EMPLOYMENT TRIBUNALS

Claimant: Mr J Lipponen

Respondent: Bank of England

Heard at: London Central **On:** 19 February 2019

Before: Employment Judge Grewal

Representation
Claimant: In person
Respondent: Mr D Cashman, Counsel

JUDGMENT having been sent to the parties on 21 February 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1 In a claim form presented on 14 June 2018 the Claimant complained of unfair dismissal and disability discrimination and possibly of having been subjected to detriments for having made protected disclosures.

2 This preliminary hearing was listed to consider the Respondent's application of 7 January 2019 to strike out the claim on the grounds that:

(i) The Claimant had not actively pursued his claim; and/or
(ii) The claim had no reasonable prospects of success.

3 I considered the documents that both parties produced and the submissions made by them. In reaching my conclusions, I took into account the following facts, almost all of which are not disputed and are supported by the documentary evidence.

Relevant Facts

4 It is not in dispute that the Claimant suffers from Generalised Anxiety Disorder and has done so at least since June 2016. That, however, does not prevent him from contacting people. The view of the Respondent's Occupational Health

Physician, Dr Williamson, expressed at a case conference which the Claimant attended on 14 July 2017 was that the Claimant was capable of informing his manager if he was not able to attend work and that there was no medical reason why he could not notify management of lateness or absence.

5 The Claimant was dismissed on 1 February 2018. It is not in dispute that he was given a first written warning on 18 September 2017 for repeated failure to attend work at the agreed times in line with his phased return to work and to notify his manager of absences and lateness in accordance with the Respondent's notification procedures. That warning was for a period of six months. It is also not in dispute that the Claimant was absent from work from 27 September 2017 to 1 February 2018 and that he did not report his absence in line with the Respondent's absence notification policy. He was invited to a disciplinary hearing which he did not attend. He was dismissed in his absence for gross misconduct.

6 On 27 April 2018, shortly before the three-month time limit for bringing a claim expired, the Claimant contact ACAS to commence Early Conciliation. He realised that he needed to do that to bring a claim before the Employment Tribunal and that it needed to be done within a certain time period. He was able to do that.

7 The Claimant was granted an Early Conciliation certificate on 14 May 2018. He appreciated that he needed to present his claim to the Employment Tribunal by 14 June 2018 and he was able to do that.

8 On 20 August 2018 the Tribunal sent the Claimant notice of a preliminary hearing that was to take place on 10 October 2018 and certain case management orders. The main purpose of that hearing was to clarify the complaints and issues in the case. That was important because the particulars of claim were not clear and it was not possible to discern from them precisely what claims the Claimant was pursuing and the basis on which he was pursuing them. The case was listed for a substantive hearing of six days from 19 to 26 February 2019. One of the case management orders was that the Claimant was to serve a schedule of loss on the Respondent within four weeks of 20 August 2018. The Claimant did not serve a schedule of loss.

9 The Claimant did not attend the preliminary hearing on 10 October 2018. He did not provide any explanation for his non-attendance. According to the note of the hearing the administrative staff attempted to contact the Claimant but were unable to do so. The Employment Judge, who conducted the hearing, recorded that he was considering striking out the claim because of the Claimant's non-attendance as that appeared to indicate that he was not actively pursuing the claim. He made an order that if the Claimant wished to say that he was pursuing his claim and that it should not be struck out he should send his comments to the Tribunal by 24 October and should also explain why he did not attend the preliminary hearing. The note of that hearing and the order were sent to the Claimant on 11 October.

10 The Claimant did not respond by 24 October and the Tribunal could have struck his claim out at that stage.

11 The Claimant wrote to the Tribunal on 26 October. He said that he had not attended the preliminary hearing and complied with the order in time because of his underlying mental health condition which had been further exacerbated by the stress caused by his very difficult financial situation. He did not provide any medical evidence to support his assertion that his mental health condition had prevented him from attending the hearing. He also asked to be allowed to supplement the information that he had provided in his original claim form so that he could state his case as clearly and fully as possible.

12 On 20 December 2018 the Employment Judge made an order that by 3 January 2019 the Claimant should serve on the Respondent's solicitors and the Tribunal the full text of his amended claim.

13 The Claimant did not provide the additional information by 3 January 2019 or at any time thereafter. As of today's date, it has still not been provided. The Claimant did not seek any extension to time in which to do so and has not provided any explanation for his failure to do so.

14 On 7 January 2019 the Respondent made its application to strike out the claim. On the same day the Tribunal wrote to the Claimant that an Employment Judge was considering striking out his claim and if he wished to respond to the Respondent's application and give reasons why the claim should not be struck out he should do so by 14 January 2019.

15 The Claimant did not respond by 14 January or give any reasons why the claim should not be struck out. The Tribunal could have struck out his claim at that stage, but it did not do so.

16 Today was supposed to be the start of the substantive hearing listed for six days. It was converted to a preliminary hearing to deal with the Respondent's application to strike out the claim.

17 The Claimant attended the preliminary hearing today and he brought with him a letter from Dr Hindler, a Consultant Psychiatrist, dated 18 February 2019. I deal with the contents of the letter in more detail below.

Claim has not been actively pursued

18 I considered first the application to strike out the claim on that ground that it has not been actively pursued.

The Law

19 Rule 37(1)(d) of the Employment Tribunals Rules of Procedure 2013 provides that 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 the ground that it has not been actively pursued.

20 It is clear from the authorities that an application to strike out under rule 37 involves a two-stage test. The first stage is to consider whether any of the grounds set out in rule 37(1) have been established. If such a ground has been established, the Employment Judge must then consider whether or not to exercise the discretion in favour of striking out. Striking out a claim is an extreme sanction and the Employment Judge must consider whether there any other more appropriate measures of dealing with the situation.

21 In **Rolls Royce plc v Riddle [2008] IRLR 873** Lady Smith in the EAT stated,

> "*Where a motion is made under this rule, the tribunal requires, accordingly, to begin by asking itself whether the claimant has failed actively to pursue his claim. It would not usually be difficult to conclude that where a claimant has failed to appear at a full hearing of which he has been notified, that amounts to a failure to actively pursue his claim."*

She said that the principles laid down by the High Court prior to the introduction of the Civil Procedure Rules showed an expectation that cases of failure to actively pursue a claim would fall into one of two categories. The first was where there had been 'intentional and contumelious' default by the claimant and the second is where there had been inordinate and inexcusable delay such as to give rise to a substantial risk that a fair trial would not be possible or there would be serious prejudice to the respondent. In respect of the first category, she said,

> "*…it is quite wrong for a claimant, notwithstanding that he has, by instituting a claim, started a process which he should realise affects the employment tribunal and the use of its resources, and affects the respondent, to fail to take reasonable steps to progress his claim in a manner that shows that he as disrespect for the tribunal and/or its procedures."*

22 In **Khan v LB of Barnet EAT/0002/18** the EAT upheld the Tribunals decision to strike out a claim on the ground that it was not being actively pursued. It concluded,

> "*the reality was that the Claimant was not engaging with the process. At most, he would do just enough at each juncture to avoid potentially struck out, but not, in my judgment enough to demonstrate a real intention to progress his claim. He failed to attend a hearing at which the issues could have been clarified. He failed to give an adequate explanation for his non-attendance… Having regard to his case, having regard to the way that it has been pursued. I have, contrary to my initial view been persuaded … that the tribunal Judge was entitled, in the exceptional circumstances of this case and the complete lack of engagement with the progress* [sic] *in a meaningful way by the claimant, to strike out the claim."*

The EAT Judge also said,

"Being a litigant in person does not mean that a litigant is exempt from compliance with procedures of from engaging in the litigation process to pursue a claim."

Conclusion

23 In the present case the Claimant did not comply with the Tribunal order to provide a schedule of loss, did not attend the preliminary hearing on 10 October and did not provide any reason for his non-attendance, did not provide the information that hew as ordered to provide by 24 October (it was provided by 26 October), has still not provided the additional information that he was ordered to provide by 3 January 2019 and did not respond to the Respondent's strike out application by 14 January 2019 as he was ordered to do so. The Claimant's explanation provided late on 26 October that his non-attendance had been due to his underlying medical condition was not supported by any medical evidence.

24 In order for this case to progress the Tribunal and the Respondent need to understand what the Claimant's complaints are. His claims need to be clarified. As he did not attend the preliminary hearing which was set up for that purpose and has not provided an amended claim as he was ordered to do, it has not been possible to move the case forward. The result is that eight months after the claim started, on the day when we should have been starting the full merits hearing, the case is still at the stage at which it was when it was first presented. Between June 2018, when the claim was presented, and today, the Claimant has not taken any step to move his case forward. It is clear from all the above that the Claimant has not actively pursued the claim. The fact that he has attended today to oppose the Respondent's application to strike out the claim does not negate the fact that he has not actively pursued the claim for the last eight months. I am, therefore, satisfied that the threshold of rule 37(1)(d) is met. However, I still have discretion as to whether to strike it out and to consider whether any sanction short of strike out would result in a fair hearing taking place within a reasonable time.

25 In exercising my discretion I took into account the following matters:

(a) Dr Hindler's report dated 18 February 2019. He says that he saw the Claimant between June 2016 and 24 January 2017. During that period the Claimant was treated with medication and undertook a curse of Cognitive Behavioural Therapy and his condition improved. Dr Hindler did not see the Claimant between 20 September 2017 and 13 February 2019 and there was no evidence that he had access to the Claimant's medical records for that period. The letter was provided to assist the Claimant to defend possession proceedings and does not address the Claimant's non-attendance at the Tribunal and failure to comply with the Tribunal orders. All it says about the Tribunal claim was that the Claimant told him that he was unable to pursue it as he was not able to afford a solicitor. There is nothing in the report to say that because of his medical condition the Claimant was not able to attend the Tribunal hearing or to comply with the Tribunal orders. There is a general statement that he understood from the

Claimant that following his dismissal his anxiety had begun to gradually elevate to the point of becoming very severe.

(b) The Occupational Health Physician's view in July 2017 was that the Claimant's Anxiety Disorder did not prevent him from making contact with his employer.

(c) There was no evidence that the Claimant's medical condition had prevented him from pursuing his claim. There was evidence that he had financial difficulties.

(d) Even if the Claimant's medical condition had been a factor, there was no evidence that going forward things were going to improve. Dr Hindler said in his letter that the Claimant had not been taking any psychotropic medication since September 2017 and that he had stopped the course of CBT. The Claimant told me that he was taking medication and that his condition was improving, but there was no medical evidence to that effect.

(e) The Claimant's financial position was not likely to improve. His flat has been repossessed and there is a judgment against him in the sum of £231,170. The Claimant said that he had the support of his brother and that that would help him. According to Dr Hindler, his brother had provided the Claimant with support in the summer of 2018 but the relationship between them had then broken down.

(f) In short, the Claimant has not put forward anything that gives me any confidence that if the claim is allowed to proceed, he will engage with the process to the level that will be expected of him. Even today the Claimant has not attended with an amended and clarified claim.

(g) We are still at the initial stage of the process and there are many stages that need to be gone through before we can have a hearing of the claim. If the claim had been clarified, disclosure had taken place and we were close to being prepared for a hearing, I could perhaps have dealt with the situation by making an "unless order". But there is still a long way to go in this case. If the Claimant has not been able to take the first necessary step in eight months, I am not confident that he will be able to take all the remaining steps in the next eight to twelve months. All the evidence leads me to conclude that it the matter were allowed to proceed, we would find ourselves in the same position several months down the line. Under Article 6 everyone is entitled to a fair hearing within a reasonable time. I cannot see that happening in this case.

(h) A considerable amount of the Respondent and the Employment Tribunal's time and resources have already been spent on a claim that the Claimant, other than starting it, has not taken any steps to progress over a period of eight months. I do not see why the Tribunal and the Respondent should expend any further resources on the claim when the Claimant has not provided any satisfactory explanation for his failure to actively pursue

the claim until now and has not given me any grounds to have any confidence that things will improve.

26 Having considered all the above matters, I concluded that it was appropriate to strike out the claim in the circumstances of this case. Having decided to strike out the claim on the first ground, I did not make a ruling on the application to strike out on the second ground.

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Employment Judge Grewal

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Date 2 May 2019

REASONS SENT TO THE PARTIES ON

10 May 2019

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FOR THE TRIBUNAL OFFICE