EMPLOYMENT TRIBUNALS

Claimant		Respondent
A	v	**London EV Company Limited**

Heard at: **Birmingham** **On:** **24 March 2023**

Before: **Employment Judge Wedderspoon**

Representation:

Claimant: **In Person**

Respondents: **Mr. P. Keith Counsel**

JUDGMENT

1. The application to strike out the claimant's claims is dismissed.

REASONS

1. By claim form dated 4 November 2019 the claimant brought complaints of unfair dismissal and disability discrimination. Her application to amend the claim to add other claims of discrimination and protected interest disclosure was refused by Employment Judge Perry on 21 May 2021. The claimant relies upon the disabilities of anxiety and depression. The claim for unfair dismissal claim was withdrawn by the claimant on 5 March 2021. The claims now pursued consist of a direct disability discrimination claim pursuant to section 13 of the Equality Act 2010 and a claim of discrimination arising from disability pursuant to section 15 of the Equality Act 2010; both claims concern the dismissal of the claimant.
2. Historically the case has been subject to four preliminary hearings. The first preliminary hearing took place before Employment Judge Camp on 20 May 2020. The respondent raised in its ET3 the inadequacy of the pleaded case and Judge Camp ordered the claimant to provide further and better particulars by 18 June 2020. The case management order was detailed and clear as to the information which the claimant was required to provide.
3. At a further case management hearing on 12 August 2020 the claimant had not provided the further and better particulars requested by Judge Camp. A further order was made to provide details of the claim; to provide medical records and an impact statement by 30 September 2020. At this hearing, the claimant had not sought full copies of relevant medical records from her G.P. She had provided a spreadsheet listing the effect of her disabilities but this was deemed by Judge Perry to be inadequate in terms of establishing disability status pursuant to section 6 of the Equality Act 2010. At paragraph 3.13 of his order Judge Perry expressed his sympathy for the claimant's difficulties but raised concerns about the detrimental effect on a fair trial for

the respondent in the absence of clarification of the claims pursued before the Tribunal.

4. On 19 November 2020 the matter came before Judge Cookson who listed a preliminary hearing to deal with the respondent's strike out application. By this stage the claimant had not clarified her pleaded case. Judge Cookson shared Judge Perry's concerns that unless the claimant pursued her claim within a reasonable period of time, there may be no option but to strike out the claim on the basis that a fair trial was no longer possible. At this stage the claimant explained she had not clarified her case because she was waiting for the outcome of her rule 50 application. She did not raise before Judge Cookson any health issue which prevented her from complying with Tribunal orders. The claimant was provided with a further opportunity to detail her claims by 18 December 2020. This timescale meant the Tribunal granted the claimant some 13 months post issue of her claim and some 18 months post dismissal to clarify her case. Further the claimant was also ordered to provide a medical report by 18 December 2020 and an impact statement by 22 January 2021. Rule 50 orders were made; a restricted reporting order and an anonymisation order.
5. On 5 March 2021 the matter came before Judge Cookson again who listed two further preliminary hearings; the first to deal with the claimant's application to amend her claim and the second to consider the respondent's application for a strike out. At the hearing it was noted the claimant had failed to comply with orders to clarify her claim and had failed to provide a disability impact statement. The claimant had provided her medical records. One hour before the hearing the claimant submitted an unsigned word document from a doctor stating that the claimant was experiencing significant mental health issues as a result of the ongoing employment tribunal process, including disassociative thoughts and suicidal thoughts at times. Working on the tribunal case was triggering significant migraines. There was a request from the doctor to allow the claimant more time. Judge Cookson refused the request for a postponement noting that the letter was not sent until one hour before the hearing was about to commence relying upon the fact that the letter did not say the claimant was unfit to participate in the hearing and made assertions about the ongoing process. The claimant informed the Judge that trying to work on a document providing further information about her claims had triggered severe migraines . The hearing focused on clarifying the claimant's complaints. The claimant was required to provide the full names at the next hearing. Judge Cookson made an unless order in respect of the failure to provide an impact statement since it was some 10 months since the claimant had been ordered to provide one.
6. On 21 May 2021 Employment Judge Perry refused the claimant's application to amend her claim and concluded the claim as originally pleaded disclosed two causes of action only namely direct disability discrimination and discrimination arising from disability; both concerning the act of dismissal. The case was listed for a final merits hearing between 9 and 12 May 2022. Judge Perry made further case management orders requiring disclosure to be provided by the respondent by 23 July 2021 and the claimant to provide disclosure by 20 August 2021. Written statements should be exchanged by 24 September 2021. Judge Perry determined that the issue of disability status would be determined as part of the final hearing. He also provided that the claimant should be permitted additional breaks as

a reasonable adjustment. Judge Perry referred to the importance of compliance with Tribunal orders and that failing to comply could result in striking out of a claim before or at the hearing.

7. On 5 August 2021 the respondent applied for an extension of time to exchange documents and provide the claimant with a draft chronology and cast list due to its main client being currently unwell. The claimant had no objections to this application. On 20 August 2021 the respondent provided its documents; draft chronology and cast list to the claimant and requested her documents by return. On 4 March 2022, the respondent requested documents from the claimant by 18 March 2022. On 8 April 2022 the claimant emailed the respondent to state that preparing the case had been challenging due to anxiety attacks. A family member was going to assist her. The claimant described the last eight months as having been challenging mentally and physically.
8. On 14 April 2022 the respondent served the final paginated bundle on the claimant. The respondent proposed to the date for exchange witness statements as 22 April 2022. By email dated 26 April 2022 the respondent applied for an unless order in respect of the claimant's provision of a witness statement. The respondent had not exchanged its statements at this stage but stated it was ready to do so. On 27 April 2022 the Tribunal issued a strike out warning to the claimant on the basis that she had not complied with the order of the Tribunal dated 21 May 2021 and the claim had not been actively pursued. The claimant was given until 4 May 2022 to object to the proposal by giving reasons in writing. On 2 May 2022 the claimant sought to postpone the final hearing. The claimant stated medical information was not available at the point of application but would be provided. By email dated 3 May 2022 the respondent opposed the application and sought an unless order in respect of the claimant's witness statements. Judge Camp refused the request to postpone the hearing on the basis the claimant had failed to explain why it would be in accordance with the overriding objective and failed to provide appropriate medical evidence.
9. By order dated 4 May 2022 Judge Wolfenden ordered the claimant to reply to Judge Camp's order by end of the day. The claimant responded by objecting to the application for an unless order to provide a witness statement. Judge Harding provided the claimant until 2.30p.m. on Friday, 6 May 2022 to produce medical evidence. The Judge would then consider whether to strike out the claimant's claim in accordance with Judge Camp's letter of 4 May 2022. The claimant emailed the Tribunal on 5 May 2022 stating she had attended a psychiatric appointment that day; medical evidence would be provided on 6 May 2022. By email dated 6 May 2022 the claimant stated she had uploaded some documents onto the respondent's internal portal on 12th April. She explained she was not registered with a GP at the moment and this had led to gaps in medication and she was in receipt of disability universal credit. Medical evidence dated 6 May 2022 stated that the claimant as unfit to participate in a final hearing by reason of the deterioration in the claimant's mental health and the claimant required stronger anti-depressants. On 6 May 2022 Judge Harding postponed the final hearing on the basis of the medical evidence but noted that the case would have had to be adjourned by reason of the lack of judicial resource. Further medical evidence produced by the claimant dated 8 December 2022 page 235 stated that the claimant had been unable to prepare for the final

hearing listed in May 2022 because of her mental health. On 23 November 2022 Judge Dimbylow ordered the claimant to provide medical evidence about her fitness to participate in proceedings by 28 March 2023. This was extended to 10 March 2013. The claimant provided medical evidence dated 17 March 2023 which stated that the claimant's mental health had improved; her concentration and memory had improved so that she can now fully participate in a hearing and in preparation for the hearing. It referred to the fact that the claimant tends to be obsessive and delays tasks.

Submissions

10. The respondent provided an updated skeleton argument to its application to strike out which the claimant was given time to read. It sought to strike out the application on a number of grounds including unreasonable conduct, failure to comply with an order and that a fair trial was no longer possible. The claimant submitted that having received the amended skeleton argument today in support of the application with additional grounds was unfair and it should be limited only to the grounds originally submitted. The Tribunal determined that pursuant to the overriding objective and in accordance with the interests of justice it would determine the application on all grounds submitted grounds; there was no disadvantage to the claimant as a litigant in person. The claimant had received the original skeleton argument dated 21 May 2021; this included the grounds pursued today at the hearing; the Tribunal had given the claimant time in the hearing to read the updated argument.
11. The respondent provided a detailed history of the case and the delays to final hearing and submitted that the claimant had acted unreasonably in delaying the progress of the case; failed to comply with the simplest of orders including providing medical evidence about her participation in a hearing and that very little progress had been made since the last hearing. It contended at this stage that it was no longer possible to have a fair trial. The respondent relied upon the amount of Tribunal time already taken up this case; the respondent had spent the sum of £37,000 in costs and by reason of the medical evidence provided by the claimant which referred to a tendency to delay tasks that there was little prospect of the case progressing. It was wholly disproportionate considering the two claims that remain. The claimant had failed to engage with disclosure. In response to the claimant's suggestion that she still suffered from migraines, the respondent questioned whether the claimant really would be able to prepare and participate in a hearing. At the very least an unless order should be put in place. A schedule of loss, witness statements and disclosure from the claimant were still outstanding. In summary the respondent submitted that the claimant's conduct had been unreasonable in terms of the delay and progress of the claim; she had not actively pursued her claim leaving everything to the last minute; she had acted vexatiously; failed to comply with Tribunal orders. The respondent had offered to exchange its statements with the claimant but the claimant had not completed hers.
12. The claimant stated that the respondent had not fully complied with orders either; the respondent had not provided its witness statements. Further she stated that by reason of her health she had been unable to comply with orders. She relied upon the up to date medical evidence and that she was mentally far better this year than last year. She suggested that she could provide a schedule of loss and disclosure within 3 weeks and witness

statement three weeks thereafter. The claimant also stated her main problem was that she sometimes got headaches which affected her ability to prepare her case. For this reason, she requested that the issue of disability status be dealt with first, as a preliminary issue, and then the final hearing listed. This would require modification of Judge Perry's order. The claimant stated she could do a three-day case but then would require a break before resuming evidence.

The Law

13. Pursuant to schedule 1 of the Employment Tribunal Rules of Procedure 2013, the overriding objective enables the Employment Tribunal to deal with cases fairly and justly. Dealing with the case fairly and justly so far as practical includes ensuring the parties are (a)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 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.
14. HHJ Tayler emphasised in the case of **Mr. T Smith the Tesco Stores Ltd (2023) EAT 1811** that the parties are not merely requested to assist the employment tribunal serving the overriding objective, they are required to do so.
15. Rule 37 (1)of the Employment Tribunal Rules 2013 provides 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 the claim or response on any of the following grounds; (a) that it is scandalous or vexatious or has no reasonable prospect of success; (b) has been scandalous unreasonable or vexatious; all(c) (non-compliance with any of these rules or with order of the tribunal; (d)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). 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.
16. At paragraph 36 of his judgement in **Smith v Tesco** HHJ Tayler stated the EAT and Court of Appeal have repeatedly emphasised the great care should be taken before striking out part of a claim and strike out of the whole claim is inappropriate if there is some proportionate sanction that may for example limit the claim or strike out only those claims that are misconceived or cannot be tried fairly. Anxious consideration is required before an entire claim is struck out on the grounds that the manner in which the proceedings are being conducted by or on behalf of the claimant has been scandalous unreasonable vexatious and that it is no longer possible to have a fair hearing.
17. In the case of **Bolch v Chipman (2004) IRLR 140**, Mr Justice Burton considered the approach to be adopted in considering whether it is appropriate to strike out on the basis of scandalous or unreasonable or vexatious conduct and concluded that the employment tribunal should ask

itself (1)whether there has been scandalous unreasonable or vexatious conduct of the proceedings if so, (2)(save in very limited circumstances where there has been wilful, deliberate or contumelious disobedience of a Tribunal order) whether a fair trial is no longer possible (3)whether strike out would be a proportionate response to the conduct in question.

18. This approach adopted by the Court of Appeal in **Blockbuster Entertainment Limited v James 2006** EWCA Civ 684 where Lord Justice Sedley stated the *"power of strike out as the employment tribunal reminded itself is a Draconian power not to be readily exercised. It comes into being if as in the judgement of the tribunal had happened here a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for exercise are that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps all that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether even so striking out is a proportionate response".*
19. In considering proportionality, the Court of Appeal noted "*the first object of any system of justice is to get triable cases tried. There can be no doubt among the allegations made by Mr. James are things which if true, merit concern and adjudication. There can be no doubt either that Mr. James has been difficult, querulous and unco-operative in many respects. Some of this may be attributable to the heavy artillery that have been deployed against him, though I hope that for the future he will be able to show the moderation and respect for others which he displayed in his oral submissions to this court. But the courts and tribunal is in this country are open to the difficult as well as to the compliant so long as they do not conduct their case unreasonably".*
20. In **Arrow Nominees Inc v Blackledge (2000) 2 BCLC 167** it was held in this context *"a fair trial is a trial which is conducted without an undue expenditure of time and money and with proper regard to the demands of other litigants upon the finite resources of the court"*.
21. In the case of **Emuemukoro v Croma Vigilant Scotland Ltd (2022) ICR 327** President, Mr. Justice Choudhury made a very important point about what constitutes a fair trial. He stated *"I do not accept Mr Kohanzad's proposition that the power can only be triggered where a fair trial is rendered impossible in an absolute sense. That approach would not take account of all the factors that are relevant to a fair trial which the Court of Appeal in Arrow Nominees set out. These include as I have already mentioned the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court. These are factors which are consistent with taking into account the overriding objective. If Mr. Kohanzad's proposition were correct and these considerations would all be so broad and 82 the feasibility of conducting a trial whilst the memories of witnesses remain sufficiently intact to deal with the issues in my judgement the question of fairness in this context is not confined that issue alone albeit that it is an important one to take into account it would almost always be possible to have a trial of the issues given enough time and resources are thrown at it discount regarding page the consequences of delay and costs for the other parties. However, it would clearly be inconsistent with the notion of fairness generally and the overriding fairness question had to be considered without regard to such matters."*

22. In the case of **Cox v Adecco Group UK & Ireland & others 2021 ICR 1307** the EAT considered the particular care the Tribunal and the represented respondents should take when dealing with litigants in person *"There has to be a reasonable attempt at identifying the claims and the issues before considering strikeout or making a deposit order. In some cases a proper analysis of the pleadings and any core documents in which the claimant seeks to identify the claims may show that there really is no claim and there are no issues to be identified; but more often there will be a claim if one reads the documents carefully even if it might require an amendment. Strike out is not a way of avoiding rolling up one's sleeves and identifying in reasonable detail the claims and issues; doing so is a prerequisite of considering whether the claim has reasonable prospects of success… Respondents seeking strikeout should not see it as a way of avoiding having to get to grips with the claim. They need to assist the employment tribunal in identifying what on a fair reading of the pleadings and other key documents in which the claimant set out the case the claims and issues are. Respondents, particularly if legally represented in accordance with their duties to assist the Tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the Tribunal to identify the documents and key passages of the documents in which the claim appears to be set out, even it may not be explicitly pleaded in a manner that would be expected of a lawyer and take particular care is a litigant in person has applied the wrong legal label to a factual claim that if properly pleaded would be arguable. In applying for strike out it is as well to take care as you may get it, then find this an appeal is being resisted with a losing hand. This does not mean that litigants in person have no responsibilities. So far as they can they should seek to explain their claims clearly even though they may not know the correct legal terms. They should focus on their core claims rather than trying to argue every conceivable point. The more prolix and convoluted the claim is the less a litigant in person can criticise an employment tribunal for failing to get to grips with all the possible claims and issues. Litigants in person should appreciate that usually when a tribunal requires additional information it is with the aim of clarifying and where possible simplifying the claim so that the focus is on the core contentions. The overriding objective also applies to litigants in person who should do all they can to help the employment tribunal clarify the claim. The employment tribunal can only be expected to take reasonable steps to identify claims and issues".*

23. His HHJ Tayler in the case of **Smith v Tesco** having upheld the judge's decision to strike out the claim stated at paragraph 47; *this judgement should not be seen as a green light for routinely striking out cases that are difficult to manage. It is nothing of the sort. We must remember that tribunal's of this country are open to the difficult. Strikeout is a last resort not a shortcut for stage to be reached at which it can properly be said that it is no longer possible to achieve a fair hearing yet that there will have been taken by the tribunal seeking to bring the matter to trial is likely to have been as much as would have been required if the parties have cooperated to undertake the hearing. This case is exceptional because after conspicuously careful forethought and fair case management the claimant prepared to cooperate with the respondent and the employment tribunal to achieve a fair trial. He robbed that opportunity.*

Conclusions

24. There has been delay in the clarification of the claimant's case which is not adequately explained by the claimant's ill health. Although medical evidence supports the claimant's contention that she was too unwell to prepare her case from May 2022; the claimant deliberately failed to comply with earlier Tribunal orders. This was both unreasonable and vexatious conduct and the claimant failed to actively pursue her claim. The claimant delayed in complying with the Tribunal orders (as explained to Judge Cookson) because she awaited the outcome of her Rule 50 application.
25. Deciding when it is convenient for a party to comply with a Tribunal order is not a choice that a party has; compliance with Tribunal orders, is mandatory and not optional. Clarification of the parties respective cases is an essential step and forms the foundation of trial preparation; it is the list of issues which determines the disclosure and witness evidence which is required for the final hearing.
26. The effect of delay on a fair trial has been clearly explained in the case law referred to above. The claimant has also been warned by both Judge Perry and Judge Cookson as to the impact of delay on a fair trial. Failure to comply with case management orders by reason of ill health has been a reason for her delay in progressing the case latterly only.
27. The latest medical material available states that the claimant's health has improved. The claimant is in a position to both prepare for the trial and participate in a final hearing. The Tribunal notes that the claimant has a tendency to delay matters as a part of her impairment.
28. The two claims which remain in issue following the case management of Judge Perry are limited to direct disability discrimination and discrimination arising from disability related to the act of dismissal. It was very clear from the issue of the proceedings that the claimant was complaining about the act of dismissal and that she contends it is discriminatory by reason of her disability. The respondent has been ready to proceed for sometime and has its witness statements ready to exchange. There is no suggestion that its witnesses are no longer available or can not attend a final hearing. To this extent the Tribunal finds that the respondent is not evidentially prejudiced. However, it has incurred a substantial amount of costs which is disproportionate to the limited claim now pursued.
29. However, striking out a claim is a draconian power. The Tribunal is mindful that the claimant has failed to comply with Tribunal orders (even before she was too unwell to participate); delayed in progressing this claim and acted at times both unreasonably and vexatiously. There has been a substantial amount of Tribunal time and resource and expense incurred by the respondent in defending this claim. Striking out the claim would leave the claimant with no redress. She would be significantly prejudiced if the Tribunal took this stance. The previous trial listing was postponed because of the claimant's poor health and due to lack of judicial resource. The claimant assures the Tribunal she can now proceed but seeks a reasonable adjustment in terms of the listing of the final hearing.
30. At present the Employment Judge determines that a fair trial is possible taking into account that the case has now been clarified; there is no trial listing in existence for this matter; the respondent is ready to proceed (cognisant since Judge Perry's order, of a limited claim which was known

from the date of the issue of the proceedings) and awaits the claimant's schedule of loss, disclosure and witness evidence. However, the Tribunal notes that any continuing non-compliance with case management orders and further delay could well mean that a fair trial is no longer possible. At present and with the corroborative medical evidence and the claimant's assurance she is ready to proceed, the Tribunal determines that it would be disproportionate to strike out the claim. Instead, the Tribunal finds that an unless order requiring the service of a schedule of loss, disclosure and witness evidence is proportionate and so orders in the attached order.

31. The Tribunal does not consider that the variation to Judge Perry's order is required to split disability status and the final hearing but timetables the final hearing to be listed so to start midweek on week one and into week two. This is a reasonable adjustment for the claimant and will allow her a rest over the weekend during the final substantive hearing.

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Employment Judge Wedderspoon

4 April 2023

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