



EMPLOYMENT TRIBUNALS

Claimant: Mrs G A Shute
Respondent: 2 Agriculture Ltd
Heard at: By video **On:** 12 December 2022
Before: Employment Judge S Moore

JUDGMENT

The claimant's claims are struck out.

REASONS

Introduction

1. The claim was presented on 7 October 2021. The claimant brought claims of unfair dismissal, direct disability discrimination, discrimination arising from disability, discrimination arising from disability, failure to make reasonable adjustments, equal pay and unauthorised deduction from wages.

Background

2. The Claimant was employed by the respondent as a QHSE coordinator from 12 March 2012 until her dismissal on 28 April 2021. The claimant was dismissed with effect from this date and paid in lieu of notice, the respondent says the claimant was dismissed for reasons of capability. It is common ground that the claimant was last in the work on 23 January 2018 and has not returned to work prior to the termination of her employment. The claimant was off sick firstly with migraines and subsequently stress-related absence, bereavement, cancer and depressive disorder.
3. The history of the claim is as follows. Her claim was been listed on issue for final hearing on the 13th, 14th and 15th of July 2022. There was a preliminary hearing on 1 April 2022 before me. The claimant informed me that she intended to call seven witnesses. It was evident that the hearing would not

be completed in three day window and accordingly I postponed the final hearing. I made a number of case management orders as follows:

4. No later than 25 April 2022:
 - a. Paragraph 9-parties were to write jointly to the tribunal with unavailable dates and agreement on the hearing length;
 - b. Paragraph 17 - The claimant was to provide further particulars. In particular the claimant was told that she needed to clarify the name and job title of the equal pay comparator and the date of the events complained of in respect of her discrimination claims;
 - c. Paragraph 19-the claimant was to provide a schedule of loss to the respondent.
5. Further orders were made for an amended response (dependent on the provision of further particulars), disclosure bundle and witness statements.
6. On 10 May 2022, the claimant's representative highlighted that the tribunal had in error sent the case management order directly to the claimant. On the same date they also came off record as the claimant's representative.
7. On 27 May 2022, the claimant asked for more time to comply with orders until 31 May 2022. The claimant had not complied with any of the above orders. The claimant explained that she was suffering from chronic daily migraines and severe migraines that render her unable to do anything apart from staying bed. The claimant contacted the tribunal again to say she had not been able to look at any paperwork or emails since she sent the email on 27 May 2022 and she would aim to get it all in by 6 June 2022 at the latest. The claimant did not subsequently comply with the above orders within the extended time she had requested.
8. On 13 June 2022 respondents wrote to the tribunal to advise none of the orders have been complied with and requested an unless order. The respondent chased their application on 22 June 2022. On that same day, the claimant wrote to the tribunal again advising she was still suffering from constant migraines and along with other personal matters and a further health scare explained she could not read or write emails. The claimant said would comply with the orders as soon as she was able to but there was no timescale as to when this would be.
9. The file was referred to a Judge for the first time in relation to the correspondence above on 29 June 2022. Judge Jenkins directed it was not appropriate to grant unless order in light of the claimant no longer being represented and to health issues. Judge Jenkins did however warn the claimant that the case needed to make progress or it could be in danger of being struck out on the basis it was not being actively pursued. Judge Jenkins varied my orders of 1 April 2022 as follows;
 - Paragraph 9 varied to 18th of July 2022.
 - Paragraph 17 date for compliance varied to 25th of July 2022.

10. On 18 July 2022, the claimant sent an email to the tribunal and the respondent referencing her migraines causing issues in complying with the orders and queried why she would have to provide medical evidence to support this. The claimant attached a copy of her prescriptions to that email but no other medical events.
11. On 20 July 2022 the claimant sent a lengthy email setting out why eight witnesses would be required to be called to give evidence on behalf claimant at the final hearing.
12. On 4 August 2022, the respondent informed the tribunal that the claimant had failed to provide a further particulars on the extended deadline of 25 July 2022. The respondent wrote again to the tribunal on 8 September 2022 advising that the claimant had not replied to their correspondence regarding the relevance of the witnesses or the further particulars of claim. The respondent made an application for strike out of the claim on the basis of claim have failed to comply with orders and was spinning to actively pursue a claim.
13. The claimant responded on 20 September 2022. She dealt with the relevance of the witnesses and then went on to advise that she cannot remember having anything else to do in respect of the further information. This was in reference to the order that she provide further particulars. She explained she was experiencing serious health issues and suggested that the tribunal could approach the GP for proof of her medical situation. It was directed that a public preliminary hearing would be listed to decide whether to strike out the claim for non-compliance with the orders of the tribunal and because it is not been actively pursued.
14. In the notice of hearing the claimant was informed that if she wished to rely on ill-health as reasons for failing to comply with orders she should provide supporting evidence. The notice of hearing was dated 3 November 2022 and the hearing was listed before me on 12 December 2022.
15. On 5 December 2022, a person called T Jones, emailed from the claimant's email address copying in the tribunal and the respondent to advise that the claimant was in "no fit state" to attend the hearing on 12 December 2022. It was explained that she had been diagnosed with clinical depression, was not a good place and that she would not cope with the hearing.
16. This email was treated as an application to postpone the hearing and was refused because the claimant had not provided medical evidence to support her application to postpone on the grounds of ill-health. The email explained it will be in the claimant's interest to obtain medical evidence in addition to an explanation of the nature of the health condition concerned. Where medical evidence is supplied the claimant was advised that should include a statement from the medical practitioner that in their opinion the claimant is unfit to attend the hearing, the prognosis of the condition and an indication of when that state of affairs may cease.
17. In the early hours of 12 December 2022, claimant sent an email to the tribunal copied to the respondent. She explained that she would not be attending the hearing and that she has contacted her oncologist secretary but unfortunately the oncologist was on holiday or week and she could not

release a letter to prove she had been diagnosed with depression. The claimant explained she was not well enough to attend a talk about the case and that most of that email had been cut-and-paste from previous emails. There was no indication when the claimant considered she may be well enough to take part in the hearing nor was there any information about a potential treatment plan which could have indicated a date in the future for progress to be made with the claim.

Preliminary hearing

18. The preliminary hearing proceeded in the claimant's absence given that she had informed the tribunal she would not be attending. The respondent was represented by Mr McQueen repeated their application for strike out. In summary the grounds for the application was follows:
- a. the claimant has not provided any medical information which details the impact of condition has on her ability to comply with tribunal orders;
 - b. the claimant had consistently failed to comply with tribunal orders despite them being extended and was also failing to respond to acknowledge correspondence from the respondent and was failing to engage on matters relating to the relevancy of witnesses and potential hearing. This was preventing the case been listed for final hearing.
 - c. It remains unclear what basis the discrimination allegations are made and further particulars remain outstanding.
 - d. The schedule of loss remained outstanding.
 - e. The claimant was last in work in January 2018 and the factual background of this claim spans some five years on the basis of what the respondent has been able to understand from the pleaded claim. For example the claims of direct disability discrimination must have occurred prior to the claimant going off sick. Therefore they must have occurred allegedly at some point in 2017.
 - f. There are significant time issues with all of the claims and claims are no further forward in respect of having primary limitation dates clarified.
 - g. The claims conduct is putting respondent to significant cost in having to write to the tribunal and the claimant concerning the claimants ongoing non-compliance with orders.

The Law

19. Rule 2 of the Employment Tribunal Rules of Procedures 2013 sets out the following:

(2) Overriding objective

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.
20. 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
21. Employment Tribunals must deal with cases fairly and justly. This applies to all cases not just the Claimant's case. The impact on other cases must be considered when exercising any power given under the rules.
22. Rule 37 of Sch 1 of the Employment Tribunal Constitution (Rules and Procedure) Regulations 2013 provides:
- “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.
(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in r 21 above.”
23. Rule 47 of the same Rules provides that if a party fails to attend or be represented at a hearing, the tribunal may dismiss the claim or proceeds with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the parties absence.
24. In Malik v Birmingham City Council UKEAT/0027/19, Choudhury J summarised the law on strike out; *“It is well-established that striking out a claim of discrimination is considered to be a Draconian step which is only to be taken in the clearest of cases”*.
25. The EAT gave recent guidance regarding the power to strike out claims in Cox v Adecco & Others UKEAT/0339/19. Steps must be take to identify claims and issues before considering a strike out or deposit order. With a litigant in person this requires more than just requiring a claimant at a

preliminary hearing to say what the claims and issues are and requires reading the pleadings and core documents that set out the claimant's case.

26. The EAT considered striking out for failing to comply with directions in the case of **Weir Valves & Controls (UK) Ltd v Armitage [2004] ICR 371**. When faced with disobedience to an order, tribunal should consider whether striking out awesome lesson remedy was an appropriate response. The guiding consideration should be the overriding objective which requires justice to be done to both parties consideration must be given to the magnitude of the default, whether the default was responsibility of the solicitor or party, what disruption, unfairness or prejudice had been caused and whether a fair hearing was still possible.
27. **Blockbuster Entertainment Limited v James [2006] EWCA Civ 684** was also a case where the claimant had not complied with procedural orders made by the tribunal. The power to strike out was described as a Draconic power not be readily exercised. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of applied procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out as a proportionate response. At paragraph 19, Lord Justice Sedley held "the time to deal with persistent or deliberate failures to comply with rules or orders designed to secure a fair and orderly hearing is when they have reached the point of no return."
28. In **Abegaze v. Shrewsbury College of Arts & Technology [2010] IRLR 238** the Court of Appeal considered a strike out under the former provisions in the 2004 Rules (under 18 (7) (b) where it is no longer possible to have a fair hearing). The relevant sections are as follows (per Lord Justice Elias):
29. Paragraph 17:
- "The strike out for failing actively to pursue the case raises some different considerations. In Evans v Metropolitan Police Commissioner [1992] IRLR 570 the Court of Appeal held that the general approach should be akin to that which the House of Lords in Birkett v James [1978] AC 297 considered was appropriate when looking at the question whether at common law a case should be struck out for want of prosecution. (The position in civil actions has altered since the advent of the Civil Procedure Rules). That requires that there should either be intentional or contumelious default, or inordinate and inexcusable delay such that there is a substantial risk that it would not be possible to have a fair trial of the issues, or there would be substantial prejudice to the respondents. "*
30. The Tribunal must engage on a proper analysis of why a fair trial is no longer possible and ensure there is a factual basis for such a conclusion.
31. the Employment Appeal Tribunal recently considered the power to strike out under Rule 37 in **Emuemukoro v Croma Vigilant (Scotland) Ltd and another UAEAT/0014/20/**
32. In this case the Tribunal had struck out the response on the first day of a five day hearing on the basis that the Respondent's failures to comply with the case management orders meant it was impossible for the trial to

proceed within the five day window. Choudhury J reviewed the authorities and rejected the proposition that the power to strike out can only be triggered where a fair trial is rendered impossible in an absolute sense. (This case was about a strike out under Rule 37 (1) (b)). The factors relevant to a fair trial (set out by the Court of Appeal in *Arrow Nominees*) include the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court.

Conclusions and Reasons

33. Firstly state that I do not consider there has been any deliberate or wilful conduct on the part of the claimant in her failures to comply with the orders of the tribunal and actively pursue her claim. I have taken into account the information provided by the claimant concerning her health and personal circumstances as set out above, in accordance with rule 47, in reaching my decision.
34. The tribunal has taken steps to try and clarify the claimant's claims in particular, preliminary hearing was held on 1 April 2022 and a number of orders were made to try and progress the claims.
35. In respect of the order at paragraph 9 to provide unavailable dates and agree the hearing length. The claimant provided information about why she maintained it was necessary to call eight witnesses, setting out why their evidence was relevant in her email dated 20 July 2022. On 4 August 2022 the respondent sought to further engage with the claimant about how this would impact on the length of the hearing and reach agreement. The claimant commented on 20 September 2022. In my judgment, on the basis of the information from the parties it would have been possible to list the case for a hearing, had there not been the other order for further particulars outstanding. Although the claimant complied with this order outside of the timescales I did not consider this would have been grounds to strike out the claim for this breach as it would not have been proportionate and a fair hearing would still have been possible.
36. However in respect of the order to provide further particulars of claim, it cannot be disputed that the claimant has twice and to date remains in breach of this order which was due for compliance on 25 April 2022.
37. This order relates to the discrimination and equal pay claims. The respondent does not know the case they are facing almost 8 months on from the issue of the claim. They cannot begin to investigate matters such as what promotion the claimant says she was overlooked which is alleged treatment relied upon for the direct disability discrimination claim and the S15 claim. They do not know the identify of the comparator of her equal pay claim who was described in the particulars of claim as "the gentleman who worked in the Scottish Mill" who the Claimant had travelled to Scotland to train. Crucially in my judgment the claimant has failed to provide information about the dates of the events she complains of in respect of all of the discrimination claims. The claimant was last in work on 23 January 2018 and some of her claims date back to 2017 and possibly 2016. As of the hearing on 12 December 2022 the respondent can speculate but not be sure that some if not all of the discrimination claims are out of time. Any claims that arose prior to 28 April 2021 are likely to be out of time as this is

the very last date (being the date of the dismissal) that could be in time and most of the discrimination claims plead conduct well before this date.

38. I consider that there are no outstanding breaches of orders in respect of the claimant's unfair dismissal claim as the orders did not cover this particular claim. The respondent understands the case they face here.
39. The order for the provision of a schedule of loss was made to clarify the claimant's unauthorised deduction from wages claim and the potential remedy for all claims. As this has not been complied with to date, the respondent does not know what claim they face in this regard. They also do not know their potential liability for the other claims if the claimant was to succeed.
40. Turning now to the other potential ground for striking out namely the failure to actively pursue the claims. As stated above the claim was lodged on 7 October 2021, 14 months ago. In addition to breaching various orders other than engaging with the relevance of witnesses, the claimant has done nothing else to pursue the claim. The claimant has failed to engage with the respondent to enable the claim to make progress and because she has not provided further particulars of her claim the respondent cannot set out their response. The claims are at a stand still.
41. Taking all of the above into account I have considered whether a fair trial is possible. I have had regard to what the claimant says about her health. However I do not have any supporting evidence other than the claimant's testimony in her various emails to assist me in reaching a decision about when, if ever, a fair trial will be possible. The claimant has been warned such evidence is necessary and been given every opportunity to provide such evidence but has not done so. She did not need a letter from her Oncologist; a GP letter would have sufficed. There is no explanation as to why the claimant has not been able to obtain medical evidence except for her email dated 12 December 2022 and she had been advised of the requirement in the notice of hearing dated 3 November 2022.
42. In the absence of any medical evidence, if I take the claimant's emails at their highest, and I have no reason to doubt what the claimant says about her health, then the position is:
 - a. The claimant is unable to remember what to do in respect of complying with orders even when they have been explained at a hearing, written down in an order and then further explained in emails giving her more time to comply; the claimant cannot remember short term things hardly at all unless they are written down or something jogs her memory;
 - b. The claimant is experiencing unexplained black outs, dizziness and chronic migraines daily and is hardly able to even read emails;
 - c. The claimant has on a number of occasions asked for more time to comply then not complied within the extended time nor given warning before the deadline she will be unable to comply;
 - d. There is no prognosis as to when the claimant may fit enough to deal with progressing her claim let alone attend a final hearing;
43. Given all of the above, as of the date of this preliminary hearing, I consider that there is no prospect of a fair trial in the foreseeable future if at all.

44. I conclude therefore that there are grounds on which to strike out all of the claims for breaching orders and failing to actively pursue. I go on now to consider whether it is proportionate to do so.
45. I am satisfied that there already has been alternative measures implemented to try and avoid a strike out. There have been several extensions of time and the claimant has been advised to obtain medical evidence on a number of occasions. Judge Jenkins declined to make an Unless Order instead giving the Claimant further time to comply. When she did not, a hearing was listed to enable the claimant to make representations as to why the claims should not be struck out.
46. I go on to look at the balance of prejudice. The claimant is unwell and says she cannot comply with orders or pursue her claim for this reason. If I had some medical evidence or a prognosis this would have enabled me to consider the balance of prejudice by evaluating how much longer the parties may have to wait to reach a hearing. As things stand, I have concluded there is no prospect of a hearing in the foreseeable future. The claimant will lose the right to bring her claims if they are struck out. This weighs heavily on the claimant. However the respondent is also severely prejudiced as there is no prospect of a hearing. The claims span back 6 years and are still in most cases unknown. I distinguish the unfair dismissal claim as a claim with lesser grounds to strike out as the respondent knows the case they face here however there is equally no prospect of a hearing for this claim either and it has not been actively pursued. The respondent cannot prepare their defence. This means they cannot begin to take witness statements or gather documents for the discrimination and equal pay claims as they do not know what the claims are about. They should not have to speculate. Even if they were able to start that process at some time in 2023, that would be almost five years after the claimant was last in work and three years after the procedure to dismiss her began. In my judgment, the time to deal with persistent or deliberate failures to comply with rules or orders designed to secure a fair and orderly hearing has reached the point of no return. For these reasons I consider it is proportionate to strike out all of the claims.

Employment Judge S Moore
15 December 2022

JUDGMENT SENT TO THE PARTIES ON 20 December 2022

FOR THE TRIBUNAL OFFICE Mr N Roche