EMPLOYMENT TRIBUNALS

Claimant: Ms T Brangman

Respondent: NCO Europe Limited

Heard at: Manchester **On:** 6 October 2021

Before: Regional Employment Judge Franey (sitting alone)

REPRESENTATION:

Claimant: Did not attend
Respondent: Miss A Nanhoo-Robinson, Counsel

JUDGMENT

1. The claim is struck out under rule 37(1)(b) and the case is at an end. The final hearing listed between 6 and 10 June 2022 is cancelled.

2. The claimant is ordered to pay the respondent's costs caused by the adjournment of the hearing on 24 August 2021 in the sum of £**2,166.00**.

3. Under rule 5 the time specified in rule 77 is extended so that the time within which any further applications for costs or preparation time should be made now expires 56 days after the date on which the judgment finally determining the proceedings is sent to the parties.

REASONS

Introduction

1. This was a preliminary hearing in public held in person. The previous hearing was a four day final hearing starting on 24 August 2021. That hearing was adjourned on the first day and did not proceed.

2. On 27 August 2021 the respondent made an application by email for an order requiring the claimant to provide three documents, and for a public preliminary hearing to consider striking out the claim, if not ordering a deposit, and an order for costs in relation to the adjournment of the hearing on 24 August 2021. That email was copied to the claimant.

3. I decided to list the application for the claim to be struck out to be heard at a public preliminary hearing.

Notice of Hearing 7 September 2021

4. Notice that such a hearing would take place on 6 October 2021 was given to the parties by a letter of 7 September 2021, sent by email. That notice confirmed that the issues to be determined would include whether the claim should be struck out because a fair hearing is not possible, and the respondent's application for costs in relation to the adjournment of the hearing on 24 August 2021.

5. The notice of hearing was accompanied by a note from Ryan Thomas, a member of the Tribunal's administrative staff, about the claimant's attendance at the Tribunal on 25-27 August 2021.

6. The notice also included an order that the claimant should provide to the respondent within 21 days three items:

(a) Her application of 4 March 2021 for the final hearing commencing 24 August 2021 to be recorded;

(b) A communication the claimant said she had received from the Tribunal confirming that this would be done; and

(c) Copies of audio recordings and transcripts which had been the subject of previous orders for disclosure but which had still not been supplied to the respondent.

Claimant's response

7. On 29 September 2021 the respondent emailed the Tribunal and the claimant about a bundle of documents for this hearing. The claimant responded by saying that she had already won her case and there was no cause for any additional bundle.

8. In subsequent correspondence with the respondent and the Tribunal the claimant asserted that there was no hearing on 6 October 2021, for example saying in an email on 30 September 2021 at 12:01:

> **"There is no reason or cause for a hearing on 6 October 2021. Furthermore, the Tribunal has not informed me of any hearing on 6 October 2021 for the reason that I have already won."**

9. On 5 October 2021 the Tribunal sent an email to the parties asking for details of who was attending and for confirmation that no COVID-19 symptoms were being experienced. The claimant responded by saying that she had not been provided with any document to state that there was any hearing on 6 October 2021.

10. The Tribunal replied by providing a further copy of the email of 7 September with the notice of hearing attached. The claimant was asked to confirm whether she was attending or would seek a postponement. The email made clear that she was not obliged to attend the hearing but it may proceed in her absence and her case might be struck out.

11. The claimant responded at 14:55 on 5 October 2021. Her email said that the listing notified by the Tribunal was invalid because the claimant had already won her case. She wanted an order requiring the respondent to pay her compensation. She said in her email that because the respondent had offered settlement the Tribunal must consider it as an admission of guilt and find that the claimant had won her case.

12. On behalf of the respondent Miss Nanhoo-Robinson informed the claimant by email later that afternoon that she could make written representations on the applications to be pursued. She was aware of the applications because she had been copied into the written application made on 27 August 2021.

Failure to Attend

13. The claimant had not attended the Tribunal by 10.00am when the hearing was due to commence. A further 20 minutes were allowed to see if she was running late. She did not arrive.

14. Rule 47 empowered me to proceed in her absence. I did not consider that any telephone enquiry of the claimant was appropriate. She had indicated that she did not regard the hearing as valid, so it was not a surprise that she had not attended. No application for a postponement had been received, and no written representations responding to the respondent's application had been received. I had regard to paragraph 21 of the President's guidance on Good Practice in Employment Tribunal hearings from April 2019, but there were no special circumstances which would justify contacting her. I concluded she just did not want to participate in a hearing she regarded as invalid.

15. The hearing began shortly after 10.20am with the claimant not in attendance. I had read the Tribunal file and the written application of 27 August 2021 prior to the hearing. I heard brief oral submissions from Miss Nanhoo-Robinson. Conscious that the claimant was not present and written reasons would be appropriate, I gave very brief oral reasons for the judgment set out above. These written reasons contain more detail.

Summary of the Proceedings

16. This section contains a summary of the proceedings to put my decision into context. Events from 24 August 2021 onwards were of importance and will be recounted in some detail.

Claim and Response

17. The claimant is black and of Bermudian origin. She was engaged as a Customer Service Representative by the respondent on 13 May 2019. Following an incident in the office she was suspended on 28 May 2019, and subsequently dismissed with effect from 4 June 2019. An appeal against dismissal was rejected.

18. Having undergone early conciliation, the claimant presented her claim form on 24 July 2019. She claimed unfair dismissal, notice pay and race discrimination. The claim form provided a summary of events on 28 May but did not contain clarity as to the legal claims pursued. The claimant provided a schedule of incidents on 18 August 2019 but the legal basis for the claims was still unclear.

19. The response form of 21 August 2019 said that the claimant had been dismissed for gross misconduct because she had become aggressive and violent in the office. It was alleged that she had pushed a manager on three occasions. It said there had been no allegation of race discrimination until the appeal.

Case Management October 2019 – July 2021

20. At a preliminary hearing before Employment Judge Holmes on 18 October 2019 the unfair dismissal complaint was struck out because the claimant had not been employed for two years, and the breach of contract claim was struck out because the claimant had been paid notice pay. The case was listed for a final hearing in July 2020 and Case Management Orders made.

21. An application by the claimant for reconsideration of the Judgment striking out the unfair dismissal and breach of contract claims was unsuccessful.

22. In April 2020 the respondent applied to strike out the claim because there was still no meaningful clarity from the claimant. The claimant resisted that application on 3 June 2020. On 22 June 2020 Employment Judge Holmes wrote to the parties responding to the claimant's points, making reference to her failure to comply with Case Management Orders, and making arrangements for a public preliminary hearing to consider the application to strike out the claim and other matters. The final hearing was replaced by that public preliminary hearing.

23. That preliminary hearing came before Employment Judge Batten on 29 July, but it had been listed as a telephone hearing to which members of the public did not have access. It was therefore adjourned to 30 September 2020. Whilst adjourning the preliminary hearing Employment Judge Batten relisted the final hearing for four days between Tuesday 24 and Friday 27 August 2021.

24. Employment Judge Horne chaired the hearing on 30 September 2020. He set out in his Case Management Summary a schedule of the allegations which were put as direct discrimination and/or harassment related to race. He granted the claimant permission to amend in certain respects but refused it in others, and he made a Case Management Order requiring the claimant to disclose transcripts of recordings which she claimed to possess.

25. Because a Judgment was issued declining to strike out the claim, some of the amendment applications were also recorded in that Judgment. The claimant subsequently sought reconsideration of the Judgment and variation of the Case Management Order.

26. Both of these were refused by Employment Judge Horne. Unfortunately, there was some delay on the part of the Tribunal at that stage due to those matters not having been referred to him promptly by the administrative staff. Employment Judge Horne’s Judgment rejecting the reconsideration application was sent to the

parties on 12 March 2021, together with a Case Management Order refusing to vary his earlier Case Management Orders.

27. On 4 March 2021 the claimant emailed the Tribunal. Her email was not copied to the respondent. She attached a letter asking for the final hearing to be recorded. Unfortunately that request was not actioned by HMCTS administrative staff. It was not printed and linked to the Tribunal file, let alone referred to a judge. There are no facilities yet for routinely recording hearings in the Employment Tribunal, and requests for hearings to be recorded are generally referred to me as the Regional Employment Judge. I was not made aware of this request. I can only conclude that this was due to pressure of work on HMCTS staff.

28. On 21 April 2021 the claimant wrote to the Tribunal about problems she was having with her landlord. She was informed that the Tribunal could not get involved in those matters. The claimant raised similar matters and repeatedly chased up a response in a series of emails between 26 April and 24 May 2021. The matters she raised had no apparent connection to the Employment Tribunal proceedings. After extensive correspondence during June and July 2021 she was informed by a letter of 29 July that these were matters for the police.

Final Hearing 24 August 2021

29. The four day final hearing began on 24 August 2021. The claimant had refused to participate by CVP. The Tribunal was chaired by Employment Judge Ainscough sitting with non legal members. Judge Ainscough and the claimant were in person in the hearing room. The non legal members, and Miss Nanhoo-Robinson on behalf of the respondent, attended by CVP.

30. At the start of the hearing the claimant queried whether it was being recorded. She said she had applied for that to happen in March 2021 and that the Tribunal had agreed that the hearing would be recorded. There was no such correspondence on the Tribunal file, and nor had the respondent seen that correspondence. The Tribunal hearing the case could not be sure of the position, so the claimant's assertion was accepted at face value.

31. After enquiries with HMCTS administrative staff it transpired that HMCTS in Manchester was trialling recording of in person hearings using portable recording devices, but that there had been problems with getting transcription of such recordings. Accordingly the Tribunal could not guarantee that an effective recording of the hearing would be made. The claimant protested that she would not regard the hearing as being fair unless it were recorded.

32. The respondent was under the impression that the Tribunal had previously agreed to the hearing being recorded. On that basis it agreed that the hearing should be adjourned and relisted if recording was not possible.

33. The Tribunal took the decision to adjourn the hearing.

34. At that point the claimant changed her position and said she wanted it to proceed. She became agitated and verbally aggressive. She accused Judge Ainscough of being a racist and biased towards the respondent. Judge Ainscough considered it appropriate to leave the hearing room abruptly at this point and the hearing concluded. The claimant was escorted out by the Tribunal security staff.

35. That afternoon the claimant sent an email in which she gave her record of events. She accused Judge Ainscough of "illegally deliberating with the respondent's representative out of the presence of the claimant" and of discrimination, bias and prejudice against the claimant. Her email concluded by saying that she would resume the hearing in person the following day and for the rest of the week.

25 – 27 August 2021

36. Although the decision to adjourn the hearing had been communicated to the claimant verbally on 24 August by the Tribunal, and confirmed to her by email by the respondent in exchanges that followed later that day, the claimant attended the Tribunal venue on Wednesday 25 August 2021. She was informed that there was no hearing in her case listed that day but she insisted on remaining at the Tribunal venue in reception.

37. That day the written Case Management Order made by the Tribunal chaired by Employment Judge Ainscough was emailed to the parties. It was emailed at 13:02 together with a letter notifying the parties that the final hearing was listed for four days between 6 and 10 June 2022. That day, and during the two days that followed the claimant sent a number of emails to the Tribunal whilst in the Tribunal reception area. She made it clear she expected the hearing to resume. In one email of 26 August at 10:37 she said:

> **"The staff at the Tribunal are refusing to allow me to enquire on my case..."**

38. A note of what transpired on those three days was prepared by Ryan Thomas of HMCTS staff. It was sent to the parties with the Tribunal letter of 7 September 2021 notifying them of the hearing today. The note shows that the claimant was told that the hearing had been adjourned and there was no point in her being at the Tribunal building, but that she insisted on staying in the reception area for the rest of the day. In relation to Wednesday 25 August the note recorded the following:

> **"She stayed in the reception area for the rest of the day and kept approaching staff members who went past. On some occasions she accused them of racism when they didn't engage with her. She also began ringing the office and demanding to speak to the Judge and for her hearing to continue. In each case she was told that she would need to put any complaint in writing and that the hearing was adjourned.**
>
> **Two security personnel from the Crown Court attended to support the security staff and they attempted to explain the situation to her, but to no avail. She left at approximately 4.00pm."**

39. The note went on to record that the claimant attended again on 26 August between 8.00am and 2.00pm, and Friday 27 August between 8.30am and 13.05pm.

Respondent's Application

40. On 27 August 2021 the respondent made an application for the claimant to be ordered to provide the exchange of correspondence in early March 2021 about recording the final hearing, and the transcripts which had been ordered by Employment Judge Horne at the hearing on 30 September 2020.

41. The email was accompanied by a written application of 15 pages which set out in some detail the applications being pursued for the claim to be struck out if a

fair hearing was no longer possible, for a deposit to be ordered if the claim was not struck out, and for the costs of the adjourned hearing on 24 August to be paid by the claimant. The sum which the respondent sought in relation to costs was specified as £2,166.00. The costs application was pursued only if the reality was that the claimant had not been informed by the Tribunal that the hearing would be recorded.

42. The written application also had attached to it a signed witness statement from Deborah Nichol, the respondent's head of Human Resources.

43. The email, the application and the witness statement were copied to the claimant.

44. Having considered these events I directed that a preliminary hearing be listed, resulting in the notification of 7 September 2021.

45. As summarised in paragraphs 7-12 above, above, the claimant did not engage with this hearing. She repeatedly asked the Tribunal for what she described as a "CMO", by which she later clarified she meant a judgment in her favour ordering the respondent to pay her compensation because she considered that she had won her case. It appeared from her emails that her belief that she had won her case was based on two propositions:

(i) The respondent had offered to settle the case and therefore this had to be taken as an admission of guilt; and

(ii) Because only the claimant had attended the hearing on days 2, 3 and 4 the case must have been resolved in her favour.

46. Further, the claimant continued to maintain that she had not received any notice of the hearing on 6 October 2021, eventually making clear on 5 October that by this she meant that she did not accept that the hearing on 6 October 2021 was valid or necessary given that (in her view) she had already won the case. Her last communication at 14:52 on 5 October 2021 reiterated this position, and repeated her request for a monetary order requiring the respondent to pay the claimant compensation.

Strike Out – Legal Framework

47. The power to strike out a claim is contained in rule 37. The relevant parts read as follows:

> **"(1) At any stage of the proceedings, either on its own initiative on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds –**
>
> **(a) …**
>
> **(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious …**
>
> **(c) for non-compliance with any of these rules or with an order of the Tribunal;**
>
> **(d) …**

> **(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim …**
>
> **(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing."**

48. The word "scandalous" does not simply mean something which is shocking, but rather conduct which is irrelevant and abusive of the other side. Conduct is vexatious when it is pursued not as a genuine effort to progress the claim, but to harass the other side or out of some other improper motive. It can also include conduct which is an abuse of process: **Attorney General v Barker [2000] FLR 759**. Unreasonable bears its ordinary meaning.

49. The leading case on striking out for unreasonable conduct remains **Blockbuster Entertainment Ltd v James [2006] IRLR 630**. The Court of Appeal made clear that for a claim to be struck out on this basis the Tribunal must be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps, or has made a fair trial impossible. In either case striking out the claim must be a proportionate response and is not appropriate if there is any other way of securing a fair trial.

50. The power to strike out is therefore effectively a last resort. That is particularly the case where allegations are made of discrimination contrary to the Equality Act 2010. There is a public interest in such allegations being heard and determined on their merits.

51. Effectively, therefore, the Tribunal has to consider the following matters:

(a) Whether there has been scandalous, unreasonable or vexatious conduct of the proceedings;

(b) If so, whether there is any means by which a fair trial can still be secured. A claim should only be struck out in its entirety if a fair trial is simply not possible.

Striking Out - Conclusions

Unreasonable Conduct

52. Although there had been a previous history of non-compliance with Case Management Orders, I disregarded that for the purpose of this application. My concern was with the conduct of the claimant since 24 August 2021, which was to have been the first day of her final hearing. From the information available on the Tribunal file, and having taken into account the numerous emails from the claimant over the course of this litigation, including those that gave her account of events at the Tribunal on that day, I concluded that the claimant had conducted the proceedings in an unreasonable way in the following respects.

53. Firstly, I was satisfied that the claimant had falsely alleged that the Tribunal had confirmed in March 2021 that the final hearing would be recorded. Although her email requesting this of 4 March 2021 has subsequently been retrieved from the tribunal's email inbox, there is no trace in the Tribunal's paper or electronic records of any confirmation that this would be done. The claimant did not produce a copy

either at the final hearing on 24 August, or in the weeks that followed. She had not complied with the order contained in my letter of 7 September 2021 which required her to provide copies of that correspondence to the respondent within 21 days. I was satisfied that she had misled the Tribunal and the respondent on 24 August by making the assertion that recording of the final hearing had been agreed in advance by the Tribunal.

54. Secondly, the accusation of racism, bias and prejudice on the part of Employment Judge Ainscough was entirely unwarranted. It was the claimant's own application to postpone the hearing (when it became apparent that recording was not practicable) to which the Judge and her non legal members acceded. Having been misled into thinking that recording had been approved in advance, the respondent acquiesced in the application to adjourn. The claimant then changed her mind, but the decision had already been taken. The claimant has provided no basis whatsoever for the allegation that there was any racism, bias or prejudice on the part of the Tribunal.

55. Thirdly, the claimant's other behaviours in the Tribunal hearing room that day, to which Miss Nanhoo-Robinson can attest, were unreasonable. They troubled Employment Judge Ainscough sufficiently that she ended the hearing abruptly by walking out.

56. Fourthly, the claimant behaved in an unreasonable fashion in attending the Tribunal building in the three days that followed when she knew that there was no hearing. She also acted unreasonably in seeking the assistance of Tribunal administrative staff about her case, and in accusing some of them of racism when they declined to help her. To accuse them of racism in that situation is unreasonable and unjustifiable.

57. Fifthly, the claimant did not comply with the order set out in my letter of 7 September 2021 requiring her to provide her email of 4 March 2021 and the alleged Tribunal response confirming that the hearing would be recorded.

58. Sixthly, the claimant has persistently asserted that she has won her case and demanded judgment in her favour together with an award of compensation. Neither of the two bases upon which she has made those demands is reasonable. Any offer of settlement made on a “without prejudice” basis does not amount to any admission that the claim is well-founded. The fact that the final hearing had been adjourned to June 2022 was confirmed in writing on 25 August 2021.

59. Seventhly and finally, the claimant has sought to deny the validity of this hearing, initially by denying that she had received any notice of it, but when it became apparent that was unsustainable she changed her position to say that it was a hearing for which there was no reason because she had already won her case.

60. The combination of these seven matters caused me to conclude that the claimant had conducted this case in an unreasonable way since 24 August 2021. The power to strike out her claim had arisen.

Whether to Strike Out the Claim

61. That gave rise to the second question: should I exercise that power? That required consideration of whether striking out would be a proportionate response, or

whether there is any other way of securing a fair hearing though case management orders.

62. The claimant misled the Tribunal and the respondent about the existence of prior approval for the final hearing to be recorded. She refused to accept the judicial decision of the Tribunal to adjourn the final hearing on 24 August. She behaved as if that decision had not been made and communicated to her. She failed to comply with the Tribunal order for the exchange about recording to be provided. She sought to deny that this hearing had been notified to her, but when that became unsustainable changed her position to say that it was no longer valid. In my judgment, it is clear from this behaviour that she does not accept the authority of the Tribunal or have any respect for its decisions.

63. I cannot see any prospect of the claimant accepting that a further final hearing is valid. That means that a fair hearing is simply not possible. Both sides need to engage with Tribunal decisions and Case Management Orders, whether they agree with them or not, if the overriding objective of dealing with a case fairly and justly is to be met. Where only one side engages, a fair hearing is not possible.

64. I therefore decided that the claim should be struck out under rule 37(1)(b) because the manner in which the proceedings have been conducted by the claimant is unreasonable and has rendered a fair trial impossible.

65. For the avoidance of doubt, I am not striking out the claim under rule 37(1)(c), as non-compliance forms only a part of the unreasonable conduct, and nor am I striking it out under rule 37(1)(e) alone. My conclusion that a fair hearing is no longer possible is a direct result of the unreasonable conduct of the claimant.

Respondent's Costs Application

66. The claimant was made aware of the application by the respondent for the costs incurred as a consequence of the adjournment of the hearing on 24 August 2021 when she received a copy of the respondent's email of 27 August 2021. Attached to that email was the application which made it clear that the costs were sought only if the assertion that the Tribunal had approved recording in advance was not true. That made it all the more important that the claimant substantiate that assertion by providing a copy of the communication in question. She did not do so.

Legal Framework

67. The power to award costs arises under rule 76. A costs order can be made where a party has behaved unreasonably in the proceedings or part of it (Rule 76(1)(a)), or where a hearing has been adjourned on the application of a party made less than seven days before the hearing date (Rule 76(1)(c)).

68. The case law on the costs powers (and their predecessors in the 2004 Rules of Procedure) include confirmation that the award of costs is the exception rather than the rule in Employment Tribunal proceedings; that was acknowledged in **Gee v Shell UK Limited [2003] IRLR 82**.

69. The procedure by which the costs application should be considered is set out in rule 77 and the amount which the Tribunal may award is governed by rule 78. In

summary rule 78 empowers a Tribunal to make an order in respect of a specified amount not exceeding £20,000.

70. Rule 84 says that the Tribunal may have regard to ability to pay in deciding whether to make a costs award, and if so the amount.

71. It follows from these rules as to costs that the Tribunal must go through a three stage procedure (see paragraph 25 of **Haydar v Pennine Acute NHS Trust UKEAT 0141/17/BA**). The first stage is to decide whether the power to award costs has arisen, whether by way of unreasonable conduct or otherwise under rule 76; if so, the second stage is to decide whether to make an award, and if so the third stage is to decide how much to award. Ability to pay may be taken into account at the second and/or third stage.

Power to Award Costs

72. In my view the claimant acted unreasonably in asserting, falsely, that the Tribunal had approved the recording of the final hearing in advance. It was this assertion which caused the respondent to acquiesce in the application to adjourn and the Tribunal to accede to it. The power to award costs had arisen under both rule 76 (1)(a) and (c).

Whether to Make an Award

73. I considered whether I should exercise my discretion and make an award. The claimant had provided no grounds opposing the application. There was a direct causal link between her false assertion that recording of the hearing had been confirmed by the Tribunal, and the adjournment. If she had not made that assertion the hearing would have proceeded. The final hearing had to be relisted and the costs of attendance on 24 August 2021 were wasted.

74. The claimant had provided no information about her financial position. I was satisfied it was right to order her to pay something towards the costs incurred because of that unreasonable conduct.

How Much to Award

75. The respondent was not seeking the totality of the costs incurred for the hearing in August 2021. The commercial arrangements between the respondent and Miss Nanhoo-Robinson's chambers meant that total fees of approximately £7,000 had been incurred for counsel for that four day hearing. Only a quarter of the sum was being sought, representing the first day.

76. In the absence of any information about the claimant's ability to pay I was satisfied that this was a reasonable and proportionate amount. The respondent made clear in the application that if it came to a question of enforcement it would be prepared to accept payment of a low sum month by month over a long period.

77. I therefore ordered the claimant to pay the respondent costs summarily assessed in the sum of £2,166.00.

Further Costs Applications

78. Rule 77 empowers either side to make a further application for costs (or, for the claimant, preparation time) up to 28 days after the Judgment which finally disposes of the proceedings. It is likely that this will be the final Judgment.

79. The respondent is concerned that it will be put to further cost if the claimant seeks reconsideration of this Judgment, and/or seeks to appeal. Miss Nanhoo-Robinson therefore applied for further time for the respondent to consider whether to make an application for the costs of the whole case (excluding those incurred on 24 August 2021). That seemed to me to be a sensible course of action, allowing both parties breathing space to consider how to proceed upon receipt of this Judgment.

80. I therefore exercised my power in rule 5 to extend the time limit in rule 77 so that any application for costs or preparation time must now be made up to 56 days after the date upon which the Judgment finally determining the proceedings is sent to the parties. Unless there is any reconsideration Judgment, that time limit starts to run when this Judgment is sent out.

Regional Employment Judge Franey
7 October 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
8 October 2021

FOR THE TRIBUNAL OFFICE