EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr. D Hall	**v**	**Wilkinson Retail Ltd**

OPEN ATTENDED PRELIMINARY HEARING

Heard at: **Nottingham** **On: 12th July 2022**

Before: **Employment Judge Heap (Sitting alone)**

Appearances
For the Claimant: **No attendance**
For the Respondent: **Mr. G Anderson - Counsel**

JUDGMENT

The Respondent's application to strike out the claim succeeds on the basis that there can no longer be a fair hearing of this matter. The claim is therefore struck out under Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

REASONS

BACKGROUND

1. This is a claim brought by Mr. Dale Hall (hereinafter referred to as "The Claimant") against Wilkinson Retail Ltd (hereinafter referred to as "The Respondent"). The Claim Form was issued as long ago as 22nd May 2020 and, as I shall come to, in those last two years little has managed to be achieved despite this being the fifth Preliminary hearing in relation to this claim.

2. The last Preliminary hearing took place before me on 13th May 2022 and at that hearing I refused an application from the Respondent to strike out the claim on the basis that the Claimant had failed to comply with previous Orders made and it was said that a fair hearing was no longer possible. Whilst I did ultimately refuse the application, I made it plain to the Claimant both at that hearing and in the written record afterwards that this was the "last chance saloon" as far as compliance with Orders was concerned and that if he did not comply with what I had Ordered him to do on time and to the letter I would revisit at the hearing today whether to strike out his claim. My decision was made for the most part on the Claimant's assurances

that he could and would comply with the Orders that I made at that hearing and that he was accessing counselling which would improve his mental health.

3. Shortly before the hearing today was due to commence the Claimant telephoned the Tribunal indicating that he understood that someone was going to telephone him to join the hearing. It was explained to him that this was an attended hearing at the Tribunal hearing centre. The Claimant lives in Retford and so it appeared unlikely that even if he set off promptly he would arrive here before the hearing time had concluded.

4. I therefore considered whether to postpone the hearing or convert it to one that could be conducted partly remotely but I was satisfied that neither of those courses should be taken. The Respondent had instructed Counsel who had attended and it was not proportionate or in accordance with the overriding objective to postpone the hearing nor had the Claimant applied for that to happen. There would be delay in converting the hearing to a hybrid hearing and it was not certain that the Claimant would be able to join that way as he had difficulties with the previous hearing that was conducted by Cloud Video Platform. I decided not to suggest that the Claimant attend only on the telephone because the whole purpose of the attended hearing today was for him to produce any other documents so that they could be copied because he said on the last occasion (and has since) that he has difficulties in getting documents to the Respondent because of copying and postage costs.

5. Moreover, I was satisfied that the Claimant was made fully aware that this hearing was going to be at the hearing centre today. That was agreed on the last occasion for the reasons already given above and the Claimant was aware that he would need to travel to the hearing centre because he specifically asked for the hearing time to be pushed back to 11.00 a.m. so that he would be able to make the journey from his home. The Orders sent after the last Preliminary hearing also set out that it would take place at the hearing centre and gave details of the time and place that the Claimant should attend.

6. Accordingly, for all those reasons I determined that I should proceed in the Claimant's absence. That is not a decision that I have taken lightly because of the fact that one of the issues to determine is an application to strike out the claim but I am satisfied that the Claimant was well aware that that was on the agenda because I specifically referenced it at the last hearing that I would revisit the question of whether to strike out the claim today if he further failed to comply with Orders that I had made. The Claimant has failed to comply as I shall come to and the Respondent had put him on notice that they considered that there had been further non-compliance and that they were asking the Tribunal to dismiss the claim.

7. The Respondent has today renewed their application to strike out the claim. They refer to what I said on the last occasion to the Claimant that it was the "last chance saloon" in respect of compliance with my Orders and that I would revisit matters today if there was further non-compliance. They point to the fact that over two years have passed since the Claim Form was issued and we are essentially very little further forward despite considerable Judicial intervention. At least one witness has left the Respondent and recollections of events so long ago are likely to prove problematic if and when the matter did finally reach a full merits hearing. It is said that a fair hearing is therefore no longer possible.

THE LAW

8. Rule 37 of the Employment Tribunals (Rules of Procedure) Regulations provides as follows:

> *"37.—(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—*
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> *(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).*
>
> *(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".*

9. Whilst the striking out of discrimination claims should be rare because of the public interest importance of such claims being determined after examination of the evidence (see **Anyanwu v South Bank Student Union [2001] 1 W.L.R. 638: UKEAT/0128/19/BA** – albeit in a different context) that will be a permissible step where there can no longer be a fair hearing, including within a reasonable time frame (see **Peixoto v British Telecommunications plc EAT 0222/07 *and* Riley v Crown Prosecution Service 2013 IRLR 966, CA***).***

10. In **Riley** Longmore LJ said as follows:

> *"It is important to remember that the overriding objective in ordinary civil cases (and employment cases are in this respect ordinary civil cases) is to deal with cases justly and expeditiously without unreasonable expense. Article 6 of the ECHR emphasises that every litigant is entitled to "a fair trial within a reasonable time. That is an entitlement of both parties to litigation. It is also an entitlement of other litigants that they should not be compelled to wait for justice more than a reasonable time. Judge Hall-Smith correctly found assistance in remarks of Peter Gibson LJ in Andreou v The Lord Chancellors Department which are as relevant today as they were 11 years ago:—*
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> > *"The Tribunal in deciding whether to refuse an adjournment had to balance a number of factors. They included not merely fairness to Mrs Andreou (of course an extremely important matter made more so by the incorporation into our law of the European Convention on Human Rights, having regard to the terms of Article 6): they had to include fairness to the respondent. All accusations of racial*

discrimination are serious. They are serious for the victim. They are serious for those accused of those allegations, who must take very seriously what is alleged against them. It is rightly considered that a complaint such as this must be investigated, and disputes determined, promptly; hence the short limitation period allowed. This case concerned events which took place very many years ago, well outside the normal three months limitation period. The Tribunal also had to take into account the fact that other litigants are waiting to have their cases heard. It is notorious how heavily burdened Employment Tribunals are these days."

CONCLUSIONS

11. I turn now to my conclusions on the Respondent's application.

12. It is necessary when doing so to set out the history of matters to date. The Claim Form was issued as long ago as 22nd May 2020. It provided little detail as to the complaints being advanced and consisted largely of what appeared to be a cut and paste of the Claimant's appeal against his dismissal. That dismissal had taken place in February 2020.

13. The Claim Form was served on the Respondent and the proceedings were listed for a final hearing which was to take place in November 2021. As I shall come to, that final hearing did not take place.

14. On 18th August 2020 there was a Preliminary hearing before Employment Judge Adkinson to identify the issues and consider general case management. That was the first Preliminary hearing of the claim and had been listed as is standard to all such claims in this Tribunal region. The Claimant did not attend that hearing. The day before he had sent an email to the Tribunal explaining that he was mentally exhausted from the whole experience so that he could not focus on what was going on. He said he was seeking help from his mental health team. Employment Judge Adkinson considered his representation and issued a strike out warning based on his concerns at that time that the Claimant may not be actively pursuing the claim. He also made case management Orders for the parties to take various steps towards determining the question of whether the Claimant was at all material times a disabled person within the meaning of Section 6 Equality Act 2010.

15. The Claimant responded to the strike out warning on 12th September re-stating that he had been extremely mentally unwell. He went on to state that he did not know how to process things and that he was not getting any support with the paperwork. Employment Judge Clark considered that response and decided not to strike out the claim whilst making it clear that the Claimant needed to comply with the Orders that had been made by Employment Judge Adkinson.

16. It is not in dispute that those Orders – which were principally in respect of disclosing his medical records and providing an impact statement - were not complied with and the Respondent then applied for an Unless Order. In response Employment Judge Camp issued a strike out warning to the Claimant. A reply was received on behalf of advisers assisting the Claimant at that time and also from the Claimant directly.

17. The explanation given at that time for non-compliance was accepted and the claim was not struck out but was listed for a further Preliminary hearing which was conducted by Employment Judge Butler. Orders were again made for the Claimant to supply an impact statement and further information and the Claimant was advised to engage and access support. Employment Judge Butler made plain to the Claimant that if he did not comply with Orders he risked the claim being struck out. The Claimant did subsequently supply an impact statement of sorts but not his medical records and he referred in being unable to do so because of his mental health. A further Preliminary hearing was then listed to discuss the approach to disability and future case management.

18. That hearing was conducted by Employment Judge Clark on 21st September 2020. Employment Judge Clark spent some considerable time and effort in seeking to understand what the claim and the issues were. He also explained to the Claimant that there may come a time that it had to be considered whether a fair hearing was possible because of the issues that his mental health had in enabling him to comply with Orders made. He was satisfied that we were "not there yet" but that was partly because the Claimant told him that he was seeking support with his health and the claim and hoped to soon be represented by a solicitor and that he was commencing therapy which he believed would assist with his mental health.

19. Employment Judge Clark set out what he believed the issues in the claim to be as far as he could discern them and made Orders for the Claimant to confirm if that analysis was correct and to again provide his medical records for the purposes of considering the issue of disability. The Claimant did not comply with any of those Orders. Again, he wrote to the Tribunal by email making reference to the fact that he was going through more new issues and was struggling to understand what was happening. He also referred to being confused and that he believed that he had complied but that the process was draining because of his mental health.

20. In response to that I directed that there should be a further Preliminary hearing to discuss what was required and that hearing came before me on 13th May 2022. As I have already observed I refused the application to strike out the claim at this stage and the Claimant assured me that he could and would now comply with what was Ordered so that the matter could progress. The Orders set out that the Claimant needed to comply with the Orders of Employment Judge Clark as to whether his analysis of the remaining[1] unfair dismissal and disability discrimination claims was correct and to send his 97 pages of medical notes and records along with an occupational health report from Medigold (both of which he already had) to the Respondent so as to further the issue of disability. I made it plain that the Claimant that if he still did not comply with what was required then I would revisit today whether the claim should be struck out.

21. Although the Claimant maintained in emails to the Tribunal and to the Respondent that he had complied with the Orders made he has in fact not done so. He has confirmed to the Tribunal (albeit not to the Respondent) that he "agrees with the Orders the previous Judge had set out" but that is not clear if he is referring to agreement with the analysis of his claim by Employment Judge Clark or something

[1] Claims of sexual orientation discrimination, discrimination because of marriage or civil partnership having been dismissed for non-compliance with an Unless Order and a complaint about unpaid wages having been withdrawn.

else. It may well be something else given what I say about that matter further below.

22. The Claimant did not comply with the Orders that I made about sending his medical notes to the Respondent. Instead, he sent a handwritten note on an enquiry form previously used to indicate whether a party can attend a remote video hearing along with 56 out of the 97 pages of his medical records. He did not send the Medigold report at all. What documents were sent were only sent to the Tribunal who then had to copy them for the Respondent. The lack of the remaining notes and records has impeded the Respondent from being able to set out its position on disability and the lack of clarity on the accuracy of Employment Judge Clark's analysis of the claim has similarly left them unable to file an Amended Response.

23. I should observe that the Claimant has been signposted by both the Tribunal and the Respondent with some sources of legal advice, including those who provide services without charge and actively encouraged by a number of Employment Judges to seek such advice. The Claimant remains a litigant in person.

24. Whilst I recognise and accept that the Claimant is struggling with his mental health and that is most likely the explanation for his non-compliance, I have nevertheless to consider whether it is going to be possible to have a fair hearing within a reasonable amount of time in this case.

25. What the Claimant was Ordered to do previously was straightforward and from hereon in the proceedings will only become more complicated. As I explained to him previously there is a lot of work involved as a claim progresses and a great deal more than he has previously been asked to do. That is not limited to sending further documents to the Respondent, considering a hearing bundle, preparing a witness statement, reading the Respondent's witness statements which he is likely to find upsetting, preparing for and attending a full hearing, giving evidence and cross examining witnesses called by the Respondent on his case. I cannot conceive how the Claimant is going to be able to undertake all of that – even with adjustments from the Tribunal - if his mental health so far has left him unable to manage to send even the medical notes and report which he already had to the Respondent and to clearly confirm what his claim is all about.

26. I should also observe in this regard that even with the very best efforts of Employment Judge Clark it is still not entirely clear what arguments the Claimant will run in respect of the unfair dismissal claim because whilst he says that the reason given by the Respondent for dismissal is not the real reason, he has not been able to date to say what reason(s) he says were in fact the real ones.

27. Moreover, in correspondence to the Tribunal recently he has made reference to a back condition that "is all related" to the claim despite having told Employment Judge Butler at an earlier hearing that the condition that he was relying on as a disability was depression and his mental health. I have not been able to get to the bottom of that today because of the Claimant's non-attendance at this hearing but I certainly cannot rule out that if this matter were to continue the position taken as at 25th May 2022 that the summary of Employment Judge Clark was accurate (assuming that that was what the Claimant meant) as to the case that he was

advancing might well change. If it does, that will only add to the complexity given that there might be a need to make applications to amend the claim and also the delay.

28. In my view because of the complaints that are advanced (even assuming that they are and remain as Employment Judge Clark set them out), the fact that disability may remain a live issue at trial and the fact that the Claimant is a litigant in person the hearing time is likely to be at least five days. It should have been heard in November 2021 but that could not take place because the claim still needed to be clarified. There is no prospect of it being heard this year and it will be well into 2023 before it could be heard. That assumes that things would run smoothly and there would not need to be further Preliminary hearings and given the history of the Claimant being unable to understand what is required and comply with Orders made that possibility appears remote. Indeed, the Claimant has not managed to attend the hearing in the correct way today and so I consider it highly unlikely that, even dealing with things in bite sized chunks, he is going to be able to undertake the other tasks necessary to prepare for a full hearing either in a timely and proportionate way or indeed at all.

29. I also need to consider the position of the Respondent as well as for the Claimant and also other Tribunal users. This case has already occupied the time of four Judges in five Preliminary hearings over the course of the last two years and in reality we are very little further forward. The basis of the claims is still not entirely clear as I have observed above and there is still not a full set of medical records so as to deal with the question of disability. As I have already said the case is likely to require more case management intervention and probably one if not more further Preliminary hearings. All of that delays other cases from being heard at a time when the Tribunal system continues to face a considerable backlog from the effects of the pandemic.

30. As to the position of the Respondent, there is not only the question of continued time and cost but also of the cogency of the evidence. The Respondent's witnesses will be required to give evidence about decisions and actions that they took over two and a half years ago. That will be likely three and a half years or more by the time that the matter would finally reach a hearing (assuming that it did make it that far). The cogency of the evidence is bound to be impacted in those circumstances and further so if there is additional delay because the Claimant cannot comply with future Orders made. At least one witness has left the Respondent and may not be as cooperative in preparation for the hearing as he or she might otherwise be if they remained in employment. The continued delay without resolution of this matter therefore does place prejudice on the Respondent and impacts the Tribunal's ability to deal with this and other cases in accordance with the overriding objective.

31. I can only conclude taking all of those matters into account that regrettably there is no longer any prospect of a fair hearing taking place within a reasonable period of time and the only course that I can take is to strike out the claims. This is not a decision that I have taken lightly given the important public interest in discrimination claims being substantively determined and the importance to the Claimant of the proceedings but given where we are to date despite the significant amount of Judicial input that has been given to the claim I cannot determine that there is any

lesser course that would achieve a just result for both parties and for other users of the Tribunal system.

32. For all of those reasons, I have struck out the claim under Rule 37 Employment Tribunal (Constitution & Rules of Procedure) Regulations.

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Employment Judge Heap
Date: 12th July 2022
REASONS SENT TO THE PARTIES ON

23 July 2022

FOR THE TRIBUNAL OFFICE

Note

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.