EMPLOYMENT TRIBUNALS

Claimant: Mr K Howard

Respondent: Secretary of State for Justice

Heard at: **London South Employment Tribunal (by CVP)**

On: 20 September 2023

Before: Employment Judge T Perry

Representation
Claimant: Ms E Sole (Counsel)
Respondent: Mrs J Gray (Counsel)

RESERVED JUDGMENT

The Respondent's application to reject the claim or to strike it out is refused.

REASONS

Introduction – Rule 50 application

1. At the outset of the hearing the Claimant made an application under Rule 50 both for the hearing to be heard in private and/or for his name to be anonymised. The Claimant essentially was struggling with anxiety due to the press attending the hearing with no notice. The Respondent was neutral on the application. A member of the press made representations against granting the application. For the reasons given to the parties orally at the time, the Tribunal declined to make such an order.

The rejection/strike out application

2. The notice of hearing stated today's hearing was to "consider whether the claim should be struck out because the ACAS Early Conciliation

requirements have not been complied with and make such further case management orders as are required."

3. The Respondent had made an application dated 28 June 2023 setting out two grounds for the Claimant's claim to be discontinued. First that the Claimant's claim should be rejected under Rule 12 and second that it should be struck out under Rule 37 (1) (a), (b) and/or (c). The letter of 28 June 2023 also included an application for costs, but there was insufficient time to consider this today.

Evidence

4. I was provided with a bundle from the Respondent running to 104 pages. I was also provided with a skeleton argument for the Claimant and an email exchange dated 25 April 2023.

5. I was provided with an agenda and list of issues (together with comments from the Claimant) but there was insufficient time to consider case management at today's hearing.

6. The Claimant gave evidence from a four page witness statement.

7. I heard oral submissions from both sides.

Chronology

8. The Claimant was employed by the Respondent from 25 May 2020 until 25 July 2022. The Claimant was off sick with stress from 21 January 2022.

9. The Claimant had raised a grievance during his employment and was represented by his Union, the Prison Officers Association, during that process.

10. Annie-Rose Morrison, the Claimant's union representative, contacted ACAS to commence Early Conciliation on 30 March 2022. An Early Conciliation Certificate was issued on 20 April 2022. The Claimant sister seems to have taken the lead in much of the initial discussions with the union.

11. Ms Morrison issued a Tribunal claim in the Claimant's name on 7 June 2022. This listed Ms Morrison as the Claimant's representative, provided an email address for the Claimant and included the Claimant's sister's mobile phone number.

12. The ET1 form did not include the ECC number obtained in April 2022. Instead the form stated that the Claimant did not have an ACAS ECC number (box 2.3) and stated that this was because “my employer has already been in touch with ACAS.” It is common ground that the ET1 form should have included the ECC number obtained in April 2022 and that the exemption claimed was incorrect.

13. On 13 July 2022 correspondence was sent from the Tribunal to Ms Morrison stating “your claim form and attachment was referred to Employment Judge Clark who has asked me to write to you to say you have not provided an ACAS early conciliation number at section 2.3 of your ET1 and have ticked the box “My employer has already been in touch with ACAS” to indicate that you are exempt from initiating the early conciliation process yourself. Your claim has been accepted, but please note that you must be able to provide evidence that your employer has indeed been in touch with ACAS about your claim. If that proves not to be the case, the claim will then be rejected later on. If in doubt, you should go to ACAS for your own certificate as soon as possible and issue a new claim.”

14. The Claimant’s claim form was processed by the Tribunal. Acknowledgment of claim was sent stating “your claim has been accepted.” It was given a case number. A copy was sent to the Respondent.

15. On 10 August 2023, the Respondent submitted an ET3 form and defended the claim. The Respondent attached a copy of the ECC certificate to the Grounds of Resistance and stated that “this case will need to be referred to a judge to consider rejection of the claim under Rule 12 of the Employment Tribunal Rules of Procedure 2013. Further details regarding this are set out in paragraphs 4 and 5 of the Grounds of Resistance.”

16. Those paragraphs stated that the claim should be rejected in full under Rule 12 because the Claimant was wrongly asserting an exemption from the ACAS Early Conciliation process applied. The Respondent denied that it had initiated contact with ACAS in relation to the matters complained of in the ET1 form.

17. On 1 September 2022 the Tribunal accepted the Respondent’s response.

18. On 5 December 2022 notice of a Preliminary Hearing by video for 2 May 2023 was sent to Ms Morrison. This contained the same formulation as for

the current hearing namely that the hearing was to "consider whether the claim should be struck out because the ACAS Early Conciliation requirements have not been complied with and make such further case management orders as are required."

19. On 25 April 2023 Ms Morrison wrote to the Respondent stating "I am not on the POA Committee anymore and will not be attending the hearing. I have passed this over to the new representative Mr J Roberts who I have also CC'd into this email." John Roberts was copied on this email.

20. Neither the Claimant nor Mr Roberts attended the hearing on 2 May 2023, which had to be postponed. The Tribunal called the number for the Claimant on the ET1 form but spoke to his sister. The Claimant may have been working on an oyster boat at the time. At this hearing the Employment Judge raised with the Respondent the case of **Sainsbury's v Clark et al** [2023] EWCA Civ 386.

21. Around 5 May 2023, the Claimant says Mr Roberts contacted him asking for his home address.

22. On 28 June 2023 the Respondent wrote to the Tribunal to apply for rejection of the claim under Rule 12 or alternatively for strike out under Rule 37. The letter was copied to both Mr Roberts and Ms Morrison. The letter set out that objections to the application should be sent to the Tribunal and Respondent as soon as possible.

23. Ms Morrison replied the same day to ask that she not be copied on further correspondence.

24. On 30 June 2023 Mr Roberts replied to say that "I am not quite sure how I became involved in this I know that Miss Morrison passed on my details as Branch chair but apart from the details the tribunal have sent me, I have no more knowledge of the case. I have on several occasions tried to gain information from both Miss Morrison and Mr Howard the latter has not responded. Mr Howard is no longer employed by the Service and has not been a member of the Prison Officers Association and due to his lack of responsiveness to my questions I am unable to represent him. I would therefore request that any further correspondence on this matter be referred to Mr Howard directly he has been forwarded the details of the Law Society should he require assistance in his endeavours."

25. On 4 July 2023 the Respondent resent its letter of 28 June 2023 direct to the Claimant.

26. At some point in July 2023 the Claimant says his sister called the Tribunal and was made aware of the current application and hearing. The Claimant said in evidence that he had not seen the grounds of resistance before about this time.

27. On 24 July 2023 Employment Judge Evans confirmed the Respondent's application would be considered at today's hearing.

28. On 15 September 2023 Mr Arnold of Employment Law 4u Ltd contacted the Tribunal to come on the record for the Claimant.

29. On 19 September 2023 Mr Arnold submitted a witness statement and skeleton argument for today's hearing.

The Law

Rejection of a claim

30. Rule 12 states:

Rejection: substantive defects

12

(1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be—

…

(d) one which institutes relevant proceedings, is made on a claim form which contains confirmation that one of the early conciliation exemptions applies, and an early conciliation exemption does not apply;

(2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a)[, (b), (c) or (d)] of paragraph (1).

(3) If the claim is rejected, the form shall be returned to the claimant together with a notice of rejection giving the Judge's reasons for rejecting the claim, or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection."

31. The law in relation to rejection of claim forms and Early Conciliation has been recently considered by the Court of Appeal in the **Sainsbury's** case referred to above**.**

32. At paragraphs 42 and 51, Bean LJ makes the point that if a claim is not rejected at the initial stage by tribunal staff or an Employment Judge, it is not open to a Respondent to argue that the claim should have been rejected. Rather, their route is to seek dismissal under Rule 27 or strike out under Rule 37. At paragraphs 43 and 51Bean LJ makes the point that Rule 6 likely permits a Tribunal to waive an error in relation to an EC certificate number in the context of an application under Rule 27 or 37.

Strike out

33. The power to strike out is contained in Rule 37 and permits strike out of a claim or response on grounds (inter alia) that the manner in which proceedings have been conducted has been unreasonable, for non compliance with Tribunal rules or that it has not been actively pursued.

34. The test is a two stage one: there must be a finding that a specified ground for striking out has been established; and there must be an exercise of discretion as to whether to strike out.

35. Strike out is a draconian power that is not meant to be used punitively.

Unreasonable conduct

36. A concise summary of the approach to take to consideration of a strike out under what is now Rule 37(1)(b) was given by Elias LJ in the Court of Appeal in ***Abegaze v Shrewsbury College of Arts & Technology*** *[2010] IRLR 236* at [15]:

"In the case of a strike out application brought under [r 37(1)(b)] it is well established that before a claim can be struck out, it is necessary to establish that the conduct complained of was scandalous, unreasonable or vexatious conduct in the proceedings; that the result of that conduct was that there could not be a fair trial; and that the imposition of the strike out sanction was proportionate. If some lesser sanction is appropriate and consistent with a fair trial, then the strike out should not be employed'.'

37. The Court of Appeal in **Blockbuster Entertainment Ltd v James** [2006] IRLR 630 *(at [5]*, per Sedley LJ) described the 'deliberate and persistent disregard of required procedural steps' as a cardinal example of conduct which would meet the definition of what is now Rule 37(1)(b).

Non-compliance with an order of the Tribunal

38. In **Harris v Academies Enterprise Trust** [2015] IRLR 208, EAT the EAT was keen to stress "rules are there to be observed, orders are there to be observed, and breaches are not mere trivial matters; they should result in careful consideration whenever they occur."

39. The guiding consideration, when deciding whether to strike out for non-compliance with an order, is the overriding objective (**Weir Valves and Controls (UK) Ltd v Armitage** [2004] ICR 371). At para [17], per Richardson J, this requires the judge or tribunal to consider all the circumstances, including:

    i) the magnitude of the default;

    ii) whether the default is the responsibility of the solicitor or the party;

    iii) what disruption, unfairness or prejudice has been caused; and,

    iv) whether a fair hearing is possible'.

Not been actively pursued

40. The principles for striking out under this heading were set out by the House of Lords in **Birkett v James** [1978] AC 297. This set out at p318F that:

    "The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g., disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party."

41. 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]).

42. In **Evans' Executors v Metropolitan Police Authority** [1992] IRLR 570, Hoffmann LJ accepted that, in applying these principles to employment tribunals, regard must be had to the 'cultural differences' between tribunals and the ordinary courts including (a) that the nature of tribunal cases and the nature of the remedies available were such as to make it intrinsically desirable that there should be an expeditious hearing, and (b) that the disparity between the limitation periods (usually three months in tribunal cases, as opposed to three or six years in civil cases) indicated that Parliament intended tribunal cases to be prosecuted as speedily as possible.

43. For public policy reasons discrimination cases should not be struck out except in the very clearest circumstances **Anyanwu v South Bank Students' Union** [2001] IRLR 305, HL per Lord Steyn at paragraph 24.

"For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."

Conclusions

Rejection

44. I consider that the Tribunal accepted the Claimant's claim. The terms of the email on 13 July 2023 are clear that the claim has been accepted and the subsequent actions of the Tribunal in sending the claim to the Respondent to defend is clear indication of this. I do not consider that it was a conditional acceptance as that is not something that is provided for under the Tribunal rules. Per the decision in **Sainsbury's**, the time for rejection has accordingly passed. I consider the reference to the claim being subsequently rejected

must be (or at the least should have been) a reference to the claim being struck out.

Strike out

45. The applications in relation to unreasonable conduct and failure to actively pursue the claim are, to a very large extent, duplicates. They both require, in order for me to strike out, either that a fair hearing not be possible or (solely as to failure to actively pursue the claim) that the default either be intentional and contumelious or that it have caused or be likely to cause the Respondent serious prejudice.

46. Whilst I consider that the Claimant's conduct in failing to actively pursue the claim is unreasonable, I do not consider it to be intentional and contumelious. It appears that there has been a breakdown in communication and responsibility between the Claimant, his sister, and his union advisers. Blame appears to be apportionable to some extent all around on the Claimant's side. However, I accept the Claimant's evidence overall that due in part to his mental health he had largely placed this matter into the hands of the union he trusted and has been let down by them.

47. Equally, I do not feel able to say that the delays mean that a fair hearing is not possible. I had no evidence before me to make any finding to this effect. There has been prejudice to the Respondent, notably the failure to attend the Preliminary hearing on 2 May 2023 (which I will return to below). However, I do not accept that this is sufficiently serious to justify strike out.

48. As to failure to comply with the tribunal rules, I consider this the strongest of the Respondent's applications. It overlaps slightly with the application as to unreasonable conduct in that the Respondent says that providing inaccurate information in the ET1 regarding Early Conciliation is unreasonable. I agree that it is.

49. Counsel for the Claimant accepted in principle that, although Rules 10 and 12 are drafted as obligations of the Tribunal to take certain steps if information is not provided or exemptions validly claimed, the Rules effectively place obligations on Claimants to make those parts of the claim form are accurate. This is clearly the implication of the decision in **Sainsbury's**. The Claimant failed to comply with this requirement.

50. I may consider whether to waive the requirements for an ECC number or valid exemption in the ET1 under Rule 6. I also, in deciding whether to strike out for failure to provide accurate information, must have regard to the factors in **Armitage**.

51. There is no denying the magnitude of the default. Had the Tribunal sought proof of the Claimant having a valid exemption from the requirement for an ECC number before accepted the claim, it would in all likelihood (and before the decision in **Sainsbury's** definitely) have been rejected. It is understandable why Employment Judge Clark in July 2022 referred to a future rejection (or more properly strike out) if the exemption turned out to have been wrongly claimed. That said, Employment Judge Clark did not know the Claimant had a valid ECC number.

52. The default does appear to be more the responsibility of the claimant's representative rather than his own error. It was the union representative who submitted the incorrect information.

53. The disruption caused to the Respondent has been significant. Including both the cost of the abortive 2 May 2023 hearing, the costs of the application dated 28 June 2023 and today's hearing. These various hearings and letter either did not need to happen or did not need to be as complex as they were. There may well be costs consequences for the Claimant (or possibly ultimately his representatives) for this disruption. This seems a sufficient potential remedy for this disruption.

54. Taking into account **Sainsbury's** and Rule 6 and the fact that the Claimant did have a valid ACAS ECC number, I am not satisfied that there has been sufficiently significant prejudice to the Respondent arising from the default to justify striking out the Claimant's claim. My decision in this regard is reinforced by the fact that I have no evidence before me to suggest that a fair hearing is not still possible.

55. For those reasons, I reject the Respondent's applications. The Tribunal will arrange a further closed preliminary hearing by CVP to consider case management and the costs application.

Employment Judge **T Perry**
Date 20 September 2023