



EMPLOYMENT TRIBUNALS

Claimant: Miss D Gnapi

Respondent: The Walt Disney Company Limited

Heard at: London Central (CVP) **On:** 24 August 2023

Before: Employment Judge Khan (sitting alone)

Appearances

For the claimant: No attendance

For the respondent: Mr M Sellwood, counsel

JUDGMENT

The judgment of the tribunal is that the claims for race and disability discrimination are struck out.

Public preliminary hearing

1. By an order of Employment Judge (“EJ”) Joffe dated 12 June 2023, this public preliminary hearing was listed to:

consider whether the claims should be struck out because the claimant has not complied with directions [orders of the tribunal] and/or because she is not actively pursuing her claims and/or because a fair trial is not possible.

2. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. In accordance with rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net.
3. There was a hearing bundle of 121 pages.
4. I considered the respondent’s written and oral submissions.
5. The claimant failed to attend the hearing having initially failed to notify the tribunal of her non-attendance or give any reasons for the same. The hearing start time was delayed to 11am and the claimant was ordered by email sent to the parties at 10.36am to confirm by 11am whether she would be attending the hearing and, noting that the claimant’s postponement

application had been refused, the claimant was told that if she had any additional information on which make a fresh application, one could be considered and she should in that case make every effort to attend the hearing to make this application. The claimant was warned that in the event that she failed to attend the hearing at 11am, failed to respond by this time or provided a response which failed to disclose any reasonable grounds for her non-attendance or for the hearing to be postponed, consideration would be given to dismissing or striking out her claims, under rules 47 or 37.

6. The claimant emailed the tribunal at 11am to apply for a postponement in the following terms: *“I had a panic attack this morning and many anxiety attacks before my last email to you all back in July. The lawsuit is a source of worry, anxiety and bad health for me. This is because I am still unwell, with no assistance from the NHS, a GP who has yet to respond to your last email regarding the status of health. I am also still without representation because my health has not permitted me to get back to the Lawyer who approached me for free representation and the very nature of this case. I asked for a postponement for all those reasons. Please reconsider.”*
7. The claimant’s reference to having a panic attack gave me some pause for thought, however, I found there was force in Mr Sellwood’s submission that the claimant had been able to send this email, which I observe was cogent and articulate. I also took account that the claimant was in essence relying on the same grounds for adjournment which EJ Joffe had already refused; she had not attended the hearing to make the application; nor was it clear when the claimant would be able to take part in any reconvened hearing. I was therefore satisfied in the circumstances in which there was a real need to progress this case, owing to its procedural history (see below), it was in the interests of justice to proceed with this hearing in the claimant’s absence, pursuant to rule 47, instead of dismissing the claims or adjourning this hearing.
8. Although the issue of whether the claims were in time has been identified by the tribunal as a matter which needed to be decided, and I therefore agreed with Mr Sellwood’s submission that this remained a live issue, I refused to consider this issue nor the additional ground for striking out the claim he advanced on the respondent’s behalf, i.e. whether the claims had a reasonable prospect of success, in the circumstances in which the claimant had not been on notice that these matters would be decided at this hearing and was not in attendance.

The claim and the procedural background

9. By an ET1 presented on 2 June 2022, the claimant identified claims for race and disability discrimination. Other than the short statement “Disney are racist” (at section 8.2) no other detail of the claims was set out in the ET1. A further potential issue arising from the ET1 was whether the claim had been presented in time because, according to this form, the claimant’s employment with the respondent had ended on 1 September 2021 which was nine months before the date on which she presented the claim.

10. The claimant was ordered by EJ Gilbert on 6 July 2022 to provide further details of the claim by 20 July 2022 and warned that a failure to comply with this order may result in the claim being struck out because it was not being actively pursued. In the same letter, the claimant was informed that a public preliminary hearing would be listed to determine the time limit issue. The claimant failed to comply with this order.
11. In the first instance, a preliminary hearing for case management was held on 23 August 2022, before EJ Isaacson who listed a public preliminary hearing (on 1 December 2022) to consider whether the claims were out of time and if so whether they should be deemed to be in time on just and equitable grounds, to clarify any remaining claims and issues, and make any further necessary case management orders. EJ Isaacson's Case Management Order recorded that the claimant had failed to comply with the order to provide further particulars, summarised some further details relating to the claims and noted that the claimant had been sectioned under the Mental Health Act in January and June 2022, had recently been diagnosed with ADHD and BPD, and she was dyslexic and dyspraxic. The claimant was ordered to provide further particulars of her claims for race and disability discrimination claim to the tribunal and the respondent, by 13 September and 27 September 2022, respectively. The claimant was also ordered to send the tribunal and respondent a witness statement by 8 November 2022 dealing with the time limit issue and also to explain why she did not comply with the tribunal's order of 6 July 2022. EJ Isaacson underlined the importance of complying with the tribunal's orders and explained that if the claimant's health prevented her from doing so she was required to update the tribunal and the respondent.
12. The claimant wrote to the tribunal on 13 September 2022 in relation to the race discrimination claim when she identified two alleged perpetrators in respect of two factual allegations, the first dated 9 August 2021 and the second which was described as follows: *"Multiple unknown dates on a weekly basis...between 1 June 2021 and 1 September 2021...multiple micro aggressions..."* She wrote again on 27 September 2022 in relation to the disability discrimination claim to state simply: "Disability discrimination: failure to make reasonable adjustments". The claimant had failed to provide the further particulars in the terms ordered.
13. This led to a further strike out warning being made on 7 October 2022, by EJ Isaacson, with the claimant given until 27 October 2022 to provide written reasons for objecting to this proposal or to request a hearing to make representations.
14. By letter dated 8 November 2022, the tribunal conveyed EJ Isaacson's order that the hearing on 1 December 2022 consider the additional ground that the claimant had failed to comply with the tribunal's orders which were sent to the parties on 23 August 2022.
15. The respondent wrote to the tribunal and claimant on 16 November 2022 to note that the claimant had not only failed to comply with the orders to provide further particulars but also to provide a witness statement, with the consequence that it had not been able to comply with the orders to serve

an amended response, provide a draft list of issues nor prepare effectively for the forthcoming preliminary hearing.

16. At the preliminary hearing on 1 December 2022, EJ Joffe decided not to strike out the claims for failure to comply with the tribunal's orders for the reasons she gave. In essence, EJ Joffe decided that a more proportionate step would be to order the claimant to provide further medical evidence and also to adjourn consideration of the time limit issue. EJ Joffe recorded that the claimant had referred to significant mental health problems which she had been able to substantiate with medical records and the claimant had reported that these difficulties had prevented her from complying with the tribunal's orders. The medical evidence which the claimant was ordered to provide included information about her prognosis which would enable the tribunal to assess the likelihood of progressing these proceedings within a reasonable timeframe.
17. On 24 January 2023, the respondent wrote to confirm that it proceeded with an application to strike out the claims on the ground that they were not being actively pursued and it also applied for a deposit order to be made in the alternative, it noted that the time limit issue remained to be decided and it requested that a public preliminary hearing was listed to determine these issues, and it also applied for an unless order for the claimant to provide the outstanding further particulars.
18. In response to this, EJ Joffe ordered the claimant to send her medical evidence to the tribunal by 6 February 2023 and to respond to the respondent's recent correspondence by the same date.
19. On 5 February 2023, the claimant wrote to object to the respondent's application for a deposit order, she confirmed that she had received an offer of legal assistance "*which I am in the process of sorting out hopefully soon, if my health permits this...*" and explained: "*Unfortunately for me I am not the NHS's priority so I am still heavily struggling in that department....I am doing my best with the help of my doctors to be in a position to move things along and comply as this case is of greatest importance to me*".
20. It is likely that the medical evidence which the claimant forwarded at around this time included a letter dated 9 December 2023 from Dr Davies in which he advised "*Presently she would not be regarded as reliable or fit to plead, or give evidence, in a court process. More importantly, her condition is still somewhat fragile and such a stress could adversely affect her mental health or the progress of treatments given. It could even put her at risk of harm to self or others. I am afraid I cannot provide a fitness date to you as it is dependent on the vagaries and delays inherent in our local Mental Health provision, in addition to the unpredictable nature of her likely diagnosis and response to treatment. I would however estimate 6 months before she would be able to engage usefully with such a process*".
21. Further to the respondent's email of 7 June 2023 seeking an update from the tribunal (the intervening hiatus appears to have arisen from the delay in bringing the parties' correspondence to the attention of EJ Joffe), the tribunal wrote to the parties on 12 June 2023 confirming EJ Joffe's order

that a public preliminary hearing be listed to deal with the matters set out above (see paragraph 1). This letter explained: *“If the claimant would like to update the Tribunal as to her current health condition and fitness to participate in the proceedings, could she please send medical evidence and any representations to the Tribunal as soon as possible.”*

22. The claimant replied on 15 June 2023 with the following update: *“In my opinion my health has slightly improved since the last time I emailed the tribunal and I believe that I am fit to proceed with the upcoming preliminary hearing although I have not started my medical treatment yet due to the NHS being overwhelmed I am told. The deadline to respond to this email was too short a deadline so I don’t have a written update/advise from my GP. I am happy to provide an accurate health update if you’d allow more time for my doctor to do this.”*
23. By letter dated 23 June 2023, the tribunal set out EJ Joffe’s orders in relation to the preparation for this public preliminary hearing which included the mutual disclosure of documents relevant to the strike out issues. This letter explained: *“This may include medical evidence on the claimant’s side. If she requires further time to obtain medical evidence, the claimant should try and agree an extension of time with the respondent. If the parties cannot agree on an extension of time the claimant should apply to the Tribunal;”*
24. The claimant then wrote on 12 July 2023: *“I am unable to pursue this lawsuit now or in the near future due to my worsening health conditions but mostly due to my untreated ADHD. The NHS is overwhelm[m]ed...their lack of treatments/care for me is out of their control...I would absolutely love to pursue this...but I know that upon dismissal of this case I might not get another chance...Should there be a pause [to] this case indefinitely until I am able-bodied I would gladly take this option but I understand that this may be a fairytale and in which case please accept my dismissal of this suit if so.”*
25. This was followed up by correspondence from the respondent dated 18 July 2023 to object to the claimant’s proposal for these proceedings to be delayed indefinitely, to request that the claimant confirm whether her most recent correspondence be treated as a withdrawal of the claims and to note that the claimant had been unable to comply with the orders dated 23 June 2023, and had contacted the respondent’s representative *“to confirm that she was not well enough to do so and intended to withdraw her claim.”*
26. The claimant wrote again on 20 July 2023 to clarify *“I was asking for more time due to my ongoing health challenges but to save time should this request be denied I stated that a withdrawal would be understood from my part.”* The claimant also explained: *“I was offered free legal counsel that I need time to engage with so therefore would not be able to make the 24th August trial date as it is short notice. If I have any options here please advise as I would absolutely love to pursue my claim provided I have enough time to sort things out with my new representation.”*
27. Treating the claimant’s recent correspondence as an application to postpone the preliminary hearing, EJ Joffe refused this application finding

that with one month to go, the claimant having failed to explain why she was unable to engage with her legal representative within the remaining time available to her, and with the proceedings now over one year old and yet to be particularised, this would not be in the interests of justice.

Relevant legal principles

28. Rule 37 of the Employment Tribunals Rules of Procedure 2013 provides, materially:

(1) 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 prospects of success;*
- (b) that the manner in which the proceedings have been conducted 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 in respect of the claim or response (or the part to be struck out).*

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by a party, at a hearing.

...

29. In deciding whether to strike out a party's case for non-compliance under rule 37(1)(c) a tribunal shall have regard to the overriding objective of seeking to deal with cases fairly and justly. This requires the tribunal to consider all relevant factors which will include:

- a. the magnitude of the non-compliance,
- b. whether the default was the responsibility of the party or their representative,
- c. what disruption, unfairness or prejudice has been caused,
- d. whether a fair hearing would still be possible, and
- e. whether striking out with some lesser remedy would be an appropriate and proportionate response.

(see Weir Valves and Controls (UK) Ltd v Armitage [2004] ICR 371, EAT). The extent to which the non-compliance is anomalous or part of a pattern will also be a relevant factor (see Harris v Academies Enterprise Trust and ors [2015] IRLR 208, EAT).

30. An important consideration in relation to the assessment of whether a fair hearing is still possible for the purposes of rule 37(1)(e) is the right of both parties to a fair trial within a reasonable timeframe. The lack of clear prognosis of when a party is likely to be well enough to participate in the proceedings and the balance of prejudice in respect of each party are relevant factors (see Riley v Crown Prosecution Service [2013] IRLR 966,

CA). Another relevant factor will be the wider public interest in the expeditious administration of justice.

Decision on strike out

31. I decided to strike out the claims on two grounds: that it was not possible to have a fair hearing and the claimant's non-compliance with the tribunal's orders.
32. I start with the observations that: there has been very little progress made in the case to date some 14 months after these proceedings commenced, which concern allegations that are said to have occurred two years ago and which remain to be particularised; and the respondent does not dispute that the claimant has been and continues to be seriously unwell by reference to her mental health. These factors appear to be inter-related.
33. As has been underlined previously in this case, in considering what is fair and just and to give effect to the overriding objective, consideration must be given to the claimant's health but the respondent is equally entitled to a fair trial which takes place within a reasonable timeframe and where the time and resources which are expended by the parties and the tribunal are proportionate to the issues involved.
34. On the basis of the limited information which the claimant has provided, there is no indication that the claimant's prognosis is such that she is likely to be able to take an active part in these proceedings within a timeframe that affords fairness to both parties. Indeed, as her email of 12 July 2023 makes clear, on the claimant's view, she will be unable to engage with these proceedings within the "near future" so that an indefinite delay (i.e. stay) would be required. It is understood that the claimant is waiting to receive treatment via the NHS, the timing of which, as the claimant has emphasised, remains unknown. Although the claimant has not clarified the nature of this treatment, the expected duration of the course of treatment or the likelihood that such treatment will facilitate her engagement in these proceedings, it is understood from the claimant's correspondence that without this treatment, she will continue to find it extremely difficult to engage in these proceedings.
35. I conclude that there is no realistic likelihood of the claimant being well enough to enable these proceedings to progress to trial within a reasonable timeframe. An open-ended delay is not in either party's interests nor the wider public interest in the expeditious administration of justice.
36. I considered whether to order the claimant to provide further medical evidence instead of striking out her claims at this hearing. Having explored this alternative with Mr Sellwood, I rejected it. Firstly, I take account of the fact that the claimant was ordered to send her medical documents as soon as possible after 12 June 2023 and further ordered to disclose her medical documents to the respondent by 12 July 2023, or such later date as agreed between the parties or as directed by the tribunal, in the event that the claimant applied for an extension of time; she therefore had over three months before today to obtain any further medical documents. Secondly, I am mindful that this approach has already been taken by EJ Joffe in

December 2022 and the proceedings are no further forward some eight months later (whilst I note that there was a delay between February and June 2023 caused by an administrative oversight, in the consequence, the 6-month prognosis given by Dr Davies has elapsed and the position at the end of this period remains that the claimant is unable to engage in these proceedings).

37. In respect of the claimant's non-compliance with the tribunal's orders, the claimant's non-compliance has been persistent and she has breached the following orders: (i) to provide further details of her claims by 20 July 2022; (ii) to provide further particulars (in the terms ordered) by 13 and 27 September 2022; (iii) to provide a witness statement by 8 November 2022; (iv) to take any of the steps preparatory to this hearing by 12 July, 26 July and 9 August 2022. As noted above, EJ Joffe recorded that at the preliminary hearing on 1 December 2022, the claimant explained that her mental health had prevented her from complying with the tribunal's orders. As is evident from the claimant's correspondence dated 12 and 20 July and of today's date, the claimant's ability to engage in these proceedings, comply with the tribunal's orders or to arrange legal assistance has continued to be compromised by her mental health and, she reports that these proceedings have exacerbated her health to the extent that she has suffered anxiety attacks and a panic attack. This underlines the point that unless the claimant's health and prognosis improve markedly then it is likely that this pattern of non-compliance will continue and the likelihood of the case proceeding to a hearing within a reasonable timeframe remains too remote. I refer to the same points set out above at paragraph 35 and 36 which apply equally to this ground.
38. For completeness, I should record that I rejected Mr Sellwood's submission that the claims should be struck out because the claimant had failed to actively pursue them, because I was not satisfied that the claimant's conduct met the requisite threshold.

Employment Judge Khan

24.08.2023

JUDGMENT SENT TO THE PARTIES ON

25/08/2023

FOR THE TRIBUNAL OFFICE