



EMPLOYMENT TRIBUNALS

Claimant: Ms S Mason

Respondent: Tesco Stores Ltd

Heard at: East London Hearing Centre

On: 28 June 2023

Before: Employment Judge Jones

Representation

Claimant: no attendance or representation
Respondent: Ms L Whittington, Counsel

JUDGMENT

The claim is struck out.

REASONS

1. This hearing was listed to determine the Respondent's application for strike out first brought on 4 January 2023 and renewed on 7 February and 6 March 2023.
2. The Claimant brought claims for constructive unfair dismissal and disability discrimination by an ET1 claim presented on 26 July 2022. The Claimant has assistance in drafting the ET1 but apart from a reference to epilepsy and the ticked boxes where the complaints were identified, there were no details and no allegations contained within it.
3. In its response to the claim on 9 September, the Respondent pointed out that there were no particulars in the claim and asked the Tribunal to consider dismissing the claim under Rule 26(1) of the Employment Tribunal Rules 2013, because there are no arguable complaints in it.
4. In response, the Tribunal wrote to the Claimant on 25 October, with a direction from AREJ Burgher that the Claimant must provide details of her

allegations of disability discrimination, specifying what happened or did not happen; when it happened or should have happened and who did it or failed to do it. She was asked to provide this information by 23 November 2022.

5. The Claimant wrote to the Tribunal on 22 November to attach copy of minutes of an internal wellness meeting to show that the Respondent knew of her condition. She did not give the information as ordered by AREJ Burgher but stated that she was in the process of gathering medical evidence. Her then representative, Ms Beslier, wrote to the Tribunal in answer to AREJ Burgher's order but failed to provide the details of claim for disability discrimination. Instead, she stated '*as for what exactly happened, and when, Tesco staff are fully aware of exactly what happened and when*'. This was not in compliance with a court order or direction.
6. On 29 November the Claimant wrote again to the Tribunal to request an extension of time to comply with the order. She stated that she was intending to get assistance from the Citizens Advice Bureau and FRU in dealing with her case. The Respondent did not oppose that application and suggested that the deadline should be pushed back to 21 December 2022.
7. On 20 December, the Claimant's present representative, Mr Nathan Leccacorvi, provided a draft document. It is likely that this is the same person referred to as Nathan Atkinson in later correspondence on the Claimant's behalf. The document was later edited and re-sent to the Tribunal in February 2023, as a disability witness statement. The version that was sent to the Tribunal and the Respondent in December contained a narrative of the Claimant's relationship with the Respondent but did not identify specific allegations in answer to the questions asked by AREJ Burgher. The Claimant also failed to give the reason for her resignation or why she considered that there had been a fundamental breach of contract leading her to resign.
8. On 4 January 2023, the Respondent made its first application for strike out of the claim on the basis that the Claimant had failed to comply with Tribunal directions and was not actively pursuing her claim. The application was considered at the first preliminary hearing on 23 January 2023.
9. EJ Warren conducted the preliminary hearing on 23 January 2023. Mr Atkinson attended on the Claimant's behalf as well as Mr Allen, solicitor for the Respondent. EJ Warren declined the Respondent's application on the basis that Mr Atkinson was now instructed and that the required details would be forthcoming. EJ Warren reminded both parties that any further failures to comply with court orders could lead to strikeout being considered. The Judge ordered the Claimant to provide further and better particulars of the claim to the Tribunal and the Respondent by 6 February 2023 together with a Schedule of Loss. He also ordered her to confirm which impairment she relied on by 13 February and to provide a disability impact statement by the same date.

10. On 7 February 2023, the Respondent made its second application to have the matter struck out as the Claimant had not complied with the orders. In response, Mr Nathan Atkinson, the Claimant's representative replied stating that the orders had already been complied with. He later clarified with the Respondent that this was a reference to the documents sent to the Tribunal on 20 December.
11. The document sent on 20 December was edited and sent again to the Tribunal on 7 February. It was now called a disability witness statement, signed by the Claimant on 6 February. There were no further and better particulars of claim included in that document. On 13 February, Mr Atkinson wrote to the Respondent and the Tribunal and apologised for the Claimant's *'lack of cooperation and detail along the way'*. Copies of some medical letters were attached to a later email from Mr Atkinson dated 13 March 2023.
12. Although Mr Atkinson made a vague reference to his concerns for the Claimant's welfare and to *'breakdown of marriage'*, he did not make any specific references to whether that was related and if so how, to the delay in the provision of the information from the Claimant, in breach of court orders and directions. No application was made to the Tribunal.
13. On 23 March the Tribunal wrote to the parties to inform them that EJ Massarella had decided that it was not possible to decide the strikeout application on the papers and that it was too late to convert the hearing on 30 March to an open preliminary hearing to consider that application. However, he ordered the Claimant, by no later than 27 March, to write to the Respondent, copying the Tribunal, providing the further information she was ordered to provide and to confirm what physical/mental impairment she was relying on in the case.
14. On 26 March 2023, Mr Atkinson forwarded a letter from a Senior Primary Care Mental Health Practitioner dated 17 March in which she stated that she had recently conducted a mental health and medication review with the Claimant and assessed her as suffering from depression in relation to ongoing physical health issues, work and family dynamics. Mr Atkinson did not say whether the Claimant was relying on depression as part of her case or whether this was submitted as a reason for the failure to comply with Tribunal orders to date or anything else. He simply stated *'please see attached'* in the email accompanying the letter.
15. The next preliminary hearing in this matter took place on 30 March 2023 before EJ Hallen. The Claimant and her representative failed to attend that hearing. A notice of hearing had been sent to Mr Atkinson, as the Claimant's representative, on 4 February to the email address he asked the Tribunal to use. On the morning of the hearing, the solicitor acting for the Respondent telephoned Mr Atkinson to enquire whether he was going to attend. This was at the direction of EJ Hallen. Mr Allen left a voicemail for him and it is likely that Mr Atkinson received that voicemail. Although Mr Atkinson later states that he did not have the dial-in details, the Tribunal notes that it was in the Notice of Hearing, which was one of the documents contained in the bundle of documents prepared by the Respondent for that hearing sent to the Claimant days before.

16. EJ Hallen was satisfied that the Claimant had been notified of the hearing and how to join and had failed to attend. He decided to conduct the hearing in the absence of the Claimant and her representative. He did not determine the Respondent's strikeout application as this was a closed preliminary hearing, but he did list the case for an open hearing at which that application could be considered. He listed an open, in-person hearing for one day, at this Tribunal to determine the Respondent's application to strikeout the claim. That hearing was listed for today, 28 June 2023.
17. The Tribunal received an email from Mr Atkinson, on the Claimant's behalf, dated 4 April in which he complained that it had been absurd for the Tribunal to send a link to a meeting on 30 March, two months earlier, on 4 February. It was not clear to this Tribunal why that would be an absurd act. Sending out advance notification of a hearing and the means to join that hearing, is entirely appropriate. He also confirmed that he had received the call from Mr Allen on the morning of EJ Hallen's hearing.
18. This Tribunal is satisfied that the Respondent complied with EJ Hallen's orders and prepared a bundle of documents for today's hearing and ensured that they were sent to the Claimant in good time for today, and by the deadline of 20 April 2023. The minutes of EJ Hallen's hearing was sent to the Claimant on 24 April 2023. A separate Notice of Hearing which clearly stated that the purpose of today's hearing was to consider the Respondent's application for strikeout, was sent to both parties on 24 April 2023. This Notice made it clear, as did the minutes, that the hearing is to be held in person, at the Tribunal building. The Claimant was therefore notified, through her adviser, Mr Atkinson, in three different ways, that the hearing was today and that it was in person at the Tribunal building.
19. The Respondent submitted a completed Agenda form, a skeleton argument, a preliminary hearing bundle and index to the Tribunal and the Claimant on 21 June 2023. The Notice of Hearing for today was in the bundle at page 109 making it quite clear that it was an in-person hearing.
20. The Tribunal has not had any correspondence from the Claimant about today's hearing. Counsel notified the Tribunal this morning that the Claimant's representative, Mr Atkinson had been in contact with Mr Allen, the Respondent's solicitor to ask for the dial-in details for the hearing. The Tribunal has not seen that correspondence. I am told that Mr Allen reminded Mr Atkinson that today's hearing was in-person, which Mr Atkinson disputed.
21. There has been no correspondence from the Claimant or Mr Atkinson today or in the days leading up to today, indicating that there was a problem with attendance or with documents. It appears that Mr Atkinson was able to correspond by email with Mr Allen, the Respondent's solicitor. There has been no application from Mr Atkinson regarding today's hearing. Neither the Claimant nor Mr Atkinson attended today's hearing and the Tribunal has not been given a reason for their non-attendance.
22. The Claimant has not submitted any other documents to the Tribunal since the letter from the Senior Primary Care Mental Health Practitioner in March and no documents in response to the Tribunal orders since the document sent 7 February, which was clearly marked as a Disability

Witness Statement. The Claimant could have been under no illusion that that document provided the information she had been ordered to provide by the Tribunal. The information that the Claimant was requested to provide was made clear in the order from AREJ Burgher on 25 October 2022. Also, in the orders made by EJ Warren in the hearing on 23 January 2023. Mr Atkinson attended that hearing and therefore had the opportunity to clarify what was required, if it was not clear to him. The orders were reiterated by EJ Massarella on 23 March. No further orders were made by EJ Hallen but his refusal to address the Respondent's application at that hearing, effectively gave the Claimant more time in which to comply with Tribunal orders.

Law

23. Rule 37 of the Employment Tribunals Rules of Procedure 2013 states as follows:
- (1) *At any stage of the proceedings, either on its own 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 and vexatious or has no reasonable prospects of success,*
 - b. *That the manner in which the proceedings have been conducted on behalf of a claimant or respondent has been scandalous, unreasonable or vexatious,*
 - c. *For non-compliance with any of these Rules or with an order of the Tribunal,*
 - d. *That it has not been actively pursued,*
 - e. *That the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response.*
- (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.*
24. The Tribunal was aware that this was a discrimination complaint and that the power to strike out such claims has been described as draconian and only to be used in particular scenarios.
25. At the same time, in the case of *Chandhok v Tirkey* [2015] ICR 527, the then President, Langstaff J stated "*The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely on their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made—meaning, under the Employment Tribunals Rules of Procedure 2013 (SI 2013/1237), the claim as set out in the ET1.*"
26. In the case of *Balls v Downham Market High School & College* [2011] IRLR 217, the EAT held that there were two stages to a decision to strike

out a claim for failing to actively pursue it in what is now Rule 37(d). *Firstly, the employment tribunal has to ask itself whether the claimant had failed to actively pursue their claim. Then, secondly, the tribunal has to ask itself whether, taking into account the whole circumstances, it ought to exercise its discretion so as to strikeout the claim. There is no fetter on that discretion. Although it will be important to take account of the whole facts and circumstances, including the fact that strike out is the most serious of sanctions.* The court referred to the pre-CPR principles as being helpful in this analysis. They show that there is an expectation that cases of failure to actively pursue a claim would fall into one of two categories: (i) an “intentional and contumelious” default by a claimant; and (ii) an “inordinate and inexcusable delay” such as to give rise to a substantial risk that a fair trial would not be possible or that there would be serious prejudice to the respondent.

27. The employment tribunal should have regard not solely to the material specifically relied on by the parties but to the employment tribunal file as there may be material which assists in determining whether it is fair to strike out the claim. The respondent referred the Tribunal to the case of *Rolls Royce plc v Riddle* [2008] IRLR 873 and *Birkett v James* 1978 AC 297 HL in which these principles were first set out.

Decision

28. The Tribunal considered the contents of the tribunal file in this matter. The contents has been discussed above and the Tribunal can confirm that the ET1 claim form referred to epilepsy and the Claimant has provided documents from medical professionals which confirm epilepsy. She has also provided a letter confirming a recent diagnosis of depression. It is not clear however, whether she relies on depression as well as epilepsy as disabilities in this claim. Despite being ordered to do so on two occasions by the Tribunal, the Claimant failed to clarify this in writing, but it is likely that she relies on her epilepsy.
29. This claim was issued on 26 July 2022. Despite the efforts of the Tribunal and the Respondent, almost a year later, at the end of June 2023, there is still no clarity from the Claimant on what led her to consider that her contract had been breached to the extent that she had no choice but to resign. The claim was not contained within the ET1. The Tribunal has made orders and held hearings in an effort to give the Claimant the opportunity to provide the details so that there can be the possibility of a fair hearing in this matter. The Tribunal still does not know what types of disability discrimination is being alleged against the Respondent and what alleged facts the Claimant says was disability discrimination. The Claimant has not provided any factual allegations. The document submitted on 20 December sets out the narrative, but it is not clear on reading that document, which are factual allegations, and which are background, what is related to disability and what relates to the matters that caused her to resign. There are no dates to any of the allegations as there are no dates in that document.
30. The Claimant has repeatedly failed to comply with court orders. She applied once for an extension of time, which was granted. Since then, there has been no communication from her. Mr Atkinson, on her behalf,

has been in contact with the Respondent but has failed to comply with the Tribunal orders. The Claimant has therefore failed, without any explanation, to comply with four court orders.

31. It is this Tribunal's judgment that there has been intentional and contemptuous default by the Claimant in relation to court orders and that this has been the case since the start of this litigation.
32. The Tribunal then considered whether, taking into account all the circumstances, it is just and appropriate to strike out the claim.
33. The Tribunal was particularly concerned that the Claimant failed to attend today's hearing. Neither the Claimant nor Mr Atkinson attended today or communicated with the Tribunal about today's hearing. The Tribunal is satisfied that the Claimant was aware of today's hearing, that it was an in-person hearing and that the issue before the Tribunal today was the serious matter of the Respondent's application for strikeout of the claim because of continued failure to comply with court orders and directions. There has been no response from the Claimant or those advising her. I am satisfied also that the Claimant was sent all the documents prepared for today's hearing. She failed to respond to those or to communicate with the Tribunal about today's hearing. Despite this knowledge, neither the Claimant nor Mr Atkinson attended on her behalf or communicated with the Tribunal to give a reason for non-attendance.
34. The Respondent has incurred significant costs in defending this matter including attending hearings, yet almost a year after the claim was issued, it is not able to understand the case that it has to meet.
35. It is this Tribunal's judgment that the Claimant has failed to pursue her claim. The Claimant has also repeatedly failed to comply with Tribunal orders, with no explanation. Lastly, the Claimant failed to attend today's hearing and the hearing on 30 March, without any explanation to the Tribunal. No reason has been given. There is nothing to reassure the Tribunal that if this matter was allowed to continue that the Claimant would actively pursue her claim, resulting in a fair hearing.
36. In the circumstances, it is this this Tribunal's judgment that the Claimant has failed to actively pursue her claim. The Tribunal will use its discretion to strike out the claim.
37. The Claim is struck out under Rule 37(d) Employment Tribunal Rules of Procedure 2013.

Employment Judge Jones

28 June 2023