THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr I F Everington	**AND**	**Tesco Stores Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **Teesside** **On:** **12 March 2018**

Before: **Employment Judge Shore**

Appearances

For the Claimant: **Ms L McMeechan**
For the Respondent: **Mr N Singer of Counsel**

RESERVED JUDGMENT

1 The respondent's application to strike out the claimant's claim is refused.

REASONS

Background

1 This is a case that arises from the decision of the Supreme Court in the **Unison** case. The claimant had lodged an application for unfair dismissal following his dismissal in August 2013. He did not pay the fee for issuing proceedings that was required at the time and did not make a successful application for remission from fees. His claim was therefore automatically dismissed.

2 I did not have the original file, as it appears to have been destroyed. HMCTS wrote to the claimant on 6 December 2017 advising him that his claim had been reinstated. As his file had been destroyed, he was requested to file an ET1. He says he did this on 10 December 2017. The file records that the Tribunal's administrative centre at Leicester sent the new ET1 to Employment Tribunal Regional Office at North Shields on 4 January 2018. The claim was then

reissued and a notice of claim and directions were sent to the parties on 5 January 2018 that set a hearing date for one day on 27 April 2018.

3 The respondent has filed a thorough ET3 but makes application for the claim to be struck out because it says that a fair trial is no longer possible.

4 After reading the file, I took the view that the dismissal of the original claim had been an administrative matter, not a judicial decision and that the reinstatement of the claim was, similarly, an administrative that was not capable of judicial reconsideration.

5 In his initial comments to me, Mr Singer, on behalf of the respondent, submitted that the decision to dismiss the original claim had to be capable of judicial review and that therefore there are a number of matters that flowed from it. The first is that the claim is out of time and that the claimant therefore has to satisfy the requirements of section 111 Employment Rights Act 1996 that a claim has to be lodged within three months less one day from the date of dismissal unless it was not reasonably practicable to do so and that the claim was submitted within a reasonable time (subject to any extension of time granted by the ACAS early conciliation procedure).

6 Further, he submits that the claim should not have been reinstated and requests my review of that.

7 In support of his submissions, Mr Singer referred to three cases: -

7.1 **Peixoto v British Telecommunications Plc UKEAT/0222/07/CEA**.

7.2 **Biggs v Somerset Council [1996] ICR 364**.

7.3 **Outasight VB Limited v Brown UKEAT/0253/14/LA**.

8 On hearing Mr Singer's preliminary submissions, I advised the parties that I would have to make a reserved decision on this matter to enable me to consider the authorities. I had quite a full list and could not guarantee that I would be able to consider the authorities and give a decision on the day of the hearing.

9 Mr Singer submitted that the case of **Peixoto** dealt with the considerations that the Tribunal had to make on the question of whether a fair trial was still possible. He took me to paragraphs 44 and 45 of the judgment which I reproduce: -

> **[44]** The legal principles to be applied in this case derive in part from *Blockbuster Entertainment Ltd v James* [2006] EWCA Civ 684, [2006] IRLR 630 (CA). This was a case which was struck out at an Employment Tribunal on the first day of the hearing, held to be a wrong decision by the EAT and on appeal by the Court of Appeal. It was a case relating to unreasonable conduct under r 18(7)(1)(c). There Sedley LJ giving the judgment with which Wilson and Brooke LJJ agreed said this:
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> "5 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 v Blackledge* [2000] 2 BCLC 167 and of the EAT in *De Keyser v Wilson* [2001] IRLR 324, *Bolch v Chipman* [2004] IRLR 140 and *Weir Valves 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.

20 It is common ground that, in addition to fulfilling the requirements outlined in paragraph 5 above, striking out must be a proportionate measure. The employment tribunal in the present case held no more than that, in the light of their findings and conclusions, striking out was 'the only proportionate and fair course to take'. This aspect of their determination played no part in Mr James's grounds of appeal and accordingly plays no part in this court's decision. But if it arises again at the remitted hearing, the tribunal will need to take a less laconic and more structured approach to it than is apparent in the determination before us.

21 It is not only by reason of the Convention right to a fair hearing vouchsafed by article 6 that striking out, even if otherwise warranted, must be a proportionate response. The common law, as Mr James has reminded us, has for a long time taken a similar stance: see *Re Jokai Tea Holdings* [1992] 1 WLR 1196, especially at 1202E-H. What the jurisprudence of the European Court of Human Rights has contributed to the principle is the need for a structured examination. The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact – if it is a fact – that the tribunal is ready to try the claims; or – as the case may be – that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist. If a straightforward refusal to admit late material or applications will enable the hearing to go ahead, or if, albeit late, they can be accommodated without unfairness, it can only be in a wholly exceptional case that a history of unreasonable conduct which has not until that point caused the claim to be struck out will now justify its summary termination. Proportionality, in other words, is not simply a corollary or function of the existence of the other conditions for striking out. It is an important check, in the overall interests of justice, upon their consequences."

[45] It is also clear that the provisions of art 6 of the convention are disjunctive and that the guarantees of a fair hearing before an impartial and independent tribunal within a reasonable time are three separate guarantees. See *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, [2002] 1 All ER 465.

11 He says that none of the dismissing officer or two appeals officers were still with the respondent's business. They have not been able to contact them despite making efforts through the respondent's HR Department. Even if it was possible to contact the three individuals, they were no longer engaged by the respondent

and therefore no longer obligated to cooperate with the proceedings. It would not be fair to compel them to attend on the respondent as there would be no ability to control the witnesses.

12 The trial in this matter is listed on 27 April 2018. Mr Singer submitted that there was a three-month less one day limit on Tribunal proceedings from the date of the act complained of for a reason. I asked him to comment on the fact that the Tribunal can look at contractual claims arising from an employment contract going back six years and he said that this was not a contract claim.

13 Mr Singer continued that the Tribunal could rely on the papers, but that it was essential to hear witnesses. Gaps needed to be filled, memories had faded and it is for the respondent to prove a reasonable dismissal.

14 At this point Mr Everington interjected and said that he still held all the paperwork from his disciplinary proceedings.

15 Mr Singer continued that the opportunity for the respondent to preserve evidence had gone and the opportunity for the respondent to bring evidence of contributory conduct had also gone.

16 Turning to the issue of the time limit, Mr Singer took me to **Biggs v Somerset County Council** which he submitted was a reinterpretation of the law as had existed prior to that case.

17 The claimant had not provided any bank statements to show that he could not afford the fee and no evidence that he had made any approach for remission. At this point Mr Singer handed up a redacted claim form and asked me to note that details about applying for remission from fees were included. On balance, he submitted that there was no evidence that it was not reasonable practicable for the claimant to have made the claim within the time period or that he had made the claim within a reasonable time thereafter.

18 Mr Singer then referred to the **Outasight** case and took me to paragraph 40 thereof to refer to **Redding v EMI Leisure Limited EAT/262/81** on the point that the requirements of justice mean the requirement of justice for all parties.

19 The period of four years that had passed since the dismissal of the claimant meant that the respondent was disadvantaged.

20 Furthermore, the Supreme Court decision in **Unison** had taken place in July 2017 so the claimant had taken some time to make the application for reinstatement. The application was at the prompting of the EAT not the claimant himself and he should have dealt with it instantly.

21 For the claimant, Ms McMeechan referred to her e-mail to the Tribunal of 9 July 2018 and confirmed that the claimant had all the relevant documents and witness statements. I asked her about the claimant's knowledge of the **Unison** case and he responded directly that he did not know anything about it. The first thing he had known about the possibility that his claim could be reinstated was when the Tribunal had written to him on 6 December 2017. He had responded to the Tribunal on 10 December 2017.

22 The claimant did not know the whereabouts of the managers who had conducted his disciplinary and appeal hearings but he knew that three of the colleagues who

witnessed the events for which he was dismissed were still employed by the respondent.

23 Ms McMeechan said that there was a fundamental issue about the process used by the respondent in the claimant's dismissal. The claimant had not been advised of when the alleged incident had taken place and he was not given copies of the witness statements until after his dismissal.

24 Mr Singer submitted that this made it even more prejudicial to allow the case to continue, as there would be matters which could not be answered by those involved in the disciplinary process.

25 After hearing the submissions of the parties, I varied the standard orders for directions that had been made as I did not think that it was in furtherance of the overriding objective for the parties to have to continue to comply with orders when a decision about strike out was pending. Those orders are now amended as set out above.

26 I considered this case carefully. Clearly, the claimant's case had been dismissed through no fault of his own. I find it clear from the HMCTS letter of 6 December 2017 that the original claim had been dismissed as an administrative function and not as a judicial function. I also find that the reinstatement of the case was an administrative function not a judicial function. I therefore find that I have no jurisdiction to overturn the reinstatement of the case and therefore Mr Singer's points on time limits are otiose. I regard this application as simply relating to whether or not a fair and just hearing can be possible.

27 Although there are good arguments on both sides, I find that it is unlikely that in the world of modern social media that the respondent cannot contact any of the managers who heard the claimant's disciplinary or appeal hearings.

28 If those witnesses cannot be located, I can understand why the respondent is reluctant to proceed, but it could certainly field someone from its HR Department who could comment on the process that was undertaken and give evidence as to contributory fault from the paperwork that the respondent retains.

29 On balance, therefore, I feel that the claimant's right to have his claim heard outweighs the points made by Mr Singer for its strike out. The Tribunal is well used to dealing with cases that are based on facts more than four years old and I see no particular difficulty in its doing so here.

30 I therefore refuse the respondent's application and confirm that the hearing on 27 April 2018 will proceed as listed using the amended Orders that I have set out above.

EMPLOYMENT JUDGE SHORE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON

22 March 2018