EMPLOYMENT TRIBUNALS

Claimant: **Ms Mary Anne McGladdery**

Respondents: **(1) Mosses Community Association Limited (in voluntary liquidation)**
(2) Mr Brent Pinder
(3) Ms Stella M Smith
(4) Mr John Pearcey
(5) Ms Annette McKay
(6) Mrs Donna Byrne
(7) Ms Marine Jones

JUDGMENT having been given at the hearing and reasons having been requested by the respondent in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, reasons are set out as follows.

REASONS

The hearing

1. The hearing was ordered by Employment Judge Cookson on her own initiative to consider case management generally and whether the responses in this case should be struck out under rule 37 on the grounds that:
    1. the manner in which proceedings have been conducted on behalf of the respondents have been scandalous, unreasonable or vexatious; or
    2. for non-compliance with orders for the Tribunal; or
    3. on the ground that the Tribunal considers it is no longer possible to have a fair hearing in respect of this claim.

The case

2. The claimant issued her first (of two) claims 4½ years ago, her second claim was issued in early July 2019, so proceedings have been on-going for some time. The claimant claimed (among other things): disability discrimination, based on her dyslexia; race discrimination, as being of Irish Gypsy Traveller heritage; and discrimination in respect of her sexual orientation as being gay. The case was

recently summarised by Employment Judge Allen on 16 May 2023. Judge Allen entered Judgment for the claimant against the first respondent for various claims. Judge Allen provided a revise and extensive final list of issues. The case was listed for 7 days, due to commence on 4 September 2023, although some documents/ correspondence refers to an 8-day hearing. Judge Allen was concerned about the preparation, and he made comprehensive further case management orders, notwithstanding case preparation orders had been made as far back as September 2019.

The law

3. Judge Cookson subsequently ordered that we look at the following provisions: rule 37(1)(b) and rule 37(1)(c) and rule 37(1)(e) of Schedule 1 The Employment Tribunals Rules of Procedure of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("the Rules of Procedure").

The overriding objective

4. It is worth restating the overriding objective contained within rule 2:

> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
> (a) ensuring that the parties are on an equal footing;
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
> (e) saving expense.
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

Striking out

5. Rule 37 provides:

> (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)…
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
> (d) …
> (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).

6. Scandalous means irrelevant and abusive of the other side. it does not mean shocking: *Bennett v Southwark London Borough Council 2002 ICR 881*. Vexatious includes anything that is an abuse of process: see *Attorney General v Barker 2000 1 FLR 759 QBD (Civ Div)*. Furthermore, a party may also find that her claim struck out on these grounds if she has conducted her case in an "unreasonable" manner. For a Tribunal to strike out for unreasonable conduct, it has to be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible; in either case the striking out must be a proportionate response: *Blockbuster Entertainment Limited v James 2006 IRLR 630 CA*.

7. In considering whether a claim should be struck out on the grounds of scandalous, unreasonable or vexatious conduct, a Tribunal must take into account whether a fair trial is still possible: *De Keyser Limited v Wilson 2001 IRLR 324 EAT*.

8. Applying *Bolch v Chipman 2004 IRLR 140 EAT* before making any strike out order under rule 37(1)(b), I must:

1. Find that the claimant has behaved scandalously, unreasonably or vexatiously when conducting the proceedings.

If I make such a finding, then

2. I must consider if a fair trial is possible, as a strike out should not be regarded merely as a punishment (save as in exceptional circumstances).

Even if a fair trial is unachievable,

3. I should consider the appropriate remedy in the circumstances as it might be appropriate to impose a lesser penalty, e.g. by making a costs order rather than striking out the claim.

9. This approach was reinforced by *Laing O'Rourke Group Services Ltd & Ors v Woolf & Anor EAT 0038/2005* where the Employment Appeal Tribunal said, "*Courts should not be so outraged by what they see as unreasonable conduct as to punish the party in default in circumstances where other sanctions can be deployed and where a fair trial is still possible*". In this instance the defaulting party was the respondent and the EAT felt a more proportionate sanction could have been allowing the hearing to proceed without the evidence of the employer.

10. In deciding whether or not to strike out a party's case for non-compliance with an order under rule 37(1)(c), the Tribunal should have regards to the over-riding objective set out in Rule 2. I should have regard to all relevant factors, including: the magnitude of the non-compliance; whether the default was the responsibility of the party or his or her representative; what disruption, unfairness or prejudice had been caused; whether a fair hearing would still be possible; and weather striking out or some lesser remedy would be an appropriate response – see *Weir Valves & Controls (UK) Limited v Armitage 2004 ICR 371 EAT*.

The documents for today's hearing

11. The respondent had prepared a hearing bundle for today. Judge Cookson did not make the preparation of the hearing bundle mandatory, but she did stipulate the requirements of preparing a hearing bundle on blue paper[1], which was ordered to be provided to the claimant at least 8 days before the hearing. Judge Cookson gave particular emphasis to this requirement. Regrettably, the respondent failed to send the hearing bundle to the claimant within the timespan clearly set out by Judge Cookson, irrespective that the claimant said that she could not collect it from the

[1] From reading the file it appears the respondent's representatives were surprisingly persistence in their opposition or reluctance or inability to provide a hearing bundle in a format that the claimant could read.

post office until 22 August 2023 (i.e. within 2-days of the hearing). Mrs Linney confirmed that she had received her hearing bundle late on Friday (i.e. 18 August 2023), although she could not confer with the claimant as the claimant has not received her hearing bundle until sometime after. Ms Brewis said that she would need to refer to some documents contained within the preliminary hearing bundle to explain the respondents' position and it would be easier to follow if those documents were before the Tribunal (and the claimant's side). I determined that I would need to consider the documents the respondent referred to, although I would try to allow extra time to the claimant, and we would explain the documents to the claimant in an attempt to overcome the respondent's non-compliance. It was on that basis that I admitted the respondents' documents. Regrettably, part-way through the hearing it transpired that Mrs Linney did not have the same bundle as everyone else. Our electronic hearing bundle was 173 pages, Mrs Linney hearing bundle was 92 pages. This had been sent the same day as the claimant's bundle (which was a full bundle). Neither Miss Brewis nor Ms Kydd (who joined us later) could explain why the claimant and the claimant's representative had been sent different preliminary hearing bundles.

The failures in respect of case preparation

12. As recently as 16 May 2023 hearing, Judge Allen drew a line under the previous lack of preparation and attempted to focus on attempting to ensure that the case was appropriately prepared for the final merits hearing. He wrote:

> **Case management**
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> 16. Previous case management orders have been made in this case. Rather disappointingly, the case has not been prepared in accordance with those orders. New case management orders were *agreed with the parties*[2]. There is sufficient time for the case to be prepared for final hearing in the time remaining, however, **it is very important that the parties do adhere to the new agreed orders and the dates set out in them**[3] as otherwise there is a significant risk that the case will not be prepared in time. The respondents, in particular, must note that the claimants' dyslexia and the fact that her representative is not a professional representative, means that it is particularly important that she/they have the bundles and statements provided on the dates ordered, that there is a reasonable period of time between the steps ordered, and that there is time allowed between the provision of witness statements and the final hearing.

13. To emphasise the point, Judge Allen went on:

> **Reasonable adjustments**
>
> 21. The claimant will need to have had the hearing bundle and witness statements well ahead of the final hearing, so that she has time to read them…

14. Judge Allen ordered that the parties exchange documents by 20 June 2023 and that a final [substantive] hearing bundle be prepared by 11 July 2023. Witness statements were due for exchange by 7 August 2023. Mrs Linney tells me, and Miss Brewis accepted, that the claimant has compiled with all the procedural steps required, past and current. The respondents have been and remain in substantial

[2] My emphasis
[3] Judge Allen's emphasis

default of the case management orders, both in disclosing the entirely of their documents and in preparing a final hearing bundle, which has undermined the claimant completing her witness statement.

15. Following the claimant's disclosure, further documents were sent to the claimant by the respondent, I am told, out of the blue. The claimant unsurprisingly challenged the relevance and the veracity of this late disclosure. Mrs Linney said that if the respondents wanted to add a number of documents so late then it was appropriate that the claimant asked for the inclusion of further documents, which she said were also relevant and provided for a more balanced assessment. This was refused by the respondent's representative.

16. By 31 July 2023 the case was referred to Employment Judge Butler. Judge Butler was concerned about the respondents' late disclosure (and the claimant's ability to read it). He noted that the final merits hearing was at risk and that this appeared to have been caused by the respondent. He made additional further case management orders to get this case back "on track". These orders provide for (1) the respondent to send the claimant an electronic bundle on 1 August 2023; (2) agreement of a joint hearing bundle by 8 August 2023; (3) the respondent to send the claimant a hard copy of the agreed bundle by 11 August 2023; and (4) the exchange of witness statement by 23 August 2023. Judge Butler ordered (5) that the parties confirm his orders had been complied with by 25 August 2023 as he had little faith with the respondent's case preparation. Those orders have not been complied with, and that is, again, the fault of the respondents.

17. Mrs Linney said that the respondent had disclosed a finalised hearing bundle on 7 August 2023, which did not contain the claimant's documents. Thereafter the respondent disclosed a further hearing bundle on 23 August 2023 with new documents and no further explanation. The claimant contended that the respondent sneaked lots of documents into a further bundle at the last possible moment without any explanation. The claimant said that she could not read much of the material, but Mrs Linney said she did her best to understand it but was not sure what most related to. The claimant said that this was unfair, and it was a deliberate pre-meditated attempt to ambush her case at the last moment.

18. We discussed the logistics of possibly reverting to the 7 August 2023 disclosed bundle, then adding the claimant's disclosure to that and calling this the final hearing bundle. I explored if statements could be finalised on those documents. The respondents have 7 or 8 witnesses to call. Mrs Linney said that she could finish the claimant's statements over the bank holiday weekend as these were substantially finished (on the claimant's documents and respondent's previous disclosure). However, it was unclear when we could get the respondents to finalise that particular hearing bundle. It was also unclear when the respondents would be ready to finalise and exchange/disclose their witness statements. Miss Brewis said these could be done over the weekend, but I was not at all convinced nor was I persuade that we could adequately deal with the respondents remaining preparatory steps by way of an unless order.

19. Unfortunately, Miss Brewis was not given enough information to meaningfully contribute in respect of the outstanding preparation and I asked for the case handler

to join us so that we could, hopefully, sort this out. The case-handler declined (she was working but she had a sick child to look after) and eventually Ms Kydd (the head of department) joined the hearing.

20. Mrs Linney informed me that she had booked off from work next week to prepare for the final hearing. She said that she had wanted to spend some time with her children who were on school holidays but that she would forgo this in order to finalise the remaining preparation. She says that she lives 45 minutes away from the claimant so she cannot go through the preparation with the claimant face-to-face. Optimistic though Mrs Linney was, I was not persuaded that this lay representative could prepare fully in the intervening period, and this would place her at some disadvantage (as envisaged by Judge Allen). But Mrs Linney's optimism was only part of the picture and the claimant's ability to participate and engage in both the final preparation and at the hearing was key.

21. The claimant said that she had expanded a huge amount of time preparing her witness statements and going through the documents so far disclosed. She said that she did not have sufficient time now to undertake further preparation, because of her dyslexia, other commitments and the stress that had taken a significant toil. Ms McGladdery appeared absolutely distraught. She was sobbing and distressed throughout the hearing, and I regard her upset as genuine. I asked if this lack of preparedness (caused by the respondents) could be remedied if she took the time off work to finalise her preparations (possibly at the respondents' expense). The claimant explained that this was not logistically possible. She has a difficult and demanding job. She works for a local authority as a Lead Engagement & Core Production Officer. She works with individuals and families in crisis. She said that she has not told her current employer about her forthcoming Tribunal hearing, but that she was extraordinarily busy at this time. She had crucial case conferences coming up. At the hearing she went through her diary, and we discussed these commitments. On Tuesday (after the bank holiday) she has a crisis case conference with a family. Wednesday was earmarked for preparation for a child protection meeting the following day. Friday is scheduled for a family hub meeting in which she needs to prepare a number of detailed family action plans. She said that she needs to correlate and prepare reports for all of these commitments, that the Tuesday and Wednesday meetings were individually crucial as these related to child protection matters and the Friday meetings were numerous which required a large volume of report writing. The claimant tells me, and I accept, that these commitments were planned for months and because of the subject matter it is urgent that they proceed. She will be working late over the weekend and next week to fulfil these important work-related commitments. The claimant told me, and I again accept, that it was with these commitments in mind that she was so keen to ensure that her case preparation was properly followed. It was only recently that the claimant was provided with the correct dyslexia software and auxiliary aids in the form of a screen, and it has taken some time to get used to this. She still finds it difficult to use her laptop. The claimant also informed me that her sister-in-law has just been diagnosed with a brain haemorrhage; this is stressful, they are close, and she wants to support her brother. Tragic as is her family member's illness, this was not predicable, and any additional stress cannot be attributed to the respondent's default.

22. However, I am satisfied that the claimant's work-related commitments and her dyslexia preclude her from: (a) responding to the respondent's late disclosure; (b) addressing this late disclosure in her witness evidence and finalising her statements; and most importantly (c) going through the respondents' evidence and final hearing bundles, both by herself and with Mrs Linney, to prepare for the hearing starting on 4 September 2023. There are 5-wrorking days to prepare. Again, I emphasise that the claimant compiled with all case preparation orders and has regularly chased the respondent's compliance.

23. I was keen to save this hearing, if possible, as I asked the clerk to check with the Tribunal's listing department before the hearing and she told me that the first available date for any rescheduled hearing was mid-summer 2025. The claimant was overwrought when I told her of this possible delay and said that because of the respondent's conduct and because of this further substantial delay she would not continue with her claim. This may or may not be a knee-jerk reaction, but I do not treat this as determinative. I am more concerned about the effect on the evidence. A further delay of 2 years in such a fact sensitive case is untenable. Memories will have faded significantly already, and 2 more years will compound this. Having a large hearing bundle and drafting full witness statement cannot remedy this deficiency because having a reasonable recall of events is vital for oral evidence and cross-examination. The claimant's evidence is largely standalone, whist the respondent witnesses may have the benefit of conferring in the intervening period. Witnesses may not be available in 2 years and the (albeit limited) medical evidence produced by the respondent's representatives identifies at least 1 respondent with suicidal ideation.

My decision

24. There is some overlap between rule 37(1)(b) and rule 37(1)(c). In respect of the former, I am satisfied that the respondents' behaviour in not complying with the case management order of Judge Allen and Judge Butler, which had the effect of frustrating the claimant's preparation, amounts to an abuse of process. This conduct of the respondent has been unreasonable because it amounts to a deliberate and persistent disregard of required procedural steps.

25. I conclude that a fair trial is no longer possible for the hearing set of 4 September 2023. The claimant cannot now be expected to ready herself for the final hearing. This is not her fault. The claimant had been pressing for the respondents to comply with their case preparation obligation because she has an extraordinarily busy time at work, particularly the following week with important commitments that she could not defer. I am mindful that a busy week for many employees amounts to an excessively busy week for the claimant because of her dyslexia and her need for additional processing time. She could not, nor was it reasonable for her to, fit in the late case preparation (required under paragraph 22 above) around the remaining 2 weekends and 5-working days preparation required.

26. There was no scope to relist this case on a priority basis now; the first available date was in 2 years' time. I was not prepared to hold listing on this case so that we might be able to back-fill a space sometime in the future that might arise for a 7-day hearing. That would create too much uncertainty in the interim, and, in any

event, there would be no guarantee the case could be heard within 2 years. The Employment Tribunal (like other sectors of the public service) is extraordinarily stretched. Tribunals have experienced diminished resources and staff losses at a time when the caseload has increased dramatically and when we are asked to do so much more. Frankly, there is no longer the tolerance in the system to indulge recalcitrant respondents. I am not prepared to bump another case out of the list or give this case priority over other parties who will have complied with orders and readied themselves for final hearing. For the reasons above deterring this case for 2 years more precludes a fair hearing.

27. I originally considered a lesser penalty for the respondent's default, mooting the possibility of the claimant taking a week off work (possibly paid for by the respondents) to prepare for the hearing but her work commitments precluded this. So other than cancelling the hearing, striking out the response was the only viable option available. Miss Brewis raised the possibility of an unless order, but this would not work because if the respondent would not comply with the orders of Judges Allen and Butler, given their explanations, I could not be confident that the respondents would comply with any further order. Furthermore, as the respondent could not follow Judge Cookson's order and provide the claimant with the today's bundle in time and, astonishingly, as they could not provide the claimant's representative with the correct up-to-date Preliminary Hearing Bundle, I have no confidence in the preparation of the respondent's representatives. Given the circumstances, I was keen to eliminate further uncertainty, which invariable surrounds unless orders. So, I determined that there was no other viable option than striking out the response.

28. So far as rule 37(1)(c), I am satisfied that the claimant's behaviour in not complying with the order of the Tribunal was not an aberration. The respondent has displayed a systematic approach of deliberate refusal (or astonishing inability) to comply with case preparation orders. Judge's Allen and Butler sought to get this claim back on track and explained the gravity of the situation and the importance of compliance. Their case preparation orders in respect of disclosure and the provision of a hearing bundle were ignored., This precluded the claimant from finalising her witness statement. The respondent's conduct was a deliberate and persistent disregard of the required procedural steps and the orders of the Tribunal.

29. The past is a good indicator to the future. Irrespective of Ms Kydd's assurance, I have no confidence that any further order will be complied with, particular given's today's example. There were no concrete proposals that a hearing bundle could be prepared immanently nor was I persuaded that the respondent's witness statement could be finalised and disclosed over the weekend. The assurance of Miss Brewis and Ms Kydd were vague and unconvincing, in effect, too little, too late.

30. I am aware that the respondent's fault lies in the preparation of this case. The individual respondents chose their representatives to act on their behalf and they also chose not to attend this hearing nor, so far as I can tell, most, if not all, of the previous case management hearings. Individuals and organisations entrust the preparation of their case with professional representatives and usually that benefits named respondents greatly. So, I am not convinced that crying foul when thing go

wrong is convincing. Named respondent take the benefit when things are done correctly; they must share the responsibility when things go wrong so I reject any contention that this strike out is unfair to the individual named respondents.

31. I am aware that discrimination claims fall into a special category in which there is a public policy consideration that as such claims usually involve disputed facts they tend to require a full examination to make a full and proper determination: see *Anyanwu & Anor v South Bank Student Union & Anor 2002 ICR 391 HL, Community Law Clinic Solicitors v Methuen 2012 EWCA Civ 571 CA*. I have not attempted to reconcile any disputed facts in my determination. I note that the effect of my order may mean that the claimant might be left with less than emphatic win, but the circumstances dictate that the claimant might just have to be satisfied with this. I am not at all persuaded that the respondents are due *their day in court*. Their expectation of a full hearing and their right to be heard is qualified by the Tribunal's demand that all parties co-operate with the over-riding objective and follow the case preparation orders of the Employment Tribunal. Fail to comply with this and the right to a hearing is otiose.

32. My motive throughout was not to punish the respondents for their poor behaviour. When I suggested that Ms Kydd apologise to the claimant for putting her into this situation, I was at that time of the view that I could avoid striking out the response. Otherwise, I would not have raised that option. Although my motivation was not to punish what the claimant termed outrageous behaviour, I am aware that my order does have a punitive effect. That said the punitive effect was entirely brought on by the respondent and is, I determine proportionate.

33. The claimant will still need to prove her claims. I do not make a decision to debar the respondents from participating further in this case. I will leave it to the hearing Judge at the final merits hearing to make an appropriate determination on that point after hearing submissions, if applicable. My order merely precludes the respondents from advancing a positive case. The ability and the extent to which the respondent will now be allowed to challenge the claimant's evidence will be a matter from the hearing judge.

34. Although I considered carefully whether a fair hearing weas possible, I did not strike out the response on rule 37(1)(e) separately because that is usually a neutral determination, and my decision was made on the basis of the respondent behaviour. I determine that the fault lies exclusively with the respondents, and I did not want to detract from such a determination.

35. To conclude I am satisfied that striking out the response is consistent with the over-riding objective of rule 2.

36. I made some case management orders at the hearing in order to assist the hearing judge and the remaining party. These will be sent separately as case management orders are not public documents.

Employment Judge G Tobin

Date: 1 September 2023

JUDGMENT SENT TO THE PARTIES ON
5 September 2023

FOR THE TRIBUNAL OFFICE