EMPLOYMENT TRIBUNALS

Claimant: **Ms Caroline Karason**

Respondent: **The Gateway Learning Community Trust & ors**

Heard at: **East London Hearing Centre**

On: **20 June 2022**

Before: **Employment Judge Barrett**

Representation
For the Claimant: Represented herself
For the Respondents: Mr F Griffiths of Counsel

JUDGMENT

The judgment of the Tribunal is that: -

1. **The Respondents' application to strike out the Claimant's claims is refused.**

REASONS

Introduction

1. At an open preliminary hearing on 20 June 2022, I refused the Respondents' application to strike out the Claimant's claims and gave reasons orally for doing so. I recorded that decision in my case management order dated 26 June 2022. On 4 July 2022, the Respondents requested written reasons.

2. The determination of an application to strike out ought to have been recorded in the form of a judgment rather than a case management order (see r.1(3)(b)(ii) of the ET rules). Realising that error, I here provide the judgment as well as the written reasons requested.

The application and response

3. The Respondents applied on 12 May 2021 to strike out the Claimant's claims on the ground that she had conducted proceedings in a manner which was scandalous, unreasonable or vexatious. Further or alternatively, the Respondents applied to strike out the Claimant's claim under case number 3202421/2019 on the ground that it was no longer possible to have a fair hearing in respect of the claim.

4. The Respondents' application was supported with full written submissions. The Respondents' counsel made further oral submissions. He submitted that the Claimant had acted scandalously, unreasonably or vexatiously by:

    4.1. her general approach to seeking to control the litigation, including:

        4.1.1. making it difficult for the Respondents and the Tribunal to ascertain the issues in her claims;

        4.1.2. challenging the Respondents to identify every attendee at an open hearing on 28 April 2022 and disputing the right of the Eighth Respondent to be present at that hearing;

        4.1.3. making a further application to amend to add 30 more respondents in December 2021;

    4.2. disputing the Respondents' solicitor's ability to conduct litigation;

    4.3. misleading the Tribunal by wrongly stating that the Respondents had conceded liability;

    4.4. failing to comply with a Tribunal order to correspond with the Respondents' representative; and

    4.5. failing to arrange childcare for hearings despite repeated warnings to do so.

5. In relation to the Respondents' further or alternative ground, in the written submissions it was explained that the Respondents sought to strike out all of the claims within the first claim that predated the Claimant's flexible working request in June 2019, in particular because the delay in determining those complaints was unfair to the individual named Respondents involved.

6. The Claimant submitted that she:

    6.1. did not maintain an application to add 30 respondents but sought clarification as to the correct respondent;

    6.2. had been confused about the correct representative and suspicious because she was asked to correspond with someone who was not a qualified solicitor;

    6.3. was frustrated not to receive a substantive response from the solicitors or parties she emailed and referred to a concession in order to provoke a response;

6.4. had been genuinely mistaken about the correct spelling of the representative's email address; and

6.5. had done her best to arrange childcare and the arrangements had fallen through for reasons outside her control.

The law

7. Rule 37 Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 Sch 1 ("ET Rules") provides: -

(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) …

(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) …

(d) …

(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).

(2) 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 the party, at a hearing.

8. For a tribunal to strike out for unreasonable conduct, it must be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible; and in either case, the striking out must be a proportionate response. In *Blockbuster Entertainment Ltd v James* [2006] IRLR 630, CA, Sedley LJ held:

"5. This power, as the employment tribunal reminded itself, is a draconic power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response.

[…]

23. The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact – if it is a fact – that the tribunal is ready to try

the claims; or – as the case may be – that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist. "

9. In *Bolch v Chipman* UKEAT/1149, Burton P offered guidance as to the questions which must be answered on an application for strike out under the predecessor to rule 37(1)(b):

"(1) There must be a conclusion by the Tribunal not simply that a party has behaved unreasonably but that the proceedings have been conducted by or on his behalf unreasonably.

[…]

Assuming there be a finding that the proceedings have been conducted scandalously, unreasonably or vexatiously, that is not the final question so far as leading on to an order that the Notice of Appearance must be struck out.

The helpful and influential decision of the Employment Appeal Tribunal, per Lindsay P, in De Keyser Ltd v Wilson [2001] IRLR 324 is directly in point. De Keyser makes it plain that there can be circumstances in which a finding can lead straight to a debarring order. Such an example, and we note paragraph 25 of Lindsay P's judgment, is "wilful, deliberate or contumelious disobedience" of the Order of a court.

But in ordinary circumstances it is plain from Lindsay P's judgment that what is required before there can be a strike out of a Notice of Appearance or indeed an Originating Application is a conclusion as to whether a fair trial is or is not still possible.

[…]

Once there has been a conclusion, if there has been, that the proceedings have been conducted in breach of Rule 15 (2) (d), and that a fair trial is not possible, there still remains the question as to what remedy the tribunal considers appropriate, which is proportionate to its conclusion. It is also possible, of course, that there can be a remedy, even in the absence of a conclusion that a fair trial is no longer possible, which amounts to some kind of punishment, but which, if it does not drive the defendant from the judgment seat (in the words of Millett J) may still be an appropriate penalty to impose, provided that it does not lead to a debarring from the case in its entirety, but some lesser penalty

But even if the question of a fair trial is found against such a party, the question still arises as to consequence. That is clear because the remedy, under Rule 15 (2) (d), is or can be the striking out of the Notice of Appearance. The effect of a Notice of Appearance being struck out is of course that there is no Notice of Appearance served."

10. The Respondents cited *Riley v The Crown Prosecution Service* [2013] IRLR 966, at paragraph 27:

"It is important to remember that the overriding objective in ordinary civil cases (and employment cases are in this respect ordinary civil cases) is to deal with cases justly and expeditiously without unreasonable expense. Article 6 of the ECHR emphasises that every litigant is entitled to 'a fair trial within a reasonable time'. That is an entitlement of both parties to litigation. It is also an entitlement of other litigants that they should not be compelled to wait for justice more than a reasonable time. Judge Hall-Smith correctly found assistance in remarks of Peter Gibson LJ in Andreou v The Lord Chancellors Department [2002] IRLR 728 which are as relevant today as they were 11 years ago:

> *[46]. The tribunal in deciding whether to refuse an adjournment had to balance a number of factors. They included not merely fairness to Mrs Andreou (of course an extremely important matter made more so by the incorporation into our law of the European Convention on Human Rights, having regard to the terms of Article 6): they had to include fairness to the respondent. All accusations of racial discrimination are serious. They are serious for the victim. They are serious for those accused of those allegations, who must take very seriously what is alleged against them. It is rightly considered that a complaint such as this must be investigated, and disputes determined, promptly; hence the short limitation period allowed. This case concerned events which took place very many years ago, well outside the normal three months limitation period. The tribunal also had to take into account the fact that other litigants are waiting to have their cases heard. It is notorious how heavily burdened employment tribunals are these days."*

Findings and conclusions

11. There was one instance of scandalous and vexatious conduct of the proceedings by the Claimant. On 1 April 2021, the Claimant emailed the Tribunal and the Respondents stating:

"According to recent correspondence with the legal representative directly, they have no objection to reducing the days of the hearing (perhaps to 1-2 days) to discuss ONLY the remedy aspect of the case in favour of the claimant as all other matters have already been discussed and established. They seem to have understood that 20 of the 23 points of what would have been the list of issues and list of allegations has already been successfully addressed leaving the remaining 3 regarding remedy and claimant loses. They should now understand that I know that others may be trying to undertake 'reserved legal activities' in their place so the legal representative also did not object to relaying this directly with the Tribunal on or before the 16 April 2021 especially if others are projecting incorrect information against that mentioned above and we more or less did not agree not to vary that deadline. Even though the legal representative should have all the correct documents and this is will now most probably be a shorter hearing, I will still stick to the direction especially regarding documents, just in case. The Respondent/Legal Representative has been copied in. I would also like to add that on the 18th of March I sent list/s of around 23-24 points to those who I thought was the correct recipient even though no body actually sent me lists that properly reflect the Tribunals order. It was so difficult in identifying the correct recipient, I feel like I was being deceived and misled but based on recent information I now

believe that I now have the correct recipient but also as you can see that information of the 18th March has now been updated."

12. I asked the Claimant why she told the Tribunal that the Respondents had conceded 20 of 23 points on the list of issues. My note of her reply is:

"Honestly, I did make that up, no one actually said that. The problem I have is that Chloe [solicitor at DAS Law] wasn't speaking to me. Sent to all the named Respondents and none of them got back to me. It was just to make sure."

13. I found that because the Claimant was frustrated by what she perceived to be a lack of communication from the Respondents, she sent an email that she knew was incorrect to the Tribunal to provoke a response.

14. With respect to the other matters which the Respondents criticised, I accepted that Claimant was not acting with deliberate intention to delay, provoke or mislead. Her conduct of litigation, save for the single instance above, could not be characterised as scandalous or vexatious. However, she had conducted the litigation unreasonably in the following three respects:

    14.1. By disputing the right of the Respondents' solicitors, DAS Law, to conduct litigation in email correspondence to them and the Tribunal. The Claimant was genuinely concerned that correspondence from DAS Law was sent by paralegal staff rather than qualified solicitors that she could look up on the SRA website. I reassured her during the preliminary hearing that was normal practice for a law firm. I found that the way the Claimant expressed her concerns, by accusing employees of DAS Law of wrongdoing, was not just mistaken but unreasonable.

    14.2. By objecting to the presence of the individual named Eighth Respondent at the hearing on 28 April 2022, as described at paragraph 22 of Employment Judge Tobin's order following that hearing. He described this as *"evidence of unreasonable conduct".* I noted that it is not unusual for a litigant in person going through the process of adversarial litigation to feel suspicious of respondents but accepted that the conduct recorded by Employment Judge Tobin was unreasonable.

    14.3. By arriving at the listed final hearing on 28 April 2021 without childcare in place. It is unusual to criticise a litigant in person struggling with childcare arrangements. However, it had been explained to the Claimant at previous hearings by Employment Judge Crosfill and Employment Judge Jones that the Claimant would not be able to engage effectively in the final hearing unless she made arrangements for someone else to look after her son. The Claimant provided documents showing that she had booked childcare for the duration of the hearing at her son's regular nursery. The nursery emailed her on 16 April 2021 to tell her that the additional hours could not be provided. By then, there was insufficient time for the Claimant to be able to port her funded nursery hours to an alternative nursery before the listed hearing. She had a limited budget meaning it was also difficult to pay in full for alternative childcare. She lacked support nearby due to her personal circumstances. However, she did not take positive steps during the 12-day period between 16 and 28 April 2021 to find alternative childcare, and she did not alert the Tribunal or the Respondent to the

problem in advance. I found that the lack of positive steps during the 12 days or advance notification was unreasonable in the context of the history of previous warnings. However, I found the Claimant was not deliberately disruptive and acknowledged that she was put in a difficult situation.

15. I rejected two further criticisms:

    15.1. The final hearing listed to commence on 8 March 2021 was postponed because the Employment Judge allocated to hear the case had previously conducted mediation in same case. The Respondents said that had it not been postponed for this reason, the hearing would have been ineffective because the Claimant had failed to arrange childcare. The Respondents were not sent the Claimant's evidence relating to this matter until the day of the preliminary hearing (20 June 2022). The Claimant presented a discharge letter showing that her son was admitted to A&E the day before the final hearing with tonsillitis and was prescribed antibiotics. She further presented a document setting out the illness and attendance rules for her son's nursery. The rules provided that a child prescribed antibiotics was excluded from attending nursery for 48 hours. I found that the Claimant had arranged childcare at the nursery for the duration of the hearing, and it was the unforeseen circumstance of her son's illness and nursery exclusion which disrupted her arrangements. In that context, her conduct in bringing her son to the hearing was not unreasonable.

    15.2. With regard to email communications between the parties, I found that the Claimant stopped sending emails to the wrong recipients at DAS Law after 12 April 2021, when she was ordered by Regional Employment Judge Taylor to correspond with the correct case handler. However, she then sent emails to an incorrectly typed version of the case handler's email address. The Respondents submitted that this had been deliberate, but I found on the balance of probabilities that it was more likely to have been a mistake.

16. Overall, I found there had been no "*deliberate and persistent disregard of required procedural steps*" (referring to the test from *Blockbuster Entertainment Limited v James* [2006] IRLR 630).

17. I went on to consider whether a fair trial was still possible and concluded that it was. The delay occasioned by two postponements was unfortunate and would impact on witnesses' memory. However, the Respondents' witnesses had witness statements prepared for the earlier hearing which they could refresh their memory from. I noted that many cases face similar delays due to the effect of Covid-19 on the Tribunal system and are able to proceed. Although one of the Respondents' witnesses had moved on to a different employment, all were still prepared to make themselves available to give evidence. In the round, a fair trial would still be possible.

18. Having concluded that a fair trial was still possible, I went to consider whether striking out the claims would be a proportionate sanction in all the circumstances for one instance of scandalous and vexatious conduct, and three further instances of unreasonable conduct. I concluded it would be a disproportionate and draconian sanction in all the circumstances and declined to strike out the Claimant's claims on that basis.

19. I further considered the Respondents' fallback position that the Claimant's complaints under case number 3202421/2019 which predated her flexible working request in June 2019, should be struck out on the ground that a fair trial was no longer possible. I noted that this would make the claim more straightforward to determine at the final hearing and was sympathetic to the submission regarding the individual Respondents. Nonetheless, I concluded that there was no real basis for finding that a fair trial was no longer possible in respect of the earlier matters. The same reasoning set out at paragraph 16 above applied. I declined to order strike out on this basis either.

Employment Judge Barrett
Dated: 25 July 2022