



EMPLOYMENT TRIBUNALS

Claimant: Mr M Koetsier
Respondent: Barker and Stonehouse Limited
At: By telephone
On: 18 July 2022
Before: Employment Judge Sweeney

Appearances

For the Claimant, no attendance
For the Respondent, Elizabeth Evans-Jarvis

JUDGMENT

1. **The Claimant's claims are struck out pursuant to rule 37(1)(c) and (d) of the Employment Tribunal Rules of Procedure 2013**

REASONS

Facts

1. By a claim form presented on **18 February 2022** the Claimant brought complaints of unfair dismissal, race, disability and sex discrimination. Very few details of those complaints were provided on the claim form.
2. On **09 March 2022**, the Tribunal listed a telephone preliminary hearing to be held **04 May 2022**. The parties were given details on how to access the hearing.
3. On **11 April 2022**, Employment Judge Loy directed the Claimant to send to the Tribunal and to the Respondent further information relating to his disability by **18 April** and **25 April 2022**. He also directed the Claimant to respond to a question regarding the correct title of the Respondent. The Claimant failed to respond.
4. The Claimant failed to attend the preliminary hearing of **04 May 2022** and did not notify the tribunal in advance that he would not be attending. Employment Judge Beever made a number of case management orders at that hearing. In particular, the Claimant was ordered, by **25 May 2022** to:

- 4.1 Write to the Tribunal and the Respondent explaining his failure to attend the hearing of **04 May 2022**;
 - 4.2 Send further information of his complaints to the Tribunal and Respondent;
 - 4.3 Send the information relating to his disability (as previously ordered by Judge Loy) to the Tribunal and the Respondent.
5. At that hearing, the Respondent made an application to strike out the proceedings under rule 37. However, Judge Beever ordered it to put its application in writing and send it to the Claimant and Tribunal by **09 June 2022**, which the Respondent did. The Claimant was ordered to respond to that application by **23 June 2022**. He also directed that there be a further open preliminary hearing to determine the strike out application and, if appropriate, to make any necessary case management orders.
6. The case was listed before me. The Respondent was again represented by Elizabeth Evans-Jarvis. Again, the Claimant failed to attend. The Respondent had prepared a short bundle of papers, consisting of the pleadings, tribunal correspondence and case management orders. It applied to strike the proceedings out under rule 37(1)(c) [non-compliance of orders] and (d) [that the claims have not been actively pursued].

Legal principles

7. Rule 37 provides that:
- (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 –
 - 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 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.
8. Strike out is a serious and draconian step for a tribunal to take. When considering a strike-out under rule 37(1)(c), the tribunal must consider whether such an order is a proportionate response to the non-compliance: **Blockbuster Entertainment Ltd v James** [2006] IRLR 630, CA.
9. A proportionate response requires the Tribunal to consider whether there was a less drastic means of addressing the failures of the Claimant and achieve a fair hearing.

The tribunal should consider the extent and magnitude of the non-compliance: **Baber v Royal Bank of Scotland plc** [2015] UKEAT/0301/15.

10. In the case of strike-out under rule 37(1)(d), these tend to fall into two broad categories:

- 10.1 Cases of inordinate and inexcusable delay such as to give rise to a substantial risk that a fair trial would not be possible or there would be serious prejudice to the respondent, and
- 10.2 Cases where the claimant's default can be characterised as intentional and contumelious

11. In **Rolls Royce Plc v Riddle** [2008] UKEATS/0044/07/MT, the EAT said at paragraphs 18-19:

"...the Tribunal requires to ask itself whether, taking account of the whole circumstances, it ought to exercise its discretion so as to strike out the claim. The rule provides for a general discretion to strike out if the tribunal is satisfied that there has been a failure to actively pursue a claim.

The rule is not drafted so as to fetter the discretion that is conferred by any particular considerations. However, as with all exercises of discretion, it will be important to take account of the whole facts and circumstances including the fact that strike out is the most serious of sanctions."

Conclusions

Non-compliance with ET orders

12. I was satisfied that the Claimant had failed to comply with orders of the Tribunal, namely:

- 12.1 Judge Loy's order sent on 11 April 2022,
- 12.2 EJ Beever's orders made at the hearing on 04 May 2022.

13. The overriding objective, as set out in rule 2 of the ET Rules, is to enable tribunals to deal with cases fairly and justly, which includes, so far as practicable:

- (a) Ensuring that the parties are on an equal footing;
- (b) Dealing with cases in ways which are proportionate to the complexity and importance of the issues;
- (c) Avoiding unnecessary formality and seeking flexibility in the proceedings;
- (d) Avoiding delay, so far as compatible with proper consideration of the issues and
- (e) Saving expense

14. A key question is whether it is proportionate to strike out the proceedings. In my judgement it is. In arriving at this conclusion, I considered that the magnitude of the non-compliance with orders is at the very highest end of the scale. The Claimant has, quite simply, done nothing. He has not attempted to comply with any order. No other person is responsible for this wholesale non-compliance. I have considered

the time and cost to the Respondent, which has had to respond to a claim form which provides little information and attended two hearings since the claim was presented five months earlier and is still not in receipt of the most basic of information from the Claimant about his complaints, as ordered by the Tribunal. To provide the Claimant with yet a further opportunity to comply with orders, in circumstances where he has made no contact with the Tribunal or explained his previous non-attendance or compliance would be unfair to the Respondent and contrary to paragraphs (d) and (e) of the overriding objective. Further, because of the total lack of any communication from the Claimant (and any indication of a willingness to comply) It would be highly unlikely to achieve compliance. The Claimant was given opportunities to respond to the application in writing and at this hearing but failed to take them. I have no confidence that he would take any further opportunity that might be afforded to him to comply. I also bear in mind the wider impact on the administration of justice involving the use of judicial and administrative resources and the listing of other cases, where the participants comply with orders. Therefore, in my judgment, it is a proportionate response to the non-compliance by the Claimant to strike out the whole proceedings at this stage under rule 37(1)(c) ET Rules 2013.

The claims have not been actively pursued

- 15.** Although, strictly unnecessary, I also concluded that the Claimant has failed to actively pursue his claims and strike the proceedings out on this ground also. The essential starting question here is: has the Claimant failed to actively pursue his claims?
- 16.** I conclude that the failure here is intentional and contumelious. There has been a wilful and deliberate flouting of the tribunal's orders. It is not a case of a lack of diligence. The position is clear: there has been a wholesale failure to attempt to comply with any order. Nor has there been any attempt to explain any failures. The Claimant has simply presented a very short claim form which cries out for further information and then done nothing. He has failed to attend two hearings and has given no reason for doing so. In those circumstances, and having regard to the overriding objective, it is proportionate to strike the proceedings out.

Employment Judge Sweeney

26 July 2022