EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MS C CREED	**AND**	**MS ELKE SMALL (R1)** **BRISTOL CITY COUNCIL (R2)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 18TH MARCH 2024

EMPLOYMENT JUDGE MR P CADNEY (SITTING ALONE) **MEMBERS: MS L SIMMONDS, MS S MAIDMENT**

APPEARANCES:-

FOR THE CLAIMANT:- **NO ATTENDANCE**

FOR THE RESPONDENT:- **MR A SMALL (COUNSEL)**

JUDGMENT

The judgment of the tribunal is that:-

1. The claimant's claims are struck out pursuant to r 37 (1) (b) and (d) (Employment Tribunals (Constitution and Rules of Procedure 2013);

and/or alternatively

2. The claims are dismissed pursuant to Rule 47 (Employment Tribunals (Constitution and Rules of Procedure 2013)

3. Directions in respect of the respondent's costs application are given below.

Reasons

1. This claim was listed for final hearing for five days starting today. The claimant has not attended in circumstances set out below.

2. The respondent has made a strike out application dated 4th September 2023 which has not yet been determined. It had ready been directed that that application would be determined as a preliminary issue at his hearing, and we have heard and determined the application.

Strike Out Application

3. This case has a lengthy procedural history. The two claims were issued in November and December 2021. On 28th September 2022 EJ Hughes heard a case management hearing and gave directions including for the exchange of witness statements on 10th February 2023. A further TCMPH heard by EJ Gray on 30th January 2023 extended that to 17th March 2023. A preliminary hearing was heard by EJ Leverton on 15th June 2023, and she extended time to 22nd June 2023. This was complied with by the respondents who make the point that the claimant has had all their witness statements since June 2023. The claimant did not comply with that order.

4. The final case management hearing was heard by EJ Roper on 3rd August 2023. He directed that the claimant serve her witness statement, and other documents relating to the issue of disability, within 14 days of the order being promulgated. Moreover the order contained (para 2) a strike out warning, that the EJ was considering striking out the claim if the claimant did not comply. The claimant did not and has still not complied.

5. On 13th March I directed that the claimant serve her witness statement immediately, and notified her that whether she had or had not done so would be taken into account in determining the strikeout application. Put simply even compliance at the last minute might mean that a fair trial was still possible (see below) and might result in the application being dismissed. However the claimant has not a supplied her witness statement and not attended to object to the application.

6. Claimant's Non Attendance - The claimant had given no indication that she would not attend the hearing until she sent an email at 08.54 18th March 2024 (this morning), approximately an hour before the hearing was due to commence. The reasons she gave for her non-attendance were in summary:

i) Her witness could not attend as BCC (R2) were threatening their jobs – The respondent denies this and there is no evidence before us in support of this assertion.

ii) Trying to change a witness statement two years after it was written – The respondent contends that this relates to correcting an error in a witness statement and that it would always have been open to the claimant to have cross examined about it.

iii) Mrs Fryer (R2s solicitor) has not submitted a witness statement in relation to the claimants allegations of fraud - As has been pointed out to the claimant it is up to each party who they call as witnesses, and the allegations underpinning these are issues are dealt with in the respondent's witness statements, and had she attended, she would have been as able to cross examine the witnesses.

iv) She is homeless and "therefore cannot attend" – The respondent stated that it could not comment on the assertion that the claimant is homeless, but does not accept that it is either the genuine or a valid reason for non-attendance for the reasons set out below.

v) She goes on to state "*I will pursue this through other means, media and suing Elke Small directly".*

7. The respondent has supplied copies of a website of Apollo Health Therapy, which it asserts is a business name of the claimant. At 8.00 am on Friday 15th March 2024 (the Friday before the hearing) she posted that it was re-opening "*with new locations and a deposit required.*" , and in response to a query from a potential customer replied on Saturday 16th March that she had "..*Mon/Tuesday afternoon / evening left this week*". The respondent submits that if the claimant intended to attend a five day hearing in the tribunal she necessarily did not have any opportunity on Monday or Tuesday afternoon. The only conclusions that can be drawn are that the claimant is able to travel to different locations for work, which undermines the contention that she could not attend the tribunal, and that she had already decided not to attend in any event. Moreover the final sentence indicates that the claims are no longer actively being pursued in or through the tribunal.

Legal Principles

8. The respondent asserts that the claims should be struck out on the basis of rules 37 (1) (b) and 37(1)(d) when read in conjunction with the overriding objective:.

Rule 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—*

(1)(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*".

(1)(d) – *"that it has not been actively pursued.*

9. The principles against which a strike out application should be considered are well known. In respect of applications under rule 37(1)(b), 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 — *Blockbuster Entertainment Ltd v James 2006 IRLR 630, CA*. (See paras 38-40 of the judgment in *Smith v Tesco* below).

10. In respect of the test as to whether a fair trial is still possible, which is an issue relevant to determining the application on either ground, there are two specifically authorities. The first is *Emuemukuro v Croma Vigilant [2021] UKEAT,* and specifically para 19 of the judgment of Choudhury P. The second is *Smith v Tesco Stores [2023] EAT 11*.

11. As the passage from Choudhury P's judgment is set out in the judgment of HHJ Tayler in *Smith v Tesco* I have only set out the relevant parts of that judgment (paras 33 -45) below (para 35 is omitted as it sets out rule 37, the relevant subsections of which for the purposes today's hearing are set out above) :

"33 It is always worth going back to the wording of the overriding objective. Rule 2 of the ET Rules provides:

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.

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.

34. It is important to remember that parties are not merely requested to assist the employment tribunal in furthering the overriding objective, they are required to do so.

(35-See above.)

36. The EAT and Court of Appeal have repeatedly emphasised the great care that should be taken before striking out a claim and that strike out of the whole claim is inappropriate if there is some proportionate sanction that may, for example, limit the claim or strike out only those claims that are misconceived or cannot be tried fairly.

37. Anxious consideration is required before an entire claim is struck out on the grounds that the manner in which the proceedings have been conducted by or on behalf of the claimant has been scandalous, unreasonable or vexatious and/or that it is no longer possible to have a fair hearing.

38. In Bolch Burton J considered the approach to be adopted in considering whether it is appropriate to strike out a claim because of scandalous, unreasonable or vexatious behaviour and concluded that the employment tribunal should ask itself: first, whether there has been scandalous, unreasonable or vexatious conduct of the proceedings; if so, second (save in very limited circumstances where there has been wilful, deliberate or contumelious disobedience of an order of the employment tribunal), whether a fair trial is no longer possible; if so, third, whether strike out would be a proportionate response to the conduct in question.

39. This approach was adopted by the Court of Appeal in Blockbuster Entertainment Ltd v James, [2006] EWCA Civ 684, [2006] IRLR630, where Sedley LJ stated: 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.

40. In considering proportionality the Court of Appeal noted:

18. The first object of any system of justice is to get triable cases tried. There can be no doubt that among the allegations made by Mr James are things which, if true, merit concern and adjudication. There can be no doubt, either, that Mr James has been difficult, querulous and

uncooperative in many respects. Some of this may be attributable to the heavy artillery that has been deployed against him, though I hope that for the future he will be able to show the moderation and respect for others which he displayed in his oral submissions to this court. But the courts and tribunals of this country are open to the difficult as well as to the compliant, so long as they do not conduct their case unreasonably.

41. In Arrow Nominees Inc v Blackledge [2000] 2 BCLC 167 it was held:

55. Further, in this context, a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court

42. Choudhury J (President) made a very important point about what constitutes a fair trial in Emuemukoro v Croma Vigilant (Scotland) Ltd [2022] ICR 327:

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.

43. The backdrop to the conclusion that the claimant had acted in a manner that was scandalous, unreasonable or vexatious so that a fair trial was no longer possible, were the extensive attempts that had been taken to clarify the issues in the claim. In his Notice of Appeal the claimant referred to Cox v Adecco Group UK & Ireland and others [2021] ICR 1307 in which, in the context of an application for strike out of a claim on the basis that it has no reasonable prospect of success, I considered the particular care the employment tribunal, and represented respondents, should take when dealing with litigants in person:

30 There has to be a reasonable attempt at identifying the claims and the issues before considering strike out or making a deposit order. In some cases, a proper analysis of the pleadings, and any core documents in which the claimant seeks to identify the claims, may show that there really is no claim, and there are no issues to be identified; but more often there will be a claim if one reads the documents carefully, even if it might require an amendment. Strike out is not a way of avoiding rolling up one's sleeves and identifying, in reasonable detail, the claims and issues; doing so is a prerequisite of considering whether the claim has reasonable prospects of success. …

31 Respondents seeking strike out should not see it as a way of avoiding having to get to grips with the claim. They need to assist the employment tribunal in identifying what, on a fair reading of the pleadings and other key documents in which the claimant sets out the case, the claims and issues are. Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents, and key passages of the documents, in which the claim appears to be set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer, and take particular care if a litigant in person has applied the wrong legal label to a factual claim that, if properly pleaded, would be arguable. In applying for strike out, it is as well to take care in what you wish for, as you may get it, but then find that an appeal is being resisted with a losing hand.

44. That said, while stressing the importance of understanding the difficulties faced by litigants in person, and stressing the paramount importance of seeking to establish the core of the claim and bring it on for a hearing, I also noted:

32 This does not mean that litigants in person have no responsibilities. So far as they can, they should seek to explain their claims clearly even though they may not know the correct legal terms. They should focus on their core claims rather than trying to argue every conceivable point. The more prolix and convoluted the claim is, the less a litigant in person can criticise an employment tribunal for failing to get to grips with all the possible claims and issues. Litigants in person should appreciate that, usually, when a tribunal requires additional information it is with the aim of clarifying, and where possible simplifying, the claim, so that the focus is on the core contentions. The overriding objective also applies to litigants in person, who should do all they can to help the employment tribunal clarify the claim. The employment tribunal can only be expected to take reasonable steps to identify the claims and issues.

Conclusions

45. This claim was not struck out because the failed attempts at identifying the issues meant that the claims had no reasonable prospects of success. Nor was the claim struck out because the failure of the claimant to cooperate in identifying the issues meant that there could not theoretically be a fair hearing of any of the claims because it would not be possible for the tribunal to understand the issues. The claim for unfair dismissal could have proceeded without further particularisation and it might theoretically have been possible to hold a trial of at least some of the discrimination claims on the basis of the list of issues produced by EJ Flood. The reliance placed by EJ Cookson on the two matters raised in the grounds of appeal, as clarified by HHJ Auerbach, the fact that the claimant had not engaged with or agreed the latest draft list of issues and that he had made a fresh application to amend, was not that they meant that there could not theoretically be a fair trial of any of the claims because none of the issues in any of the claims were sufficiently clarified; but that there could not be a fair trial because the claimant refused to cooperate with the respondent and employment tribunal. The great difficulty in identifying the issues was part of a course of conduct in which the claimant had shown that he was "not prepared to cooperate with the tribunal process". EJ Flood concluded that the course of conduct showed that the claimant would not abide by his obligation to assist in achieving the overriding objective and that his disruptive conduct exhibited at the hearing before her was likely to be repeated. EJ Flood found that the claimant was guilty of a "continued refusal to cooperate". The claimant would not work towards a trial that was fair in the sense of avoiding the undue expenditure of time and money, taking into account the demands of other litigants and the finite resources of the employment tribunal. One listing of the full hearing had already been lost and no progress was being made in preparing for the second hearing listed. Preparation was moving backwards, not forwards. There was every reason to believe that the lack of cooperation would persist.

12. The following principles derived from the authorities as summarised in *Smith v Tesco*:

i) The question of whether a fair hearing is still possible is not to be considered in isolation or in absolute terms;

ii) Fairness in this context includes the question of whether to proceed to trial involves the undue expenditure of time and money;

iii) The tribunal is entitled to analyse the claimant's past behaviour and ask whether there is any reasonable prospect going forward of the claimant complying with case management orders and or co-operating in accordance with the overriding objective.

Conclusions

13. Rule 37 (1) (b) – In our judgment the failure to provide a witness statement in the circumstances described above, and with the repeated opportunities that have been given to the claimant is clearly unreasonable conduct of the proceedings. Particularly in a discrimination case, where the burden is on the claimant to adduce evidence from which the tribunal could infer discrimination in the absence of an explanation (stage1 of the Igen v Wong test) the evidence in support of the allegations as set out in the witness statement is of critical importance. Secondly case management directions are given, at least in part, to allow the parties properly to prepare for the hearing, which is an essential part of a fair hearing. The absence of a witness statement from the claimant means that the respondent does not know the evidence it has to meet in support of the allegations and cannot properly prepare for the hearing, at least in terms of cross examination of the claimant. The failure to provide a witness statement does, therefore, significantly affect the ability of the tribunal to hold a fair hearing.

14. In respect of the next question, whether a fair hearing is still possible, it is theoretically open to the tribunal to keep on giving the claimant opportunities to comply and meeting any failure by mean of costs orders. However for the reasons set out above that is not the test we are required to apply. In our judgement there is a public interest in litigation being conducted expeditiously and promptly and the respondent is entitled to have allegations brought against them resolved, and not left hanging over them unnecessarily and unreasonably. In addition, given the claimant's failure to produce a witness statement thus far, even in the knowledge that EJ Roper was considering striking out the claim, we have little confidence that she would comply if given a further opportunity.

15. It follows that it is proportionate in those circumstances to strike out the claims.

16. Rule 37(1)(d) - The respondent also asserts that the claim is self- evidently not being actively pursued where the claimant has chosen not to attend, but make herself available for other work. In addition she appears to be asserting that she has chosen to pursue other claims in other forums, which in and of itself indicates that she is no longer pursuing these claims.

17. In our judgment this is correct and the claim is also struck out on this ground.

18. Rule 47 – Rule 47 gives us the discretion to dismiss the claim on the failure by the claimant to attend. Given her failure to attend in the circumstances described above the claims are also dismissed pursuant to this rule.

Costs

19. Following the dismissal of the claims the respondent orally applied for an order for costs limited to counsel's brief fee for the final hearing of £2,500. That has been

supplemented by a written application received at 13.21 today which has been copied to the claimant.

20. The claimant is directed to supply in writing to the respondent and tribunal **within 14 days of the date promulgation of this judgment:**

i) Any objection to the application for costs;

ii) Any information as to her means (income / savings / regular financial obligations / loans etc) which she would wish the tribunal to take into account in considering whether to make an order for costs;

iii) Whether she is content for the application to be determined on the papers or seeks an oral hearing.

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Employment Judge Cadney
Dated: 19th March 2024

Judgment sent to the parties on 3rd April 2024

For the Tribunal Office