



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Aziz
Respondent: Highams Park Academy Trust
Heard at: East London Hearing Centre
On: 27 September 2023 (By Cloud Video Platform)
Before: Employment Judge B Beyzade

Representation

Claimant: Not present or represented
Respondent: Mr A Leonhardt, Counsel

JUDGMENT

The Judgment of the Tribunal is that:

- 1) The claimant being neither present nor represented during the Preliminary Hearing in public listed at 10.00am on 27 September 2023 at the East London Hearing Centre by Cloud Video Platform and at a point in excess of 145 minutes after the time set for the Preliminary Hearing and there being no answer on the telephone number furnished by the claimant for the purposes of the Tribunal communicating with her at 10.25am and 10.54am, and the claimant not having responded to email correspondence sent by the Clerk to the Tribunal at 10.56am, and the claimant not having otherwise communicated with the Tribunal in relation to her non-attendance at the Preliminary Hearing; and on the respondent's application made at the Bar, and having considered the content of the Tribunal file, the Tribunal dismisses the claimant's claim in terms of *Rule of Procedure 47 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013*.

REASONS

Summary of claim and procedure to date

1. The claimant lodged a claim on 19 May 2022 for unfair dismissal (constructive dismissal), race discrimination, pregnancy or maternity discrimination and religion or belief discrimination, which the respondent defended.
2. Following a Preliminary Hearing for Case Management on 10 November 2022, Employment Judge Crosfill issued directions to the parties, and parties were directed to prepare a provisional list of issues by 20 March 2023, the respondent was accordingly directed to prepare any application to strike out any part of the

claimant's claim pursuant to Rule 37 by 20 February 2023; the claimant was required to provide any witness statement for the purposes of establishing that her complaints were brought in time or that she should be given an extension of time to bring such complaints together with any evidence as to her means in respect of any deposit order application to the respondent by 05 March 2023 (and the claimant was directed to make any amendment application by 06 February 2023 to include all the matters included in the further information sent to the Tribunal on 23 November 2022); and the respondent was directed to serve any witness statement in response by 12 March 2023, and thereafter, to prepare a Bundle for use at the Preliminary Hearing by 19 March 2023. A Preliminary Hearing in public was listed on 05 May 2023 by Cloud Video Platform ("CVP"), and the Final Hearing was listed to take place in person at the East London Hearing Centre on 27, 28 and 29 September 2023 before a full Tribunal.

3. The claimant sent email correspondences to the Tribunal on 05 February 2023 making an application to amend her claim to include the detail provided in the further particulars submitted by her to the Tribunal on 23 November 2022 and to seek permission to give evidence from Qatar (and to attend any hearings remotely).
4. The respondent lodged their grounds of opposition to the amendment application on 13 February 2023 and they made an application for strike out and/or deposit orders dated 20 February 2023. At the same time, the respondent sent a copy of the draft provisional List of Issues to the Tribunal (see pages 163 to 168 of the Preliminary Hearing Bundle). The claimant indicated by email dated 12 March 2023 that she agreed to the provisional list of issues in accordance with the amended claim form and the details set out at section 8.2.
5. Employment Judge Hallen noted at the Preliminary Hearing by CVP at the East London Hearing Centre on 05 May 2023 that the purpose of the hearing was to consider the claimant's amendment application and the respondent's application for a deposit order and/or strike out. As Employment Judge Hallen did not have sight of the documents relating to the parties' applications prior to the Hearing, there was insufficient time for the Tribunal to determine parties' applications, and accordingly, the claimant's amendment application and the respondent's strike out and/or deposit order applications were relisted to be determined at a Preliminary Hearing on 13 July 2023 (listed for one day).
6. Employment Judge Hallen directed that the respondent was to prepare the Preliminary Hearing Bundle by 29 June 2023; the claimant shall prepare any Witness Statement and documents for the purposes of establishing that her complaints were brought in time or that she should be given an extension of time to bring such complaints together with any evidence as to her means in respect of any deposit order application to the respondent by 15 June 2023; and that by 29 June 2023 the respondent may serve any witness statement in reply.
7. The Clerk to the Tribunal contacted the claimant by email dated 19 May 2023 to advise "*I am afraid that it will not be possible to give evidence to the Tribunal remotely from Qatar.*" On 14 June 2023 the claimant was further advised by the Clerk to the Tribunal that "As Qatar has not given permission, you will be required to attend the Tribunal in person." The claimant sent emails dated 28 June 2023 and 03 July 2023 advising that she will not be in London on 13 July 2023, and she enquired

whether the date of the hearing could be changed. The claimant indicated that she will be in London again in July 2024.

8. The claimant sent an email dated 12 July 2023 to the Tribunal advising:

“I trust my request to postpone the final hearing is received as a natural response to the refusal of evidence from Qatar as this means I cannot be there remotely for the final hearing. I believe for the Court and Respondent equally that attending the preliminary hearing tomorrow will be a waste of resources given the above as none of us would be clear on what dates we would be working towards.”
9. By letter dated 12 July 2023 the then Acting Regional Employment Judge Burgher directed that “The application to postpone to July 2024 is refused. It is not in accordance with the overriding objective for there to be further delay. The claimant must therefore make arrangements to attend, failing which the tribunal will deal with the matters in her absence.”
10. Thereafter, by a further letter dated 12 July 2023, the hearing listed on 13 July 2023 was postponed and parties were advised “Employment Judge Gardiner has decided to postpone the hearing. This has been necessary because there is no Employment Tribunal room available to hear the preliminary hearing. The claimant is to indicate within 7 days whether she accepts that the hearing needs a revised time of 1 day. Both parties are to provide all non-availability dates for the next 6 months.”
11. Acting Regional Employment Judge Russell issued directions to parties dated 17 August 2023 as follows “The first day of the final hearing 27th September 2023 is converted to a Preliminary hearing public at 10am for 3 hours to decide the strike out and deposit order applications and to clarify the issues.” At the same time, a Notice of Hearing was issued to parties (on 17 August 2023) advising the claimant and the respondent that the Preliminary Hearing in public will take place at the East London Hearing Centre by CVP on 27 September 2023 at 10.00am.
12. Regional Employment Judge Burgher issued directions on 11 September 2023 extending the time estimate for the Preliminary Hearing on 27 September 2023 listed at 10.00am to 1 day.

Preliminary Hearing in public on 27 September 2023

13. The case called for Preliminary Hearing at East London Hearing Centre by CVP on 27 September 2023 at 10.00am.
14. There was no appearance for or on behalf of the claimant.
15. The respondent was represented by Mr A Leonhardt, Counsel at the Preliminary Hearing.
16. The case file records that Notice of the date and time set down for Hearing was sent to the claimant and the respondent on 17 August 2023 at the correspondence address provided by them to the Employment Tribunal for the purposes of receiving such communications. No return of the Notice of Hearing issued to the claimant, or the respondent has been received by the Tribunal.

17. The claimant did not send a copy of her witness statement to the Tribunal or to the respondent as directed by Employment Judge Crosfill, and thereafter, by Employment Judge Hallen.
18. The respondent had filed a Preliminary Hearing Bundle consisting of 612-pages and a document titled "List of Key Documents and Summary of Procedural History", to which reference was made by the respondent's representative during the Preliminary Hearing.
19. On the sitting Judge's directions, the Clerk to the Tribunal checked and confirmed that no contact had been made by the claimant with the Tribunal in connection with the Hearing since correspondence was sent to parties by the Tribunal by email on 17 August 2023.
20. On the sitting Judge's direction, the Clerk to the Tribunal attempted to communicate with the claimant on the telephone number provided by the claimant for that purpose at 10.25am and 10.54am. Although the claimant did not respond to the telephone communications, the claimant was advised by voicemail message on the morning of 27 September 2023 that the claimant had not attended the hearing and that she must contact the Tribunal or attend the Preliminary Hearing by 11.30am, in the absence of which the Preliminary Hearing will proceed in her absence.
21. The claimant was advised by email sent at 10.56am on 27 September 2023 that the claimant must make contact with the Tribunal to make an application (stating the grounds clearly and the reasons for non-attendance) or attend by 11.30am, in the absence of which the Hearing will proceed in her absence and the claim may be dismissed.
22. The Tribunal sat at 10.11am and then adjourned briefly at 10.38am and sat again at 11.30am to afford the claimant the opportunity to attend (though late) or to communicate with the Tribunal regarding her non-attendance. After a brief adjournment at 11.51am, the Tribunal reconvened at 12.25pm.

Dismissal of claim pursuant to Rule 47 of the ET Rules

23. At 12.25pm and in light of the claimant's unexplained non-attendance and in the absence of a good reason (which was satisfactory to the Tribunal), and on the respondent's application, the Tribunal dismissed the claimant's claim in terms of Rule 47 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the ET Rules"). I took into account the nature of the claimant's claims, the issues that the Tribunal were required to investigate and determine (per the provisional list of issues referred to earlier in this Judgment), the issues in relation to the claimant's unfair dismissal (constructive) complaint and the time limits and the burden of proof provisions that are set out in sections 123 and 136 of the Equality Act 2010 respectively in relation to the claimant's discrimination complaints (the claimant had not attended the Preliminary Hearing to discharge any obligation placed upon her), and the procedural history relating to the claim. I considered the documents on the Tribunal file. I was satisfied that the claimant had been afforded ample opportunity to attend the Preliminary Hearing and she had failed to attend on 27 September 2023. I took into account the Tribunal's overriding objective (Rule 2 of the ET Rules).

24. The claimant did not attend today's hearing and Rule 47 of the ET Rules specifically deals with non-attendance at a hearing. It was not appropriate to hear the claimant's claim (the Tribunal was unable to clarify the claimant's claim or hear the claimant's amendment application or the respondent's applications) in the claimant's absence given the nature of the claim and the issues before the Tribunal. I therefore dismissed the claimant's claim. Prior to dismissing the claim, I considered and gave full effect to the Tribunal's overriding objective (Rule 2 of the ET Rules).

Respondent's alternative submission – strike out Rule 37(1)(d) of the ET Rules

25. If the Tribunal decided not to dismiss the claimant's claim under Rule 47 of the ET Rules, the respondent's representative submitted, in the alternative, that the claimant's claim should be struck out pursuant to Rule 37(1)(d) of the ET Rules on the basis that the claimant's claim has not been actively pursued.

26. Rule 37 of the ET Rules states:

“37.—(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—

...

(d) that it has not been actively pursued;

...”

27. Rule 37(2) provides that “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.” The Notice of Hearing advised parties that the respondent's strike out application would be decided during today's hearing. The claimant did not avail herself of the opportunity to attend today's hearing in order to make representations in opposition to the respondent's strike out application.
28. The *Evans' Executors v Metropolitan Police Authority* [1992] IRLR 570, [1993] ICR 151, CA case established that the *Birkett v James* [1978] AC 297 principles should apply to a case brought in an Employment Tribunal. *Birkett v James* holds that a claimant's complaints should not be struck out unless there has been intentional and contumelious default (i.e. the default is disrespectful or abusive to the Tribunal), inordinate and inexcusable delay leading to a substantial risk that a fair trial is not possible, or serious prejudice is caused to the respondent.
29. In *Rolls Royce plc v Riddle* [2008] IRLR 873, EAT, Lady Smith pointed out that it is quite wrong for a claimant 'to fail to take reasonable steps to progress his claim in a manner that shows he has disrespect or contempt for the Tribunal and/or its procedures' (at [20]). Although striking out a claim is the most serious of outcomes for a claimant, she commented that 'it is important to avoid reading the warnings in the authorities regarding its severity as indicative of it never being appropriate to use it' (at [35]). In that case, Lady Smith, on appeal, struck out the claimant's unfair dismissal claim on the basis of intentional and contumelious default on his part, in particular that he had misrepresented to the Tribunal that he could not attend the

hearing on medical grounds, causing it to be adjourned, and had thereafter failed to give reasons as to why his claim should not be struck out, and had failed to take any steps to communicate with the Tribunal or otherwise progress his claim in the four months prior to the Preliminary Hearing at which the strike out was considered. All of this indicated 'a persistent disregard for the tribunal, its procedures, and the respondents' interests', making a strike out of the claim 'inevitable'.

30. Prior to the Preliminary Hearing on 13 July 2023 (which was postponed pursuant to Employment Judge Gardiner's order of 12 July 2023), the claimant indicated that she was located in Qatar, and she was subsequently advised by the Clerk to the Tribunal on 19 May 2023 that she could not give evidence from Qatar. She advised by email dated 28 June 2023 that she will be in London again in July 2024.
31. Employment Judge Hallen had ordered the claimant at the Preliminary Hearing on 05 May 2023 to provide a witness statement in relation to the respondent's position that her claims are out of time. Employment Judge Crosfill had previously directed the claimant to provide a witness statement in relation to the same issues. The claimant did not send a witness statement in relation to those matters to the Tribunal or to the respondent's representative.
32. The claimant did not attend the Preliminary Hearing listed today, on 27 September 2023, by CVP at 10.00am. The case file records that Notice of Hearing was issued to parties on 17 August 2023. The claimant did not contact the Tribunal to advise that she will not be attending the hearing (or provide any reasons for her non-attendance) and she did not apply for a postponement.
33. The respondent's representative points out the one of the reasons why the claimant's attendance was required was in order to enable the Tribunal to further clarify the claims and the issues. In the circumstances in which the claimant has not attended the Preliminary Hearing today, 27 September 2023, the Tribunal is not in a position to clarify the claims and issues that are before the Tribunal.
34. Furthermore, the respondent's representative submits that the claimant made an amendment application which was due to be decided at today's hearing. The claimant has not attended the hearing to pursue her amendment application.
35. I accepted the respondent's representative's submission that in all the circumstances the claimant's claim could not progress to a Final Hearing, in the absence of the claimant's attendance and participation at today's Hearing.
36. The respondent's strike out and deposit order applications remain extant. The claimant has not attended the Preliminary Hearing to make any submissions in opposition to the respondent's applications.
37. The respondent submits that it has suffered prejudice as this is the third ineffective hearing (albeit the first two hearings were not effective due to matters beyond the parties' control) and the headteacher whose evidence is likely to be important in terms of the claim and issues before the Tribunal is no longer employed by the school (I was advised that there may be difficulties in terms of the respondent obtaining their evidence). The respondent's representative also refers to the delay and further costs to be incurred if a strike out order is not granted. I am satisfied that

the delay in determining the claim and issues has caused significant prejudice to the respondent.

38. I have balanced this against the impact of striking out the claimant's claim which is the most serious of outcomes for a claimant. I was further advised that the claimant has not communicated with the respondent since July 2023 (despite the respondent's communications copying in the claimant in terms of emails relating to preparation for the Preliminary Hearing). I took into account that the claimant has not communicated with the respondent or the Tribunal to advise in relation to any reasons for her non-attendance at today's hearing or in terms of not providing a witness statement.
39. I am satisfied that the claimant's claim has not been actively pursued. Taking into account the claim and the issues before the Tribunal (per the parties' pleadings and the provisional draft list of issues), the claimant's failure to provide further clarification sought in relation to her claim, the claimant's failure to pursue her amendment application, and the respondent's circumstances (including the significant prejudice caused to the respondent), I am not satisfied that a fair trial would be possible. In those circumstances and in the absence of any explanation from the claimant for her non-attendance and her failure to provide a witness statement, if I had not dismissed the claim in terms of Rule 47 of the ET Rules as a result of the claimant's non-attendance, and having considered the procedural history of this claim, I would have exercised my discretion to dismiss the claimant's claim under Rule 37(1)(d) of the ET Rules. Thus, I am satisfied that it would have been appropriate to issue a strike out order in respect of the claimant's claim. I considered and gave full effect to the Tribunal's overriding objective as set out in Rule 2 of the ET Rules.

Postscript – claimant's email sent on 27 September 2023 at 3.58pm

40. After the conclusion of the Preliminary Hearing, the claimant sent an email to the Clerk to the Tribunal at 3.58pm apologising for her absence and outlining a family member's personal circumstances. The claimant stated that she will wait to receive the outcome of today's Hearing. It will be open to the claimant to consider proceeding by way of Application for Reconsideration of the Judgment if she believes that there are grounds for her to do so, setting out the grounds in full and enclosing any relevant evidence. The ET Rules which set out the principles, the nature of the application, the process and timescale for making the application are set out at Rules 70 to 72 of the ET Rules, a copy of which are available online.

Employment Judge Beyzade

27 September 2023