



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

Mr Bilal Hussain

AND G4S Facilities Management (UK) Limited

HELD AT Manchester (by CVP)

ON 18 May 2022

EMPLOYMENT JUDGE A M BUCHANAN (sitting alone)

Appearances

For the claimant: No attendance.

For the respondent: Mr Nick Sheppard of Counsel

JUDGMENT having been sent to the parties on 24 May 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Preliminary Matters

1.1 This matter came before me for a public preliminary hearing. It had been listed as a public preliminary hearing for three hours by cloud video platform as questions of strike out were before me.

1.2 The matter was dealt with remotely by cloud video platform. I did not have access to the Tribunal file, but I had various documents before me as follows:

1.2.1 A bundle comprising sixty pages which had been prepared by the respondent. Any reference in these Reasons to a page number is a reference to the corresponding page within that bundle. That bundle contained the claim form and the form of response together with other relevant documents to which I refer below.

1.2.2 An email sent on behalf of the claimant to the Tribunal dated 12 May 2022 which had attached to it three medical certificates.

1.2.3 An email sent on behalf of the claimant to the Tribunal dated 12 May 2022 timed at 23:09 which had attached to it a case management agenda completed on behalf of the claimant.

1.2.4 A skeleton argument containing submissions from counsel for the respondent in respect of this hearing and sent to the Tribunal and copied to the claimant on 16 May 2022 at 11:24.

1.2.5 An email from Hasan Razzaq on behalf of the claimant dated 17 May 2022 and timed at 22:07.

1.3 Oral reasons were given at the conclusion of the hearing. In the event of any conflict between those oral reasons and these written reasons, these reasons prevail.

Relevant history of the claim

2.1 The claimant filed the claim form on 8 February 2021 supported by an early conciliation certificate on which Day A was shown as 13 January 2021 and Day B as 28 January 2021. Proceedings were filed against G4S and HRGO Recruitment. The claimant stated he had worked as a General COVID-19 Operative from 17 July 2020 until 20 October 2020 at the Centenary Square Covid-19 testing site (in Bradford). Complaints were advanced of unfair dismissal, age discrimination, race discrimination and unpaid holiday pay. In the claim form, the claimant gave his date of birth as 26 January 2002 which would mean he was aged 19 when the claim was filed and throughout the time he worked with the respondent and aged 20 at the time of the hearing. The particulars of the complaints were set out at pages 14 and 15. The second paragraph on page 15 begins with general allegations of bullying and the use of racially discriminatory language by two managers against the claimant and others.

2.2 The claim against the second respondent was rejected for lack of an early conciliation certificate number in respect of the second respondent. That decision was notified to the claimant on 19 February 2021. There was no application for reconsideration of that decision. The Judgment on 18 May 2022 amended the name of the first respondent to that set out above. A preliminary hearing by telephone was set for 20 September 2021.

2.3 On 19 February 2021 a letter was sent to the claimant by the Tribunal explaining that he did not have the required service under section 108 of the Employment Rights Act 1996 to advance a claim of unfair dismissal and the claimant was given until 5 March 2021 to explain why the complaint of unfair dismissal should not be struck out. In the event, the respondent subsequently pleaded that the claimant was an agency worker and not an employee and that he lacked the status to advance an unfair dismissal claim irrespective of the service question.

2.4 On 15 March 2021 a response was filed by the respondent denying all complaints advanced. It was submitted that the claimant was an agency worker and not an employee of the respondent. Any claim for holiday pay was denied. It was submitted that the claimant's engagement was terminated because he had been given numerous verbal warnings for excessive breaks followed by a written warning for not adhering to the verbal warnings and for leaving the site for one hour. In addition, it was submitted that the claimant had been told to take a day off in order not to breach the working time regulations but that he had continued to work. When spoken to about this it was said

that the claimant had been confrontational and disrespectful to his managers and had continued to come into work on his days off. The claimant was asked to provide further particulars of each of the complaints that he raised of acts of bullying and racial discrimination by managers of the respondent. By reference to the matters referred to in paragraph 11 of the grounds of response the claimant was asked in paragraph 12 of the grounds of defence:

“In respect of each allegation raised above, the respondent respectfully requests that the claimant provides full and detailed particularisation of each complaint raised above, including the dates when he contends such allegations took place and any witnesses to the same and specific confirmation when these matters were previously raised with the respondent and, to the extent that they were not, why not”.

2.5 On 30 March 2021 and in the absence of any written representation from the claimant in response to the letter from the Tribunal of 19 February 2021, the claim of unfair dismissal was struck out.

2.6 On 26 April 2021 the respondent wrote to the Tribunal (page 35) and to the claimant repeating its request for further and better particulars of various allegations raised by the claimant in the claim form in respect of alleged acts of bullying and racial discrimination by managers of the respondent. It was noted that the case management hearing had not been set until 20 September 2021 and to save time, it was requested that the Tribunal order full and detailed particulars of the various matters included in both the form of response at paragraphs 11 and 12 and repeated in the e-mail of 26 April 2021.

2.7 On 11 June 2021 (page 33) by a letter from the Tribunal on the direction of Employment Judge Allen, the claimant was asked whether or not the requested information had been provided by him and, if not, he was required to provide that information by 6 September 2021.

2.8. On 16 September 2021 (page 37) the Tribunal wrote to the parties to advise that the hearing on 20 September 2021 had been postponed due to a shortage of judges available to hear the matter. The matter was re-listed to take place on 12 October 2021.

2.9 On 11 October 2021 (page 38) and noting that the requested further particulars had still not been received from the claimant (some six months after they had first been requested) (page 38) Regional Employment Judge Franey gave a strike out warning to the claimant to the effect that unless a response to the request was heard by 25 October 2021, the claim may be struck out on the basis that it was not being actively pursued. At the same time, the hearing set for 12 October 2021 was cancelled.

2.10 On 25 October 2021 at 23:50, an e-mail from the claimant was received by the Tribunal. This was not copied to the respondent and on 22 November 2021, the claimant was reminded of his obligations so to do pursuant to Rule 92 of the 2013 rules.

2.11 In his e-mail of 25 October 2021 (page 43) the claimant stated that he had not been able to actively pursue the claim due to his own personal, financial and emotional capabilities. The claimant stated that he was living on his own and having to support his mother who was mentally unwell and who lived in Halifax and the claimant was

spending time travelling between Bradford and Halifax to look after her. The claimant stated he did not have access to the basic internet and communication avenues, and he had to rely on others which was very hard for him. In addition, the claimant stated that he was a “*looked after child*” and that a lot of his time was spent purely on surviving and maintaining his independence. The claimant stated that the matters complained of in the claim form had caused him increased stress. The claimant stated he was dealing with this matter at the age of 18/19 with no one to help him. The claimant stated that he had personal medical difficulties which he was trying to get diagnosed and that the combination of these factors had caused things to be pushed out of his vision due to fear of his own overall circumstances. The claimant wished to have the claim of unfair dismissal reinstated and concluded as follows: “*All in all I mean no disrespect or disregard for procedure by not being able to write things in time however it has only ever been due to the consequences of my personal situation financial/emotional medical situation. Has caused me to not be able to have access to information at the right time in the first place delaying the time I can respond in. In brief I really believe I should have the right to fight fiercely for both claims due to the context if the situation as explained from a fair and balanced platform of view. If you would like any more information etc please do contact me I look forward to hearing back from me in due course thank you for your time*”.

2.12 On 22 November 2021 (page 45) the respondent wrote to the Tribunal and to the claimant noting the claimant’s correspondence and pointing out that the claimant had not actually responded to the order requiring him to provide further information.

2.13 There was a delay in that correspondence being put before an Employment Judge but on 15 March 2022 (page 46) the following correspondence was sent to the parties: “*Employment Judge Holmes has directed that the claimant has replied to the strike out warning but since the claimant’s e-mail of 25 October 2021 the claimant appears to have done nothing to pursue the claim. There is now another proposal to strike out the claim on the grounds that the claim is not being actively pursued. If the claimant wishes to object claimant must do so in writing to the Tribunal copying in the respondent by 22 March 2022*”. The second strike out warning was sent to the claimant on 15 March 2022 (page 47).

2.14 On Fri, 1 Apr 2022 at 05:35 an email message was received by the Tribunal from the email account of the claimant but apparently written on his behalf by an unnamed friend. The message read:

“I am writing on behalf of Bilal Hussain his friend who is doing correspondence for his issues as he’s extremely ill and does not have his own phone so responsibility for his such technical issues via correspondence is a massive issue which I’ve been delegated to deal with .He’s suffering for a long period of time hence the delay of responses over the year Thai is medically backed. i would just like to peruse this claim even though its past the 22nd of March this is due to the soar issues and that this message from Mr Siddique has only come to me now due to the said complications which can be delved deeper. This is just a brief message to iterate and am able to go on further to more requested details ,in short Mr Hussain does want to actively peruse the claim.”

2.15 On 7 April 2022 the respondent respectfully requested that the claim be struck out as the claimant had repeatedly failed to comply with orders for information and the

claim had not been actively pursued and no medical evidence had been provided to support the claimant's contention as to why he had not been able to actively pursue the case or comply with orders.

2.16 On 19 April 2022 the Tribunal wrote to the parties by email at 15:53 convening the hearing on 18 May 2022 and that letter included in bold type the following direction: *"Employment Judge Batten directs the claimant must file any medical evidence of his illness by 14 days before the preliminary hearing"*.

2.17 On 19 April 2022 at 16:01 (page 50) correspondence was received by the Tribunal (not copied to the respondent) on behalf of the claimant from an unnamed correspondent saying that he was the friend of the claimant and responding on his behalf as the claimant was unable and incapacitated to do so at the moment and requesting an extension of time to the date of the hearing (set for 18 May 2022) due to the fact of *"recovering certain pieces of evidence"* which were not in the claimant's possession. It was said that some evidence was contained on one of the claimant's telephones which was in the possession of another person who was in another country and who would be returning around June 2022 and the letter continued: *"hence to be able to give full recourse for a fair justifying on behalf of the accuser we would like a extension to the time of the hearing please"*.

2.18 On 6 May 2022 (page 52) the respondent wrote to the Tribunal and to the claimant objecting to any application to postpone the hearing on 18 May 2022. The respondent noted the claimant had failed to comply with an order to provide further information and had only corresponded when the claim was on the point of being struck out. The correspondence gave no time frame for when information would be provided or for why it could not have been provided earlier. It was noted that the respondent no longer operated the contract in question on which the claimant had worked and was unlikely to be able to respond to the allegations brought even if particulars were now provided. The respondent contended that the overriding objective would not be furthered by allowing the claimant further time.

2.19 On 11 May 2022 (page 56) the respondent sought further clarification as to whether or not the hearing set for 18 May 2022 had been postponed.

2.20 On 12 May 2022 three medical certificates were filed on behalf of the claimant. A certificate showing an examination by a doctor from the Picton Medical Centre in Bradford on 8 November 2021 saying the claimant was not fit for work in the period 29 October 2021 until 21 November 2021 by reason of *"foot/ankle sprain/groin pain"*. The second certificate from the Bradford Extended Access and RED Hubs spoke of an examination on 16 December 2021 and the claimant being fit for work between 6 December 2021 until 2 January 2022 with amended duties (avoiding lifting and reduced walking) by reason of *"groin pain awaiting investigation"*. The third certificate from the Picton Medical Centre in Bradford spoke of an investigation on 8 March 2022 advising that the claimant was fit for work with adjusted duties in the period 3 January 2022 until 23 April 2022 by reason of *"groin pain"*.

2.21 On 12 May 2022 correspondence was received by the Tribunal which was copied to the respondent from Hasan Razzaq ("HR") apologising for the delay in sending a case management agenda because he thought it had been sent with the medical

notes. The letter sought a postponement of the hearing on 18 May 2022 because the claimant was suffering from a “*deep and sensitive illness*” which was part psychological and part physical due to the severe stress caused to the claimant by the matters complained of in these proceedings. The claimant's routine had been hard hit and he was not able to be conscious for a large part of the day and night only rising a little in the late hours. The condition had not been diagnosed. In addition, the claimant was suffering from severe anxiety. The letter continued: “*From my understanding, the fit note ending partly last month can be extended to reflect the situation hence more structured reasoning for this can be taken. From what aware he's to be given appointments shortly which from my understanding will end up with some treatment, causing him to be in short more presentable and able-bodied and minded. Continually another issue is at this time a part of the evidence which is one copy is not at hand. What I mean by this is that this evidence is on the hard drive of a damaged phone which an acquaintance had mistakenly unbeknownst to us, abroad and will not be arriving till the 26 June. The evidence is quite substantial and is needed to achieve an in-depth productive preliminary hearing. Also, another issue that has come up is that one of the key witnesses Anna cannot partake due to not being physically available to do so due to family matters. I have messages and contact details required to substantiate this. Without this witness, a massive amount of content cannot be distributed and analysed hence a fairly weighted and composed case cannot be given. I understand these are a number of issues that have come all at once seemingly, which I appreciate wholesomely for the tribunal's understanding. However, these are things that have happened due to happenstance, and feel it would be fair to forward this date till after the 26 June, so that this conglomeration of issues doesn't unfairly be an obstacle to discriminate against a full impartial preliminary hearing, in accordance to the context of the providence of the situation*”.

The letter continued that HR could not support the claimant on the day of the hearing as he was away outside of the area on work, that the claimant was isolated and that he was a former looked after child who did not have support and that he was relying on food banks. The letter concluded:

“Hence to be equitable for a full addressed preliminary hearing a request for after the 26 June has been given. As these issues have come frantically to Bilal which can't be solved by him, as responsible.

I trust to hear from you respective selves soon, patiently. For any further communications, please email Bilal directly”.

2.22 At the same time on 12 May 2022, the claimant lodged an agenda for case management to which I refer below in more detail.

2.23 On 17 May 2022 at 16:26 the Tribunal wrote to the parties in these terms:

*“Employment Judge Holmes has reviewed the claimant's application to postpone the hearing tomorrow and it has been **refused**. Reasons being none of the sick notes produced cover the hearing date, nor do they suggest the claimant could not attend a hearing. The other reasons produced by the claimant (or his representative) are not good enough. Employment Judge Holmes directs the hearing **will proceed as listed**”.*

2.24 On 17 May 2022 at 22:07 HR wrote again to the Tribunal in these terms:

"I am Hasan Razzaq corresponding on behalf of Bilal I have received the email and would like to clear the perceived misunderstanding with the reasoning. I understand the sicknote had not been extended to the date of the PH, however when these were sent they were provided to cover the dates which requested in the previous correspondence with the employment tribunal administration, whilst also these notes were not specifically made for the initially to the correspondence however were for other governmental institutions and were forwarded due to the apt descriptions and ease of transference . Hence due to the understanding of describing the afflictions and severity of such medical ailment to this present moment, it was insinuated it would be understood that this condition would continue in the short while since it supposedly was ended, as the length of it was quite long, it made sense to say if it hadn't suddenly stopped, continually I can understand in an extended note covering this date this an more fulfilling comprehensive description up to far with administrative expectations, as this would not be any issue due to the reality of the worsening of the claimants health's up to this present point. Moreover I can correspond with the claimant when I'm personally with him, or with his doctor as I have his permission due to the present state to get the required details on the sicknote.

Furthermore, I understand that you have mentioned that the other reasons are not validated or good enough , I would like to respectfully understand how they aren't and if any deeper reasoning/ details is requested into them, to show how they are validated. As briefly referring to the they are an conglomeration of uncontrollable happenstance and inequity in being able to productively act, during this pressurised period, because of economic, social, medical elements to put it briefly. I can understand if this would need further details/understanding to be up to par with the administration if the tribunal and this can be wholesomely given if requested I. Also I can get for you correspondence with civil servants having understanding of his conditions and reasoning from several institutions, as the testimony of these will only moreover consolidate the reasonings given.

Continually, I have read the defendants document and can briefly respond that all the counter arguments with evidence can be provided however due to the sudden change in myself corresponding on Bilal behalf completely and my location , for said above reasons, I can't give respond in the given email with all particulars because of ease of access due currently, for above mentioned reasons however can and will. If a more comprehensive understanding and correspondence of the validity, with evidences, for the reasonings given is achieved. What I can say is that I have been aware of Bilal situation in the past, as when it in the more present time had gotten more serious as before, I was requested to take correspondence until a change in circumstance had happened as opposed to now-which in this case means taking full charge of correspondence with a limited access to all inclusive information due to the situations, as above described. Hence I have access to his and my own emails, and see all previous via to write on his behalf as I could. There is no ploy to cover playing for time or any other inference which was insinuated in an point made by the defendant, I am willing to give my details and testify committing to this. Furthermore another point I'm able to wholesomely explain is the fact, I can't correspond on behalf of the claimant on the 18th even if I'm the one able to facilitate such exchange. The reasoning being is that I'm put of the city on work related activities which important cannot be rearranged and I don't have the facilities to provide equipment if I were to have been able to do so before when I was in the vicinity. Hence there can't be no respecting argument that

I could have been able to correspond on the claimants behalf without risking very important commitments in my life, due to its relatively short notice to do so, it wouldn't be equitable at all. To reiterate Id like to again refer back I can easily clear all the other defendants points however at any reasonable appropriated time based on the context of the situation, described furthered and can be furthered detailed with more evidence. Achieving this will create a more equitable and fair footed platform based on the ability to defend and argue the points given by the claimant, to bring about fulfilled true justice to the matters regardless of which way it may turn. As the consequence of these affairs have been very hard hitting and painful, for the claimant the consequences can be reflected in many facets of his life today, which believed actions are not to be representative of true inclusive, great British values. Hence why we strongly believe in the validity in this case and our right for our minority voices to be heard, with retrospect to the full detailed reasoning and context of the situation. I'd like to thank you for your appreciated time and will be looking forward to hear from your respected selves soon. Thank you".

2.25 There were some difficulties in forwarding documents to me which meant that the hearing did not begin until 10:15am. By that time the respondent was in attendance, but the claimant was not. I asked my clerk to telephone the claimant on the mobile number in the claim form and to email to the address provided in the claim form. There was no reply from the claimant. I heard submissions from the respondent and adjourned to deliberate and announced my judgment at 12:30pm. There was no response from the claimant at any time as the hearing progressed.

Submissions

Respondent

3.1 The respondent had filed a skeleton argument which extended to 5 pages and 25 paragraphs. The history of the matter was set out.

3.2 The respondent referred to Rule 37 of the 2013 Rules and reference was also made to the decision of HHJ Taylor in **Cox -v- Adecco UKWEAT/0339/29 2020 ICR 1307**. The respondent particularly drew my attention to paragraphs 29-31 of the Judgment in respect of litigants in person.

3.3 Reference was made to **Emuemukoro-v-Croma Vigilant (Scotland) Limited UKEAT?0014/2020** where the EAT rejected the submission that strike out should only be exercised if there is no alternative: the governing question is always proportionality.

3.4 The respondent referred to the history of the matter and the numerous non-compliances by the claimant evidencing a failure to actively pursue the claim. Further it was submitted that it was no longer possible to have a fair trial of the issues. The claimant had provided a case management agenda but had still not provided the details requested by the respondent as long ago as February 2021 some 15 months earlier. The claimant had corresponded with the Tribunal previously using his own email account and HR had now done the same using the claimant's email account. The claimant clearly has access to the necessary technology.

3.5 It was submitted that the respondent no longer operates the test centre where the claimant was engaged. The contract to run test centres is closed and the respondent is now effectively unable to defend any claim as the relevant witnesses are no longer either employed or engaged by the respondent. The balance of prejudice lies in favour of the claim being struck out as not actively pursued.

3.6 In oral submissions, the respondent submitted that the claim was now 18 months old, and the respondent still did not know the case it had to meet. None of the matters had been raised by the claimant internally whilst he was engaged by the respondent. The claimant was ordered to provide information and not evidence and there is no reason why he could not have done so. The respondent engaged some 8000 agency workers to run the various centres it was responsible for during the pandemic and has now closed all the contracts and lost contact with those workers. There would be very significant prejudice caused to the respondent if the claim is allowed to proceed further. The respondent will be unable properly to defend the claim because of the passage of time. The claimant has had two strike-out warnings related to the failure to provide the information requested and still has not done so.

3.7 It was submitted that any claim for unpaid holiday pay would be against the second named respondent, but proceedings had been rejected against the putative second respondent and there was no appeal by the claimant against that rejection. It was submitted that the medical evidence provided did not support the medical position as claimed by the claimant and HR in the correspondence received from them.

Claimant

3.8 The claimant was absent from the hearing and no submissions were received. I took full account of the documents sent to the Tribunal by the claimant at various times as detailed in section 2 of this Judgment.

The Law

4.1 I reminded myself of the overriding objective set out in Rule 2 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 Rules"):

"The overriding objective.... is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly 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 is compatible with proper consideration of the issues and saving expense".

I note that I must give effect to the overriding objective in exercising powers available to me under the 2013 Rules and that the parties and their representatives should assist me in furthering the overriding objective and in particular in cooperating generally with each other and the Tribunal.

4.2 I referred to Rule 37 of the 2013 Rules:

“(1) At any stage of the proceedings, either on its own initiative or on 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”.

4.3 I reminded myself of Rule 53(1) of the 2013 Rules which provides that consideration of strikeout may be dealt with at a preliminary hearing. I noted Rule 56 of the 2013 Rules which requires consideration of strike out should be dealt with at a public preliminary hearing. I noted that this hearing had been convened as a public preliminary hearing.

4.4 I noted the provisions of Rule 30A of the 2013 Rules and in particular paragraph (2) which provides that where a party makes an application for a postponement of a hearing less than seven days before the date on which the hearing begins, the Tribunal may only order the postponement where:

“(a) all other parties consent to the postponement and

(i) it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement: or

(ii) it is otherwise in accordance with the overriding objective:

(b) the application was necessitated but an actual mission of another party or the tribunal: or

(c) there are exceptional circumstances”.

I considered the provisions of Rule 30A(3) but concluded it had no application in the circumstances of this case. I noted the definition of “*exceptional circumstances*” In Rule 30A(4)(b) and that those circumstances may include ill health relating to an existing long term health condition or disability.

4.5 I noted the provisions of Rule 47 of the 2013 Rules:

“If a party fails to attend or to be represented of the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence”.

4.6 I have considered the Equal Treatment Handbook and in particular the section entitled “Litigants in Person”. I have noted the potential difficulties in communicating with people who speak English as a second language.

4.7 I note that the power to strike out a claim because it has not been actively pursued is akin to what was described in earlier versions of the rules of the Tribunal as striking out a claim for want of prosecution. The substance of the power remains the same and cases decided in the context of previous versions of the rules of procedure remain relevant. I note that in the case of **Evans -v- Commissioner of Police of the Metropolis 1993 ICR 151** the Court of Appeal held that the power to strike out for want of prosecution must be exercised in accordance with the principles set out in a decision of the House of Lords in **Birkett -v- James 1978 AC 297**. Therefore, a claim can be struck out where there has been delay that is intentional or contumelious (namely disrespectful or abusive to the Tribunal) or where there has been inordinate and inexcusable delay which gives rise to a substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the respondent.

4.8 I note that the second category of reason for strike out requires not only that there has been a delay of an inordinate and inexcusable kind but also that the respondent must show that it will suffer some prejudice as a result. I note that I must consider the prejudice as a separate matter, and it cannot simply be assumed. I note that the prejudice can arise from the fact that memories may have faded about the events in question. I note the purpose of the Employment Tribunals is to deal with workplace disputes promptly before memories fade about the events in question. I note the decision of **Rolls Royce plc -v- Riddle 2008 IRLR 873** where the Employment Appeal Tribunal recognised the claimant's conduct may result in his losing the right to continue with a claim. Clearly the striking out of a claim is a draconian measure but it is one which can be ordered where the claimant's default is intentional and shows disrespect for the Tribunal and its procedures.

4.9 I have noted the decision in **Elliott -v- Joseph Whitworth Centre Limited EAT 0030/13** where it was indicated that, whilst the fact that potential witnesses may have left the respondent organisation or gone abroad may not in itself be a reason why a fair trial is not possible, fading memory is such a reason. What amounts to a delay and whether or not it is inordinate turns on the decision of the Tribunal as does the question of where the balance of prejudice to the parties lies. It is right to look at the type of allegations being advanced when assessing prejudice.

Discussion and Conclusion

The name of the respondent.

5.1 I noted that the respondent had set out its full name in the response filed on 15 March 2021 but that no formal order amending the name of the respondent had been made by the Tribunal. The claimant had raised no objection to the amended name. Accordingly, I made an order amending the name of the respondent to that set out at the head of this Judgment.

The renewed application to postpone the hearing.

5.2 First I considered whether or not it was appropriate to continue with the hearing in the absence of the claimant. I noted the application to postpone the hearing received from HR on behalf of the claimant on 12 May 2022 which had been refused by

Employment Judge Holmes on 17 May 2022 with notice of that decision being sent to the parties at 16:26 by email. Clearly the claimant received that decision for at 22:07 on the same day, HR wrote to the Tribunal again in the terms set out in paragraph 2.24 above. I considered that correspondence in detail and concluded it was in effect a further application for a postponement of the hearing today.

5.3 The reasons for the request to postpone appeared to repeat those in the earlier application which had been refused. Reference was made to the medical evidence which had been provided and it was said that further medical evidence could be provided. The request to postpone resulted from a combination of events in a pressurised time for the claimant because of economic, social and medical elements of which more detail could be given if requested and more time was allowed. HR referred to having access to the claimant's emails. HR would not be available on 18 May 2022 due to his own work commitments, and he could not represent the claimant as he would be out of the city.

5.4 Given the timing of the application, I considered Rule 30A. I considered the long history of this matter and concluded that previous adjournments of the hearing were not because of an application from the claimant and so Rule 30A(3) was not engaged. I considered that the provisions of Rule 30A(2) were potentially engaged.

5.5 I noted that the respondent did not consent to any postponement of the hearing today and thus Rule 30A(2)(a) was not applicable. I concluded that the application to postpone from the claimant was not necessitated by an act or omission of the respondent or of the Tribunal and that Rule 30A(2)(b) was not engaged. I considered Rule 30A(2)(c) and whether there were exceptional circumstances justifying a postponement. I noted the definition of exceptional circumstances in Rule 30A(4)(b) and thus looked at the medical evidence provided by the claimant in detail. Three fit notes had been produced. The first declared the claimant unfit for work in the period 29 October 2021 until 21 November 2021 namely six months ago. The second and third fit notes recorded that the claimant was fit for work with adjustments in the period 6 December 2021 until 23 April 2022. The reason for the need for adjusted duties was groin pain. I was not satisfied that that evidence showed exceptional circumstances sufficient to allow a postponement within the provisions of Rule 30A. The medical evidence did not say that the claimant was unfit to attend a hearing at the Tribunal today – far from it. I looked again at the email of 17 May 2022 at 22:07 and found nothing in that application to amount to exceptional circumstances. The claimant had known of this hearing since 19 April 2022 and had had ample time to ensure he could attend by video in person or by a representative and nothing persuaded me otherwise. I concluded there were no exceptional circumstances justifying a postponement within Rule 30A of the 2013 Rules.

5.6 In those circumstances I refused any application to postpone the hearing and decided to proceed.

The application from the respondent to strike out the claim.

5.7 The hearing proceeded in the absence of the claimant and Rule 47 of the 2013 Rules was engaged. Attempts were made to contact the claimant by telephone and email without success. I gave full consideration to all the documents before me. The

question of strike out of the claim was before me and I proceeded to hear the submissions of the respondent on that point and then adjourned to consider the matter in detail.

5.8 I noted the following relevant matters from the chronology of this claim:

5.8.1 The claim was filed on 8 February 2021 and relates to events which occurred between 17 July 2020 and 20 October 2020. When the claim form was filed the latest of the (still unspecified) allegations had occurred almost four months earlier. The claim form contains serious allegations of age discrimination and race discrimination for which the claimant now seeks compensation of £50,000.

5.8.2 When the respondent filed its response in March 2021, it made a proportionate and straight forward request (since repeated at least twice) for the claimant to particularise the allegations of bullying and discrimination by providing details of who said or did what and when and whether or not the allegations had been raised by the claimant during his period of working with the respondent. There has been no suggestion from the claimant at any time that he does not understand that straight forward request. It was a request for particulars of the claim. It was not a request for evidence.

5.8.3 The claimant did not respond to that request for information and on 11 June 2021, some three months later, the Tribunal told the claimant to provide the information by 6 September 2021 in advance of the preliminary hearing then anticipated on 20 September 2021. That was some 11 months after the latest of the still unspecified events must have occurred.

5.8.4 In the absence of any information from the claimant, a strike out warning was sent to him by the Tribunal requiring him to reply by 25 October 2021. Ten minutes before the deadline specified, the claimant wrote to the Tribunal excusing his failure to respond by reference to his medical position. When evidence was eventually provided of that medical position, it formed no sensible basis for any reason not to have done what claimant had been asked to do. In any event, the medical evidence now provided has no relevance to any time prior to 29 October 2021 or after 23 April 2022. The correspondence from the claimant at that time again raised the complaint of unfair dismissal which had been struck out and which appears to have had no basis in law because of both the claimant's length of service (absent any complaint of automatic unfair dismissal) and his status as an agency worker with the respondent. In that correspondence, the claimant accepted that he had failed to actively pursue his claim.

5.8.5 in March 2022 the Tribunal noted that the particulars requested from the claimant had still not been provided and a further strike out warning was given with the claimant to reply by 22 March 2022. The claimant did not reply within that time scale.

5.8.6 On 1 April 2022 the claimant responded to the Tribunal stating that he had been unable to respond because of his medical position but failing to evidence that position.

5.8.7 When the medical evidence on which the claimant relies was produced and, whilst I do not underestimate the painful nature of the claimant's illness specified on

the fit notes, it forms no basis for a failure to provide the basic information of the complaints of age and race discrimination which the respondent seeks.

5.8.8 The claimant made two lengthy applications for postponement of this hearing through HR but still did not provide the basic particulars of the complaints which he had been asked to provide as long ago as March 2021 some 14 months before the hearing.

5.8.9 When responding to the Tribunal, the claimant sent an agenda document (pages 62-68) in which he asserts that the respondent behaved and treated him with prejudice using methods of racist attitudes verbally and in their attitudes around the workplace. Details of those allegations were not provided. Allegations of payroll fraud and corruption are alluded to. In the agenda, for the first time, the claimant valued his claim in respect of loss of earnings and damages for injury to feelings and anxiety and depression at £50,000. The agenda refers to allegations of the claimant being ostracised and forced to sign warning documents and facing massive health and safety concerns at the site at which he worked and includes the sentence (page 64) *"Hence will campaign for the issues to be dealt with by going through i.e. in another case or starting to address them through this separate preliminary hearing to then continue from"*. Reference is again made to the unfair dismissal claim which was struck out on 30 March 2021 - 14 months ago.

5.8.10 The claimant did not attend the hearing this morning. The claimant knew his application of 12 May 2022 had not succeeded and repeated it late on 17 May 2022 but did not attend the hearing in order to find out the result of that second application. When contacted by telephone and email at the start of the hearing, the claimant did not respond. The claimant has had two strike out warnings issued to him over a period of seven months and has still not provided the particulars of his claim which form the basis of those strike out warnings being issued. The claimant has not asked for HR to be recorded as his representative in these proceedings and the claimant continues to appear in person (but with the assistance of HR).

5.9 I have applied that analysis to the law as set out above. I bear in mind that the striking out of a claim is a draconian step and one which should be used very sparingly. This is particularly so when allegations of discrimination are advanced. I have considered the type of allegation which is advanced in this case. Some particulars are given in the claim form itself, but the respondent has properly sought particulars of what the claimant alleges its managers did. This is a case where everything will depend on an assessment by the Tribunal of the evidence from witnesses. At present some 18 months after the latest date on which events complained about could have occurred, and some 21 months from the earliest such date, the respondent still does not know the full details of the allegations of what it is the managers are alleged to have said and/or done. In that time period the memories of the relevant witnesses are bound to have faded. When and if particulars were to be provided, the respondent would be faced with approaching former members of its team and asking them to recall events which they would have no reason to remember, and which would have occurred many months earlier. If the claimant had provided this information when requested, in March 2021, that difficulty would have been avoided and that difficulty has only increased as month has succeeded month. The claimant has advanced this claim containing serious

allegations, for which he seeks very considerable compensation, and has a duty to prosecute that claim without delay as the overriding objective makes clear.

5.10 I have considered whether the delay on the part of the claimant in providing the straightforward information requested can be said to be intentional. I have concluded that it is. The claimant has allowed many months to pass without responding to the straightforward request. It appears that he was medically able to do so between March 2021 and October 2021 but chose not to do so. The claimant has accepted that he did not actively pursue the claim in that period. The reason the claimant gives for his delay since October 2021 relates to his health, but the evidence provided to substantiate that reason is very far from compelling. There is no doubt that there has been very considerable delay in this case, and I conclude that it is intentional.

5.11 if I am wrong in that conclusion, then I have considered whether there has been inordinate and inexcusable delay. I am satisfied that the delay in this case has been inordinate and inexcusable. The reasons given by the claimant for his failure to respond, which relate in the main to his medical position, are simply not borne out by the evidence I have seen. There is no reason why a person suffering from the physical conditions diagnosed could not have provided the information for which he is now claiming £50,000 compensation from the respondent.

5.12 A delay of any magnitude can always be dealt with by a sanction other than a strike out. I have considered whether I should properly allow further time for production of the information with the sanction of an unless order attached. The difficulty for a claimant who delays, as this claimant has done, is that the longer the delay the greater is the risk that a fair hearing becomes impossible or that serious prejudice is caused to the respondent. I conclude that this is what has happened in this case. The respondent has already suffered serious prejudice in not being able to identify, trace and interview the relevant personnel. I received cogent submissions from Mr Sheppard that the respondent has now collapsed the contracts to run COVID testing stations, such as the one on which the claimant was working, and now no longer has contact with its former personnel. In any event, even if contact could be made with those people now, they would be being asked to remember events which they have no reason to recall, and which would have occurred at least 18 months earlier. Memories are bound to have faded if not disappeared altogether. Given the nature of the allegations in this case and given the delay, I conclude that there is a substantial risk that both a fair hearing is impossible or, if not, that the respondent is likely to be caused serious prejudice in the circumstances of this case given the type of allegations being advanced.

5.13 I have balanced the prejudice to the parties. I note that in cases such as this the prejudice argument is generally equal on both sides and that I must look for other factors. The crucial factor I find in this case lies in the nature of the allegations which the claimant seeks to advance. Allegations of bullying and harassment by his managers will require oral evidence and detailed recollection by witnesses. These are not allegations which can be tested by objective evidence in documentary or other form and that is the factor which persuades me that the balance of prejudice lies in favour of striking out the claims for the reasons I have explained.

5.14 In those exceptional circumstances, I conclude that it is appropriate to strike out the remaining claims of the claimant in this matter on the ground that those claims have not been actively pursued.

.....
A M Buchanan EMPLOYMENT JUDGE

**REASONS SIGNED BY EMPLOYMENT
JUDGE ON 22 August 2022**

.....
**REASONS SENT TO THE PARTIES ON
24 August 2022**

.....
AND ENTERED IN THE REGISTER

.....
FOR SECRETARY OF THE TRIBUNALS

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