EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mrs S Wilkes **v** The Windsor Forest Colleges Group

PRELIMINARY HEARING

Heard at: Reading (in public) **On**: 16 May 2023
Before: Employment Judge George

Appearances
For the Claimant: In person
For the Respondent: Mr J Allsop, counsel

RESERVED JUDGMENT

1. The respondent's application under rule 37 for an order striking out the claim is dismissed.

2. The claimant shall pay to the respondent £1,013.48 in respect of legal costs of Case Number 3312790/2022.

REASONS

1. This preliminary hearing was listed on the direction of Employment Judge Anstis to consider the respondent's application to strike out the claimant on the basis that the claimant had failed to comply with tribunal orders and/or the claim has not been actively pursued under rule 37(1)(c) & (d) of Schedule 1 of Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (hereafter referred to as the 2013 Rules). The hearing was converted to an in person hearing on the application of the claimant.

2. I have the benefit of a file of documents which contained pages numbered up to 137 as set out in the index at page 1. In addition, the claimant had forwarded to the respondent and the Tribunal 18 pages of additional documents on which she wished to rely. These were added to the preliminary hearing file by consent. Most of those documents relate to her health condition and are analysed below. There were also some documents concerning the underlying substantive issues which were relied on by the claimant in support of the submission in effect that she would suffer prejudice if the claimant was struck out. All of those documents have been

taken into account in reaching my judgement. Mr Allsop had prepared a skeleton argument on behalf of the respondent which is referred to as RSA in these reasons. Both parties made oral representations.

3. On 12 May 2023 the respondent applied for an order that the claimant pay them costs arising out of the second claim between these parties (Case no 33 12790/2021). That claim was dismissed by Judge Anstis on the basis that it had been presented out of time and the tribunal did not have jurisdiction to consider it. His judgement and reasons were sent on 16 April 2023 following a warning sent on 30 January 2023. I had the costs application before me but accepted the claimant's submissions that she had not had a reasonable opportunity to respond to it. The respondent had put forward a schedule of the full costs of the entire litigation by way of comparison indicating that they intended, if they were successful in their applications, to apply for costs of claim 1. That and the costs schedule for claim 2 had only been provided the Friday prior to the hearing. I therefore made case management orders that she should no later than 31 May 2023 provide a written response to the application.

4. The hearing had been scheduled for 3 hours but overran. I reserved my decision on the application for strike out and a written record of the above case management orders was sent to the parties on 22 May 2023. No response has been received from the claimant although she wrote on 1 June 2023 in effect asking for a stay. That was rejected for reasons sent to the parties on 17 July 2023. In those circumstances this judgement and reasons determines not only the outstanding application for strike out but also the outstanding costs application.

5. Following a period of conciliation which lasted from 6 July 2021 to 17 August 2021 the claimant presented a claim on 16 September 2021 by which she complained of age discrimination arising out of her employment as lead learning support assistant which started in September 2012. There is a minor difference between the parties about whether she started on 1 September or 5 September but that is not material for the purposes of the issues at the preliminary hearing. The respondent entered an in time response defending the proceedings on 23 November 2021.

6. The basis of the allegation of age discrimination was that the reason for the treatment she complained of was age-related health concerns which led to medical absences. I note the following procedural history:

    6.1 The tribunal sent the parties on notice of preliminary hearing on 27 February 2022 in which the claimant was directed to send the respondent a document setting out the calculation of her losses by 28 March 2022. – This is a document commonly referred to as a Schedule of Loss. It appears that the claimant's email address was mistyped in this email and that a bounced back email was either not received by the Tribunal or not noted by them.

    6.2 The claimant applied to add an allegation of victimisation based on disciplinary proceedings by an email dated 29 April 2022 (page 70)

6.3 The respondent acknowledged that application on 3 May 2022 and drew attention to the fact that the claimant had not provided the Schedule of Loss

6.4 The tribunal on 30 June 2022 directed the claimant to provide further information about her proposed victimisation claim (page 72). This appears also have been sent to the mistyped email address.

6.5 On 1 August 2022 (page 73) the respondent applied for an unless order under rule 38 of the 2013 rules to specify that unless the claimant provided the Schedule of Loss her claim should be dismissed without further order. They also applied for a direction that her application to amend the claim be refused if she did not provide particulars ordered. The respondent had noticed that the tribunal order of 30 June 2022 had been sent to an incorrect email address the claimant and therefore re-sent their email of one of August 2022.

6.6 It is apparent that by the time of the strike out warning sent by the tribunal on 18 September 2022 the Tribunal had corrected the email address they were using the communication to the claimant because on the date specified for her to write with any objections to the proposal that her claim be struck out for failure to comply with the order for a schedule of loss she wrote in connection with it (page 77).

6.7 Later on 3 October 2022 (page 88) the claimant wrote to say that she had not received the order requiring her to provide a schedule of loss at the time it was made up possibly because of an incorrect email address. She stated that when she did see it she had been sick and in a poor financial state before starting a new job on one August 2022. She describes experiencing “debilitating symptoms, sleep and digestive problems, dizziness, headaches, high blood pressure” and stress. She asks that the claim be not struck out because to do so would deprive her of an opportunity to show a pattern of behaviour extending over time prior to April 2021 and through to her dismissal. “There are two potential claims which have not yet been filed with the tribunal: constructive dismissal and holiday pay. I believe it would be premature and just to strike case out before these claims.”

6.8 On 6 October 2022 the claimant applied for the preliminary hearing in private by telephone to be conducted in person but did not initially explain the basis of that application. The respondent objected and the claimant then explained her reasons as being that she felt that her numerical disadvantage since there would be a legal team of three representing the respondent and ongoing stress, concentration issues and suspected undiagnosed ADHD. The hearing was converted to an in-person hearing (page 97). Details of the orders made at that hearing are set out below (paras.9 & 10.XX).

6.9 Instead of applying to amend her claim, the claimant presented a second claim (Case No: 3312790/2022) on 21 October 2022 which was responded to by the respondent on 21 November 2022.

6.10 Judge Milner-Moore's record of hearing was sent to the parties on 25 October 2022

6.11 On 9 November 2022 the claimant applied for an extension of the 11 November deadline by which to apply to amend her claim on the basis that she suffered dizziness affecting her stamina and concentration and had been referred to the ENT service. The respondent consented to that and suggested that some directions should also be put back by 14 days. This did not include the direction that the Schedule of Loss be provided by 25 November 2022.

6.12 On 28 November 2022 the respondent wrote to the tribunal to inform it that the claimant had neither provided a Schedule of Loss nor applied for an extension of time. They applied for an unless order.

6.13 On 12 December 2022 the claimant wrote saying she continued to suffer "symptoms previously reported" and had her ENT appointment the following day. On 15 December 2022 the claimant wrote saying that she had been diagnosed with benign paroxysmal positional vertigo (BPPV) and had received treatment for that as well as for a cough/breathlessness and had a follow-up appointment on 9 February 2022. She asked for a suspension of the tribunal orders until after appointment.

6.14 The respondent replied on 19 December 2022 referring to information from a source found on the NHS website which they argued suggested that the condition referred to by the claimant had a limited impact on her ability to prosecute her claim and that the claimant had not provided medical evidence to support her argument that, in effect, a stay for two months was necessary because of her health conditions. They repeated their request for an unless order.

6.15 Time to provide a Schedule of Loss and any application to amend was extended to 1 February 2023 on grounds of the claimant's ill health by an order sent on 17 January 2023 in which the parties were told that the dates on the other orders remained as set in the order sent on 25 October 2022 and that a further extension of time for the schedule of loss was not likely to be granted unless there were exceptional circumstances.

6.16 Such an order was sent by the tribunal on 30 January 2023 would stand dismissed without further order 20 one days from that date unless the claimant explained why that should not be the case on the basis that it is not been presented in time of the employment tribunal did not have jurisdiction for it.

6.17 On 1 February 2023 (the last day of the extended deadline) the claimant applied for "an extension due to continued ill health" and did not provide any medical evidence to support that or details explaining why her ill health prevented her from complying with the tribunal directions.

6.18 The application before me was made on 3 February 2023 (page 1 to 2.

6.19 On 19 February 2023 the claimant wrote to the tribunal. The new information in email is that she has been diagnosed with acute and chronic sinusitis for which she is being treated with a further referral to ENT on 1 March 2023 and was being treated for an ear infection. As the respondent pointed out on 20 February 2023 the claimant did not provide any medical evidence "to show that any of the conditions which the Claimant has mentioned in her email would have prevented her from providing the required information." The respondent correctly points out that the have asked for her to provide this information on numerous previous occasions.

6.20 The respondent voluntarily disclosed their list of relevant documents in accordance with the timetable on 24 February 2023.

6.21 When the respondent told the tribunal that the claimant had not provided her own she wrote

> "as you know I had ENT appointment yesterday… I am currently ill with acute sinusitis for which I have started more treatment with further tests planned. As previously stated am happy to share details/evidence should the tribunal require."

6.22 On 16 April 2023, a hearing was listed to consider the respondent's application to strike out the claim. On the same date, Judge Anstis provided his reasons for refusing of the claimant's application of 1 February 2023 and for listing today's hearing. While expressing his concern about the continued non-compliance with tribunal orders by the claimant he says this,

> "the claimant being ill is not an excuse for all non-compliance with tribunal orders. Someone who is ill may be capable of doing some things but not others. In the absence of any medical evidence to support the claimant's application for an extension of time I refuse that application."

7. In her record of hearing, Employment Judge Milner-Moore clarified the issues to be determined in the first claim as set out in the case summary which starts at page 106. She stated that the claimant alleged 13 specific acts of detriment which are alleged to be unjustified direct age discrimination. The earlieset dates from about June/July 2020 and the latest in time from 28 May 2021. There is also an indirect age discrimination claim based on an alleged policy of seeking to move staff from an old style contract onto a new style contract in order to save money which the claimant alleges was to a particular disadvantage of those in the over 50s age group because they were more likely to be employed under the old style contract. The attempts to move her

to the new contract is said to have happened in January and March 2020, on 7 April 2020 and in October 2020. Judge Milner-Moore set out in paragraph 10 to 13 of her order, and no doubt explained at the hearing, why neither the application to add victimisation claim of 29 April 2022 nor the further information sent on 8 July 2022 sufficiently identified the claim that the claimant wished to add. She therefore declined to consider the application without a clear statement of the proposed amendment in writing. She ordered that any application for permission to amend the claim should be made by 11 November 2022 and contain the details set out in paragraphs 15 and 16 and 17 and 18 of the record of hearing.

8. Judge Milner-Moore decided not to strike out the claim for the previous failures but said the following,

> "I have made clear to the claimant that it is important that the orders made by the Tribunal are complied with. Orders are made by the Tribunal with a view to ensuring that cases are properly prepared and so that a fair hearing can take place. If a party is not in a position to meet a deadline set in an order that party should try to agree with variation with the opposing party (if what is at issue is a short delay) or, if a more substantial variation is required, should ask the Tribunal to vary the order. Where orders are not complied with the Tribunal may make orders that party explain why the case should not be struck out (as EJ Anstis did in this case), or may make "unless orders" (an order that unless there is compliance the case will be struck out) all such non-compliance may give rise to costs orders"

9. I agree with everything Judge Milner-Moore said there. I would only add that if a party asks the Tribunal to vary the order because they have a health condition which means that they are not able to comply with it, then they should volunteer medical evidence to support their application and a party should always suggest a date by which they will be able to do what they have been ordered to do.

10. Judge Milner-Moore also gave guidance to the claimant on producing a schedule of loss and made clear that it should be provided by 25 November 2022 even if information about her pension entitlement had not by that date been provided by the respondent.

11. Judge Milner-Moore set the following timetable for case preparation ahead of the final hearing listed for August 2024.

Any application to amend claim by	11 November 2022
Schedule of Loss	25 November 2022
Claimant and Respondent to send each other a list of all relevant documents	24 February 2023
Claimant and Respondent to agree which documents will be used at the final hearing	17 March 2023
Respondent to prepare a file for use at the final hearing and send a copy to the claimant	14 April 2023
Claimant and Respondent to send	23 June 2023

each other copies of their witness statements	
Updated Schedule of Loss	8 July 2024
Parties to write to the Tribunal to confirm readiness for the hearing	15 July 2024
Respondent to send documents to the Tribunal	29 July 2024

12. As at the date of the hearing before me, although the respondent had on 10 November 2022 agreed to a 14 day extension on some of those deadlines this had not been confirmed by the tribunal. Following the order of Employment Judge Hawksworth (page 119) there was an adjustment to the above dates. No further extension has been granted and the Tribunal's response to the claimant's application for one was to list this hearing. I set out that adjustment and the state of compliance as at the hearing before me out in the following table,

		Original deadline	**Extension to**	**Compliance**
1	Any application to amend claim by	11.11.2022	01.02.2023	No
2	Schedule of Loss	25.11.2022	01.02.2023	No
3	Claimant to send the Respondent a list of all relevant documents	24.02.2023	No	No
4	Respondent to send the Claimant a list of all relevant documents	24.02.2023	No	Yes. On 24.02.2023
5	Claimant and Respondent to agree which documents will be used at the final hearing	17.03.2023	No	Not possible because of non compliance with 3
6	Respondent to prepare a file for use at the final hearing and send a copy to the claimant	14.04.2023	No	Not possible because of non compliance with 3
7	Claimant and Respondent to send each other copies of their witness statements	23.06.2023	25.08.2023[1]	Unknown
8	Updated Schedule of Loss	8 July 2024		
9	Parties to write to the Tribunal to confirm readiness for the hearing	15 July 2024		

[1] Extension granted after the preliminary hearing as communicated to the parties on 17 July 2023.

Respondent to send documents to the Tribunal	29 July 2024

13. The respondent's submissions were that the above chronology amounted to intentional and contumelious default which could be inferred from the non-compliance together with numerous applications made for extensions of time which were unsupported by credible medical evidence.

14. In the alternative to the argument that this engaged the Tribunal's power under rule 37(1)(c) 2013 Rules they argued that rule 37(1)(d) was engaged because the conduct amounted to a failure actively to pursue the claim. Intentional and contumelious default could be inferred because the claimant had been repeatedly told by the tribunal what the consequences were and given a strikeout warning and still did not comply which led to an inference this was not simply an inadvertent failure but that the claimant was choosing not to comply. This meant I would then need to consider whether it was just to allow the claimant to continue her claim.

15. The claimant's explanation for not providing medical evidence until the hearing was that she had confidentiality concerns. They argued that the medical evidence provided by the claimant at the hearing included two invitations inviting the claimant for two appointments for two MRI scans on 29 January 2023. But, stated Mr Allsop, of themselves they did not explain why the claimant had not complied with the direction or give confidence that she will be able to comply with directions in the future. It was argued that the claimant had apparently failed to take on board the need for her to make that explanation and there appeared to be nothing stopping her from seeking a letter from her GP or a specialist to explain why she was not able to comply and what the likely timescale was the her to do so.

16. Given that the second claim had been struck out on the basis that it was out of time, he argued that, had there been medical evidence to show that it had not been reasonably practicable on health grounds for the claimant to present it in time, one would have expected the evidence to have been presented to the tribunal when the claimant had the opportunity to do so.

17. The reason the respondent argued that no lesser sanction would compel obedience were that the claimant had they alleged history of failing to progress the claim properly but instead, for example, had hastily lodged claim 2 which was deficient in the particulars it contained and out of time. By that the claimant had precipitated action that did not need to happen. The steps taken by the Tribunal and the respondent to reset the timetable at the preliminary hearing explained the consequences to the claimant of not keeping to it. There had been further inactivity.

18. On the respondent's part, applying for unless orders had only provoked action by the claimant to seek to delay further compliance without providing a cogent explanation for her delay or taking any of the necessary steps to progress the case. They argued that this gave no assurance that, despite the fact that hearing is not listed until August 2024, it was likely to be effective. In essence it was argued that the Tribunal would need evidence to

conclude that it was appropriate for the claimant to continue. It was not fair that the respondent solely should be expected to comply with case management orders and prepare for giving live evidence when all the indications were that the claimant would continue to fail to prepare for a hearing in the claim that she had brought. The absence of a Schedule of Loss meant the respondent did not know what they faced by way of consequences of the hearing. They might yet have to face an amendment application. Any reset in directions would mean a further delay in seeing what the claimant has to say in a witness statement about the matters she relies on which would itself cause further prejudice because of the impact of the passage of time on recall of relevant events. This would diminish the ability of the respondent to defend itself over time. In written submissions and oral submissions Mr Allsop reminded me of the comment of HHJ Tucker in Khan v London Borough of Brent (UKEAT/0002/18) that "being a litigant in person does not mean that the litigant is exempt from compliance with procedures or from engaging in the litigation process to pursue a claim."

19. The claimant argued that her default had not been deliberate but that she had been ill. As a private person, she had lacked trust in the respondent which meant she had been unwilling merely to forward the MRI scans. She described having a sustained period of ill health over the winter. She said she had started in a new job on 1 August 2022 and the pressure of doing so had triggered debilitating sinusitis. She had struggled on for a long period of time and finally had to take time off work in February and March 2023 which she had now come through. The impact on her have been a lack of concentration, focus and stamina.

20. There have been occasions when she had asked for an extension time and said that she would provide evidence if the tribunal wanted it; she stated that she had expected they would say if medical evidence was necessary. The claimant stated that one judge had granted an extension without medical evidence so she thought it must be okay if she merely offered the evidence it had been asked for. I pointed out that Judge Anstis had made clear that the lack of medical evidence was part of his reason for refusing an extension of time in the order sent to the parties on 16 April 2023 (see para XX above). In spite of that, the first time she had provided (limited) medical evidence had been the day before the hearing.

21. The claimant said she had trust issues in sending her MRI scans and discussing them in a public hearing seemed insecure to her. The fact that the email of 22 February had, as she put it, gone astray filled her with more anxiety. Although she had forwarded some information by email, She stated during the course of the hearing that she had more information that she had not yet provided which she wish to be redacted before they were sent to the respondent. That was why she had requested an in-person hearing because it meant it was safe, "where in the room I can show it".

22. Anything the claimant wished to rely on relevant to her explanation for non-compliance needed to be shown to the respondent in advance in an unredacted form, even if agreement could potentially be reached about it being redacted before seen by the lay clients, in order for them to be able to

make a judgement about whether they objected to delay production or not. I could not take into account evidence which the other side had not had the opportunity to comment on and it was for the claimant to decide whether she was going to apply for something additional to be seen.

23. A five-minute break to be called during which the respondent's representatives went to the claimant's waiting room and she showed them the documents you wish to rely on in evidence. The respondent then confirmed they had no issue with the claimant passing the document to me. It was the and outpatient prescription sheet showing that the claimant had been prescribed medication on 1 March 2023 for acute sinusitis including antibiotics.

24. **The claimant should know that if she tries in the future to produce documents at the last minute the respondent may not be as flexible because it depends upon whether they are disadvantaged by the late document. If she produces documents at the last minute the tribunal, ordinarily, will not agree to take them into account**.

25. The consultant neuroradiologist's report about her MRI scans suggests that the claimant had a diagnosis of BPPV, headaches and sinus disease but MRI scans did not themselves produce evidence of anything of concern.

26. The claimant referred to her email to the tribunal at page 125 saying she had a diagnosis of chronic sinusitis and when asked what it was in the email and she explained to the reader why she cannot comply with a direction, said that chronic sinusitis produced a long-term fuzzy head, temperature, exhaustion and that she had had an ear infection in addition. She had been prescribed five lots of antibiotics some of which she described as being "for people with pneumonia". She had since referred through CT scan which she had had. She said she was clear of sinusitis though it was ongoing and acute at times.

27. The claimant had also produced documents sent overnight which seem to relate to the underlying issues. Among them was a letter written by the respondent's representatives on 20 October 2022 following the preliminary hearing set out the details of the holiday pay claim which the claimant said she was unable to understand. Some of the documents referred to, she suggested to be relevant to the constructive dismissal claim that she contested should not have been struck out. That was not an issue before me, save in respect of the costs application.

28. The claimant did appear to have difficulty in focusing on the questions I asked to try to find out from her why she had been unable to comply with so many orders. She was annoyed by a comment in the amended ET3 to the effect that they deny the part of her role as teaching GCSE maths and produced a letter circulating the GCSE results for 2018. I asked her why that letter was produced at the hearing before me and have not been produced at the time ordered for exchange of documents. The claimant's response suggested that she had been concerned that the order of events scheduled by Judge Milner-Moore had not been kept to; that the respondent by putting in an amended ET3 had not adhered to the that intended schedule.

29. The claimant also said that she had sent a further ET1 by post on 14 November 2022. There is no record of any other claim being received in this region than the two which were before me at this preliminary hearing.

30. I had great difficulty in encouraging the claimant not to discuss the constructive dismissal claim which she regarded as all overlapping with the existing claim and repeated that there still was a case to answer. I asked to explain the relevance of the documents sent overnight, for example that dated 6 December 2013 she relies on as evidence that she is entitled to 4 more days holiday in the year than those on the new style contract. I informed the claimant that it was for her to say what she thought she was owed when sitting out her calculation of loss in the Schedule of Loss. She answered that she would have thought that a calculation could be produced that she could follow and that produced by the respondent on 20 October 2022 was not one that she could follow but was obstruction.

31. She thought that she would have been given clear direction when she asked for extensions as she had been by Judge Milner-Moore. I asked her why she did not consider the direct by Judge Hawksworth to have been clear and she said that she had applied to extend that. However her request had been only a bare request for an extension with insufficient reason for it given. I asked her why she had not come to the hearing before me with a plan for when she would be able to comply with these orders and she said that she thought she would be given a direction by me as to when things would need to be done if she was given that opportunity.

32. I asked to comment on the respondent's argument that the history of the matter meant that I should not believe she would continue to meet deadlines in the future. The claimant said that although they said that at the hearing they had not previously said that in writing nor had they previously said that she should not be trusted. She hoped that I could see that she wanted to go forward and that she believed in her claim. In answer to my questions about when the sinusitis subsided she said it was an ongoing process, she was still a little bit weakened, she had not gone back to full hours work and, on reflection, said that the acute phase had probably passed by early April.

33. The respondent argued that, by her submissions, the claimant was seeking to deflect attention from herself and blame the respondent when it was obvious that she was at the hearing because of her own failings. They pointed out, accurately, that the claimant had negotiated more time for written submissions on the costs application rather than accepting that she had been granted an indulgence of two weeks that she did not have before today. That, they argued, told us all it was needed to know about the future.

Applicable Law

34. The Employment Tribunals (Rules of Procedure) 2013 Sch.1 include the following:

"**37.— Striking out**

(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 prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

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

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing 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 the party, at a hearing."

35. The EAT has made it clear that the power of strike out for non-compliance with Tribunal orders under rule 37(1)(c) should only be considered in the most serious of cases. The question of whether a strike out is proportionate and whether a fair trial is possible are among the material factors.

36. The guiding consideration is the overriding objective: Weir Valves & Controls (UK) Ltd v Armitage [70].

> "The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience." (Weir Valves para.17)

37. The Employment Tribunal has the power to strike out a claim which has not been actively pursued by the claimant under rule 37(1)(d) 2013 Rules.

38. In Evans v Commissioner of Police of the Metropolis [1993] I.C.R. 151, the Court of Appeal held under the then applicable rules that if the default is not intentional and contumelious, for the Employment Tribunal to strike out a claim for want of prosecution it is necessary to show:

    38.1 that there has been inordinate and inexcusable delay on the part of the claimant or his lawyers; and

    38.2 that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues or is such as is likely to cause or to have caused serious prejudice to the respondent.[2]

39. However, it should be added that Hoffman LJ (as he then was) commented that taking into account the cultural differences between an Employment Tribunal case and a High Court case:

[2]; [1992] I.R.L.R. 570 CA (Civ Div). applying the same principles as then applied in the High Court and County Court and were explainedin *Birkett v James* [1978] A.C. 297 HL

> "In the normal run of cases, litigants before [Employment] Tribunals may be struck out for conducting their cases at a pace which is regarded as acceptable in the High Court."[3]

40. When considering an application to strike out under what is now r.37(1)(d) of the 2013 Rules, the tribunal must begin by asking itself whether the claimant has failed actively to pursue his claim. In Rolls-Royce Plc v Riddle,[4] the claimant failed to attend at the final hearing of his claim, having received notice. The EAT held that if the tribunal were satisfied that the claimant had failed actively to pursue his claim then the discretion to strike out arose. There were two different scenarios for failing actively to pursue a claim: (i) where there has been "intentional and contumelious" default by the claimant; and (ii) where there has been 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 respondent if the claim were to carry on. The first situation involved consideration of whether it would be just to allow the litigant to pursue his claim when his failure to take reasonable steps to pursue his claim is indicative of contempt for the tribunal and its procedures. The second involves consideration of whether there can be a fair trial.

Conclusions on the strike out application

41. I have decided not to strike out the claim under rule 37(1)(c) or (d) but I want to emphasise that the present circumstances come very close to meeting the high bar that the Tribunal must be satisfied of before doing so.

42. I start first with the allegation the claimant has failed to comply with tribunal orders. The there can be no doubt that the claimant has failed to comply with tribunal orders on numerous occasions.

    42.1 I accept that the original order for the claimant to provide a schedule of Loss by 28 February 2022 may not have been sent to the correct email address. However, by 3 May 2022 she knew as a result of the respondent's communication (page 71) that an order has been made and she had not yet complied with. She accepted in her email of 3 October 2022 (page 88) that she had received the order by June 2022 of the latest. Although she was in breach of the order she had an explanation for it but she shows no concern at all for the situation and does not say when she will provide a schedule which she must know the tribunal intended to be provided more than 7 months previously.

    42.2 However, it was made very, very clear to her by Employment Judge Milner-Moore that she must supply a Schedule of Loss by 25 November 2022 even if by then the respondent had not provided further information about pension loss (page 100). This deals with the claimant's complaint that she does not understand the respondent's holiday pay calculation. It was made clear to her that her responsibility to meet that deadline was independent of the respondent's obligation to meet hers and there was no compliance. She did not apply for an extension of time for that deadline although

[3] [1993] I.C.R. 151; [1992] I.R.L.R. 570 CA (Civ Div)
[4] [2008] I.R.L.R. 873 EAT

she applied for an extension to a different deadline by which to apply for an amendment. In reality, she disagrees with rather than doesn't understand the holiday pay calculation and, since there is no holiday pay claim in the present claim, that is no excuse for not providing a schedule of loss.

42.3 The later order giving her until 1 February 2023 to provide a Schedule of Loss made clear that a further extension would only be granted in "exceptional circumstances". She did not comply with that order.

42.4 She did not comply with to provide all relevant documents by 24 February 2023. She sent a handful of documents relevant to the substantive issues by email the night before the preliminary hearing in public but otherwise she has not complied with that order.

42.5 She has not made an application in writing to amend her claim providing the particulars directed by Judge Milner-Moore either by the original deadline of 11 November 2022 or by the extended deadline of 1 February 2023. As a consequence the present claim does not include complaints of victimisation, holiday pay or constructive dismissal.

43. In my view, the claimant ought to have realised that a detailed explanation was needed of why her ill health prevented her from complying with these orders and when she would be well enough to meet deadlines. She ought to have realised that the medical evidence is needed to backup assertions of ill health.

44. The fact that an employment judge has given her the benefit of the doubt and taken her assertions at face value is no reason to think that medically evidence is not needed as a general rule when the respondent has made it very clear that they consider her explanations do not provide an excuse for an activity because they are not backed up by cogent medical evidence. Judge Anstis explained in straightforward language that the tribunal will not simply presume that someone who is unwell is unable to do all activities related to the preparation or conduct of the litigation. Since the claimant was subject to strike out warning on 18 September 2022, she ought to have realised that failure to comply with tribunal orders will not be overlooked in definitely because it has a knock-on effect on the likelihood that a case will be ready for a final hearing. If cases are not ready for a final hearing, which has been in the diary for months or years, and it cannot go ahead as a result that causes inconvenience and cost to the parties. It also wastes tribunal resources because time has been allocated to one case, but not used to progress that case, when it could have been allocated to other parties' cases.

45. The magnitude of the default means that seven months after the preliminary hearing in private, 18 months after presentation of the claim (as at the time of the preliminary hearing in public before me) the claim has barely progressed. The issues have been clarified at the hearing in October 2022 but nothing further has been done. The principal consequence of the claimant's failure to apply to amend her claim as directed is that, in the event she does now apply

to amend her claim and has to explain the delay she is likely to find it hard to do so. That may make it less likely that any amendment application would be granted, although that would be for the employment judge considering such an application to decide.

46. More than that, the structure of Judge Milner-Moore's orders was clearly intended to mean that the issues in dispute were definitively certain by the end of 2022. The claimant seems to regard there still being case to answer in respect of her resignation despite the strike out of claim 2. I accept the respondent's submission that her failure to act on the direction to particularise her amendment application creates some uncertainty. **Unless and until she makes an application to amend and it is successful, the issues in the present claim the remaining claim are those set out in Judge Miller-Moore's case summary starting at page 106 and no others.** Given her delay so far, she cannot presume that any application would be successful.

47. The claimant's failure to provide a schedule of loss means that the respondent has no sense of the value the claimant puts on the claim as it is. It is important that both parties know the value that they each respectively put on a claim because it encourages a proportionate approach to litigation and the prospect that their differences may be settled. The claimant's failure to put a value on her claim means that that is not possible and she seems to think that it is the respondent's fault that she is unable to do so. There is no holiday pay claim and therefore whether or not she finds it difficult to understand the calculation of the respondent in their letter of 20 October 2022 is no excuse for not setting out her own calculation of loss.

48. I am therefore satisfied that the power under rule 37(1)(c) arises because there has been a failure to comply with orders and I have analysed the impact of that above. When considering the proportionality of striking out the claim I need, among other things, to consider whether a fair hearing is possible. The respondent is justifiably concerned that the claimant may not comply with court orders in the future. An almost total failure to carry out preparation can mean that it reaches the point where any judgements made the end of hearing cannot be said to be fair. Tribunal litigation is conducted in a transparent way with full disclosure of allegations, documentary evidence and statement setting out what witnesses are expected to say. Tribunal litigation is not carried out by ambush. However, that amounts to a justifiable fear that a fair trial will become impossible.

49. Unhappily the state of the Tribunal lists, particularly in this region, involve long delays before hearing dates can be scheduled. This does not reduce the responsibility on the parties to prepare in good time. There is benefit in enabling prospective witnesses to focus on what happened at the most contentious events as soon as possible after the allegations are made rather than waiting until nearer hearing which may be years after the event. Having said that, in the present case the most it can it seems to me that can be said on the question of whether a fair trial is possible is that lack of timely witness statements potentially means the respondent witnesses giving instructions later rather than sooner. There is also a reasonable fear that further cost may be spent by the respondent without confidence that the claimant will similarly

be preparing her case and that the present lack of progress may continue until nearer the hearing.

50. That does not seem to me to be enough to conclude that a fair hearing of these proceedings is not possible. It may be that the claimant to some extent is benefiting from the backlog of cases in the Tribunal lists but it is nonetheless a reality that cannot be ignored. Furthermore the issues are now definitively set which does provide some clarity.

51. Additionally in my view a lesser sanction is available that has not previously been tried namely an order made on the basis that unless the claimant complies with it by a particular date the claim will stand dismissed without further order. That is not in order to be made lightly and care must be taken when drafting it to make sure that it is clear what action the claimant must take and by when and also clear what the consequences will be. I emphasised to the claimant that the current state of affairs cannot continue.

52. I do also consider separately the question of whether there has been a failure actively to pursue the claim. The first thing I consider is whether there has been an intentional and contumelious default by the claimant. In this context contumelious means showing disrespect or disregard for the orders of the tribunal. I need therefore to consider the claimant's explanation for her failure to comply with orders.

53. In essence it is that she was ill and increasingly so through the autumn and winter of 2022. She was referred to ENT specialist in October 2022 and thereafter for MRI scans in January 2023. She has a diagnosis of BPPV and acute sinusitis which she describes today as being very debilitating. She was prescribed antibiotics on 1 March 2023 and told me at the hearing that by April she was very much better. She started a new job on 1 August 2022 and focused her energies on that despite beginning to feel unwell. She clearly believes that she became more unwell because she did not take sick leave sooner but then was absent from work due to ill health in February and March 2023.

54. In her contemporaneous correspondence to the tribunal she merely stated that she had these conditions without explaining why they prevented her from working on a Schedule of Loss for example. She did not, as she might have done, explain that she had difficulties in concentration which meant that a task she had anticipated would take a week was now going to take two weeks, for example. She disregarded the respondent's reasonable request for medical evidence to back up their assertions. At the hearing before me she expressed concerns about cyber security in connection with providing medical evidence and that she had presumed her offer to provide evidence was sufficient because the tribunal did not order her to do so.

55. She still does not seem to appreciate that she is at fault because she was the party that had not complied with an order and therefore it was for her to demonstrate that her failure to do so was genuinely due to a reasonable cause the provided her with an excuse. As the respondent said, having persuaded me that she had not had a reasonable opportunity to reply to the costs application, she tried to negotiate more time for that reply. Instead of

complying with my order to respond to the costs application, she asked for no further work to be done on the claim without providing sufficient reason for that application. None of this gives confidence that she has understood that she has an obligation to progress the claim.

56. She cannot use concerns about privacy as an excuse for not complying with an obligation to disclose documents that she intends to rely on. As I have said Tribunal litigation is conducted on the basis that the parties know in advance each other's cases and each other's evidence. Her presumption that she could bring medical evidence to a hearing and show it for the first time in the room is wrong.

57. Having said all that, even though my view is that the illness she has experienced is not a sufficient reason – in the sense that it does not fully explain her non-compliance, she has persuaded me that it was a genuine explanation which causes me to think that she did not deliberately and intentionally disregard tribunal orders. Given the strike out warning in September 2022 and the very clear guidance given by Judge Milner-Moore it is surprising and concerning that she does not come across and does not act as though she is taking responsibility to progress her own claim. I do think she has shown some disrespect to the tribunal. She has made no apology; she never suggested an alternative date; the few documents that she has disclosed were late at suggesting she seeking to control what she relies on. Parties must send each other all of the relevant documents whether or not they help their case or help the other party's case. She has brought this claim and has a responsibility to progress it. However I do not consider that this goes so far as to merit the description contumelious.

58. I do think that there has been inordinate delay and the excuses put forward for it do not fully explain or justify the length of delay and the totality of the non-compliance. One example of that is that the claimant told me she had recovered following the course of antibiotics by March or April 2023 and yet she has not made any attempt to start the preparatory work or come to the preliminary hearing in public with a proposed revised timetable.

59. In this she has shown some disrespect for the Tribunal procedure which sets the timetable and works when the parties cooperate with one another so that the limited resources of tribunal time can be allocated equitably between different litigants. She had been given clear advice by Judge Milner-Moore on what you needed to do in order to apply to amend claimant did not do it. Instead she hastily lodged claim 2 with so few details that it did not cover the same ground.

60. The claimant refers to having trust issues but it is she who has behaved in a way that does not give confidence that she will do her best to cooperate with orders in the future. The respondent argues that the claimant's failure to comply with case management orders directing her to respond to the costs application are a further indication of the likelihood of future inactivity. The written case management orders were sent to the parties on 22 May 2023 and the claimant's application for a stay on 1 June 2023 provided no explanation for her failure as she had been ordered to do to respond to the costs application by 31 May. I accept that if past behaviour is indicative of

future conduct there must be a risk that the claimant will not comply with tribunal orders in the future and will not comply with the overriding objective to avoid delay.

61. Considerations of justice of broad and my conclusion that a fair trial is still possible is a weighty consideration. Even were I persuaded that the disrespect the claimant has shown could be regarded as contumelious I do think it is just to allow the claim to proceed and this stage. Furthermore claimant brings an age discrimination claim and I should be very cautious before striking out such claim where fair trial is still possible. There is an alternative to strike out available to me and that is the route I choose.

62. However, the claimant seems to me to be conducting litigation in a way which has the effect of increasing costs for the respondent and there may be cost consequences if they show that she is guilty of unreasonable conduct of the litigation. What I mean by this is a persistent failure to comply with tribunal orders and applications for an extension of time at the very last moment (or more recently for a stay) without explaining why it is necessary or providing evidence to justify it could well be said to increase cost. The claimant seems to presume that the litigation will proceed to a timetable that fits her agenda even if it inconveniences the other party or the Employment Tribunal Service. She must comply with tribunal orders because this is not a process that she is subject to; she has initiated it.

Costs application

63. The respondent made their application for costs on 12 May 2023 within 28 days of the judgement and reasons dismissing case number 3312790/2022 being sent to the parites. They rely on rule 76(1)(a) and (b) of the 2013 Rules: that the claimant has acted unreasonably in bringing the proceedings or that the claim has no reasonable prospect of success.

64. I have set out in para XX above the case management orders in which Judge Milner-Moore which explained in detail exactly what the claimant needed to do to make a fully particularised application to amend. It is true that had the application been made, it was not bound to succeed and that was also explained to the claimant at the preliminary hearing. On the other hand, it is difficult to see what advantage presenting claim 2 gave her given that it appeared to be out of time. Claim 2 was limited to a constructive dismissal claim and did not include a discrimination claim or holiday pay claim.

65. I accept that given the exchange at the preliminary hearing, it may well have been an abuse of process to present claim 2 since the arguments could have been presented in claim 1 by amendment. I am not asked to decide that definitively but it would have been arguable. It is not inevitable in every case that it would be an abuse of process to present a second claim, but it was a surprising course to take in the circumstances of this case. The claimant has not shown a state of health that made it impossible for her to comply with the orders for a particularised amendment application and yet possible to submit an employment tribunal claim. In all those circumstances I accept that that the claimant behaved unreasonably in bringing claim 2.

66. I also accept that claim 2 had no reasonable prospects of success. I take into account the reasoning of Judge Anstis in full (page 131 and ffg.). It appears that the claimant resigned on 13 May 2022 and no reason was shown why it was not reasonably practicable for her to present the claim in time. The dates of early conciliation appear to suggest that the deadline for her submitting the claim was 9 September 2022 but it was presented on 21 October 2022 (see the respondent's response at page 49). It is true that the claimant has described there is being a continuing course of conduct in her submissions at the preliminary hearing before me. However claim 2 did not include a discrimination claim and therefore that is not a relevant argument when considering whether the claim was, on the face of it, out of time when presented. For that reason I accept it had no reasonable prospects of success.

67. The consequence of the presentation of this claim is that the respondent unnecessarily had to respond to it. I gave the claimant the opportunity provide me with information about her means, and she did not take it. She has not asked me to take means into account. I have decided not to do so because I have not been asked to and have no information to consider.

68. I have considered the costs schedule in the total sum of £1,534.32 exclusive of VAT. It seems to me that it is likely that some of the emails from the claimant referred to in this schedule concerned both claim 2 and claim 1. I also consider that the sums claimed for a trainee's time in preparing the schedule of cost to be unreasonable, when compared with the sums claimed for drafting the schedule of costs for the case that the whole. I have decided that the appropriate thing to do to reflect the consequence to the respondent of the conduct, taking those matters into account, is to deduct the cost of preparation of the schedule of costs from the claimed sum but make no adjustment for the prospect that some of the correspondence dealt with both claims. I therefore award £1,013.48 (£1,534.32 - £521.84) excluding VAT.

69. Separate case management orders are made.

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Employment Judge George

Date: …18 September 2023 ……..

Sent to the parties on:
19 September 2023.....

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For the Tribunal Office