



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms A Mahon

**Respondent:** Caffcass

**Employment Judge JM Wade (in chambers)**

On the application of the respondent for a strike out of the claim dated 12 May 2021:

## JUDGMENT

The claimant's claim is struck out.

## REASONS

1 This claim, issued on 3 January 2020, relates to a dismissal in September 2019 and Equality Act allegations. It was stayed by me until 31 October 2020 on a telephone hearing, to enable the claimant to find new lawyers or advise that they were not to be instructed (there have been a number of different lawyers involved at expense to the claimant).

2 Earlier this year I gave relief from sanctions having discussed matters with the parties at a hearing on 3 February 2021. The summary of matters as they then stood appears below.

3 I directed a capacity hearing on 28 April 2021, made third party orders for the claimant's medical records, provided a certificate for the claimant's psychiatrist to complete and so on. Despite that work, the hearing did not determine the capacity issue for a number of reasons, including medical evidence and securing access to the official solicitor.

4 The Employment Judge at that hearing gave further directions for a way forward. There was no evidence of those Orders having been addressed by the claimant between then and today, save for the email below. There have now been six hearings in this case.

5 On 12 May 2021 at 9.54 Ms Atkinson emailed to say that "there may be a solicitor that is able to represent", who had advised seeking a delay in the hearing so that they could look at the case information. She said: "I can reassure the court that this is the last possible option for representation". That was all that was said.

6 There was no hearing in fact listed. On 12 May 2021 the respondent applied for strike out on the basis of previous failures to comply with orders, that the claimant does not pursue the case, and that there can be no fair hearing.

7 On 3 June 2021, there being no update from the parties as ordered, I directed I would consider the issue of strike out this week on the basis that it is no longer possible to have a

fair hearing, despite the best efforts of all involved. There has been no communication from the claimant or Ms Atkinson to oppose a strike out, request a hearing or confirm a way to progress the case since the last communication on 12 May 2021. My clerk has searched the Tribunal's systems using a number of identifiers today. I note that papers were emailed to the claimant directly on 3 June 2021, to ensure that the claimant herself was directly aware of where things stand.

8 I take into account that the defence costs in this case are coming from the public purse and that two out of the three respondent witnesses may well not be available to take part in a future hearing (through long term ill health/departure). I take into account that the claimant's participation is also unlikely – trying to deal with the capacity issue as a discreet issue did not bear fruit and it is unlikely that seeking to determine further substantive issues would proceed more effectively.

9 In the round, we have reached the stage where despite the best efforts of all involved, there is no prospect of a fair hearing within a time frame which is consistent with justice in this jurisdiction where strict time limits apply.

10 Having heard from the claimant directly in February I was told that closure in this case was very important for her health. I am giving that closure today, albeit not in the way she would have wished, nor if matters were different, would anyone wish. I had commented previously that representation in the Tribunals is not a matter that I can change within our rules - it is a matter for politicians in circumstances such as these. I am bound to conclude that it is necessary in the interests of justice in this case, to strike out this claim, all other options having been considered and tried in this case.

11 The interests of justice include considering the interests of all those who bring cases to the Tribunal and need access to its scarce resources, and the interests of the respondent in having this claim determined within a reasonable time frame. I do not underestimate the prejudice to the claimant in having her claim brought to an end, not on merit, but because I now conclude it is not possible, for all the reasons we have previously discussed, for a fair hearing to be enabled. That said, this is the rarest of cases where balancing that prejudice in the round, this is the right decision.

Employment Judge JM Wade

Date: 15 June 2021

JUDGMENT SENT TO THE PARTIES ON

Date: 15 June 2021

# Annex: text of orders sent to parties on 14 February 2021

## ORDERS

- 1 The unless order sent to the parties on 21 December 2020 is revoked.
- 2 As relief from the case being dismissed on 20 January 2021, the case is reinstated.
- 3 The February 2021 four-day final hearing (of which today was to have been the first day) is cancelled pending a capacity hearing and further case management.
- 4 I reserve any further case management of this case to me and the file is to be marked accordingly.
- 5 There shall be a capacity hearing at 10 am by CVP on 28 April 2021; a separate notice of hearing shall be sent.
- 6 The Employment Judge who conducts that hearing must have available to him or her, the paper file.
- 7 There shall be breaks every hour during that hearing or as required by the claimant.
- 8 The hearing will require the completion of the attached certificate by the claimant's psychiatrist by **17 March 2021**.

## CASE MANAGEMENT SUMMARY

1. The claimant and Ms Atkinson confirmed that they are both content with the reasonable adjustment of Ms Atkinson being copied on emails from the Tribunal and the respondent.
2. I summarised events to date with the help and input of the parties. The claimant was dismissed by Caffcass in September 2019. She did not have the necessary two years' employment with Caffcass to bring an unfair dismissal complaint. She had worked before that as a social worker in different settings. Solicitors were instructed to bring claims of disability discrimination and complex Equality Act claims were presented in January 2020 including about dismissal, failures to make reasonable adjustment during employment, and unfavourable treatment because of something arising in consequence of disability (Section 15 claims).
3. Caffcass does not accept the claimant was a disabled person by reason of mental impairment (anxiety and depression) between 2017 and 2019 and a Tribunal will need to determine that issue. Caffcass does accept the claimant was a disabled person by reason of physical impairment (fibromyalgia and associated pain) during her employment.
4. A Tribunal hearing will need to determine the substantive complex issues in the case and four days had been the estimated hearing length. The claimant attended a telephone case management hearing herself on 30 June because by then she was without solicitors due to lack of funds. She then did not attend a hearing in September. In the summary of that hearing the Employment Judge said this:  
*The list of issues requires further work at a telephone hearing or at the start of the final hearing – the latest version was sent by the respondent on 3 July. There are too many complexities in the case being presented for it to be managed by a litigant in person with impairment, in my view. I would not start the case at a full hearing unless further clarification had been done.*
5. That case management summary included four possibilities for the way the case might be able to progress to a hearing, including if the claimant lacked capacity and a litigation friend was appointed. The case was then paused to allow for those possibilities to be explored and a final hearing was listed to start today. When there was no progress in

preparing the case in compliance with orders, an unless order was made. In an email of 19 January from the claimant's mental health nurse (to whom the claimant had forwarded the unless order) there was no indication of a means by which the case would be pursued and the frustration in that situation was apparent. The case came to an end on 20 January 2021 in accordance with the unless order.

6. There then followed a raft of correspondence including that the claimant and Ms Atkinson had taken from the comment above that the Tribunal had decided the claimant lacked capacity. They have completed forms for the official solicitor to act and the claimant has spoken to the office of the Official Solicitor. I explained that the Tribunal had not determined capacity yet, and it would be unprecedented to my knowledge for the Official Solicitor to act in an employment case.
7. I have today been able to hear directly from the claimant and she has explained that she considers that her mental health will be adversely affected unless the case is heard at a hearing and determined. She needs closure and to be heard. I asked if she has contemplated both positive and adverse outcomes to the case, but particularly the possibility of an adverse consequence, and she still wishes the case to be determined at a hearing.
8. I also discussed an adjusted approach to case management: by hearing the mental health disability issue first and separately, and then by an Employment Judge identifying the arguable complaints for a final hearing, to be conducted with a litigant in person with impairment, the case could come on for hearing with the minimum of further preparation. The respondent could provide a file and the original particulars could be the claimant's witness statement. (it is the preparation steps with which the claimant has struggled because she cannot access emails from the Tribunal or the respondent without support – hence the copying in of Ms Atkinson).
9. The claimant tells me she could attend a video link hearing to give evidence if Ms Atkinson could also be present and there were sufficient breaks, and she believes she could give evidence in her case, but she believes she cannot make decisions about it or prepare the case or conduct it in her own interests.
10. The claimant had been told by the office of the Official Solicitor that it is a possibility that the OR would act as litigation friend.
11. Mr Hutchison did not disagree with my summary of events to date and he relies on his written communications and objects to the reinstatement. He considers the case is stale, memories fade, one witness is currently off sick, and it is unlikely we will be any further forward in a year's time.
12. There is clearly force in what he says, but given the claimant's previous career as a social worker without the difficulties she tells me that were present at Caffcass, and the impact upon her of her employment and dismissal, and her belief and wish for the claims to be heard, in all these circumstances I considered that justice required the case to be reinstated.
13. The decision to be taken was whether to conduct a capacity hearing alone, or to combine this with a hearing of the mental health disability issue as the medical evidence is likely to overlap. The respondent is of the view that the costs in determining disability may very well be wasted if the capacity issue then involves delay – we cannot know the next steps until that is decided. I agree with that, and so I have fixed a capacity hearing only.
14. I am also persuaded that the volume of reading in this case means it is best that case management decisions come to one Employment Judge where possible and I have therefore reserved it to me for that reason. Any hearings determining issues will be allocated to any Employment Judge.
15. I said to the parties that the expert evidence for the capacity hearing could come from either Ms Atkinson or the claimant's psychiatrist, but on reflection I consider that Ms Atkinson is best relieved of that task because she has already had a great deal of input. The Tribunal is going to be best helped by information from a further source at this stage.