Case Numbers: 1305084/2020
1306704/2020
1309654/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr A Whitehead

Respondent: Warwickshire County Council

PRELIMINARY HEARING

Heard at: Birmingham (in public) **On:** 21 & (no parties) 24 November 2022

Before: Employment Judge Camp **Members:** Mr E Stanley
Ms J Keene

Appearances
For the claimant: partly Mr M Walker, counsel; partly in person, assisted by Mr Walker
For the respondent: Mr T Sheppard, counsel (via CVP)

REASONS

1. These are written reasons for paragraphs 2 and 3 of the reserved[1] Judgment and Orders signed by the Employment Judge on 24 November 2022.

Adjournment [2]

2. This is our decision on the claimant's application to adjourn this hearing today. We refuse the application.

3. This hearing was set up at the end of a two day preliminary hearing in September 2022 which the claimant attended, represented by counsel. We refer to the Case Management Orders made at that hearing and the written Reasons for some of those Orders, signed by the Employment Judge on 6 November 2022, in particular paragraphs 12 and 13.

4. The applications to strike out that we are supposed to be dealing with today were going to be dealt with at that hearing in September 2022, but we ran out of time. By consent, we directed that they be dealt with at this hearing instead. Everyone was apparently ready in September to deal with them. Towards the end of the hearing, we checked with both sides and they confirmed (the claimant through counsel; a different barrister from the one representing the claimant today) that, subject to one or two

[1] The Judgment (paragraph 3) was reserved, being given in writing and not orally, but it was not labelled as such.

[2] Reasons were given orally on 21 November 2022.

specific things, they had all of the documents that were necessary for the applications and for the final hearing. There was, for example, no suggestion, as there has been today, that the respondent had a different set of bundles from the claimant's set of bundles, or anything like that. We think claimant's then counsel would surely have noticed if that was the case.

5. The additional documents we ordered should be provided between the September 2022 hearing and today's hearing were:

   5.1 the up to date correspondence from 31 August 2022 onwards, to go into the bundles for this hearing. This was something we wanted and was not something the parties asked for, nor was it something either side suggested they needed for the strike out applications;

   5.2 any documents relied on by the claimant in relation to the strike out applications that were not in the bundles that were before us at the September 2022 hearing.

6. The respondent duly provided indexed and paginated hard copies of the up to date correspondence in accordance with our Orders. The hope and expectation was that the claimant would pick them up from the Tribunal on 6 October 2022, when he dropped off his additional documents. It appears that he did not do so, possibly due to a mix-up by the Tribunal administration. However, what he did not pick up then was no more than what had already been sent to him and sent by him, and the overwhelming majority of it was letters sent by him (or on his behalf).

7. The claimant did drop off his additional documents at the Tribunal on or around 6 October 2022, in a file. What he provided included many documents that were already before the Tribunal. Be that as it may, they were forwarded to the respondent by email. The respondent took it upon itself to put together additional bundles for this hearing, containing all of the correspondence up to just before this hearing and the claimant's additional documents. This filled two lever arch files, the great bulk of the pages in those two files being documents provided by the claimant and/or correspondence from the claimant.

8. The adjournment application is made essentially on the basis that the claimant has received these two lever arch files at the last minute. He denies receiving anything from the Tribunal or the respondent since the September 2022 hearing until last week [the week commencing Monday, 14 November 2022]. His new direct access barrister, Mr Walker[3], is in a difficult position in that he apparently decided in preparation for this hearing to focus on the adjournment application rather than the strike-out application and in that he did not see the two new lever arch files of documents until the morning of this hearing.

9. What we were intending to deal with today is each side's strike out application. The applications were made in May 2022. Specifically what we would and would not be dealing with was originally set out in Case Management Orders made in July 2022

[3] As with the September 2022 hearing, neither we nor the respondent knew whether the claimant would be represented at this hearing and if so by whom until the day of the hearing.

and was confirmed at the hearing in September 2022, as set out in the Orders made then.

10. The respondent has through counsel told us that when making its strike out application today, it will be relying on only one document in addition to the documents that were before the Tribunal at the September 2022 hearing. The one additional document is our written Reasons for the contentious decisions made at that hearing. Those written Reasons were signed by me – the Employment Judge – on Sunday, 6 November 2022 and they should have been sent out by the administration the following day. There was another unfortunate mix-up or oversight by the administration, which meant they were not in fact sent out and received until over a week later, i.e. last week. Claimant's counsel had, for whatever reason, not seen them before today and tells us that he has not yet read them.

11. However, the written reasons are no more than the written version of reasons that were given orally on 23 September 2022. We would have expected the barrister then representing the claimant to have made a note of them on the day and to have provided the claimant with a copy had he wanted one. In any event, the claimant heard the oral version of them in September and has had sufficient time, any dyslexia-related difficulties notwithstanding, to read the written reasons and digest them. It will not, we think, take claimant's counsel more than 30 to 45 minutes to read them thoroughly and respondent's counsel will no doubt take us all to the relevant parts of them when making the strike out application.

12. The fact that counsel and, allegedly, the claimant had not before last week seen some or even all of the correspondence from the Tribunal and the respondent from 31 August 2022 onwards is not a good reason for a postponement. Apart from the written Reasons just mentioned, which the claimant and counsel should in our view be able to cope with, that correspondence is irrelevant to the respondent's application. None of it is relied on by the respondent, nor was any of it relied on or even put before us at the September 2022 hearing, when the strike out applications were due to be heard. The claimant and his then barrister were presumably ready to deal with the applications. Claimant's counsel did not apply for a postponement of the hearing of the strike out applications on the basis that she was insufficiently prepared and/or did not have the requisite paperwork. It was postponed for other reasons.

13. So far as the claimant's own application is concerned, he was himself ordered to provide, and presumably did provide, all and any documents he relies on that were not before the Tribunal in September 2022. It is very difficult indeed to see how in practice his position is adversely affected by allegedly not seeing until last week or today a relatively small amount of correspondence from the Tribunal and the respondent, none of which directly addresses the substance of his application. In particular, we struggle to see the relevance of correspondence post-dating the September 2022 hearing that the claimant says he did not receive to an application the claimant made in May 2022 that was supposed to have been decided at that September 2022 hearing.

14. Moreover, the claimant's allegations about not receiving correspondence stretch credulity. Bearing in mind that all[4] correspondence from the respondent sent or copied to the Tribunal is being posted by the Tribunal to the claimant as well as being posted to the claimant by the respondent, possibly 20 to 30 items of correspondence would have to have gone astray between 31 August 2022 and now.

15. In those circumstances, we refuse the postponement application and will go ahead with the hearing today. We will give claimant's counsel an opportunity to read the written Reasons over lunch and will resume after lunch with the respondent's application. The claimant can respond to it through counsel or by himself if Mr Walker feels himself to be professionally embarrassed.

16. After that, we will see where we are in terms of having enough time to deal with the claimant's application. We always directed we were going to hear the respondent's application first and that we would only deal with the claimant's application if we had enough time. If we don't have enough time, the claimant's application could potentially be dealt with at the start of the final hearing (if the respondent's application is unsuccessful) – we could not prevent him from seeking to pursue it then; we shall cross that bridge if and when we come to it.[5] But at the very least, we can hear the respondent's application, which it would be particularly undesirable to put off until the start of the resumed final hearing. This is not least because if it is successful there would be no need to resume the final hearing (whereas there would still need to be a hearing if the claimant's strike out application were successful) and because if it is unsuccessful it would disrupt the final hearing and potentially affect the time estimate.

17. By way of a 'postscript', we should mention that an application to postpone was originally made on the basis that: this preliminary hearing had a two day time estimate; at the hearing in September 2022, it was listed to take place on 21 and 22 November 2022; almost immediately after the hearing, one of the Tribunal members realised they had made a mistake and that they were not free on the 22nd; the only day other than the 21st that all three of us on this Tribunal could do was the 24th; we understood from the claimant that he was free for the whole of the week and so we assumed that moving the date of the second day of the hearing from 22 to 24 November 2022 would not cause him difficulties; we then asked the respondent by email to confirm that they could make 24 November 2022 and they did so; we then confirmed the 24 November 2022 hearing date in our Orders, telling the claimant to let the Tribunal know as soon as possible if he was unable to attend on that day; he did not get back to us because, he says, he did not receive our Orders (which were posted to him twice, the first time at the end of September 2022 and the second time at the beginning of this month [November 2022]); he cannot attend on the 24th and his barrister is not booked for the 24th.

18. None of this affects our decision on the postponement application that has been pursued. Whether or not the September 2022 Orders were in fact delivered to the claimant's address, we can at least hear the respondent's application today and we

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[4] Since the hearing, we have discovered that during October and November 2022 at least one letter from the respondent was not forwarded by the Tribunal administration to the claimant as it should have been. This does not affect the validity of the point being made.

[5] The claimant withdrew his application to strike out before the final hearing resumed, apparently in light of our decision on the respondent's application to strike out.

can make our decision on Thursday [24 November 2022] and send it out on paper. Nobody will need to attend on Thursday come what may.

Respondent's strike out application

19. These are the reasons for our decision rejecting the respondent's strike out application. As discussed with the parties, we took the unusual step of sending out our decision in writing with written reasons to follow. This was because the parties needed to know what our decision was as soon as possible, given that the final hearing was due to resume on 1 December 2022, and we – correctly – predicted that due to his other professional commitments the Employment Judge would not have enough time to write up the reasons quickly.

20. The respondent's application to strike out was originally made under cover of a letter dated 6 May 2022. In our Order of 22 July 2022, we set out what parts of that application we would and would not be dealing with. Our decision in this respect has not been challenged by the respondent. In particular, in the Order of 22 July 2022 and the written reasons for it, we explained that we would not be dealing with any application to strike out or for a deposit order on the basis of the claimant's claim or parts of it allegedly having little or no reasonable prospects of success. We also set out that we would not deal with any part of the applications to strike out based on the claimant's alleged conduct prior to 22 September 2021. (We should perhaps mention, because it came up during the hearing, that there being a cut-off date of 22 September 2021 did not prevent the respondent from referring to things that happened before 22 September 2021 in order to explain why what the claimant did from 22 September 2021 onwards was allegedly scandalous, unreasonable or vexatious).

21. Further refinements to what parts of the respondent's application we would deal with were made at the preliminary hearing in September 2022. Amongst other things, we discussed what could broadly be called the "email issue". This is an allegation along these lines:

    21.1 the claimant is perfectly capable of receiving and sending emails and is simply pretending that he isn't;

    21.2 sometimes, when the respondent sent emails to email addresses the claimant had been using (and/or had put as his preferred means of communication on some of his claim forms), the respondent had received rude replies purporting to be from third parties but which were, in fact, from the claimant himself, or from close associates of his and sent with his knowledge.

22. That discussion about the email issue took place in the context of a broader discussion about whether there needed to be witness evidence at this hearing. The respondent, through counsel, confirmed that the respondent was not relying on the email issue for the purposes of its application to strike out. Partly on that basis, all sides agreed, and we ordered, that there would be no witness evidence at this hearing.

23. The decision and agreement that there would be no witness evidence at this hearing was made because it seemed that neither side was pursuing its application to strike out on the basis of factual allegations that were genuinely in dispute, at least not

where it would be unfair for us to resolve that dispute without hearing from witnesses, and from the claimant in particular. We understood this to be the parties' position too. Accordingly: we are not going to resolve any such disputes as part of this decision; the respondent may not rely on any such disputed allegations of fact in support of its application.

24. So far as concerns the law we have to apply, we don't think it is necessary to do more than refer to and adopt the summary of the law set out in respondent's counsel's – Mr Sheppard's – skeleton argument. As far as we are aware, there is no dispute that that is an accurate statement of the law. The key consideration for us is whether a fair trial is still possible; Mr Sheppard did not submit that this is one of those rare cases where the claim should be struck out even if a fair trial is still possible.

25. In addition to the cases referred to in his skeleton argument, Mr Sheppard placed particular reliance on Sud v London Borough of Hounslow [2015] UKEAT 0156_14_2310. We shall deal with that decision and Mr Sheppard's submissions in relation to it later in these Reasons.

26. The respondent made an allegation that the claim itself is scandalous and/or vexatious. In particular, it was submitted that this case was like that described in Attorney General v Barker [2000] 1 FLR 759 where whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process. We note that we have started the final hearing of the claims that are still before the Employment Tribunal. We did so in September 2021. The respondent did not object to us doing so at the time. We have not heard enough evidence to be able properly to form a view on the merits of any of the complaints. We therefore proceed on the basis that these are claims the claimant could win. The respondent is therefore asking us to strike out as scandalous and/or vexatious a potentially meritorious claim. So far as concerns the claimant's motivation for bringing his claims, we will not be able to make a decision about that, if at all, until after we have heard all the evidence and submissions. Accordingly, we reject that part of the application.

27. We turn to the allegations of scandalous, vexatious and/or unreasonable conduct as well as the allegations that there has been non-compliance with Tribunal Orders. Although we are aware that scandalous, vexatious and unreasonable technically have different meanings, and that non-compliance with Orders is a separate and free-standing basis for striking out claims under rule 37, we will use "unreasonable conduct" (and similar expressions) as a shorthand for scandalous, vexatious and/or unreasonable conduct and/or unreasonable non-compliance with Tribunal Orders.

28. The first question for us is: has there been unreasonable conduct?

29. Our short answer is that there has been. Although we by no means accept all of the respondent's allegations, we do accept that the claimant has conducted himself unreasonably in a number of respects. We shall now set out the clearest examples of this.

30. First, the claimant conducted himself unreasonably by making and pursuing the so called “ad-hoc application”. We refer to our decision refusing that application, from paragraph 164 of the Reasons signed by the Employment Judge on 6 November 2022. In those Reasons, we highlighted the parts of the application that we found most inappropriate. We also highlighted the fact that claimant’s counsel (realistically) conceded that we had no power to make the Orders the claimant apparently wanted us to make. In addition, we stated in paragraph 170 of those Reasons that, “even if the ad-hoc application were otherwise unobjectionable, we would dismiss it on the twin bases that: it is effectively a repeat of the recusal application [which we had just refused]; insofar as it is something in addition to that, it asks us to make orders we have no power to make.”

31. Despite his protestations to the contrary, the claimant must have known – and certainly ought to have known – that it was inappropriate to make the ad-hoc application in the first place, in May 2022. By the time we came to the hearing in September 2022, the claimant persisted with the application, and would not withdraw any part of it, notwithstanding the fact that we had already by that stage refused his recusal application and expressed the view that the ad-hoc application stood and fell with the recusal application. He was represented by counsel at that hearing. Counsel, in accordance with her professional duties, would undoubtedly have advised the claimant that the application was manifestly inappropriate and was hopeless in the circumstances. He pursued it anyway.

32. A second thing we consider to be unreasonable conduct is unreasonable non-compliance with Tribunal Orders. For example, we made Orders for the claimant to provide his PCR test result on 24 September 2021. The circumstances in which that Order came to be made are set out in the reasons for refusing the claimant’s recusal application, in paragraphs 56 and 57 in particular. We did not learn that the claimant had in fact had a negative PCR test result until we ordered the production of and received copies of parts of his medical records, in July and August 2022.

33. The claimant has also, without anything close to a satisfactory explanation, failed to provide either the Tribunal or the respondent with copies of his original recusal application, apparently made on or around 9 December 2021. This has been ordered by the Tribunal a number of times and the claimant seems simply to have ignored those Orders.

34. The thing which is to our mind by far the most serious instance of unreasonable conduct by the claimant is something which has not even been referred to in the respondent’s application or in counsel’s submissions made in support of it. Because it has not been referred to by the respondent, it would not be appropriate for us to make too much of it here. In any event, it would be unfair for us to strike out the claimant’s claim on the basis of it, given that it has not featured in the respondent’s submissions.

35. The conduct we are referring to is writing the letter the claimant wrote to his GP surgery on 23 July 2022 in response to our Order for disclosure of parts of his GP records of 21 July 2022. We repeat paragraphs 26 and 27 of our decision of 4 August 2022 (sent to the parties the following day) rejecting the claimant’s applications made in letters of 23 July 2022. Our view remains that the claimant sending that letter to his GP surgery, threatening dire consequences should our order be complied with and

apparently enclosing a cheque to pay any fine for criminal breach of it, was wholly unreasonable and unjustified.

36. A further, related thing we consider to have been unreasonable conduct, but which has likewise not been mentioned in the respondent's application or the submissions in support of it, is an apparent application made in letters of 23 July 2022 for disclosure of the medical records of the three of us sitting on this Tribunal. Again, because this seemingly formed no part of the respondent's application, we would not in any event strike out the claimant's claim because of it.

37. The next thing that we count as unreasonable conduct is the claimant telling us in the run up to and at this hearing that he hadn't received any correspondence at all from the Tribunal or the respondent by post between late September and mid November 2022. We repeat what we said in relation to this when refusing his postponement application on 21 November 2022 (see paragraph 14 above). It is literally unbelievable that the postal service has failed to that extent, assuming the claimant has any facilities at all at the postal address he has given for himself and is at all willing to receive and read his post. Although we accept that there has been some disruption to the postal service by industrial action, such disruption as there has been has been limited and intermittent, much of the planned industrial action was in fact called off, and we do not accept that any industrial action has resulted in so much correspondence, over such a relatively long period of time, going astray.

38. There is, then, a potential basis for striking out in accordance with rule 37.

39. The next question we therefore ask ourselves is: is a fair trial still possible?

40. The decision in Sud is the only thing referred to in submissions providing any substantial basis for arguing that a fair trial is no longer possible in the present case.

41. In Sud, an Employment Judge decided to strike out a claim on the basis of explicit findings: that the claimant had deliberately misled the Tribunal by presenting false information and altering the date in a document; and that this had resulted in an eight day Employment Tribunal hearing being postponed. In Sud in the EAT, Laing J (as she then was) cited with approval the following passage from the Employment Judge's decision: "These [presenting false information and altering the date in a document] are both very serious matters as they undermine the ability of the Tribunal to have trust in Mrs Sud's veracity. The substantive matters in dispute in this case will ultimately depend very heavily on Mrs Sud's own evidence. The consequences of her showing herself willing to tamper with evidence and mislead the tribunal as to the existence of evidence are thus very serious. They cast serious doubt on the question of whether there can be a fair trial of the issues in the case. They also amount to unreasonable conduct of the case."

42. Laing J's decision included the following: "when one considers the facts as carefully set out by the EJ, it is absolutely clear that the Claimant's conduct had been such that a fair trial was no longer possible. The EJ referred in terms to the fact that the Claimant's conduct had fatally undermined the trust that the Tribunal could have in her veracity. For those reasons, it seems to me that the EJ's conclusion that the appropriate course was to strike out the claim was one that was plainly open to her, and indeed it seems to me that it was on the facts the right decision".

43. In the present case, there is nothing comparable to the specific findings that the Tribunal made in the Sud case on which its strike out decision was based. We have not decided that the claimant deliberately misled the Tribunal in any respect. We have not decided that the claimant has altered documents. We have not decided that the claimant has misled us as to the existence of documents.

44. Heavy reliance has been placed in submissions on various parts of our decision rejecting the recusal application. That reliance is misplaced. Within our recusal decision, we made various findings about what had happened during the first part of the final hearing before us in September 2021 and we rejected a number of the claimant's factual allegations about that. However, as set out in paragraph 147 of the Reasons for the decisions that we made at the September 2022 preliminary hearing, "we … expressed no view as to whether the claimant genuinely believes the allegations he made in his recusal application; we have simply decided that particular allegations are inaccurate".

45. The closest we have come to making a finding that the claimant has deliberately not been telling us the truth is what we said in relation to the adjournment application on 21 November 2022, and what we have just written, about the claimant's alleged non-receipt of post. Those observations are not remotely akin to what was present in the Sud case.

46. In addition, it appears unlikely that at least most of the claimant's complaints will stand or fall on the basis of our assessment of his credibility. In relation to many of his complaints, the factual disputes of importance are relatively limited. In relation to all, or almost all, of his complaints, even if we accept that everything he says about what he witnessed is factually accurate, he will not necessarily win because we will still have to decide why the respondent did what it did, i.e. what was going on in the heads of the relevant individuals at the relevant time.

47. We accept that the claimant may to some extent have damaged his own credibility by some of the applications he has made and by what he has said and what has been said on his behalf at this hearing and at the September 2022 hearing in relation to those applications. However, we do not interpret the EAT's decision in Sud as being to the effect that whenever a party does this in the course of proceedings before a final hearing this makes a fair trial no longer possible. And we don't think that can possibly be the law.

48. It is not a rare thing for someone's credibility to be damaged in this way. For example, there are often preliminary hearings to deal with substantive issues where individuals who will also be witnesses at the final hearing give evidence, e.g. preliminary hearings in cases involving allegations of disability discrimination to decide whether the claimant was disabled in accordance with the Equality Act 2010. When deciding substantive issues at a preliminary hearing, the Tribunal may well have to make findings about the credibility of a witness. Where the Tribunal has made an adverse credibility finding against an individual at a preliminary hearing, and the same individual subsequently gives evidence at the final hearing, it is routine, and legitimate, for that finding to be relied on and referred to at the final hearing. The Tribunal at the final hearing will take it into account, but will form its own view as to that individual's credibility based on all the evidence before it. An adverse credibility finding made by a Tribunal at a preliminary hearing is never by itself going to be

determinative of disputes of fact about other things that arise at the final hearing. To put it another way: that the Tribunal at a preliminary hearing rejected a claimant's evidence does not mean that the Tribunal will necessarily reject all or even any of their evidence at the final hearing, still less does it fatally undermine the trust the Tribunal has in that claimant's veracity to such an extent as to make a fair trial impossible.

49. We are entirely satisfied that a fair final hearing remains possible in the present case. The final hearing has already started. Neither side suggested when it started that a fair trial was not possible. Both sides are apparently ready for it to resume. Once it resumes and concludes, we will almost certainly be making our decisions on factual disputes wholly or largely on the basis of the witness and other evidence presented at the final hearing itself, in particular the evidence directly on the factual disputes in question. Our decision-making process is not going to be significantly different from the process we would have adopted had the final hearing concluded in October 2021 as planned. Nothing has changed materially since the final hearing was adjourned part-heard in September 2021, from our point of view.

50. We think it is in everyone's best interests, and in accordance with the overriding objective, for us to do what we have been wanting to do since we first dealt with this case, namely (if the parties cannot reach a compromise; and it appears they cannot) make a decision on the merits, having heard all of the evidence.

51. For those reasons, we refuse the respondent's application to strike out.

Employment Judge Camp

30 December 2022