EMPLOYMENT TRIBUNALS

Claimant: **Mr M H Aidara**

Respondent: **Delphi Technologies Ltd**

JUDGMENT
On applications for reinstatement and strike out

1. **The Claimant's application for his race discrimination claim to be reinstated is refused.**

2. **The Respondent's application for the unfair dismissal claim to be struck out is refused.**

REASONS

Introduction

1. This is the Judgment on two applications, from Mr Aidara for reinstatement of his race claim and from the Respondent for strike out of the unfair dismissal claim. The decision was made without a hearing, as explained below.

2. For the purposes of this consideration, I am taking Mr Aidara's case at his highest. For that reason, while the Respondent says that his absence from the 27 July to 7 October 2020 was unauthorised, I consider this on the basis that Mr Aidara says that he was allowed to take unpaid leave in an emergency and that he does not accept as accurate the notes of the meeting with him when he asked permission.

3. To the extent that I have made findings of fact, that is without hearing evidence and those findings serve only as the basis for this Judgment. They are not binding on the Tribunal dealing with the final hearing.

The history

4. Mr Aidara's claim was made on 14 December 2020. He brings a claim for unfair dismissal and race discrimination.

5. He had been employed as a machine operator. He was employed from 1 April 2017 to 7 October 2020, when he was dismissed.

6. He comes from Mali. He describes himself as Black African.

7. The facts are not agreed but it is his case that he was requested unpaid leave on 30 July 2020 by his manager because his mother in Mali was ill and that he was allowed to take it.

8. He agrees he came back late. There was civilian unrest and a military coup with the border closed. He had difficulty in getting home, his flight was then cancelled and on his return he had to be isolated. So while he says he was granted unpaid leave, in an emergency, his absence was prolonged.

9. He was dismissed, he says, on 7 October 2020, the date when it had eventually been agreed that he would be back at work.

10. The Respondent agrees that he was dismissed and relies on misconduct. The reason for the dismissal is not agreed. Mr Aidara appealed, without success.

11. He says the reason was discrimination. In his claim form he says he was treated differently from others. What he says is,

> "a lot of people there who had many months off work and came back to work, some they even called them to give them redundancy money but they sacked me."

12. That is all he says in the claim form about discrimination.

13. The claim was identified at the case management hearing on 8 July 2021 as being in respect of unfair dismissal and race discrimination. The discrimination claim is identified as direct race discrimination, and the unfavourable treatment identified as the basis for it is the dismissal.

14. At the Case Management Hearing he identified Mike on SV Wash, and a David Cross or Chris or Crease, the Group Manager, as comparators.

15. The claims were contested.

16. At that Case Management Hearing, Employment Judge Gray fixed the dates for a three day hearing on 12, 13 and 14 January and gave orders for preparation for the hearing, including for the exchange of witness statements by 9 December 2021. Mr Aidara was ordered to provide details of other actual comparators by 15 July 2021 and did not do so.

17. The Order was clear about what he had to do. It included the explanation that the witness statement is to contain everything that the witness can tell the Tribunal and that witnesses would not be allowed to add to their statements unless the Tribunal agreed.

18. It also directed him to provide details of his comparators. He did not do that.

19. The Order included warnings about the consequences of non-compliance, including as to strike out or costs.

20. Mr Aidara did not provide a witness statement either by 9 December 2020 or by the first day of the listed hearing. I accept that the Respondent reminded him. He had chosen not to provide a witness statement but just to attend the hearing.

21. He attended the virtual hearing on 12 January 2022. It was a video hearing. He was unable to connect save by telephone, even with the help of the clerk. He faced high charges for the use of his telephone. The hearing could not fairly proceed. That was not his fault.

22. That he had not provided a witness statement was his fault.

23. He was asked why he had not provided a witness statement. He said, of the Respondent's solicitor, "I don't have to share anything with him". He thought he gave his account in the hearing, "For me, it should be in hearing room" "I don't have to share nothing with him, this was my belief."

24. He had not understood that he had to explain his case in advance and that the Respondent had to know on what basis he was making claims against them, in order to have a fair opportunity to defend those claims. He accepted that he had not done things right.

25. He said he was not able to prepare a witness statement in time for the hearing to continue on the second day for which it was listed.

26. The Respondent had sent him their witness statements but he had not accessed the link.

27. It was explained to him in simple terms that his evidence had to be given in advance.

28. He agreed to provide a witness statement setting out the facts of his case by 26 January 2022. An "Unless" order was made on that basis.

29. It was likely that he would not receive the Order before the deadline and the consequence of breaching an Unless Order is severe, so the Order was explained fully. He was told in plain language of need for a witness statement, disclosing the basis for his claims. He was told he had to set out the facts of his case, in date order and in numbered paragraphs, and to explain why he claimed unfair dismissal and race discrimination. . He had to explain what had happened and why he said his race was a factor.

30. At the same time, the case was relisted for a hearing in person in December 2022, on 19 , 20 and 21. Mr Aidara refused a translator for that hearing.

31. The Respondent's application for strike out was dismissed.

32. Mr Aidara provided a witness statement on 23 January 2022 by way of an email.

33. The witness statement covers the circumstances of his absence and the dismissal. It says nothing about race discrimination, or about other people having been treated differently from him, save for incidents in 2013 and 2017. Those incidents were not mentioned on his claim form.

34. The Respondent wrote to Mr Aidara on 31 January 2022 to say to him that he had not provided the facts he relied on in relation to the race discrimination claim. They gave him a further chance to provide a witness statement by 14 February 2022 and warning him of the consequences of failure.

35. Mr Aidara did not provide an additional or more detailed witness statement.

36. The email accepted as his witness statement does not contain evidence to support or explain the claim of race discrimination.

37. The Case Management Order dated 12 January 2022 was issued on 17 February 2022. That explained the requirement for a witness statement:

> "A witness statement is a written statement that explains what happened; it sets out the facts that that witness needs to tell the tribunal. For Mr Aidara, it will explain what he did, what others did, what happened in the order it happened, so that the Tribunal and the Respondent understand why these claims are being made. It will set out the history and the facts that he says show he was unfairly dismissed and that show he was discriminated against, that is, treated badly, because of his race or colour. It is a factual statement of evidence in support of the claims made."

38. Mr Aidara did not have that before him in writing when the witness statement was due, although it had been explained to him, but he did have it by the time that the Respondent made a further application.

39. On 21 February 2022, the Respondents made an application in respect of both claims. The application was –

    1. For confirmation that the email of 23 January 2022 did not comply with the requirements of the Order made and that therefore judgment should be issued confirming that both claims stood dismissed.
    2. In the alternative, that, if there was enough in the email for it to be accepted as a witness statement in respect of the unfair dismissal claim, that the email did not comply with the requirements of the Unless Order made in respect of race discrimination and that judgment should be issued dismissing the race discrimination claim for failure to comply with the Unless Order.
    3. Or, again in the alternative, that the claims be struck out, requesting a half day hearing. That application was made on the basis that
        3.1. The manner in which the proceedings had been conducted by Mr Aidara had been scandalous, unreasonable or vexatious;
        3.2. That there had been a failure to comply with the Employment Tribunal Rules or an Employment Tribunal Order,
        3.3. And/or that it was no longer possible to have a fair hearing in respect of the claim.

40. The application refers to the explanations given by them and by the Judge and the opportunities given to Mr Aidara to provide what was needed, even after the deadline imposed in the Unless Order itself. This was their second application for strike out.

41. That application was copied to Mr Aidara. He did not send any response to the Tribunal.

42. On 22 March, Judgment was issued confirming that the effect of the Unless Order was that the race discrimination claim had been struck out. That Judgment was issued on 7 April 2022. That Judgment set out that a full explanation had been given to Mr Aidara as to the importance and necessity of a witness statement, that it was essential and that it must set out the facts relied on in relation to Mr Aidara's claims of race discrimination and unfair dismissal.

43. The judgment contained the explanation that Mr Aidara could ask to have the Order dismissing his claim set aside. He had to make that application by 21 April 2022.

44. At the same time, Mr Aidara was invited to comment on the Respondent's application for his unfair dismissal claim to be struck out. He was asked whether he wanted a hearing at which that application could be considered and why his unfair dismissal claim should not be struck out. He was required to reply by 21 April 2022.

45. Mr Aidara sent in an email on 21 April.

46. He said,

> "I am Mohamed Houssene AIDARA, the witness statement i sent contains both cases (UNFAIR DISMISSAL AND DISCRIMINATION) Maybe it is not done professional way I believe. So I ask if the Tribunal can offer me a lawyer please.
> That is why I think both cases should stand.
> The Respondents keep asking for the case to be strike out instead trying to defend. They know about wrong doing.
> Thank you for your comprehension."

47. He did not answer the questions sent to him.

48. On 12 May 2022, the Tribunal sent Mr Aidara a letter, explaining that the Tribunal could not offer him a lawyer, providing a list of sources of legal advice and assistance, and setting out the following:

> "You have said that you do not want the unfair dismissal claim to be struck out and you want the race claim that has been struck out to be allowed to proceed to a hearing.
> These are the questions you need to answer.
> Race discrimination:
>
> 1. Why do you say it is fair and just for your race claim to go ahead? Please read what the judgment says about why it was struck out before answering – the witness statement you sent in did not explain or refer to your race discrimination claim.
> 2. Are you asking for a hearing, when you can explain why the race discrimination claim should be allowed to go ahead? If you do not ask for a hearing, the Tribunal will decide whether the race discrimination case can go ahead by reading what you and the Respondent have written?
>
> Unfair dismissal
>
> 3. Do you want a hearing for the Tribunal to decide on the Respondent's application for the unfair dismissal claim to be struck

out? If not, it will be decided by the Employment Judge on the basis of what you and the Respondent have written.

4. Why do you say it is fair and just for your unfair dismissal claim to proceed?

You have been asked most of these questions before. You are being given one more chance to answer them. Please make sure you answer each of them."

49. On 25 May, Mr Aidara sent in an email. He asked for his race discrimination claim to go ahead.

> "My sacking was race related to my race. The manager (Alfie) who denied my emergency family leave had months off for leg injury and manager (Dave Crips) who denied to come back had months off for illness. A lot of people had emergency family leave. Some call from their home the same day. I had the same problem for getting contract and appraisal."

50. In reply to the question about why it was fair and just for the unfair dismissal claim to be allowed to go ahead, he said,

> "Because I think it right to. I have been unfairly dismiss. The first tribunal was cancelled and I have been asked to give statement which I did. I can't see why it should not go ahead."

51. He wanted both cases to proceed to a hearing. He resisted strike out. He did not request a hearing to consider strike out or the setting aside of the Unless Order.

52. That was properly copied to the Respondent.

Law

53. An employment judge or tribunal has power, at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on any of five grounds (see SI 2013/1237 Sch 1 r 37(1))

54. Those grounds are that,

> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
> (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;
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

55. Strike-out is a drastic power, requiring caution in its exercise. Where central facts are in dispute, strike out will be exceptional. It is a power to be exercised with particular caution in discrimination and whistleblowing cases *(Anyanwu v South Bank Students' Union [2001] IRLR 305, HL; North Glamorgan NHS Trust v Ezsias [2007] EWCA Civ 330, [2007] IRLR 603, [2007] ICR 1126).)* These are cases of their essence fact-sensitive. The power remains available for cases where the claims made cannot succeed.

Strike out under Rule 37(a)

56. Scandalous includes irrelevant to the issues or conduct abusive of the other party.

57. Vexatious refers to a claim not pursued with the expectation of success but to harass the other side out of an improper motive. The term is also used to indicate what might be described as an abuse of process.

58. Cases of failure to comply with an order of the tribunal can also be dealt with as cases of scandalous, unreasonable or vexatious conduct *(Ahmed v Bedford Borough Council [2013] UKEAT/0064/13).*

No Reasonable prospect of success

59. The test here is not whether the claim is likely to fail; nor whether it is possible that the claim will fail. It is whether there is no reasonable prospect, in other words, the prospects of success are fanciful.

60. It is not to be decided simply by reference to submissions, but all the material available, including the Tribunal file. The issues must be clearly identified before any such consideration is given. Where there is a serious dispute between the parties, it is not for the tribunal to conduct an impromptu trial of the facts.

61. In *Twist DX Ltd and Others v Dr Niall Armes and others, [2020] UKEAT/0030/20,* a protected disclosure case, an appeal against a refusal to strike-out for no responable prospect of success, there is a review of the principles;

- A decision to strike out is a draconian measure, given that it deprives a party of the opportunity to have their claim or defence heard. It should, therefore, only be exercised in rare circumstances
- The power to strike out on the "no reasonable prospect" ground is designed to weed out claims and defences or parts of them that are bound to fail. So the question is whether the claim or contention has a realistic as opposed to a fanciful prospect of success.
- It is not appropriate where the central facts are in dispute and oral evidence is needed to resolve them.
- It is right to take the case presented at its highest in terms of its factual basis, so the test is, whether the case at its best still cannot succeed in law.
- It is not the occasion to resolve novel issues of law

- There remains a discretion to be exercised fairly and justly having regard to pleadings (claim and response) and any written evidence or oral explanations. In that way, it may be possible that an amendment would clarify and render the pleaded case more realistic, and in that case permission to amend should be considered. That must come before any decision to strike out.
- More latitude is appropriate where a party is not legally represented and/or is not fully proficient in written English.

Strike out under Rule 37(b) – scandalous, unreasonable or vexatious conduct

62. The power to strike out under rule 37(1)(b) expressly includes the manner in which proceedings have been conducted on behalf of the Claimant or the Respondent, making it clear that a representative's conduct can be taken into account.

63. In *Bolch v Chipman 2004 IRLR 140,* the EAT set out the steps that a tribunal must ordinarily take when determining whether to make a strike-out order:

    a) Before making a striking-out order under what is now rule 37(1)(b), an employment judge must find that a party or his or her representative has behaved scandalously, unreasonably or vexatiously when conducting the proceedings
    b) once such a finding has been made, he or she must whether a fair trial is still possible, as, save in exceptional circumstances, a striking-out order is not regarded simply as a punishment. If a fair trial is still possible, the case should be permitted to proceed
    c) Even if a fair trial is unachievable, the tribunal will need to consider the appropriate remedy in the circumstances. It may be appropriate to impose a lesser penalty, for example, by making a costs or preparation order against the party concerned rather than striking out his or her claim or response.

64. In *Emuemukoro v Croma Vigilant (Scotland) Ltd (2022) ICR 327*, the EAT considered that, where a party's unreasonable conduct has resulted in a fair trial not being possible within that the allocated window, the power to strike-out is triggered. Whether the power ought to be exercised depends on whether it is proportionate to do so. Due to the conduct there was no other option other than an adjournment, which would have resulted in unacceptable prejudice to the Claimant (a conclusion that was not challenged by Croma Vigilant. The EAT therefore concluded that the tribunal had not erred in striking out the response.

Non-compliance with Rules or Order

65. A claim can be struck out due to the Claimant's wilful disobedience of an order. A deliberate decision to disobey the Tribunal's order can prevent the Tribunal from having the best evidence on which to base its findings of fact. Additionally, as a matter of public policy, orders are there to be obeyed, otherwise cases cannot be properly case-managed and fairness achieved between the parties *(Essombe v Nandos Chickenland Ltd UKEAT/0550/06).*

66. I am referred to *Weir Valves & Control (UK) Ltd v Armitage [2004] ICR 371*, in which the EAT set out the principles for tribunals to apply when considering whether to strike out a claim on this ground:

67. When an order has been breached, the Tribunal must be able to apply a sanction in response to wilful disobedience of an order. However, it does not always follow that disobedience should mean a strike-out. The guiding consideration is the overriding objective to do justice between the parties. A tribunal should therefore consider all the circumstances when deciding whether to strike out or whether a lesser remedy would be an appropriate sanction.

68. Relevant factors will include:

    - the magnitude of default;
    - whether the default is that of a party or their representative;
    - what disruption, unfairness or prejudice has been caused; and
    - whether a fair hearing is still possible.

69. The Tribunal must always guard against allowing its indignation to lead to a miscarriage of justice. The Tribunal must consider whether striking out or some lesser remedy would be an appropriate response to the disobedience – is strike-out a proportionate response.

70. In *Emuemukoro (above),* Peninsula had not complied with directions; there was a massive file of documents but it did not contain the documents which mattered. Peninsula had failed to prepare their witness statements. The Tribunal found unacceptable prejudice to the Claimants in an adjournment being forced, given that the parties agreed that there could be no fair trial within the trial window. It was right too to take into account the prejudice to the Respondent. The proportionate response was the less drastic one, which in this case was to strike out the response and make a judgment in the case rather than adjourn the hearing and cause prejudice to the Claimant. There had been no error in Tribunal approach.

Procedure:

71. By rule 37(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.

72. By rules 53 and 56, such a hearing must be an open public hearing.

73. Only the person against whom the application is made can require an oral hearing and must be given a chance to respond and to request one. The application can be determined on the papers. It is not appropriate to order witness statements and evidence (*Kwele-Siakam v Co-operative Group Ltd EAT 0039/17).*

Unless Order – Rule 38(1)

74. Where the order in respect of which there has been non-compliance states that if it is not complied with by the date specified, the claim or response (or part) will be dismissed without further order.

75. Where this kind of 'unless order' has been made, a tribunal will issue an order dismissing the claim or response (or part thereof) for non-compliance without giving the relevant party an opportunity to make representations under rule 37(2). Unlike strike-out orders under rule 37, a tribunal has no discretion in relation to orders under rule 38(1). Where an unless order is not complied with and no application has been made for relief against sanction, the claim or response must be dismissed automatically as at the date of non-compliance.

76. The only question for the tribunal is therefore whether or not there has been compliance in accordance with the order.

77. There is a right to apply within 14 days of the date that notice of the dismissal was sent to the parties to have the order set aside on the basis that it is in the interests of justice to do so, under rule 38(2). That may be determined on paper, if there is no request for a hearing.

78. Guidance is set out in *Thind v Salvesen Logistics Ltd EAT 0487/09,* to the effect that while it is important for tribunals to enforce compliance with unless orders, the interests of justice and the overriding objective may prompt a decision to reinstate the claim earlier dismissed. Factors to be considered will include the reason for the default, whether or not it was deliberate, how serious it was, the prejudice to the other party and whether a fair trial remains possible. No single factor is determinative.

79. The starting point is the interests of justice, taking into account all relevant factors and avoiding those that are irrelevant. It requires a broad assessment, involving a balancing exercise. (*Singh v Singh (as representative of the Guru Nanak Gurdwara West Bromwich) 2017 ICR D7, EAT).*

80. At this stage, it is for the claimant to provide evidence to satisfy the tribunal that it is in the interests of justice for his claim to be allowed to proceed *(Hylton v Royal Mail Group Ltd EAT 0369/14).*

Deliberations

81. What I have to decide is this:

- Whether there is an application to set aside the Unless Order
- Whether there should be an oral hearing in respect of any of the matters I have to consider.
- Whether to set aside the Unless Order, so permitting the race discrimination case to proceed.
- If so whether the claimant is to be permitted to add to his witness statement to include the explanation he now gives as to the basis of his discrimination claim.
- Whether the unfair dismissal claim should be struck out on any of the grounds relied on by the Respondent, including that

- the manner in which the proceedings have been conducted have been scandalous, unreasonable or vexatious
- there has been non-compliance with the Rules or an Order of the Tribunal
- that it is no longer possible to have a fair hearing

Application

82. Mr Aidara was given notice that his race discrimination claim was dismissed pursuant to the Unless Order on 7 April 2022. He responded by email on 21 April 2022. He asked that it proceed. That must be read as an application to set aside the Unless Order, thereby reinstating the race claim.

Oral hearing

83. The Respondent asked for an oral hearing in respect of the strike-out application. Mr Aidara did not. Only the party against whom the application is made has the right to request a hearing. I don't dismiss the Respondent's request lightly but in my judgment, an oral hearing is not necessary. I have the Respondent's earlier submissions on strike out and the file that was prepared for the full hearing that did not go ahead in January. I am satisfied a fair assessment can be made on the papers.

84. There has been no request for the application for reinstatement to be considered at an oral hearing. I am satisfied it can be fairly decided on the papers.

Considering reinstatement based on the application of 21 April

85. Mr Aidara had not in his witness statement given any evidence in relation to race discrimination. He did not mention being treated differently or from whom. That is why the Judgment was issued confirming that the effect of the Unless Order was that the claim was dismissed.

86. He does not explain in terms in his application why it is in the interests of justice for the claim to be allowed to proceed.

87. He does refer to wrong-doing by the Respondent, of which they were aware, and his difficulty in handling the case without professional help. He does not say more than that.

88. He still does not say what the basis of the race discrimination case is. He does not refer to what he says in the claim form about being discriminated against and he said very little there.

89. His application does not provide a basis on which to allow the claim to proceed.

90. A decision could have been made simply on that basis not to reinstate the race discrimination claim. Instead, he was invited to give further explanations.

Considering reinstatement based on his response of 25 May

91. He has in his response of 25 May provided a further statement to support his race discrimination claim.

> "My sacking was race related to my race. The manager (Alfie) who denied my emergency family leave had months off for leg injury and manager (Dave Crips) who denied to come back had months off for illness. A lot of people had emergency family leave. Some call from their home the same day. I had the same problem for getting contract and appraisal."

92. In favour of setting aside the Unless Order, the Claimant is a litigant in person – so that means he has no legal knowledge. He does not understand the way the Tribunal processes work, and his expectation has been that everything would all fall to be explained and dealt with at the hearing.

93. While Case Management Orders refer to the duty to co-operate, he regarded the Respondent's representatives with suspicion and did not understand that duty.

94. He did not understand that the Respondent needs to know what his allegations are, so that they can investigate and provide a response.

95. He has some difficulty with the language, although able to communicate imperfectly but effectively enough. He is looking for a full and fair hearing, and dismissing the claim defeats that.

96. The full hearing is now not until December 2022, so there is some time for further case preparation.

97. He has too provided some – a little – further information about the basis for his claim.

98. In terms of balance of hardship, if the race claim is not reinstated, he loses the opportunity to bring it.

99. Against that, there is a sustained history now, of him failing to keep to the terms of Tribunal Orders. He failed to provide details of his comparators as ordered by July 2022. He did not co-operate over disclosure and the Tribunal File. He failed to provide a witness statement, in spite of the very clear terms of the original Case Management Order, and in spite of fair reminders from the Respondent. He attended the final hearing without a witness statement and was not in a position to provide a witness statement within the time allocated for that hearing.

100. While the hearing could not proceed on the first day because of technological difficulties, none of the time allocated could be used because he had not provided that witness statement.

101. Whatever his difficulty earlier in the case in understanding the process, he has now had the benefit of the explanations in the case management hearing on 12 January 2022, the explanations in the case management order, the explanations in the Judgment issued on 22 March 2022. Added to that, the Respondent again after his failure to explain his discrimination claim in the witness statement, explained the failure and offered him more time. Given an

Unless Order, that was going the extra mile – again, they were being fair to someone unrepresented and with language difficulties.

102. I bear in mind that he does have language difficulties and that he has limited understanding of formal procedures and that his expectations of what the process involves are very different from reality.

103. He did not accept the offer of an interpreter at the hearing, so it is reasonable to think that he can with care cope with the explanations given to him in writing and in person, now given repeatedly. He said he understood them, at the telephone hearing in January. I accept that, because he complied in part after that.

104. Legal advice is available within the community and without charge, although I accept that sources of such advice are more limited than they used to be. Mr Aidara is able to use the internet. A google search on preparing for an Employment Tribunal hearing produces simple step-by-step guides which include explanations about witness statements and deadlines for preparatory steps. In the Case Management Order of July 2021, links are given to information about Employment Tribunal procedures including case management and preparation and to the President's Guidance on General Case Management. The Orders sent to him included explanations of what was required, which he has not followed.

105. In the light of all of that, his ignorance of the process he was involved in is not reasonable, and was not reasonable at the latest by the date of attending the Case Management Hearing in July 2021 and receiving the Order. Paying attention to that Order, researching and / or seeking advice would have given him the necessary understanding of what he had to do.

106. He suffered no penalty for attending the final hearing without the witness statement required – although he could have lost his case at that point, for that very failure. Had it not been for the technical difficulties that deprived him of a proper opportunity to participate, his case would have been very much at risk of strike-out because he had not followed the Tribunal's Orders. Instead, he had the benefit of oral explanations as to what he had to do, and a further opportunity to do it.

107. He acted within the deadlines for compliance since, but not provided the information required.

108. For the first time, on 25 May, on prompting from the Tribunal, he provided a little substance as to the basis for his race claim.

109. Insofar as it is the basis for his race discrimination claim, this is information that he should have included in his witness statement by 9 December 2021, and, pursuant to the Unless Order,by 26 January 2022 – so, five and a half months after the deadline for exchanging witness statements and more than four months after the deadline in the Unless Order.

110. In terms of balance of hardship, if the race claim is reinstated, the respondent faces preparing for a potentially substantial claim against them

111. A key question is therefore whether the case should be permitted to proceed on the basis that his comments of 25 May, if regarded as supplementing his original witness statement, enable the Respondent to know the case they have to meet.

112. There, in my judgment is the key difficulty.

113. This is what he says,

> "My sacking was race related to my race. The manager (Alfie) who denied my emergency family leave had months off for leg injury and manager (Dave Crips) who denied to come back had months off for illness. A lot of people had emergency family leave. Some call from their home the same day. I had the same problem for getting contract and appraisal."

114. Assuming that Alfie and Dave Crips are white British, it is clear that they had time off for ill health. Mr Aidara had unpaid leave (taking his case at its best) for a family emergency, that he says was granted at the end of July, from which he did not return until 7 October – so more than two months and by his own admission, late. He does not explain why he sees his treatment as unfavourable or unfair by comparison with theirs.

115. His other comparators are unidentified – "A lot of people…." Those comparators had emergency family leave. He does not say it was extensive or extended or that they returned late.

116. He has not identified any other individual comparator by name or circumstance.

117. At the Case Management Hearing in July 2021, he named Dave and Mike as his comparators (page 33).

118. He was then ordered to identify any other comparators and did not do so.

119. Dave, named on 25 May, is probably the manager mentioned at the Case Management Hearing. Alfie has not been mentioned before.

120. I see from the witness statements that the Respondent understood the Claimant's comparators to be Mateusz and Michael, based on what was said during the disciplinary proceedings.

121. So we have different individuals being put forward as comparators Mateusz and Michael to the Respondent, Dave and Mike (perhaps Michael) at the case management hearing and in this application, Dave and Alfie. No-one was identified in the claim form.

122. In my judgment, the Respondent is in no better position to understand the claim they have to meet as a result of this application than they were before.

123. I bear in mind that people often rely on hypothetical comparators and it is not essential to put forward a named individual. The question remains as to whether the claimant has done enough to justify allowing the claim to proceed.

124. It seems inevitable that Mr Aidara will be giving further information at the hearing that is new to the Respondent and that they may have difficulty in responding to, impromptu.

125. In my judgment this undermines the whole basis on which preparation for hearings proceeds. The rules and procedures of the Tribunal are aimed at enabling fair and effective hearings with the evidence focused on the allegations and each party having a full opportunity to understand the case

against them and to give explanations, and then to explore and challenge the opposite case.

126. I am satisfied that the Respondent has tried to help Mr Aidara by giving prompts and explanations. It is also clear that he mistrusts any help they offer. But he has also failed to act on the information given to him or available to him, acting instead on his own view of what is needed.

127. The Respondent is faced with trying to address a case that remains uncertain and the risk of further adjournment. Mr Aidara is also at risk if the case proceeds. He cannot expect to be allowed to add to his evidence at the hearing.

128. In my judgment, Mr Aidara's very late and brief explanation for bringing the race claim, if added to his witness statement, does not enable the Respondent to know the case against them. Nor is it appropriate at this stage for there to begin a further process of exploring what it is that Mr Aidara relies on, given his very slow, reluctant and incomplete explanations so far and the opportunities he has had.

129. In my judgment, the non-compliance has been substantial and continues. I recognise hardship for Mr Aidara in not being able to pursue the claim but he has had ample opportunity to present his case properly, while the Respondent is at risk of facing a hearing at which the allegations are presented for the first time.

130. The hardship to the Respondent would have justified at the least very serious consideration to strike-out in January. We are effectively no further on.

131. Because of Mr Aidara's non-compliance, the case could not be said to be ready for hearing in January. It is still not, five months later.

132. I have considered in general terms the potential merits of the claim: From what he has put forward, his case is simply that he was dismissed after being off on emergency leave, on a prolonged basis and returning late. Explaining that other people had emergency family leave, or sickness absences, without dismissal or that they were offered redundancy payments does of itself not raise a question about why he was treated as he was. That may not have been a sufficient basis for strike-out but it is at least a factor to consider in looking at an application to reinstate: he has not identified the discriminatory conduct, conduct that raises that question about why he was treated as he was and why that was different from the way others were treated..

133. I remind myself that I have to consider the interests of justice and the overriding objective and that that may prompt a decision to reinstate the claim earlier dismissed. Factors to be considered will include the reason for the default, whether or not it was deliberate, how serious it was, the prejudice to the other party and whether a fair trial remains possible. No single factor is determinative.

134. In my judgment, the failure to address race discrimination in the witness statement is not remedied by the application of 21 May or by the response given on 25 May, and there is no advantage by allowing that to be treated as a supplementary witness statement. The failure is serious. There is clear prejudice to the Respondent. The failure persists in spite of repeated efforts

to explain to Mr Aidara what was required, and generous opportunities to set out his case. Given the history, I am not satisfied a fair trial is possible: Mr Aidara has prejudiced his own access to a full and fair hearing if the usual, and important, rules are applied not to admit new evidence at the hearing; the Respondent still does not know the case it has to answer.

135. I do not find that Mr Aidara has established a basis for the reinstatement of his race claim.

Strike out

136. The Respondent has also applied for strike out of the unfair dismissal claim.

137. In considering an application to set aside an Unless Order, the onus is on the Claimant to show that he has done enough to justify reinstating his claim. In a strike out application the burden is on the respondent to justify positive action to terminate the claim.

138. The witness statement has been accepted as sufficient to meet the requirements of the Unless Order in respect of unfair dismissal. The other grounds for that application are

- The manner in which the proceedings had been conducted by Mr Aidara had been scandalous, unreasonable or vexatious;
- That there had been a failure to comply with the Employment Tribunal Rules or an Employment Tribunal Order,
- And/or that it was no longer possible to have a fair hearing in respect of the claim.

139. In my judgment, the manner in which the proceedings have been conducted by Mr Aidara has been unreasonable and there has been a persistent failure to comply with the Employment Tribunal Orders. In my judgment, the failures to comply have been deliberate, albeit based on a misconception about how the Tribunal works and Mr Aidara's own views on what a fair process would be. He has disregarded the explanations given to him and the information available to him and the Orders made.

140. I so find on the basis of the matters that I have dealt with above, but note the application of the Respondent of December 2021, that sets out in some detail the Claimant's failure to comply with any elements of the Case Management Order of July 2021, save as to the provision of a Schedule of Loss.

141. However, even with a finding of unreasonable conduct, the sanction imposed must be proportionate.

142. I am not satisfied that a fair hearing is not achievable. There has been delay but the case is now in most respects ready for hearing.

143. There are central facts in dispute. Mr Aidara asserts that he had permission for his absence and was prevented by circumstance from returning, by civil unrest, the closure of the border, by the cancellation of his flight and eventually by the requirement to isolate because of the pandemic.

144. He faces the difficulty that it is not up to the Tribunal to decide whether they would have dismissed on the grounds of misconduct on those facts. The test in unfair dismissal, as set out in the issues on page 32 of the case management order, is whether dismissal was a sanction that a reasonable employer might have chosen. In other words, if no reasonable employer would have dismissed on the facts, he can succeed. If some reasonable employers would have dismissed, then that is enough to make it a fair dismissal. It is by no means clear that he will succeed in this claim.

145. Even so, applying the law as set out above, it is right in my judgment that the case should still proceed to a hearing, given that central facts are in dispute, applying the law to the facts here. It is not the case that no fair hearing is possible or that the claim is bound to fail.

146. I dismiss the Respondent's application for the unfair dismissal claim to be struck out.

A final note

147. Mr Aidara needs to make sure he has disclosed (sent copies of) the documents he relies on and that he needs the Tribunal to see to the Respondent and asked for them to be in the Tribunal File. That is explained in both the Case Management Orders. Leaving it to the hearing is too late. If he has not done so already, he is already late and needs to ask for extra time to be agreed by the Respondent or the Tribunal.

Employment Judge Street
22 June 2022

JUDGMENT SENT TO THE PARTIES ON
30 June 2022 By Mr J McCormick

FOR THE TRIBUNAL OFFICE