EMPLOYMENT TRIBUNALS

Claimant: Ms J Cornelius
Respondent: London Borough of Haringey

Heard at: Watford **On:** 14, 15, 16 October 2024

Before: Employment Judge Dick
Mr L Hoey
Ms H Bharadia

Representation
Claimant: Did not appear
Respondent: Ms A Palmer (counsel)

JUDGMENT

1. The claimant's applications for strike-out of the response and for postponement of the 14 October hearing are refused.

2. All claims are dismissed under rule 47 as the claimant failed to attend or to be represented at the hearing.

REASONS

Key to references:

{x} – Page x of correspondence bundle

Introduction

1. This case was listed for a main hearing, to begin on 14 October 2024 with a six-day time estimate. The hearing was in fact concluded by 16 October. From the start of the claim and all the way through preparation for the main hearing the claimant was represented by her brother Mr Cornelius. Neither the claimant nor Mr Cornelius attended on 14, 15 or 16 October, although Mr Cornelius did communicate with the Tribunal by email up until the 15th. Mr Cornelius had informed the Tribunal some time ago that he and his sister were in Antigua, for reasons which we set out in more detail below.

2. Over the course of those days we dealt with three linked issues:

    a. The claimant's application to postpone the hearing.
    b. The claimant's application to strike out the case for the respondent.
    c. Whether, should we refuse the first two applications, we should proceed to hear the case in the claimant's absence or instead dismiss the case (under rule 47).

3. Before dealing directly with those issues it will help for us to set out a summary of what happened before and during the main hearing.

The claim and the preliminary hearing

4. The claim was presented on 10 April 2023 and concerned the claimant's dismissal, which was communicated to her on 24 November 2022. The case came before Employment Judge ("EJ") Dick for a preliminary hearing, which the claimant and Mr Cornelius did attend, on 22 September 2023, when the dates for the main hearing were set. A summary of the claim may be found from paragraph 42 of EJ Dick's orders following that hearing {63}. For the purposes of this judgment we need only say the following. The claim was for unfair dismissal, direct race discrimination and victimisation (and possibly also holiday pay). The discrimination and victimisation claims principally concerned events leading up to the dismissal and the dismissal itself. A recurring feature of the case was the claimant not attending investigatory meetings, hearings in connection with the respondent's disciplinary process and hearings in connection with the claimant's appeal against her dismissal. (In the latter case the claimant did attend but then declined to participate as the respondent would not allow her brother to represent her.) While the claimant would no doubt argue that there was good cause for her not attending these meetings/hearings, we note that in her claim form, particulars of claim and her statement given for the purposes of her internal appeal (see below) she does not deny that she did not attend. To give one example from the particulars of claim ({33}, para 100) the claimant says that she did not attend a hearing as it was "a scam" and "fake" – in other words she was dissatisfied with the process and therefore declined to engage in it. As will become clear, this in our judgment mirrors her approach to these proceedings.

5. At the 2023 hearing, EJ Dick made the usual case management orders, including for exchange of documents ("disclosure"), preparation of an agreed bundle, and exchange of witness statements. There was also an order for preparation of an amended response in light of the issues having been clarified. As is clear from EJ Dick's orders, at the time of the preliminary hearing it was contemplated that the respondent and her brother would be travelling to the Caribbean shortly after the hearing, but would be back in the UK by the time of the main hearing. In preparation for the 2023 hearing the claimant had completed a case management agenda {112} which included, so far as is relevant, the following:

> **15 October 2023 to 15 Feb 2024**. It is imperative that claimant and her brother go overseas without much further delay to settle arrangements for the care (respite and otherwise), and the financial affairs and the property affairs of their 95+ year old father. He lives alone, and cannot now properly handle these issues himself.
>
> It is understood that with current backlogs it is unlikely that a Tribunal hearing on the merits would take place within this timeframe anyway soon anyway.
>
> This should not affect preparation of records or preliminary matters either, which can be done electronically. The claimants documents and records are almost exclusively electronic.
>
> The Claimant's brother, currently her representative, can receive and make calls from and to the UK … The main issues for preparation would be connectivity for video conferencing (unlikely) and paper based transactions.

6. The claimant was therefore saying that she and her brother should be able to deal with case preparation electronically from the Caribbean, although clearly there is some suggestion that they might have difficulty participating in a video hearing. (EJ Dick had also drawn it to the parties' attention that, should they wish to call any witnesses from abroad, they would need the Tribunal's permission. In the event that was not a significant issue given that on 8 October 2024 EJ Wood granted permission for the claimant to give evidence remotely.)

Correspondence and preparation for the main hearing

7. We now go on to consider some of the correspondence exchanged between the parties. We should stress that we do not deal with every item, only those which were relevant to our decision.

8. On 6 December 2023 the respondent submitted an amended response. This was within 28 days of receipt of EJ Dick's orders, i.e. it was in accordance with those orders. The respondent had previously submitted a formal application to amend the response, which the Tribunal had explained by way of letter was unnecessary given EJ Dick's orders. On 20 October 2023, i.e. before the amended response was due, in an email Mr Cornelius referred to the respondent's application to amend as the respondent seeking to "plug shortcomings" in an "open-ended iterative way"; this, he said, was not "fair or transparent or legitimate". In the circumstances, we consider those comments to be unjustified.

9. On 12 February 2024 {169} Mr Cornelius emailed the respondent's solicitors requesting various documents by way of disclosure (this request was made in time, EJ Dick's order being that any such request should be made by 19 February). The respondent's solicitor, Ms Sarah Harnett, replied two weeks later to say that she was taking instructions on the request but noting that some of the documents requested were included on the list of documents disclosed

by the respondent. She said the documents were too large to send by email and so would be made available via a secure file sharing site. Mr Cornelius's reply concluded by saying "Finally, we have no interest in the use of your firm's bespoke software for these purposes." We consider this response to have been unreasonably obstructive. It also fundamentally misunderstood the use of a file sharing site, which would not involve the use of any bespoke software. Without waiting for a response Mr Cornelius emailed the Tribunal the same day (26 February) to apply for orders for disclosure of documents. Although the email lists three particular documents, it is clear that the claimant was in fact seeking documents which were referred to in those three documents (we infer that those three documents had already been disclosed). The email referred to an attachment which we understand was the 12 February email (see above). So it might have been possible for the Tribunal to have discerned what documents the claimant had sought on 12 February, though it would not have been clear whether some had been provided since, nor would if have been particularly clear why the claimant asserted that they passed the test for disclosure. Later on 26 February, Ms Harnett wrote back to Mr Cornelius setting out her position on the requests and explaining how the file sharing website worked. She offered to send the documents by hard copy instead should Mr Cornelius provide a preferred address for them to be sent to. We understand from the respondent that Mr Cornelius did not provide such an address. He certainly did not do so in an email of 27 February 2024 {279} in which he referred to the respondent's "attempt to variously obfuscate or manipulate or otherwise frustrate what is a straightforward matter". We consider these comments too to be unjustified.

10. On 19 March 2024 {188} Ms Harnett wrote to Mr Cornelius, replying to his disclosure request, enclosing some documents and offering to send by other means those which were too large to email. She included a specific point by point response, explaining why certain requests were not met, for example explaining that the requested document did not exist or that the request was not a valid disclosure request. Over the rest of March and April further emails were exchanged about disclosure and the draft bundle for the main hearing. On 8 April 2024 Ms Harnett requested that Mr Cornelius agree to extending the deadlines for preparation of the bundle. On 9 April 2024 {241} Mr Cornelius replied to refuse that request and, unreasonably in our view, accused Ms Harnett of seeking to conceal from the Tribunal a breach of the Tribunal's orders on disclosure of documents.

11. On 10 April 2024 {244} Ms Harnett made a written request to the Tribunal for a variation of the timetable. On 15 April 2024 {email at 249, application at 348} Mr Cornelius wrote to the Tribunal with what counsel for the respondent, fairly in our view, described as a long and discursive complaint about the respondent's conduct of the case. Mr Cornelius did agree to some of the extensions sought by the respondent. He also reiterated the application of 26 February, without specifying which documents he still sought or why. In an email of 17 April 2024, Ms Harnett referred to a recent email from Mr Cornelius in which he mentioned having access to documents which the respondent had made available on the file sharing website, despite him having previously indicated that he was unwilling or unable to access documents by that method.

12. On 18 April 2024 Ms Harnett wrote to Mr Cornelius enclosing a number of documents which she said had been located whilst her client had looked into the specific disclosure request and were disclosed in accordance with the ongoing duty of disclosure {253}. Unreasonably, in our view, Mr Cornelius's response was: "this is not continuing disclosure, it is the release by your client of previously withheld documents." {254}

13. On 3 May 2024 Ms Harnett wrote to the Tribunal to request an urgent case management hearing to deal with the outstanding preparation issues in the case {279}. On 8 May 2024 Mr Cornelius wrote to the Tribunal requesting that the response be struck out under rule 37 for "abuse of process". The essence of the complaint was that the respondent had misleadingly told the Tribunal there had not been an agreement on the bundle index, when, as Mr Cornelius saw it, it was the respondent who was at fault, having not disclosed basic items and having tried to pressure the claimant into accepting "draft listings" from which "huge rafts of the claimant's documents had been unilaterally excluded by the respondent". We observe that this somewhat overblown phrasing is simply another way of saying that the respondent made a suggestion and the claimant did not agree to it – in other words, just as the respondent had said, there had not been an agreement.

14. The first response of the Tribunal to the parties' requests came by way of letter on 28 May 2024 {287}. EJ Quill made orders amending the timetable in accordance with the claimant's request. Regarding disclosure, EJ Quill said:

> Each side appears to be asserting they have already replied to the other's request for specific documents. Therefore, no additional order will be made at present. It is up to the party who is dissatisfied with the answer to write to the Tribunal with a specific, clear and concise request for the Tribunal to order disclosure of documents not on the other side's disclosure list.
>
> Any such applications must be made by 18 June 2024.

15. On 30 May 2024 {289} Ms Harnett wrote to Mr Cornelius enclosing a further copy of the most recent draft bundle index which had been sent to him on 26 April 2024. Mr Cornelius did not reply to the respondent. Indeed, as counsel for the respondent pointed out, Mr Cornelius had by now stopped corresponding directly with the respondent, instead engaging with the respondent only via communications sent to the Tribunal.

16. On 5 June 2024 {294} Mr Cornelius wrote to the Tribunal again requesting that the response be struck out. He repeated his complaints about how the respondent had gone about attempting to agree the bundle and said that the respondent had failed to disclose a small number of unspecified "key documents". He referred to the email of 26 February 2024 as a "reduced and simplified disclosure request". For the reasons set out above we consider that it was no such thing. The 5 June email does refer specifically to documents setting out the terms of reference given to external investigators. It wrongly asserts that the "respondent did not deny that it possessed the requested

materials when asked to confirm". In fact, Ms Harnett's response of 19 March had said that in two cases the terms of reference were set out in other documents (which it is evident had been disclosed) and in the other case did not exist. The complaint goes on to say that the respondent has not disclosed other documents, which again are not specified. There are further complaints about the respondent's conduct in relation to bundle preparation which are either unjustified or unparticularised. Mr Cornelius also said: "Quite reasonably, the Claimant's confidence in the fairness and administration of the process have evaporated and the Claimant's ability to participate has been fundamentally compromised." The same day Ms Harnett wrote to the Tribunal to again request an urgent case management hearing {298}. In an email of 1 July 2024 {306} Mr Cornelius repeated some of the complaints made in the 5 June email and again asked for the response to be struck out. He also said that the claimant would not be ready for the main hearing because of the problems already set out. (EJ Dick had made an order that the parties must write to the Tribunal to say whether they were trial-ready and if not why not.) Ms Harnett had responded to EJ Dick's order in a similar way on 1 July 2024. On 4 July 2024 Mr Cornelius wrote to the Tribunal, unreasonably characterising Ms Harnett's email as oblique and evasive, taking what in our view was a pedantic point that Ms Harnett had said the *matter* (as opposed to the *respondent*) was not trial-ready.

17. On 23 August 2024 the Tribunal again wrote to the parties {317}. EJ Quill declined to list the matter for a case management hearing and declined to make any further orders beyond an order that the respondent must send a bundle to the claimant by 31 August 2024 and the parties must exchange statements by 14 September 2024 (exchange of statements had not happened since a bundle had yet to be agreed).

18. On 30 August 2024 {320} Mr Cornelius responded to the Tribunal to say the following:

> Prior to receipt of the Tribunal's letter the Claimant… had already left the UK on 7 August 2023, having been notified of a serious deterioration in both the health, and care regime, of her 96 year old father, who resides 4000 miles away, in the Caribbean (Antigua).
>
> The Claimant's brother and representative, …, left the UK on 22 August 2024 for the same reasons.
>
> Accordingly, at the time of writing the Claimant can make no further comment, or take any action, on the Tribunal's letter of 23 August 2024.
>
> [*Mr Cornelius then said that the claimant had always complied with the Tribunal's orders and suggested that the respondent had not.*]

19. On 27 August, 30 August, 12 September and 13 September Ms Harnett emailed Mr Cornelius, dealing with ongoing disclosure and the bundle and enquiring when he would be in a position to exchange witness statements. It appears Mr Cornelius did not respond to those emails. On 13 September Ms

Harnett wrote to the Tribunal requesting an extension of two weeks for the exchange of witness statements in light of the lack of a response from Mr Cornelius.

20. On 13 September 2024, after Ms Harnett's email of the same day, Mr Cornelius wrote to the Tribunal. He said:

> At the time of writing the Claimant and her representative are overseas and having to rely on mobile phones, emails and email attachments as we do not have access to the Claimant's file stores. The Claimant's letter to the Tribunal of 30 August 2024 refers.

21. That is all Mr Cornelius said about his and the claimant's whereabouts. There was nothing about his father's condition. We note the contradiction with the claimant's suggestion at the time of the preliminary hearing that the claimant would be able to prepare the case while overseas. Mr Cornelius's email made further complaints about the bundle provided by the respondent and referred to a statement prepared by the claimant, dated 18 May 2023, as part of her internal appeal (to the respondent's Members Appeal Panel) against her dismissal. (That appeal was not heard until after the claim was presented.) Mr Cornelius repeated or expanded upon his complaints about the respondent's conduct in relation to the bundle, saying that some material had been omitted when it should not have been and other material had been included when it should not have been. He concluded:

> Had the Tribunal addressed on a timely basis the Claimant's applications concerning the Respondent's repeated failures to comply with the Tribunal's orders and timetabled stages the hearing date might have been achievable. In all the circumstances, the Respondent's machinations in particular have rendered the Claimant's position unfair and her participation untenable.
> As previously requested, the Respondent should be struck out.

22. On 24 September 2024 the Tribunal wrote to the parties to say that EJ French had listed the case for a public preliminary hearing to decide whether the case could proceed to a final hearing, to deal with further directions and to consider the claimant's strike out application (if time permitted).

23. Mr Cornelius wrote back on 25 September{337}, saying that there was "not any prospect of a fair, final hearing proceeding on 14 October 2024". He repeated his complaints about disclosure in the bundle. He also said:

> The Claimant and her representative are 4000 miles away (i.e. 5 hours behind UK time) attending to matters concerning the deteriorating condition and care of their 96 year old father. The Claimant's correspondence of 30 August 2024 refers.

24. Mr Cornelius also asserted that if the respondent had complied with orders and if the Tribunal had attended to his [i.e. Mr Conelius's] "serious concerns", the claimant's "ability to participate in the 14 October 2024 would not have been fatally compromised as it is now. Enough is enough."

25. On 7 October 2024 the Tribunal wrote to the parties to say that EJ Quill directed that the preliminary hearing ordered by EJ French could still take place by video even if the claimant was overseas: “A hearing at 2 PM UK time would be at 9 AM for the claimant and that is not reasonable” (*sic* – clearly what was meant was “not unreasonable”). An option for the claimant to dial in could be provided if internet access was not fast enough for video.

26. On 8 October 2024{341} Mr Cornelius wrote back. He repeated what he had said in his 30 August email and added:

> On 17 September 2024 our father's medical physician confirmed to us that our father’s deterioration is because he is no longer of sound mind and has cancer. He is **dying**.

27. Mr Cornelius said nothing more about his or the claimant’s ability or willingness to attend the forthcoming hearing. He repeated some of his earlier complaints and also said:

> Indeed, as stated previously, during the course of these proceedings, the Respondent and their representatives bypassed the Claimant's representative and the Tribunal, and on two occasions at least wrote threatening letters to the Claimant directly.
>
> For all this the response ought to be struck out never mind anything else.

28. No further details were provided about the “threatening letters”. Mr Cornelius concluded:

> In all the circumstances, as previously notified months ago, enough is enough. Certainly it is not possible to proceed to a just and fair hearing on 14 October 2024 *or at all* [our emphasis].
>
> In all the circumstances, the Respondent's antics have unfairly prejudiced the Claimant's position and rendered her participation untenable.
> The response should have been struck out months ago.

29. As counsel for the respondent pointed out, the claimant had yet to make a formal application for postponement of the 8 October hearing, or indeed of the main hearing.

30. The preliminary hearing of 8 October 2024 was heard at 2 p.m. by EJ Wood. The claimant and Mr Cornelius did not attend. EJ Wood did not have time to deal with the strikeout application. He ordered that the parties were to exchange witness statements by 10 October 2024 and pointed out that the claimant might simply make a sworn statement adopting the contents of her particulars of claim and/or her statement of 23 May 2023. (We understand that no statement, either in the form referred to by EJ Wood or otherwise, was sent to the respondent.) EJ Wood ordered that the main hearing should be converted from an in-person hearing to a CVP (video) hearing and, as we have said, granted the claimant

permission to give evidence at that hearing by video from Antigua. The final order that EJ Wood made is as follows {346}:

> If the claimant wishes to make an application to adjourn the final hearing, then it must do so without delay, and not later than on the first day of the final hearing. The Tribunal notes that the claimant's father has been ill for some time and that he has a serious diagnosis. If such an application is made on grounds relating to her father's illness, then it will need to be supported by robust medical evidence which explains why the claimant and/or her representative are not able to attend a video hearing from Antigua due to her father's illness. If they have caring responsibilities, such medical evidence will have to explain why care cannot be carried out by others during the duration of the hearing.

31. EJ Wood's orders were sent to the parties on 10 October 2024. The following day, 11 October, the final working day before the main hearing, Mr Cornelius wrote again to the Tribunal. Mr Cornelius referred to a statement that the respondent had sent him the day before, written by Ms Harnett, relating to his application to strike out the response. He pointed out (rightly) that the Tribunal had not ordered that statements be prepared for the purposes of the strike out application. (Equally, we observe, there was nothing to stop the respondent from producing such a statement.) Mr Cornelius said that he would be happy to prepare his own statement in response, though no such statement appears to have been sent to the Tribunal or to the respondent. Mr Cornelius continued:

> Suffice to say, an adjournment is therefore applied for via this email. On a practical level, the Claimant's representative is abroad until 29 October 2024.
>
> Should no adjournment be granted the Claimant will be obliged to address the matter higher up anyway such is the depth of her concern over the issues and the way these have been administered.
> …
> However, the Claimant and her representative are not prepared for matters to continue to be subjected to proceeding in this one-sided manner, perhaps unwittingly, without higher challenge or review.

32. That last paragraph, taken together with the text we have italicised in paragraph 28 above, appears to us to be an indication that (regardless of their father's condition) the claimant and Mr Cornelius intended to play no further part in the proceedings, at least at first instance. The email makes no further mention of the willingness or ability of Mr Cornelius or the claimant to participate in the main hearing. Mr Cornelius referred to a "last straw" of the respondent unilaterally producing a late and un-agreed 2000 page bundle for which no agreement was sought. In fact, we find, it is evident from what we say above that Mr Cornelius's agreement had been sought and the bundle was only so large as he had not responded and the respondent had thought it better to include more rather than less. Mr Cornelius made further complaints about disclosure, mentioned the claimant's sworn statement of 18 May 2023 and

complained about the draft "cast list" that the respondent had prepared, without providing his own alternative.

The main hearing

33. On the morning of the first day of the final hearing all the respondent's witnesses were in attendance on the video link and the respondent was ready to start the case. As we have said, the claimant and Mr Cornelius did not attend. Recognising that it would have been 5 a.m. in Antigua, we adjourned the case until 2.30 p.m. and asked our clerk to contact the claimant by telephone (at 2 p.m.) and by email. We understand that our clerk's attempt to contact the claimant by telephone was unsuccessful. By the time we sat in the afternoon there had been no response to our clerk's email, but it had only just been sent. After hearing briefly from the respondent's counsel, we decided to give the claimant overnight to get in contact. We spent most of the morning and afternoon reading the respondent's witness statements and parts of the hearing and correspondence bundles which the respondent had prepared. Shortly after 2.30 p.m. (our time) we had the following order sent to the parties:

> At 10 am British Summer Time "BST" tomorrow the Tribunal will consider the claimant's application (dated 11 October) to postpone the final hearing in this case. If the Tribunal decides not to grant the postponement application and the claimant does not attend tomorrow, the Tribunal may decide whether to dismiss the case or to hear the case in the claimant's absence. The Tribunal may also consider the claimant's application to strike out the respondent's case.
>
> By 9 a.m. BST tomorrow, the claimant must provide the following information in writing:
>
> (i) Any medical evidence on which she wishes to rely (as explained in the orders of EJ Wood of 8 October, including on diagnosis and prognosis).
>
> (ii) An indication of whether she or her representative intend to participate in the hearing tomorrow. If not, why not? If so, when will she be available bearing in mind that the Tribunal usually sits between 10 a.m. and 4 p.m. BST.
>
> (iii) Reasons why, if the claimant and her representative have caring responsibilities, those responsibilities cannot be met by others during the course of the final hearing as currently listed (i.e. from 15 to 21 October).
>
> (iv) Any submissions she might wish to make about the Tribunal proceeding in her absence or dismissing the case.

34. The following day, before we sat again at 10 a.m. we were provided with Mr Cornelius's emailed response to the above orders. Mr Cornelius's answer, such as it was, to points (i) and (ii) was:

> In answer to the above points, the late and 'continual' service of such a voluminous load of jumbled paperwork by the Respondent- e.g. 2000 pages of unagreed bundle, not even in chronological order, as was ordered plus

late served witness statements- is not navigable, or reasonable, or just, in the reduced timeframe imposed by the Tribunal. As such the Claimant and her representative will not be attending.

As stated previously, the Claimant made a point of complying with the preparatory case management orders to time and made strenuous efforts to do so. The Respondent did not and in effect has been rewarded by the Tribunal's recent orders for not doing so, while the Claimant has been penalised.

35. And to points (iii) and (iv):

The situation was summarized for the Tribunal, extensively and definitively, in the Claimant's letter of 14 September 2024 and attachments. As stated before, the details of this correspondence are expressly referred to and taken as read.

The Claimant's correspondence of 10 October 2024, 25 September 2024, 30 August 2024 and 4 July 2024 1 July, also refer.

On these points therefore the Claimant offers no further comment other than those outlined above and in the Claimant's emails and applications to the Tribunal other than to note that to proceed in these circumstances would be unreasonable and give rise to higher review of the administration of this matter at minimum. The Claimant considers the medical advice received would be pertinent at that stage.

[*Mr Cornelius then set out further complaints about disclosure, preparation of the bundle and witness statements. He complained of the respondent's breaches of orders and what he described as the Tribunal's last-minute actions and orders. So far as the claimant's application to strike out the respondent's case was concerned, Mr Cornelius referred the Tribunal to his previous written submissions*.]

36. Noting the reference to a letter and attachments of 14 September, we asked our clerk to check the Tribunal systems for an email from that date. There was no such email, but it seemed clear to us that the Mr Cornelius must be referring to the email of 13 September. We had a copy of that email, but not the attachments. We asked our clerk to find the email and forward it to us. It was clear that none of the attachments said anything about the reasons for Mr Cornelius and the claimant being abroad.

37. We have, we think, set out above all of the information that Mr Cornelius and the claimant provided to the Tribunal about their reasons for being abroad at the time of the main hearing.

38. In light of the 15 October email and the other information available to us we concluded that the claimant had made clear, through Mr Cornelius, that she did not intend to participate in the main hearing. We therefore heard submissions in the claimant's absence from Ms Palmer for the respondent on the three

points that we set out in paragraph 2 above. Ms Palmer opposed the applications for postponement and for strike out and, after taking instructions, was neutral on whether, should we refuse both those applications, we should hear the case in the claimant's absence or dismiss it under rule 47. We were taken through the correspondence referred to above and were also asked to consider the statement prepared by Ms Harnett for the purposes of resisting the strike out application. While we were assisted by that statement in the way it set out the chronology etc., we should say that we did not make any findings on the basis of the statement that we could not have made on a simple consideration of the correspondence in the bundle. For that reason we did not consider that we would be likely to be assisted by the statement that Mr Cornelius had offered to, but had not, provided.

39. We adjourned the case overnight and delivered the above judgment, with oral reasons, on 16 October.

Application for postponement

40. In our judgement, in his 15 October email, Mr Cornelius, on the claimant's behalf, made clear that the reason he and the claimant would not be attending was because of their concerns about disclosure, the bundle, and the witness statements. Mr Cornelius made no effort to provide further information about the reasons why he and the claimant were abroad. He made no suggestion that it would have been impossible or difficult to have appeared on the video link, either to argue the application for strike out or to deal with the main hearing more generally. He said nothing about whether the claimant has, or has tried to obtain, any medical evidence about her father's condition. He provided no further detail about his father's condition – which he could have provided himself even if he did not have any medical evidence – and did not explain whether for example he and the claimant are the only people who could have cared for their father during the course of the hearing. Nor did he offer any reasons why no application was made to postpone the case before 11 October. There was also no explanation of why Mr Cornelius expected to be able to be back in the UK by 29 October 2024 despite his father's condition.

41. Through the 15 October email, and indeed some of the earlier correspondence, Mr Cornelius had made clear that he and the claimant no longer wished to participate in this case. He had made clear earlier than that that he and the claimant had no intention of cooperating in a meaningful manner with the respondent in order to prepare for the case. That situation plainly came about because Mr Cornelius and the claimant felt aggrieved about the respondent's conduct of the case, and to some extent also about the Tribunal's decisions. We consider this is the likely reason why there was no application for postponement before 11 October. For the reasons we have set out above, we consider that, whether those feelings of grievance were genuine or not, they were clearly not well-founded.

42. We are not unsympathetic to how, in light of their father's condition, the claimant and Mr Cornelius must be feeling. We of course might have been sympathetic to an application for postponement on the basis of the claimant's father's ill-

health, if it had been supported by some evidence, or at least some meaningful effort to explain why postponement was necessary and whether the claimant or Mr Cornelius were able to participate in a video hearing. We consider that over the course of the last week or so the claimant and Mr Cornelius were given every opportunity to provide such information and they declined to do so. It is clear that Mr Cornelius was in a position to engage in detailed correspondence. We would of course have been willing to consider, for example, altering sitting hours in light of the time difference, but no suggestions along those lines were made to us. If there were any difficulties with the internet connection at their father's home (and we do not actually know whether they were staying there) Mr Cornelius and the claimant had had several days to try to make alternative arrangements and to inform the Tribunal about any difficulties.

43. Since the application was made less than seven days before the start of the hearing, it could only be granted in exceptional circumstances (see rule 30A). However, we make clear that we would not have granted the postponement in the circumstances even if the exceptional circumstances test did not apply. A postponement was not in the interests of justice. The application is not supported by any evidence nor even by sufficient reasons. In the circumstances the prejudice caused to the respondent by a likely 18 month postponement would be considerable. In contrast the prejudice caused to the claimant by a refusal of the postponement would be minimal – there was little if no prospect, in our judgment, that in the event of a postponement the situation would likely be any different at the time of any relisted main hearing – the claimant and her representative have simply withdrawn from any meaningful engagement because of the unjustified sense of grievance that we refer to above.

44. We therefore refused the application for postponement.

Strike out

45. Having come to the above conclusions we decided that it was appropriate to consider the claimant's application for strike out on the basis of the paperwork submitted and the respondent's submissions.

46. We considered rule 37

> 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).

47. It seemed to us that had the claimant been present to pursue the application, it would have been put under subparagraphs (b), (c) or (e). We took account of *Blockbuster Entertainment Ltd* v *James* 2006 IRLR 630 as summarised by the authors of the *IDS Employment Law Handbooks*: "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." We also note that it is clear that in this context "fair trial" means "fair trial within the window allocated to the case". We further took account of *Weir Valves and Controls (UK) Ltd* v *Armitage* 2004 ICR 371, EAT – again, as summarised: "In deciding whether to strike out a party's case for non-compliance with an order under rule 37(1)(c), a Tribunal will have regard to the overriding objective set out in rule 2 of seeking to deal with cases fairly and justly. This requires a Tribunal to consider all relevant factors, including: the magnitude of the non-compliance; whether the default was the responsibility of the party or his or her representative; what disruption, unfairness or prejudice has been caused; whether a fair hearing would still be possible, and whether striking out or some lesser remedy would be an appropriate response to the disobedience." We of course had regard to the overriding objective more generally, rather than only in applying rule 37(1)(c).

48. On the basis of what we have set out above, we find:

    a. Regarding r 37(b): The respondent's conduct was not scandalous, vexatious or unreasonable, let alone did it involve a deliberate and persistent disregard of procedural steps or make a fair trial impossible in the time allocated to the main hearing. We were unable to discern whether any of the claimant's outstanding requests were in fact for things that met the test for disclosure. To the extent that any legitimate complaints about disclosure had not yet been dealt with, that was the fault of the claimant or her representative, for not putting the requests clearly. Even if there were still issues about disclosure, they could have been dealt with on the first morning of the hearing by the Tribunal making orders for disclosure – in other words there was an obvious remedy available that was considerably less onerous than strike out. Strike out would therefore have been disproportionate, even if the other conditions necessary to engage the Tribunal's power to strike out were present (which they were not). Regarding late disclosure, the respondent had a duty to attend to ongoing disclosure. Any of the claimant's complaints about the contents of the bundle could in our judgment have been dealt with had the claimant and Mr Cornelius meaningfully engaged with the respondent rather than writing multiple prolix emails which made a number of unfair complaints.

    b. Regarding r 37(c): to the extent that there had been non-compliance, it had largely been engendered by the lack of cooperation from the

claimant and her representative. Otherwise, all comments above also apply to this ground.

c. Regarding r 37(e): for the reasons we have set out above, a fair trial within the allocated time would have been eminently possible in our view.

49. We therefore refused the application for strike out.

Whether to proceed or to dismiss

50. We applied rule 47:

> 47. Non-attendance
> If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence.

51. Having considered all of the above, we decided to exercise our power to dismiss the claim. We considered that it would not be in accordance with the overriding objective to spend another day or more of valuable Tribunal time adjudicating upon a claim which the claimant was no longer prepared to meaningfully pursue. In coming to this decision we took some account of our preliminary view of the strength of the case for the claimant. (We do stress that this was only a preliminary view, recognising that the view could only be formed on evidence which had not been tested in cross-examination, and we consider it likely that our decision would have been the same even had we not taken account of the strength case for the claimant.) So far as the race discrimination and victimisation claims were concerned, on which at least the initial burden of proof would be upon the claimant, we could see no evidence which would be likely to lead a Tribunal to the conclusion that the claimant had been subjected to different treatment or victimisation on account of her race. So far as the unfair dismissal claim was concerned, the respondent had provided detailed evidence which in our judgment was likely to lead a Tribunal to the conclusion that dismissal was within the band of reasonable responses open to an employer. Like her approach to this litigation, the claimant's approach to the dismissal proceedings and the appeal appeared to us, at least on a preliminary reading of the evidence, to be to decline to participate meaningfully in the process and then to raise spurious complaints about the procedure without engaging with the substance. So far as the holiday pay claim is concerned, we note that after the 2023 hearing EJ Dick ordered: "By 20 October 2023 the claimant is to clarify what, if any of the calculation is in dispute. In the absence of such clarification, the Tribunal at the next hearing may treat the holiday pay claim as withdrawn." We are not aware of the claimant having made any such clarification.

52. We therefore dismissed the claim (i.e. all the complaints) under rule 47 on account of the claimant's failure to attend or to be represented at the hearing.

53. Finally, EJ Dick wishes to apologise to the parties for the delay in preparing these reasons and wishes also to make clear that the delay was in no way the fault of the other members of the Tribunal.

Employment Judge Dick

19 November 2024

SENT TO THE PARTIES ON
25 November 2024
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T Cadman
.....
FOR THE TRIBUNAL OFFICE