EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000204/2022

Held in Chambers in Glasgow on 19 June 2023

Employment Judge D Hoey

Mr S Doyle	**Claimant** **In Person**
Glasgow Credit Union	**Respondent** **Represented by:** **Ms Gilzean -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The respondent's application for strike out of the claim is refused and the claim shall proceed to a final hearing without further delay.

REASONS

1. The claimant lodged a claim on 29 December 2022 in respect of automatically unfair dismissal. The respondent lodged a response. At a preliminary hearing the issues were identified and the claimant was required to provide information to ensure the respondent could fairly respond to the claim that had been raised. The respondent maintained the claimant had not provided the

information and sought the necessary details. Ultimately the respondent argued the necessary information had not been provided and sought strike out of the claim, the claimant having failed to comply with order of the Tribunal and there being no reasonable prospects of success.

2. The parties had agreed that the matter would be dealt with in chambers with both parties providing full written submissions. The respondent lodged a 6 page submission. The claimant argued the orders had been complied with and as a lay person should be given leeway. The claimant by email stated that a document was attached to the email which set out the full response. There was no document attached to the email and the administration made a number of calls to the claimant to seek this document. A final request was issued by email on 16 June for the attachment.

The strike out application

3. The respondent’s written application runs to 6 pages. It is not reproduced in full, but it has been considered in its entirety. The respondent alleges that there are no reasonable prospects of success since the disclosures relied upon by the claimant cannot, in law, amount to a protected and qualifying disclosure. Secondly the respondent argues the claimant has repeatedly and persistently failed to comply with orders rendering it impossible for the respondent to respond to the claim, there being no notice of the specifics of the claim raised and as such the claim should be struck out.

4. The claimant in correspondence stated that he had tried “within the bounds of capabilities” to comply with the orders and he has other commitments that take up his time. He also argued he had made it clear he reported that the chair had misled the board on at least 2 occasions and had raised concern about solvency. He also argued the disclosures do have reasonable prospects of success.

Facts

5. The facts necessary to determine the application are not in dispute and for the purposes of determining the preliminary issue are set out below.

6. The claimant lodged his claim form on 29 December 2022. He had less than a year's service and ticked the box stating he had been unfairly dismissed and was making a whistleblowing claim. When asked in the ET1 to set out details of his claim the claimant set the position out in a paragraph. He said that when he raised a "speak up/whistleblowing complaint" he was suspended and subsequently dismissed. He believed he had been "persecuted for having the audacity to question those in more senior roles around their personal behaviours" which the claimant believed to be out of step with FCA conduct rules.

7. The respondent in their ET3 stated that the claimant was not employed by the respondent as he was engaged as non executive director and was removed from office. As he was not an employee or a worker the Tribunal had no jurisdiction. The respondent's alternative position was that the claimant had not been unfairly dismissed or subjected to any detriment. It was said that the respondent discovered the claimant had not been honest and that he was removed for that reason. The ET3 also stated that the ET1 did not make clear what the disclosures relied upon were.

8. The respondent completed the agenda that is used prior to case management preliminary hearings to focus the issues. The claimant had not completed an agenda. The respondent stated that it needed further specification of the claimant's claim and in particular details about the disclosures relied upon – what it was, to whom it was made, what was said and when, together with additional information such as the information disclosed, the legal obligation breached, why it was said to have been in the public interest and in good faith and the disadvantage the claimant says he suffered because of each disclosure.

9. A preliminary hearing had been fixed for 7 March and on 2 March the claimant sought a postponement as he was away on business nd required time to look over the papers in this case. The request was refused and the preliminary hearing took place on 7 March 2023.

10. At the preliminary hearing the claimant said his claim was straightforward as he had made 3 disclosures, at least 2 of which his employer had known about and he said as an employee or worker he had been dismissed or suffered a detriment because of those disclosures. He was advised of the importance of setting out the precise basis of the claim to ensure the respondent knows the case it is defending (and can ensure relevant evidence is brought to respond to the claim). The claimant was ordered by 28 March 2023 to provide in writing full and precise specification of each disclosure relied upon:

    a. The information the claimant said he communicated in respect of the 3 disclosures including what information was included, when and to whom it was communicated;

    b. The legal failure relied upon (by reference to the specific sections of the Employment Rights Act which were set out in summary form to assist the claimant);

    c. Why the claimant said each disclosure was in the public interest; and

    d. In what way the disclosures were made in good faith

11. The claimant was also required to provide documents relied upon by 28 March. Witness statements were to be exchanged no later than 30 May 2023.

12. It was agreed that a preliminary hearing would take place to determine worker or employment status.

13. The Note made it clear that the parties were under a duty to comply with the orders and a failure to comply can have serious consequences. The Note stated that if the Order was not complied with an expenses order could be made or the claim could be struck out.

28 March response by the claimant

14. On or around 28 March the claimant sent an email to the respondent. It was his response to the Tribunal's order for detail.

The disclosures

15. The first matter was to be "the information the claimant said he communicated on which he relies in support of the 3 disclosures to include what precisely

that information contained, when it was communicated and to whom". The claimant said as follows.

16. He stated that the first disclosure was a "protected disclosure to the FCA in respect of financial mismanagement of the Glasgow Credit Union with regards to retained profit position and dividend position". No further details were provided.

17. The second disclosure was "in respect of breach of the conduct rules on integrity by the chair of the credit union with a more experience board director Gordon Keenan". No further details were provided.

18. The final disclosure was Disclosure request via the ET1 form in respect of disclosure to relevant regulator around irregularities in disclosures made by the board chair after my suspension (but prior to my termination) which became apparent in documentation supplied under a subject access request.

19. The second question was the legal failures relied upon by the claimant in respect of each disclosure. The claimant said firstly "Lack of fiduciary responsibility in respect of the management of the credit unions finances in a 'mutual' manner" and secondly "Breach of the FCA conduct rules on integrity by the board Chair in respect of disclosures at meetings which transpired to be misleading to the board."

20. The third matter was to whom a disclosure was made if not to the employer and why it was a protected and qualifying disclosure in terms of the Act. The

claimant said "Experienced board director whom I understood used the disclosure as a basis to challenge. Leading that this led back to me as being the person who disclosed the information."

21. With regard to why it was in the public interest the claimant said: "Having been involved in credit unions for some time and aware that the damage of toxic board members and understanding my responsibilities as a board director, I felt obliged to make these disclosures. I am aware that Glasgow Credit Union was previously mismanaged under another board and felt that unless I took action the fate may repeat itself."

22. Finally the claimant's response to being asked why the disclosures were made in good faith was: "I believe all my disclosures were made in good faith and with the interest of the credit union at the heart of them. Credit Unions are a lifeline to otherwise underserved areas of society. Therefore any mismanagement or toxicity a board level could have significant wider consequences. As a director of GCU it was my responsibility to highlight. Being new to Glasgow Credit Union I sought the counsel of a more experienced director."

20 April letter from respondent

23. On 20 April 2023 the respondent's agent wrote to the claimant and the Tribunal arguing that the claimant had failed to comply with the orders and that the claims do not have reasonable prospects of success. The claimant had not set out when the alleged disclosures were made. The respondent had asked the claimant by email to set out the dates when the disclosures were made but the claimant did not respond to that email.

24. The respondent's agent stated that the disclosures were not qualifying protected disclosures. The first disclosure was said to be made to the regulator, but the respondent was not advised of it and as such cannot be the reason for any detriment. The second disclosure was said to have been made

to a fellow board director, but that person was not the claimant's employer, and the respondent was not made aware of the disclosure and so could not be a reason for any treatment. Finally, a disclosure via an ET1 cannot be a qualifying disclosure and post-dated the detriment relied upon.

25. The claimant had also now shown what, if any, legal failure he raised.

26. The claimant was asked for comments by 10 May 2023.

27. Absent any response the respondent wrote to the Tribunal requesting their application for strike out be dealt with urgently. On 11 May the claimant wrote to the respondent and Tribunal saying he would send his objections "within the week". He apologised as he had been ill.

28. The claimant was given until 23 May to provide his comments on the strike out application.

29. On 23 May the claimant sent a short email objecting to strike out saying he believed his case should be heard on its merits. He believed he had been "wronged while in the employ of the respondents". He said he believed he had a good case as he made disclosures in good faith.

30. On 30 May the respondent asserted that the claimant had still not provided the information that had been ordered and they were still unable to defend the claims given the lack of information. The disclosures set out by the claimant were not qualifying protected disclosures and there were no reasonable prospects of success and the claimant had failed to comply with the orders.

31. On 31 May the parties were advised that the respondent's application would be considered at the hearing on 9 June and the claimant should provide comments no later than 7 June.

32. On 1 June the respondent advised the Tribunal and the claimant that they were prepared to concede the claimant was a worker. They also asked the hearing be converted to deal with strike out.

33. On 7 June the claimant advised that illness prevented him from attending the hearing on 9 June albeit he was eager to conclude matters as soon as possible.

34. On 8 June the claimant copied the respondent's email of 30 May with comments. With regard to the assertion the claimant had not provided the necessary specification of his claim (as set out in the Order) the claimant apologised saying he was doing the best himself without legal representation. He had other commitments to deal with too.

35. With regard to the assertion the claimant had failed to provide details of the disclosures he said he reported the chair had mislead the board on at least 2 occasions and raised concerns about financial solvency.

36. The claimant said he did not believe the respondent was not aware of the FCA disclosure as they were involved in an investigation in relation to whistleblowing of another director for a number of the same things.

37. With regard to the disclosure to a fellow director he said that he had told Mr Keenan whom he had "buddied up" with as a new director and he believed he was "an authority figure and appointed agent".

38. The claimant stated that he was unaware a claim in an ET3 could not be a disclosure.

39. Both parties subsequently agreed to the respondent's application for strike out being considered in writing. The claimant was instructed to ensured the points made by the respondent's agent had been fully considered. In particular the claimant should state whether or not it is accepted that the orders had not been followed (and if not why not and when would they be followed) and whether or not the claimant is satisfied the key information in relation to the claim has been specified (as ordered) and if not when would this be done and finally whether the claimant accepted the position a disclosure in an ET1 (postdating the detriment) was no longer being relied upon.

40. The claimant agreed to the matter being dealt with in chambers and asked that he be given until 12 June to set out his full response.

41. The Tribunal advised the parties that the matter would be considered in chambers on 13 June and by no later than 12 June the parties should ensure any written submissions are provided. The claimant should ensure each of the points raised b the respondent was fully dealt with.

42. The claimant replied thanking the Tribunal.

43. On 11 June the claimant responded to the issues set out by the Tribunal in a short email. He stated that he believed he had complied with the orders and

any omission was on an honest basis (saying he did not believe there was any omission). He said he "was an "ordinary individual seeking justice from the tribunal service". The claimant reiterated that he believed the orders had been fully complied with and he would correct any omission as soon as possible if raised with him by the respondent. He said he believed he had

been clear in the basis of his claim. If the respondent did not think this was he would correct this as soon as possible.

44. Finally he agreed the ET1 would not be relied upon as part of his claim and as such only 2 disclosures were being relied upon.

45. On 12 June (at 7.39am) the respondent provided their 6 page submission document setting out the basis for their assertion the claims should be struck out. They maintained their position that the disclosures were still not fully specified and the claimant had still failed to comply with the orders. While the claimant was not legally qualified there was no basis for him not providing the information that had been clearly asked of him if he wished his claim to proceed. He had not done so.

46. An hour later the claimant sent an email to the Tribunal and respondent stating that he was responding to the respondent's letter and he "attached comments in the word document". There was no attachment to the email.

47. The claimant was asked by the Tribunal to send any attachment to which his email referred which would be referred to the judge as none had been attached to the original email.

48. The clerk telephoned the claimant but received no response. Rather than determine matter on 13 June I asked that further steps be taken to obtain a copy of the word document referred to by the claimant as it may contain important information in his defence of the strike out application. Further telephone calls were made but to no avail.

49. A further communication was issued on 16 June requesting the word document be sent by 1pm which failing a decision would be made on the basis of the information before the Tribunal. The claimant sent an email to the Tribunal explaining he did not know the attachment had not been sent. He explained he was at work and unable to return home to email but said it would be done by 9am on Monday 19 June.

50. The Tribunal directed that the claimant provide the communication by 9am on Monday 19 June together with a response to the following points:

    a. "The claimant appears to state that he has complied with the orders. It is noted, however, that in his email to the respondent of 28 March 2023 the claimant did not set out the precise detail of the 2 disclosures now relied upon. The claimant did not state when he made the communication to FCA in respect of the first disclosure and when this was communicated to the respondent (such that the respondent knew of it and could treat the claimant adversely because of it) and secondly when he disclosed to a board colleague, Mr Keenan, breach of the rules with regard to integrity and how the disclosure to Mr Keenan was known by the respondent such that the respondent treated the claimant adversely as a result. The claimant should ensure he provides such precision with regard to each of the 2 disclosures now relied upon.

b. The claimant also alleges he complied with each of the Tribunal's orders. The claimant is asked to confirm that he did not exchange a witness statement on 30 May 2023 (and if not why not).

c. The claimant was also asked to confirm if he accepts at no stage has he set out when the first 2 disclosures were made (ie on what date). The claimant was required to explain why he has not done this when ordered and to confirm the dates both disclosures were made and to whom in the respondent.

51. The parties were advised that a decision in respect of the respondent's application will be made in the course of next week in light of the claimant's failure to send the required information to the Tribunal this week.

Claimant's response on 19 June 2023

52. The claimant provided a written response, which he said he had formatted as the virus software may have delayed its initial transmission. The claimant did not accept he wilfully ignored or failed to comply with any of the Orders. He said he had been attempting to do all of this on his own, whilst maintaining a current full-time role and raising a young family with additional support needs.

53. The claimant said he believed he had complied with all the orders to the best of his ability. He said he made two disclosures that the respondent were aware of. Firstly of the Financial Conduct Authority. He was unable to confirm exactly when he reported poor behaviours. His second disclosure was in relation to his concern around poor management.

54. The claimant believed both disclosures were known by the respondent (not least in communications by Mr Keenan to the Board which the claimant believes made it obvious it was the claimant who had made the disclosures). He believe the Board discussed matter which led to his removal.

55. The claimant indicated that he was not aware of any obligation to produce a witness statement and any failure was unintentional. He also referred to a mental impairment that can impact his concentration.

Law

56. A Tribunal is required when addressing matters such as the present to have regard to the overriding objective, which is found in the Rules at Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, rule 2 of which states as follows:

"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable— (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense.

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

Strike out

57. Rule 37 provides 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 the claim or response, or some part of either, is scandalous or vexatious or has no reasonable prospect of success

(b) for non-compliance with any of the ET Rules or with an order of the tribunal"

58. The Employment Appeal Tribunal held that the striking out process requires a two-stage test in **HM Prison Service v Dolby [2003] IRLR 694**, and in **Hassan v Tesco Stores Ltd UKEAT/0098/16**. The first stage involves a finding that one of the specified grounds for striking out has been established;

and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim. In **Hassan** Lady Wise stated that the second stage is important as it is 'a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit' (paragraph 19).

59. Striking out is not automatic and care is needed given the draconian nature. In **Hasan** the Employment Appeal Tribunal held that relevant factors in the exercise of that discretion that might have weighed heavily included the early stage of the proceedings, the ability to direct that further and better particulars of each claim be specified and the absence of any application on the part of the respondent for striking out.

60. With regard to striking out where there are no reasonable prospects of success the claimant's case must be taken at its highest and the Tribunal must be able to conclude from the information before it that there are no reasonable prospects of success. If central facts remain in dispute it will only be in an exceptional case that a case is struck out on the grounds that there is no reasonable prospect of success. The court in **North Glamorgan NHS Trust v Ezsias [2007] IRLR 603** observed that in whistleblowing (and discrimination) cases in particular it would be rare to strike such claims out before hearing evidence and they should generally only be decided after hearing evidence, because of the particular public interest in examining such claims on their merits rather than striking them out at a preliminary stage.

61. In **Cox v Adecco (UKEAT/0339/19/AT)** the Employment Appeal Tribunal set out general principles the Tribunal should apply in this area. It was noted that if a case has no reasonable prospect of success, it ought to be struck out. The Tribunal's time should not be taken up by having to hear evidence in cases that are bound to fail. No one gains by truly hopeless cases being pursued to a hearing. It is necessary to consider, in reasonable detail, what the claims and issues are. Strike out is not a way of avoiding rolling up one's sleeves and identifying in reasonable detail the claims and issues; an employment judge

cannot decide whether a claim has a reasonable prospect of success if they do not know what the claim is or do not really understand it. There must be 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.

62. In the case of a non legally qualified party, the claim should not be ascertained only by requiring the claimant to explain it during a stressful hearing; this runs the risk of the litigant becoming ‘like a rabbit in the headlights’ and failing to explain what they have set out in writing. Reasonable care must be taken to read the pleadings, any additional information and key documents which set out the claimant’s case. Requesting additional information from a litigant in person who has pleaded a case poorly can simply lead to a document which ‘makes up for in quantity what it lacks in clarity’ potentially creating a strike out claim that is even less clear than it was before. Requests for additional information should be as limited and clearly focussed as possible.

63. If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment.

64. In considering failure to comply with orders, the Tribunal should ensure the decision is proportionate. Hence in **Ridsdill v D Smith and Nephew Medical UKEAT/0704/05** it was held to be disproportionate to have struck out a claim for failure to provide witness statements and schedules of loss where a less drastic means of dealing with the non-compliance was available, such as unless orders and costs orders.

65. The guiding consideration, when deciding whether to strike out for noncompliance with an order, is the overriding objective (**Weir Valves and Controls (UK) Ltd v Armitage [2004] ICR 371** which requires the tribunal to consider all the circumstances, including 'the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is possible' (see paragraph [17]. The tribunal must consider the matter objectively and weigh the factors in the balance on an assessment of fairness.

A sanction short of strike out may be appropriate.

66. In **Harris v Academies Enterprise Trust [2015] IRLR 208**, the EAT (at [26]) referred to the fact that 'A failure to comply with orders of a tribunal over some period of time, repeatedly, may give rise to a view that if further indulgence is granted, the same will simply happen again. Tribunals must be cautious to avoid that', but the Employment Appeal Tribunal noted that if the failure was an 'aberration' and unlikely to re-occur, that would weigh against a strike out. At [33] the Employment Appeal Tribunal described another relevant principle as 'each case should be dealt with in a way that ensures that other cases are not deprived of their own fair share of the resources of the court. If a case drags on for weeks, the consequence is that other cases, which also deserve to be heard quickly and without due cost, are adjourned or simply are not allotted a date for hearing'.

67. Consideration of a striking out order under rule 37(1)(c) must include consideration of whether a fair hearing is still possible.

68. Proportionality, and consideration of whether there are alternative orders to a strike out that would better address the breach of Rules or orders, will be a necessary consideration before the power under r 37(1)(c) is exercised by a Tribunal.

69. If the whole of a claim is struck out, that will bring proceedings to an end.

Decision

70. The Tribunal considered the respondent's application carefully in light of the authorities. Each aspect is dealt with in turn.

No reasonable prospects

71. The first issue relates to whether or not the claim raised by the claimant has no reasonable prospects of success. It is important in considering this that the claim as fairly understood from the communications from the claimant is taken at its highest. In other words it is assumed that what the claimant sets out is

proven and the assessment of prospects is made on that basis. Each disclosure is considered in turn.

First disclosure

72. The specific details of each disclosure were not set out in the claim form nor in any communication to the Tribunal which made broad references to a disclosure having been made. It was only at the preliminary hearing that the claimant said there were 3 disclosures relied upon. The claimant wanted to provide the detail in writing. It was only on 28 March 2023 that the claimant in an email to the respondent set out what he considered the disclosures to be.

73. With regard to the first disclosure this was "protected disclosure to the FCA in respect of financial mismanagement of the Glasgow Credit Union with regards to retained profit position and dividend position."

74. In principle this is capable of amounting to a protected and qualifying disclosure. This could amount to disclosure of information showing failure to comply with a legal obligation (in terms of conduct of business within a regulated environment)

75. While the respondent says they did not receive the disclosure it is the claimant's position that his disclosure to the regulator was communicated to the respondent. While the respondent argues it did not receive any communication of said disclosure that is a matter for evidence. If the respondent can show they did not know of the disclosure clearly the treatment could not be a reason for it but that is a matter for evidence.

76. The claimant believes the respondent was aware of this, which the respondent's agent's disputes. It is a matter of evidence. If the respondent was made aware of the disclosure and the detrimental treatment was because of the disclosure, the claim would have merit.

77. It cannot be said that there are no reasonable prospects of establishing the first disclosure on the basis of what the claimant has said.

Second disclosure

78. The second disclosure is "disclosure in respect of breach of the conduct rules on integrity by the chair of the credit union with a more experience board director (Mr Keenan)".

79. The respondent argues that Mr Keenan was not the claimant's employer and as such the disclosure could not be protected and qualifying. The claimant, however, argues that he understood Mr Keenan to represent the respondent (as a senior director). He appears, taking his case at its highest, to be asserting the respondent knew about the disclosure he made to Mr Keenan and treated him adversely as result of that disclosure.

80. If the claimant is able to establish that in evidence, it cannot be said there is no reasonable prospects of success. It is possible that Mr Keenan could be regarded as an agent of the respondent or that the respondent did in fact know of the disclosure given what the claimant now says about his belief the Board knew of the disclosure the claimant made to Mr Keenan. That is a matter for evidence.

Third disclosure

81. The claimant no longer relies upon a disclosure made in the ET1 which is a fair concession given the ET1 post dated the detriment relied upon and could not therefore be a reason for it.

Summary in respect of prospects of success and disclosures

82. Applying the law in this area as set out above it cannot be said that there are no reasonable prospects of success of either or both of the 2 disclosures which the claimant is progressing being found to be protected and qualifying disclosures as a matter of law, from the information presently available. The claimant has done his best to set out the position as he understands it. The position has become finely focused with the claimant only now relying on 2 disclosures as set out above. While the information provided is not

comprehensive, it is sufficient to identify a stateable case. Whether or not it succeeds is a matter for evidence.

83. From the information presented and taking account of the overriding objective and proportionality the claim being advanced by the claimant (with regard to establishing 2 protected and qualifying disclosures were made by him) cannot be said to have no reasonable prospects of success.

84. In any event, taking a step back, it would not be proportionate to strike out these claims on grounds of prospects. The issues the respondent raise are important issues but they are matters for evidence. The disclosures, although lacking in precision, do contain just enough information which could result in satisfaction of the legal tests but that is a matter for evidence (and nothing in this judgment should be taken to bind the Tribunal hearing the evidence in this case). It would be for the Tribunal hearing the case to consider the facts as agreed or as led to determine this issue, which cannot be determined at this juncture.

85. While there may be aspects of the information provided that are less than clear, the claimant has given an explanation. He has now made it clear that he cannot remember precisely when he made the disclosure. That is an evidential issue and in the absence of clarity from the claimant, it may not be possible for the claimant's case to succeed but ultimately that is a matter for evidence and would not justify striking out the claims given the authorities.

Failure to comply with orders

86. The next ground relied upon by the respondent in support of their application to have the claim struck out is that the claimant has failed to comply with the orders of the Tribunal. The respondent notes the claimant was clearly told that a failure to provide a response could result in the claim being struck out. The claimant had been given a number of opportunities to respond and on each occasion the claimant has failed to set out the necessary information.

87. The claimant did fail to exchange a witness statement as ordered by the Tribunal. The claimant's explanation for this was that he had not appreciated the obligation upon him in this regard. He also referred to a mental impairment that can affect his concentration.

88. It was said that the claimant has also repeatedly failed to provide the specific information requested. The claimant has said he has done his best and has offered to remedy any omission. The information requested was clear and was discussed orally at the case management preliminary hearing and followed up in the detailed Note.

89. The Tribunal must also ensure a proportionate approach is taken given the draconian nature of strike out. The full context should be taken into account together with the impact on both parties, any prejudice and the question as to whether a fair hearing can take place, even in the face of failure to comply with Orders.

90. The Tribunal has considered that it is not proportionate to strike out the claim in this case as a result of the failure of the claimant. The claimant has provided basic information. That information does provide just enough information

when considered alongside the context that gave the respondent notice of the 2 disclosures and the treatment. Any adverse impact upon the respondent can be dealt with in a less onerous way than strike out. For example it may be that the claimant's failure to provide the full information could affect the claimant's ability to succeed in his claim, particularly if important details cannot be recalled by him. Equally if the claimant's failure has caused the respondent to suffer additional expense that can be remedied in a less draconian way compared to strike out.

91. The claimant at the case management preliminary hearing made it clear that he was arguing his suspension and removal as a non executive director was because he made 3 disclosures (at least 2 of which were known to the respondent). As the treatment was his removal, those 2 must be the 2 now

proceeding (since obviously the respondent could not be aware of the claim form lodged after his removal). That has now been confirmed.

92. Taking a step back, a fair reading of all the claimant's communications is that he is offering to prove that he was removed because he made 2 disclosures. One was to the regulator about a breach of the rules (and alleged financial mismanagement) which the respondent was told about and the second was disclosure to a more senior fellow board member (and mismanagement and regulatory failures), which was also communicated to the respondent.

93. In other words, while the claimant has failed to be precise and clear in his response, the failure to comply was not such as to justify striking out his claims in their entirety. It is regrettable that the claimant has not fully complied with the orders given the delay this has occasioned. There has clearly been a failure to comply with the orders but the failure is not such as to prevent a fair hearing nor to cause such prejudice to the respondent as to justify striking out the claims.

94. Cognisance is taken of the claimant's reference to ill health and other issues but equally it is important to ensure, if the claimant wishes to progress his claim, that he fully and actively engages with the Tribunal process.

95. The failures of the claimant in complying with orders is not such that it would be in the interest of justice to strike his claims out. It would not be proportionate to do so. The respondent was able to understand the basic nature of the disclosures and therefore it has been possible to understand the basis of the claim and the failure to comply with the orders has not been such as to prevent matters from progressing.

96. It is important to ensure that respect is given to Orders which are issued for good reason and are intended to ensure a level playing field exists between parties. It was unfair that the claimant did not precisely answer each of the basic questions set out in the Note. These were matters peculiarly within his

knowledge. The respondent was inconvenienced by the claimant's failure to do so and significant time has been taken up in trying to focus the issues. That is taken into account in reaching a decision in this matter.

97. This is not a case where the claimant has ignored the orders and did nothing. The claimant has at least tried to engage and said he believed he had replied and offered to fix any omission identified. The respondent has repeatedly set out what the omission is but the claimant appears to have not understood this. While the basic nature of the disclosure has now been set out, the claimant has not set out when this was disclosed (and how the respondent learned of it). That is something peculiarly within the claimant's knowledge and is something he should set out. The Tribunal, while considering the claimant's failure to be regrettable, did not consider the failure to justify striking out the claim. It is possible to progress matters without further delay and any prejudice to the respondent can be minimised.

98. It is also relevant to note that the preliminary hearing that had been fixed was in respect of employment status only. The respondent had argued the claimant was not a worker or employee and as such the claims should be dismissed. The focus of the parties' activities was therefore in relation to that matter (and not the issue as to the disclosures). It was not until shortly before the date of that hearing that the respondent conceded the claimant was a worker (for the purposes of this claim only). The failure of the claimant to set

out the precise basis of the disclosures did not therefore materially have an impact upon that matter, which was proceeding to a hearing in any event. The fact the respondent has conceded worker status now allows the matter to progress without further delay, there being no need to focus purely on that preliminary issue.

99. It is not in the interests of justice to strike out the claims on account of the claimant's failure to comply with the orders in this case, despite his failure to comply with the orders. While there has been a failure to comply with the Orders, the claimant did engage with the respondent and Tribunal and

provided just enough information. If time has been lost (or expense incurred) as a result of the claimant's failure to fully comply with the Orders that is a matter that can be dealt with in other ways. It is not just nor appropriate to strike out the claims in this case on the facts.

Taking matters forward

100. It is noted that in terms of section 48(2) of the Employment Rights Act 1996 it is for the employer to show the ground on which an act or omission was done. In other words it is for the respondent to show that the reason for the detriment in this case was in no sense whatsoever because of the disclosures. In this case the respondent offers to do precisely that. The respondent says there were clear reasons for their actions, each of which were entirely independent of any disclosure made by the claimant. The respondent also denies knowing of the 2 disclosures relied upon (and as such the disclosures could not be a reason for their actions). The claimant argues that he believes the respondent was aware of the disclosures but has no certainty. That is a matter that the respondent can lead evidence upon and determine the issues in this case. If the respondent's position is correct and there was no knowledge of either disclosure the claims would be dismissed. That is a matter for evidence.

101. The evidence needed to determine this claim is not significant (and will amount to what the respondent knew about the disclosures and why the claimant was removed from his position). The respondent would be able to lead evidence from the person who made the decision relied upon as amounting to a detriment. The respondent is offering to show the reason was clear and entirely unconnected to the disclosures relied upon (albeit in general terms). That is likely to be capable of being resolved within a short period of time. It may also be something in respect of which the parties wish to produce written witness statements to ensure advance notice is given as to the respective party's positions. The parties should discuss and seek to agree the position.

102. The respondent concedes the claimant is a worker. The issues therefore for determination are whether the disclosures made by the claimant amount to

protected and qualifying disclosures and whether or not the disclosures were a reason for the treatment.

103. It is in the interests of justice to progress this case to a final hearing without further delay. That hearing can determine both issues, whether or not the disclosures are protected and qualifying and whether the respondent has shown that the reason for the treatment relied upon is in no sense whatsoever related to the disclosures. That ought to be capable of being concluded within 2 days. The parties should speak with each other to agree dates and how the hearing should be conducted to allow matters to proceed in accordance with the overriding objective. The parties should confirm the position with the Tribunal and case management orders can be issued without the necessity of a hearing or further delay.

104. Both parties are reminded of the overriding objective and of the need to work together to ensure the hearing can be proceed in a proportionate and fair way.

105. The claims are not struck out and the matter shall proceed to a final hearing.

Employment Judge: D Hoey Date of Judgment: 19 June 2023
Entered in register: 22 June 2023 and copied to parties