



EMPLOYMENT TRIBUNALS

Claimant:

Miss S D Clay

v

Respondent:

Leicestershire Partnerships NHS Trust

Heard at: Leicester

On: 26 July 2022

Before: Employment Judge Fredericks

Appearances

For the claimant: Mr P Browning (Lay Representative)

For the respondent: Miss C Goodman (Counsel)

JUDGMENT ON A PRELIMINARY ISSUE FOLLOWING OPEN PRELIMINARY HEARING

1. The respondent's application to strike out the claimant's claim is refused.
2. The claim is not struck out.

WRITTEN REASONS

1. These reasons are produced at the respondent's request following the issuing of case management directions to manage the case to trial. In my view, written reasons for the refusal to strike out the claim were provided with those directions, but it appears that the respondent requires fuller reasons. The claimant's oral evidence made it clear that this was not a case where a strike out would be appropriate. This is, instead, a case where the claimant is in an extremely vulnerable state and ought to be regarded as such in dealings with her.

Background

2. As outlined in the latest case management summary, on 16 May 2022, I conducted a Telephone Case Management Discussion and offered this hearing to consider the respondent's application to strike out the claimant's claim following a period of non-engagement with the claim which led to the vacation of the allocated trial window. Between that discussion and the hearing today, the claimant provided medical information documenting her contact with doctors over her suffering seizures and on-going mental health difficulties.
3. At the TCMD, I advised the respondent's solicitor that the medical evidence might satisfy the respondent such that it would not pursue a strike out application against the claimant such that we would not need to attend today. On 5 July 2022, Mr Berkshire for the respondent confirmed that the respondent was not satisfied that the medical evidence supplied explained why the claimant had not engaged with the claim in the run up to the original trial window. The respondent's strike out application therefore came before me for determination.

The hearing

4. The respondent was represented by Counsel and the claimant was represented by her partner, a lay representative. I had the benefit of the sight of a bundle of documents running to 98 pages. References to page numbers in these reasons refer to the page numbers in that bundle. I was also given a costs schedule prepared by the respondent although, in circumstances where the claim was not struck out, no costs application was made.
5. It was immediately apparent that the claimant was in a very fragile emotional state and both she and her representative referenced her mental health at the outset of the hearing. It appeared to me that the documentation submitted by the claimant prior to the hearing did not show the true picture of her medical difficulties and, keen to understand all of the relevant circumstances which might assist in deciding whether to exercise my discretion to strike out, I directed that the claimant should give oral evidence to explain the medical documentation she had submitted.
6. After oral evidence in chief was given, Miss Goodman was afforded an adjournment to prepare to cross examine the claimant in the event cross examination was not prepared. The hearing did not recommence until Miss Goodman was satisfied that she was ready.

The relevant facts

7. The facts as I find them on the balance of probabilities are as below. In the event, there was no conflict of evidence in relation to the facts I find.
8. The claimant was dismissed on 7 January 2021 following an investigation into her alleged alcohol consumption at work and her actions during the early part of the investigation. The claimant's father had passed away prior to this time, and the claimant was struggling emotionally to deal with that. Around this time, a referral was made to the Nursing and Midwifery Council and the claimant has been through fitness to practice proceedings.

9. The claimant's claim form was received on 7 May 2021. A notice of claim was sent to the respondent on 12 May 2021. The original hearing for the case was set down to be heard on 7 September 2021. The respondent submitted an ET3 and Grounds of Resistance dated 9 June 2021. During case management, the trial window was extended and a multi-day hearing was listed to begin on 16 May 2022. The respondent's solicitor agreed directions with the claimant's previous solicitor to get the case ready for trial. By way of disclosure, documents were exchanged on 7 February 2022. When, on 8 March 2022, the respondent's solicitors queried an aspect of disclosure (pages 52-53), the claimant's previous solicitor said that he would forward the request the claimant (page 51). On the same day, in the evening, the claimant's previous solicitor e-mailed the Employment Tribunal to advise that they were no longer acting for the claimant (page 50).
10. The claimant's evidence, which I accept, is that she was significantly unwell at this time. I accept as a fact, having heard the claimant speak and answer cross examination, that the claimant attempted suicide in late 2021 and early 2022 during the period of her claim and during the period of her fitness to practice proceedings. The claimant explained, and I accept, that she was not 'in the world' around this time and required significant encouragement to leave the flat where she lives – and did not collect any post from her letterbox in the shared flat area.
11. On 11 March 2022, the claimant attended Accident and Emergency in Peterborough and received treatment for a facial injury and an elbow injury. Her medical notes on page 83 record that she had two seizures, reportedly as a result of stress caused by these proceedings and her fitness to practice proceedings. The note records that the claimant has a history of seizures. Miss Goodman challenged the claimant about the comment "*mood stable, propranolol helping*", and the claimant explained that this is in comparison to her previous visits relating to attempted suicide. The claimant also explained, and I accept, that the after effects of a seizure go on for some time and so there is a significant mental, physical and emotional toll that comes with such episodes. On 19 March 2022, the claimant attended Accident and Emergency in Leicester to receive treatment for the elbow injured about a week prior. The bundle contained photographs showing the extent of the physical damage suffered by the claimant. On 25 March 2022, the claimant obtained a fit note from her GP which said she was unfit to work for a three month period due to "*stress/depression/anxiety*" and "*recent seizures*".
12. In my judgment, the claimant's evidence about the impact of (1) her mental health difficulties, (2) her seizures, and (3) her physical injuries sounds more plausible than implausible. Miss Goodman was unable to displace those difficulties in cross examination because, in my view, the claimant was giving a bravely honest account of her medical problems and what they meant for her being able to function normally - and by extension for her ability to engage with her claim.
13. On 22 March 2022, the respondent's solicitor Mr Berkshire had written to the claimant at her home address to ask her to make contact by 30 March 2022 (page 56). Page 57 shows a proof of delivery receipt from Royal Mail dated 26 March 2022. The signature is indecipherable and perhaps begins with a 'b'. The Royal Mail delivery-person has recorded the item as being received by 'Clay'. On 30 March 2022, Mr Berkshire wrote to the Employment Tribunal making an application that the claimant's claim be struck out because it is not being actively pursued (pages 59-

60). This was sent to the claimant at her home address on the same date (page 58), and another delivery confirmation with the same indecipherable signature shows that the item was received by someone called 'Clay' on 1 April 2022 (page 61).

14. The respondent urges me to find that the claimant received these items as shown by the Royal Mail documents indicating receipt. Mr Browning submits, and the claimant supports in her evidence, that the letters were all opened together on 27 April 2022, and that as such the claimant never opened or received the letters sent on 22 March 2022 or 30 March 2022. On 25 April 2022, the respondent's solicitor wrote again to the Employment Tribunal to request the claim be struck out, as the Employment Tribunal set deadline to respond had passed (page 64). This was delivered on 27 April 2022 by Royal Mail and the proof of receipt, in the name of Clay, clearly bears a signature 'S D Clay'. The claimant confirmed that this was her signature and that she received this item on that date. The claimant denied that the earlier signatures are hers. Mr Browning also denied that those signatures were his.
15. The claimant's evidence is that she lives in a shared block of flats and that those making deliveries will give parcels to anyone who comes to the door in the building. I consider this to be a likely circumstance in such living arrangements. Consequently, I find that the claimant did not actually receive or open any correspondence in relation to her claim, from anyone, until 27 April 2022.
16. Mr Browning wrote to Mr Berkshire immediately upon receipt of the letters on 27 April 2022 objecting to the strike out order being giving and stating that the claimant intended to pursue her claim (page 67). On 29 April 2022, Mr Berkshire applied for the claim to be struck out because it was then too close to the allocated trial window beginning 16 May 2022 for there to be a fair hearing (pages 68-69). There was by that point no exchange of witness statements and no agreed bundle. This application was confirmed again in writing on 3 May 2022 when it appeared that the Employment Tribunal had not dealt with the earlier correspondence (page 71).
17. On 3 May 2022, the Employment Tribunal sent the claimant a warning that Employment Judge Hutchinson was considering striking out the claim because it was not being actively pursued (page 73). The claimant was to reply by 9 May 2022, and she did so to appoint Mr Browning as her representative and object to the order being made (page 80). On the same date, Mr Berkshire wrote to the Employment Tribunal to postpone the previous strike out applications and for orders to be made to hold a preliminary hearing on 16 May 2022. Employment Judge Heap agreed with that application, and following the ensuing case management discussion with Mr Berkshire and Mr Browning, I directed as is outlined at pages 45 to 49.

Submissions

18. Miss Goodman submitted that I should strike out the claim because the claimant had not complied with tribunal orders, which led to the abandoning of a listed trial window. Miss Goodman relied on the principle from *Enuemukoro v Croma Vigilant (Scotland) Ltd and ors [2022] ICR 327* that a claim or response may be struck out if a failure to adhere to tribunal orders means that a fair hearing cannot be heard in the allocated trial window. As well as noting that the trial window had come and gone, Miss Goodman submitted that the respondent would be prejudiced if the claim were to continue because one of its key witnesses, the disciplinary panel chair, is due to

shortly retire and has said that she does not wish to be a witness in these proceedings following her retirement.

19. In reply, Mr Browning accepted (as he must) that the claimant had missed key deadlines in the preparation for her case to be heard and that this led to the listed trial window being abandoned. However, he relied on the medical difficulties suffered by the claimant, which led to her not being able to engage with the claim as well as not being able to inform anyone of that, as a reason why her claim should not now be struck out. He invoked a sense of justice and said it would not be fair for the claimant's claim to be struck out in such circumstances.

Relevant law

20. When approaching any application, and during the course of proceedings, the tribunal must give effect to the overriding objective found at Rule 2 Employment Tribunals Rules of Procedure 2013. This says:

"2 - The overriding objective of these Rules 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 compatible with proper consideration of the issues; and*
- (e) saving expense.*

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

21. The power to strike out a claim or response is found at Rule 37. That provides that:

"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.”

22. As well as identified any wrongdoing or non-compliance which might leave a party open to their case being struck out, the tribunal must as a separate stage consider whether or not striking out is a proportionate response (*Baber v Royal Bank of Scotland Plc EAT 0301/15*). When considering whether to exercise discretion to strike out a claim for non-compliance with orders, the tribunal must consider whether any lesser remedy would be appropriate for the disobedience (*Weir Valves and Controls (UK) Ltd v Armitage [2004] ICR 371 EAT*). The tribunal should consider whether there is a more proportionate response open to it as at the time the determination is being made (*Ridsdill and ors v D Smith and Nephew Medical and ors EAT 0704/05*). In that case, the EAT held that the trial could have been adjourned for the procedural deficiencies to be remedied.

23. Claims may be struck out where illness makes it impossible to hold a fair hearing (see for example *Peixoto v British Telecommunications plc EAT 0222/07*; *Riley v CPS [2013] IRLR 966 CA*), but the authorities supporting this emphasise that the illness must be of a nature that makes conducting proceedings or giving evidence (1) impossible, and (2) not possible for the foreseeable future. These cases were considered as part of my decision but discarded because the claimant says she is able to continue the claim now.

24. In *Emuemukoro v Croma Vigilant (Scotland) Ltd and anor [2022] ICR 327*, Choudhury J considered whether an Employment Tribunal erred in striking out a respondent's case where the respondent's failure to agree a trial bundle or prepare witness statements meant that a fair hearing could not be heard in the allocated five-day trial window. The Judge at first instance was faced with a situation where the respondent's legal representative had failed to deal with the case adequately upon the departure of a member of staff. They decided it was in the interests of justice to strike out the claim because the alternative would lead to a delay of many months. Choudhury J held that the power to strike out is triggered in such circumstances but, in line with earlier authorities, emphasised that the decision whether or not to exercise the discretion to strike out should be informed by whether or not such a step is proportionate in the circumstances open to the Judge at the time the application is determined.

Conclusions

25. It is plain that the claimant did not comply with orders or directions and that a trial window has been missed. There is non-compliance with orders and it was not possible to hold a fair trial within the trial window. In my view, these are circumstances which trigger the power to strike out as outlined in *Rule 37* above. The real question for me to consider is whether or not, on this case at this time, striking out the claim would be a proportionate response. In my judgment, it would be disproportionate to strike out the claim at this hearing.

26. In my view, *Emuemukoro* does not assist the respondent in terms of advancing this strike out application. *Emuemukoro* relates to a decision made at the final hearing

where there was no other timetable in relation to the claim and it was not considered just to create one. There was no lesser sanction which could be applied and no ability to hold a fair hearing in circumstances when the claim was to be finally determined at the point the application was heard. That is different to this case, where there is a trial window listed and there are already extant directions, which are live, designed to guide the parties to a fair hearing during that window.

27. Although it is true that the originally listed trial window was abandoned, the respondent did not press its application on what would have been the first day of the trial window. I am now being asked to consider something retrospectively when, in fact, the trial window now stands at some point in early 2023. Determining the application today, I consider that striking out on the basis of missing a trial window back in May would be disproportionate and draconian. There is a lesser sanction which would in my view preserve the ability to hold a fair trial on the already set dates: the claimant simply must comply with my directions to prepare properly for that hearing and failure to do so may lead to further applications and/or unless orders being made.
28. In addition, I found the claimant's evidence about her difficulties during the relevant period to be compelling and have made a series of factual findings which make it clear that the claimant was effectively unable to deal with her claim during the crucial period. I do not consider that she ever intended to not pursue her claim. Her illnesses rendered her incapable of complying with orders – in my view just as effectively as if she had been hospitalised with illness. Considering, as I must, the overriding objective, I do not conclude that it would be proportionate to strike out the claim. It would not be fair or just to deprive the claimant of the chance for her case to be heard fully because she had been too ill to engage with it in a way we might ordinarily expect her to. Without using the phrase 'overriding objective', this is the argument Mr Browning was seeking to make and I agree with him on it.
29. I have not ignored the respondent's position in my considerations. I accept that the respondent has been put to cost and delay as a result of the claimant's conduct. However, this may be remedied at the final hearing in any consideration of costs if necessary or appropriate (bearing in mind that this determination would also be relevant to any consideration of the claimant's conduct). I am also mindful of the respondent's concern about one of its witnesses. I do not, though, accept that this is in any way a degradation of evidence which threatens the ability to hold a fair trial in the future. I suspect that the witness who may be reticent is not the only one on the panel who may be able to give evidence. Ultimately, retirement does not seem to me to be a good reason to avoid giving evidence and the respondent is able to seek an order to compel the witness to attend if necessary. Consequently, I do not consider that a respondent witness indicating an unwillingness to give evidence is any sort of reason to strike out the claimant's claim.
30. I know that this decision is inconvenient for the respondent but it is not, I think, unduly prejudicial to the respondent's case. For all of these reasons, the claimant's claim is not struck out and it is allowed to continue. I have made separate directions in relation to disclosure and preparation for the final hearing.

Case Number: 2601135/2021

Employment Judge Fredericks

24 September 2022