EMPLOYMENT TRIBUNALS

Claimant: **Ms C Hoey**

Respondents: **Riverside Surgery**

On: **21 June 2023**

Before: **Employment Judge McAvoy Newns**

Heard at: **Leeds Employment Tribunal (via CVP)**

Appearances:

For the Claimant: **Mr M Harris (Lay Representative)**

For the Respondent: **Ms L Gould (Counsel)**

RESERVED JUDGMENT

1. The Respondent's application for strike out is not well-founded and fails.

2. The Respondent's application for costs pursuant to Rule 76, dated 10 February 2023, as explained further during this hearing, is well-founded and succeeds. The Claimant is ordered to pay the Respondent costs of £3,036 inclusive of VAT.

WRITTEN REASONS

Form of hearing

3. This was a remote hearing which was not objected to by the parties. The hearing took place via CVP, the Tribunal's video conferencing platform.

Background

4. On 20 November 2021, the Claimant lodged a claim, the particulars of which were in excess of 80 pages long. I was told that the Claimant had purchased a template online and had populated that template.

5. The first hearing of this case took place before me on 4 May 2022. It was listed for one day. Its purpose was set out in the Tribunal's letter dated 21 February 2022, namely:

   5.1 To identify the allegations, clarify the issues and to finalise a list of issues;

   5.2 To determine any applications to amend the Claimant's claim;

   5.3 To determine whether any or all of the Claimant's claims should be struck out on the grounds that they have no reasonable prospects of success;

   5.4 To determine whether any of the Claimant's claims have little reasonable prospects of success and, if so, whether deposit order(s) should be issued; and

   5.5 To make case management orders as appropriate to prepare the claim for a final hearing including, if possible, fixing the hearing date.

6. Unfortunately, the Claimant's representative did not attend the hearing on 4 May 2022 with the information necessary to clarify the claims. He asked for me to issue directions for the parties to comply with e.g. to agree a list of issues between themselves.

7. As the Claimant had a lengthy claim and was represented by a lay representative, I considered it compliant with the overriding objective to use our allocated time to clarify the claim as best as we could during the hearing. Consequently, we did our best to clarify as many claims as possible. Some claims were withdrawn and subsequently dismissed. I set some case management orders for the Claimant to comply with and we met again on 26 September 2022 to continue this exercise. During this hearing, I heard submissions on strike out and deposit and reserved my decision regarding the same, which was sent to the parties on 19 October 2022.

8. Following the 26 September 2022 hearing, I listed a 10-day hearing for March 2023. I set case management orders for the parties to comply with, to ensure readiness for that hearing.

9. Correspondence was directed to me demonstrating that the Claimant had not complied with my case management orders in full. In particular, not all of the requested information, ordered by me, had been provided. The Respondent sought strike out on that basis. The Claimant also wished to make an amendment application.

10. EJ Lancaster postponed the March 2023 final hearing. I made further orders and listed a further public preliminary hearing for 24 March 2023. I was concerned about the delay in this preliminary hearing taking place, particularly given that the claim was lodged in November 2021 and related to matters from June 2020 onwards and stated in my orders:

    "I would prefer for that hearing to take place much sooner, ideally prior to the commencement of the Christmas break. This does not however seem possible considering the parties dates of unavailability. If the parties' availability changes, they should notify the Tribunal as soon as possible to

ascertain whether an earlier listing can be accommodated. The Tribunal can presently accommodate a listing well before 24 March 2023".

11. This could not be accommodated. The 24 March 2023 was subsequently postponed following the Claimant's application. No blame is attributed to the Claimant or her representative for this application. The matter was then relisted for today.

12. Case management orders together with a list of issues have been sent to the parties alongside this Reserved Judgment and Written Reasons. This Judgment deals with the Respondent's applications for strike out and costs.

Application for strike out

13. During today's hearing, the Respondent applied for strike out. They had stated in earlier correspondence that they planned to do so. The 24 March 2023 hearing has been listed to consider and determine such application and today's hearing was listed to deal with the matters that ought to have been dealt with on 24 March 2023, had that hearing not been postponed.

14. It was noted that, by my orders dated 18 November 2022, compliance with the case management orders at paragraphs 12, 13, 20, 21, 23, 24, 32, 35 and 36 of the case management orders following the 26 September 2022 hearing had been suspended.

15. However, this suspension did not apply to the orders at paragraphs 11 (provision of further information) or 17 and 18 (provision of disability related documents). The parties had been warned that, if any of these orders had not been complied with, the Tribunal may strike out the claim or the response and/or award costs in accordance with the Employment Tribunal Rules.

16. In respect to the order for the Claimant to provide further information, the deadline for her to do so was 28 October 2022. Some information was provided by the Claimant prior to this date. However, I was directed to an email from the Respondent's representative explaining that not all of this information had been provided, explaining the prejudice that this caused them. During the strike out application today, the Respondent's representative relied upon this point for background purposes noting that, as at today's hearing, the information had been provided. It had however been delayed.

17. The thrust of the Respondent's application for strike out concerned the failure to provide disability related documents. These were for what are commonly referred to as a "disability impact statement" and relevant medical records. The Claimant's representative accepted that, even as at the date of today's hearing, almost eight months after the deadline for compliance, this order had not been complied with.

18. The Respondent's representative rightly raised the point that strike out is a draconian measure, not to be taken lightly and I am required to consider whether a fair hearing is possible. In the alternative to strike out, she asked me to consider making an Unless Order.

19. She noted that, without these disability related documents, the Respondent was unable to confirm or deny whether the Claimant was disabled with reference to any of the four conditions relied upon. This halted some of the progress that could be made with defending the disability discrimination claims. She asked me to consider strike out of the entire claim (or, should it be more proportionate, the disability discrimination claim) bearing in mind the other failures on the Claimant's representative part. As stated above, in the alternative, she asked me to consider making a deposit order.

20. During today's hearing, before the strike out application had been heard, the Claimant's representative asked me to make an order for these documents to be provided. I noted and explained to the Claimant's representative that an order had been made, as explained above, and seemingly ignored. I asked whether the Claimant's representative had read the orders and/or made the Claimant aware of them. This was relevant to whether I should exercise my discretion to strike out the claim, or part of it, on the basis that I had no confidence that any other orders that I chose to make would enable this claim to be adequately prepared for the final hearing, putting the prospects of a fair hearing in jeopardy.

21. The Claimant's representative told me that he had no recollection of knowing about those orders. He had had problems at home, caring for an elderly relative, his wife and his daughter. He accepted that he had made mistakes and apologised for doing so. He said that these weren't the Claimant's fault, these were purely his fault, and the Claimant should not be punished for his errors. He told me that he "will guarantee it will be done".

22. In respect to the Claimant's engagement with these proceedings, he accepted that he had not sent the correspondence from the Tribunal to the Claimant herself. He chose not to do so because of her ill health and the fact that he wanted to reduce pressure from her.

23. The Claimant's representative also raised the point that some of the failures to comply were less material in that the deadlines were only missed by a couple of days. He relied upon the Respondent's own alleged failures, e.g. the request for extension of time to serve the ET3 and the request for hearing to be postponed. He alleged there had been a lack of co-operation on the Respondent's part which he asked me to consider.

Costs

24. During today's hearing, the Respondent applied for costs. They had stated in earlier correspondence and during previous hearings that they planned to do so. An application was sent in writing on 10 February 2023 and the Claimant's representative responded to that application in writing on 24 February 2023.

25. The written application was made pursuant to Rule 76. The grounds were:

    25.1 The Claimant breached Tribunal orders;

    25.2 The Claimant/her representative acted unreasonably by bringing part of the proceedings which have subsequently been withdrawn; and

25.3 The Claimant/her representative acted unreasonably in their conduct of the proceedings in particular following the 26 September 2022 preliminary hearing.

26. The costs claim included £5,600 inclusive of VAT for Counsel's fees. Of this, £1,800 inclusive of VAT was Counsel's fees for today's hearing. In respect to solicitor's fees, a blended rate was applied and the total costs claimed were £15,930.72 including VAT.

27. As the Claimant's representative confirmed today that he was not representing the Claimant pursuant to a damages based agreement, the Respondent's representative confirmed that, bearing in mind Rule 80, a wasted costs application was not being made.

28. The Respondent's representative referred to Rule 76 and stressed the point that this is applicable even if the unreasonable conduct was on the part of the representative and not the Claimant herself. She recognised that the Claimant's representative was not charging a fee but yet he was someone who held himself out as someone who could assist a claimant with Tribunal litigation.

29. A focus of the application was that the parties shouldn't have needed a third hearing. If the orders had been complied with in full, there would be no requirement to consider strike out on that basis.

30. She relied upon the fact that I had struck out a number of claims and issued a deposit order during a previous hearing. She submitted that these claims ought never have been pursued in the first place.

31. She said additional costs had been unreasonably incurred since the costs application was made but that, in order to be proportionate, they had decided to not claim for these costs as well.

32. The Claimant's representative told me that he found the costs related documents in the bundle to be "interesting and fascinating". He went on to say that he "didn't know it would cost that much". He said he didn't understand the impact of the delays on the costs set out in the schedule or the correlation between the two. He said that when he arrived at the first hearing he asked for a list of issues to be produced, outside of the hearing, which would have avoided these costs. He said that the second hearing was needed because of the complexities surrounding some of the legal terminology.

33. He accepted that the claim was extensive and referred to the decision to purchase and populate a template. He said this would "inevitably give the Respondents a complete nightmare". He said it was clear this didn't make sense to anyone.

34. He said that in order to be unreasonable there needs to be no reason. He had provided reasons for why the delays occurred. He considered these to be reasonable.

35. In terms of the Claimant's means, it was explained that the Claimant was living in France looking after her unwell mother. She had considerable debt,

in the region of £6,000 of outstanding bills from a prior divorce which was being litigated separately. She owes £1,700 to electricity companies. In terms of her job search, she had applied for several posts for which she was invited to final interviews but was unsuccessful. She believed that the reason she was not appointed was due to poor references from last employer. Her universal credit had stopped and plans to reapply for the same. Any income she has received has been adhoc. She is awaiting heart surgery.

36. He explained that if I made a costs order, the Claimant would lose the opportunity to pursue the claim as she won't be able to pay it. He said that the Claimant hadn't brought the claim for financial gain but because of a perceived false allegation which is of fundamental importance.

37. The Respondent's representative made the point that a costs order is not a deposit order which doesn't need to be paid before the hearing. She said that simply not being able to pay now is a consideration but the application doesn't stand or fall on that point.

The Law

Strike out

38. An Employment Judge has the power under Rule 37(1) of the Tribunal Rules of Procedure, 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 the ground that:

    38.1 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 (Rule 37(1)(b)); and

    38.2 for non-compliance with any of these Rules or with an order of the Tribunal (Rule 37(1)(c).

39. In Blockbuster Entertainment Ltd v James 2006 IRLR 630, the Court of Appeal confirmed that, for a tribunal to strike out for unreasonable conduct, it must be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible; and in either case, the striking out must be a proportionate response.

40. In Bennett v Southwark London Borough Council 2002 ICR 881, the Court of Appeal provided guidance on strike out due to the conduct of a party's representative. It is not simply the representative's conduct that needs to be characterised as scandalous but the way in which he or she is conducting the proceedings on behalf of his or her client. When the sanction is the drastic one of striking out the whole of a party's case, there must be room for the party to disassociate him or herself from what his or her representative has done. Where the conduct of the proceedings is categorised as scandalous, a tribunal must go on to consider whether striking out is a proportionate response.

41. In De Keyser Ltd v Wilson 2001 IRLR 324, the EAT stressed the importance of Tribunals considering whether a fair trial remains possible before striking out claims. They made it clear that certain conduct, such as the deliberate flouting of a tribunal order, can lead directly to the question of a striking-out order. However, in ordinary circumstances, neither a claim nor a defence can

be struck out on the basis of a party's conduct unless a conclusion is reached that a fair trial is no longer possible.

42. In Bolch v Chipman 2004 IRLR 140 the EAT added that, even if a fair trial is unachievable, the Tribunal will need to consider the appropriate remedy in the circumstances. It may be appropriate to impose a lesser penalty, for example, by making a costs or preparation order against the party concerned rather than striking out his or her claim or response.

Costs

43. Pursuant to Rule 76(1), a Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted.

44. In Yerrakalva v Barnsley Metropolitan Borough Council and nor 2012 ICR 420, the Court of Appeal reiterated that costs in the Tribunal are still the exception rather than the rule. It also held that costs should be limited to those 'reasonably and necessarily incurred'.

45. In Vaughan v London Borough of Newham [2013] IRLR 713, the EAT held that the question of affordability does not have to be decided "once and for all by reference to the party's means as at the moment the order falls to be made", so that if there is a realistic prospect that the claimant might at some point in the future be able to pay a substantial amount, it was legitimate to make a costs order in that amount thereby enabling the respondents to make some recovery "when and if that occurred".

46. In McPherson v BNP Paribas (London Branch) [2004] EWCA Civ 569 it was held that: "The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring [the receiving party] to prove that specific unreasonable conduct by [the paying party] caused particular costs to be incurred".

47. In respect to this, in Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255 Mummery LJ stated that: "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects if had".

48. In Sud v Ealing London Borough Council 2013 ICR D39 CA, the Court of Appeal held that the cost assessment process did not entail a detailed assessment. Instead, the Tribunal should adopt a 'broad-brush' approach against the background of all the relevant circumstances.

Submissions

49. Both parties provided oral submissions. A written application for costs from the Respondent together with a written reply from the Claimant were also

received. These submissions are not set out in detail in these reasons but both parties can be assured that I have considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

Conclusions

Strike out

50. I agree with the Respondent that the conduct of the Claimant and her representative during these proceedings has been unreasonable.

51. Firstly, the Claimant chose to purchase then populate a lengthy online template claim, containing a significant amount of legal jargon, which has made seeking to understand the basis of her claim extremely difficult. It is clear from the fact that the Claimant has subsequently withdrawn many of the claims referred to in that template that she was not intent on pursuing them. The time and cost of discussing these claims could have been avoided and I expect they would have done had the Claimant not initiated her claim with the lengthy online template that she had chosen to purchase.

52. Secondly, the Claimant's representative attended the hearing on 4 May 2022 unprepared. It appears that he had expected that the hearing would be postponed and case management orders would be issued. However, had I agreed to do this, given his lack of engagement in the Tribunal's case management orders (considered later in these Reasons) it is very likely that the claim would be less well-prepared than it currently is and that further costs would have been incurred by the Respondent in seeking to clarify that claim and finalise a list of issues.

53. Thirdly, the orders for further information were not complied with in full. This has caused the Respondent to be required to chase the Claimant's representative for compliance. It has also necessitated this third preliminary hearing which ought to have been avoidable.

54. Nevertheless, as at today's date, the claim has been clarified, a list of issues is in final form (subject to any final comments from the parties) and the only outstanding order, which had not been suspended, concerns the provision of disability related documents. It would be extremely draconian and contrary to the overriding objective for me to strike out the entire claim on this basis.

55. An option therefore is for me to strike out the Claimant's disability discrimination claims, given that it is these claims that these orders specifically relate to.

56. After careful consideration, I have decided not to do so. A fair trial of this claim could be possible, if these orders are complied with by **22 September 2023,** as per the case management orders that have been sent alongside this Reserved Judgment and Written Reasons. If the disability related documents are provided by this date, the Respondent has ample time to consider them before the hearing in February 2024. The remainder of the case management orders facilitate time for the parties to adequately prepare for the next hearing.

57. I am however concerned that the Claimant's representative did not appear to know, during today's hearing, that these orders had been set during the

26 September 2022 hearing and confirmed to the parties shortly afterwards, as explained earlier. As explained earlier, he had asked me to make these order during this hearing, not realising that the orders had been made, had not been suspended and were significantly overdue. This has therefore reduced my confidence that the Claimant or her representative on her behalf will comply with these orders if only an ordinary case management order is made.

58. Consequently, as an alternative to strike out, appreciating what the recent EAT judgments have said about making Unless Orders, I have decided to issue an Unless Order. This Unless Orders has been sent to the parties alongside this Reserved Judgment and Written Reasons. I have also asked for it to be sent to the Claimant herself, given the draconian nature of it and the fact that the Claimant's representative has told me that he has not been routinely sending the Tribunal's documents to the Claimant herself.

59. Accordingly, the Respondent's application for strike out fails.

Costs

60. Some of the conclusions reached above regarding strike out are relevant to the Respondent's costs application.

61. For the reasons cited above, I do consider the Claimant's conduct, as well as the conduct of her representative, to be unreasonable. Therefore, I am required by the Rules to consider making a costs order.

62. If the threshold for making an order is made out, as it is in this case, it is for the Tribunal to consider all relevant factors in determining whether to exercise its discretion to make an order. They must not move straight to making a costs order without first considering whether to exercise discretion to do so.

63. There does not need to be a precise link between any relevant conduct and any specific costs claimed for the Tribunal to exercise their discretion to order costs. The vital point in exercising the discretion to order costs is for the Tribunal to look at the whole picture of what happened in the case thus far, and to ask whether there has been unreasonable conduct in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had.

64. Unreasonable conduct on the part of the Claimant and her representative has resulted in:

    64.1 there being three full day preliminary hearings in a case where one or, at worst, two should have been needed; and

    64.2 the Respondent having to spend time chasing the Claimant's representative for her full compliance with case management orders.

65. I am conscious that costs are the exception rather than the rule and that they are intended to be compensatory rather than punitive. I am also mindful of the Claimant's means, as explained earlier.

66. I have reflected on the list of issues that I have sent alongside the case management orders. Even had the Claimant not bought and populated a lengthy online template (causing need for the claims within which to be whittled down during hearings), it is foreseeable that two full day preliminary hearings may have still been required. The factual and legal basis of the Claimant's remaining claims is complex. The Claimant's representative is not legally qualified.

67. However, had the Claimant's representative complied with the case management orders following the 26 September 2022 preliminary hearing, the prospects of today's third hearing being needed are slim. The Respondent would not have pursued a strike out application. The list of issues would have been finalised. An application for permission to amend the claim in respect to the constructive unfair dismissal claim was made however that was sensibly withdrawn during this hearing. Based on the representations I had heard, it appeared such application had no prospects of success and therefore a one day hearing to determine that application alone would have likely given rise to there being grounds for a costs application. A further amendment application was made in respect to the holiday pay and wages claim however that could have been dealt with on the papers by me, without need for a hearing.

68. In these circumstances, and after looking at the overall picture, I have exercised my discretion to make a costs order. This concerns both Counsel's fees and solicitor's fees. Given the extent of the unreasonable conduct and the costs that the Respondent has incurred as a consequence of the same, it is appropriate for me to exercise my discretion in this way.

69. For the reasons outlined above, I have decided to order the Claimant to pay the Respondent's Counsel's costs for solely the third preliminary hearing. This amounts to £1,800 including VAT.

70. I have not exercised my discretion to order the Claimant to pay the other costs incurred by Counsel. The other two hearings may have been needed in any event and, considering the case law cited above, together with the Claimant's means (both now and her likely future means) it would not be appropriate for me to order the Claimant to pay more.

71. I have also decided to exercise my discretion to order the Claimant to pay the Respondent's solicitor's costs associated with the third preliminary hearing and chasing the Claimant for her full compliance with the orders following the 26 September 2022 hearing (including dealing with matters arising from such lack of compliance).

72. It is difficult to decipher from the costs schedule the effect of the Claimant's and her representative's unreasonable conduct, as highlighted above, on the solicitor's costs incurred. It does not say, for example, in November 2022, specific costs were incurred in chasing the Claimant or, in May/June 2022, specific costs were incurred in instructing Counsel for the third preliminary hearing.

73. In any event, I'm conscious that I'm not required (nor even entitled) to undertake a detailed assessment when considering whether to make a costs application and, if so, what costs to award.

74. The blended rates provided are of £235.20 per hour between January and December 2022 and £259.20 per hour between January and December 2023 (inclusive of VAT).

75. I expect that at least 2.5 hours work has been undertaken in chasing the Claimant's representative regarding their compliance with the case management orders / dealing with the Claimant's lack of compliance with the same.

76. I also expect that at least 2.5 hours work has been undertaken in instructing Counsel for the third preliminary hearing.

77. Adopting a broad brush approach, I have decided to order the Claimant to pay £1,236 (representing £588 for 2.5 hours work in 2022 and £648 for 2.5 hours work in 2023).

78. I have taken into consideration the Claimant's means, as summarised above, when reaching this decision. I am conscious that the Claimant presently does not have funds to satisfy this costs order but she ought to be able to do so in the future once she regains employment. However, given her debts, I do not consider it likely that she will be able to pay the full costs claimed for a long period of time. I have been mindful of this when only ordering the Claimant to repay a small proportion of the Respondent's solicitors fees and for only ordering the Claimant to pay the Respondent's brief fee for the third preliminary hearing.

79. Accordingly, the Respondent's cost application succeeds. The Claimant is ordered to pay the Respondent the sum of £3,036 inclusive of VAT.

Employment Judge McAvoy Newns

11 August 2023