EMPLOYMENT TRIBUNALS

Claimant: ABC

Respondent: University Hospitals of North Midlands NHS Trust

Heard at: Stoke (Hanley) Employment Tribunal **On:** 03-04/02/2020

Before: Employment Judge Mark Butler
Mr SG Woodall
Mr TC Liburd

Representation
Claimant: In Person
Respondent: Mr M Fodder (Counsel)

JUDGMENT

The unanimous decision of the employment tribunal is that:

1. The claims are not struck out
2. The case is postponed.
3. The case will be relisted for 15 days at the next available dates.

REASONS

These are the reasons given at the request of the claimant following oral judgment and reasons delivered at the hearing.

4. This case was listed for a 10-day hearing, starting on 03 February 2020. However, the claimant had not produced witness statements in accordance with tribunal directions, nor had she produced a schedule of loss.

5. The claimant applied for postponement of this case based on medical grounds on 14 December 2019. However, this was not supported by appropriate medical evidence. The claimant's initial application to postpone this hearing was not accepted. Consequently, Employment Judge Findlay directed that the claimant must provide appropriate medical evidence by 20 January 2020 to support her postponement on the basis that she was unable to prepare or attend the hearing. The claimant sent some documents to the Employment Tribunal on 12 January 2020, but alongside these made a further application to postpone the final hearing. This resulted in Employment Judge Perry, on 24 January 2020, directing the claimant to again provide medical evidence to show that she was unable to prepare for the hearing, and to show cause as to why the claim should not be struck out. Employment Judge Perry placed a deadline for compliance with his Direction of 4pm on 31 January 2020.

6. The claimant sent by email a number of attachments to the Employment Tribunal on 31 January 2020, in an attempt to comply with the directions of Employment Judge Perry.

7. This tribunal considered the matter of striking out the claims on day 1 of the final hearing. And we handed down this decision on day 2. In considering the matter we were assisted by a short bundle prepared by the respondents, which included a chronology and outline submissions, along with some of the medical evidence sent by the claimant, and a number of authorities. We were also assisted by submissions made on behalf of the respondent, and by the claimant herself.

LAW AND DISCUSSION

8. Mr Fodder has helpfully laid out the relevant Employment Tribunal rules and some useful case law in his outline submissions. And we have been taken to each of those in turn by Mr Fodder. We refer to the relevant legal principles where necessary and where they are relevant to this decision.

9. In essence, we were asked to consider the application of Rule 37 of the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013 to the claimant. Rule 37 gives the Employment Tribunal the power, at any stage of proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response. Strike out must fall within one of several expressed grounds for strike out. Those

relevant to this case are those raised by Mr Fodder in his skeleton, namely:

i. Non-compliance with any of the rules or with an order of the tribunal
ii. That it has not been actively pursued
iii. That the tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response.

10. We note that we heard no submissions by Mr Fodder in relation to the claim not being actively pursued and so make no further comment on that.

11. We were reminded of the approach to be adopted when considering whether to strike out a claim, as approved and applied in the **Hasan v Tesco Stores (2016) UKEAT/0098/16** case:

i. Has one of the specified grounds for striking out been established?
ii. Does the tribunal consider, as a matter of discretion, that the claim should be struck out, or should the order be amended or should a deposit be ordered?

12. That highlighted in **Hassan** is the approach that this employment tribunal adopted when considering whether to strike out the claims.

13. Mr Fodder helpfully asked the tribunal to take note of Rule 6 of the ET Rules, which is applicable to cases involving non-compliance of Tribunal directions in the ordinary sense. In effect, Rule 6 lays down optional actions the tribunal may consider in such circumstances. We are mindful that whatever decision we reached, the overriding objective was our guiding principle.

Has one of the specified grounds for striking out been established?

(1) **Non-compliance with any of the rules or with an order of the tribunal**

14. There have been clear Directions in this case as to exchange of Witness Statements and as to serving a schedule of loss on the respondent.

- Employment Judge Gaskell directed at Hearing 31 January 2019, Schedule of Loss by 29 March 2019, and Witness Statement exchange by 27 September 2019.

- Employment Judge Perry's Direction of 15 November 2019 amended the dates for sending the Schedule of Loss and for exchange of Witness Statements to 06 December 2019 (this was after the parties sought to agree changes to the directions themselves).

15. Having not complied with these Directions, the claimant applied for postponement of this case based on medical grounds on 14 December 2019. However, this application was not well supported by medical evidence.

16. This all culminated in:

a. First, Employment Judge Findlay directing that the claimant produces medical evidence to show that she was unable to prepare for or to attend the hearing by no later than 16 January 2020; and

b. Secondly, Employment Judge Perry expressing that the claimant was in breach of the tribunals order to exchange their Witness Statement(s), and directing her to provide medical evidence to show that she was unable to prepare for the hearing, and to show cause why the claim should not be struck out. This was required by 4pm on 31 January 2020.

17. It is the case that the claimant has sent in some documents to the employment tribunal, as attachments to an email, that she says is medical evidence that supports her position that she was unable to prepare for the hearing. However, in this tribunal's opinion, it does not reach that height. And although the documents do raise a number of health issues at varying dates, which does show that the claimant has had some medical problems, these documents do not provide the necessary evidence as directed by Employment Judge Findlay or Employment Judge Perry.

18. The closest the documents come to satisfying that requirement is the letter from the claimant's GP of 28 January 2020, where it is stated that:

> *"Miss Onuigbo tells me that she is due to attend a court hearing soon and does not feel able to prepare her legal case for such a hearing. Clearly with the above history she does have a lot going on with her physical health and I would be grateful if you would consider postponing the hearing for the time being."*

19. There is no clear statement that the claimant was unable to prepare for this hearing, nor that she was unable to attend. For the avoidance of doubt, we have considered each of the documents that the claimant sent into tribunal as evidence of her inability to prepare for this hearing. And these have not changed our view in this respect.

20. In these circumstances, this tribunal has no difficulty in agreeing with the view taken by Employment Judge Perry in that the claimant remains in breach of the tribunals order to exchange their Witness Statement(s). We also find that the documents supplied as medical evidence has not satisfied either the earlier direction of Employment Judge Findlay or that required by Employment Judge Perry to show cause.

21. For completeness there was also a breach of Employment Judge Gaskell's Direction in relation to identifying any further documents to be included in the bundle, with the date for compliance being missed.

22. For the avoidance of doubt, we found that the first part of strike out pursuant to rule 37 has been satisfied in that the claimant has failed to comply with Court directions.

(2) Whether a fair hearing is still possible

23. Turning to this ground for strike out. We start by observing that striking out on this ground alone does take an exceptional set of circumstance, and that is clear from the decided case law in this area. However, consideration of whether a fair trial is still possible retains importance when considering whether as a tribunal we ought to use our discretion to strike out for the other grounds, including strikeout for non-compliance with an order. Authority for this proposition is the judgment of Judge Richardson in **Weir Valves and Controls (UK) Ltd v Armitage [2004] ICR 371**, who identified this as a factor to be taken into account, alongside others including the magnitude of the default, whether the default is the responsibility of the solicitor or the party, and what disruption, unfairness or prejudice has been caused (see paragraph 17).

24. In considering whether a fair trial was possible. We as a tribunal need to take account of all relevant circumstances. It is clear that in terms of the default in respect of the failure to exchange Witness Statements, not so much the Schedule of Loss, the default has impacted upon the ability of this claim going ahead. And that is significant.

25. One such exceptional case where there was the tribunal did strike out a claim on the particular ground of a fair hearing no longer being possible is the **Riley v CPS** **[2013] EWCA Civ 951** case, which we were taken to by Mr Fodder. The factors considered important in supporting the decision to strike out in **Riley** included:

    - The mounting costs for the respondent
    - The dimming of recollections of the respondent's witnesses
    - The worry and stresses of the respondent's witnesses
    - Whether any of the respondent's witnesses had left their employ
    - The absence of any definite prognosis of any recovery sufficient to take part in the proceedings in the foreseeable future

26. As part of this analysis, it is clear that we must include in our analysis the fairness to not only the claimant but also the respondent.

27. However, the **Riley** case, and borrowing the words from Mr Fodder, does not sit on all fours with this case before us. On reflecting on the **Riley** case, it is clear that the extent of the medical evidence, and the clear expressions by the medical practitioners as to Ms Riley's fitness to participate in proceedings, played an important part in the decision to strike out the claim on the grounds that a fair trial was no longer possible. And this is clear through that recorded at para 23 of the judgment, which refers to the Employment Tribunal judge's decision, and again clear in paragraphs 26 and 28 of LJ Longmore's judgement. In this case before us there has simply been no view expressed as to the claimant's fitness to participate in proceedings either in the near past, at present, or in the future. And further, there have not been a long history of attempts to get any such prognosis, which is a relevant consideration in our opinion.

28. Turning to each of the factors considered in **Riley** and considering them in the context of this case:

- Mounting costs. This case has already seen significant costs being incurred by the claimant, the respondent and the tribunal. In fact, this is the fourth day that has been dedicated to this case to date. There will be clear cost implications should the case not be struck out and the case be relisted. We accept that there are costs in terms of staff time for those acting as witnesses.

- This case does involve recollections of events from as far back as 2014. The longer this case is delayed being heard the greater the impact on the cogency of the evidence. This is a real concern in this case. And this is a case where recollections of events are going to be important. Some of the events that form part of the claim are events that are significantly in the past, which places this case, at least in terms of the allegations that go back to 2014/15, on the cusp of a fair trial being difficult. However, we are mindful that the respondent's case is very much based on documents that were produced contemporaneously, and that their witnesses have all produced their witness statements in preparation for today, which will have helped their memory in this regard.

- This is a case of discrimination, and this inevitably brings with it stresses for witnesses that are being called or identified in the proceedings. However, we also note that none of the witnesses are named respondents, a factor that we have taken into account.

- We heard no evidence of witnesses having left the employ of the respondent yet. But we appreciate the possibility of this happening over the foreseeable future.

- There is no prognosis as to when the claimant will be fit to attend hearing. Although we did not expect to see any such prognosis given there is no medical evidence, in our findings, to suggest that the claimant is unfit to attend this hearing, nor unfit to have prepared her witness evidence, something we have already explained earlier. Nor was she directed by either EJ Findlay or EJ Perry to enquire about such prognosis. As a litigant in person we would not expect such a query to automatically spring to mind. Had the claimant been directed to produce medical evidence that explained any prognosis of when she was likely to be able to proceed with her claim, then submissions in relation to this being missing would have carried greater weight. But that is not the case here.

- We have taken account of the fact that the claimant has attended yesterday and today and that she was more than able to make her points. Which, in a sense, supports our finding of her ability to participate in proceedings going forward.

29. We are not convinced that this a case that reaches that level of a fair trial no longer being possible in these circumstances. Although, we do add that it is a very narrow decision in that respect having balanced the factors that have just been explained.

Does the tribunal consider, as a matter of discretion, that the claim should be struck out, or should the order be amended, or should a deposit be ordered?

30. The discussion of whether a fair trial is possible also forms part of our analysis when considering whether to use our discretion to strike out the case too. This discussion is not repeated again here.

31. We are mindful that the claimant has not been subject to any unless orders. Nor, until the 24 January 2020, has the tribunal been moved to entertain striking out her claims.

32. We accept that the claimant did have legal representation of sorts, which led to compliance with directions, save for those mentioned earlier. This is not a case of wholesale non-compliance with directions, and the case is almost ready to be heard. We did hear from the claimant that she was seeking legal representation and had been crowdfunding to that end. It is a factor that we have considered but, given that we have no evidence that she is on the verge of securing legal representation, we have placed little to no weight on this particular factor.

33. But we have also considered that, as per LJ Sedley in **Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684**, it would take 'something unusual indeed to justify the striking out, on procedural grounds, of a claim which has arrived at the point of trial'. And further that the tribunal should consider whether there is 'less drastic means to the end for which the strike-out power exists'. This builds on Judge Richardson's decision that '…tribunals should consider whether a lesser sanction might be appropriate in the circumstances' (at paragraph 33 of **Armitage**).

34. We consider that in these circumstances we do not think it appropriate, taking account of the overriding objective, to strike out the claimant's claims. We consider there to be lesser sanctions to strike out that we can impose to achieve the result of taking this case to its conclusion, and this is in the form of unless orders.

35. After reaching this conclusion not to strike out the claim, we then turned to consider whether this case could start on one of the 10 days already listed, or whether it would need to be postponed.

36. We are mindful that one of the core principles of fairness in litigation is that every party should be permitted to present his or her case fully and openly. And having reflected on the current state of the case, the claim is simply not ready to be heard. On balance, having considered the claimant's submissions, we do not consider that the claimant will be in a position to have her case heard this week, and it is very unlikely to be in a

position to be heard next week. The claimant is bringing numerous complex claims, and is currently seeking legal assistance, which in the claimant's submissions is needed in order to produce the statement in question. And there is a significant risk that the claimant may well find herself unable to secure legal representation at short notice, to help her produce her witness statement with a view to starting this hearing within the current listing.

37. Further, there is some evidence, albeit limited, that the claimant does have some health matters that do appear to be impeding her in a number of ways, although we have accepted, as already stated, that it does not reach that as required by EJ Findlay or EJ Perry. This is a factor that we needed to take into consideration.

38. Additionally, having a witness statement very late in the day makes it very difficult for the respondents to prepare their case properly. We also took account that this case, if it started this week, given we have lost 2 days already, or early next week, it would certainly go part-heard, which introduces the additional difficulty of finding an appropriate date where this composition of tribunal can sit. In our view, it would make sense to list this case for longer, and in one go. All of which are circumstances we took into account. We are further minded that this will be the first postponement in this case.

Conclusion

39. Taking all the circumstances discussed above into account, we consider that, applying the overriding objective, this case can only be fairly disposed of by vacating the remaining dates and postponing this hearing, and giving the claimant an opportunity to get her case ready to be heard. In doing so, we consider that a postponement along with a series of unless orders is an appropriate course of action. These will be contained in a separate Case Management document.

Employment Judge **Butler**

21 February 2020

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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