EMPLOYMENT TRIBUNALS

Claimant: Mr M Clements

Respondents: Secretary of State for Justice (R1)
Mr Neil Stewart (R2)

Heard at: Midlands West Tribunal via Cloud Video Platform

On: 24 February 2023

Before: Employment Judge Brewer

Representation

Claimant: Mr S Martins, Consultant
Respondent: Ms J Moore, Counsel

JUDGMENT

The claimant's claims are dismissed as being out of time or otherwise struck out

REASONS

Introduction

1. This case commenced in July 2021 and more than 18 months later there is still no adequately defined list of issues, no case management orders have been made save for the provision of a schedule of loss and relating to further particulars. The case has not yet been listed for a final hearing.

2. The claimant's claim is that he suffered unlawful detriments on health and safety grounds within the meaning of s.44(1A)(a) and/or (b), Employment Rights Act 1996 (ERA).

3. The case was not particularly well pleaded and on 20 December 2021 EJ Harding wrote to the claimant asking him to provide a list of detriments which he asserted

had been done because he had refused to return to the workplace, and to do so by 7 January 2022. I shall return to that matter below, suffice it to say that the claimant's response did not properly particularise his claims.

4. There was an initial case management hearing in October 2022 before EJ Beck who was unable to identify all of the issues in the case, despite the fact that at that stage it had been ongoing for more than a year, because the claimant's solicitor advised that he had had insufficient time to take his client's instructions. In the circumstances it was ordered that there be an open preliminary hearing to determine all, or a combination of the following:

    a. a technical amendment to the claimant's claims which had simply quoted the wrong section number,

    b. whether the claimant's complaints of unlawful detriment on health and safety grounds were made out of time and if so whether to extend time,

    c. an application by the claimant to amend his claim to include post termination detriments and

    d. an application by the respondent to strike out the claims or in the alternative make deposit orders pursuant to rules 37 and 39 respectively of the Employment Tribunal Rules 2013.

5. That preliminary hearing came before me, today. The claimant no longer pursues an application to amend the claim to include post termination detriments and the technical amendment to the claimant's claim was conceded by the respondent.

6. I heard oral evidence from the claimant, I had a bundle of documents and written submissions from the respondent. I heard and have considered oral submissions from both representatives, and I am grateful to them for their assistance in navigating this preliminary hearing.

Issues

7. Given the above, I was left to deal with the out of time point and the application to make an order to strike out the claimant's claims or in the alternative required the claimant pay a deposit as a condition of continuing some or all of his claims.

Law

8. I set out here a summary of the relevant law.

Time limits

Reasonably practicable

9. Section 48(3) ERA is in the following terms:

> *"An employment tribunal shall not consider a complaint under this section unless it is presented—*

> *(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or*
>
> *(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."*

10. The section should be given a 'liberal construction in favour of the employee' (**Dedman v British Building and Engineering Appliances Ltd** 1974 ICR 53, CA).

11. The onus of proving that presentation in time was not reasonably practicable rests on the claimant. '*That imposes a duty upon him to show precisely why it was that he did not present his complaint'* (**Porter v Bandridge Ltd** 1978 ICR 943, CA). Accordingly, if the claimant fails to argue that it was not reasonably practicable to present the claim in time, the tribunal will find that it was reasonably practicable (**Sterling v United Learning Trust** EAT 0439/14).

12. Even if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his or her favour. The tribunal must then go on to decide whether the claim was presented 'within such further period as the tribunal considers reasonable'.

13. In **Palmer and anor v Southend-on-Sea Borough Council** 1984 ICR 372, CA, the Court of Appeal conducted a general review of the authorities and concluded that 'reasonably practicable' does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like 'reasonably feasible'. Lady Smith in **Asda Stores Ltd v Kauser** EAT 0165/07 explained it in the following words: *'the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done'.*

Presentation within further reasonable period

14. In **University Hospitals Bristol NHS Foundation Trust v Williams** EAT 0291/12 the EAT emphasised that this limb does not require the tribunal to be satisfied that the claimant presented the claim as soon as reasonably practicable after the expiry of the time limit in order to allow the claim to proceed. Rather, it requires the tribunal to apply the less stringent test of asking whether the claim was presented within a reasonable time after the time limit expired. That said, a tribunal is unlikely to accept a late claim where the claimant fails to act promptly once the obstacle that prevented the claim being made in time in the first place has been removed. What amounts to a 'further reasonable period' for the purposes of s.48 is essentially a matter of fact for the employment tribunal to decide on the particular circumstances of the case. There is no hard and fast rule about what period of delay is reasonable and the extent of the delay is just one of the circumstances tribunals will need to consider.

Continuing act

15. The Court of Appeal in **Hendricks v Metropolitan Police Commissioner** [2002] EWCA Civ 1686, acknowledged that where an employer applies a discriminatory or detrimental 'policy, rule, practice, scheme or regime' which continues to apply over a period of time, this has rightly been held to amount to conduct extending over a period. However, **Hendricks** stressed that these are simply examples – and are not exhaustive examples – of what might constitute conduct extending over a period.

16. The result is that in cases involving numerous allegations of acts or omissions it is not necessary for an applicant to establish the existence of a policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken. Rather, what the applicant has to prove, in order to establish conduct extending over a period, is (*a*) that the incidents are linked to each other, and (b) that they are evidence of 'an ongoing situation or continuing state of affairs'. As the Court of Appeal stated in **Hendricks**, *'The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed*'.

Strike out

17. The relevant part of Rule 37 is as follows:

> *"(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;* […]

18. In relation to 'no reasonable prospect of success', the principles applicable to strike out under this provision were set out by the EAT in **Cox v Adecco Group UK & Ireland** [2021] ICR 1307 (sub-paragraphs (7) and (8) apply only to litigants in person which in this case the claimant is not):

> *"…a number of general propositions emerge, some generally well understood, some not so much.*
>
> *(1) No one gains by truly hopeless cases being pursued to a hearing.*

(2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate.

(3) If the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate.

(4) The claimant's case must ordinarily be taken at its highest.

(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is.

(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim.
[…]

(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances."

19. There has to be a reasonable attempt at identifying the claims and the issues before considering strike out or making a deposit order.

20. In relation to unreasonable conduct, **Blockbuster Entertainment Ltd v James** [2006] EWCA Civ 684, the Court of Appeal confirmed that the correct approach to the exercise of the strike out power for unreasonable conduct is that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If either of these conditions are fulfilled, it becomes necessary to consider whether striking out is a proportionate response.

21. There is considerable overlap between Rule 37(1)(b) and (c). Deliberate and persistent breaches may more likely fall under the former provision, negligent or reckless non-compliance under the latter.

22. Other relevant cases are referred to below.

Findings of fact

23. The starting point of the hearing was to try to identify precisely what claims were being pursued by the claimant.

24. In his evidence the claimant said that the circumstance of danger which he reasonably believed to be serious and imminent occurred on 30 January 2021. The claimant's evidence was that on that date he believed he had lost his sense of taste, he knew that this was a symptom of COVID-19, he told the respondents

he was going to leave work and take a COVID test, which he did. The test result arrived after 2 days, was negative and the claimant returned to work.

25. The claimant said that as a result of the above, he suffered 4 detriments as follows:

    a. the claimant filed a grievance on 30 January 2021 which remains unresolved,

    b. the claimant raised a grievance on 15 February 2021 which has been ignored,

    c. the claimant raised a grievance on 22 March 2021 which has been ignored,

    d. the claimant was bullied and threatened with a "*COVID related absence threat*" on 4 July 2021.

26. Early conciliation commenced with the first respondent on 16 May 2021 (Day A) and with the second respondent on 17 May 2021 (Day A).

27. Early conciliation certificates were issued in relation to the first respondent on 27 June 2021 (Day B) and in relation to the second respondent on 28 June 2021 (Day B).

28. Where the act complained of is the refusal by employers to redress a grievance, time begins to run from the date on which the decision was made, and not the date when it was communicated to the claimant (**Virdi v Commissioner of Police of the Metropolis** [2007] IRLR 24, EAT)

29. It follows that the claims at paragraph 25 (a) and (b) above are out of time unless they form part of a continuing act with the allegations at paragraph 25 (c) and/or (d), to which I shall return below.

30. What follows is the procedural chronology of this case which was set out by Ms Moore in her skeleton argument none of which was challenged by Mr Martins.

31. The particulars attached to the ET1 were "*inadequately pleaded*", as described by EJ Harding, who therefore ordered the claimant to provide a list of detriments on which he relies by 7 January.2022.

32. The claimant failed to do so in time, providing a list on 10 January 2022 which replicated the content of the inadequately pleaded ET1.

33. By e-mail on 11 January 2022 a further list of 17 points were raised by the claimant but, as EJ Beck later noted, "*they were not particularised by date, nor did they give sufficient details of the detrimental treatment said to have occurred in consequence of the claimant leaving the workplace on the 28/1/22*".

34. A telephone hearing was listed for 4 October 2022.

35. On 30 September 2022, the respondents sent to the Tribunal a bundle for the telephone hearing, along with a draft list of issues and draft case management agenda. Prior to this, efforts had been made to agree those with the claimant. The respondents suggested that the claimant complete the list of issues; and he was invited to provide his own agenda. There was no response and no agenda or list of issues provided by the claimant before the hearing.

36. At the telephone hearing on 4 October 2022, the claimant stated through his representative that there had not been time to prepare a list of issues before the hearing. The claimant' repreentative requested a 25 minutes' break from the hearing to take instructions, which was granted. Despite this as EJ Beck's case summary states, "*Unfortunately, this did not result in me being able to draw up a full list of alleged detriments suffered*". EJ Beck started a list, providing an example of the detail and format required and noted that some of the dates provided contradicted the pleaded claim.

37. During the hearing on 4 October 2022, the respondents requested that any directions for the provision of further or clearer particulars be subject to an unless order, given the history of the case. EJ Beck declined to make such an order, noting "*The claimant is aware he must comply with the directions made at 6, 8 and 10 below*". The directions to which EJ Beck specifically referred the Claimant provided as follows,

    a. **(6)** that the claimant shall by 1 November 2022 clarify the detriments he said he suffered due to leaving work, which "*should include the date of the act which is said to be the detriment, a brief description of the act, and who from the respondent was involved in it*",

    b. **(8)** that by 29 November 2022 the claimant shall lodge an amendment application in respect of s. 44(1A) ERA 1996, and deal with the respondents' arguments that claimant's claim is out of time; and

    c. **(10)** that the claimant shall by 10 January 2023 file a response to the respondents' application for strike out/deposit order (including details of his means).

38. Those directions have not been properly complied with.

39. On 1 November 2022, the claimant sent an email to the Tribunal and respondents providing some further dates and details in respect of some of the alleged detriments, partly in red text for unclear reasons, and which still in part appeared to contradict the ET1.

40. On 30 November 2022, the claimant sought a 14-day extension**.** It was assumed this was in relation to compliance with paragraph 8 of the 4 October 2022 order (see above). The respondents responded leaving the matter to the Tribunal but proposing an alternative timeline should the extension be granted.

41. On 28 December 2022 (a month late), the claimant sent a bullet pointed list of dates said to represent "*the detriments relied upon*" without detailing what occurred on which date, and which detriments had now been abandoned, thereby seemingly suggesting that all claims were brought in time. The claimant made an

unclear/erroneous effort to amend the claim in respect of the new s.44(1A) provisions.

42. At the date of this hearing, contrary to the order referred to at paragraph 37(c) above, the respondents had received no response to the application for strike out/deposit order, or details of the claimant's means to pay (although these were provided during the hearing).

43. Contrary to EJ Beck's preparation directions at the time of the hearing the claimant had not engaged with the respondents' repeated attempts to agree a bundle index or informed them whether any response to the application has been sent to the Tribunal. The only response, received on 15 February 2023, stated "*We shall revert to out substantively tomorrow*." [*sic*]. This was despite the respondents' representative informing the claimant of the directions requiring a response and an agreed bundle, and that she would be on annual leave on 16-17 February 2023.

Discussion and conclusions

44. As set out above I am left with two matters to determine:

    a. whether the claimant's complaints of unlawful detriment on health and safety grounds were made out of time and if so whether to extend time, and

    b. an application by the respondent to strike out the claims or in the alternative make deposit orders pursuant to rules 37 and 39 respectively of the Employment Tribunal Rules 2013.

Out of time

45. I can deal with the first matter quite briefly.

46. In his evidence to me the claimant confirmed that there was nothing which prevented him from presenting his claim in respect of what he now says are the first two detriments before 26 July 2021. In other words, there was no physical or mental impediment to him bringing his first and/or second detriment complaint within the normal time limit. In those circumstances I do not need to go on to consider whether the extra time taken to present the claims was reasonable. Both claims were submitted out of time.

47. The argument by Mr Martins on behalf of the claimant is that the claims should be allowed to proceed because they form part of, to use the common terminology, a continuing act. The claimant's position is that the continuing act encompass is all four detriments.

48. In relation to the claimant's first grievance, in his original claim form he states that he had been temporarily put to work on reception, after he left work to take his COVID test and sought to return he was informed that he had unauthorised absence in the previous 12 months and that he was going to return to his normal role. The claimant says that he filed a grievance that he was being bullied by Mr. Stewart.

49. The claimant says that his second grievance dealt with "*matters leading up to my absence from work*", that absence being the period he left to take and await the outcome of the COVID test.

50. The claimant says that his third grievance was what he calls a "*rehashing*" of what he had previously sent.

51. The claimant is unclear as to who he sent his first grievance to but ay that the second one was submitted to the Governor and the third one to a Mr Penny.

52. The claimant says that the first grievance remains unresolved and the second two were ignored.

53. There is, in the original ET1 a reference to the 4th detriment, under the general heading "*the detriment*" but it is important to note that what the claimant now says are the first three detriments do not appear as detriments in the original claim form.

54. When ordered to clarify the detriments, the claimant purported to do so in an e-mail of 10 January 2022, but he simply repeated what is in the original claim form; that is to say those matters set out under the heading "*the detriments*". to reiterate, these do not include what the claimant now says are the first three detriments.

55. In a subsequent e-mail dated 11 January 2022, the claimant says that he suffered 17 detriments one of which relates to two outstanding grievances but without any further detail.

56. In a further attempt to set out the detriments an e-mail was sent on 1 November 2022 on behalf of the claimant setting out six detriments none of which referred to grievances.

57. As I have indicated above, the claimant's position at this hearing was that there are four detriments, three of which relate to unresolved or ignored grievances and the fourth to a very unclear allegation that the claimant was bullied and threatened with a "*COVID related absence threat*" although I stress there is absolutely no explanation as to what the bullying or threatening amounted to or even what is meant by a COVID related absence threat. The claimant also does not say by whom he was bullied or threatened.

58. As I have set out above what the claimant has to prove, in order to establish conduct extending over a period, is (a) that the incidents are linked to each other, and (b) that they are evidence of 'an ongoing situation or continuing state of affairs'.

59. I concede that it is possible even on the bare facts available, that the claimant could show that the detriments are all linked in the sense that the first detriment and the last one both seem to relate to COVID and the third detriment is related, supposedly, to a rehash of the first two grievances, and it may be inferred therefore that they also relate to COVID. But there is still insufficient detail to understand the claimant's case and it remains entirely unclear to me how the

claimant says there is any evidence of an ongoing or continuing state of affairs. The claimant says that the first grievance is ongoing in the sense that it is unresolved. The claimant says that his second grievance sent to the governor was ignored and that the third grievance which was sent to Mr Penny was also ignored. Taking the claimant's case at its highest therefore, there was an ongoing grievance being dealt with by unnamed persons and two grievances which have been ignored by different people. There is then a fourth detriment which on the face of it makes no sense.

60. In my judgement there is no reasonable prospect of the claimant persuading an Employment Tribunal that these detriments are evidence of a continuing state of affairs and therefore my conclusion is that the first two detriments are claims which were made out of time, the Tribunal does not have jurisdiction to hear them, and they are dismissed.

No reasonable prospect of success (Rule 37(1)(a))

61. I turn it next to the application the remaining claims be struck out on the basis that they have no reasonable prospect of success.

62. The claimant's case is brought under s.44(1A)(a) and/or (b) ERA.

63. The claim under (a) requires that the claimant show the following:

    a. there was a circumstance of danger,
    b. which he reasonably believed to be serious and imminent,
    c. which he could not reasonably have been expected to avert,
    d. as a result of which he left or proposed to leave or, while the danger persisted, refused to return to work.

64. The claim under (b) requires the claimant to show the following:

    a. there was a circumstance of danger,
    b. which he reasonably believed to be serious and imminent,
    c. as a result of which he took or proposed to take appropriate steps to protect himself or other persons from the danger.

65. The circumstance of danger was, according to the claimant's evidence before me, that he believed he may have COVID. He says that as a result of that he left work in order to get a COVID test although it is quite clear from all of the pleadings that he was allowed to leave (although that does not prevent his leaving being "appropriate steps").

66. It seems to me that the key question is whether there is any reasonable prospect of the claimant persuading a Tribunal sitting on the final hearing of this matter that his belief that he may have COVID was circumstance of danger within the meaning of the ERA.

67. Giving the normal English meaning to the words used in the statute, it seems to me that "danger" is synonymous with injury, damage, loss, pain or peril. However, the existence of a danger is not sufficient to give the employee protection from

detriment. The danger must be such that the claimant has a reasonable belief that it was serious and imminent.

68. It is difficult to pin down exactly what is meant by “serious”, but a reasonable working definition might be “bad or dangerous enough to worry you”.

69. The question of whether something is imminent is whether it is likely to happen very soon.

70. Thus the first two parts of the statutory test, whether under s.44(1A)(a) or (b) is whether there was a state of affairs which would cause injury, damage, loss, pain or peril bad enough to cause worry and that the injury, damage, loss, pain or peril was likely to happen very soon.

71. Taking the claimant's case at its highest, when he left work on 30 January 2021 to get his COVID test, he either had COVID or he did not have it.

72. If he did not have it there was no circumstance of danger.

73. If he did have it, then him leaving work to have a COVID could not amount to him leaving work because he could not reasonably have averted the circumstance of danger, i.e. having COVID (s.44(1A)(a)), because he had it so could not avert it, and it could not amount to an appropriate step to protect himself (s44(1A)(b)), because he already had COVID, so protect from what?

74. It is possible that the claimant could argue that leaving work was an appropriate step to protect other persons from the serious and imminent circumstance of danger, but there is no evidence that the claimant worked with anyone who was clinically vulnerable and because by definition those who were particularly at risk from COVID would likely have been shielding and therefore not at work in any event, proving the reasonable belief will be extremely difficult. Nowhere in any of the pleadings or subsequent attempts at clarifying the claimant’s case does he suggest that he had any reason to believe that anyone in hi workplace was at serious and imminent risk from him when he left work on 30 January 2021 to get his COVID test.

75. At paragraph 17 of the grounds of claim the claimant says as follows:

> *“when the Secretary of State made such serious and imminent threat of declaration on 10 February 2020, formally declaring that coronavirus posed serious imminent threat to public health, I refused to return to the workplace because I believed I had contracted COVID-19 so I decided to take a COVID test”*

76. However, at paragraph 9 of the grounds of claim the claimant says as follows:

> *“I had eaten 3 satsuma's but couldn't taste of them, so I rang Amy Langston and she told me to go [for] a COVID test”*

77. Given that the claimant had permission to leave work it is difficult to see how he can argue that he refused to return to the workplace because he believed he had contracted the virus. Taking his grounds of complaint in the round, what seems

to have happened is that he told his line manager that he believed he may have contracted COVID-19 and she told him to go and get a COVID test from which we can infer that he would not return unless and until he had the result.

78. In those circumstances it is also very difficult to see any reasonable prospect of the claimant persuading an Employment Tribunal that his leaving work caused any detriment given that he had permission to leave work.

79. Furthermore, given all of the circumstances, to date the claimant has presented no credible argument as to the connection between his first grievance being unresolved, his second and third grievances being ignored and the entirely unclear threat which he refers to as his fourth detriment and him leaving work with permission from his line manager in order to get a COVID test.

80. Taking the claimant's case at its highest, in my judgment there is no reasonable prospect of him persuading an Employment Tribunal that there was a circumstance of danger. Even if he could do that, there is no reasonable prospect of him persuading an Employment Tribunal that such danger was serious or imminent whether to himself or others. Furthermore, even if he could do both of those things, I consider that there is no reasonable prospect of him persuading an Employment Tribunal of the causation element of the statutory test for health and safety detriment under section 44(1A) ERA.

81. I consider that this claim has no reasonable prospect of success and should be struck out.

82. Notwithstanding the finding above, I should nevertheless go on to consider the respondents' alternative grounds for seeking a strike out.

The proceedings have been conducted in an unreasonable manner by or on behalf of the claimant (Rule 37(1)(b))

83. As I have already mentioned, this case commenced on 26 July 2021 by the presentation of the claim form. Presumably the claimant believed he had a claim when he commenced early conciliation more than two months before that date.

84. Despite that passage of time this case has barely begun and the only significant order which has been made and complied with is the requirement for the claimant to provide a schedule of loss. All other procedural steps have been aimed at trying to understand what the claimant's case actually is. His claim form is entirely unclear.

85. I have set out above in some detail what has taken place over the last 18 months in order to try to get the claimant to set out precisely what his claims are and even now there is no definitive list of issues, although it is possible that one could now be constructed based on what the claimant said at this preliminary hearing.

86. The respondents argue that the claimant's conduct to date has been unreasonable, and it is fair to say that his claim has vacillated wildly during the course of the last 18 months.

87. Initially ~~the claim~~ form set out four detriments only one of which is now relied upon.

88. Subsequent “clarification” led to the identification of 17 detriments and then that was reduced not long after to six detriments and it is fair to say that prior to this preliminary hearing it was impossible for the respondents to know what the legal case was which they had to respond to.

89. Of course, it is always open for a claimant to say that they do not fully understand the law, they have done their best to plead their case and that the issues can be identified during case management. However, in this case, the claimant has been professionally represented throughout, there has been an attempt at a preliminary hearing to identify the issues and the claimant has been given significant time to sort out and set out exactly what his claims are and he has not yet done so.

90. It is difficult to understand why that is the case. When the claimant commenced early conciliation in May 2021, he must have believed then he had a claim against both respondents despite which it is not yet possible to get him to properly elucidate exactly what that claim is, and I consider that to be wholly unreasonable in the circumstances.

91. I find that the claimant's conduct has been unreasonable.

92. Furthermore, in my judgment It is difficult to see how this unreasonable conduct does also not amount to a deliberate and persistent disregard of a key procedural step in the Employment Tribunal process, that of identifying the issues. In truth, identifying the issues should be the easiest step in the Employment Tribunal litigation process because that simply requires the claimant to say what they are claiming and why in relation to the applicable law. Conceding that a lay claimant may need assistance in doing that, in this case, as I have said, the claimant is professionally represented and therefore it is difficult to conclude other than the failings are deliberate.

93. The alternative to unreasonable conduct being deliberate and persistent as a reason to strike out their claims, is that a fair trial is impossible.

94. The respondents argue that a fair trial is impossible and point out that in **Emuemukoro v Croma Vigilant (Scotland) Ltd** [2022] ICR 327 and **Arrow Nominees Inc v Blackledge** [2000] 2 BCLC 167 **i**t was held that a hypothetical possibility that with the investment of more time and money, and assuming future cooperation, a fair trial may be achieved is no answer.

95. I take the point made by the respondents that if enough resources are thrown at any case a fair trial is possible and that regard must be paid to the consequences of delay and costs to the respondents but, as I said to the parties at the hearing, if I was minded to not strike out the claims, given the claimant’s evidence and the submissions by Mr Martin's it would be possible for me to set out a definitive list of issues although I cannot deny the possibility that that list could be challenged and yet again altered by the claimant in which case we would be back to square one.

96. I do not think I can say that a fair trial is impossible as things stand.

97. However, as I have set out above, if the claims had not been struck out under Rule 37(1)(a) I should consider whether they should be struck out under 37(1)(b) having found that there was unreasonable conduct and that requires an assessment of whether striking out the claims is proportionate.

Is strike out proportionate?

98. In my judgment, given the failing's in the pleading of the claimant's case, given the number of opportunities the claimant has had to perfect his claim, given the length of time the claimant has had to explain precisely what he is claiming and given the fact that he has been professionally represented throughout, I consider that strikeout for unreasonable conduct is proportionate in this case and had the claims not been already struck out on the basis of no reasonable prospect of success, I would have no hesitation in striking out the claims for unreasonable conduct.

Non-compliance with ET Rules or with an order of the Tribunal (Rule 37(1)(c))

99. The respondents finally rely upon the failure of the claimant to comply with the orders of the Employment Tribunal as a basis for the strike out application.

100. In this case, as no doubt in most cases, there is a significant overlap between unreasonable conduct where that relates to failing to properly plead their case or comply with the Tribunal's orders to provide proper further particulars and the application to strike out for non-compliance.

101. I repeat here what I said above about the failings in the pleaded ae even after more than 18 months of this litigation. I can only conclude that there is here a series of deliberate failures to properly plead this case in compliance with the Tribunal's Orders and I consider that strikeout for non-compliance with the Tribunal's Rules is proportionate in this case and had the claims not been already struck out on the basis of no reasonable prospect of success, I would have no hesitation in striking out the claims for non-compliance.

102. For all the above reasons the claimant's claims are struck out and dismissed.

Employment Judge Brewer
27 February 2023