EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Kondaya Dewayalage	**v**	Tesco Stores Limited

Heard at: Watford (in public by video) **On**: 28 October 2021

Before: Employment Judge Quill

Appearances

For the Claimant: In person
For the Respondent: Ms Greenley, Counsel

JUDGMENT

1. The Respondent's application to strike out the claim is refused.

2. The decision was given orally and the respondent requested written reasons, which are below.

REASONS

1. The case had been listed for a final hearing for two days, today, 28 October 2021 and tomorrow, 29 October 2021. That listing was made at a preliminary hearing on 26 May 2021 where the judge was Employment Judge McNeill QC. The claimant attended that hearing and the respondent was represented by a solicitor.

2. Orders were made for the preparation for the hearing which included, amongst other things, that the claimant should send his schedule of loss to the respondent by 7 July (paragraph 3.1 and 3.2 of the orders), and that a list of documents should be sent to each other by 7 July. In the respondent's case, the respondent was ordered to send its documents too, either hard copies or electronic copies. A final hearing bundle was to be by 4 August and the witness statements were to be exchanged by 24 September.

3. The claimant did not comply with the order for schedule of loss by 7 July. He has not complied with it at all. He has informed the respondent that he is seeking losses of £50,000 but without providing a breakdown.

4. During the course of today's hearing, the claimant told me that he has actually had some intermittent jobs since leaving the respondent's employment last year and that, a few weeks ago, around August, he started what he hopes to be a permanent job. It seems that that information was included in any attempted schedule of loss that the Claimant has sent to the Respondent. In any case, he confirms that no documents about it have been sent to the respondent and does not believe he disclosed the existence of that job (or his previous jobs since termination of employment) to the Respondent prior to today.

5. In terms of documents, the claimant has not sent any documents to the respondent. He has given a variety of different explanations for that including that he thinks the respondent would have everything that he has, and that he was waiting for the respondent to send him a copy of CCTV, and that he wanted the respondent's documents to be sent to him by post. (He says that he has not received them by post; Ms Greenley's instructions were that they had been sent both by post and by email). Evidence in the bundle before me indicates that they may well have been sent to him by email on 7 July. Certainly the respondent attempted to do so. The claimant does not admit receiving the 7 July email and, of course, sometimes emails with large attachments do not actually get through to the recipient.

6. Around 19 October, the respondent applied for strike out and later on applied for this hearing to be postponed. The postponement came on the back of a telephone conversation in which the claimant had said to the respondent's solicitor that potentially at least he had some documents but he was intended to bring those to the hearing rather than send them to the respondent in advance.

7. Against that background, the final hearing bundle was not prepared by 4 August or at all, and witness statements were not exchanged by 24 September or at all. Those were the dates specified in the orders.

8. The respondent seeks to strike out on three bases under Rule 37 (b), (c) and (d).

    37.— Striking out

    (1) 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 any of the following grounds—

    (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) that it has not been actively pursued;

9. I will deal with the last one first, 37(1)(d). I am satisfied that it is not correct that the claim has "not been actively pursued" by the claimant. While he has, as I am going to discuss in more detail, breached relevant orders, the reasons that he is in breach of the orders are not that he is no longer actively pursuing the case. From the claimant's own perspective, he is actively pursuing the case and he is seeking to have a resolution by one means or another.

10. In terms of the manner of proceedings, the case law which I have to consider includes, for example, De Keyser Limited v Wilson [2001] IRLR 324, and, for example, Blockbuster Entertainment v James [2006] IRLR 630 but a relevant summary of the law is found in Bolch v Chipman [2004] IRLR 140 so it is sufficient for me just refer to that.

11. Before making a striking out order, an employment judge must find that the party or the representatives has behaved scandalously, unreasonably or vexatiously actually in the conduct of the proceedings as opposed to more generally.

12. If the finding is that a party has deliberately to coin a phrase, "thumbed their nose" at the litigation process and as acted scandalously with the intention or perhaps with the effect of preventing a fair trial from ever taking place, then that in itself is a significant issue and may potentially in itself be a ground for striking out a claim. But if the party has not acted in such a way and if (even though they have behaved scandalously or unreasonably or vexatiously) a fair trial is still possible then it may be a appropriate to have some other sanction applied, short of a strike out. A strike out is a draconian measure and should potentially only be taken as a last resort.

13. In considering whether a strike out should be made for non-compliance with any orders of the tribunal then the factors are listed in Weir Valves and Controls (UK) Ltd v Armitage [2004] ICR 371 and they include: the magnitude of the non-compliance; whether the default was the responsibility of the party or his or her representative; what disruption, unfairness or prejudice has been caused; whether a fair hearing would still be possible; whether striking out or some lesser remedy would be an appropriate response to the disobedience.

14. Under either Rules 37(1)(b) or (c), it is necessary, as with any other decision that a judge must make, to have regard to the overriding objective.

15. In this case it is my decision that the claimant does not have good excuses for his failures. He has failed to comply with the orders. However, for the reasons mentioned below, some other sanction is possible and strike out would be too draconian in these particular circumstances.

16. The hearing has already been postponed before today. Therefore the choice today was between either striking it out (and bringing an end to the proceedings without a decision on the merits) or else relisting it. I think it is possible to still have a fair trial albeit that will be at least 12 months into the future. I do take into account that witnesses memories may well fade over the ensuing 12 months, but trials do take place in courts and tribunal hearings sometimes several years after the events in question.

17. I have taken into account what the claimant has told me. He reminds me he is acting as a lay person. He has told me that he believes he has done his best to comply with the orders as he understood them to be. One of the most serious failings in my opinion, based on what I have heard today, is the lack of disclosure from the claimant about the fact that he had started a new job. The first time the respondent has been told about that is during the course of today's proceedings. That can, of course, be the subject of cross examination in due course but is not a good enough reason for me to strike out the claim.

18. In terms of the claimant's assertion that - other than documents about his new earnings - he has no other documents in his possession, I am recording that that is what he said to the tribunal today. If that is indeed the case, then the respondent is not disadvantaged by the fact that it has not had specific confirmation until two or three weeks ago orally by phone, repeated again to me today, that the claimant's position is that he has no other documents in his possession. Again, that can be a subject of cross examination if the respondent sees fit.

19. The other things that have not been done is that the bundle has not been done and witness statements have not been exchanged. The claimant's failures to comply with the prior orders is the main reason that these latter steps have not been completed so far (especially in light of his apparent ambivalence about whether he had no relevant documents, or whether he did have some, but believed he could just present them on the day, without prior disclosure). However, it is not too late to do those things moving forward.

20. So, for those reasons, I decline to strike out the claim. (Case management orders for future progress of the matter have been sent separately. It hopefully goes without saying that both parties must stick to the revised timetable.)

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Employment Judge Quill

Date: 12.11.2021

Sent to the parties on: 22 November 2021

For the Tribunal Office