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# THE EMPLOYMENT TRIBUNALS

**Claimant:** **Ms E Schofield**

**Respondent:** **DCK Concessions Limited**

**Heard at:** **East London Hearing Centre**

**On:** **Friday 13 December 2019**

**Before:** **Employment Judge Scott**

**Representation**

Claimant: Mr Supiya (Consultant)

Respondent: Mr Thompson (Solicitor)

# PRELIMINARY HEARING (OPEN) JUDGMENT

1. **The Respondent's application to strike out the Claimant's claims under Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 is refused.**

2. **The Respondent's application that the Claimant be estopped from relying upon all matters that pre-date the COT3 agreement dated 20 April 2017 is refused.**

3. **The Equal Pay claim is dismissed upon withdrawal.**

4. **The Respondent has permission to amend its defence within 7 working days of the date that this Judgment is sent to the parties.**

# REASONS

1. Today's Preliminary Hearing follows a Preliminary Hearing (open) on 11 October 2019.

2. The Preliminary Hearing summary; final list of issues and Tribunal Orders have been sent to the parties separately.

**Strike out application**

3. I set out below a chronology of what has happened (or not) since the June & October hearings.

- 3 July: The Respondent serves its request for further information [72-73];
- 18 July: The Respondent writes to the Claimant seeking agreement to amend the POC [74-75];
- 6 August: The Respondent writes to the Claimant attaching copy letters of 3 and 18 July, reminding the Claimant that the deadline for serving replies to the Respondent's request for further information was 2 August and reminding the Claimant that they need to discuss the proposed amendment to the POC;
- 12 August: The Respondent writes to the ET requesting an unless order in respect of the further information request, as the deadline for replies had now passed;
- 21 August: Mr. Supiya advises the Respondent that he is abroad and facing internet connectivity challenges and that he should be in a position to respond substantively the following day (he does not);
- 2 September: The Respondent writes to the ET noting that the Claimant has not served a psychiatric report or responded to the request for further information and that the only communication received has been the short letter dated 21 August;
- 5 September: The Respondent writes to the Claimant noting a continued lack of response to their correspondence, specifically to their request for further information and the psychiatric report;
- 6 September: Mr Supiya writes to say that he has returned to the UK and that he will respond substantively by the close of play (he writes on 8 September);
- 8 September: The Claimant rejects the Respondent's request to amend the POC;
- 12 September: The Respondent notes the Claimant's email of 8 September and confirms that the matter will need to be dealt with by the ET;
- 24 September: The Tribunal writes to the parties enclosing Judge Burgher's instructions which direct that if the Claimant does not respond to the Respondent's letter of 12 August by 3 October, the hearing listed on 11 October will be converted to an Open Preliminary hearing to consider strike out for non-compliance with ET Orders and/or on the basis that the claim is not being actively pursued;
- 1 October: The Respondent writes to the ET seeking an order that the POC are amended as requested and that the PI claim be struck out for

non-compliance with the ET's Orders (failure to serve a psychiatric report);

- 3 October: The Claimant writes to the ET stating that it responded to the Respondent's letter of 12 August by email dated 8 September and that the other matters in dispute can be dealt with at the 11 October hearing. The Claimant advises that she will be seen by a psychiatrist 'next week Friday' (i.e. 11 October);
- 4 October: The Respondent writes to the ET. The Respondent asks the ET to note that the Claimant has not served a reply to its request for further information and/or a psychiatric report and that the Claimant has thereby failed to comply with Judge Burgher's order that it respond to its letter of 12 August by no later than 3 October and that accordingly the 11 October hearing should be converted to an Open Preliminary Hearing to deal with a strike out application;
- 9 October: The ET writes to the parties noting the Respondent's application of 4 October. Judge Massarella refuses to grant the application because, he states, the application has been made too late;
- 9 October (13.16): The Respondent writes to the ET referring to Judge Burgher's letter of 24 September, which gave notice that 'if the Claimant does not respond to the Respondent's letter of 12 August 2019, the hearing listed on 11 October will be converted to an Open Preliminary Hearing to consider Striking Out the Claimant's claim ….' (the Claimant says that she did not receive a copy of the Respondent's email to the ET dated 9 October; Mr Thompson understands that his secretary forwarded the email to Mr Supiya (see below)).
- 9 October: The ET writes to the parties. Judge Massarella says that he overlooked Judge Burgher's letter of 24 September. He reminds the Claimant that she has been on notice since 24 September that the 11 October hearing would be converted to an Open Preliminary Hearing and a strike out application considered, if the Claimant had not responded to the matters set out in the Respondent's letter of 12 August by 3 October. Judge Massarella noted that there appeared to be a dispute as to whether the Claimant has responded to the 12 August letter and, if so, whether such reply was sufficient. He concluded that was a matter for the 11 October hearing;
- 10 October: The Claimant requests a copy of the Respondent's correspondence with the Tribunal dated 9 October 2019;
- 10 October: The ET speaks with Mr Thompson's secretary to ask that she forward a copy of the Respondent's email to the ET of 9 October to the Claimant;
- 10 October: The Claimant attends an appointment at The Springfield Hospital for assessment. An email to the Claimant dated 10 October 2010 states that two further appointments will be scheduled (17 October & 31 October) and that a report 'from the assessment and a treatment plan' will be furnished to the Claimant's solicitor but no date by which the report will be sent is stated;

- 11 October: Preliminary Hearing. The Claimant was ordered, in so far as is relevant to today's strike out application, to serve a reply to the Respondent's request for further information dated 3 July 2019 on or before 25 October 2019 and serve an expert report on or before 8 November 2019;
- 8 November 2019: The Claimant serves medical evidence [80-87];
- 12 November 2019: The claimant serves a reply to the Respondent's request for further information (late) [89-95];
- 19 November 2019: The Respondent writes to the Claimant, alleging that the reply is incomplete.

4. Prior to hearing Mr Thompson's strike out application, I spent time clarifying the issues with the parties (below). That included giving some time to Mr Supiya to take instructions in respect of the alleged incomplete reply to the request for further information.

5. Mr Thompson referred to the Judgment sent to the parties on 7 November 2019 and reminded me that I had said that I would not hesitate to revisit strike out at this hearing *in the event of material non-compliance with the Tribunal's Orders.*

6. Mr Thompson submitted that the Claimant had, yet again, failed to respond to the Tribunal's orders/actively pursue the claim. He reminded me of the chronology (above) and of the law (below). He submitted that the case had reached the point where a fair hearing is not possible and that the Respondent had incurred costs as a result of the Claimant's failure to comply with Tribunal Orders/actively pursue the claim (at least one additional preliminary hearing/countless correspondence). He submitted that justice must work both ways and that the point had come where the Tribunal must say enough is enough. He submitted that the same behaviour is likely to continue, no matter what assurances the Claimant gives.

7. Mr Thompson pointed out that even today a reply to the request for further information based on an incomplete reply had not been provided, until I directed that Mr Supiya take instructions from the Claimant and provide the information requested or say why the information should not be provided. I directed Mr Supiya to provide Mr Thompson with written answers to the questions during the adjournment. He did not do so. Instead, we were required to work through the questions and answers together to glean the answers to the questions, all very time consuming. Finally, he submitted that at no time has Mr Supiya given a reason or reasons for the failure to respond in a timely manner to the request for further information.

8. Mr Supiya referred me to the reply to the RFI that he served on 12 November 2019 (late). He apologised for serving the reply late but only when I pointed that out to him. He submitted that the issue is whether a fair trial is possible and that it is.

**The Law**

9. Rule 37(1) of the Employment Tribunals (Constitution & Rules of procedure) Regulations 2013 provides (in so far as material) that at any stage of the proceedings the Tribunal may strike out all or part of a claim on any of the following grounds:

*(c) for non-compliance 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….*

10. I must consider whether any of the grounds are established and, if so, whether to exercise my discretion to strike out, given the permissive nature of the rule (*Hasan v Tesco Stores Ltd* UKEAT/0098/16). Mrs Justice Cox commented in *Ridsdill and others v Smith and Nephew Medical* UKEAT/0704/05 (paragraph 25) that strike out is a "draconian measure" which ought to be applied only as the final tool in the range of sanctions open to a Tribunal. In *Arriva London North Ltd v Maseya UKEAT/0096/16 (12 July 2016, unreported)* Simler J stated: *'There is nothing automatic about a decision to strike out. Rather, a tribunal is required to exercise a judicial discretion by reference to the appropriate principles*'.

11. The EAT set out the principles to be considered when considering whether to strike out on the ground that a party has failed to comply with ET rules or Orders in *Weir Valves & Control (UK) Ltd v Armitage* [2004] ICR 371. When an order has been breached, the ET must, according to the EAT, consider the overriding objective. This requires the judge or tribunal to consider all the circumstances, including *'the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is possible'*.

12. Where strike out is sought on the ground that a claim has not been actively pursued, I must consider whether the delay is excusable; if the delay is excusable, I should not strike out; but if it is inexcusable, a striking out order can only be made where it is also shown that a fair trial would be impossible or that there is or would be serious prejudice to the Respondent. In *Rolls Royce plc v Riddle [2008] IRLR 73,* Lady Smith pointed out that it is wrong for a claimant *'to fail to take reasonable steps to progress his claim in a manner that shows he has disrespect or contempt for the tribunal and/or its procedures*' and that although striking out a claim is serious that *'it is important to avoid reading the warnings in the authorities regarding its severity as indicative of it never being appropriate to use it*'.

13. In *Barber v Royal Bank of Scotland Plc* [2018] UKEAT/0302/15/ Simler P described the appropriate exercise of the power to strike out:

> "… there is nothing automatic about a decision to strike out and such orders are not punitive … in deciding whether to strike out a party's case for non-compliance, Tribunals must have regard to the overriding objective of seeking to deal with cases fairly and justly. That is the guiding principle and requires consideration of all the circumstances and, in particular, the following factors: the magnitude of the noncompliance; whether the failure was the responsibility of the party or his representative; the extent to which the failure causes unfairness, disruption or prejudice; whether a fair hearing is still possible; and whether striking out or some lesser remedy would be an appropriate response to the disobedience in question … "

" … even in a case where the impugned conduct consists of deliberate failures in relation for example, to disclosure, the fundamental question of any Tribunal considering the sanction of a strike out is whether the parties' conduct has rendered a fair trial impossible.." paragraphs [15] and [16] of her judgment.

14. Simler P referred to the guidance on strike out given by Burton P in *Bolch v Chipman* [2004] IRLR 140:

*(i) There must be a finding that the party is in default of some kind, falling within Rules 37(1).*

*(ii) If so, consideration must be given to whether a fair trial is still possible and save in exceptional circumstances, if a fair trial remains possible, the case should be permitted to proceed.*

*(iii) Even if a fair trial is achievable, consideration must be given to whether strike out is a proportionate sanction or whether there may be a lesser sanction that can be imposed.*

(iv) *If strike out is the only proportionate and fair course to take, reasons should be given why that is so.*

15. Simler P also referred to the judgment of Sedley LJ in *James v Blockbuster Entertainment Ltd* [2—6] IRLR 630: *"Sedley LJ recognised the draconian nature of the strike out power and that it is not to be readily exercised. He held, even where the conditions for making a strike out order are fulfilled, it is necessary to consider whether the sanction is a proportionate response in the particular circumstances of the case, and the answer to that question must have regard to whether the claim can be tried because time remains in which orderly preparation can take place, or whether a fair trial cannot take place…"* paragraph [13] of her judgment.

16. The Overriding Objective is set out in Rule 2 of the ET Regs 2013 and is concerned to ensure that cases are dealt with justly. This requires consideration of a number of relevant factors, including the magnitude of the non-compliance, whether the default was the responsibility of the solicitor or the party, 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. It must also consider whether a strike out order is a proportionate response to the non-compliance. Strike out is a draconian order which should only be deployed in appropriate cases. In all cases, I must consider whether a fair trial is still possible.

**Conclusion**

17. In considering the application, I have considered the time line set out above. My conclusion should be read in conjunction with the Judgment sent to the parties, following the Preliminary Hearing on 11 October 2019.

18. I take into account that the Claimant served a reply to the request for further information late on 12 November, not on or before 25 October 2019 as directed. I also take into account that the reply was incomplete. However, having clarified the issues today, the reply is now complete.

19. I have concluded that we have still not reached the point where it is no longer possible to have a fair hearing and that the case can proceed to a hearing (in November (the hearing date has changed, because one of the Respondent's witnesses is unavailable for the original hearings dates). I have concluded once again that to strike out the claims today would be disproportionate and not in the interests of the Overriding Objective (Rule 2). I conclude that the Claimant has, on this occasion, done just enough and that the claim should proceed. I understand the frustration expressed by Mr Thompson on behalf of his client but do not think strike out is in line with the overriding objective.

20. The Claimant and her representative should note the Tribunal's orders carefully and ensure that there is no further failure to comply with the Tribunal's Orders.

21. It is of course open to the Respondent to make a costs application in respect of, for example, time spent chasing the Claimant for information ordered to be provided and/or in respect of one or both of the Preliminary hearings. That is a matter for the Respondent.

**Estoppel application**

22. Mr Thompson made an application for an Order that the Claimant be estopped from, in his words, re-litigating pre COT3 matters, prior to April 2017. He took me to the COT3 [1-2]. The COT3 states, in so far as material, that it is:

> "*… in full and final settlement of all and any claims she may have…as at the date of this agreement. This settlement does not waive any future rights that arise after the date of settlement….*"

23. Mr Thompson submitted that the law is clear and I agree. He referred me to *Henderson v Henderson* [1843] 3 Hare 100 (a claimant may be barred from raising a new claim, if the subject-matter is one which could, with reasonable diligence, have been put forward at the original hearing); *Spire Healthcare v Brooke* [2016] EWHC 2828 (whether Spire's claim was barred by reason of estoppel arising out of the settlement of the main action); *Edwardson v Cheshire East BC* (1301948/2017 (ET)) (a preliminary hearing to consider whether some of the claimant's claims were unable to be pursued because they either were or ought to have been, brought under his previous claim); *DWP v Brindley* UKEAT/0123/16 (appeal against a decision that the ET had jurisdiction to hear the Claimant's second claim, the Respondent arguing that the signing of a COT3 in relation to a previous claim precluded the Claimant from bringing the second claim. The appeal was dismissed); *Cleary v Birmingham CC* (1301725/2008 & others (ET)) (whether proceedings had been validly compromised). Mr Thompson accepted, when asked, that the Claimant is not seeking to litigate matters that arose pre COT3 but he submitted that it is unfair for the Claimant to be permitted to rely upon matters pre-COT3 and there is a risk that the merits hearing will run long.

24. Mr Supiya submitted that the Claimant was simply seeking to rely upon matters pre-COT3 as background but necessary evidence to the allegations set out in the ET1.

## Law

25. The Court stated in the case of *Henderson v Henderson* that "*where a given matter becomes the subject of litigation…, the court requires the parties … to bring forward the whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in context, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of the case*.". *Edwardson* (an ET decision) concerned whether the Claimant could seek to litigate claims that had been or should have been brought in the pre-COT3 claim. *Spire Healthcare* was concerned with whether Spire could raise new and different allegations or issues that were not raised in the contribution proceedings. *Brindley* was about whether the Tribunal had jurisdiction to hear the Claimant's second claim. *Cleary* was about whether the COT3 compromised the claims in question. I have had regard to the cases that Mr Thompson referred me to.

## Conclusion

26. The agreement cannot, in my opinion, be read as precluding reliance upon past events that were the subject of the COT3 agreement as background evidence. The authorities referred to deal with whether a party may seek to litigate a matter that has been compromised/raise a line of argument in subsequent proceedings which could and should have been raised in the compromised proceedings. They do not deal with the issue at hand, namely, whether a party may seek to rely upon matters preceding the COT3 as background evidence in support of a claim arising from facts that post-date the COT3, which is the case here. The COT3 does not change what happened pre-COT3. The purpose of the COT3 was to prevent a future claim based on those facts. The Claimant cannot, in my view, be precluded from relying on past matters in support of this claim or future claims or to rebut a response. Without the necessary and relevant context, it may be difficult for the Tribunal hearing the claim to understand the present claim. That is not the same as seeking to re-litigate the pre-COT3 matters, which the COT3 precludes. The Tribunal may have to find facts relating to the matters that pre-date the COT3; in particular, for example, whether the Claimant was Level 2 or 3 pre-COT3. Of course, the Claimant is not entitled to make any claim for relief arising out of matters the pre-date the COT3. She is only permitted to rely upon any matter pre-dating the COT3 in so far as necessary and proportionate as broad context to this claim. I give Directions by way of separate order.

Employment Judge Scott

31 December 2019