EMPLOYMENT TRIBUNALS

Claimant: Mrs N Leeks

Respondent: University Hospitals Coventry and Warwickshire NHS Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Midlands West Employment Tribunal (by CVP and in person (hybrid))

On: 12 July 2023

Before: Employment Judge Kelly (sitting alone)

Appearances
For the claimant: No attendance
For the respondent: Mr Mellis of counsel

JUDGMENT

The judgment of the Tribunal is that:

The claimant's claims are dismissed.

REASONS

1. The claimant has not attended this hearing. The hearing was conducted with the respondent in person at the hearing center and the Judge attending by video conference.

2. References to pages below are to pages of the bundle for today's hearing.

3. There was a video conference hearing attended by both parties on 17 Nov 2022 after which Employment Judge Perry (the Judge) made a case management summary and case management order on 18 Nov 2022 (18 Nov CMO) (p148).

4. In that hearing, as recorded in the 18 Nov CMO, the claimant interrupted the Judge on three occasions resulting in a warning that those interruptions would not be permitted to continue. However, the claimant further interrupted the Judge and shouted at him. The Judge warned the claimant he would need to

take steps to stop her disrupting the hearing. The claimant persisted in her conduct and so the Judge was forced to put her on mute. The Judge took a break. On returning to the hearing, the claimant apologised. The Judge accepted that, what he had perceived as shouting, could be because the hearing was taking place by CVP. However, the claimant subsequently repeatedly interrupted the Judge and spoke over him three times, so that the Judge put her on mute again. Subsequently, the claimant interrupted the Judge again and the Judge put her on mute again. All of this disruption meant that the hearing had taken substantially longer than it should have done and it was not possible to address all the matters which should have been addressed in the hearing.

5. As set out in the case management summary of the 18 Nov CMO:

    a. The Judge orally explained to the claimant that he required the claimant to explain within 21 days why her claim should not be struck out on the basis that:

        i. The way she was conducting herself was unreasonable and/or

        ii. If she believed it was acceptable to behave in a tribunal hearing in the way she had done on that day, a fair hearing would be jeopardised.

    b. The Judge informed the claimant that he would expect her to give an undertaking there would be no repeat of her conduct that day.

    c. The Judge ordered the claimant to provide her medical records within 8 weeks or give consent to the respondent to do so. The Judge warned that, if the claimant did not do so, the disability discrimination claim would be stayed and possibly the whole claim (at para 1.19).

6. As set out in the Case Management Orders of the 18 Nov CMO, today's hearing was listed to determine, at the discretion of the Judge on the day:

    a. Whether to strike out all or part of the claim

        i. (At para 4.1.1) Because the manner in which the proceedings have been conducted by the claimant had been unreasonable.

        ii. (At para 4.1.2) Because the Tribunal considered that it was no longer possible to have a fair hearing of it.

    b. Whether to order a stay of the discrimination complaints and/or the wider claim.

7. As set out in the Case Management Orders of the 18 Nov CMO, the Judge ordered the claimant, by 9 Dec 2022, to explain why her claim should not be struck out on the basis that:

    a. Because the manner in which the proceedings have been conducted by her has been unreasonable.

b. Because the Tribunal considers that it is no longer possible to have a fair hearing.

c. When responding, she will be expected to provide an assurance to the Tribunal there will be no repeat of her behaviour today.

8. The Judge also ordered the claimant to provide to the respondent by 13 Jan 2023 either copies of her medical evidence on which she intended to rely in relation to the disability issue or (at para 4.2.2) a signed form of authority for her GP to release her GP notes to the respondent.

9. The claimant sent an email to the Tribunal of 2 Dec 2022 (p179) headed request of a rescinding of para 4.2.2. The reference to para 4.2.2 was to the paragraph of the 18 Nov CMO identified above. In this email, among other things:

   a. She complained of technical problems during the video conference of 17 Nov 2022, and that she could not effectively take part in the hearing because of this. There is no indication she raised these during the hearing.

   b. She referred to medical evidence which she had already supplied prior to the 17 Nov 2022 hearing.

   c. She complained that the order at para 4.2.2 was not legal because neither the respondent's solicitor nor an Employment Judge should be given access to her medical records; and her medical records contained private information.

   d. She asked the Judge to 'rescind' order 4.2.2.

   e. She applied for relief from sanctions (strike out, unless order, deposit order, cost order).

10. The claimant sent her email of 2 Dec 2022 again on 3 Dec 2022.

11. The claimant sent in a further email on 9 Dec 2022 (p187), asking the Judge to 'rescind' para 4.1.1 and para 4.1.2 of the 18 Nov CMO. The contents of para 4.1.1and para 4.1.2 are identified above. She said the Judge had unjustly asserted that she had conducted the hearing in an unreasonable manner and wrongly asserted that it was no longer possible to have a fair trial. She gave more information of the technical problems she said she had encountered during the hearing. She said that it was the Judge who was obstructing the course of justice.

12. The claimant did not provide an assurance to the Tribunal there would be no repeat of her behaviour in the 17 Nov 2022 hearing and nor did she address the question of whether a fair trial was still possible, other than to make the bald assertion that a fair trial was still possible. This was in spite of the Judge at the 17 Nov 2022 hearing both explaining the issue and what she could do to rectify it to the claimant orally, and including it in the written order.

13. The claimant appealed to the EAT on 6 Jan 2023 against the 18 Nov CMO. The content of that appeal are a matter of record and we do not repeat them here.

14. On 13 Jan 2023 (p189), the claimant applied to the Tribunal for a stay of the proceedings pending the outcome of the appeal to the EAT.

15. On 19 Jan 2023 (p193), the Tribunal wrote to the claimant with the Judge's response to her communications. In relation to matters relevant to this decision and in summary:

    a. Any issues relating to the conduct of the hearing on 17 Nov 2022 related to the claimant's behaviour. If the claimant had wished to raise matters, she had opportunity during the hearing and ample opportunity to do so in writing since then.

    b. The application to rescind paragraphs 4.1 and 4.2 was refused.

16. On 8 Jun 2022, the Judge informed the parties that, in the absence of the EAT determining the claim should proceed from the sift stage, the Hearing on 12 July 2023 would proceed (p255).

17. By letter of 20 Jun 2023, the EAT notified the claimant that her Notice of Appeal disclosed no reasonable ground for bringing the appeal. The claimant evidently received this on 20 June because, on the same date, she requested a rule 3(10) hearing.

18. It followed that the decision of the Judge was that today's hearing should proceed because the EAT had not determined that the claim should proceed at the sift stage.

19. As far as we are aware there has been no correspondence from the claimant after this date either to the Tribunal or the respondent. The claimant did not acknowledge the bundle sent to her for today's hearing by the respondent. She did not inform the Tribunal or the respondent that she would not attend today's hearing.

20. At 10.00am today, as the claimant had not attended the hearing, the Tribunal telephoned her. The claimant informed the clerk that she would not be attending today in person or joining remotely. She said that she was bed bound. She said she was appealing to the EAT and so did not feel the need to attend the hearing. She referred to her notification to the EAT that she was appealing. She referred to the matter having been considered by two different judges and that that was confusing.

21. In the 17 Nov 2022 hearing, it was established that the claimant had previously brought seven other claims before the Employment Tribunal.

22. Mindful of rule 47 of the Employment Tribunal Rules of Procedure 2013 (Rules), we considered whether we should dismiss the claim or proceed in the absence of the claimant. We also considered if we should adjourn the Hearing.

23. We decided to proceed in the absence of the claimant because: the claimant was aware of the hearing; her application for a stay had been refused by the Tribunal unless the EAT determined the claim should proceed at the sift stage, which it did not; she had not applied for a postponement even though she had previously demonstrated her capacity to send in multiple emails to the Tribunal; she had not attended, even by telephone, to apply at the hearing for a postponement; she had not notified the Tribunal or the respondent in writing of her intention not to attend, but had left it to the Tribunal to contact her; she had had opportunity to participate in the hearing which was renewed when the Tribunal called her to find out if she would join the hearing; when called by the Tribunal, she had not sought a postponement. We conclude that it was the claimant's choice not to attend the hearing.

24. Under Rule 37 of the Rules, 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;

    (d)that it has not been actively pursued;

    (e)that the Tribunal considers that it is no longer possible to have a fair hearing

25. Rule 2 of the ET Rules provides: 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.

26. As stated by His Honour Judge James Taylor in Mr T Smith v Tesco Stores Limited EA02921-000062-00:

    a. 'The EAT and Court of Appeal have repeatedly emphasised the great care that should be taken before striking out a claim and that strike out of the whole claim is inappropriate if there is some proportionate sanction that may, for example, limit the claim or strike out only those claims that are misconceived or cannot be tried fairly.

    b. Anxious consideration is required before an entire claim is struck out on the grounds that the manner in which the proceedings have been conducted by or on behalf of the claimant has been scandalous,

unreasonable or vexatious and/or that it is no longer possible to have a fair hearing.

c. In Bolch Burton J considered the approach to be adopted in considering whether it is appropriate to strike out a claim because of scandalous, unreasonable or vexatious behaviour and concluded that the employment tribunal should ask itself: first, whether there has been scandalous, unreasonable or vexatious conduct of the proceedings; if so, second (save in very limited circumstances where there has been wilful, deliberate or contumelious disobedience of an order of the employment tribunal), whether a fair trial is no longer possible; if so, third, whether strike out would be a proportionate response to the conduct in question.'

27. His Honour Judge Taylor further referred to Court of Appeal in Blockbuster Entertainment Ltd v James, [2006] EWCA Civ 684, [2006] IRLR630, where Sedley LJ stated: 'This power, as the employment tribunal reminded itself, is a draconic power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either 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 these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response.'

28. His Honour Judge James further stated: 'Choudhury J (President) made a very important point about what constitutes a fair trial in Emuemukoro v Croma Vigilant (Scotland) Ltd [2022] ICR 327: 19 I do not accept Mr Kohanzad's proposition that the power can only be triggered where a fair trial is rendered impossible in an absolute sense. That approach would not take account of all the factors that are relevant to a fair trial which the Court of Appeal in Arrow Nominees [2000] 2 BCLC 167 set out. These include, as I have already mentioned, the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court. These are factors which are consistent with taking into account the overriding objective… It would almost always be possible to have a trial of the issues if enough time and resources are thrown at it and if scant regard were paid to the consequences of delay and costs for the other parties. However, it would clearly be inconsistent with the notion of fairness generally, and the overriding objective, if the fairness question had to be considered without regard to such matters.'

29. His Honour Judge Taylor added: 'This judgment should not be seen as a green light for routinely striking out cases that are difficult to manage. It is nothing of the sort. We must remember that the "tribunals of this country are open to the difficult". Strike out is a last resort, not a short cut.'

30. The respondent made various arguments as to why the claim should be dismissed. One such argument was that the claimant's non compliance with the Tribunal's order to provide or make accessible further medical evidence meant that a fair hearing was no longer possible. We do not consider it appropriate to strike out for failure to provide or make accessible further medical

evidence because the penalty provided for that in the 18 Nov 2022 CMO was expressly a stay of the claim, not a strike out.

31. We turn to the issue of the way the claimant conducted herself at the hearing on 17 Nov 2022. We consider the claimant's conduct in that hearing to have been unreasonable.

    a. We note the narrative set out above of interruptions and speakings over, despite warnings, a break and being put on mute, which was so disruptive that the Judge had to resort to muting the claimant. The result was that the hearing took an excessive length and did not cover all the matters required.

    b. In his decision in this claim of 20 June 2023, His Honour Judge Taylor stated (p259) that it is clear that the claimant acted inappropriately and that the Judge did not blame the claimant for technical hitches.

    c. Further, having apologised in the 17 Nov 2022 hearing, and thereby apparently accepting her wrongful behaviour, the claimant effectively retracted this position in her email of 9 Dec 2022, saying the Judge had unjustly asserted that she had conducted the hearing in an unreasonably manner. She thereby acted in a contradictory and unreasonable manner.

32. We make the difficult and unusual decision that it is not possible to have a fair trial:

    a. The claimant did not provide an assurance to the Tribunal there would be no repeat of her behaviour in the 17 Nov 2022 hearing and nor did she address the question of whether a fair trial was still possible, other than to make the bald assertion that a fair trial was still possible.

    b. In her correspondence, the claimant has failed to indicate any recognition that she behaved unreasonably in the 17 Nov 2022 hearing. Instead, she has sought to blame technical problems and the Judge. Accordingly, the Tribunal can have no confidence whatsoever that, if the claim is allowed to continue, the claimant will behave any differently. It appears likely that the claimant will again repeatedly interrupt and talk over the Judge and other participants in the hearing.

    c. The effect of the claimant's disruptive behaviour was to lengthen the hearing and mean that relevant matters were not dealt with. As per Emuemukoro, the question of fairness includes the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court. These are factors which are consistent with taking into account the overriding objective. It seems it will not be possible to conclude the hearing in the time allocated.

    d. In her conduct on 17 Nov 2022, and failure to give the assurances as to future conduct sought and instead blaming the Judge, the claimant has demonstrated a failure to comply with her duty under the overriding

objective to co-operate with the Tribunal and has failed to give the Tribunal any reassurance what she will do so.

33. We then have to consider if striking out the claim is the appropriate remedy or whether there is some lesser penalty which we could impose which may ensure that the claimant conducts herself in the claim appropriately and make a fair trial possible. However, given the claimant's refusal to admit any wrongdoing, we see no way of rectifying her conduct. The claimant has been given the opportunity to give an assurance that she would not repeat her behaviour. Far from doing so, she instead blamed the Judge. The claimant, although unrepresented, has considerable experience of employment tribunal claims, having previously brought seven such claims. She is not ignorant of the processes.

34. Further, the claimant has shown that she is not willing to accept the authority of the Tribunal by failing to attend today's hearing. We note that the claimant failed to notify either the Tribunal or the Respondent of her intention not to attend the hearing. This information was not conveyed until the Tribunal called the claimant at 10.00am this morning. If the claimant was too unwell to attend, she failed to notify the Tribunal of this, even by email, and apply for a postponement, with reasons. The claimant was well enough to take the call from the Tribunal and give reasons why she would not be attending. She gave no indication she sought a postponement. On the contrary, the comments she made to the Tribunal clerk indicate that the claimant did not attend the hearing because she was appealing to the EAT, not because she was physically unable to attend due to ill health. This was in spite of the Judge having expressly rejected her application for a stay in light of her application to the EAT in the event that the EAT rejected her appeal at the sift stage. The claimant ignored the Judge's decision that the claim should proceed.

35. We consider that the claimant's choosing not to attend the hearing was part of a course of conduct with her unreasonable behaviour at the 17 Nov 2022 hearing under which the claimant demonstrated an attitude that she would not accept the authority of the employment tribunal; and she is not prepared to cooperate with the tribunal process.

36. We take into account the consequences of a strike out order and recognise that it is a draconian measure and most prejudicial to the claimant who is unrepresented. We also take into account the prejudice to the respondent which has been subjected to an extended hearing on 17 Nov 2022 where all relevant matters could not be dealt with due to the claimant's behaviour and which has been put to the cost of attending today's hearing due to the claimant's behaviour. It is now facing a hearing at which it would expect there to be persistent disruptive behaviour by the claimant, meaning that the hearing could not be completed in the time allocated.

37. Therefore, we consider it proportionate to strike out the entire claim due to the claimant's unreasonable conducted in the hearing on 17 Nov 2022.

Signed electronically by me

Employment Judge Kelly

Signed on: 12 July 2023