EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103523/2022 (P)

Held at Aberdeen on 17 February 2023

Employment Judge J M Hendry

Mr M MacDonald	**Claimant** **Represented by** **Mrs J Coutts-MacDonald, Wife**
IKM Testing UK Ltd	**Respondent** **Represented by** **Mr M Wishart, PBS Ltd**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the respondent's application for strike out is refused.

E.T. Z4 (WR)

1. The claimant Mr. M. MacDonald raised proceedings against his former employers for unfair dismissal and disability discrimination. The case was subject to case management in the usual way. On 7 November 2022 there was a Preliminary Hearing (PH) for case management purposes particularly to check if medical records were available for a hearing on disability status arranged to take place on 20/21 December. That date had been agreed after consultation with parties some time earlier.

2. At the telephone hearing the claimant was represented by his wife, Mrs J Coutts-MacDonald. She had represented him throughout. He was not present.

3. I need to narrate some history. There had been a Preliminary Hearing in August. After this the Judge recorded at paragraph 3 of his Note:-

"*I was conscious that there was a hearing on disability status set down for the end of December but that meant we had four or five weeks in hand to have the medical records produced and inspected by the respondents for them to decide if they are proceeding with the hearing on disability status.*"

4. The claimant's representative wrote to the Tribunal on 22 November indicating that she was struggling with her mental health and had been put on anti-depression medication by her GP H. She wrote:-

"*I am not currently in the correct position to be dealing with this court matter and I am requesting and an extension to any further requests of documents, particulars as I feel I am not submitting the correct information required. I am in the process of trying to engage a solicitor so we can proceed with the case.*"

The claimant's representative asked if the hearing date could be postponed.

5. The application to postpone the hearing was objected to by the respondent's agents. A Legal Officer directed the claimant on the 28 November to provide comments on the respondent's opposition and to submit medical evidence in respect of the postponement application. The claimant's representative sent in photographs showing the type of medication that she was prescribed (Fluoxetene). She wrote on 4 December:-

"*I am aware we have had since 14 September however I did not foresee myself having mental health issues. The only reason we are trying to seek representation is that I am not in a position to be handling this case now due to my mental health. Otherwise we would not be asking for an extension.*"

6. On 5 December the Tribunal wrote to the claimant refusing the postponement meantime:-

"*If you could explain why the claimant cannot conduct the case himself or has limited assistance from you conduct the case that might help the Judge understand the position better. You have not produced a letter or note from your G.P. indicating you are too unwell to attend/conduct the hearing. While it is always best to have representation it is not a necessity.*
A party can, with the guidance of the Tribunal, conduct their own case. This is not unusual if they are able to do so. If a party or their representative have health difficulties the Tribunal can also for example allow short regular breaks in the proceedings to assist them or consider other ways of adjusting the proceedings such as having the hearing on the internet to allow a claimant to sit at their home.
The Judge does not believe that it is in accordance with the overriding objective to postpone the proceedings on the basis of the information currently before him. He will therefore arrange a short telephone discussion (TPH) to discuss matters with you and also to discuss the current state of preparations for the hearing."

7. A further TPH was arranged.

8. On 15 December Ms Coutts-MacDonald lodged her husband's medical records.

9. The telephone PH hearing took place on 15 December. What transpired is recorded in the Note prepared at the time. I recorded that the purpose of the hearing was to ensure that parties were prepared for the hearing on 20 and

21 December and that the medical records had been recovered. That hearing had been arranged on 14 September 2022. My Note said this:

"*The Tribunal was conscious that the claimant was not legally represented (being represented by his wife). The focus of those hearings was to ensure that the claimant was aware of what evidence he would require to lead at the hearing to prove disability status. There has been a difficulty/delay in the recovery of medical records.* (my emphasis)

……*Ms Coutts-MacDonald indicated that she had only now received the medical records and hoped to scan them and pass them to Mr Wishart today. We discussed this briefly then she indicated that her husband's flight from Amsterdam had been delayed and he would not be returning until 23 December. This clearly came as a complete surprise to the respondent's agent. I questioned the claimant's wife who explained that the original flight home had been booked for 21 December. This would have been too late to take part in the first day of the hearing. She said that the claimant was obtaining ad-hoc work and couldn't refuse to work that had been offered to him in Amsterdam. I asked what steps the claimant had taken to ensure that he was going to be back for the hearing on 20 December. I also asked when a postponement had been sought.*

3. *Ms Coutts-MacDonald explained that she and her husband were trying to get a solicitor to appear at the hearing. I expressed my view that this was a "red-herring" as it was the claimant who would have to give evidence about his disability at the hearing and a solicitor could not conduct a hearing on disability status without the claimant. Ms Coutts-MacDonald indicated that she did not realise this.*"

10. I asked Ms Coutts-MacDonald to set out the background and her position in writing. The respondent's agent indicated that they were seeking strike-out. Given that the claimant is a party litigant I asked for the strike-out application to be made in writing and meantime postponed the hearing. The claimant e-mailed on 5 January 2023 apologising for failing to ask for a postponement indicating that she was unaware that her husband needed to appear in person. She wrote:-

"*Unfortunately I realise I am ill-equipped to deal with something of this magnitude. Mark was off for a considerable amount of time without any income. Mark was the soul (sole) earner in our household for myself and two young boys. All we set out to do was to recoup his loss of earnings.*"

She indicated that matters had been very stressful financially and from looking after her children and coping with both her own and her husband's mental health issues. She explained that the timeline of the medical note was out of her control and she found this all very stressful and had been treated for anxiety and depression.

11. The respondent's representatives' position was that they had renewed their application for strike-out set out in their e-mail of 15 December. They pointed out that there had been three case management hearings. The process had stalled through no fault of the respondent. They were aware that the best evidence rule required the claimant to give evidence and the failure of the claimant to arrange either to postpone the hearing or to attend was unreasonable.

12. There was other correspondence to which I need not refer. It was agreed that the strike-out application could be dealt with in chambers and on the basis of written submissions. Parties were given a further final opportunity to lodge written submissions before today.

Judgment

Background

13. This was an unfortunate case in which the respondent's and their agents are entirely blameless. While I can fully accept that the claimant's representative, his wife, appears to have been suffering from stress, and indeed found that the whole exercise of applying to the Tribunal was stressful, it must have been clear to both the claimant and his wife that he would have to attend the hearing to give evidence about his disability. The initial Note indicated that we discussed the nature of any hearing wrote: *"If disability status is not accepted then the claimant (and possibly the claimant's representative) will have to give evidence in relation to the condition, how it arose, how severe it is etc."* (*my emphasis*).

14. I therefore, find it difficult to accept that there was any dubiety about the matter. Nevertheless, the background circumstances appear unfortunate to say the least with the claimant and his wife apparently having health problems and given the loss of his job money worries in addition. I noted that the claimant's wife had asked for a postponement shortly before the PH in December. It is unfortunate that she had not explained that the claimant would be away working nor did she tell the Tribunal that he was unable to attend until the telephone PH.

15. I can understand that the prospect of obtaining work especially just before Christmas was one that the claimant felt that he could not refuse. However, he should have been candid with the Tribunal and sought a postponement. To take work knowing that he would not be back until the second day of the hearing was an extraordinary thing to do. I am afraid that I do not accept the explanation that he thought a solicitor could appear for him. He was clearly warned in the September Note that he would have to give evidence about his disability if the respondent did not accept the medical evidence. I suspect that he may have taken the risk of going while perhaps hoping that the medical records would not appear in time forcing the postponement or if they did they would be accepted as sufficient evidence of his disability by the respondent and the hearing could go off.

Strike Out Application

16. The background to this case is that the claimant is a party litigant represented by his wife. I reminded myself of the terms of Rule 2 ("The Overriding Objective")

> "*Overriding objective*
>
> ***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."

17. I considered the relevant rule that relates to strike-out namely Rule 37:

Striking out

"***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—*

(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.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above."

18. It has been observed that the power of strike out is a draconian one and should only be exercised in rare circumstances. The effect of a successful strike out application would be to prevent a party proceeding to a hearing and

leading evidence in relation to the merits of their claim. (**Balls v Downham Market High School & College [2011] IRLR 217 EAT**)

19. As a general principle discrimination cases should not be struck out except in very clear circumstances and the cases in which such claims are struck out before the full facts could be established are rare (**Chandhok & others v Tirkey [2015] IRLR 195 EAT**).

20. For the purposes of Rule 37(1)(a) a vexatious claim has been described as one that is not pursued with the expectation of success but to harass the other side out of some improper motive. Vexatious proceedings are those that have little or no basis in law and where the intention of the proceedings or their effect is to subject the respondent to inconvenience, harassment or expense out of all proportion to any likely gain. Such behaviour involves an abuse of process (**Attorney General v Barker [2000] FLR 759**). Similarly, we have here unreasonable behavior (not seeking a postpone and being unavailable for a hearing date assigned following consultation between the parties).

21. The case law in this area was reviewed in the recent EAT case of **Smith v Tesco Stores Ltd** in which HHJ.Tayler reviewed the authorities in this area. That case concerned a litigant who was described as having undertaken a course of unreasonable conduct and whose case had been struck out by the Tribunal:

> "*36. The EAT and Court of Appeal have repeatedly emphasised the great care that should be taken before striking out a claim and that strike out of the whole claim is inappropriate if there is some proportionate sanction that may, for example, limit the claim or strike out only those claims that are misconceived or cannot be tried fairly.*
> *37. Anxious consideration is required before an entire claim is struck out on the grounds that the manner in which the proceedings have been conducted by or on behalf of the claimant has been scandalous, unreasonable or vexatious and/or that it is no longer possible to have a fair hearing.*

*38. In **Bolch** Burton J considered the approach to be adopted in considering whether it is appropriate to strike out a claim because of scandalous, unreasonable or vexatious behaviour and concluded that the employment tribunal should ask itself: first, whether there has been scandalous, unreasonable or vexatious conduct of the proceedings; if so, second (save in very limited circumstances where there has been wilful, deliberate or contumelious disobedience of an order of the employment tribunal), whether a fair trial is no longer possible; if so, third, whether strike out would be a proportionate response to the conduct in question.*

*39. This approach was adopted by the Court of Appeal in **Blockbuster Entertainment Ltd v James**, [2006] EWCA Civ 684, [2006] IRLR630, where Sedley LJ stated:*

'This power, as the employment tribunal reminded itself, is a draconic power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response.'

40. In considering proportionality the Court of Appeal noted:

18. The first object of any system of justice is to get triable cases tried. There can be no doubt that among the allegations made by Mr James are things which, if true, merit concern and adjudication. There can be no doubt, either, that Mr James has been difficult, querulous and uncooperative in many respects. Some of this may be attributable to the heavy artillery that has been deployed against him, though I hope that for the future he will be able to show the moderation and respect for others which he displayed in his oral submissions to this court. But the courts and tribunals of this country are open to the difficult as well as to the compliant, so long as they do not conduct their case unreasonably.

*41. In **Arrow Nominees Inc v Blackledge** [2000] 2 BCLC 167 it was held:*

55. Further, in this context, a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court

*42. Choudhury J (President) made a very important point about what constitutes a fair trial in **Emuemukoro v Croma Vigilant (Scotland) Ltd** [2022] ICR 327:*

19 I do not accept Mr Kohanzad's proposition that the power can only be triggered where a fair trial is rendered impossible in an absolute sense. That approach would not take account of all the factors that are relevant to a fair trial which the Court of Appeal in Arrow Nominees [2000] 2 BCLC 167 set out. These include, as I have already mentioned, the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court. These are factors which are consistent with

taking into account the overriding objective. If Mr Kohanzad's proposition were correct, then these considerations would all be subordinated to the feasibility of conducting a trial whilst the memories of witnesses remain sufficiently intact to deal with the issues. In my judgment, the question of fairness in this context is not confined to that issue alone, albeit that it is an important one to take into account. It would almost always be possible to have a trial of the issues if enough time and resources are thrown at it and if scant regard were paid to the consequences of delay and costs for the other parties. *However, it would clearly be inconsistent with the notion of fairness generally, and the overriding objective, if the fairness question had to be considered without regard to such matters.''*

22. This was not a case where the claimant has been guilty of what properly could be described as a course of unreasonable conduct. Neither he nor his wife had acted unreasonably in the conduct of the case until his failure to make himself available at the arranged hearing was discovered. This was, however, a serious matter. Although there was, as the respondents point out, three preliminary hearings this was no more than the usual number of what could be described as standard case management preliminary hearings where one party is not legally represented that I would anticipate. The final case management hearing was expected to be short. It again was not required through any fault of the claimant or his representative and related to the recovery of medical records and to ensure that as a party litigant he was aware of what would happen at the evidential hearing. This was not an unusual process or set of circumstances. The hearing was to find out if the records had been recovered and also, if they had been, whether they had been considered by the respondent.

23. In the present case I considered the three important questions before me suggested by the authorities. The first was whether the conduct been scandalous, unreasonable or vexatious? In the present case this has to be answered in the affirmative. The failure to ne available at the arranged hearing was unreasonable.

24. The second issue is whether a fair trial still possible? This is not a question of just whether or not a new hearing can be arranged and the case proceed. As the then President Choudhury pointed out in ***Emuemukoro*** regard has to

be had to the cost and inconvenience caused to the respondents. I do not minimise those but the expenses are less that would have been occasioned if the hearing in December had been prepared for and then discharged. That at least has been avoided. Although the respondents have been put to inconvenience and no doubt expense there is no compelling reason why a fair trial on the issue of disability status/strike-out cannot take place. I also do not consider that such a drastic remedy appropriate in this case when there is a lesser sanction that is proportionate. In my view the lesser sanction here is for the respondents to make an application for expenses and for that to be considered under the appropriate rules: accordingly, I invite them to do so.

25. **Listing letters will be sent out to identify dates for a hearing on disability status or if that is now conceded for a full merits hearing.**

Employment Judge: J M Hendry
Date of Judgement: 8 March 2023
Date sent to Parties: 8 March 2023