Case No: 2201072/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr A B Ali

Respondents: (1) Tesco Stores Ltd; (2) Mr N Harrison; (3) Mr S Buckley; (4) Mr L Berete; (5) Ms E Etwareea

Heard at: London Central Employment Tribunal (in public, by CVP)

On: 9 January 2023

Before: Employment Judge Gordon Walker, sitting alone

Appearances:

For the claimant: in person

For the second respondent: Mr D Brook, counsel

For the other respondents: Mr S Way, counsel

JUDGMENT

1. The respondents' application to strike out the claims made pursuant to rule 37(1) of the Employment Tribunal Rules of Procedure 2013 is dismissed.

2. The respondents' application for a deposit order made pursuant to rule 39(1) of the Employment Tribunal Rules of Procedure 2013 is dismissed.

REASONS

1. Written reasons were requested by the second respondent in accordance with rule 62(3) of the Employment Tribunals Rules of Procedures 2013. The following reasons are provided.

2. The respondents made a written application dated 23 August 2023 to strike out the claimant's claims pursuant to rule 37.

3. An open preliminary hearing was listed for 9 January 2023 to determine the application for strike out, or, alternatively, for a deposit order pursuant to rule 39.

<u>The parties' submissions</u>

Mr Way's submissions for the first, third, fourth and fifth respondents

4. Mr Way applied to strike out the claims pursuant to rule 37(1)(b) or (e).

5. First, in support of the application pursuant to rule 37(1)(b), Mr Way principally relied on the alleged failure of the claimant to comply with the case management order of 15 July 2022 to provide further information about his claims by 12 August 2022. The claimant did send an email on 12 August 2022 purporting to comply with the order. Mr Way submitted that this was deficient and did not amount to compliance with the case management order. Mr Way did not say that this was a deliberate failure to comply with the case management order, but that it this was a serious failure to comply. Whilst he accepted that the claimant was a litigant in person, he submitted that it was relevant to have regard to the claimant's failure to attend the case management preliminary hearing on 15 July 2022, because, if the claimant had attended that hearing, he would have been assisted by the Employment Judge at the hearing in clarifying the claims. He said that the claimant made a choice not to attend that hearing, and he did not have a good reason for his non-attendance. Mr Way submitted that there were additional failures by the claimant to comply with case management directions, for example he did not send the email of 2 August 2022 to the parties. Mr Way said this was relevant context.

6. Second, in support on his application pursuant to rules 37(1)(b) and (e), Mr Way submitted that a fair hearing was no longer possible. Applying ***<u>Emuemukoro v Croma Vigilant (Scotland) Ltd</u>*** [2022] ICR 327 at paragraphs 18-19, he submitted that the question was whether the hearing could take place in the allocated trial window commencing 14 February 2023. This was not possible as the claimant had prevented any meaningful case management of his claim. The reason why the hearing could not go ahead was due to the fault of the claimant in not complying with the order to provide further information.

7. Third, Mr Way submitted that strike out was a proportionate sanction having regard to the claimant's failure to comply with orders, and the impact of losing the trial listing on the respondents and the Tribunal. It was relevant to consider that most of the claimant's claims were out of time.

8. In support of the application for a deposit order pursuant to rule 39, Mr Way submitted that some, or all, of the discrimination claims were out of time and therefore the claims had little reasonable prospects of success. He repeated the submissions on proportionality and submitted that these factors were relevant when exercising the discretion to make a deposit order. He said that the constructive unfair dismissal claim has little reasonable prospect of success as the claimant had not pleaded the repudiatory breach of contract.

Mr Brook's submissions for the second respondent

9. Mr Brook adopted the submissions of Mr Way. He further submitted that the claims against the second respondent should be struck out (presumably pursuant to rule 37(1)(a), although this was not expressly stated) as they were out of time and the claimant had not said why it would be just and equitable to extend time.

Claimant's submissions

10. The claimant apologised for not attending the preliminary hearing in July 2022. He said he thought he needed to obtain his medical records for that hearing and he had been unable to do so in advance of the hearing. He said that his life was hectic at that time as he was moving out of his childhood home, a process that was ongoing for many months.

11. The claimant said that he had tried to comply with the case management orders. He said that he did not have a law degree but did his best to provide the further information. He did send the 2 August 2022 email to the parties, but he had initially mistakenly used the wrong email address for Mr Way's instructing solicitor.

12. The claimant accepted that his claims against the second and third respondent were out of time. The last alleged acts pleaded against the second and third respondent being 3 October 2020 and December 2019, respectively. He said that the claims against the other respondents were a continuing course of conduct culminating in his resignation.

Legal principles

13. The Tribunal has the power to strike out the claims pursuant to rule 37(1):

> ***37.— Striking out***
> *(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) that it is scandalous 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 scandalous, 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 in respect of the claim or response (or the part to be struck out).*

14. The Tribunal has the power to make a deposit order pursuant to rule 39(1):

> ***39.— Deposit orders***
> *(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*

15. In ***Emuemukoro*** at paragraphs 8-10 Choudhury P summarised the legal

principles relevant to applications made pursuant to rule 37(1)(b). ***Blockbuster Entertainment Ltd v James*** [2006] IRLR 630 paragraph 5 is cited, which states:

"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. The principles are more fully spelt out in the decisions of this court in Arrow Nominees Inc v Blackledge [2000] 2 BCLC 167 and of the Employment Appeal Tribunal in De Keyser Ltd v Wilson [2001] IRLR 324 , Bolch v Chipman [2004] IRLR 140 and Weir Valves & Controls (UK) Ltd v Armitage [2004] ICR 371 , but they do not require elaboration here since they are not disputed. It will, however, be necessary to return to the question of proportionality before parting with this appeal"

16. At paragraphs 18-20 of ***Emuemukoro*** Choudhury P said:

18. In my judgment, Ms Hunt's submissions are to be preferred. There is nothing in any of the authorities providing support for Mr Kohanzad's proposition that the question of whether a fair trial is possible is to be determined in absolute terms; that is to say by considering whether a fair trial is possible at all and not just by considering, where an application is made at the outset of a trial, whether a fair trial is possible within the allocated trial window. Where an application to strike out is considered on the first day of trial, it is clearly a highly relevant consideration as to whether a fair trial is possible within that trial window. In my judgment, where a party's unreasonable conduct has resulted in a fair trial not being possible within that window, the power to strike out is triggered. Whether or not the power ought to be exercised would depend on whether or not it is proportionate to do so.

19. I do not accept Mr Kohanzad's proposition that the power can only be triggered where a fair trial is rendered impossible in an absolute sense. That approach would not take account of all the factors that are relevant to a fair trial which the Court of Appeal in Arrow Nominees [2000] 2 BCLC 167 set out. These include, as I have already mentioned, the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court. These are factors which are consistent with taking into account the overriding objective. If Mr Kohanzad's proposition were correct, then these considerations would all be subordinated to the feasibility of conducting a trial whilst the memories of witnesses remain sufficiently intact to deal with the issues. In my judgment, the question of fairness in this context is not confined to that issue alone, albeit that it is an important one to take into account. It would almost always be possible to have a trial of the issues if enough time and resources are thrown at it and if scant regard were paid to the consequences of delay and costs for the other parties. However, it would clearly be inconsistent with the notion of fairness generally, and the overriding objective, if the fairness question had to be considered without regard to such matters.

20. Mr Kohanzad's reliance on rule 37(1)(e) does not assist him; that is a specific provision, it seems to me, where the tribunal considers that it is no longer possible to have a fair hearing in respect of a claim, or part of a claim, that may arise because of undue delay or failure to prosecute the claim over a very substantial length of time, or for other reasons. However, that provision does not circumscribe the kinds of circumstances in which a tribunal may conclude that a fair trial is not possible in the context of an application made under rule 37(1)(b) or (c) , where

the issue is unreasonable conduct on the part of a party or failure to comply with the tribunal's orders or the Rules.

17. In ***E v X and another*** UKEAT/0079/20 paragraphs 40-50 Ellenbogen J set out the legal principles relevant to the issue of dealing with a continuing act point as a preliminary issue.

Conclusions

Strike out application

18. Applying the guidance in ***Emuemukoro*** and ***Blockbuster Entertainment***, in order to strike out the claim pursuant to rule 37(1)(b) there must be unreasonable conduct which has either taken the form of deliberate and persistent disregard of required procedural steps, or made a fair trial impossible. Strike out must be a proportionate response.

19. The unreasonable conduct relied upon by the respondents is the claimant's alleged failure to provide further information. It was submitted that this should be viewed in the context of the claimant's unreasonable failure to attend the preliminary hearing of 15 July 2022 and his failure to comply with other orders, namely to send the 2 August 2022 email to the other parties.

20. I reject this submission. I do not find that there was unreasonable conduct. I have reached this decision because:

    a. The claimant's email of 12 August 2022 was an attempt by him to comply with the order of 15 July 2022 to provide further information. The claimant provided the information that he believed was required of him. There was substantial compliance with the order. The claimant's response was imperfect. He did not set out the precise causes of action or the terms of contract that were allegedly breached by the first respondent for the constructive unfair dismissal claim. The reason for that imperfection is that the claimant is a litigant in person. The standard of compliance envisaged by the respondents in their submissions is unrealistic and too high for a litigant in person.

    b. I accept that, if the claimant had attended the preliminary hearing on 15 July 2022, he would have had the assistance of the Employment Judge at that hearing to clarify his claims. The claimant did not attend the preliminary hearing as he mistakenly believed that he needed to obtain medical records first, and, as he said, his life was "hectic" as he was moving home. The claimant should have asked the Tribunal for an adjournment if he was not able to attend the preliminary hearing. He did not have a good reason for his failure to attend and to not notify the respondents and the Tribunal beforehand. However, I find that he had a genuine reason for not attending, which was compounded by his unfamiliarity of the Tribunal process.

c. I accept the claimant's submission, which was supported by the documentation in the bundle, that he sent the 2 August 2022 email to the respondents, albeit that it was not sent to Mr Way's instructing solicitor until after her email of 16 August 2022, because the claimant erroneously sent it to the wrong email address initially.

21. Having found that there was no unreasonable conduct, rule 37(1)(b) is not engaged. I go on to consider Mr Way's other submissions for the sake of completeness and to address his application made under rule 37(1) (e).

22. First, on the issue of whether a fair trial is possible, I accept that the hearing cannot take place in February 2023 as there has been little or no compliance with the case management orders. ***Emuemukoro*** paragraph 18 is distinguishable because it refers to applications made *"at the outset of a trial"* which is not the case here. Whilst I accept that the hearing cannot take place in the allocated trial window, I do not find that rule 37(1)(e) is engaged. I note that ordinarily cases are struck out under this rule in more extreme cases, often when a party has become unwell and there is no prognosis for recovery (for example ***Riley v Crown Prosecution Service*** [2013] IRLR 966). In support of this conclusion, I also rely on ***Emuemukoro*** paragraph 20 which draws a distinction between rules 37(1)(b) and (e) and gives examples for the latter such as *"undue delay or failure to prosecute the claim over a very substantial length of time"*. It is not uncommon for the parties to have failed to prepare for the trial such that is not able to be heard in the allocated listing. This is what occurred in the present case. The Tribunal does not ordinarily describe this as meaning that a fair hearing is no longer possible.

23. Second, on the issue of proportionality. Even if I am wrong on the above, strike out would not be a proportionate response because the reason why the case is not ready for trial in February 2023 is due to fault on all sides. Specifically, I find that:

a. The respondents were focused on striking out the claim rather than obtaining the further information required from the claimant to understand the claims. If the respondents felt that the further information was deficient, as they have submitted, in accordance with the cooperation envisaged by the overriding objective, they should have requested further information from the claimant directly or asked the Tribunal to list a further case management preliminary hearing. This did not happen. The matter was perhaps complicated by the issuing of a strike out warning, the subsequent correspondence from the Tribunal of 11 August 2022 (which did not specify a date for compliance and the consequences of non-compliance were a little unclear), and the confusion about whether the claimant had complied with this order by sending the respondents the 2 August 2022 email. The 11 August 2022 correspondence from the Tribunal stated" "*…the claimant must send a copy of his email correspondence dated 02 August 2022 to the respondents by return and must advise the Tribunal in writing that he has done so. If the*

claimant fails to do so, no further action will be taken by the Tribunal in respect of the content of the email dated 02 August 2022." I can understand why, when these matters are read together, the respondents felt they had potential grounds to strike out the claim. But, by focusing on this, rather than case management of the claim, they too are responsible for the fact that the case is not ready for trial.

b. The strike out application was made on 23 August 2022 but was not listed for hearing until 9 January 2023. That delay, coupled with the fact that no case preparation took place in the interim period, meant that the case cannot be ready for trial in February 2023.

24. The claims against the second respondent are out of time. The issue for the Tribunal will be whether it is just and equitable to extend time. I have not had any evidence from the claimant on this issue. There was no case management order from the Tribunal requesting this from him. This issue should be determined after hearing such evidence and the claimant must have prior notification of his requirement to adduce such evidence. This could be at the final hearing or, potentially, at a preliminary hearing.

Deposit order application

25. The claimant says that there was a continuing course of conduct in respect of his claims against the first, fourth and fifth respondents. I do not find that the claimant has little reasonable prospect of establishing a continuing course of conduct, because:

    a. It is common ground that the dismissal is in time. There is therefore at least one potentially in time act.

    b. The flavour of the allegations is similar, namely an alleged failure by the respondents to take the claimant's complaints seriously.

26. If the claimant does not establish a continuing course of conduct, the issue will be whether it is just and equitable to extend time. I do not find that the claimant has little reasonable prospect of success on this issue. Paragraph 24 above is repeated.

27. The respondents submit that it is relevant to consider the claimant's failure to comply with case management orders. However, I have not found that there was a serious or deliberate failure to comply with orders.

28. The respondents submit that the constructive unfair dismissal claim has little reasonable prospect of success as the claimant has not explained the alleged breach of contract, or why this alleged breach is repudiatory. I find that submission puts too high a standard on the claimant who is a litigant in person. In his claim form the claimant says that he was subject to race discrimination and that this was not taken seriously by the first respondent, and that this made him unwell. He says in his further information dated 12 August 2022 that this was a *"blatant disregard of correct procedure"* and he

had no choice but to resign. I find that the claimant has, in simple lay language, thereby set out the basis of a constructive unfair dismissal claim. It will be a matter for the final hearing whether the claimant succeeds in this claim. I cannot determine the merits of the claim without hearing the evidence, which would not be appropriate for the purposes of a deposit order application.

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Employment Judge Gordon Walker

Date 12 January 2023

JUDGMENT SENT TO THE PARTIES ON

.12/01/2023

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