EMPLOYMENT TRIBUNALS

Claimant: MS T MERLAN

Respondent: KIER LIMITED

RECORD OF A PRELIMINARY HEARING

Heard at: Watford Open Hearing by CVP **On: 30 June 2022**

Before: Employment Judge Skehan (sitting alone)

Appearances
For the claimant: No Attendance
For the respondent: Kelly, counsel

JUDGMENT

1. The claims are struck out

REASONS

(1) This matter had been listed for a further open preliminary hearing heard today. The purpose of the hearing was to consider whether or not to strike out the claimant's claims under Rule 37 of the Employment Tribunal Rules or in the alternative make a deposit order under Rule 39 of the Employment Tribunal rules, and/or in the alternative deal with outstanding case management issues including the listing of a final hearing.

(2) At the commencement of this hearing, the clerk made attempts to contact the claimant by phone. Her calls were not answered. The claimant did not join the video hearing. I was happy that the claimant was aware of the hearing and I considered it in the interest of justice and in line with employment tribunal Rule 47 to proceed to consider strike out of the claimant's claims.

The claim

(3) The claimant was employed by the respondent as a cleaner and remained in employment when the form ET1 was issued. The ACAS early conciliation notification was issued on 20 October 2020 and the ACAS certificate on 28 October 2020. The ET1 form was presented on 29 October 2020. The claimant's claims are unclear. It appears that the claimant wished to make a

claim for race discrimination and whistleblowing detriment. The claim was defended and the respondent lodged a notice of appearance.

(4) On 16 March 2021 employment Judge Manley directed that the claimant must send the tribunal and the respondent more information in relation to her claims by 6 April 2021. This request was repeated on 27 March 2021. The claimant did not comply with this order and has failed to provide any clarification of her claims.

(5) A preliminary hearing was held on 21 June 2021 before me. The claimant did not attend. It is noted that prior to this hearing the claimant had requested a postponement on the basis of her ill-health. No medical evidence was supplied in support of this application. The claimant's application for a postponement was refused. Due to delay on the part of the administration, the written summary of this hearing was forwarded to the parties on 16 October 2021. The claimant was reminded that she must engage with the tribunal process and failure to do so risked her claims being struck out under the provisions of Rule 37 of the Employment Tribunal rules because the claimant has failed to comply with repeated orders of the tribunal and/or the claim has not been actively pursued.

(6) I note that there is an email from the claimant on the tribunal file from June 2021 indicating that the claimant has health issues. However no medical evidence is provided. There has been no engagement by the claimant with the tribunal or the respondent for in excess of 12 Months.

Strike out – legal principles

(7) Rule 37 provides:
"37. Striking out

(i) 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—

(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).

(ii) 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."

(8) The need for caution when considering whether to strike out, especially in discrimination or whistleblowing cases, was emphasised in **Abertawe Bro Morgannwg University Health Board v Ferguson [2013] ICR 1108 EAT**, per Langstaff P:

"33. We would add this final note. Applications for strike-out may in a proper case succeed. In a proper case they may save time, expense and anxiety. But in a case which is always likely to be heavily fact sensitive, such as one involving discrimination or the closely allied ground of public interest disclosure, the circumstances in which it will be possible to strike out a claim are likely to be rare. In general it is better to proceed to determine a case on the evidence in light of all the facts. At the conclusion of the evidence gathering it is likely to be much clearer whether there is truly a point of law in issue or not."

(9) Default with respect to Tribunal orders will not automatically result in a strike out and the Tribunal must consider whether there may still be a fair trial – **De Keyser Ltd v Wilson [2001] UKEAT/1438/00, per Lindsay P**:

"24. As for matters not taken into account which should have been, the Tribunal nowhere in the course of their exercising their discretion asked themselves whether a fair trial of the issues was still possible. In a case usefully drawn to our attention by both sides' Counsel, namely Arrow Nominees Inc -v- Blackledge [2000] 2 BCLC 167 the Court of Appeal had before it a case where the Judge below had more than once declined to strike out the proceedings on the basis that whilst one party had, in the course of discovery, disclosed forged documents and had lied about the forgeries during the trial, a fair trial was, in his view, still possible. We pause to reflect on the magnitude of the abuse there in comparison with Mr Pollard's and De Keyser's. Whilst in other respects the context of the Arrow Nominees case is very different, there are passages in the judgment in the Court of Appeal of relevance. Thus at page 184 there is a citation from Millett J.'s judgment in Logicrose -v- Southend United Football Club Ltd (1988) The Times 5th March 1998 as follows:—

(10) "But I do not think that it would be right to drive a litigant from the judgment seat without a determination of the issues as a punishment for his conduct however deplorable, unless there was a real risk that that conduct would render the further conduct of proceedings unsatisfactory. The Court must always guard itself against the temptation of allowing its indignation to lead to a miscarriage of justice.""

(11) The question of whether there can be a fair trial may fall to be considered within the current window; see the decision of the EAT in **Emuemukoro v Croma Vigilant (Scotland) Ltd 2022 ICR 327, EAT**, per Choudhury P:

"18. In my judgment, Ms Hunt's submissions are to be preferred. There is nothing in any of the authorities providing support for Mr Kohanzad's

proposition that the question of whether a fair trial is possible is to be determined in absolute terms; that is to say by considering whether a fair trial is possible at all and not just by considering, where an application is made at the outset of a trial, whether a fair trial is possible within the allocated trial window. Where an application to strike-out is considered on the first day of trial, it is clearly a highly relevant consideration as to whether a fair trial is possible within that trial window. In my judgment, where a party's unreasonable conduct has resulted in a fair trial not being possible within that window, the power to strike-out is triggered. Whether or not the power ought to be exercised would depend on whether or not it is proportionate to do so.

19.I do not accept Mr Kohanzad's proposition that the power can only be triggered where a D fair trial is rendered impossible in an absolute sense. That approach would not take account of all the factors that are relevant to a fair trial which the Court of Appeal in Arrow Nominees set out. These include, as I have already mentioned, the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court. These are factors which are consistent with taking into account the overriding objective. If Mr Kohanzad's proposition were correct, then these considerations would all be subordinated to the feasibility of conducting a trial whilst the memories of witnesses remain sufficiently intact to deal with the issues. In my judgment, the question of fairness in this context is not confined to that issue alone, albeit that it is an important one to take into account. It would almost always be possible to have a trial of the issues if enough time and resources are thrown at it and if scant regard were paid to the consequences of delay and costs for the other parties. However, it would clearly be inconsistent with the notion of fairness generally, and the overriding objective, if the fairness question had to be considered without regard to such matters.

[…]

21.In this case, the Tribunal was entitled, in my judgment, to accept the parties' joint position that a fair trial was not possible at any point in the five-day trial window. That was sufficient to trigger the power to strike- out. Whether or not the power is exercised will depend on the proportionality of taking that step. […]"

(12) In **Bolch v Chipman UKEAT/1149** Burton P offered guidance as to the questions which must be answered on an application for strike out under the predecessor to rule 37(1)(b):

"(1) There must be a conclusion by the Tribunal not simply that a party has behaved unreasonably but that the proceedings have been conducted by or on his behalf unreasonably.

[…]

(2) Assuming there be a finding that the proceedings have been conducted scandalously, unreasonably or vexatiously, that is not the final question so far as leading on to an order that the Notice of Appearance must be struck out.

The helpful and influential decision of the Employment Appeal Tribunal, per Lindsay P, in De Keyser Ltd v Wilson [2001] IRLR 324 is directly in point. De Keyser makes it plain that there can be circumstances in which a finding can lead straight to a debarring order. Such an example, and we note paragraph 25 of Lindsay P's judgment, is "wilful, deliberate or contumelious disobedience" of the Order of a court.

But in ordinary circumstances it is plain from Lindsay P's judgment that what is required before there can be a strike out of a Notice of Appearance or indeed an Originating Application is a conclusion as to whether a fair trial is or is not still possible.

[…]

(3)Once there has been a conclusion, if there has been, that the proceedings have been conducted in breach of Rule 15 (2) (d), and that a fair trial is not possible, there still remains the question as to what remedy the tribunal considers appropriate, which is proportionate to its conclusion. It is also possible, of course, that there can be a remedy, even in the absence of a conclusion that a fair trial is no longer possible, which amounts to some kind of punishment, but which, if it does not drive the defendant from the judgment seat (in the words of Millett J) may still be an appropriate penalty to impose, provided that it does not lead to a debarring from the case in its entirety, but some lesser penalty

(4)But even if the question of a fair trial is found against such a party, the question still arises as to consequence. That is clear because the remedy, under Rule 15 (2) (d), is or can be the striking out of the Notice of Appearance. The effect of a Notice of Appearance being struck out is of course that there is no Notice of Appearance served."

(13) For a tribunal to strike out for unreasonable conduct, it must be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible; and in either case, the striking out must be a proportionate response — **Blockbuster Entertainment Ltd v James 2006 IRLR 630, CA**.

(14) In deciding whether to strike out a party's case for non-compliance with an order under rule 37(1)(c), the tribunal will have regard to the overriding objective set out in rule 2 of seeking to deal with cases fairly and justly. This requires a tribunal to consider all relevant factors, including:

(i) the magnitude of the non-compliance
(ii) whether the default was the responsibility of the party or his or her representative
(iii) what disruption, unfairness or prejudice has been caused
(iv) whether a fair hearing would still be possible, and
(v) whether striking out or some lesser remedy would be an appropriate response to the disobedience — **Weir Valves and Controls (UK) Ltd v Armitage 2004 ICR 371, EAT**.

(15) In **Evans and anor v Commissioner of Police of the Metropolis 1993 ICR 151, CA**, the Court of Appeal held that an employment tribunal's power to strike out a claim for want of prosecution must be exercised in accordance with the principles that (prior to the introduction of the Civil Procedure Rules in 1998) governed the equivalent power in the High Court, as set out by the House of Lords in **Birkett v James 1978 AC 297, HL**. Accordingly, a tribunal can strike out a claim where:

(i) there has been delay that is intentional or contumelious (disrespectful or abusive to the court), or

(ii) there has been inordinate and inexcusable delay, which gives rise to a substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the respondent.

(iii) The first category is therefore likely to include cases where a claimant has failed to adhere to an order of the tribunal. As such, it overlaps substantially with the tribunal's power under rule 37(1)(c) to strike out for non-compliance with tribunal rules or a tribunal order.

(16) Presidential Guidance has also been given in relation to strike out:

"8.Under rule 37 the Tribunal may strike out all or part of a claim or response on a number of grounds at any stage of the proceedings, either on its own initiative, or on the application of a party. These include that it is scandalous or vexatious or has no reasonable prospect of success, or the manner in which the proceedings have been conducted has been scandalous, unreasonable or vexatious.

9.Non-compliance with the rules or orders of the Tribunal is also a ground for striking out, as is the fact that the claim or response is not being actively pursued.

10.The fact that it is no longer possible to have a fair hearing is also ground for striking out. In some cases the progress of the claim to hearing is delayed over a lengthy period. Ill health may be a reason why this happens. This means that the evidence becomes more distant from the events in the case. Eventually a point may be reached where a fair hearing is no longer possible.

11.Before a strike out on any of these grounds a party will be given a reasonable opportunity to make representations in writing or request a hearing. The Tribunal does not use these powers lightly. It will often hold a preliminary hearing before taking this action.

12.In exercising these powers the Tribunal follows the overriding objective in seeking to deal with cases justly and expeditiously and in proportion to the matters in dispute. In some cases parties apply for strike out of their opponent at every perceived breach of the rules. This is not a satisfactory method of managing a case. Such applications are rarely successful. The outcome is often further orders by the Tribunal to ensure the case is ready for the hearing.

13.It follows that before a claim or response is struck out you will receive a notice explaining what is being considered and what you should do. If you oppose the proposed action you should write explaining why and seeking a hearing if you require."

Deliberation and Decision

(17) This is a claim arising from incidents that happened prior to October 2020. The allegations made by the claimant are unclear and the claimant has repeatedly failed to comply with Employment Tribunal orders to clarify her claim. Further the claimant has on two occasions failed without any reasonable explanation to attend hearings listed for case management purposes. I consider that the magnitude of the claimants non-compliance with tribunal orders in the circumstances is significant. The claimant is acting as a litigant in person and the responsibility for her failure to comply with the employment tribunal orders lies with her. The respondent is now subject to substantial prejudice in that it does not know the case it has to answer. Should this claim continue, the details of it will be provided in excess of four years following the events complained of. This delay will have an obvious detrimental effect on the respondent's ability to gather evidence to defend the claim. Further, the current listing expectations for these claims within this region is approximately late 2023 to early 2024. This further compounds the prejudice suffered by the respondent, caused by the claimant's failure to engage within the litigation process.

(18) I have carefully considered whether a lesser sanction would be appropriate to assist the parties in bringing this matter to a fair final hearing. I consider that in the circumstances, in light of the claimant's failure to clarify her claim, the substantial delay and the claimant's further non-attendance at today's hearing, there is no appropriate alternative order that could be made by the tribunal that would be compatible with the overriding objective to deal with the matter fairly and justly.

(19) These are circumstances in which I have concluded that the claimant, by failing to comply with the employment tribunal directions and attend the preliminary hearing has failed to particularise her claim and delayed this matter, resulting in a situation whereby a fair trial in this matter is now impossible.

(20) For the reasons set out above the claimant's claims are struck out in accordance with the provisions of rule 37 (b), (c), (d) and (e) of the Employment Tribunal rules.

_____30 June 2022_____
Employment Judge Skehan

Sent to the parties on:

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For the Tribunal:

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