



EMPLOYMENT TRIBUNALS

Claimant: Mr John Grantham

Respondent: Bournemouth, Christchurch and Poole Council

Heard at: Bristol **On:** 26th January 2022

Before: Employment Judge P Cadney

Representation:

Claimant: In Person/Written Submissions

Respondent: Mr A Peck (Counsel)/ Written Submissions

Reconsideration/ Strike Out Judgment

The judgment of the tribunal is that-

- i) The claimant's application to reconsider the Judgment of EJ Emerton of 30th June 2021 striking out all claims save for that for unfair dismissal is dismissed.
- ii) The respondent's application to strike out the unfair dismissal claim is well founded and the claim is struck out.

Reasons

1. On 26th January 2022 I heard a preliminary hearing listed to determine the respondent's application to strike out the claimant's claim for unfair dismissal, his other claims of disability discrimination and whistleblowing detriment having been struck out earlier. It emerged at the hearing that the claimant had made an earlier application for reconsideration which had not yet been dealt with. After consultation with the REJ he decided that I should deal with both applications and I gave further directions for written submissions which have now been received.

Procedural History

2. The case has a lengthy and complex procedural history which I will summarise as briefly as possible:-
 - i) The ET1 was received on 19th March 2019 arising from the claimant's dismissal in December 2018, and included a request for a stay for more time to prepare his case. A six week stay was granted by EJ Harper.
 - ii) On 2nd May 2019 the claimant wrote asking for more time and the case was listed for a PH to determine strike out/deposit order.
 - iii) The PH was held on 19th September 2019 by EJ Emerton, He directed that the case be listed for an in person PH on 24th February 2020 and gave a number of case management directions; in particular to set out the details of his unfair dismissal, disability discrimination and whistleblowing claims.
 - iv) On 30th November 2019 the claimant wrote asking for an extension of time.
 - v) On 23rd December 2019 EJ Gray issued a strike out warning.
 - vi) On 31st January 2020 at a TPH EJ Emerton vacated the hearing listed for 24th February 2020 and re-listed the hearing for 3rd /4th May 2020. Further time for compliance with the original directions from the September hearing was granted and extended to 13th March 2020.
 - vii) On 13th March 2020 the claimant provided in partial compliance a Schedule of Loss and asked for a further week to supply particulars of his claims. Between the 18th March and 20th April 2020 the claimant made a number of requests for a further extension of time.
 - viii) On 22nd April an unless order made by EJ Rayner requiring compliance by 24th April 2020.
 - ix) In partial compliance some incomplete documents were sent shortly before midnight on 24th April 2020.
 - x) As a consequence of the pandemic the PH was converted to a TPH on 13th May 2020 at which all the claimant's claims were struck out for non-compliance with the unless order by EJ Emerton.
 - xi) On 2nd June 2020 the claimant made an application for EJ Emerton's order to be set aside.
 - xii) Between then and 30th June 2021 the claimant continued to provide number of documents including on 19th May 2021 a document Further Particulars of Claim.

- xiii) On 30th June 2021 EJ Emerton in part revoked his earlier order permitting the unfair dismissal claim to proceed. Directions were given and the case listed for hearing for three days 26th – 28th January 2022.

Reconsideration Application.

3. On 12th July 2021 the claimant applied for a reconsideration of EJ Emerton's decision to strike out the claims, and not to set aside the Unless Order of 22nd April 2020. He asserted that the "indirect disability discrimination" claim was inextricably linked to the unfair dismissal claim. He refers to having had a stress induced breakdown in 2014 and to recovery from reaction to severe stress and adjustment disorder during 2019. Although the application only specifically refers to the indirect disability discrimination claim I will assume, as this was certainly how the claimant put it to me orally at the hearing on 26th January 2022, that he was seeking to be permitted to pursue all of his claims including the public interest disclosure detriment and/or automatic unfair dismissal claims. His oral submission was to the effect that the decision to dismiss and the unfair dismissal claim could not be understood or properly assessed unless he is permitted to advance all of his claims.
4. The first application is for reconsideration of EJ Emerton's failure to set aside EJ Rayner's unless order of 20th April 2020; and the second that in any event EJ Emerton should reconsider the decision only to permit him to pursue the unfair dismissal claim.
5. EJ Emerton deals with this at paragraph 44 to 66 of the reconsideration Judgment of 30th June 2021. He sets out in great detail the background to the order, the legal principles to be applied, and he did partially set aside the unless order insofar as it related to the unfair dismissal claim. He did not set it aside in relation to the other claims. Having described (paragraph 58) the "continued and persistent non-compliance of case management orders by the claimant prior to the imposition of the order.", the conclusion that any of the claims should be permitted to proceed is on the face of it a markedly generous one. The explanation appears to be that EJ Emerton took the view that the unfair dismissal claim was distinct and separable from the disability discrimination and/or whistleblowing claims. He describes (in para 5) that the claimant "*had set out his claim with sufficient clarity that the respondent should be able to call evidence and deal with the matters raised, in a relatively short and simple hearing.*"
6. However, in the hearing before me on 26th January 2022 the claimant did not accept that proposition. He contends that the disability discrimination claims, and whistleblowing claims, and the unfair dismissal are inextricably linked and that even if his reconsideration application is unsuccessful and that he is not entitled to pursue the claims as separate freestanding claims, that he is entitled to rely on all the evidence in relation to all of the claims. This is clearly not how EJ Emerton understood the issues nor how he envisaged the case proceeding.
7. It is sensible at this stage to attempt to summarise at least the unfair dismissal claim. The claimant was employed by the respondent as a Passenger Transport Officer. He was dismissed for having sent confidential information about some

138 service users comprising, the respondent alleges, in excess of 5000 separate data breaches from his work email to his home computer, and was subsequently discovered to have been storing at least some of these as printed material in his summer house. There is no dispute that the claimant had done this and the limited issues in the unfair dismissal claim appears to be whether he had a legitimate reason for doing so and/or whether the respondent should have accepted that he at least believed that he had a legitimate reason (even if he was wrong) sufficient to mitigate the apparent seriousness of his actions and to mitigate the sanction.

8. The Further and Better Particulars supplied on 24th April 2020 set out claims for public interest disclosure detriment and automatic unfair dismissal; and disability discrimination claims (direct discrimination / associative discrimination/ indirect discrimination / discrimination arising from disability /harassment / victimisation). The specific allegations relating to the unfairness of the dismissal are set out at paras 4.3.3 and are summarised above.
9. In addition he supplied further Draft Particulars of Claim on 19th May 2021. It is not clear whether these were before EJ Emerton at the time of his reconsideration decision. Insofar as it relates to the unfair dismissal claim sets out allegations of procedural failings, and substantive unfairness but again appears to accept that there is no dispute as to the underlying facts and states *"To date no one has sought to understand why I chose to disclose such sensitive personal information about my personal internet use.."*, and later *"My intention/purpose was good and justifiable in the circumstances of this case.."*.
10. In the circumstances it is completely understandable that EJ Emerton took the view that the unfair dismissal claim was not linked with or dependant on the other claims but centred on the discrete issue of the reason for the claimant's actions. Similarly EJ Emerton's reasoning for not setting aside the unless order and striking out the other claims is very clearly set out and equally comprehensible. The document supplied on 24th April 2020 was described by EJ Emerton as *"Still failing to bring any clarity to his claim."*, and that as a result the case was no further forward by June 2020 than it had been in March 2019 and there was *"no realistic prospect of making any further progress with clarification"* (para 8).
11. The reconsideration application does not engage with any of these points. As far as I can judge, however for the first time the claimant asserts that *"the potentially fair reason for dismissal is dependant on conduct arising from my disability"*. This appears to suggest that but for his disability the claimant would not have acted as he did in sending confidential documentation from his work to his home computer; and appears, therefore to suggest that he accepts that it was not legitimate to do so. However this is entirely contradicted by his continued assertions that his actions are entirely justified.

Conclusions

12. On reconsideration the tribunal may confirm, vary, or revoke the previous decision where it is necessary in the interests of justice to do so (rule70). My task is obviously made more difficult by the fact that the decision being

reconsidered is not one that I made. However, I have EJ Emerton's detailed reasoning as to the basis for the original decision.

13. The first issue which I need to consider is the effect of the claimant's contention before me that the disability discrimination claims and/or the public interest disclosure claims are inextricably linked with the unfair dismissal claim and that he is entitled to rely on them evidentially even if not as free standing heads of claim. As set out above EJ Emerton's reasons for striking out those claims (and refusing to revoke that decision on reconsideration) was based on the finding that despite being given every opportunity to elucidate them that there was still no clarity as to those claims. Insofar as it is relevant this is a conclusion with which I agree. Clearly if there is no clarity to the claims one possible conclusion is that it is not possible for the respondent to deal with them evidentially any more than if they are pursued as separate heads of claim. If this is correct one possible outcome of the reconsideration application would be to revoke EJ Emerton's order permitting the unfair dismissal claim to proceed and to restore the original decision dismissing all of the claims. The alternative analysis is that the claimant has only sought reconsideration of the other claims and not the unfair dismissal claim and it is not open to me to revisit that decision. If that is correct the question of the admissibility of any of the material in relation to the disability discrimination claim is a case management issue.
14. I bear in mind that this is an application for reconsideration of a reconsideration judgment; and that both initially and on reconsideration EJ Emerton applied the unless order and declined to set it aside; and dismissed all claims except that for unfair dismissal. In my judgement there is nothing in the application which leads me to the conclusion either that EJ Emerton was wrong or that I would not have reached the same decision; and nothing that leads me to the conclusion that EJ Emerton's original decision should be revoked or varied in relation to the claims that he struck out.
15. In relation the unfair dismissal claim I have reached the conclusion that whilst it was generous to allow it to proceed that there is no application for reconsideration of that decision and it should therefore stand.

Strike Out Application

16. In any application for the strike out of a claim the tribunal must firstly determine whether any of the conditions for doing so as set out in rule 37 have been met; and if so whether to exercise the discretion to do so.
17. Where there is an assertion of unreasonable conduct (r37(1)(b)) the tribunal has the power to strike out a claim where there has been persistent or deliberate disregard of case management orders or where a fair trial is no longer possible; and if striking out is a proportionate response (*Blockbuster Entertainment v James* [2006] EWCA Civ 1684). The determination of whether a fair trial is still possible does not simply involve examining the "absolutist" question of whether a fair trial is possible at all at any stage; but of consideration of whether a fair trial is still possible in the trial window allocated for hearing, although the question of proportionality still applies (*Emuenkoro v Croma Vigilant (Scotland Ltd* [2021] UKEAT).

18. As set out above, following EJ Emerton's reconsideration the unfair dismissal claim was set down for hearing over three days on 26th-28th January 2022 and directions were given for the hearing. Those were standard directions for an unfair dismissal case and limited the bundle to 100 pages and the witness statement word count to 3,000 words for the claimant and 5,000 words in total for the respondent's witnesses. Both these reflect EJ Emerton's view that the unfair dismissal claim was relatively straightforward.
19. The respondent contended and contends that the claimant has failed to comply with the case management orders. Firstly the claimant has not provided a concise outline as to why he contends that his dismissal is unfair or identifying what the live issues are. Secondly that whilst the respondent has in compliance with the case management orders provided a list of documents on 26th August 2021 the claimant has not done so but has made a series of document requests to the respondent without identifying why they are relevant to the unfair dismissal claim. The 100 page bundle was due to be agreed by 15th December 2021 and witness statements exchanged by 29th December 2021. Neither has taken place.
20. Between the end of October 2021 and early January 2022 the respondent made a number of applications relating to the provision, of documents compliance with CMOs and finally seeking the postponement of the hearing and the strike out of the claim. On 5th January 2022 the claimant wrote accepting that he "had difficulty complying with case management orders" and states "this is a direct consequence of my disability – depression and anxiety exacerbated by autistic inertia -and easily resolvable by reasonable adjustments such as mediation and dialogue". He repeats that "...my actions were justified and in good faith...". He also set out that his father had died on New Years' Day having been diagnosed with cancer in August and asking for more time to be allowed on compassionate grounds.
21. On 12th January 2022 EJ Self vacated the final hearing and directed that 26th January 2022 be converted to a Preliminary Hearing to determine the respondent's strike out application on the basis of the claimant's unreasonable conduct/ non-compliance with orders/ failing to actively pursue the claim.
22. The respondent submits that those three are overlapping categories in this case. It contends that it is unreasonable behaviour to have failed to particularise the basis for the unfair dismissal claim some three years after the claim was lodged; that he is also in breach of the existing case management orders, and demonstrates that the case is not being actively pursued. Whilst the respondent understands that in general the claimant's case is that he was in the circumstances entitled to send confidential material to his home computer (and whilst EJ Emerton took the view that the unfair dismissal claim was relatively straightforward) it is still not known specifically how the claimant puts his case, particularly as it still does not know the extent to which the claimant is seeking to rely on allegations relating to the disability discrimination claims and/or whistleblowing claims evidentially. It effectively submits that despite EJ Emerton's optimistic hope that that the unfair dismissal claim would involve narrowly defined issues and a relatively short hearing it still has no way of

knowing if that is correct and if not how the claimant puts his case; and that the claimant has still not complied with the case management order from September 2019.

23. Similarly the respondent asserts that the claimant has made no serious attempt to narrow his claim and focus on the unfair dismissal claim since the original strike out and then the re-instatement of the claim on reconsideration. It is now approaching two years since the claims other than unfair dismissal were struck out but the claimant appears to believe that he can proceed as if that decision had never been made. The claimant has not begun any serious process of limiting the documentation to comply with a 100 page bundle page limit, but has not applied to vary the order. Accordingly it submits that the case is not being actively pursued. Whilst it is clear that the claimant is still considering the case and is attempting to pursue it as a whole, he has never focussed specially on the unfair dismissal claim and is not in reality actively pursuing that claim as a stand-alone claim.
24. In addition it asserts that a fair trial is no longer possible as a number of potential witnesses are no longer employed by it and witness memories are bound to have faded given the passage of time since the dismissal.
25. It follows that the claims should be struck out for each of the three grounds identified by EJ Self.
26. There are a number of aspects of the litigation that concern me:
 - i) This litigation has been proceeding for three years. The discrimination and other claims were struck out nearly two years ago; and the claim for unfair dismissal was listed in July 2021 for hearing in January 2022. Accordingly it should now have been concluded.
 - ii) The claimant was granted every opportunity to cogently and concisely set out his claims. He did not do so and the claims were struck out, with the unfair dismissal claim subsequently restored.
 - iii) The claimant knew, or should have known from the decision, that EJ Emerton regarded the unfair dismissal claim as a stand-alone claim that was not dependant on any of the others. Whilst the claimant had applied or a reconsideration of that decision he could not assume that that application would be successful, but he neither applied for a variation of the case management orders or made any serious attempt to comply with them.
 - iv) As a result the trial window had to be vacated as on any analysis the case was not ready for hearing; and is in reality was no further forward than it was when the directions were given.
 - v) Despite the other claims having been struck out nearly two years ago the claimant continues to focus on them and he has made no attempt at all to restrict his claims;

- vi) Given his inability to comply in nearly three years with the existing case management orders at every stage of the proceedings the expectation that he claimant will be able to narrowly focus and abide by any further case management orders is optimistic in the extreme.

Conclusions

27. On one analysis a fair trial is still possible even at this distance in time if the unfair dismissal claim is confined as narrowly as I have at paragraph 8 above and as was clearly anticipated by EJ Emerton. However the claimant is unwilling or unable to focus his claim and still seeks to pursue allegations which are the basis of claims which have already been struck out for his failure adequately particularise them. In addition the claimant's request for "mediation or dialogue" as a reasonable adjustment similarly does not suggest he has grasped the stage the litigation had reached by June 2021, with only the unfair dismissal claim remaining.
28. That gives two possibilities. Firstly the unfair dismissal claim could be re-listed for a further three day hearing and more time given for compliance with the existing directions. Given the history of this case, however, I have no confidence that any future directions would meet with any greater success particularly as he claimant appears not to accept that the order of EJ Emerton requires him to focus exclusively and narrowly on the unfair dismissal claim. More fundamentally the purpose of case management is to allow claims to proceed to hearing within a reasonable timeframe, and to be ready for hearing. There must come a point at which the tribunal concludes that it is simply not fair or reasonable to the respondent to be facing litigation which should and could have been concluded by now. Had the directions been complied with the final hearing would have taken place in January 2022, which is itself nearly three years after the claim was lodged. That it did not is entirely due to the claimant's failure to comply with case management directions. As set out above I am entitled to take into account not simply whether a fair hearing is possible at all at some point in the future, but whether a fair trial is possible in the trial window allocated. In this case self-evidently it was not.
29. It follows that in my view the first threshold test is met in that there has unquestionably been a persistent disregard for case management orders. The second question is whether a strike out is a proportionate. In many circumstances where an unfair dismissal claim had been listed for final hearing which had not proceeded because of the default of one party an immediate strike out would be disproportionate. However, in the exceptional circumstances of this case, in my view the situation is somewhat different. For the reasons given above the claimant has been in persistent default of case management orders at every stage of the litigation. In consequence the case was not ready for the final hearing. I bear in mind the that a strike out is draconian sanction which may result in the dismissal of a meritorious claim and should only be used as a last resort and where there is no other proportionate sanction. However, bearing all of that in mind, and whilst I have some degree of sympathy for the claimant he has been given every opportunity to present his claims and has consistently failed to comply with case management orders to

allow him to do so and in my judgement in the particular and unusual circumstances of this case is a proportionate order.

30. It follows that the claimant's claim for unfair dismissal is struck out.

Employment Judge P Cadney
Dated: 29 March 2022

Judgment sent to parties: 12 April 2022

FOR THE TRIBUNAL OFFICE