Case No: 3311866/2020

EMPLOYMENT TRIBUNALS

Claimant | | **Respondent**

Mr K Bey v **Tesco Stores Limited**

Heard at: Watford (by CVP) **On:** 23 May 2022

Before: Employment Judge Alliott
Members: Ms Sian Hughes
Mrs Freeda Betts

Appearances:

For the Claimant: In person
For the Respondent: Mr Sam Way (Counsel)

JUDGMENT having been sent to the parties on 16 June 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. On 12 May 2022 the respondent applied for an unless order requiring he claimant to serve witness statements relevant to his claim.

2. On 16 May 2022 Employment Judge Quill directed that the respondent's application be dealt with at the outset of this hearing.

3. At the outset of this hearing the respondent's application has been to strike out the claimant's claim under Rules 37(1)(a) (that it has no reasonable prospect of success), 37(1)(b) (that the manner in which the proceedings have been conducted by the claimant has been scandalous, unreasonable or vexatious) and Rule 37(1)(c) (non-compliance with orders of the tribunal).

4. On 16 July 2021 Employment Judge Hawksworth held a preliminary hearing. The issues were set out listing six items of alleged treatment identified for the discrimination claim. These were clearly based on the claimant's pleaded case. Three items relate to events in 2018 and early 2019. Based on the date of issue of the claim and the EC certificate any event prior to 28 April 2020 is prima facie out of time. The first three items of alleged treatment are therefore all in excess of one year out of time. It will be for the claimant to show that they form part of a series of connected events or conduct over a period linked to the three items in time and/or why it would be just and equitable to extend time. In addition, the unauthorized

deduction of wages claim appears to relate to 2018/2019. The issues as set out include the time point.

5. On 16 July 2021 Employment Judge Hawksworth also made case management orders. These include:-

> "Witness statements
>
> 21. The claimant and the respondent must prepare witness statements for use at the hearing. Everybody who is going to be a witness at the hearing, including the claimant, needs a witness statement.
>
> 22. The claimant and the respondent must send each other copies of all their witness statements by 25 February 2022.
>
> 23. A witness statement is a document containing everything relevant the witness can tell the Tribunal. Witnesses will not be allowed to add to their statements unless the Tribunal agrees.
>
> …
>
> 25. At the hearing, the Tribunal will read the witness statements. Witnesses may be asked questions about their statements by the other side and the Tribunal."

6. This hearing was set down for five days beginning today.

7. By agreement the partis extended the deadline for exchange of witness statements to 26 April 2022. On 26 April 2022 the respondent served its witness statements, but password protected.

8. On 6 May the claimant sent six witness statements, including his own, to the respondent. The claimant's witness statement is one prepared for him concerning a High Court clinical negligence case brought by his wife. It is dated February 2022. As such, the claimant is presumed to be familiar with the concept and format of a witness statement.

9. The other five witness statements are of no or very peripheral relevance to this case.

10. The respondent emailed the claimant on 6 May pointing out that the witness statements were not relevant. This was followed up on 10 May with a request that the claimant confirm if he intended to file updated witness statements relevant to the case. The application for an unless order was sent to the claimant on 12 May 2022. A chaser was sent on 17 May 2022. The claimant did not respond.

11. Thus it is that at the start of this hearing the claimant has no witness evidence.

The law

12. As per the IDS Employment Law Handbook on Practice and Procedure at 11.112:

> "A tribunal can exercise its power to strike out a claim or response (or part of a

claim or response) "at any stage of the proceedings" – Rule 37(1). However, the power must be exercised in accordance with reason, relevance, principle and justice – Williams v Real Care Agency Limited [2012] ICR D27, EAT"

13. At 11.126:

> "For a tribunal to strike out for unreasonable conduct, it has to 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. At 11.129:

> "Is fair trial still possible? In considering whether a claim should be struck out on the grounds of scandalous, unreasonable or vexatious conduct, a tribunal must take into account whether a fair trial is still possible – <u>De Keyser Ltd v Wilson</u> [2001] IRLR 324, EAT… However, in ordinary circumstances, neither a claim nor a defence can be struck out on the basis of a party's conduct unless a conclusion is reached that a fair trial is no longer possible.
>
> Both the De Keyser case and <u>Bennett v Southwark London Borough Council</u> were applied in <u>Bolch v Chipman</u> [2004] IRLR 140, EAT, a case in which the EAT overturned a Tribunal's decision to strike out an employer's response on the ground that he had threated the employee, who was claiming unfair dismissal, with physical violence. In doing so, the EAT set out the steps that a tribunal must ordinarily take when determining whether to make a strike out order:
>
> - 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.
>
> - Once a finding has been made, he or she must consider, in accordance with De Keyser Ltd v Wilson, whether a fair trial is still possible, as, save in exceptional circumstances, a strike out order is not regarded simply as a punishment. If a fair trial is still possible, the case should be permitted to proceed.
>
> - Even if a fair trial in 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."

15. In addition, Mr Way submitted that the Blockbuster case is support for the proposition that:-

> "Where a claim has reached the point of a full hearing then it would require something very unusual to justify its striking out. Further that the test of whether a fair trial is possible is met where a fair trial is not possible within the allocated trial window (per Choudhury P in Emuemukoro v Croma Vigilant (Scotland) Ltd [2022] ICR 327."

16. In addition, Mr Way cited to us an extract from <u>Harris v Academies Enterprise Trust</u> [2015] IROLR 2008 which provides:-

> "Rules are there to be observed, orders are there to be observed, and breaches are not mere trivial matters; they should result in careful consideration whenever they occur."

Conclusions

17. The claimant is a litigant in person. He has dyslexia. Nevertheless, at every stage of his various grievances he had union assistance. The claimant remains employed by Tesco and is presumed to have continuing access to union advice. In addition, the claimant told us he had been to the Citizens Advice Bureau and had had help from his daughter in law, who had a background in HR and sat next to him to assist at the preliminary hearing. The claimant did not blame his dyslexia for not complying with the order for a witness statement. We note that the claimant has begun a law degree and is clearly an intelligent and articulate individual.

18. The claimant's reason for non-compliance, namely that he thought his claim was adequately set out in emails, we found to be unconvincing. The claimant had made a witness statement in his wife's case and the order of Employment Judge Hawksworth is clear and specifically refers to the claimant as a witness. We found that the claimant's reason for not providing a witness statement was unreasonable.

19. In any event, the claimant has made no attempt to comply since 6 May 2022 despite being given every opportunity to do so by the respondent.

20. We find that the claimant's conduct of the case has been unreasonable.

21. We have considered alternatives to a strike out order. Firstly, we have considered allowing the claimant to verify the contents of his claim form and the contents of the further information document on oath and adopting that as his witness evidence.

22. The respondent is fully aware of what events it has to deal with. What the respondent does not know and could not know from the claimant's claim and further information is what his case is on less favourable treatment and why he says it was because of his race/religion and belief/age. Hearing from the claimant today we became more and more concerned at the prospect of the claimant giving evidence of alleged conduct by the respondent's employees that the respondent would hear for the first time during his evidence. On more than one occasion, when asked a question, the claimant launched into accounts of events not previously referred to that he says had upset him. In addition, no existing document dealt with the time issues, the reasons for any delay and whether it would be just and equitable to extend time. We came to the clear conclusion that a fair trial was not possible. In our judgment it is inevitable that the claimant would give evidence of matters he was dissatisfied with either in chief or in the course of cross examination and that in all fairness to the respondent an adjournment would be inevitable to allow the respondent to investigate and responds to such allegations. As it is, the existing documentation does not provide any basis upon which the claimant asserts his treatment was due to a protected characteristic other than merely pointing to his race/age/religion and belief.

23. We considered adjourning this case and ordering the claimant to serve a proper witness statement. We decided this would not be a proportionate response in compliance with the overriding objective. The tribunal's resources are finite, and the claimant has had his opportunity to litigate the issues in this case which has been listed for 5 days for some time. It clearly cannot go ahead. Listing is already being made in 2024 and other tribunal users have to be taken into account. The case is already quite old, and all delay is the enemy of justice. It is clear that the respondent has been put to considerable trouble and expense in defending this claim so far and, notwithstanding its size and administrative resources, a further delay would be unfair on it and all its witnesses. (10 witnesses are scheduled to give evidence on behalf of the respondent.)

24. For the aforesaid reasons we have concluded that a strike out order is the only proportionate and fair course to take.

Employment Judge Alliott

Date: 27 July 2022
SENT TO THE PARTIES ON

01 August 2022
FOR THE TRIBUNAL OFFICE