



EMPLOYMENT TRIBUNALS

Claimant: Mr D Dickinson

Respondent: Nuffield Health Fitness & Wellbeing Gym

Heard at: Manchester

On: 18 July 2022

Before: Employment Judge McDonald
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Mr R Chaudhry (Solicitor – Advocate)

JUDGMENT

The respondent's application to strike out the claimant's claim is refused.

REASONS

Introduction

1. This is my judgment on the respondent's application to strike out the claimant's claim under rule 37 of the Employment Tribunal Rules of Procedure 2013 ("Rule 37"). I refused the application at the hearing giving oral reasons. The claimant asked for this written record of those reasons.

2. In brief, the application was brought on the basis that there had been a failure to comply with Tribunal orders and because the claimant was not actively pursuing his case. The claimant attended and had, on 15 July 2022, sent in a written document setting out his objection to the striking out. Because these reasons are in writing they are fuller than the reasons given at the hearing.

The Law

3. Dealing very briefly with the law, Rule 37 provides that:

“37.— Striking out

(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 response (or the part to be struck out).”

4. In **Baber v the Royal Bank of Scotland (UKEAT 0301/15)** the Employment Appeal Tribunal summarised the relevant considerations when deciding whether to make a strike out order. The first consideration is that there must be a finding that the party is in default. Next, consideration must be given to whether a fair trial is still possible. Save in exceptional circumstances, if a fair trial remains possible the case should be permitted to proceed.

5. The principles to be applied in considering a strike out for non-compliance with a Tribunal order were set out by the Employment Appeal Tribunal in **Weir Valves and Controls (UK) Ltd v Armitage (2004) ICR 371**

Discussion and Conclusions

6. The first thing I need to establish is whether the conditions for making a striking out order are established. In relation to that, it is clear to me that the claimant is now actively pursuing his case, albeit by his own admission due to very challenging personal circumstances over the past few years he has for a time disengaged from it. I do find, and again the claimant very honestly accepted, that there has been non-compliance with Tribunal orders.

7. The claimant in this case brings claims of disability discrimination and the Tribunal has found that he is a disabled person by reason of autistic spectrum disorder. Because of his neurodiversity, perhaps unusually it was agreed that he rather than the respondent would be ordered to prepare the bundle of documents for the final hearing. There have been delays in doing so.

8. At a hearing on 9 June 2021 Employment Judge Dunlop made orders to attempt to get that process back on track. That required the claimant to send to the respondent by 14 July 2021 a USB memory stick containing the draft bundle of documents. It is accepted that that has not happened and consequently the subsequent steps which Employment Judge Dunlop envisaged happening have not happened either.

9. There has clearly therefore been default in compliance with the Tribunal orders. That is not in itself enough for me to strike out the claim. I also have to consider whether a fair hearing of the case is still possible. In this case the final

hearing has been listed for September 2023. In terms of time before then, therefore, there is time to get the case back on track.

10. Mr Chaudhry made submissions that it was nonetheless not possible for a fair hearing to happen. The first reason for that was that the passage of time has meant that the respondent's witnesses are no longer in a position to assist the respondent with its case, or at least to such an extent as they would have been. One witness in particular is no longer employed by the respondent and it would be difficult for it to ensure that they attend the hearing.

11. Although Mr Dickinson (the claimant) pointed out that he also had lost a witness as a result of the passage of time, I do take into account that the default in this case is on his part. While the impact may be the same for both parties, it is fair to say that the reason for that impact is at least in part due to the claimant's disengagement, as he put it.

12. The second reason why Mr Chaudhry said that a fair hearing was not possible was that having heard from Mr Dickinson at today's hearing he was not convinced that it will ever be possible to finalise the bundle in this case. Mr Dickinson very helpfully explained to me how his neurodiversity impacts on the way that the bundle will need to be prepared. He explained that he needs to process documents in order to ensure that he has a good grasp of them. He also explained that what he has been doing is going through emails from three different sources i.e. a subject access request, his own emails and the emails disclosed by the respondent, and sorting them out in order to ensure that all the chains are complete and are in chronological order. That, as Employment Judge Dunlop noted in her Case Management Order, has resulted in the emails being put into Word format documents. That is a matter of concern to the respondent because they are concerned that the sorting process may have led to a degree of editing or emails being taken out of context.

13. Having heard from the claimant I am satisfied that it will cause him difficulty if preparation of the draft bundle was simply to be handed over to the respondent at this point. As against that, however, I have significant concerns about the time it may take the claimant to finalise the draft bundle. I fully understand the point he made, which is that until he starts sorting out the remaining emails (which he believes amounts to between a quarter to a third of the emails in total), he will not be in a position to give an accurate time estimate for how long it will take to finish that process and finalise the draft bundle. He told me that he had found the timescales set by Employment Judge Dunlop in her Order to be "aggressive" which made it difficult to comply with those timescales in practice.

14. In terms of the factors that I need to take into account, a fair hearing is central. I also however need to take into account the overriding objective which requires me to ensure that the parties are on an equal footing. I also need to take into account the Tribunal's duties to ensure that disabled parties are not disadvantaged by Tribunal processes and practices. That does not mean, however, that a disabled party's case can never be struck out. I must also take into account the right of the respondent to a fair trial. The overriding objective includes the need to pay due regard to the need to avoid delay and saving expense.

15. Taking into account all those factors the key issue for me is whether the claimant will be in position to prepare a draft bundle which will be satisfactory from the respondent and the Tribunal's point of view, and be able to do so within a reasonable length of time. That reasonable length of time will need to take into account the fact that there has already been a significant delay in preparing the bundle.

16. I accept Mr Chaudhry's submission that the vagueness on the part of the claimant in being able to specify or agree a timetable is a matter for concern. The last thing that the Tribunal wants is for matters to drift again and for there to be another strike out application in a few months' time. Even worse would be if matters simply drifted along until the final hearing was imminent and for it then to turn out that it was not possible for that final hearing to go ahead.

17. There are factors which cause me to think that the claimant will positively engage with the case and that there is some optimism that the draft bundle can be completed. They are in particular the fact that he has clearly re-engaged with the case and was able to make clear and eloquent submissions at this hearing. He also told me that his personal circumstances, which have been very difficult for the last year or even two years, are now somewhat improved. He has also been in communication with his brother and his partner, both of whom appear to be in a position to potentially support him with his case. There is a possibility of obtaining legal representation or at least advice. At the hearing he said that if the Tribunal was saying that he now needed to prioritise this case then he would do so. In short, the answer to that is that he must now do so. I accept that recalling the events which led to this case are themselves difficult for the claimant. The time has come, however, where he must engage with the case and move it forward otherwise the possibility of a fair hearing will evaporate.

18. We did discuss the possibility of the respondent taking primary responsibility for preparing the bundle. Having heard from the claimant I am satisfied that he would be disadvantaged if the respondent did do so because of his need to process the documents which go into the bundle. I take into account his comments about the timescale set by Employment Judge Dunlop but I take the view that a relatively short period of time should be allowed in this case because the onus really is on the claimant to show that the draft bundle can be concluded. I have made case management orders accordingly.

Conclusion

19. I have concluded that at this stage it would not be right to strike out the claimant's case. Although the margins are fine, it seems to me a fair hearing is still possible if the claimant does what he said he would do at the hearing, which is to prioritise this case and put his nose to the grindstone (to use his words).

20. I therefore reject the application to strike out the claimant's case. I made case management orders which are set out in the Case Management Summary of today's date.

Employment Judge McDonald

Date: 21 July 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON

Date: 4 August 2022

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