EMPLOYMENT TRIBUNALS

Claimant: **Miss A Collins**

Respondent: **MM! The Party Limited**

Heard at: **London South via CVP** **On:** **15 December 2022**

Before: **Employment Judge Beckett**

Representation

Claimant: In person
Respondents: Miss I Baylis (counsel)

JUDGMENT

1. The claim of unfair dismissal is struck out.

REASONS

2. The claimant was employed by the respondent as a company manager from 5 December 2021 to 24 February 2022.
3. The claimant brought a claim on 19 May 21 for unfair dismissal.
4. A strikeout notice was issued by the tribunal on 17 June 2022 on the basis that the claim was for unfair dismissal and the claimant did not have the required continuity of service, namely two years.
5. The claimant subsequently stated that she had not classified her case as one of unfair dismissal, and on 7 October 2022 she set out a claim of breach of contract.
6. The respondent applied to strike out the claim on the basis that the tribunal had no jurisdiction to hear the claim of unfair dismissal and that the original claim did not include a claim for breach of contract. They further submitted that any

application to amend would be resisted on the basis that it was a new head of claim and out of time.

7. The respondent also argued that the breach of contract claim was misconceived and had no reasonable prospect of success.

8. At the hearing I had submissions from both parties.

The hearing

9. The hearing was listed for 2 hours on 15 December 2022 day. The hearing was conducted over CVP (video hearing).

10. Counsel for the respondent outlined her submissions in brief at the outset of the hearing. She stated that it was an obvious case to be struck out as set out in her skeleton argument. It was a case that was pleaded as unfair dismissal.

11. If the tribunal were to find that it was a breach of contract claim or allow an amendment to a breach of contract claim, again they said it was submitted that it is a clear case to be struck out as there was no reasonable prospect of success.

12. The respondent submitted that the claimant would have a cause of action by way of a wrongful dismissal claim. The result of a successful wrongful dismissal claim would be that the claimant would only be entitled to the notice pay that she would have been given had the contract been terminated in compliance with the contract. In the case of this claimant the notice was not less than two weeks. The respondent in fact paid the claimant 8 weeks' notice.

13. Miss Collins gave evidence on oath. She stated that she had in fact ticked the box for unfair dismissal when completing her claim. She stated that at the time that box appeared to be the most relevant box on the form and so that she could make a claim in time she ticked that and then attached documents.

14. When asked what she would tick now, she said not the same box given the clear confusion that this had caused, but added that she could not see that box to tick that was relevant to her and she did not know as she had not had a legal background.

15. She stated that at the time her judgement was that the unfair dismissal box was the most relevant. She then stated that now she would probably tick the box stating another type of claim.

16. The claimant was asked questions by counsel for the respondent. She confirmed that she had read the form thoroughly before she ticked the box and she felt that unfair dismissal was the most relevant one to choose.

17. The claimant stated that when she received the initial correspondence relating to a strikeout, and had responded, she formed the impression that an appeal of sorts had been upheld and that the tribunal had accepted that it was a not a claim for unfair dismissal and that she could move forward with the claim.

18. She stated that she was aware of legal restraints that are placed on employers and knew that unfair dismissal was not what she wanted to claim and that she had been quick to clarify that when she received that correspondence from the tribunal. Although she stated that part of her role as a production coordinator had been the drafting of contracts, after further questioning it was apparent that she had not been involved of legal contracts, but had in fact been adding a name, position and salary to contracts that had already been drafted.

19. The claimant was asked about the timing of her claim and accepted that the first time she mentioned a breach of contract was in a letter on 7 October 2022. However, within the bundles of documents provided by the claimant (at item C, page 7) there was a letter dated 24 June 2022 stating that the claim was wrongful dismissal. There was then a further letter dated 7 October 2022 where the term breach of contract was used (page 10 of the attachments).

20. By way of further submission, the claimant stated that the contract she has signed was a fixed term contract which would continue to run until Mama Mia The Party! closed. She stated therefore that the contract had not been terminated. When asked whether she was therefore saying that she was still under contract, the claim it said that she was not but added that the dismissal was not in accordance with the contract.

21. The claimant added that she was required to give two weeks' notice if she wanted to leave, but that there was nothing in the contract as to any notice that they respondent would need to leave. She therefore submitted that as a fixed term contract had been terminated without any substantial reason she ought to be entitled to compensation. She added that she was struggling to see why that argument was not valid.

22. During the course of the hearing, it was clear that the claimant was upset and at times stated that she was not able to find particular papers to support her case. At the end of the hearing, I asked both parties if they would wish to send in further written submissions.

23. The respondent's position was clear; they wanted the decision to be made as soon as possible as in the submission it was a "clear" case of strike out. The claimant however did wish to avail herself of an opportunity to provide further submissions.

24. I was sent those further submissions on 11 January 2023. This is the first opportunity that I have had to consider those documents.

The law

25. Rule 2 of the Employment Tribunal Rules of Procedures 2013 sets out the following:

(2) Overriding objective

The overriding objective of these Rules is to enable Employment 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.

26. 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.

27. Employment Tribunals must deal with cases fairly and justly. This applies to all cases not just the Claimant's case. The impact on other cases must be considered when exercising any power given under the rules.

Striking out claims

28. Rule 37 of Sch 1 of the Employment Tribunal Constitution (Rules and Procedure) Regulations 2013 provides:

"Striking out

37.—

(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).

(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.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in r 21 above."

*29.*In *Malik v Birmingham City Council* UKEAT/0027/19, Choudhury J summarised the law on strike out; *"It is well-established that striking out a claim of discrimination is considered to be a Draconian step which is only to be taken in the clearest of cases".*

30.The EAT gave recent guidance regarding the power to strike out claims in *Cox v Adecco & Others* UKEAT/0339/19. Steps must be taken to identify claims and issues before considering a strike out or deposit order. With a litigant in person this requires more than just requiring a claimant at a preliminary hearing to say what the claims and issues are and requires reading the pleadings and core documents that set out the claimant's case.

31.The EAT considered striking out for failing to comply with directions in the case of *Weir Valves & Controls (UK) Ltd v Armitage* [2004] ICR 371. When faced with disobedience to an order, tribunal should consider whether striking out awesome lesson remedy was an appropriate response. The guiding consideration should be the overriding objective which requires justice to be done to both parties consideration must be given to the magnitude of the default, whether the default was responsibility of the solicitor or party, what disruption, unfairness or prejudice had been caused and whether a fair hearing was still possible.

32. *Blockbuster Entertainment Limited v James [2006] EWCA Civ 684* was also a case where the claimant had not complied with procedural orders made by the tribunal. The power to strike out was described as a Draconic power not be readily exercised. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of applied 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 as a proportionate response. At paragraph 19, Lord Justice Sedley held "the time to deal with persistent or deliberate failures to comply with rules or orders designed to secure a fair and orderly hearing is when they have reached the point of no return."

33.In *Abegaze v. Shrewsbury College of Arts & Technology [*2010] IRLR 238 the Court of Appeal considered a strike out under the former provisions in the 2004 Rules (under 18 (7) (b) where it is no longer possible to have a fair hearing). The relevant sections are as follows (per Lord Justice Elias):

"The strike out for failing actively to pursue the case raises some different considerations. In Evans v Metropolitan Police Commissioner [1992] IRLR 570 the Court of Appeal held that the general approach should be akin to that which the House of Lords in Birkett v James [1978] AC 297 considered was appropriate when looking at the question whether at common law a case should be struck out for want of prosecution. (The position in civil actions has altered since the advent of the Civil Procedure Rules). That requires that there should either be intentional or contumelious default, or inordinate and inexcusable delay such that there is a substantial risk that it would not be possible to have a fair trial of the issues, or there would be substantial prejudice to the respondents" [at paragraph 17].

34. The Tribunal must engage on a proper analysis of why a fair trial is no longer possible and ensure there is a factual basis for such a conclusion.

35. The Employment Appeal Tribunal recently considered the power to strike out under Rule 37 in *Emuemukoro v Croma Vigilant (Scotland) Ltd and another* UKEAT/0014/20. In this case the Tribunal had struck out the response on the first day of a five day hearing on the basis that the Respondent's failures to comply with the case management orders meant it was impossible for the trial to proceed within the five day window.

36. Choudhury J reviewed the authorities and rejected the proposition that the power to strike out can only be triggered where a fair trial is rendered impossible in an absolute sense. (This case was about a strike out under Rule 37 (1) (b)). The factors relevant to a fair trial (set out by the Court of Appeal in Arrow Nominees) include the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court.

Conclusions and Reasons

37. I have considered all the evidence and submissions in detail. It is clear that the claimant initially made a claim for unfair dismissal. However, she was then advised that such a claim could not be pursued in light of her length of employment.

38. To amend her claim, she would have needed to make a written application with details as to why the claim should be amended, and an explanation for any delay.

39. I have considered the authorities relating to applications to amend, as set out in the skeleton argument for the respondent. I have also considered the more recent case of *A Choudry v Cerberus Security and Monitoring Services Limited* [2022] EAT 172.

40. The amendment sought would in fact be a new claim. Such a claim is substantially out of time.

41. I have to balance the injustice and/ or hardship of allowing or refusing the application to amend. To refuse it would bring an end to any claim. However, were I to allow it, the claimant would then be in a position where she could only claim for notice pay. The respondent has already paid the claimant 8 weeks' pay. Her notice period was two weeks. The respondent has already spent significant sums defending this claim.

42. I have also considered the finite resources of the Tribunals, There is no reasonable prospect of success in respect of such a claim. I therefore do not allow the amendment.

43. The claim of unfair dismissal is therefore struck out, as the claimant did not work for the respondent for the necessary period of time.

.....
Employment Judge Beckett
London South ET
Dated: 6 February 2023

Notes:

Reasons for the Judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to Employment Tribunal Judgments

All judgments and written reasons for the judgments are published online shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case. They can be found at: www.gov.uk/employment-tribunal-decisions.