Case Nos: 2200214/2018
2200278/2018

EMPLOYMENT TRIBUNALS

Claimant: **Ms N Leeks**

Respondent: **University College London Hospitals NHS Foundation Trust**

Heard at: **London Central (by CVP)** **On: 9 August 2022**

Before: **Employment Judge Walker**

Representation
Claimant: in person
Respondent: Mr G Price of Counsel

JUDGMENT

All the Claimant's claims are struck out.

REASONS

The Application

1 The Respondent made an application on 10 June 2022 to strike out all the Claimant's claims in these two cases on the grounds that:

(a) they had not been actively pursued and/or
(b) it is no longer possible to have a fair hearing
(c) the way in which they have been conducted has been scandalous unreasonable or vexatious

2 On 23 June 2022 Employment Judge Adkin wrote to the Claimant to notify her that the Tribunal was considering a strike out of her claims and to require her to give reasons why not by 5 July 2022.

3 The Claimant wrote to the Tribunal on 5 July 2022 opposing the application. This hearing was listed to consider the Respondent's application.

The Claimant's Application to the Tribunal for it to make adjustments

4 The Claimant applied to the Tribunal for the hearing to commence at 12 noon by way of an adjustment to accommodate her medical condition. Her initial application was refused by Employment Judge Glennie but when she repeated it, the matter was left to be considered at the beginning of this hearing. When the hearing commenced at 10:00 a.m., I considered the Claimant's application and the evidence that she had supplied that she was suffering from various medical conditions which resulted in her taking medication which she said caused her to feel drowsy until the effects wore off, which she estimated would be at about 12 noon, four hours after she had taken her last tablet at 8:00 a.m. that morning. The tablet that was in issue was co-codamol. The Respondent opposed the application on the basis that it was concerned that delaying until 12 noon would prevent the Tribunal from considering the application fully.

5 The Claimant supplied some medical reports and more recent information about her medical prescription saying her medication made her drowsy. Her prescription included some pain killers being naproxen and solpadol, but not co-codamol. However, she also supplied a copy of stickers showing that recently a pharmacy had supplied her with co-codamol. She took medication for other symptoms as well but those were not relevant as they would not cause drowsiness.

6 At 10:00 a.m. we commenced the hearing and the Claimant appeared lucid and well able to converse.

7 I checked with the parties how long each of them intended to take in terms of presenting their position on the Respondent's application in order to assess whether a delay to 12 noon would prejudice the potential to consider the matter.

8 I concluded that I could read the papers, before hearing the parties and thus allow the Claimant most of the further time she had requested, by deferring the start time to 11:30 a.m. The effects of the co-codamol would wear off over time and by 11.30 a.m., I considered the effects, if any, would be very much reduced. I had noted the Claimant did not show any adverse impact from the co-codamol while we were considering her application. As a result, the Claimant's application was granted in part and accommodation was made for her by delaying the effective start of the hearing until 11:30 a.m.

Background

9 The claims were commenced in January 2018, and both relate to events in 2017. There was a problem with preparation of the case. The detail of those problems is set out in my previous Reserved Judgement made on 2 October 2019.

10 That Reserved Judgement addressed a strike out application made by the Respondent which was heard on 24 April and 11 July 2019. I then sat in chambers in September 2019 and the judgement was signed on 2 October and sent to the parties on 22 October 2019.

11 I concluded, at that time, as set out in paragraph 63 of the Reasons that the Claimant's behaviour had been unreasonable. I explained fully why I considered that to be the case. It is not necessary to repeat those findings. I rely on the explanation set out in that judgment.

12 In the light of that finding, I gave careful consideration to striking out the claims. However, I concluded that the case law required me to consider whether a fair hearing was still possible notwithstanding the Claimant's behaviour. In 2019, I concluded that it was, and I noted the Respondent did not, at that time, contend otherwise.

Facts

13 Since the 2019 application to strike out was refused, almost three years have passed. It is five years since the events giving rise to the claims. In that time the claims are no further progressed. The only action which the Claimant says she took to pursue the claims was that she chased the Tribunal about listing the claims and she gave evidence about that. Her evidence was that she telephoned the Tribunal in what she refers to as the lockdown period. The first lockdown commenced about 23 March 2020. According to the Claimant, she regards that as ending in December 2020 for family reasons. The Claimant cannot remember when she called the Tribunal or who she spoke to, but according to her description of the time, it was during the period March to December 2020. She did not make a note of her conversation, but she recalled that she had been told that the reason her case had not been listed was that the Tribunal was extremely busy with COVID related claims. She thought that had been a matter of common knowledge and so when she telephoned again, she merely asked if the case was listed and when she was told it was not, she did not take any further action or ask the Tribunal to do anything about it. She assumed that the pressure of the COVID claims still applied.

14 The Respondent applied to the Tribunal seeking a strike out on 10 June 2022. Their letter made various points and specifically said:

> *"There has been no correspondence between the parties and/or the Tribunal since October 2019."*

And also

> *"A brief search of the claimant's surname on the Employment Tribunal Decisions website, produces evidence that the claimant has actively pursued and has participated in a number of similar employment tribunal claims in the period 2018 to 2022 when, notably, she has taken no steps in the current proceedings".*

The Respondent copied this letter to the Claimant. The Tribunal wrote to the Claimant and asked her to give reasons why the claim should not be struck out by 5 July 2022. The Claimant replied to the Tribunal on 5 July 2022 explaining why she did not consider the claims should be struck out, largely referring to the pervious judgment and arguing that the case should be listed for a full merits hearing. She did not mention her telephone calls to the Tribunal. Thereafter, this hearing was listed.

15 Before this hearing, the Claimant prepared a submission addressing again the reasons why she did not consider the claims should be struck out. It was only in that submission that she mentioned that she had telephoned the Tribunal.

16 Subsequently, as I have noted, the Claimant made an application for reasonable adjustments to be made for her for this hearing. Her primary request was that the hearing should not start before 12 noon today. The Claimant writes lengthy and coherent emails, and she sent a number of them prior to today's hearing.

17 The Respondent provided a list of other tribunal claims in which the Claimant was also a claimant, which appeared on the Employment Tribunal Judgments Database, which is publicly available. Those showed that in 2019 when the Claimant was involved with this litigation, she had had other active litigation ongoing. In 2020 and 2021 there had been further litigation between her the Claimant and other NHS trusts indicating that she continued the process of litigation on other cases throughout 2020 and 2021.

18 I have checked a few of the decisions that I was referred to on the tribunal judgement database just to confirm that the Respondent has provided correct submissions on the point. I am satisfied that they have referred me publicly available judgments.

Submissions

Respondent's Submissions

19 The Respondent made submissions today about the circumstances both by way of a skeleton argument and orally and had made the initial application in writing.

20 The Respondent submitted today that the delay had been so serious that Rule 37(d) and (e) both applied in that the claim had not been actively pursued and it was no longer possible to have a fair hearing. Specifically, the Respondent said that one member of their staff who was to be a witness had now left their employment and could not be compelled to attend the Tribunal hearing. In consequence, the absence of that one witness would be a severe disadvantage.

21 The Respondent also argued that after such delay, memories are weakened, and the remaining witnesses would have some difficulties with their evidence.

22 The Respondent referred to the case law and submitted that nothing at all had been done since the previous hearing (which was 11 July 2019). There was no evidence that the Claimant did call the Tribunal as she now suggests. The Respondent noted that the Claimant did not say in her first response to the Tribunal enquiry about striking out, that she had called as a reason why it should not strike out her claims.

23 The Respondent said the Claimant had engaged in other significant tribunal litigation in the relevant time period.

24 The Respondent referred to case law and specifically to the cases of Evans and another v Commissioner of Police of the Metropolis; Blockbuster Entertainment Limited v James [2006] EWCA Civ 684 and to Mr Emuemukoro v Croma Vigilant (Scotland) Limited and others [2021] WL.

25 The Respondent noted that in the previous ET judgment, the clear conclusion was that despite the Claimant's unreasonable behaviour, a fair hearing was still possible. The Respondent argued this would no longer the case.

26 The Respondent referred to the test set by Lord Justice Malcolm in the Evans case in which he quoted Birkett and James and said the questions for the tribunal

are firstly whether the default is intentional and contumelious. If it is not, the Tribunal must then consider whether there has been inordinate and inexcusable delay and that such delay gives rise to a substantial risk that it is not possible to have a fair trial or that it is likely to cause or has caused serious prejudice to the Respondent either as between themselves or others.

27 The Respondent suggested the delay here was both inexcusable and inordinate. On the question of a fair trial, the Respondent says that it is a wider question than simply whether it is technically possible to have a fair trial. The Tribunal should look at the finite resources of the employment tribunal, at the Article 6 rights of the Claimant and at the evidence and at the resulting degradation of the evidence due to the delay.

28 The Respondent referred to the position in the previous reserved judgement. In that case it was held a fair trial was possible, but now it was not possible after a delay of three years. That delay had had an impact as one witness was no longer employed. The Respondent argued that the Claimant was still acting unreasonably, for example in relation to the preparation of the bundle for this hearing but also questioned whether the Claimant could fully engage in a hearing given the reasonable adjustments the Claimant had sought.

<u>The Claimant's Submissions</u>

29 The Claimant submitted that the application should be refused. The Claimant said she did take action and telephoned the Tribunal about her case.

30 The Claimant said she had always wanted to pursue her case.

31 The Claimant said a fair hearing was still possible as the evidence had been preserved and there was a bundle of 1028 pages still available.

32 The Claimant said it was scandalous and wrong for the Respondent to rely on employment tribunal decisions which were under review, sub judice or not ratified by the Employment Appeal Tribunal.

33 The Claimant said that the proper course of action was for the case to be listed for a full hearing and to progress and reminded the Tribunal that she is a lay litigant in person and did not know what to expect. She referred the Tribunal to the Equal Treatment Bench Book and said she had no idea of how long to wait for a re-listing. The Claimant said the Respondent could have asked the Tribunal what was happening, and they had equal responsibility for the delay.

34 On the question of the bundle for this hearing, the Claimant suggested that the Respondent had acted unreasonably. She had discovered a sender could manipulate the Royal Mail's delivery system and that putting the bundle on the Respondent's website was unreasonable. They should have sent it to her, as she requested, in parts which were reduced in size and thus capable of going through her e-mail system.

35 The Claimant felt the Respondent was subjecting to her to the equivalent of a suspended criminal sentence. There is no suggestion that the Claimant has been put under any criminal sentence, but she felt that was descriptive of her sense that she had done nothing wrong but was still being penalised by the Respondent.

36 If the case was struck out the Claimant said she would be denied justice and the Tribunal had a duty to list the case.

The Law

37 Rule 37 of the Employment Tribunal's (Constitution & Rules of Procedure) Regulations 2013 addresses striking out and provides as follows:

> ***Striking out***
>
> ***37.***—*(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.*

38 This rule has been interpreted in case law and the Tribunal has guidance on what to consider. The principles identified in case law which are most relevant to the grounds primarily focussed upon by the Respondent (which are (d) and (e)) are set out below.

> *Birkett v James [1978] AC 297 at 318, per Lord Diplock. It must be shown '(a) that there has been inordinate and inexcusable delay on the part of the [claimant] or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiffs or between each other or between them and a third party'*

39 In summary, therefore, if the delay is excusable, there can be no striking out; but if it is inordinate and inexcusable, a striking out order can only be made where it is also shown that a fair trial would be impossible or that there is or would be serious prejudice to the respondents. The question of prejudice is important.

40 Hoffmann LJ pointed out in *Evans' Executors v Metropolitan Police Authority [1992] IRLR 570*, *[1993] ICR 151, CA* (at 159):

"I accept that in the ordinary case the nature of the prejudice will usually be obvious. It may be, as has been said in the cases, that it is necessary to investigate the facts before memories have faded, not to allow hurt feelings to fester and to provide as summary a remedy as possible."

41 Choudhury P in *Emuemukoro v Croma Vigilant (Scotland) Limited* gave examples of situations covered by rule 37(1)(e) including where a fair hearing is no longer possible because of undue delay or failure to prosecute a claim. That question is not limited to a fair trial ever being impossible. At [18] the judgment states:

"There is nothing in any of the authorities providing support for [the employer's] proposition that the question of whether a fair trial is possible is to be determined in absolute terms; that is to say by considering whether a fair trial is possible at all and not just by considering, where an application is made at the outset of a trial, whether a fair trial is possible within the allocated trial window. Where an application to strike-out is considered on the first day of trial, it is clearly a highly relevant consideration as to whether a fair trial is possible within that trial window. In my judgment, where a party's unreasonable conduct has resulted in a fair trial not being possible within that window, the power to strike-out is triggered. Whether or not the power ought to be exercised would depend on whether or not it is proportionate to do so.'

Conclusion

42 Having carefully considered all the submissions in the case law I was referred to, I first noted that the Respondent seeks to strike out all of the Claimant's claims against the Respondent and that to do so is a draconian remedy. A strike out should never be undertaken without careful consideration.

43 The Respondent's letter of 10 June relied on three grounds as a basis for their application to strike out, but before me today the Respondent's counsel emphasised, in their oral submissions, two grounds and those are the grounds I have primarily addressed.

44 I considered was whether the case was not actively pursued which was the first argument raised by the Respondent. I noted that in relation to that, the Claimant had said she had in fact pursued it by contacting the Tribunal and had tried to find out the position. I considered the description of the events that the Claimant had given in her evidence. She said she had contacted the Tribunal by telephone in 2020 and possibly 2021. She could only describe one phone call in any detail. The Claimant said she was told the Tribunal had a very large caseload and there were problems with Covid. She did not think she needed to send an e-mail follow up. She said she called again and only asked if her case was listed but when told it was not, she did not ask or pursue anything or make any requests for the case to be listed. She assumed Covid was still a problem. She also says that she was thinking she would write to the Tribunal before she got the Respondent's application to strike out in June 2022, so she did not get around to doing it. I find that entire description of events unconvincing.

45 The Claimant has written extensively to the Respondent and the Tribunal on many subjects, and it is not consistent with her pattern of behaviour to make a phone call and do nothing thereafter. The Claimant has always emailed in the past and I find the evidence that she did not think it necessary to do so and rather preferred to rely on a phone call to be out of character. In reaching that conclusion I took note of the fact that the e-mail which the Claimant sent on 5 July 2022 (which gave the reasons why the Tribunal should not strike out her claim) made no mention of any phone calls. Overall, I am not inclined to believe her evidence on that point.

45 However, even if the Claimant did telephone the Tribunal, it still means she did not actively pursue this case for a minimum of 5 months between late October 2019 when she got the Reserved Judgement and at the earliest late March 2020. If she was told that there were a lot of covid cases, it was more likely considerably later in the year. Then after one call, the Claimant cannot really recall making further calls but says that she did but only asked if the case was listed but did not ask the Tribunal to do anything.

46 I do not recall regard that description of her calls (assuming that it is correct) as sufficient to amount to pursuing her case. It is my conclusion that the Claimant delayed and did not pursue her case.

47 The case law says that if I conclude that there has been delay, I have to consider whether it has been inordinate and inexcusable. It is my view that taking no action or even the limited action which the Claimant describes between October 2019 and June 2022 is not only a delay, but it is inordinate and inexcusable. The Claimant did not suggest that she attempted to communicate with the Respondent at all throughout that time. She made, she says, one substantive phone call to the Tribunal, but took no effective follow up and did not put any pressure on the Tribunal to give her a listing for her case or write to the Respondent to say that she had made any effort to get the case listed. The onus is on the Claimant to pursue her case.

48 Having reached the conclusion that there has been both inordinate and inexcusable delay, I then have to consider whether that gives rise to a substantial risk that it is not possible to have a fair trial. That is the second ground on which the Respondent relies, but it is also a component of the assessment of whether the failure to pursue the claim has reached the point where striking out is appropriate. In my view, on that question, it is no longer possible to have a fair trial.

49 The Respondent has lost access to one key witness. That means there is now no prospect of a fair hearing. I made it clear in the Reserved Judgement in October 2019, that the only reason the claim was not struck out then was because it was possible to have a fair hearing. That position has been prejudiced. It is no longer possible for there to be a fair hearing.

50 I note in the ***Emuemukoro*** case that it was the held that the question was not whether a fair trial was ever possible, but in that case whether a fair trial was possible in the course of the time allotted. Because it was not, the claim was struck out.

51 My conclusion here is that it is now too late for there ever to be a fair hearing. Rule 37 provides this Tribunal may strike out a case where it is no longer possible

to have a fair hearing in respect of the claim or response or part of it. My conclusion is that a fair hearing is not possible due to the absence of one key witness for the Respondent and the length of delay which will impact on the other witnesses' recollections. A strike out is proportionate and appropriate as it would cause unacceptable prejudice to the Respondent if the case were to proceed.

52 I bear in mind the fact that the Claimant would be prejudiced by not having the opportunity of pursuing her claim, but I consider overall that it is clear she has made little or no effort to pursue the matter for a very long time.

53 The Claimant argues that the Respondent was equally at fault in failing to pursue the listing, but there is no obligation on them to do so. It is the Claimant's case. It is inherent in the ground for striking out that if the Claimant does not actively pursue her case she may be struck out. There is no obligation on the Respondent to take on that mantle and pursue the case for her in relation to the claim.

54 The third ground which the Respondent raised in the application and in their skeleton argument was the provision in rule 37 that the way in which the proceedings have been conducted has been scandalous unreasonable or vexatious. The Respondent says the Claimant's conduct of the proceedings has been unreasonable. I do not intend to consider that in any detail in the light of my other determinations, save to say that was my conclusion in 2019.

55 For the sake of completeness I should explain that I have considered all the points which the Claimant has raised.

56 The Claimant says that she had always wanted to pursue her case. It would be unusual for a Claimant to say they did not want to do so but there is no evidence that she took steps to pursue it.

57 The Claimant says to fair hearing is still possible as the bundle has been preserved, but that is not enough. The loss of witness evidence can be critical and the fact that some documents are still available is not sufficient.

58 The Claimant said it was wrong and scandalous for the Tribunal to be referred to employment tribunal decisions which are in different tribunals, but those are publicly available decisions which are published on a register available for the for searching and there is nothing wrong at all in the Respondent drawing attention to them, solely for the purpose of pointing out that the Claimant was able at the time to take steps and thus able to pursue this case despite any medical problems she may have had.

59 The Claimant argues that the proper action is for the case to be listed for a full hearing, but for the reasons I have given that is not appropriate.

60 The Claimant reminds the Tribunal that she has various medical issues and that she is a lay litigant, and she has referred to the Equal Treatment Bench Book and the difficulties which lay litigants often face. However, there is a point when she would have been expected to pursue the matter for herself to find out what had happened to her listing and to correspond with the Respondent. There is no evidence that she took any reasonable steps to do so. The fact that the Claimant is able to find the Equal Treatment Bench Book and supply extracts from it is one

of several matters which demonstrate that her medical conditions do not prevent her from corresponding with the tribunal and the Respondent at some length. The other tribunal cases in which she has been engaged show she was capable of addressing claims through this period of over two and a half years. She is adept at legal research for a lay individual. She is often tenacious in her argument. If she was concerned at the length of time it was taking, it was wholly within her power to write to the Tribunal demanding that something should be done.

61 As regards the bundle, and the Claimant's suggestion the Respondent had been unreasonable by reference to the Royal Mail's delivery system, there is absolutely no evidence that the Respondent had manipulated that system. At first, they put the bundle on a specialist system which can be downloaded. Then they sent it to her. The Claimant refers to the Royal Mail's own tracking description of their actions. Those descriptions do not indicate the Respondent had manipulated the Royal Mail system as the Claimant suggests. Putting the bundle on a specialist download system is not unreasonable, but rather a standard practice which many solicitors now adopt which is usually more effective than sending a document in parts or in hard copy.

62 The other comments which the Claimant has made are entirely understandable, but no basis for changing the outcome. In all the circumstances, the Claimants claims should be struck out in their entirety.

Employment Judge Walker

27 August 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

30/08/2022

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FOR THE TRIBUNAL OFFICE