



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr A Collins

v

A Fulton Company Limited

Heard at: Watford

On: 5 July 2022

Before: Employment Judge R Lewis
Members: Mr D Bean
Ms M Harris

Appearances

For the Claimant: No attendance or representation
For the Respondent: Mr M Selwood, Counsel

JUDGMENT

The claim is struck out.

REASONS

Procedure at this hearing

1. Reasons are provided by the tribunal of its own initiative in the interests of justice, as the claimant did not attend the hearing.
2. This was the listed final hearing of the claim. A relevant chronology is set out below.
3. The claimant was not present at the start time of 10am. At the Judge's direction, a member of tribunal staff telephoned him twice on the mobile number shown on the ET1. The member of staff reported that there had been no answer on either occasion, and that he had left a voice mail.
4. We met the respondent's counsel and solicitor at 10.10am and told them that we could see two possible courses. One would be to adjourn to 10am the following day, spend the day reading, and write to the claimant in terms to state that the hearing would proceed the following day, in his absence if need be, and that it would be open to the respondent on that occasion to apply for a strike out. An alternative would be to proceed to hear an application to strike out today.

5. Ms Kara of Clyde & Co confirmed that the email address on the tribunal system was the one which she continued to use, and no items sent to it had been bounced back.
6. Mr Selwood stated that he wished to apply at this hearing for strike out. We adjourned for about 20 minutes. Before resuming at 10.45, we asked the tribunal clerk to check again with the tribunal inbox to see if the claimant had perhaps emailed the tribunal. The claimant had not done so, and the tribunal agreed to hear the application for strike out.
7. Having heard the application, we adjourned briefly and gave judgment. We told the respondent that the tribunal would prepare reasons of its own initiative, but that there might be delay in their being sent due to insufficient typing resources. We therefore asked the solicitor to communicate to the claimant what the outcome had been, so that he would know as soon as possible.
8. The respondent did not apply for costs but indicated that a costs application might be made. In order to avoid delay and an administrative burden, we have therefore provisionally listed the costs application. The listing is provisional in the sense that if the respondent chooses not to apply, it has agreed to notify the tribunal, and the date will be vacated. If however the application is made, the date given below is available to the respondent and this tribunal.

Litigation history

9. It is necessary to say something of the history of the litigation. It arises out of about six weeks employment between late June and early August 2019. Day A was 14 September 2019 and Day B was 14 October. The claim was presented on Day B.
10. A first case management hearing took place by telephone before the present judge on 1 July 2020. The claimant took part, as did the respondent's solicitor. The Judge listed the case at that hearing for 5 days starting on Monday 4 July 2022, ie 2 years and 3 days into the future.
11. A second case management hearing took place on 31 March 2021 before Employment Judge Hyams. The claimant took part, as did the respondent's solicitor. Judge Hyams achieved a meticulous and detailed list of issues.
12. The primary claims were of discrimination on grounds of race and/or sexual orientation. The claimant alleged that no fewer than 13 colleagues had openly and repeatedly subjected him to abusive language on the far extreme of offensiveness. All these allegations were vigorously contested and denied.
13. On 9 November 2021 the claimant wrote to the respondent's solicitor as follows:

“Due to unforeseen [sic] circumstances I will be dropping the claim against Fulton on all counts so far.”

14. Ms Cowburn of Clyde & Co replied the same morning to inform the claimant that any withdrawal must be made to the tribunal (plainly in accordance with Rule 51).

15. There then followed correspondence on whether the email of 9 November constituted withdrawal of the claim. In the course of that correspondence, the claimant wrote to the tribunal on 15 March 2022 as follows:

“To whom it may concern, I only sent the correspondence to the respondent in relation to ending the case due to bad **advise** from close associates and have decided to continue with, what I think is a very important matter either by having a new hearing to decide it’s course or, to continue on up the 04/07/22 as originally discussed.”

16. Subsequently on 12 April the tribunal wrote to the parties on Employment Judge George’s direction:

“The claimant has not withdrawn the claims. Are the parties ready for the hearing on 4 to 8 July 2022?”

17. The respondent replied on 12 April to confirm that it was ready. The tribunal file did not contain a response from the claimant.

18. On 6 June 2022, Ms Begum, Legal Officer, wrote to the parties to send them the pre-hearing check list. Her covering email wrote (bold font in original):

“If you fail to [complete and return the Checklist] then an Employment Judge may consider striking out the claim or response on the ground that it is not actively pursued.”

19. The respondent returned the completed Checklist, the claimant did not.

20. On 17 June Clyde & Co applied for the claim to be struck out; by letter of 23 June the tribunal wrote that Employment Judge Foxwell had directed that “any application for strike out can be dealt with at the outset of the final hearing.”

21. The hearing was due to start on Monday 4 July. For reasons related to judicial resource the parties were informed the previous Friday, 1st July, that the hearing had been reduced to four days and would start on Tuesday 5 July.

22. The case was ready to start. There was a bundle of 278 pages. The claimant had submitted a witness statement. The respondent had submitted 13 statements, each from a person against whom a personal allegation of discrimination had been made.

Discussion

23. Rule 37 provides:

“At any stage of the proceedings.. a tribunal may strike out all or part of the claim,.. on any of the following grounds –(b) that the manner in which the

proceedings have been conducted .. has been scandalous, unreasonable or vexatious; (d) that it has not been actively pursued.”

24. Mr Selwood's submission was concise. The material points are the following:-
 - 24.1 The claimant had at first engaged with the tribunal process by undergoing early conciliation, presenting a claim, and corresponding with the respondent and the tribunal, including taking part in two preliminary hearings;
 - 24.2 Since November 2021, when he had written that he wanted to drop the claims, his participation in the claim had fallen, although on 15 March 2022 he had stated that he wished to continue.
 - 24.3 His email of that date was significant. It confirmed that the claimant knew and understood the listing arrangements.
 - 24.4 He had since then failed to reply to the tribunal's email question of 12 April and failed to complete the check list procedure.
 - 24.5 He had been told in the check list procedure, and again by letter of 23 June, that this hearing might consider strike out.
 - 24.6 The respondent and tribunal had used the correct lines of communication with the claimant.
 - 24.7 The claimant had not given the respondent or tribunal any reason or evidence on which to form the view that he wished to adjourn or was in any way unable to take part in this hearing.
25. Mr Selwood submitted that the alternative of adjourning to the following day should be avoided. Given the volume of paperwork, and the number of witnesses, the tribunal would struggle to conclude the case in four days, and it would be undesirable in principle to go part-heard. If the case were wholly adjourned, delays in the tribunal system might lead to a listing in 2024. Mr Selwood very fairly conceded that as all allegations were denied, this could not logically be said to affect recollection, but the prolongation of extreme and emotive allegations for a period of another 18 months would be burdensome, disproportionate and unfair.
26. The first question for us to consider is whether any of the grounds for strike out set out in Rule 37 have in fact been made out. We have no hesitation in finding that the claim has not been actively pursued. We note in particular that the claimant did not confirm his wish to proceed and did not complete the check list. He has been put on notice that this hearing would consider strikeout. He has failed to address the substance of the applications, or the underlying issue of proactive conduct of the proceedings.
27. We find that those facts also constitute unreasonable conduct of the litigation, in circumstances where the case is emotive, engages issues of principle for all concerned, raises allegations of extreme gravity, and has led to two detailed case management hearings.

28. We considered whether the interests of justice might be better or more appropriately served by adjourning, either to the following day or generally. In the absence of any communication from the claimant, we had no reason to do either. We had no explanation of his dis-engagement from the process, and no reason to believe that he would conduct the case differently in future. We therefore declined to do so.
29. Although it is implicit in what is said above, we find that the interests of justice do not favour potentially exposing the respondent to further legal costs or absorbing further judicial resource.
30. Mr Selwood made no application under rule 47. We add only as observation that if we had been asked to dismiss under that rule, we would have done so.

Costs hearing

31. The costs hearing has been listed to take place at the Watford Tribunal, for 3 hours before the same Judge and Tribunal Members at 10am on **Wednesday 16 November 2022**.
32. The Judge has directed that if it decides to make the application, the respondent should set out in writing to the claimant the grounds on which it is making the application, and a schedule or summary of the sum of costs applied for and the basis of calculation. The information should be set out in a manner and sufficient detail for the claimant to understand the case which he has to meet.
33. It is recorded that in accordance with Rule 84 a party against whom a costs order is sought must put before the tribunal information about their ability to pay. If the respondent makes the application, it must advise the claimant accordingly, and any information about his ability to pay should be sent by the claimant to the respondent and the tribunal no later than **9 November 2022**.
34. The respondent is reminded that if it decides not to proceed with an application for costs, it should notify the tribunal and the claimant of its decision, so that the listing can be vacated.

Employment Judge R Lewis

Date: 9 August 2022

Sent to the parties on: 25 August 2022

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For the Tribunal Office