# EMPLOYMENT TRIBUNALS

**Claimant: Miss M Shannon**

**Respondent: South Tees Hospital NHS Foundation Trust**

**Heard at: Newcastle (CVP)** **On: 3 October 2022**

**Before: Employment Judge A.M.S. Green**

**Representation**
Claimant: In person
Respondent: Ms A Smith – Counsel

# RESERVED JUDGMENT

The claimant's claims are struck out under rules 37(1)(b), (c) & (d).

# REASONS

Introduction

1. The purpose of this hearing is to consider the respondent's application for striking out the claims on the basis that:

    a. The manner in which the proceedings have been conducted by or on behalf of the claimant has been scandalous, unreasonable or vexatious (Rule 37 (1) (b).

    b. The claimant has not complied with the orders of the Tribunal (Rule 37 (1) (c).

    c. The claim has not been actively pursued (Rule 37 (1) (d).

The claim and response

2. The claimant is employed by the respondent, an NHS Foundation Trust, as a staff nurse on accident and emergency. She started her employment on 12

April 2018. She suffered an injury to her foot whilst she was at home which resulted in her taking three-month sickness absence from work. On 29 November 2021, she presented a claim to the Tribunal following a period of early conciliation that started on 13 November 2021 and ended on 15 November 2021. She indicated on the claim form that she was claiming disability discrimination, holiday pay and "other payments." In her claim form, she states the following:

> *The issue I am having is of bullying by management, I was being forced to come to work when I had injured my foot I had a [sic] operation and damage nerves in my foot that has resulted me having an operation and being off a year, I've been bullied and harassed from senior management and my injury lawyers have got paperwork that has resulted in them accepting liability, I have been underpaid and not paid for over a year as a result of my injury, they are refusing to pay me my money that I am, the management have been harassing me to the point I've felt suicidal and on edge, the effects this has had on me has resulted in me having panic attacks, sorry, anxiety I am a young mum with 2 children and even couldn't even change my clothes or even shower by my self, I've lost out on money to pay my mortgage I've had to borrow money of bank family and friends to help me get by, I'm willing to explain more to you when I can see you I've got injuries that will affect my career*

In section 15 of her claim form, the claimant provides additional information:

> *I've been treated badly and been left with a Permanent injuries that has been dramatic and the psychological effects that has left me with, the bullying and harassment from the manager named leaane Sankey and Stephen McKenna I want to speak to the judge and to tell everything*

3. The respondent denied liability. It said, amongst other things, that it was unable to plead a defence in any detail as the claim lacked specification.

History of the proceedings

4. On 5 January 2022, the claimant emailed the Tribunal and the respondent's solicitor to confirm that she had been asked to clarify some key points. She confirmed the identity of her employer and that she had sent her paperwork to the Royal College of Nursing and she referred to a separate personal injury claim.

5. On 10 January 2022, the Tribunal confirmed that the name of the Respondent should be changed to South Tees Hospitals NHS Foundation Trust.

6. On 9 February 2022, there was a private preliminary hearing before Employment Judge Morris. The claimant was not represented and appeared in person. At that hearing, Judge Morris ordered the claimant to write to the Tribunal and the respondent by 2 March 2022 to state whether she had obtained representations in the proceedings by or through the Royal College

of Nursing or any other representative. Thereafter, a further preliminary hearing would be listed. Judge Morris noted, amongst other things:

> *16. In discussion with the claimant, however, it rapidly became apparent that she did not have a sufficient appreciation of the issues that she would have to address and the Tribunal would have to consider in relation to any of her claims, not least of disability discrimination. In accordance with the overriding objective I would have sought to assist the claimant and ensure that "the parties are on an equal footing" but I was concerned that given her apparent lack of knowledge and understanding of fairly complex issues she might commit herself to something that she might later regret.*
>
> *17. An example of the claim is lacking precision was that the claimant had ticked the box in section 10 of her claim form to indicate that she wanted "a copy of this form, or information from it, to be forwarded on your behalf to a relevant regulator". That section of the form is only relevant if a claim consists of or includes a claim that a claimant is making a protected disclosure (a 'whistleblowing') claim and it is therefore to be inferred that the claimant was seeking to present such a claim. In its response (ET3), the respondent had drawn such an inference but stated that it was unable to respond to such a complaint as the claimant had failed to set out the basis of her claim. When I pursued this point with the claimant she answered that she had whistleblown on one employee (SM) to another employee (SG). I remarked that such an allegation was not referred to in the claimant's claim form and if, therefore, she wished to pursue such a complaint she would need to apply to the Tribunal for permission to amend her claim to add such a complaint, to which the respondent might object.*
>
> *…*
>
> *19. In the circumstances, it was obviously sensible to allow a short period of time within which the claimant could clarify whether she could obtain representation by or through the RCN. Such representation would enable her to obtain advice regarding her claims and the issues arising, and it necessary advice in relation to amending her claim to add a public interest disclosure claim. Such representation would also be of benefit to the respondent, which would then know the case that had to answer, and ultimately the Tribunal. I proposed the possibility of a short delay to the claimant who said that she was very grateful and wished to take that opportunity; indeed, she would contact the RCN today. For his part, Mr Stepanous agreed that if the RCN were to become involved it could represent a saving in costs and management time of his client and the Tribunal. He also made the point that if the claimant was pursuing a personal injury claim that would usually involve a consideration of medical evidence and that could also save time in the Tribunal proceedings if the Court were to determine that she has a disability or that issue is dealt with in the medical evidence. At this point the claimant interjected that she had letters from Occupational Health dated 20 August 2020 and 31 August 2021 that confirmed that she would come under the disability provisions of the Equality Act 2010. While noting each of these latter points that had been raised by Mr Stepanous and the claimant respectively, and accepting that such evidence that they had each referred to could be important in determining the issue of whether the claimant is a disabled person as that*

*term is defined in section 6 of the Equality Act, I made it clear that in these* proceedings the determination of that issue was a matter for the Tribunal.

7. Paragraphs 3 & 4 record that the orders were made by consent and explained to the parties at the hearing. It stipulated that the orders must be complied with and warned that if they were not complied with the Tribunal could take the following steps:

    a. Waive or vary the requirement.

    b. Strike out the claim.

    c. Bar or restrict participation in the proceedings.

    d. Award costs in accordance with the rules.

8. On 17 February 2022, a preliminary hearing for case management was listed for 21 March 2022.

9. On 28 February 2022, the claimant applied to the Tribunal for a 14 day extension.

10. On 4 March 2022, the Tribunal extended the time limit for the claimant to respond to the order until 11 March 2022.

11. On 7 March 2022, the claimant notified the Tribunal that she had instructed Mr Max Horninglow, a solicitor, to represent her.

12. The parties prepared a joint agenda for the preliminary hearing listed for 21 March 2022.

13. On 21 March 2022, Employment Judge Pitt conducted a preliminary hearing. At that hearing, Mr Horninglow represented the claimant. A four-day Final Hearing was listed for 21-24 November 2022. Several case management orders were made including a requirement on the part of the claimant to provide the respondent and the Tribunal with further and better particulars of her claim by 11 April 2022. At that juncture, the claimant's disability was in issue and she was required to provide a disability impact statement and supporting medical records by 25 April 2022.

14. Mr Horninglow came off the record.

15. On 21 April 2022, the claimant emailed the respondent's solicitor and stated, amongst other things:

    *hi markus, sorry it's to me so long to get back yo anyone I have had issues at home a leak in my house I have had to get pipe work, ceilings and bathroom replaced. I am going to forward you some documents.*

    The claimant provided a timeline of events running to several pages which did not explain any of the further information required and ordered by Judge Pitt.

16. On 21 April 2022, the claimant emailed the respondent's solicitor attaching a document which was a markup of the respondent's proposed list of issues. Despite its length, the claimant had not provided sufficient detail about what her claims were. She also attempted to bring in a whistleblowing claim despite the fact that it would require leave to amend.

17. The claimant sent another email to the respondent's solicitor on 21 April 2022 in which she stated:

> *Hi markus, I am happy to send you over my witness statements now and my medical evidence over to yourself. aswell as all my other documentation if you require that I can send all that now over if you require it.*

At this point, the claimant was indicating to the respondent's solicitor that she had everything she needed to progress the claim.

18. The respondent's solicitor replied to the claimant on the same day in an email setting out the relevant case management orders made by Judge Pitt. they then indicated that they had not received the further and better particulars of claim and the schedule of loss ordered by Judge Pitt. they went on to say:

> *We note that you have amended the list of issues which indicates that you intend to pursue a claim of whistleblowing. Please note that at the first preliminary hearing on 9 February 2022, Judge Morris informed you that your claim form did not set out a claim of whistleblowing and if you wished to pursue such a complaint, you would need to apply to the Tribunal for permission to amend your claim to add such a complaint, to which the Respondent might object. This is referred to at paragraph 17 of Judge Morris' Order dated 9 February 2022, a copy of which is attached.*
>
> *By 25th April 2022, you are required to provide medical evidence and an impact statement setting out how your condition amounts to a disability. This is referred to at paragraphs 14 and 15 of Judge Pitt's Order.*
>
> *This claim was submitted on 29 November 2021 and despite 2 preliminary hearings (one of which you were represented at), we have made and will continue to make little progress until you have clarified what claims you are bringing. At present, the Respondent still does not understand the case that it has to meet.*
>
> *We are prepared to allow you additional time to complete the documents and/or take legal advice in this matter.*
>
> *Therefore, please can you provide the following documents by Friday 29th April 2022:*
>
> *1. Further and better particulars of claim;*
> *2. Schedule of loss;*
> *3. Medical evidence; and*
> *4. An impact statement setting out how your condition amounts to a disability.*

*Should we not receive the above documents, we will be left with no alternative to write to the Tribunal in respect of your non-compliance.*

*Should you have any difficulties completing the documents, please may we suggest that you take legal advice which can be obtained from the Citizen's Advice Bureau or by contacting the Law Society.*

The language used by the respondent's solicitor was clear and intelligible and helpful in that they were willing to extend time to enable the claimant to provide the information and documents requested therein. They were also helpful in suggesting and recognising that the claimant might face difficulties in completing the documents and suggested that she could take legal advice which she could obtain from the Citizen's Advice Bureau or by contacting the Law Society. There is no suggestion here that the respondent's solicitor was taking advantage over the claimant given her lack of legal representation or that its tone was hectoring; quite the contrary.

19. The claimant responded to the respondent's solicitor in an email dated 26 April 2022 in which she clarified that she was not making a claim for loss of earnings and that she was claiming for injury to feelings. She also stated that she would like to have until 29 April 2022 to provide the information requested and she said, "I will send over all the information to yourself".

20. On 29 April 2022 the claimant sent an email to the respondent's solicitor without any attachments. She responded later the same day saying that she apologised for the delay because she was attending internal meetings and had to do paperwork for those meetings as well as the case. She then went on to say, "I am just going to send my statement and particulars over." This suggested imminence.

21. Later on 29 April 2022, the claimant sent the respondent her basic medical evidence. She admitted that she did not have the paperwork relevant to her bullying and harassment claims. She confirmed that she was not making a claim for loss of earnings and that she was not pursuing a whistleblowing claim. She was claiming for bullying and harassment, disability discrimination and victimisation. She said that she had amended her particulars to the best of her abilities.

22. The claimant then sent the amended list of issues later on 29 April 2022. These had already been considered by the respondent. Her email also contained a list of alleged impairments for the purposes of her claim to be disabled under the Equality Act 2010.

23. The respondent's solicitor wrote to the Tribunal on 3 May 2022 setting out a summary of the case management orders that Judge Pitt had made and narrating the correspondence passing between the parties thereafter and delays that have been occasioned as a result of the claimant's non-compliance with the orders. Consequently, the respondent felt it incumbent to apply for a variation of the case management order requiring it to lodge its response to the further and better particulars of claim by 3 May 2022 and requested an extension until 16 May 2022.

24. On 4 May 2022, the Tribunal allowed the application to vary the timetable and extended the deadline for the respondent to file its amended grounds of resistance until 16 May 2022.

25. On 5 May 2022 the respondent's solicitor wrote to the claimant seeking clarification on her list of alleged impairments for the purposes of her claim to be disabled. The claimant was requested to provide that information as soon as possible.

26. On 16 May 2022, the respondent's solicitor wrote to the Tribunal filing its amended grounds of resistance. It also requested that a further preliminary hearing be listed given that little progress had been made and the matter. The respondent said that it still did not understand the case that it was required to answer.

27. On 27 May 2022, the respondent's solicitor wrote to the claimant asking whether she had obtained representation. They also drew to her attention the deadline for exchanging list of documents which was 30 May 2022. They thought that this could not be met given that the respondent still did not understand the case that it was required to answer and there were no indication of the issues. They referred to the application for a further preliminary hearing and suggested that, in the meantime, the parties should agree to postpone exchanging documents until the preliminary hearing had taken place. Once again, they suggested that the claimant should take independent legal advice from the Citizen's Advice Bureau or the Law Society.

28. A preliminary hearing was listed for 13 July 2022.

29. On 31 May 2022, the respondent's solicitor chased the claimant for a response to their email of 27 May 2022. They attached a request for further and better particulars for the purposes of identifying which acts/incidents the claimant relied upon to pursue her claims. This is known as Scott Schedule and it is commonly used in litigation to provide structure and focus when identifying and elaborating on claims being made. They asked the claimant to provide this information to them within 28 days (i.e. by 28 June 2022). They said that if the claimant did not provide the information within the timescale, she was warned that the respondent's solicitors would apply to the Tribunal for an order to do so. Once again, they suggested that she take independent legal advice from the Citizen's Advice Bureau or the Law Society. Reading this, it is clear what the claimant was required to do.

30. On 27 June 2022, the claimant emailed the respondent's solicitor in response to his request for more paperwork. She said the following:

> *Hi markus, max has said you want me to do more paperwork what is it as I am on holiday until 5th July I aren't spending my holiday stressing over paperwork*

31. On 13 July 2022, Employment Judge Aspden conducted a private preliminary hearing. The claimant was neither present nor represented. The respondent was represented by their solicitor, Mr Stepanous. Judge Aspden records that the hearing proceeded in the claimant's absence and recorded "the claim

cannot progress without the claimant's active engagement in the proceedings." Judge Aspden noted the following, amongst other things:

> *12. However, I do still have some concerns about whether the claimant is willing to actively engage with these proceedings, given the claimant's response to the respondent's request for clarification of her claims. Therefore, I do still require her to confirm she is pursuing her claims. The parties and their representatives are under a duty to assist the Tribunal to further the overriding objective, which is to deal with cases fairly and justly. That includes dealing with a case in ways which are proportionate to the complexity or importance of the issues, avoiding delay, saving expense and seeking flexibility in the proceedings. That means the parties have to cooperate with each other and comply with Orders. They must bear in mind that the Tribunal's resources are limited. It is not only this case which Employment Judges have to manage and Tribunal staff have to deal with and the overriding objective of ensuring just handling of cases is not confined to the case in which the parties are involved.*
>
> *13. In addition, the claims still need to be clarified. Until they are, the respondent cannot respond to the case. There is some urgency to this as the final hearing is scheduled for November.*
>
> *14. It is important that we know what the claimant is saying the respondent did that contravened the law. That is because there are limits on the kind of dispute or disagreement that a Tribunal is allowed to consider. This is sometimes called the Tribunal's 'jurisdiction'. The Tribunal's function is to consider complaints from individuals that their employer has breached certain employment rights laid down by law (including those in the Equality Act). The Tribunal does not, however, have general oversight of employment relationships. Its role is not to investigate grievances or rule on every dispute that might arise in the workplace or whether an employer has acted fairly and reasonably.*
>
> *15.So that we can identify what, if any, claims the claimant is making that the Tribunal is allowed to consider I have directed the claimant to answer a number of questions about her claims. Once the claimant has responded to these Orders an Employment Judge will consider the file and decide how best to proceed.*
>
> *16.I have set out in an appendix some brief details about the Equality Act 2010 that may help the claimant better understand the relevant legal framework.*

32. Judge Aspden made the following orders:

    a. Within 7 days of the date the orders were sent to the parties, the claimant was required to write to the Tribunal and the respondent stating whether or not she was still pursuing the claims in the Tribunal.

    b. If the claimant was still pursuing the claims, she was to do the following things within seven days of the date of the orders being sent to the parties:

i. Comply with paragraph 11 of the case management orders made by Judge Pitt at the preliminary hearing on 21 March 2022. That was the order to send her schedule of loss to the Tribunal and the respondent. She was ordered to explain why she had not complied with that order.

ii. She was required to write to the Tribunal and the respondent answering the questions and providing further information about her claim set out below in the case management orders.

c. On receipt of the information, a judge would consider the file and decide what steps to take. This could include a consideration of any of the claims having no reasonable or little reasonable prospect of success and a further preliminary hearing may be arranged to consider whether the claims could be struck out or of a deposit order should be made.

d. In paragraph 5 of her case management orders, Judge Aspden set out a series of questions relating to each of the claims that the claimant was required to answer. They are very clear and intelligible for a lay person such as the claimant to follow.

33. On 26 July 2022, the respondent's solicitor wrote to the Tribunal applying for the claims to be struck out on the following grounds:

a. The manner in which the proceedings have been conducted by or on behalf of the claimant has been scandalous, unreasonable or vexatious (Rule 37 (1) (b).

b. The claimant has not complied with the orders of the Tribunal (Rule 37 (1) (c).

c. The claim has not been actively pursued (Rule 37 (1) (d).

34. On 8 August 2022 the respondent wrote to the Tribunal indicating that the parties were not ready for the final hearing because of the claimant's non-compliance with case management orders.

35. On 12 August 2022, the claimant emailed the respondent's solicitor stating the following:

*I have my particulars ready I have my evidence and sent all my evidence to the judge. I am sorry its took me some time but I have been dealing with alot. I am suffering with my mental health at the hands of the hospital I am seeing a counsellor for ptsd, I have suffered a break down. I have had to cut my hours due to further injury of my foot causing me not to be able to afford a solicitor I can for evidence to prove this, but I am ready to proceed once again I do apologise.*

This was the fifth time that the claimant had indicated to the respondent that she had all the necessary documents and information required but she had still not sent them over to them.

36. On 23 September 2022. the claimant emailed the respondent's solicitor to state that she was awaiting surgery and was on an emergency list for the next four weeks and could be called any time her surgery. She indicated that she had further documents to send to him and the Tribunal. If her surgery were on the day or day before of the hearing, it would need to be rescheduled.

37. On 28 September 2022, the respondent's solicitor emailed the claimant indicating that they needed to send the hearing bundle to the Tribunal on the same day and requested her to send any document she wished to rely upon at the hearing by 2PM so that they could be added to the bundle.

38. On 28 September 2022, the claimant emailed the respondent' solicitor to state that she would not have time to send all of her paperwork over because she was in hospital getting a preassessment done for her surgery.

39. On 30 September 2022, the claimant provided a marked up version of the Scott Schedule. She provided information in respect of the following claims:

    a. Direct disability discrimination.
    b. Failure to make reasonable adjustments.
    c. Harassment.
    d. Victimisation

The claimant did not provide any information regarding her claims for discrimination arising from disability or indirect disability discrimination.

Applicable law

40. Rule 53 (1) (c) of the Rules of Procedure confirms that a Tribunal has the power to consider the issue of strike at out a preliminary hearing. Rule 37 sets out the grounds on which a Tribunal can strike out a claim or response (or part).

41. A claim or response (or part) can be struck out on the following grounds:

    a. That it is scandalous or vexatious or has no reasonable prospect of success — rule 37(1)(a).

    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 — rule 37(1)(b).

    c. For non-compliance with any of the tribunal rules or with an order of the tribunal — rule 37(1)(c).

    d. That it has not been actively pursued — rule 37(1)(d).

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) — rule 37(1)(e).

The respondent relies on Rules 37(1)(b), (c) and (d).

42. It is not suggested by the respondent that the claimant is behaving in a scandalous or vexatious manner. However, what is suggested is that she has behaved in an unreasonable manner in conducting the claims. For the Tribunal to strike out claims for unreasonable conduct under rule 37 (1) (b) it must be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible in either case, the striking out must be a proportionate response (**Blockbuster Entertainment Ltd v James 2006 IRLR 630, CA**).

43. In considering whether a claim should be struck out on the grounds of scandalous, unreasonable, or vexatious conduct, a Tribunal must consider whether a fair trial as possible. In **De Keyser Ltd v Wilson IRLR 324, EAT** I am reminded that the EAT made it clear that certain conduct, such as the deliberate flouting of a Tribunal order, can lead directly to the question of striking out order. However, in ordinary circumstances, neither a claim nor defence can be struck out on the basis of a party's conduct unless the conclusion is reached that a fair trial is no longer possible. In **Bolch v Chipman 2004 IRLR 140, EAT**, the EAT set out the steps that a Tribunal must ordinarily take when determining whether to make a strike out order as follows:

a. Before making a strike out order under rule 37 (b) the Employment Judge must find that a party or their representative has behaved scandalously, unreasonably, or vexatiously when conducting the proceedings.

b. One such a finding has been made, they must consider in accordance with **De Keyser** whether a fair trial is still possible, as, save in exceptional circumstances, a strike out order is not regarded simply as a punishment. If a fair trial is still possible, the case should be permitted to proceed.

c. Even if a fair trial is unachievable, the Tribunal will need to consider the appropriate remedy in the circumstances. It may be appropriate to impose a lesser penalty, for example, by making a costs or preparation order against the party concerned rather than striking out their claim or response.

44. In **Emuemukoro v Croma Vigilant (Scotland) Ltd and Ors 2022 ICR 327**, the EAT rejected the proposition that the question of whether a fair trial is possible must be determined in absolute terms; that is to say, by considering whether a fair trial is possible at all, 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. CV Ltd had failed to comply with any of the tribunal's case management orders that had been made in preparation for the hearing. E had made an application for the response to be struck out for that reason, but it had not been practicable to deal with that application in advance of the hearing. The strike-out application was renewed on the first morning of what was scheduled to be a five-day hearing. The strike-out order was granted by the tribunal, which found that it was no longer possible for a fair trial to proceed. It was not feasible to remedy the deficiencies in the time available, and an adjournment, which would have been for many months due to the tribunal's backlog of cases, would have caused E prejudice owing to the two-year delay since dismissal and the fact that E's considerable losses continued to grow substantially from week to week. CV Ltd appealed against the strike-out decision to the EAT, which rejected the appeal. It held that there was nothing in any of the authorities to indicate that the question of whether a fair trial is possible must be determined in absolute terms. The EAT considered that, where a party's unreasonable conduct has resulted in a fair trial not being possible within that the allocated window, the power to strike-out is triggered. Whether the power ought to be exercised depends on whether it is proportionate to do so. The EAT found no error in the tribunal's approach to proportionality. Striking out was considered to be the least drastic course to take in this case. It was a highly relevant factor that the strike-out application was being considered on the first day of the hearing. The parties were agreed that a fair trial was not possible in that hearing window. There was no other option other than an adjournment, which would have resulted in unacceptable prejudice to E (a conclusion that was not challenged by CV Ltd). The EAT therefore concluded that the tribunal had not erred in striking out the response.

45. In deciding whether to strike out a party's case for non-compliance with an order under rule 37 (1) (c), the Tribunal must have regard to the overriding objective set out in rule 2 of seeking to deal with cases fairly and justly. This requires the Tribunal to consider all relevant factors, including:

    a. The magnitude of the non-compliance.

    b. Whether the default was the responsibility of the party or their representative.

    c. What disruption, unfairness or prejudice has been caused.

    d. Whether a fair hearing would still be possible.

    e. Whether striking out or some lesser remedy would be an appropriate response to the disobedience (**Weir Valves and Controls (UK) Ltd v Armitage 2004 ICR 371, EAT**).

46. The question of proportionality is determined according to the same principles as adumbrated in **Blockbuster Entertainment**.

47. A Strike out order is neither automatic nor punitive. It is not simply a question of determining whether there has been a failure to comply with an order but the magnitude of non-compliance.

48. Striking out a claim under rule 37 (1) (d) follows the principles set out in the case of **Birkett v James 1978 AC 297, HL** as applied by the Court of Appeal in **Evans and anor v Commissioner of Police of the Metropolis 1993 ICR 151, CA**. Accordingly, the Tribunal can strike out a claim where:

    a. there has been delay that is intentional or contumelious (disrespectful or abusive to the court); or

    b. there has been inordinate or 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.

49. The first category is likely to include cases where the claimant has failed to adhere to an order of the Tribunal. Consequently, it overlaps substantially with the Tribunal's powers under rule 37 (1) (c). The second category requires not only that there has been a delay of an inordinate or inexcusable kind, but that the respondent can show that it will suffer some prejudice as a result. In **Evans** the EAT held that although striking out a claim on the basis of a claimant's failure actively to pursue is a Draconian measure, it is one that can be ordered where the claimant's default is intentional and shows disrespect for the Tribunal and/or its procedures. Overall, the EAT felt that the claimant had shown considerable disrespect to the Tribunal and its procedures, and to the respondent's interests.

50. In **Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL**, discrimination cases are generally fact sensitive, and any issues should usually only be decided after all the evidence has been heard. However, in that case, Lord Hope observed:

    *The time and resources of the employment tribunals ought not to be taken up by having to hear evidence in cases that are bound to fail*

51. In **Chandhok v Tirkey [2015] ICR 527** Langstaff P cited **Anyanwu** and went on to say at paragraph 20:

    *This stops short of a blanket ban on strike-out applications succeeding in discrimination claims. There may still be occasions when a claim can properly be struck out—where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ in Madarassy v Nomura International plc [2007] ICR 867 , para 56):*

*"only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

*Or claims may have been brought so repetitively concerning the same essential circumstances that a further claim (or response) is an abuse. There may well be other examples, too: but the general approach remains that the exercise of a discretion to strike out a claim should be sparing and cautious.*

52. The Tribunal must take a view on the merits of the case and only where it is satisfied that the claim or response has no reasonable prospect of succeeding can it exercise its power to strike out.

53. In **Ahir v British Airways plc 2017 EWCA Civ 1392, CA**, the Court of Appeal asserted that tribunals should not be deterred from striking out even discrimination claims that involve disputes of fact if they are entirely satisfied that there is no reasonable prospect of the facts necessary to find liability being established, provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been explored. The Court accepted that the test for strike-out on this ground with its reference in rule 37(1)(a) to 'no reasonable prospect of success' was lower than the test in previous versions of the strike out rule, which referred to the claim being frivolous or vexatious or having 'no prospect of success'. In this case, the Court upheld an employment judge's decision to strike out the victimisation and discrimination complaints of an employee who had been dismissed for falsifying his CV. His claims were based on allegations that six managers who had each separately considered the admitted misconduct of the employee during the disciplinary process had allowed their decisions to be tainted by the protected acts of the employee even though there was no evidence to suggest that they were aware of those protected acts. The Court concluded that the employment judge had rightly described the allegations as 'fanciful' and struck out the claims as having no reasonable prospect of success.

Discussion and conclusions

54. In support of its written application, the respondent submitted the following:

    a. It was unclear from the claim form whether what the respondent did was an act of discrimination nor was it clear what the claimant says she is owed in respect of holiday pay or why she was entitled to any other payments.

    b. The respondent narrated the history of the case management hearings and subsequent events in the litigation.

55. In her oral submissions Ms Smith narrated the procedural history. She indicated that the claimant had repeatedly promised to send information and documents requested, indeed, which the Tribunal had ordered, to the respondent but had failed to do so. She acknowledged that the claimant had

been suffering from mental health problems, but she had plenty of time to progress matters since initiating proceedings in November 2021. Ms Smith submitted that the claimant had repeatedly refused to comply with case management orders. She submitted that this was not simply a failure but evidence of acting deliberately and consciously refusing to comply with what was required. The case management orders, and guidance provided by three Employment Judges was very clear. Furthermore, the respondent's solicitor had acted in a considerate way and in accordance with the requirements of the overriding objective and the Equal Treatment Bench Book in helping the claimant to try to comply with the applicable case management orders. Either the claimant was telling the truth when she was saying to the respondent's solicitor that she had the documents and information but deciding not to provide them or she was being dishonest in that she did not have them. There was no other reasonable explanation. The claimant also knew what the consequences of non-compliance with the applicable case management orders would be.

56. Ms Smith submitted that the evidence showed that the claimant's inaction had cause delay that was both intentional and disrespectful to the Tribunal. The consequence was that there could not be a fair hearing within the trial window. This was because the respondent did not know what the claim was that it was required to answer. Until it knew what the claim was, it could not decide what documentary and oral evidence would be required to meet it. If the claim was to be heard at the final hearing under these circumstances, the respondent would suffer significant prejudice. The respondent had already incurred significant costs given that this claim had been ongoing for nearly 2 years, and it was none the wiser about what the claims were. These costs were considerable and disproportionate. The claimant had breached case management orders that were intended to elicit from her what was being claimed. She had not provided further and better particulars of her claim. This was relevant to considering the magnitude of the effect of her non-compliance. This was also relevant to the prospects of a fair trial. The impact of this non-compliance not only affected the respondent but also the Tribunal given the fact that there had been three preliminary hearings. The claimant was responsible for this default. Mr Smith acknowledged that the claimant had been briefly represented by a solicitor, but a large part of the problem was of her own making. The claimant was continuing to refuse to comply with these basic but essential case management orders to the extent that even if the final hearing was vacated and relisted, there was still no prospect of a fair trial. The claimant's behaviour to date indicated that she was unlikely to comply with any future case management requirements as a lesser step than striking out her claims. Under the circumstances, it would not be appropriate to apply a lesser remedy such as an unless order because of the claimant's continuous and deliberate failure to comply.

57. I was invited to strike out the claims as a proportionate step to take. Ms Smith acknowledged that it is in the public interest that discrimination cases are heard. However, nearly two years had elapsed, and the claimant was still failing to comply with case management orders, and she still cannot say why there was discrimination.

58. Ms Smith acknowledged that the claimant had provided a partially completed Scott Schedule in response to the request for further information. This postdated the application for strike out and had been sent late. She commented on the fact that many of the claims were left blank and even those which had been completed provided insufficient information and were unclear and did not answer the basic questions that had been provided by the Tribunal to help her. Although she was a litigant in person, I was invited to consider the guidance that had been provided by the Tribunal at the previous case management hearings and also to consider that the claimant was an intelligent person who could have researched the Internet or gone to the Citizen's Advice Bureau for advice. I was also to consider the fact that she had taken legal advice from a solicitor and had been represented, albeit briefly.

59. If I was not minded striking out the claims, I was invited, in the alternative, to issue an unless orders. Under those circumstances, the final hearing would have to be vacated as the parties would not be ready to go to trial.

60. I then heard from the claimant. She repeatedly told me that she had not deliberately failed to comply with the case management orders. When she started the Tribunal process, she did not understand what was required. She acknowledged that the respondent's solicitor had been helpful and fair. He had helped her along the way. When she first submitted her claim to the Tribunal, she had an ongoing grievance with the respondent. This required her to prepare a lot of paperwork and eventually the grievance was sorted out. However, her mental health had deteriorated, and she had suffered another foot injury which meant that she had to reduce her hours. Her income dropped and she could not afford to instruct a solicitor and pay her household bills. Consequently, she was having to pursue matters on her own and given her lack of knowledge of the law she was struggling with the paperwork.

61. The claimant told me that she suffered a nervous breakdown and was advised by her counsellor to take a break from everything. She was not sleeping, and she had lost more than one stone in weight. It had all been too much for her. She was trying to return to work. She was on an emergency list for further surgery, was undergoing counselling and physiotherapy weekly. When she looked at the paperwork, it brought back bad memories which she found difficult to cope with. She apologised for not responding in time and she acknowledged that she had not been as compliant as she should have been. She was not intentionally trying to cause delay. She said that she wanted to be listened to if it went to trial and if it was resolved in her favour, it would be a lesson for the respondent to learn so that others would not have to go through what she did. Although she had once been a strong person, she was no longer coping.

62. The claimant told me that her foot injury meant that she had been non-weight-bearing since August. This had prevented her from going out to obtain legal advice. She had made telephone calls to representatives but they all required her to attend in person for advice. She said that she was hoping to get surgery shortly and once this was completed, she would be weight-bearing and she could go out and get legal advice. She confirmed that the Royal

College of Nursing was representing her in her personal injury claim. They would only fund that claim and were not representing her in her employment claim.

63. The claimant told me that she had suffered from PTSD and was getting counselling and was coming through and described that she was at the end of the tunnel and was now taking the correct medication. She told me that she was taking sertraline and was in a better frame of mind to progress matters.

64. I adjourned to consider whether I could give judgment with oral reasons in the allocated for the hearing. Before returning to the bench my clerk emailed me to say that the claimant also posted the following in the chat messaging facility in CVP in my absence:

> *hi judge sorry i am wondering if i can add one more point. at the time i was so mentally unwell i was running from anything to do with the hospital as it was causing me trauma. when i was diagnonised with PTSD and recived the correct support and put on the correct medication it was only then i was able to start facing what was making me so unwell. i can only apologies for any delays i have caused the system and to marcus and the hospital i at that point was just to mentally unwell. where as now i am in in more stable postion to continue this case due to the mental health support i am receiving. i hope you can take this point on board thank you*

65. On returning to the bench, I informed the parties that I would reserve judgment.

66. Striking out any claim, particularly a discrimination claim, is a Draconian step and one which should not be taken lightly. However, notwithstanding this, I am minded striking out the claims under rule 37(1)(b) for the following reasons:

    a. The procedural history of this claim is lengthy. The claim is nearly two years old. There have been three case management hearings prior to this preliminary hearing. On each occasion, the Employment Judge set out clear orders that the claimant was required to comply with and when that had to happen. Furthermore, the claimant was aware from those orders what the consequences could be if she did not comply with them. This included their being struck out.

    b. The claimant repeatedly made promises which she did not deliver on. She repeatedly said that she had information and documents and gave the respondent's solicitor the impression that these would be sent to them imminently. That did not happen. She had to be chased up. When information and documents such as further and better particulars or the impact that her physical impairment had on her, for the purposes of her claim to be disabled were provided, these did not provide sufficient information for the respondent to answer the case against it.

    c. I believe that the claimant's behaviour was deliberate and unreasonable given the circumstances of the prior preliminary hearings, the proactive approach taken by the respondent's solicitor and the clear guidance set out in the case management orders and

summaries. She knew what was required of her. I am particularly troubled by the claimant's email of 27 June 2022 when she was responding to the request for more paperwork. She simply dismissed that request because she was on holiday, and she wasn't prepared to spend her holiday "stressing over paperwork". Her holiday took precedence over her claim. This not only showed disrespect to the respondent but also to the Tribunal and it is unacceptable. I acknowledge that the claimant may have suffered from and may continue to be suffering from mental health issues and is distressed by what is happening. She alleges that she is suffering from PTSD and is receiving counselling. She also says that she has been taking sertraline because of her poor mental health. However, the medical evidence provided in the bundle deals with her physical injury to her foot and not her mental health other than passing references from occupational health practitioners who refer to her being stressed. I have not seen any records or reports relating to her psychiatric condition from a relevant specialist. Tribunal proceedings are inherently stressful because they relate to the breakdown of a working relationship with all the emotional consequences that flow therefrom. There is no supporting medical evidence concerning the claimant's psychiatric state let alone saying that she is unable to engage in the litigation process to explain her behaviour. There is nothing to suggest that she did not understand what was required of her in progressing her claim. She also acknowledged the help that the respondent upon for solicitor gave her.

d. An order for further and better particulars of claim is not insignificant. It is a fundamental principle of natural justice that a party should have sufficient information about a claim so that it can properly answer it. Without that information, the respondent is placed at a fundamental disadvantage because it cannot prepare for the final hearing that was listed in November. Even if the claimant now complied with the orders, there would be not enough time for the respondent to be properly prepared for the final hearing. Without properly articulated claims, the respondent cannot file a proper defence. It cannot identify the documentary evidence that it wishes to rely upon. It cannot identify witnesses to give oral evidence in support of its defence. If the respondent was to go to the final hearing under such circumstances, it would be doing so with one arm "tied behind its back". The trial would not be fair.

e. The claimant has been given ample leeway not only by the respondent's solicitor who has been helpful and who has behaved appropriately throughout but has also been given support by the Tribunal at three preliminary hearings about what she need to do. Given that history, I fear that a lesser remedy such as an unless order or a costs order will not change things.

67. The claims warrant being struck out under rule 37 (1) (c) for the following reasons:

a. The magnitude of the non-compliance is significant given that failure to provide particulars of claim prevents the respondent from answering the allegations against it properly.

b. The claimant was responsible for the default.

c. The default has caused serious disruption, unfairness, and prejudice to the respondent in that it cannot properly answer the claim against it.

d. A fair hearing within the trial window would not be possible as a consequence of the claimant's default.

68. I am also satisfied that the claim should be struck out under rule 37 (1) (d) because there has been delay that is intentional or contumelious (disrespectful or abusive to the court). I have already indicated that the evidence supports that the claimant did not deliver on promises that she made, and she also treated the Tribunal disrespectfully in her email of 27 June 2022 where, frankly, her holiday was more important than complying with a case management order.

Employment Judge Green

Date 3 October 2022