EMPLOYMENT TRIBUNALS

Claimant: Mr R Tedd

Respondent: Surrey County Council

Heard at: Croydon by CVP **On**: 7 July 2023

Before: Employment Judge Barker

Representatives
For the claimant: In person
For the respondent: Mr Howells, counsel

RESERVED JUDGMENT

The decision of the Tribunal is that the claimant's claims are struck out under rule 37(1)(d) of the Employment Tribunals Rules of Procedure Regulations 2013. This is because the claim was not actively pursued.

REASONS

Preliminary Matters and Issues for the Tribunal to decide

1. The purpose of the hearing was to consider whether to strike out the claimant's claims because of his non-compliance with the order of EJ Dyal of 7 December 2022 and because the claims have not been actively pursued since 7 December 2022.

2. This hearing was listed following a case management hearing before EJ Bromige on 30 May 2023. At the hearing EJ Bromige directed the claimant to do the following:

> *"1. By 23 June the claimant shall serve medical evidence supporting his assertions in his emails between 23 to 26 May 2023 and provide an explanation in writing as to why he failed to comply with EJ Dyal's order at all until 4 May 2023*
> *2. By 30 June 2023 the claimant shall serve responses to EJ Dyal's case management order"*

3. The assertions in the claimant's emails between 23 to 26 June 2023 were, in summary, that he had a hospital appointment with an endocrinologist at 1pm on 30 May 2023 and therefore could not attend the Tribunal hearing which was listed for three hours between 10am and 1pm on 30 May 2023.

Adjustments during the hearing

4. The Tribunal took careful note of the claimant's submissions about his health issues. The Tribunal had read EJ Dyal's case management hearing record from the hearing on 7 December 2022 and noted the reasonable adjustments that were made by EJ Dyal on that occasion. These were to take regular breaks, proceed more slowly, give the claimant time to process and respond and take breaks for the claimant to administer medication as required. During this hearing, those adjustments were adhered to.

5. This hearing started slightly late because of connection issues, starting at approximately 10.15am. At 11.05am, the Tribunal adjourned until 12 noon as the claimant had made a number of complaints about his health during the course of the hearing and had indicated that he wished to administer some medication.

6. The claimant told the Tribunal during the hearing that he was experiencing a number of health issues during the course of the hearing itself. The claimant told the Tribunal "right now I am suffering from an angina attack. Right now my GP would say I need to go to A&E and call an ambulance." He also said "I have got chest pain now and need to call 999 because they are checking my heart every time this happens". The claimant did not call 999 during the hearing or indicate that the hearing would need to be adjourned for this reason, but continued to make his submissions. He did say that he may need to take medication "shortly" and the claimant was offered a break to do so but did not take it straight away. Nevertheless, the Tribunal adjourned very shortly thereafter, at 11.05am.

7. The lengthy break was also for the claimant to have the opportunity to consider the respondent's skeleton argument. This contained 6 pages of submissions and a case report that ran to five pages. The claimant was advised that he did not need to read the case report as this was sufficiently summarised in the respondent's counsel's submissions.

8. It is noted that both the claimant and the Tribunal received the respondent's skeleton argument by e-mail the day before the hearing, arriving at 4.32pm. It was, however, the claimant's assertion that "*it didn't arrive in my inbox until after 8.30pm. This is because e-mail servers don't work in real time and there is a delay in in things coming through*". This was given as the claimant's reason as to why he had not read the skeleton argument in advance. The Tribunal was not persuaded by this, but as the judge also needed time to read the submissions, and in the interests of a fair hearing, additional time was provided to the claimant to do so.

9. When the Tribunal resumed after the break, the claimant told the Tribunal that he felt much better and had taken his medication, had read the skeleton argument and was ready to continue.

10. The claimant had provided an e-mail to the Tribunal and the respondent's solicitor, timed at 21.33 the day before the hearing. This contained an image that could not be viewed but that the claimant said was confirmation of his GP appointment at 2.50pm on 30 May 2023. This appointment was reflected in his GP records, which the Tribunal and the respondent did have access to in the bundle.

11. The claimant told the Tribunal that he was unable to open the bundle sent by the respondent as a password was required and had not been supplied. The Tribunal was surprised that this was the case as the bundle had been shared by the respondent's solicitor in the same way with the Tribunal and a password had not been required to open it. The respondent's solicitor was not in the office on the day of the hearing and so it was not possible for the respondent's counsel to obtain an alternative bundle of documents for the claimant. However, the vast majority of the documents were the pleadings, the case management minutes and the claimant's own medical evidence, so the Tribunal was satisfied that the claimant did have alternative access to these documents and was familiar with them. Nevertheless, when a particular document was being discussed, the Tribunal displayed it on screen for the claimant to read, which he said was acceptable.

<u>The claimant's requests to postpone the hearing on 30 May 2023</u>

12. At the hearing on 7 December 2022, at which some of the claimant's claims were clarified and a partial list of issues drawn up, EJ Dyal ordered the claimant to provide certain additional information by no later than 26 January 2023. This was in the form of specific questions directed at filling in gaps in the claimant's allegations, such as specific dates on which events were said to have taken place. It was apparent from the list of issues and the minutes of the case management discussion that EJ Dyal and the respondent's representative had taken quite some time to assist the claimant in clarifying his claims, which had been presented to the Tribunal in a lengthy narrative-style document attached to the ET1 claim form.

13. On 23 January 2023, the claimant wrote to the Tribunal, stating that he had suffered a heart attack both before and after Christmas 2022 and that he was not in good health. He requested a further six weeks to comply with EJ Dyal's case management order.

14. The respondent did not object to the claimant's application although they noted that they had not received any medical evidence in support of it. In response, the claimant submitted a text message received from his GP on 13 December 2022 requesting that he attend Royal London Accident and Emergency department the same day because he may have been experiencing "cardiac chest pain/ ischaemia". The Tribunal granted the claimant's application, so that the date of compliance with EJ Dyal's order was postponed until 9 March 2023. The claimant did not take any steps whatsoever in connection with complying with this revised deadline before 4 May 2023. He did not provide any further information to the respondent and did not apply to the Tribunal for an extension of time.

15. On 4 May 2023 the claimant did not, as directed, provide specific answers and information in response to the questions in EJ Dyal's list of issues, but instead sent 30 emails to the respondent, some of them with what was described by the respondent as "numerous attachments". The respondent observed that the claimant provided no explanation for the emails nor did he identify which item(s) from the list of alleged detriments the e-mail evidence related to.

16. A second case management hearing, which had the purpose of further clarifying the claimant's claims, including those relating to disability discrimination, was listed for three hours to take place on 30 May 2023. It was listed to start at 10am and run until 1pm.

17. In correspondence between 23 May and 26 May, the claimant provided information that he would need a 2-hour lunch break between 12 noon and 2pm, to attend an endocrinologist hospital appointment that could not be postponed because he may well not get another appointment for several months. The claimant was asked by the Tribunal, and advised by the respondent, that if he wished to vary the time of the hearing or postpone it he needed to notify the Tribunal by e-mail and provide evidence of his appointment.

18. The relevant emails from the claimant to the respondent and the Tribunal are as follows:

    18.1. 23 May 2023, two emails were sent by the claimant to say that he had a "*hospital appointment*" on 30 May and that he needed a break between 12 noon and 2pm on 30 May "*to attend my appointments*".

    18.2. 24 May 2023, to Julie Care of the respondent, copied to London South ET at 16.27:
    "Hi Julie,
    I won't be able to attend until 1pm I have an appointment this week with an endocrinologist then one next week. I can only attend until 12pm and then need to attend this appointment. I can reconvene in the afternoon session.
    Thanks,
    Richard"

    18.3. On 25 May 2023 the claimant wrote to Julie Care:
    "I have to attend these health appointments nothing I can do to change them I cannot cancel to have to wait another three months whilst my health continues to deteriorate."

    18.4. On 25 May 2023 the claimant wrote to London South ET:
    "Hi
    I need to postpone this hearing to another date. I have medical appointments. I had one today and one on the day of the hearing of which I have to travel to.
    Thanks
    Richard Tedd."

18.5. On 26 May 2023 the claimant wrote to London South ET, copied to Julie Care:

"Dear sir or madam
I have sent in proof of an appointment this morning 26th June 2023 I need to attend A&E with what could be and still may be determined a stage of heart failure.
My health is deteriorating and now have to see a cardiologist can you please put this in front of a judge urgently.
I am not well enough to attend at present and I have a further medical appointment I need to travel to on that day.
Thank you for your assistance.
Richard"

18.6 On 30 May 2023, after the conclusion of the hearing (which finished early as the claimant had not provided the information ordered by EJ Dyal to the respondent), the claimant wrote to the London South ET, copied to Julie Care, at 14.55:

"Dear Sir or Madam
Advance notification of a medical appointment.
Richard Tedd"

What was attached was a letter for an outpatient consultation on 5 July 2023.

19. The Tribunal has also seen from the claimant's medical records that he had an appointment with his GP on 30 May 2023 at 14.50, which appointment was booked some time earlier. A notification SMS was sent on 27 May 2023 by his GP surgery regarding this appointment.

20. No evidence of an appointment with an endocrinologist, or any appointment between 12 noon and 2pm, was provided in advance of the hearing on 30 May 2023.

21. The claimant attended the hearing on 30 May, which started slightly late but not long after 10am. The claimant told EJ Bromige that he had attended A&E on 26 May 2023 and that he had a medical appointment "*today*".

22. The judge's record of the case management hearing at paragraph 10 notes in relation to this discussion *"he was unable to tell me what time the appointment was, or when it had been booked. The claimant at this stage appeared (to me) to be flustered and requested a short break, which was granted. The case was adjourned until 10.40am*".

23. EJ Bromige's case management record continues at paragraph 11 and 12

"when the hearing resumed, the claimant told me that he had attended Accident and Emergency at the Royal London Hospital at approximately 1am on 26 May after he had called an ambulance. He had a follow up appointment at 14.50 hours

today in Whitechapel. I queried this, given the timeline I have set out above, and that the claimant was writing on 23 May about a hospital appointment scheduled for today. I did not receive a satisfactory answer to this inconsistency. The claimant referred to having seen an endocrinologist on Thursday 25 May and that a follow up appointment was anticipated but again, this did not support the claimant's position on 24 May that he had an endocrinology appointment booked for 30 May."

24. EJ Bromige notes, at paragraph 14, that during the adjournment the claimant emailed a fit note to the Tribunal at 10.34 am signed by Doctor Omran who confirmed the claimant was not fit for work between 27 May and 10 June 2023. It did not comment on whether the claimant was fit to participate in legal proceedings during that time and there was no explanation as to why this had only had been submitted that day, after the hearing had started, considering it would have been in the claimant's possession since Saturday 27 May. EJ Bromige continued

"*In any event the claimant's application was not predicated on the basis that he was too unwell to participate in proceedings, but rather he needed time to get to a medical appointment at 14.50 hours which meant he could not attend past 12.00 hours."*

The claimant's application to adjourn the hearing was not determined because it became apparent that the case management hearing could not be effective on the 30 May 2023 because the claimant had not complied with the requests for further information made in the order of EJ Dyal for compliance by 26 January, the date for compliance of which had been extended by the Tribunal to 9 March 2023."

25. This was because the claimant's purported compliance had been, as set out above, not that he had provided further information, but that on 4 May 2023 he sent 30 emails to the respondent with a number of attachments, no explanation nor identification which item from the list of alleged detriments the e-mail evidence related to.

26. It was not considered an appropriate use of the Tribunal's resources by EJ Bromige to "*wade through 262 pages of evidence to try and draw out what should have been relatively short and straightforward answers to the questions posed by EJ Dyal."*

27. This led EJ Bromige to, of his own volition, set the case down for a further one day open preliminary hearing to decide whether to strike out the claimants claims for the reasons set out above.

<u>The medical evidence supplied by the claimant concerning a medical appointment during the hearing on 30 May 2023</u>

28. During this hearing, the respondent's counsel took the Tribunal and the claimant through the emails that were sent and received by the parties and the Tribunal during the period between 23 to 26 May 2023, which are set out above. As the claimant did not have access to the Tribunal bundle, the Tribunal shared its screen so that the claimant could read the document being referred to while it was being discussed .

29. The respondent's counsel also took time to go through the medical evidence provided by the claimant for this hearing with him. As each document was discussed, the Tribunal put the relevant page on screen for the claimant to read.

30. None of the documents disclosed by the claimant support his assertion that he had an appointment either in a hospital or with an endocrinologist or between the hours of 12 and 2pm on 30 May 2023, such that he would have been unable to attend the hearing with EJ Bromige and such that the hearing needed to be adjourned and re listed.

31. During the hearing, the claimant was asked to explain why he had not disclosed an appointment letter, appointment e-mail or text message for this appointment that was taking place during the hearing on 30 May 2023. The claimant's response to the Tribunal was as follows:

    "I work for the NHS. I understand how medical records work. Records have to be changed sometimes... there is an annual refresh in October every year... sometimes medical records are allocated against a temporary NHS number. I was told to call 999 and go straight to hospital. If evidence is needed then my GP or another medical professional can be called to give evidence at the tribunal. I am not a medical professional although I do work for the NHS. I have got chest pain right now I need to call 999 they are checking every time as to what's happened with my heart."

32. It is noted that this response did not answer the question that was asked. The claimant was somewhat evasive in his response, and so the Tribunal asked the question again as to why there was no record of his appointment on 30 May 2023 between 12 noon and 2pm. The claimant replied "*this is a misinterpretation of what was being said"*.

33. With respect to the claimant, this did not really answer the question either. The Tribunal explained to the claimant that this was a very important issue and that it was understood that the claimant had a number of issues with his health and that the Tribunal had noted these carefully. He did not need to repeat the information about his health issues. The issue was the whereabouts of an appointment letter, email or text. There was evidently nothing of that nature available to the Tribunal. Was this correct? Was the claimant's evidence now that in fact there was no appointment and the emails were being misinterpreted? The claimant said that this was the case, this was correct.

34. Again, with respect to the claimant, this is a significant change in his position. At no point prior to or during the hearing on 30 May 2023, when it would have been clear that this "misunderstanding" was in the minds of the respondent and the Tribunal, did the claimant seek to correct this. He did not say, as he said before me, that in fact he actually needed to go to his GP between 12 and 2pm on a regular basis (for which there was no evidence before the Tribunal) or that the endocrinologist appointment had in fact been arranged for July 2023, or that he

needed additional breaks for health reasons between 12 and 2pm, all of which were raised with the Tribunal during this hearing today.

35. Put simply, the claimant's explanations are not consistent or credible. He was not able to give a clear answer to the question of why there was no evidence of an appointment scheduled to take place during the hearing on 30 May. His answers during this hearing have been evasive.

36. Therefore, taking all of the evidence into account, including the parties' submissions on the matter, there is no evidence before the Tribunal to support the claimant's clear assertion to the Tribunal and the respondent that he was unavailable during the listed time of the hearing on 30 May 2023 by reason of an endocrinology appointment to take place starting between 12noon and 1pm. His GP records and other medical records were before the Tribunal. The claimant understood that this letter, if it existed, was important. He did not offer to supply it subsequently. He changed his position during this hearing and asserted that there had been a misinterpretation of his messages.

37. The conclusion I have reached is that it was simply not true of the claimant to say before the hearing on 30 May that there was an endocrinology, or any other hospital appointment at that time on that day, or indeed any medical appointment at any time during the hearing on 30 May, that meant that he was unable to attend.

Evidence concerning the claimant's ability to comply with the orders of EJ Dyal, including additional information and documents

38. The claimant's evidence to the Tribunal is that he has a number of life-limiting and complex health conditions. This is accepted by the Tribunal. That the claimant has a number of life-limiting and complex health conditions is not the issue before the Tribunal at this hearing. This was explained to the claimant several times during the course of this hearing.

39. It was explained that the issue that the Tribunal sought evidence and submissions on was the extent to which the claimant was unable to comply with the direction of EJ Dyal between 9 March and 4 May 2023, and why. It was not necessary for the claimant to give the Tribunal detailed accounts of the specifics of his blood pressure readings, medication types and dosages, visits to hospital or test results in general. The Tribunal explained that evidence was sought from the claimant as to why he did not comply at all with the direction of EJ Dyal until 4 May 2023 and then did not comply in the way he had been asked to. Given that the claimant's explanation is that he was unwell during that time, the Tribunal asked for medical or other evidence to support this from that time.

40. Despite this, the claimant has not assisted the Tribunal in understanding the impact of his medical conditions on his ability to engage in litigation from December 2022 to May 2023. When asked direct questions about the effect of his conditions on his day to day life from December 2022 to May 2023, or to date, the claimant had a tendency to not answer the question but instead to tell the Tribunal the story of his

illnesses and diagnoses. This had already been set out in some detail in 15 paragraphs in the witness statement that he was asked to produce by EJ Bromige, which was requested in order to provide an explanation as to why he failed to comply with EJ Dyal's order at all until 4 May 2023.

41. The claimant's witness statement at paragraph 2.5 notes that he is a carer for his family, including his elderly parents who have their own health problems. He also told the Tribunal that he supported his partner through what was clearly a difficult legal issue and that he was working when he could for the NHS, although he has had to take considerable time off.

42. When challenged on a point, or when asked a direct question that he found difficult, the claimant had a tendency to reply to the effect of "I am having an angina attack right now", or "right now the GP would say to me that you need to dial 999 and go right away to hospital" or "do you want me to have a heart attack right here in court. This was what happened at Surrey County Council."

43. The respondent challenged the claimant's assertion that he was too unwell to comply with the case management orders until 4 May, by taking the Tribunal through the claimant's GP records for April 2023 by way of example, which records show that the claimant was contacted daily for a period of weeks by a nurse who was carrying out monitoring of the claimant as he had tested positive for Covid-19 around that time. The GP notes record that the claimant had mild shortness of breath but on a number of occasions when asked whether he was unable to carry out his normal activities, the claimant answered "no".

44. The claimant told the Tribunal, when being taken through these GP records, that there had been a "*lack of understanding*" of the medical records, and suggested that the respondent needed professional medical advice in order to understand them. He suggested that the hearing ought to be adjourned to allow a medical professional to attend as an expert witness. The Tribunal noted that this would not be necessary as the GP records were clear and factual. Did the claimant say that they were now unreliable? It was noted that he emailed on 22 June 2023, to the London South ET and the respondent's representative:

    "I have sent across my GP records both in support of my statement and the emails and messages sent. I hope I have duly clarified and satisfied the Employment Tribunal. This is the last of my GP records."

    I have a lot more evidence in support but hopefully my GP records that shows and supports my statement is enough for you not to strike out this action.

    I am planning to send across the other evidence from other hospitals to send across to the court in due course but this is a big cost to me in both time and money spent."

45. The claimant told the Tribunal that he did now say that these GP records were misleading and inaccurate and that he had consultant information and scan records from Bart's NHS Trust which would show just how unwell he was at the time to

which the issue related and which would contradict the GP notes. He took some time to review his emails and said that he had sent these documents to the respondent's solicitor but that she had failed to include them in the bundle. He referred in particular to a number of attachments to an email dated 25 June 2023. He listed them to the Tribunal, and said that they were London Bridge hospital CT scans, consultants' letters, documents from Bart's, documents from Dr Kandinski, and medical records including those relating to his blood pressure.

46. The Tribunal asked the claimant to please email these specific documents to the respondent's counsel and to the Tribunal. The Tribunal commented that it should be a relatively straightforward task to simply forward the email of 25 June identified by the claimant to the respondent and the Tribunal, which contained the attachments that the claimant wished the Tribunal to consider. The claimant took some time to do so, approximately ten minutes during the hearing, at approximately 13.30. It then became apparent that the claimant was sending multiple other emails instead of those requested. When asked why, the claimant said that the information was in the middle of an email chain and it was proving very difficult to find. This was not what he had said some minutes earlier.

47. The Tribunal broke for lunch at this point, for an hour and five minutes, and asked the claimant to isolate and forward the one single email from 25 June 2023 that he said contained the information missing from the bundle. As the claimant is clearly IT literate, and uses technology and databases in his work, this was expected to be a straightforward request. The claimant agreed to do so. The respondent's counsel was also asked to locate that email if possible and forward it to the Tribunal. The respondent's counsel was also asked to try to find a method of supplying the claimant with a further copy of the bundle over the lunchbreak.

48. On resuming the hearing after lunch, it became apparent that the claimant had sent fifteen individual emails to the Tribunal and the respondent during the lunch break, despite the express contrary instructions of the Tribunal immediately before the break.

49. The Tribunal took some time during the hearing to open and review the contents of each email. It was identified that only three emails contained any new evidence. Twelve emails contained documents that were already in the bundle. Of those three emails, these each contained between 16 and 24 pages of medical notes, mostly from the claimant's endocrinology appointments at Barts NHS Trust, and only two appointments were from the time period in question –15 March 2023 and 14 December 2022. The Tribunal considered the information contained in these documents and the respondent's counsel was allowed time to consider them and respond. None of the documents provided evidence to show that the claimant's GP records were inaccurate or that he was, for the period from 7 December 2022 to 4 May 2023, unable to complete the case management order of EJ Dyal. The records of 14 December 2022 reflect that the claimant had a pancreatic CT scan, the results of which are recorded as "*did not show anything concerning*." The records of 15 March 2023 note hypertension and a myocardial infarction, amongst other matters, but nothing in those documents demonstrates that the claimant was physically or mentally impaired to the extent that, over the period 9 March to 4 May (or to 30

May) that he was not capable of responding to EJ Dyal's order, or in the alternative, not capable of applying to the Tribunal for an extension of time.

50. It was the respondent's counsel's submission that EJ Dyal had taken time to carefully identify what was required from the claimant, such that compliance with the order for information and documents was not onerous. I accept that a significant degree of assistance was provided by EJ Dyal to the claimant in identifying a list of issues and complaints and identifying any omissions from these. The respondent's counsel somewhat tentatively suggested that the claimant had been "*spoon-fed*" by EJ Dyal. The claimant took exception to the use of this word at the time it was first used, and returned to it in his closing submissions. The claimant said that the respondent's counsel should "*go over to EJ Dyal today and apologise*". He also said that it was offensive to him (the claimant), as he had not been "*born with a silver spoon*" in his mouth and had worked hard in his life to achieve what he had achieved.

51. The Tribunal did not consider that the word was disrespectful. Part of the respondent's application is that the claimant does not have a good reason for failing to comply with EJ Dyal's order, and part of that is the submission that EJ Dyal's order was not onerous to comply with, as EJ Dyal had assisted the claimant to a considerable degree. The wider context of that submission is that EJ Dyal himself recorded in the case management discussion minutes that a considerable amount of time had been spent at the hearing on 7 December in clarifying the claimant's lengthy narrative into a list of specific allegations.

52. It was explained to the claimant that this was not at all uncommon, and that Tribunals were obliged to place parties on an equal footing by the Employment Tribunals Rules of Procedure, Rule 2. The claimant did not have legal representation and the claims he discussed with EJ Dyal are complex, being that he made protected disclosures and suffered a number of detriments as a result.

53. It is therefore no criticism of him that he was given assistance by the Tribunal to draw up a list of complaints, and not disrespectful to EJ Dyal that such assistance was provided. Despite this explanation, the claimant said that he still considered the term offensive. I have taken his submission on that point into consideration.

The Law

54. An employment tribunal can exercise its power to strike out a claim or response (or part of a claim or response) 'at any stage of the proceedings', either on its own initiative or on the application of a party, as per rule 37(1) of the Employment Tribunal Rules of Procedure 2013. However, the power must be exercised in accordance with reason, relevance, principle and justice. (Williams v Real Care Agency Ltd 2012 ICR D27, EAT).

55. Rule 37(1)(c) and (d) state that Tribunals may strike claims or responses out on the following grounds:

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

and

(d) that it has not been actively pursued.

56. In Abertawe Bro Morgannwg University Health Board v Ferguson 2013 ICR 1108, EAT, the Employment Appeal Tribunal noted that, in suitable cases, applications for strike-out may save time, expense and anxiety. However, in cases that are likely to be heavily fact-sensitive (such as those involving discrimination or public interest disclosures) the circumstances in which a claim will be struck out are likely to be rare. This was similarly expressed in Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL.

57. Where a claim or response is to be struck out under Rule 37(1)(d), that it has not been actively pursued, this is generally for one of the following two categories of reason as established in Birkett v James [1978] AC 297 and applied in Executors of Evans and anor v Commissioner of Police of the Metropolis [1992] IRLR 570, CA:

    57.1. that the default is "intentional and contumelious", or

    57.2. if not, that the conduct has resulted in 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 other party.

58. Both categories recognise that a claimant's conduct may result in his or her losing the right to continue with a claim.

59. "Contumelious" default is one that shows disrespect or contempt for the Tribunal and/or its procedures.

60. In Rolls Royce plc v Riddle 2008 IRLR 873, EAT, an employment tribunal erred when it declined to strike out a claim after the claimant falsely informed it that he had been medically unfit to attend the hearing and failed to comply with its various directions. The Employment Appeal Tribunal determined that the claimant had shown considerable disrespect to the Tribunal and its procedures, and the respondent's interests. Although striking out a claim on the basis of a claimant's failure to actively pursue it is a draconian measure, it is one that can be ordered where the claimant's default is intentional and shows disrespect for the tribunal and/or its procedures.

61. A case may be struck out for contumelious conduct even where a fair trial is still possible. Lady Smith in Rolls Royce plc v Riddle 2008 IRLR 873, EAT said that

    "it is quite wrong for a claimant, notwithstanding that he has, by instituting a claim, started a process which he should realise affects the employment tribunal and the use of its resources, and affects the respondent, to fail to take reasonable steps to progress his claim in a manner that shows he has disrespect or contempt for the tribunal and/or its procedures.

In that event a question plainly arises as to whether, given such conduct, it is just to allow the claimant to continue to have access to the tribunal for his claim."

62. Where a claim or response is to be struck out under Rule 37(1)(c), for non-compliance with any of the Employment Tribunal Rules or with an order of the Tribunal, a Tribunal must have regard to the overriding objective set out in rule 2 of the Rules of seeking to deal with cases fairly and justly. This requires a Tribunal to consider all relevant factors, including:

    • the extent and the magnitude of the non-compliance
    • what disruption, unfairness or prejudice has been caused
    • whether a fair hearing would still be possible, and
    • whether striking out or some lesser remedy would be an appropriate response to the disobedience (Weir Valves and Controls (UK) Ltd v Armitage 2004 ICR 371, EAT).

Application of the law to the facts found

63. The claimant's claim is heavily fact-sensitive, in that it is for whistleblowing and disability discrimination. The claimant's submission to the Tribunal is that there is *"great public interest*" in his claim. This is because he alleges that the respondent's actions have caused his considerable health problems and that the protected disclosures he made indicated that public money was being misappropriated. He also alleges that his current health problems are so complex and significant that he is a significant user of NHS resources and therefore public money.

64. The grounds on which EJ Bromige, of his own volition, set this matter for determination are whether the claimant's claims should be struck out under Rule 37(1)(c) or (d).

65. Rule 37(1)(d) involves a Tribunal considering whether the claimant's failure to actively pursue his claim was (as per Birkett v James and Executors of Evans and anor v Commissioner of Police of the Metropolis) "*intentional and contumelious*" or if not, that the conduct has resulted in inordinate and inexcusable delay.

The alleged medical appointment on 30 May

66. When asked about the existence of the medical appointment that caused him to say he was not able to attend the case management discussion on 30 May 2023, he was not able to provide a satisfactory answer, such that the Tribunal concludes that the claimant was being truthful when he said he had an endocrinologist appointment that day, or indeed any medical appointment during the time listed for the hearing on 30 May.

The reasons for the delay in compliance from 9 March 2023

67. When asked for the medical evidence that supported his assertion that he had been too ill to provide the information ordered by EJ Dyal by 9 March 2023, such

that he did not comply at all until 4 May 2023, and then not adequately, the claimant's answers were also unsatisfactory and contradictory.

68. Firstly, he told the respondent that (in the email referred to above from 22 June 2023) his GP records were adequate evidence of his medical position at the relevant time. When it became clear during the respondent's submissions that the GP records did not support the allegation that he was too ill to comply, the claimant asserted that he had numerous other more reliable records that did support this position, such as consultants' reports and scans and that the GP records were in fact highly unreliable.

69. He then said that the medical position was so complex that the Tribunal and the respondent would not be able to understand it without expert medical evidence, and the hearing should be adjourned. This was not borne out on the evidence before me.

70. When permitted to disclose these by the Tribunal (despite having asserted on 22 June 2023 that he did not intend to rely on them as this was not necessary), he sent a barrage of emails and numerous attachments, most of which were not relevant information regarding his consultants' reports or scans and/or were not from the relevant time. As with his compliance on 4 May, his late submission of evidence swamped the Tribunal and the respondent with information, despite an express instruction from the Tribunal not to do so.

71. The claimant's conduct strongly suggests that he considers that it is the Tribunal's job and not his, to sift through his evidence to support his contentions. All he apparently considered he had to do was to gather a selection of papers and send them over. However, this is the claimant's claim and he makes a large number of serious allegations. It is his responsibility to support those allegations with appropriate evidence. That is not a job for the Tribunal, or the respondent. It is unreasonable to expect the Tribunal or the respondent to do this job for him.

72. When the Tribunal took the time to review the fifteen emails and their attachments during the hearing, they did not demonstrate the information that the claimant alleged they did. There was no evidence to demonstrate that the claimant was so unwell that his ability to comply with EJ Dyal's order between 9 March and 4 May was significantly compromised. He also offers no explanation for why he did not request a further extension of time.

<u>The claimant's preparedness for this hearing</u>

73. During this hearing, the claimant did not co-operate with the respondent and the Tribunal in circumstances where I do not consider there was a reasonable excuse for his conduct. The claimant's role at the respondent was Project Manager for Surrey Fire and Rescue Service Pensions, and he worked for the Head of Data, Digital and Special Projects. He is clearly a confident and experienced user of IT and is articulate and intelligent.

74. Despite this, he did not attend the hearing ready to participate. He said he was unable to access the file of documents in circumstances that had not applied to either me or the respondent's counsel when accessing the online file (he said that a password was required of him), but did not appear to have taken any steps prior to the hearing to obtain this. He alleged that an email sent at 4.32pm the previous day had taken an extra four hours to arrive in his inbox, which I considered to be highly unlikely, so that he had not read the respondent's counsel's submissions. He ignored the Tribunal's instructions to forward a single email and instead sent fifteen emails. This was behaviour that was un-cooperative and caused additional Tribunal time and resources to be spent on determining the respondent's application, in that the hearing finished without a decision being delivered.

75. The claimant was asked to address the issue of intentional or contumelious delay in his closing submissions. He said that there was no intentional or deliberate lack of compliance on his part. He had been very ill and continued to suffer greatly with ill health. He had caring commitments for his elderly parents and was attempting to hold down paid employment. He had assisted his partner in a difficult legal dispute. It was unfair of the respondent to expect him to "*work 24 hours a day*" to pursue his claim.

76. The claimant said on two occasions during the hearing that he would need "*more time*" to go through his medical records to extract the relevant information. When asked why he needed more time, given the preparation time that he had already had and the notice of this hearing that he had already had, he replied "*because I am ill*". However, many parties are not in good health when conducting Tribunal proceedings. The fact that the claimant is not in good health is not of itself a reason for the Tribunal to be limitlessly tolerant of delays. It is open to him to request an extension of time, supported by relevant medical evidence, in the proper manner. It is not appropriate or reasonable to do so in the middle of a hearing. This is not a reasonable use of Tribunal time or resources, causes delay and also inconveniences the respondent.

77. Furthermore, the claimant's medical records do not show that he was so impaired that he has not been able to prepare for this hearing. A number of medical records (and the claimant's own submissions during this hearing) show that he has taken steps to maintain his health as best as he can, such as on 26 May 2023 it was noted that he was "well earlier in the day and had been swimming". The fact that he has been able to care for his elderly parents and hold down paid employment and assist his partner with a legal dispute shows that he was not, in fact, unable to prepare for this hearing, or indeed unable to comply with EJ Dyal's case management order. It was that he did not consider it a priority for him to do so.

Conclusions

78. The Employment Tribunal is responsible for the administration of workplace justice for claimants with disabilities. The Tribunal hears claims and responses from gravely ill parties and makes adjustments to allow their participation in hearings. The Tribunal frequently allows generous extensions of time when requested, and indeed this was done for the claimant. However this does not wholly excuse a party

from compliance. The Tribunal must also, as per the overriding objective (Rule 2 of the Employment Tribunals Rules of Procedure 2013), deal with cases fairly and justly. This means doing what is fair and just for both parties. This includes avoiding delay and saving expense. The parties themselves are required by Rule 2, to assist the Tribunal to further the overriding objective and "*in particular shall co-operate with each other and the Tribunal*".

79. In relation to the issue of why the claimant did not comply with the order of EJ Dyal by 4 May, and then did not comply appropriately, I conclude that the claimant was able to do so, but chose not to. In that sense, his default was intentional. He chose, in the time he had available, to prioritise other matters. He has not demonstrated that this was something he had no choice over. There is insufficient medical evidence that he was so adversely affected as a result of his health issues that he could not comply. This has caused delay, expense and prejudice to the respondent. It caused delay to the Tribunal and meant that the case management hearing on 30 May 2023 could not be effective. This resulted in a waste of Tribunal time and resources.

80. In relation to the claimant's assertion that he was unable to attend the hearing on 30 May because of a medical appointment that was scheduled for during the hearing, I find that there was no misunderstanding of the claimant's position as stated by him when he applied to have that hearing vacated. His position was perfectly clear – he had an appointment with an endocrinologist on 30 May, during the latter part of the hearing, that he could not reschedule. This position is unsustainable on the evidence before me today. No such appointment existed. There is no evidence of this appointment whatsoever in the extensive medical evidence supplied by the claimant and he cannot credibly explain the absence of this.

81. The claimant has, I find, deliberately misled the Tribunal and the respondent as to the reason why he could not attend for the full duration of the hearing on 30 May. No reason presents itself on the evidence as to why he has misled the Tribunal and the respondent in this way. I can only conclude that he simply did not wish to attend, possibly because he considered that he had better things to do.

82. In the words of Lady Smith in Rolls Royce v Riddle, "…*it is quite wrong for a claimant, notwithstanding that he has, by instituting a claim, started a process which he should realise affects the employment tribunal and the use of its resources, and affects the respondent, to fail to take reasonable steps to progress his claim in a manner that shows he has disrespect or contempt for the tribunal and/or its procedures*."

83. The claimant should have realised that by starting his claim, he had started a process that affects the Tribunal and the use of its resources, and affects the respondent. He has failed to actively pursue his claim, by attempting to adjourn the hearing on 30 May and by failing to comply properly with the order of EJ Dyal for further information, both without good reason. He has done so in a manner that shows he has disrespect for the Tribunal and its processes, and disrespect for the respondent. His default was both intentional and contumelious.

84. The claim is therefore struck out under Rule 37(1)(d), as it has not been actively pursued. As the grounds for doing so have presented themselves clearly during this hearing on the evidence before me, I have not gone on to consider whether the claim would also be struck out under Rule 37(1)(c), as it is not proportionate to do so.

85. The claim is hereby dismissed.

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Employment Judge Barker
Date: 13 July 2023