



EMPLOYMENT TRIBUNALS

Claimant

Ms J Taggart

Heard at: Sheffield

Before: Employment Judge A James

Representation

For the Claimant: Did not appear and was not represented

For the Respondent: Ms B Breslin, counsel

Respondent

Astrea Academy Trust

On: 30 June 2023

JUDGMENT

- (1) The claimant's claim is struck out because:
- a. the claimant has failed to comply with orders of the tribunal; and
 - b. the claim is not being actively pursued and the tribunal is satisfied, in the absence of any explanation from the claimant, that the default by the claimant is intentional and contumelious.

REASONS

The issues

1. The issues which the tribunal had to determine at this preliminary hearing are whether the claimant's claim should be struck out because:
 - 1.1. the Claimant has failed to comply with an order of the Tribunal to provide Additional Information and a schedule of loss.;
 - 1.2. the claim has not actively been pursued by the Claimant

Findings of fact

2. The claimant started work for the respondent at Intake Primary School on 1 October 2017, in the role of Office Manager.

3. The Respondent is a multi-academy trust and company limited by guarantee. It employs all individuals working at the schools within the Trust, including those employed at Intake Primary School (The School). The School is led by the Principal, Helen Broad.
4. The claimant's employment formally ended on 19 February 2023, following her resignation with notice on 20 January 2023.
5. Acas Early Conciliation took place between 20 and 23 January 2023. The claim form was issued on 3 March 2023. No time limit issues arise.
6. The claimant ticked the box for unfair dismissal and says in box 8.2:
Bullied constantly by the head teacher until it was impossible to work there.
Asked by the head teacher on the 13/01/2023 for my resignation.
7. Notice of the claim was sent to the respondent on 10 March 2023. Standard case management directions for an unfair dismissal claim were made and sent to the parties at the same time. Amongst other things, those required that the claimant provide a schedule of loss to the respondent by 21 April 2023. The claim was listed for a one-day final hearing on Friday 30 June 2023, today's date, by video link (CVP).
8. In its response, the respondent requested that the claimant be ordered to provide further and better particulars of her claim, in order to be able to properly defend it.
9. On 25 April 2023 the name of the respondent was formally changed from Intake Primary School to Astra Academy Trust. On the same date, the claimant was ordered by Employment Judge Lancaster to provide additional information about her claim by 5 May 2023, as follows:
She must identify the alleged instances of 'bullying' which she relied upon as being a contributing factor to a fundamental breach of contract prior to her decision to resign. She must say what was done when. The case management hearing timetable is therefore suspended for the time being, but the final hearing date remains unless further directions are given.
10. On 19 May 2023 the tribunal received an application from the respondent's solicitors, asking that the claimant's claim be struck out because of the failure by her to comply with the order of the tribunal to provide further information and failure to actively pursue her claim.
11. On 22 May 2023, the claimant was ordered by the tribunal to provide a reply to the Tribunal's letter of 25 April 2023 by return. No reply has been received. Therefore, on 14 June 2023, the hearing was changed to an in-person hearing, to consider the respondent's application to strike out the claimant's claim. The notice of hearing confirmed that if the claimant's claim is not struck out, the Judge would clarify the claimant's claim and make case management orders.
12. Ms Breslin pointed out that there is at page 29 of the bundle confirmation from the Post Office that the ET3 form, which R's solicitors had sent to the claimant at the address given in both the Acas Early Conciliation Certificate and the claim form, had been received and signed for by Ms Taggart. There

is nothing to suggest that the address is no longer correct. If the claimant has moved, she has not told the respondent or the tribunal.

Relevant law

13. Rule 37(1) of the Employment Tribunal Rules of Procedure 2013 provides:
 - (1) *An employment judge or tribunal has power, at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on any of the following five grounds: ...*
 - (c) *for non-compliance with any of these Rules or with an order of the Tribunal;*
 - (d) *that it has not been actively pursued; ...*
 - (2) *A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.*
14. Before making a strike out order in any of these situations, the tribunal must give the party against whom it is proposed to make the order a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing (r.37(2)).
15. The striking-out process requires a two-stage test (see *HM Prison Service v Dolby [2003] IRLR 694, EAT*, at para 15; approved and applied in *Hasan v Tesco Stores Ltd UKEAT/0098/16 (22 June 2016, unreported)*). 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, order it to be amended or order a deposit to be paid.
16. The principles applicable to strike out applications are set out in numerous authorities, and recently in for example in, *Malik v Birmingham City Council, UKEAT/0027/19/BA*, 21 May 2019, Choudhury P, paras 29-33; *Cox v Adecco, UKEAT/Appeal No. UKEAT/0339/19/AT*, 9 April 2021, at para 28.
17. The general principle is that a Tribunal will not strike out discrimination claims except in the most obvious and plain case (*Anyanwu v South Bank Student Union [2001] 1 WLR 391*). The same approach applies in whistleblowing cases: see *Ezsias v North Glamorgan NHS Trust [2007] ICR 1126*, at para 29, in which the Court of Appeal held that the same or a similar approach should generally inform whistleblowing cases.
18. However, self-evidently (and as *Anyanwu* and *Ezsias* themselves make clear) such cases must exist. The respondent argues that this is such a case.

Non-compliance with orders
19. A failure to comply with a direction should not automatically lead to the party's application or response being struck out altogether; a tribunal should consider whether a striking out or some lesser penalty is appropriate, in the light of the overriding objective in r 2 of ensuring a fair hearing: *Weir Valves and Controls UK Ltd v Armitage [2004] ICR 371, EAT*.
20. As a general rule this power to strike out should only be used where a court would use its equivalent power, ie where any judgment otherwise obtained

would not be fair between the parties; a punitive order would only rarely be justified: *National Grid Co plc v Virdee* [1992] IRLR 555, EAT. This approach is now strengthened by the 'overriding objective' in reg 2. However, overturning previous EAT authority, it was held by the Court of Appeal in *Governing Body of St Albans Girls' School v Neary* [2009] EWCA Civ 1190, [2010] IRLR 124 that a tribunal in considering an application to strike out might find the nine factors set out for the purposes of civil actions in CPR r 3.9(1) helpful but it is not bound to use them or to refer to them in its decision.

21. I consider those factors are helpful. They are as follows:

(1) On an application for relief from any sanction imposed for a failure to comply with any rules, practice direction or court order the court will consider all the circumstances including –

(a) the interests of the administration of justice;

(b) whether the application for relief has been made promptly;

(c) whether the failure to comply was intentional;

(d) whether there is a good explanation for the failure;

(e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;

(f) whether the failure to comply was caused by the party or his legal representative;

(g) whether the trial date or the likely date can still be met if relief is granted;

(h) the effect which the failure to comply had on each party; and

i) the effect which the granting of relief would have on each party;

The claim has not been actively pursued

22. The power to strike out under para (1)(d) covers two separate kinds of case — (1) intentional and contumelious (i.e. rudely contemptuous) default by the claimant; (2) inordinate and inexcusable delay such as to give rise to a substantial risk that a fair trial would not be possible or there would be serious prejudice to the respondent; thus, there can be a striking out under (1) even if a fair trial would still be possible: *Rolls Royce plc v Riddle* [2008] IRLR 873, EAT. In the case of (2), it may be preferable to force the issue of delay by an 'unless' order, only then proceeding to strike out if that order is disobeyed: *Abegaze v Shrewsbury College of Arts and Technology* [2010] IRLR 238, CA. It was subsequently held that the 'unless' order procedure in *Abegaze* should be adopted where a claimant has failed/declined to comply with an order to undergo a medical examination (eg where a question arises as to disability): *GCHQ v Bacchus* UKEAT/0373/12, [2012] EqLR 1002.

Conclusions

Threshold conditions

23. The claimant is plainly in breach of the order of the tribunal to provide a schedule of loss by 21 April 2023, and to provide further information, as ordered on 25 April 2023, and repeated on 22 May 2023.
24. The claimant has not turned up to the tribunal hearing today. Her claim form does not include a telephone number or email address. Since striking out is a draconian step, I asked the respondent if it could provide a telephone number for the claimant. The respondent helpfully did so. A mobile telephone number was provided and the clerk has called the number four times, without any response. A voicemail was left during the last attempt but no response had been received by the time this judgment was delivered.
25. Turning to the CPR 3.9.1 factors:
 - (a) *the interests of the administration of justice*; the time of the tribunal and the respondent is being taken up, when the claimant is failing to comply with orders, and failing to actively pursue her claim.
 - (b) *whether the application for relief has been made promptly*; there is no such application.
 - (c) *whether the failure to comply was intentional*; in the absence of any explanation, the tribunal can only assume that the failure is intentional.
 - (d) *whether there is a good explanation for the failure*; there is no explanation from the claimant for the failure
 - (e) *the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol*; this is not considered relevant in the circumstances.
 - (f) *whether the failure to comply was caused by the party or his legal representative*; the claimant is not legally represented; the failure appears to be hers alone.
 - (g) *whether the trial date or the likely date can still be met if relief is granted*; the hearing was due to go ahead and inevitably would have to be re-listed. Precious tribunal time has already been set aside for this claim.
 - (h) *the effect which the failure to comply had on each party*; the respondent has been put to expense, but is not able to understand the case it has to meet in its defence.
 - (i) *the effect which the granting of relief would have on each party*; it appears to the tribunal that further pressures tribunal time would be spent, and the respondent would be put to further expense, when there has been no indication from the claimant that she wants or intends to pursue her claim.
26. As for the failure to actively pursue the claim, in the absence of any explanation from the claimant, the tribunal can only assume that it is both intentional and contumelious (in the sense that it shows a contemptuous disrespect for this tribunal).

Exercise of discretion to strike out

27. Two threshold conditions having been met, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended, make an unless order, or order a deposit to be paid. In the absence of any active engagement by the claimant in relation to her claim since it was submitted, the tribunal has no basis for concluding that any of those alternatives would be just. The tribunal is therefore satisfied that this is an entirely appropriate case where the discretion to strike out the claimant's claim should be exercised and it is.

Employment Judge A James
North East Region

Dated 30 June 2023

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