EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**v**	**RESPONDENT**
Mr A McEvoy		Home Office

Heard at: London South Employment Tribunal **On:** 25 May 2022

Before: Employment Judge Hyams-Parish

Representation
For the Claimant: In person
For the Respondent: Ms G Hirsch, Counsel.

JUDGMENT ON PRELIMINARY ISSUE

The claims brought under the above case numbers are struck out on the following grounds:

(a) The manner in which the proceedings have been conducted by the claimant has been unreasonable; and

(b) There has been non-compliance with an order of the Tribunal.

REASONS

A. APPLICATION

1. This case was listed for an open preliminary hearing to consider the following matters:

   1.1. whether the claims should be struck out due to unreasonable conduct and/or because the claimant had failed to comply with orders of the Employment Tribunal;

   1.2. whether to allow an application by the claimant to amend his claim; and

   1.3. what further case management directions I considered necessary to progress the case.

2. Ms Hirsch requested that I deal with the strike out application first, as the outcome of this application could, if successful, mean that no further orders or applications would need to be considered. I agreed to adopt this approach.

3. At the outset of the case, I checked that the claimant had understood the purpose of the hearing, to which he replied that he did.

4. The parties had been informed that the hearing would be conducted using CVP.

5. By 10am the claimant had not appeared in the CVP waiting lobby and therefore I asked the clerk to telephone him. The clerk spoke to the claimant who said that he could not attend the hearing as he was at work. He said that he had not seen the email from the Employment Tribunal confirming that his application to adjourn this hearing had been refused.

6. Having had the above reported to me by the clerk, I instructed her to telephone the claimant again and inform him that if he did not attend the hearing, it would go ahead in his absence and his claims may be struck out, given that the purpose of the hearing was to consider a strike out application.

7. The claimant then decided to join the hearing, asking for a ten minute delay to do so. However the claimant could only join via a telephone link as his video did not appear to be working and we could not see him in the CVP room. The claimant agreed to participate using telephone, and we could hear him clearly. Other than this technical difficulty, the hearing proceeded in the normal way.

8. Once the hearing started and I ascertained what the issues were, I adjourned for an hour to read the relevant papers. I had been provided with two bundles

of documents by the respondent and directed to particular pages that I should read.

9. Having spent time questioning the claimant and hearing representations from him and Counsel for the respondent, I gave an oral judgment with reasons at the end of the hearing.

10. These written reasons are provided at the request of the respondent.

B. CHRONOLOGY/FINDINGS OF FACT

11. This case has a long history to it, which it is necessary to summarise to provide some context to the decisions I have recorded below.

12. By two claim forms presented to the Employment Tribunal on 23 November 2019 and 25 May 2020 respectively, the claimant brings the following claims against the respondent:

    12.1. Disability discrimination

    12.2. Holiday pay

    12.3. Arrears of pay

    12.4. Unfair dismissal

    12.5. Whistleblowing

13. Notice of the first claim was sent to the parties on 13 December 2019 with a return date for receipt of the ET3 response of 10 January 2020. Notice of the second claim was sent to the parties on 3 August 2020 with a return date for receipt of the ET3 response by 31 August 2020.

14. In the bundle of documents before me, there were in fact two claim forms dated 23 November 2019. One of them contained much more detailed particulars. In her judgment, referred to below, Employment Judge Webster ruled that this more detailed claim form had not been submitted to, or received by, the Employment Tribunal.

15. The respondent denies the claims. Whilst the respondent presented a combined response to both claims, this was received on 25 August 2020, by which date the time limit for presentation of a response to the November claim had already expired. The response was accompanied by an application for an extension of the time limit for presentation of the response to the November claim form. The respondent's position is that it did not receive notification of the November claim form and on becoming aware of it, on 5 June 2020 they made an application for an extension of time.

16. A preliminary hearing before Employment Judge Truscott was held on 11 November 2020. At that hearing, the case was listed for an open preliminary hearing on 17 March 2021 to consider the following matters:

    16.1. Whether to extend time for acceptance of the respondent's ET3?

    16.2. Whether the alleged conduct on which the claimant sought to rely was time barred, either in whole or in part? Such question would require consideration whether there was a continuing act, and if not, whether it would be just and equitable to extend time.

    16.3. To make such directions as were appropriate.

17. Employment Judge Truscott ordered the claimant to provide to the respondent, by 4 January 2021, a schedule in tabular form listing the dates and the allegations upon which he relied. He was also ordered to state, in relation to each allegation, any reason why the claim was made out of time and whether there was any just and equitable basis for extending time.

18. On 22 October 2021, the case came before Employment Judge Tsamados. The hearing was conducted by CVP. What happened at the start of that case bears a remarkable resemblance to what happened in the case before me. The written decision by Employment Judge Tsamados recorded the following:

> ***22. I conducted the hearing from the Employment Tribunal by video link using HMCTS' Cloud Video Platform ("CVP"). I had in front of me the Tribunal file and electronic and paper copies of the respondent's skeleton argument dated 3 March, updated on 18 October 2021, and a bundle containing 109 pages.***
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> ***23. By 10 am, my clerk informed me that Ms Hirsch was present in the CVP hearing room but the claimant was not. On my instruction, my clerk telephoned the claimant to find out why he was not present. The claimant told him that he was not aware of the hearing date, two members of his family had been diagnosed with cancer and he had focused on that, his email account had been corrupted and he did not have all of his documents to hand. I instructed my clerk to tell the claimant that he needs to join the CVP hearing room at 10.45 am to explain why he is not in a position to proceed. The claimant then had technical issues, but was able to join the CVP hearing by telephone only and the hearing commenced at 10.51 am.***
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> ***24. In addition to those matters set out by EJ Truscott QC, the respondent was seeking an order that the claimant's claims be struck out on the basis of unreasonable conduct.***
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> ***25. I had a rather circular discussion with the claimant in which I found it very difficult to pin him down as to what he was saying and whether he wanted to proceed today, despite my stressing the implications for him of the matters that were to be determined. Ultimately, he indicated***

that he was not able to go ahead and so was seeking a postponement of the hearing . He gave a number of reasons for this, which I set out below:

> ***25.1 He did not get formal notification of the hearing in writing; He has had problems with his home PC for several months and cannot access his PC or his email account;***
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> ***25.2 He did not receive emails, some have been deleted, there is a virus on his home PC and his service provider has closed down his email account;***
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> ***25.3 His focus over the past number of months has been supporting his mother and his brother who have been diagnosed with cancer***
>
> ***25.4 By 10am the claimant had not appeared in the CVP waiting area. This resulted in the clerk having to telephone him to find out where he was. He claimed not to have been aware of the hearing and applied for a postponement. He said that there had been a virus on his computer which resulted in him not receiving emails.***

26. Ms Hirsch objected to the hearing being postponed. She gave the following reasons:

> ***26.1 The claimant was at the hearing conducted by EJ Truscott QC and so was clear what the Open Preliminary Hearing was going to be about save for the strike out application. The hearing was originally scheduled for March 2021;***
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> ***26.2 He was actively involved in the litigation until he left the respondent's employment and it seems that he has in reality lost interest in the case;***
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> ***26.3 She does not accept what the claimant has said as to not getting emails or his provider shutting down his email address. None of the emails sent to him have resulted in a non-receipt notice being sent to the respondent;***
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> ***26.4 If the claimant had such problems, he should have told the Employment Tribunal and the respondent without delay;***
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> ***26.5 Whilst she is of course sorry to hear of his family's health issues, litigation is not a game, the respondent has incurred costs and the claimant has a responsibility to let the Employment Tribunal and the respondent know if he is having problems. Failure to do so is further unreasonable conduct;***
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> ***26.6 The skeleton and bundle can be provided to him and the hearing can commence at 1 pm this afternoon.***

27. In response, after a lot of direction from me to focus, the claimant said he could not proceed this afternoon, for which he gave the following reasons:

27.1 He did not have the skeleton and bundle to hand. It is on his PC which he does not have access to because it has a virus;

27.2 He was not able to prepare for the hearing because he was awaiting "some sort of legal support" to prepare his skeleton argument;

27.3 He faced the pressure of starting a new job;

27.4 He was reliant on the respondent conducting a data protection investigation, which was delayed and when it was progressed, he encountered technical problems, his PC then contracted a virus and so he was at a disadvantage (he seemed to be suggesting that the respondent had passed the virus to his PC);

27.5 "Technically" he is working today and has deadlines and pressures to meet;

27.6 The whole case has been dragged out by the respondent and the data protection investigation was left to him to conduct.

28. After a short adjournment I gave the following decision to the parties. In view of the matters raised by the claimant as to IT difficulties with access to his email account and to his PC leading to him being unaware of today's hearing and unable to prepare even if the hearing resumed later today, I do not believe it would be in the interests of justice to continue today, given the issues to be determined, as to whether his claims are in time and whether his claims should be struck out because of unreasonable conduct. The hearing is therefore postponed and I will relist it for a further day.

29. In agreement with the parties I set the date for the Open Preliminary Hearing as indicated above.

30. I was of the view that the claimant must provide evidence to the Employment Tribunal and to the respondent in support of the reasons why he was not aware of the hearing today and unable to proceed. Ms Hirsch requested that this should contain evidence in support and a witness statement which addresses that evidence and which goes beyond mere assertion.

31. I agreed that the claimant should provide a witness statement addressing the issues he gives by way of explanation as to why he could not proceed with the hearing today but given the claimant's concerns as to what evidence was available to him, I told him it would be limited to what he can provide.

32. The claimant did add belatedly that he has recently been diagnosed with Chronic Fatigue Syndrome. I told him that if he is relying on this as part of his explanation, he would need to include this in his witness statement and provide evidence in support.

33. The terms of what the claimant is required to provide are set out in detail in the above Case Management Order.

> ***34. In addition, the claimant should provide an alternative email account to the Employment Tribunal and to the respondent for future correspondence, although I will direct that correspondence is also sent by Royal Mail.***

19. Employment Judge Tsamados took the opportunity to comment in his order that he was concerned about the manner in which the claims had been presented. He noted that there was a much more detailed version of the particulars of claim which had not been submitted and that they amounted to an amendment of his claim, without having obtained permission from the Employment Tribunal. Even then, it was not clear from the more detailed version of the particulars, whilst it set out more facts, what the claimant was actually claiming.

20. During this hearing, I asked the claimant whether he had done what he had been ordered to by Employment Judge Tsamados because I could find nothing on file confirming that he had written to the Employment Tribunal stating his new email address. All that had happened, as far as I could see, is that in January 2022 he had begun to correspond with the Employment Tribunal from a different email address. In addition, I could see correspondence on file from the respondent that they still did not know what email address to contact the claimant on. The claimant said he had written to both the Employment Tribunal and the respondent with details of the new email address. I asked him to provide evidence in the form of copies of the emails. He could not provide such emails, despite me giving him time over the lunch time break to find them. I find that the claimant did not contact the Employment Tribunal or the respondent as he alleged. I found the claimant to be wholly unconvincing when attempting to persuade me that he had done what he was asked to do, even more so when considered against other explanations provided by the claimant during the hearing (see below).

21. On 21 February 2022 the case came before Employment Judge Webster for an open preliminary hearing. The respondent applied for the claims to be struck out because they were out of time, and also due to the claimant's unreasonable conduct of the proceedings. Employment Judge Webster refused to strike out the claims on the grounds that they had been submitted out of time. She also considered an application by the respondent to submit their response out of time, which she allowed.

22. In response to the application that the claims be struck out due to the unreasonable conduct of the claimant, she made the following remarks:

> ***46. It is correct that the claimant's conduct in managing this claim has been on occasion difficult and has caused significant delays. However I do not accept that the incidents relied upon are so bad as to amount to unreasonable conduct that ought to lead to his case being struck out.***

47. I accept the claimant's submissions that his mistakes have been largely unintentional and owing to a lack of legal advice. Nevertheless it is worth noting that I have also found the claimant to be at times disingenuous in his comments or answers before me; with his explanations for the state of his claim varying and changing during the hearing. His grasp of documents and his case overall have been vague and he has made many wide ranging assertions without basis. Further, he has very casually made at least one very serious unsubstantiated allegation against the respondent during today's hearing, saying that they are committing fraud. I strongly suggested to the claimant that making such allegations in open court when he had made no such allegations in his claims was ill advised and not appropriate.

48. The need for specificity has been made clear to the claimant at several points during the hearing and appears to have been raised by the two previous EJs who have dealt with this case.

49. It is not in dispute that the claimant sent the respondent a document purporting to be the ET1 and grounds of claim that he submitted on 23 November 2019 but which is in fact made up of grounds of claim that are not before the tribunal and never have been - and from what I could glean are a hybrid and extended version of the two grounds of claim.

50. I was very troubled by the claimant's conduct in amending the ET1 and sending this with a different received date on it to the respondent. This is a significant issue that involves misrepresentation to the tribunal and the respondent. Had it not been for EJ Tsamados' observations that the documents the claimant was relying upon were different from those actually sent to the Tribunal, the claimant would not have flagged this issue at all. However I, with some reservation, on balance accept the claimant's explanation that this has occurred due to inexperience as opposed to intent and for those reasons I do not find his conduct in this regard unreasonable.

51. The claimant says that such a document was sent in error. He worked on many versions of the Grounds of Claim for the second claim and this document was simply yet another version. He accepted during today's hearing that he understood that this could have been misleading but it was not intentional.

52. I accept this explanation by the claimant. I consider that it is possible for numerous drafts of the same document to exist and that an individual may continue working on such a document afterwards without understanding the exact legal nature of the pleadings submitted. The claimant has been unwell at various times and I have taken that into account when assessing whether the claimant's behaviour was deliberate. I do not consider that it was part of a plot by the claimant to mislead the respondent though I accept it had that effect. The possible impact of that on the respondent has been taken into account however in my decision to allow the respondent's response to be accepted out of time and to provide an amended response should it wish to do so – though Ms Hirsch has stated that bar the new information in the Further Information Table, their ET3 responds to all the claims as pleaded in the two 'real' ET1s.

53. The claimant has not fully completed the Further Information table. However he has provided a large amount of information, including dates

> ***and facts and whilst he has not provided an explanation for the timing of him bringing a claim in many areas, he has nevertheless made an attempt at completing the table. There has been no wholesale refusal to comply with orders. The failure to provide a reason for delay has not disadvantaged the respondent in their application for the claims to be struck out today due to being out of time. If anything such a failure to provide explanation would, in some situations, have aided them. My decision not to strike out the claims for being out of time has not been made because of the claimant's failure to explain any delay. That failure is still something that the respondent could rely upon when the Tribunal makes it findings on whether any or all of the claimant's claims are in time at the full hearing.***
>
> ***54. Although the respondent has asserted that the claimant has introduced new facts and claims by completing the table, they have not provided me with an analysis of which parts of the table are new or not. I understand that they have not undertaken that exercise because the claimant has not made any application to amend his claim to date. Nevertheless, the claimant providing more information than the respondent wants regarding how his claim has come about is not necessarily unreasonable conduct and in this case I consider that the claimant has, without legal advice, attempted to provide the tribunal and the respondent with the information he considered to be relevant in answer to the questions put to him by the table. It has in no doubt complicated matters but it is not, I find, capable of being unreasonable conduct that ought to lead to the claimant's claims being struck out.***
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> ***57. With regard to the email address – I do not find that the claimant stating that the address is not monitored to be unreasonable conduct. He provided an email address and he has used it for correspondence and replied to emails albeit sporadically. I find that putting this 'signature' at the bottom is intended to be an indication that the claimant may not look at the email address very regularly as opposed to a statement of intent by the claimant to ignore the emails or not respond to them or that this is not a properly functioning email address. I reached this conclusion based on the fact that the claimant has given assurances to me that he understands he will be needed to check his email regularly and respond accordingly. The claimant was heavily and repeatedly reminded by me during the case management discussion of how to progress this case (as reflected in the Orders) that he must take responsibility for managing his case and complying with the Tribunal orders. I reminded him that the process of preparing a case for hearing was a collaborative process and that he must work with the respondent's representatives. I told him that he must check his emails on a very regular basis and respond to correspondence promptly. Future failures to do so may result in the Tribunal finding that his conduct is unreasonable particularly in light of the concerns raised by me during this hearing and EJ Tsamados at the last hearing.***

23. Employment Judge Webster accompanied her reasons with a set of orders which stated, with precision, exactly what information must be provided by claimant. Much time was clearly spent by Employment Judge Webster making this as clear as possible, with the intention that the claimant address each of the questions. At the end, she said the following:

> ***60. Nevertheless, as has already been set out in this Judgment and in the Orders, the claimant is now on notice that he must comply with orders of the Tribunal in a timely fashion and provide the information actually requested as opposed to providing what he wants to say. A continued failure to appropriately engage with the process could result in his claims being struck out and that risk is greater now that he has had explained by the Tribunal, on at least 2 occasions, that he must comply with Tribunal orders.***

D. LEGAL PRINCIPLES

24. Rule 37 of the Employment Tribunal Rules provides as follows:

> ***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).***
>
> ***(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.***
>
> ***(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.***

25. Even though one or more of the above grounds may be made out, strike out is not automatic and any decision to strike out must only be taken having considered all of the circumstances of the case and the overriding objective to deal with cases fairly and justly. I was very conscious in reaching my decision below that strike out is a draconian measure which must be taken only after a careful analysis of the facts and circumstances.

E. ANALYSIS, CONCLUSIONS AND ASSOCIATED FINDINGS OF FACT

26. I found the claimant to be an articulate and intelligent person who engaged fully in the hearing. I accept of course that he was not legally trained and therefore I judged him by the standards as I would any other litigant in person. At times during the hearing, however, I found the claimant's explanations to be wholly unconvincing and not credible.

27. One example of this was when the claimant was asked questions about his knowledge of today's hearing, which he insisted he was not aware of, hence why he did not appear at the hearing on time. The notice of hearing was sent to the parties in February 2022. The claimant said he did not receive this letter and indeed it appeared from the file that it was sent to his old email address.

28. Having received the standard letter providing instructions for today's hearing, but which did not refer specifically to the date of the hearing, the claimant wrote to the Tribunal on 18 May as follows [sic]:

> ***Please accept my sincere apologies.***
>
> ***I do not have details of forthcoming Open Preliminary Hearing.***
>
> ***I am currently awaiting legal advice which I am hope may bring this case to an early close. Due to changing personal circumstances I would be grateful for a short postponement of 4 weeks please.***

29. It was then put to the claimant that even if he did not know about the hearing because he had not received the notice of hearing, he was copied into an email from the respondent in which they set out their opposition to any postponement of the hearing, referring specifically to the date of today's hearing. The claimant said that he did not see this because he did not open up his emails. He was then asked why, having requested a postponement, that he did not check his emails the following day for any reply.

30. It is fair to say that the claimant was probed in some detail about this and he gave a range of reasons why he did not regularly check his emails, despite previously been told to by Employment Judge Webster, including reasons relating to his health, but also including the fact that he "did not have time to check his emails". I was concerned by the claimant's disregard of the clear instructions given to him about monitoring his emails. Whilst I saw and read a letter written by the claimant's treating physicians regarding the claimant's conditions, namely Chronic Fatigue Syndrome and Myalgic Encephalomyelitis, I am not satisfied that those conditions prevented the claimant, or were a good reason, for not opening his emails. Neither did the above mentioned letter about his conditions suggest that the conditions prevented him from monitoring his emails on a regular basis. The reality, in my judgment, was that the claimant was deliberately selective about the emails he opened and when he decided to open them. It was a deliberate disregard of the instructions by the Tribunal.

31. I then turned to whether the claimant had not complied with Employment Judge Webster's orders. I looked carefully at what the claimant had provided in terms of further information about his claim. It was provided in a form which Employment Judge Webster was at pains to make clear that she did not want to see. It lacked the detail requested, and failed to clearly answer the questions posed by Employment Judge Webster. Due to the way in which the claimant had presented the information, it would have taken hours to go through it and make sufficient sense of it so as to ensure the respondent was clear about the case it needed to meet.

32. Considering all that I had heard at the hearing, I concluded that for the reasons set out above, the claimant had indeed acted unreasonably in the manner in which he had conducted these proceedings and that he had failed to comply with Tribunal orders. I was left very concerned about the claimant's attitude to these proceedings and was in no doubt that, due to this, the case would continue to be very protracted, thereby burdening the respondent with unnecessary expense.

33. This case already has a long history to it and we are still only at the very early stages. The Tribunal is always mindful of the need to assist those representing themselves, acknowledging the need to ensure the parties are on an equal footing. However, it is the claimant who brings the claims and makes the allegations, and it is the claimant who must take responsibility for managing the case and treating it with the seriousness and importance that any legal proceedings deserve. Giving assistance to an unrepresented litigant does not mean doing the claimant's job for him or her.

34. The instructions provided by Employment Judge Webster could not have been clearer. I am in no doubt that the claimant understood this but chose, once again, to provide the information in the way he wanted to, rather than the way the Tribunal wanted him to. This was unreasonable and the claimant could have done much more to comply with the order.

35. This is one of those unusual cases where I have concluded that the appropriate response to the claimant's failure to comply with orders and for the unreasonable manner in which he has conducted this case, is to strike out all of his claims. The effect of this decision is that the claims stand as dismissed and the claimant can no longer pursue them in the Employment Tribunal.

……
Employment Judge Hyams-Parish

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