to give the claimant any further chances; when she has failed to take advantage of the chances she has previously been given.

13. That then leads into the question of whether or not to strike out and whether some lesser sanction can get this case back on track (which Employment Judge Tsamados attempted to do at the July 2021 preliminary hearing and which the claimant did not take advantage of the opportunity and leniency shown to her on that occasion). There is prejudice to the respondent in that it does not know, three years after the claimant's employment terminated and five months before the final hearing, what case is it has to respond to. The respondent cannot take detailed instructions from its witnesses, until the respondent knows the case the claimant is bringing. Any misrepresentation of the claimant's case, should have been clarified by the 10/7/2020 following

the first preliminary hearing. Even then, that claimant was not compliant with the Order and the information was not provided on time.

14. The Tribunal is concerned at the disadvantage to the respondent resulting from the delay in providing this information and even now there is no written application to amend setting out the precise amendment the claimant wishes to make. This causes severe prejudice to the respondent. The claimant and/or her representatives have a very cavalier attitude to this litigation. Ms Taleb herself said the claimant is making grave allegations of discrimination; if she is making such allegations, it is up to her to properly set them out in order that the respondent can answer them.

15. The Tribunal is not prepared to allow the claimant a sixth attempt to get her house in order (noting that she has been professionally represented throughout, has had three different counsel represent her at three preliminary hearings and despite the claimant's then counsel saying on 26/7/2021 she had given robust advise to her instructing solicitors about the deficiencies in the claim); there has been a complete lack of progress. The Tribunal is satisfied in these circumstances that there is too great a prejudice to the respondent and that the appropriate action is to strike out the claim in its entirety. There are too many missing matters to be satisfied that it is proportionate to only strike out parts of the claim. It is still the case that the information which the Tribunal Ordered the claimant to provide on 19/6/2020 still has not been provided in a simple and straight-forward format. The respondent should not be penalised as a result of the claimant's failure to properly conduct the litigation. The respondent still does not know and therefore the Tribunal cannot understand, what allegations the claimant advances. It is therefore proportionate to strike the claim out for those reasons. The Tribunal notes that it has rarely seen a claim that has been pursued with such disregard for the overriding objective and for the Tribunal's Orders. For the case to proceed, all the claimant had to do was to address what is outstanding, still today, despite being on notice of this application, the claimant has still has not done so.

16. Following the outcome of the strike out application, the respondent applied for wasted costs against claimant's representative. According to its costs schedule, the respondent seeks modest costs of 17 hours preparation time, at an hourly rate of £60 + vat.

17. The claimant invites the Tribunal to reject the costs application on the basis that the constructive unfair dismissal claim and the discrimination claims in relation to pay, were clear. That does not account for the fact that Employment Judge Tsamados on 19/6/2020 identified 10 matters at paragraph 5.1 which required further information and he recorded on 26/7/2021 there was confusion over with the dismissal was unfair or constructively unfair. Contrary to what Ms Taleb said, the claim referring to a

difference in pay was not clearly set out. According to the claimant's original pleadings, she was pursuing five heads of claim. In addition, that does not account for the fact that the claimant still has not properly pleaded her claim; despite clear instructions upon how to do so by the Tribunal.

18. Rule 76 provides the gateway to making an order for costs and the Tribunal must firstly decide whether those matters identified at Rule 76 (1) are engaged. Based upon the findings in respect of the strike out application, or more patently the failures identified; the Tribunal finds that the conduct of the proceedings has been unreasonable. The Tribunal then has to consider whether or not to make a costs order and in particular, to make a wasted costs order against the claimant's solicitor under Rule 80. Ms Taleb did not say anything to the contrary and it is therefore assumed that the claimant's solicitor is acting in pursuit of profit.

19. The conduct considered to be unreasonable is the failure to provide the required information and the failure to particularise the claims, in the manner in which the Tribunal Ordered the claimant to do so. That resulted in a postponement of the final hearing listed for July 2021. Since then and even to today, that information has not been fully provided.

20. In exercising discretion, the Tribunal has taken into account the claimant has been legally represented by a solicitor and that to date, three different counsel have been instructed. The claimant's representative has never said that she does not understand what information is required and the comment by counsel at the second preliminary hearing is noted that robust advice had been given in respect of the deficiencies in the pleadings. As a result of the failings, a disproportionate amount of Tribunal time has been spent on this case, all of which was unnecessary.

21. The wasted costs regime requires the representative to have acted improperly, unreasonably or negligently.

22. As Ms Taleb said, there is a high bar to overcome for an application of wasted costs to be successful and Ms Jervis did not make her application in the alternative. Furthermore, she did not attempt to persuade the Tribunal how the claimant's solicitor's conduct engaged the mischief set out in Rule 80.

23. From the authorities, it cannot be seen that the conduct was improper, in that it was conduct which would ordinarily lead to justify disbarment, striking off, suspension or other serious professional penalty. It cannot be seen that it was unreasonable as this word is interpreted in Rule 80; it was not conduct designed to harass the respondent. Although the word 'negligent' is interpreted in a non-technical way to denote failure to act with the

competence reasonably to be expected of ordinary members of the profession; it does not cross that threshold.

24. It is noted that the respondent's application was made at a stage in the proceedings, well in advance of the final hearing and, even on its own costs application, prior to significant costs being incurred by the respondent.

25. It is not enough that there is unreasonable conduct which would engage Rule 76, there must be an abuse of process or an abuse of court to make a costs order under Rule 80. Although having considered the conduct of the proceedings, it is not found that the conduct does in fact cross the threshold which amounts to an abuse of the court. The conduct was incompetent, but that does not put it as high as the rigorous test of there being an abuse of process such as to award wasted costs against claimant's representative. For those reasons the wasted costs application fails.

26. The six day final hearing listed to commence on 20/2/2023 will be removed from the list.

Employment Judge Wright

22 September 2022