EMPLOYMENT TRIBUNALS

Claimant: **Ms N Keeble**

Respondent: **Department for Environment Food and Rural Affairs**

Heard at: **Bristol** **On: 25th August 2023**

Before: **Employment Judge P Cadney**

Representation:
Claimant: In Person
Respondent: Mr P Keith (Counsel)

PRELIMINARY HEARING JUDGMENT

The judgment of the tribunal is:-

i) The claimant has conducted the litigation unreasonably within the meaning of r37(1)(b) and/or failed actively to pursue the claims within the meaning of r37(1)(d) between 13th January and 14th June 2023 (Employment Tribunal (Constitution and Rules of Procedure) Regs 2013);

ii) As a fair trial is still possible and/or as it is not proportionate to strike out the claim the respondent's application to strike out the claim is dismissed;

iii) Further directions are given below.

Reasons

1. This comes before me today to determine the respondent's application to strike out the claimant's claims.

Respondent's Strike out Application

2. The respondent asserts that the claims should be struck out on the basis of rules 37 (1) (b), 37 (1) (d) and 37(1)(e) when read in conjunction with the overriding objective:

Rule 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—*

(1)(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*".

(1)(d) - " *that it has not been actively pursued;"*.

(1)(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).*"

3. The principles against which a strike out application should be considered are well known. In particular respect of applications under rule 37(1)(b), for a tribunal to strike out for unreasonable conduct, it must be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible; and in either case, the striking out must be a proportionate response — *Blockbuster Entertainment Ltd v James 2006 IRLR 630, CA*. (See paras 38-40 of the judgment in *Smith v Tesco* below).

4. In respect of the test as to whether a fair trial is still possible, which is an issue relevant to determining the application on each of grounds there are two relevant recent authorities. The first is *Emuemukuro v Croma Vigilant [2021] UKEAT,* and specifically para 19 of the judgment of Choudhury P. The second is *Smith v Tesco Stores [2023] EAT 11*.

5. As the passage from Choudhury P's judgment is set out in the judgment of HHJ Tayler in *Smith v Tesco* I have only set out the relevant parts of that judgment (paras 33 -45) below (para 35 is omitted as it sets out rule 37, the relevant subsections of which for the purposes today's hearing are set out above) :

"33 It is always worth going back to the wording of the overriding objective. Rule 2 of the ET Rules provides:

Overriding objective

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.

34. It is important to remember that parties are not merely requested to assist the employment tribunal in furthering the overriding objective, they are required to do so.

(35-See above.)

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.

*43. The backdrop to the conclusion that the claimant had acted in a manner that was scandalous, unreasonable or vexatious so that a fair trial was no longer possible, were the extensive attempts that had been taken to clarify the issues in the claim. In his Notice of Appeal the claimant referred to **Cox v Adecco Group UK & Ireland and others** [2021] ICR 1307 in which, in the context of an application for strike out of a claim on the basis that it has no reasonable prospect of success, I considered the particular care the*

employment tribunal, and represented respondents, should take when dealing with litigants in person:

30 There has to be a reasonable attempt at identifying the claims and the issues before considering strike out or making a deposit order. In some cases, a proper analysis of the pleadings, and any core documents in which the claimant seeks to identify the claims, may show that there really is no claim, and there are no issues to be identified; but more often there will be a claim if one reads the documents carefully, even if it might require an amendment. Strike out is not a way of avoiding rolling up one's sleeves and identifying, in reasonable detail, the claims and issues; doing so is a prerequisite of considering whether the claim has reasonable prospects of success. …

31 Respondents seeking strike out should not see it as a way of avoiding having to get to grips with the claim. They need to assist the employment tribunal in identifying what, on a fair reading of the pleadings and other key documents in which the claimant sets out the case, the claims and issues are. Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents, and key passages of the documents, in which the claim appears to be set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer, and take particular care if a litigant in person has applied the wrong legal label to a factual claim that, if properly pleaded, would be arguable. In applying for strike out, it is as well to take care in what you wish for, as you may get it, but then find that an appeal is being resisted with a losing hand.

44. That said, while stressing the importance of understanding the difficulties faced by litigants in person, and stressing the paramount importance of seeking to establish the core of the claim and bring it on for a hearing, I also noted:

32 This does not mean that litigants in person have no responsibilities. So far as they can, they should seek to explain their claims clearly even though they may not know the correct legal terms. They should focus on their core claims rather than trying to argue every conceivable point. The more prolix and convoluted the claim is, the less a litigant in person can criticise an employment tribunal for failing to get to grips with all the possible claims and issues. Litigants in person should appreciate that, usually, when a tribunal requires additional information it is with the aim of clarifying, and where possible simplifying, the claim, so that the focus is on the core contentions. The overriding objective also applies to litigants in person, who should do all they can to help the employment tribunal clarify the claim. The employment

tribunal can only be expected to take reasonable steps to identify the claims and issues.

Conclusions

45. This claim was not struck out because the failed attempts at identifying the issues meant that the claims had no reasonable prospects of success. Nor was the claim struck out because the failure of the claimant to cooperate in identifying the issues meant that there could not theoretically be a fair hearing of any of the claims because it would not be possible for the tribunal to understand the issues. The claim for unfair dismissal could have proceeded without further particularisation and it might theoretically have been possible to hold a trial of at least some of the discrimination claims on the basis of the list of issues produced by EJ Flood. The reliance placed by EJ Cookson on the two matters raised in the grounds of appeal, as clarified by HHJ Auerbach, the fact that the claimant had not engaged with or agreed the latest draft list of issues and that he had made a fresh application to amend, was not that they meant that there could not theoretically be a fair trial of any of the claims because none of the issues in any of the claims were sufficiently clarified; but that there could not be a fair trial because the claimant refused to cooperate with the respondent and employment tribunal. The great difficulty in identifying the issues was part of a course of conduct in which the claimant had shown that he was "not prepared to cooperate with the tribunal process". EJ Flood concluded that the course of conduct showed that the claimant would not abide by his obligation to assist in achieving the overriding objective and that his disruptive conduct exhibited at the hearing before her was likely to be repeated. EJ Flood found that the claimant was guilty of a "continued refusal to cooperate". The claimant would not work towards a trial that was fair in the sense of avoiding the undue expenditure of time and money, taking into account the demands of other litigants and the finite resources of the employment tribunal. One listing of the full hearing had already been lost and no progress was being made in preparing for the second hearing listed. Preparation was moving backwards, not forwards. There was every reason to believe that the lack of cooperation would persist.

6. The following principles can be derived from the authorities as summarised in *Smith v Tesco*:

i) The question of whether a fair hearing is still possible is not to be considered in isolation or in absolute terms;

ii) Fairness in this context includes the question of whether to proceed to trial involves the undue expenditure of time and money;

iii) The tribunal is entitled to analyse the claimant's past behaviour and ask whether there is any reasonable prospect going forward of the claimant complying with case management orders and or co-operating in accordance with the overriding objective.

Background

7. The first claim (1401787/2021) was issued on 4th May 2021 and came before EJ Roper for a case management hearing on 7th March 2022.The second claim (1402405/2022) was then issued on 28th July 2022, and both claims came before me for a case management hearing on 14th November 2022. At that hearing I identified the claimant's claims as I understood them and directed the claimant to notify the tribunal whether the claims had been correctly identified, if not to identify further claims and to provide further information (see directions below). At the time of the hearing both parties had prepared Lists of Issues but had not been able to agree a definitive list and it was agreed that I would produce a list of the claims as I understood them and would identify any further information needed. I summarised the position in paras 58/59 (set out below) and then set out the claims and further information needed as I understood it at paras 60 -81:

"58 The parties have thus far not been able to agree the List of Issues and I indicated that after the hearing I would go through the documents and produce a List which (subject to the claimant's agreement/amendment) attempts accurately to reflect her claims whilst refining the issues for the tribunal and setting out any Further Information needed.

59. The claimants List of Issues provides a lengthy narrative as to the events. It is not a criticism of the claimant but it is difficult to disentangle events that are simply part of the narrative and those which are the subject matter of claims before the tribunal. The EJ's List of Issues below attempts where possible to identify claims specifically made by the claimant. The primary claims appear to be the failure to make reasonable adjustments/provide auxiliary aids and I have dealt with those claims first."

8. In addition, I listed the claim for final hearing for five days commencing on 2nd October 2023. That hearing has had to be postponed as there is no realistic prospect of the parties being ready for the final hearing.

9. The essence of the respondent's submission is that the claimant has failed to comply with the case management orders from that hearing, with the result that the final hearing has had to be postponed.

10. The specific directions in issue are set out below.

"*Claims and Issues*

12 The claims and issues, as discussed at this preliminary hearing, are listed in the Case Summary below. Within 28 days of the service of the Reply/Amended Response the parties shall agree and supply to the tribunal marked FAO EJ Cadney a final agreed List of Issues.

Further information

13 The Claimant must write to the Tribunal (marked FAO EJ Cadney) and the respondent within 28 days of the promulgation of this order:

13.1 Whether the EJ has correctly identified her claims and if not to set out any other claims being brought;

13.2 To provide the further information as to her claims identified as required by the EJ.

Amended Response

14 The Respondent is permitted to serve on the claimant and tribunal (marked FAO EJ Cadney) within 21 days of the receipt of the Further Information:

14.1 A Reply/ Amended Response;

14.2 Any contention that any of the claimant's claims require permission to amend and/or any objection to amendment;

14.3 Any application that any of the claimant's claims be struck out as having no reasonable prospect of success and/or a deposit order made for any having little reasonable prospect of success..

11. The respondent submits that despite being granted an extension to comply with direction 13 from 10th February 2023 to 5th April 2023 the claimant had not complied by that date and has still not fully complied. As a result, it has not yet been able to comply with direction 14 and, in reality, the claims are no further forward than they were when the directions were given.

12. The claimant does not dispute that she received the case management directions but contends that her medical condition meant that she had a "psychological inability to log onto her laptop." She has supplied after the hearing evidence that she did not log on to her laptop between 30th November and 9th January 2023. Also, that whilst she was given special permission to be in the office in January 2030 it was specifically for the purposes of submitting an ill health retirement application. She subsequently requested further adjustments including the provision of an ipad. She rented workspace in Spacehoppers in Stroud but because on absence of transport from 15th April to 23rd 2023. She was not able to read the CMO because it was supplied as a PDF. However, she contends that despite not complying with the case management directions she has corresponded to the extent that she is able, about work related issues with the respondent and its solicitors.

13. The respondent does not accept that there has been any reasonable impediment preventing her from complying with the orders. It points to the fact that the claimant applied for an extension of time on 27th February 2023, although for reasons it does not accept are accurate, and was granted an extension until 5th April 2023. The claimant did not comply with the order by the that point and on 11th April 2023 the respondent made its first strike out application, to which the claimant responded on 24th April 2023.

14. The claimant did supply a "Claimant's List of Issues" on 14th June 2023. However, the respondent contends that it does not answer the specific questions posed in the order; and purports to introduce new claims of harassment and indirect discrimination. Accordingly, the respondent submits that it is no clearer as to the claims it has to meet, and now potentially faces further new claims. As a consequence, it has renewed its application to strike out the claim on 23rd June 2023.

15. In my judgement the following are broadly the considerations I have to take into account in determining whether the claimant is in breach of any of the rules relied on by the respondent.

16. On behalf of the respondent:

i) The claimant failed until 14th June 2023, some six months after the order was sent and three months after the extension she had been granted, to even attempt to comply with the directions, and at a point where the final hearing was already significantly at risk;
ii) In attempting to do so she as not in reality advanced the case significantly, and in my judgement, a further in person preliminary hearing will be needed to finally identify the claims and deal with any amendment application before it could be listed for final hearing;
iii) The claimant has demonstrated that she is able, for example in response to the original strike out application, to respond with reasonable promptitude
iv) The events themselves are already historic and the claims will not on any analysis finally come to hearing at some point in 2024.

17. On behalf of the claimant:

i) Whilst she did not comply with either the initial or the extended order for an extremely long time, she has attempted belatedly to comply with the directions;
ii) Even if it can be criticised her attempt to comply was a serious attempt to do so which clearly involved some thought and care.

18. In my judgement the claimant's explanations do not fully explain why she was not able to even attempt to comply with the direction for six months, and the delay is unreasonable behaviour within the meaning of r37(1)(b), and that at least for that period the claims were not being actively pursued within the meaning of r37(1)(d).

19. However, that does not in and of itself resolve the issue of whether the claims should be struck out; which requires addressing two further questions - whether a fair hearing is still possible; and whether a strike out is proportionate.

20. In respect of a fair trial, that question is both a separate basis for striking out the claim(r37(1)(e)), and part of test for striking out on the other grounds. Whilst it is not determinative in and of itself it is a significant consideration that I am bound to take into account. However the question is not to be approached in absolute terms (see the extract from *Emuemokoro* above).The respondent relies on the fact that because of the claimant's failure to comply the final hearing was at the time of the applications not feasible, and it has now been postponed. A fair trial would be one

held when originally listed and an adjourned hearing not caused by any fault of the respondent is by definition not fair.

21. However, there is no specific argument or evidence before me that the evidence has been affected to the extent that it cogency has been so impaired that a fair trial is not possible.

22. In those circumstances a fair trial in the absolute sense described in Eluemukoro is obviously still possible. The more difficult question is whether it is still possible given the time and expense to which the respondent will be put in continuing to defend the claims. In all the circumstances and on balance, albeit with some reluctance I am not persuaded that a fair trial is no longer possible, and in my judgement a fair trial of these is still possible.

23. The final question is whether it is proportionate to strike out the claims. As is frequently pointed out, to do so is draconian and may prevent the claimant from succeeding in what may be in whole or in part a meritorious claim.

24. Despite the breaches of the rules of procedure identified above, the claimant has belatedly attempted to comply with the directions. This is not a case in which the directions have been completely ignored. In those circumstances in my judgement to strike out what may be meritorious claims would be disproportionate.

25. It follows that as in my judgement a fair trial is still possible, and that a strike out of the claims would not be proportionate, the respondent's application to strike out the claims is dismissed.

Directions

26. As set out above in my judgement this case will need to be listed for a further PH to finally identify all of the claims and/or any amendment application. However, the claimant has indicated in the correspondence that she is intending to bring a further claim. If she does so it would clearly be sensible to consider all the claims together.

27. Whilst the tribunal cannot dictate to the claimant or limit her capacity to prevent further claims, it would assist the future conduct of this litigation if the claimant indicates whether she is intending to bring any further claim if so to indicate a likely timescale. She is directed to reply within 14 days.

28. Further directions will then be given.

Employment Judge P Cadney
Dated: 6th October 2023

ORDER SENT TO THE PARTIES ON
30 October 2023 By Mr J McCormick

FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS