Case Number: 2502513/2022

THE EMPLOYMENT TRIBUNALS

Claimant Ms V Spinks

Respondent North Tees and Hartlepool NHS Foundation Trust

Heard at Newcastle upon Tyne Hearing Centre (via CVP video link)

On 24 October 2023

Before Employment Judge Langridge

Representation:

Claimant No attendance
Respondent Mr C Breen, counsel

JUDGMENT

Rule 37 Employment Tribunals Rules of Procedure 2013

The claimant's unfair dismissal and public interest disclosure claims are struck out on the following grounds:

(a) under Rule 37(1)(c) for non-compliance with the Tribunal's orders; and/or

(b) under Rule 37(1)(b) due to the claimant's unreasonable conduct of the proceedings; and/or

(c) under Rule 37(1)(e) because the Tribunal considers that it is no longer possible to have a fair hearing.

REASONS

Introduction

1. This preliminary hearing was fixed to deal with the respondent's applications for an unless order, alternatively an order striking out the claimant's claims on the grounds of her non-compliance with Tribunal orders. At a previous preliminary hearing attended by both parties on 14 April 2023, Employment Judge Loy made case management orders (CMOs) and listed the final hearing for 5 days between 4-8 December 2023. Although the claimant complied partially with orders for the provision of Further Information, she made no attempt to comply with most of them, and since 21 June 2023 has contacted neither the Tribunal nor the respondent regarding the progress of her claim.

2. The Tribunal sent a Notice of Hearing for today's preliminary hearing on 14 September, which was correctly addressed to both parties. The only contact from the claimant was in response to receiving a link to the CVP hearing yesterday, when she sought a postponement. The claimant alleged that she had been unaware of the hearing date, but provided no explanation for why she could not attend today. The postponement was refused.

3. When the claimant failed to attend today's hearing at 2pm, the Tribunal clerk phoned her. The claimant said she was at work and would not be attending. She was aware that the hearing was likely to proceed in her absence.

The claims

4. The claimant had been employed by the respondent NHS Trust as Head of Workforce Development and Engagement until on 30 September 2022 she resigned with notice taking effect on 31 December 2022. In her claim form she complained that her post had been removed from a new structure within the Trust, and alleged that this was a direct result of her raising whistleblowing concerns relating to bullying behaviour towards her by the Director of Medical Education. The claimant claimed constructive unfair dismissal and detriment as a result of making public interest disclosures (PIDs). The only information about potential PIDs was that:

    a. The claimant had been bullied;
    b. The respondent had failed in its duty of care towards her;
    c. There was poor governance relating to a public funding issue (unspecified).

5. In her claim form the claimant stated that she had a "dossier with a comprehensive chronology of events and associated evidence".

6. In her Further Information dated 8 May 2023 the claimant set out 11 instances where PIDs had been made, some of which amounted to a repetition of previous disclosures. The substance of the PIDs identified in this document were as follows:

    a. The Director of Medical Education had an intention to upgrade certain individuals in the department "without due process".

b. An employee had reported being bullied and undermined by the Director of Medical Education.
c. The claimant had been bullied in respect of an issue with the allocation of rooms and resources.
d. The bullying behaviour was ongoing and the respondent had downplayed the claimant's concerns about it.
e. The claimant resigned on 30 September 2022 due to the respondent's failure in its duty of care towards her.

7. Although information was provided to identify when and to whom the disclosures were made, they otherwise lacked substance. The specific factual basis upon which these disclosures were said to amount to PIDs was not set out; the claimant did not identify on what basis they could be said to be qualifying disclosures under section 43B of the Act; nor did she say how they were matters of public interest.

8. In its Response, the respondent denied that the claimant had made any qualifying or protected disclosures, and took issue with the lack of a public interest element as the claimant's concerns related only to her own position. It requested further information about what disclosures the claimant had made. The respondent then set out its positive case regarding the restructure. It had appointed an Interim Chief People Officer and an Interim Deputy Chief People Officer to carry out a review, which led to a recommendation for a new structure. The post held by the claimant and another post (Head of Workforce) were both identified as being at risk. A consultation exercise began, and both postholders were advised they could apply for roles in the new structure. The claimant decided instead to resign.

<u>The non-compliance</u>

9. The Tribunal's CMOs required the claimant to provide Further Information about both her public interest disclosure claims (paragraph 5 of the orders) and her constructive unfair dismissal claim (paragraph 6). The date for compliance was 5 May 2023.

10. The specific information the claimant was ordered to provide was as follows:

5.1 Details of each and every disclosure (act of whistleblowing) setting out in date order:

5.1.1 What was disclosed;
5.1.2 To whom;
5.1.3 When;
5.1.4 Where and how.

11. Under paragraph 5.1.5 of the CMOs the claimant was ordered to identify on what grounds she asserted that her disclosures had been qualifying disclosures, by reference to section 43B Employment Rights Act 1996 ('the Act'), namely whether she was alleging that:

5.1.5.1 A criminal offence has been committed, is being committed or is likely to be committed. If so, explain what offence;

5.1.5.2 That a person has failed, is failing or is likely to fail to comply with any legal obligation which they are subject to. If so, explain what legal obligation is being referred to and the nature of the failure;

5.1.5.3 That a miscarriage of justice has occurred, is occurring or is likely to occur, if so, explain how and what;

5.1.5.4 that the health or safety of any individual has been, is being or is likely to be endangered. If so, explain how and what is the nature of the danger to health and safety;

5.1.5.5 That the environment has been, is being or is likely to be damaged. If so, explain how and what;

5.1.5.6 That information tending to show any matters falling within any of the preceding paragraphs, has been or is likely to be deliberately concealed. If so, how and what.

12. The claimant was further ordered to respond to the following:

5.2 Please explain why any such disclosure of information is made in the public interest?

5.3 In date order, provide a description of each and every detriment that has happened to you because you “blew the whistle” including in date order:

5.3.1 What was said or done, by whom, to whom, when and where?

13. In respect of the unfair dismissal claim, the Tribunal made orders under paragraph 6, requiring the claimant by 5 May 2023 to identify:

6.1 Each and every express and/or implied term of her contract of employment, breach of which she relies upon in support of her claim to have been constructively dismissed;

6.2 In respect of each express and/or implied term so identified, in date order set out each and every act or omission by the respondent upon which the claimant relies in support of her contention that all or any such terms have been breached by the respondent.

6.3 In respect of the acts or omissions so identified the claimant must include

6.3.1 the name of the person who she contends did the acts or omissions identified,

6.3.2 a description of the job title held by the person(s) so identified;

6.3.3 what was said, done or not said or not done by the person(s) so identified; and

6.3.4 when each of the matters so identified are said to have taken place.

14. On 8 May the claimant wrote to the Tribunal and the respondent purporting to comply with the CMOs. Her document set out some limited factual information relating to 11 disclosures made between January and October 2022, the focus of which related to her personal position. The number of disclosures on which the claimant relied had expanded from the four identified at the preliminary hearing on 14 April. They dated back to January 2022.

15. The Further Information did not make any attempt to comply with paragraphs 5.1.5, 5.2 or 5.3 of the orders, nor did it address in any way the detail required under paragraphs 6.1, 6.2 or 6.3.

16. On 11 May the respondent wrote to the Tribunal pointing out the specific omissions and requesting more time to file its amended Response to the claims as a consequence.

17. The Tribunal wrote to the claimant on 16 June directing her to provide an explanation by 23 June for not complying fully with the CMOs. The claimant replied on 21 June saying she had acted in good faith and done her best to comply, and queried what information was felt to be missing. That same day, the respondent wrote to provide the requested clarification, pointing the claimant to the paragraphs of the orders which had not been dealt with. The claimant did not engage with that reply, did not provide the missing information, and indeed took no steps whatsoever after emailing her letter of 21 June to progress the case forward. From that point on, the claimant made no contact with either the Tribunal or the respondent until requesting a postponement the day before this hearing.

18. On 19 July the respondent applied for an unless order under Rule 38, on the grounds of the claimant's ongoing non-compliance with the above orders. This was copied to the claimant. The Tribunal wrote on 2 August stating:

> "The claimant must respond fully to Judge Loy's Orders in paragraph 5 & 6 within 7 days of receipt of this Order."

19. The timetable for the further CMOs was varied to accommodate the claimant's non-compliance. The claimant did not reply to the Tribunal's email of 2 August.

20. On 14 August the respondent renewed its application for an unless order, and raised the matter again on 7 September. This preliminary hearing was fixed as a result, with a notice of hearing being emailed on 14 September to the claimant at her correct email address. Despite being aware since 19 July of the respondent's intention to seek an unless order, a consequence of which could be the striking out of her claims, the claimant neither complied with the Tribunal's orders nor communicated to offer an explanation. When refusing the postponement application, Judge Arullendran advised the claimant to attend the preliminary hearing because otherwise her claims could be struck out in her absence.

Relevant law

21. There are a number of key principles and authorities which I have taken into account in reaching this decision, as well as the overriding objective under Rule 2 of the Employment Tribunal Rules of Procedure 2013. This provides as follows:

> "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;
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> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
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> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
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> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
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> (e) saving expense.
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> 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."

22. In the case of Blockbuster Entertainment Ltd v James [2006] IRLR 630 the Court of Appeal held that a tribunal should not be too quick to consider striking out for any non-compliance with its order, which is a Draconian power and not to be exercised too readily. The question is one of proportionality. The question should preferably be addressed well before the trial takes place. The court held that a tribunal should make a structured examination in order to see whether there is "a less drastic means" of achieving the aim, short of an order striking out the claims. There may be an overlap between a mere failure to comply and unreasonable conduct of the proceedings. It is also relevant to consider whether a failure to comply is a one off minor breach, or a wilful and repeated one: Ridskill v D Smith and Nephew Medical UKEAT/0704/05

23. The importance of the overriding objective was discussed in the EAT decision of Weir Valves and Controls (UK) Ltd v Armitage EAT/0296/03, where the court said that the tribunal should consider all the circumstances including "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 possible".

24. In Harris v Academies Enterprise Trust [2015] IRLR 208, the EAT said that "a failure to comply with orders of a tribunal over some period of time, repeatedly, may give rise to a view that if further indulgence is granted, the same will simply happen

again. Tribunals must be cautious to avoid that". The EAT noted that if the failure was an aberration and unlikely to re-occur, that would weigh against a strike out.

25. In the more recent authority of Emuemukoro v Croma Vigilant (Scotland) Ltd 2022 ICR 327, the EAT held that the requirement for exercising the power to strike out under rule 37(1)(b) on the ground of unreasonable conduct, was either that the unreasonable conduct had taken the form of a deliberate and persistent disregard of required procedural steps or that it had made a fair trial impossible. The EAT went on to say that:

> "… where the application to strike out was considered at the outset of the trial and the party's unreasonable conduct had resulted in a fair trial not being possible within that trial window, the power to strike out was triggered; that whether the power should then be exercised depended on whether it would be proportionate to do so, taking account of all factors relevant to a fair trial, such as the undue expenditure of time and money, the demands of other litigants and the finite resources of the court …"

26. In Smith v Tesco Stores Limited 2023 EAT 11 the court reinforced the principles set out in previous authorities. Referring to Emuemukoro, the EAT quoted the words of the then president of the EAT Mr Justice Choudhury, in rejecting a submission that the power to strike out can only be triggered where a fair trial is "rendered impossible in an absolute sense". That approach would not take account of all the relevant factors that are relevant to a fair trial, as set out in Emuemukoro.

27. The very recent authority of T v Royal Bank of Scotland plc in 2023 EAT 119 was also considered. It emphasises the importance of considering alternatives to striking out claims. In that case, the court held that the Tribunal had erred in making such an order:

> "Notwithstanding that orders had not been fully complied with, and the claimant's challenging approach to the litigation, the tribunal did not reasonably conclude that the claims were entirely incapable of being tried at the listed hearing, and that there were no orders it could make that could reasonably be expected to secure that."

28. The EAT held that a tribunal should make clear in its reasoning why it felt that the claimant's conduct was so serious as to warrant striking out the claims. Features of that case included the fact that: the substance of the claims was reasonably clear; adequate further information had been provided, even though orders for clarification had not been complied with; disclosure of documents had taken place, even if incomplete; witness statements had been prepared in draft, even though not finalised; and the claimant's conduct had not been wilful or deliberate, being affected in part by mental health problems. Overall, the tribunal had not given full consideration to alternatives to striking out, so as to enable the imminent trial to proceed.

Conclusions

29. I am required under rule 37(2) to consider whether the claimant had a reasonable opportunity to make representations about the proposal to strike out her claims.

30. The claimant was aware from the respondent's application for an unless order dated 19 July that there might be serious consequences arising from her non-compliance, including striking out her claims. The respondent's concern was reiterated in its emails of 14 August and 7 September. The Tribunal's letter of 2 August made plain that an explanation for the default was required. From around 14 September the claimant knew of the existence and purpose of today's hearing. At the eleventh hour she applied to postpone it. She was immediately told that the hearing could proceed in her absence and was advised by Judge Arullendran to attend as the claims could be struck out. The claimant gave the Tribunal no explanation for why she had not made arrangements to attend, nor did she make any effort to attend at least at the start of the hearing before me in order to explain her difficulties. Instead, the claimant accepted that the hearing was likely to proceed in her absence, and chose not to be present. The claimant could have made representations in writing at any time in the 3-4 months before this hearing, but chose not to do so.

31. I am therefore satisfied that the claimant had a reasonable opportunity to make representations before my decision was made.

32. The overriding objective under Rule 2 requires Tribunals to deal with cases fairly and justly, in a proportionate manner, exercising a degree of flexibility, avoiding delay and saving expense. The Rule also imposes an obligation on the parties to cooperate with the Tribunal and with each other. Applying Weir Valves and Controls (UK) Ltd v Armitage, I considered the magnitude of the claimant's default in this case, before going on to deal with the question of prejudice and whether a fair hearing was still possible.

33. There is no question that the claimant failed to comply with most of the orders made by Judge Loy on 14 April. Although she provided some limited factual information about disclosures, she made no effort whatsoever to identify what part or parts of section 43B of the Act she relied on. On the face of her Further Information, it is not apparent that there was any failure to comply with a legal obligation, for example, nor less that a criminal offence had been committed, nor that health and safety might be endangered.

34. What is clear from the pleaded case is that the claimant complains about her own individual position within the Trust. On its face there is no public interest element, and the claimant made no attempt to comply with the order requiring her to explain why any such disclosure was made in the public interest.

35. The claimant made no attempt to comply with paragraph 5.3 of Judge Loy's orders by providing details of each and every alleged detriment. Similarly, she made no attempt to comply with paragraph 6 of the orders, requiring her to identify the express and/or implied terms of her contract which she relied on in support of her claim to have been constructively dismissed.

36. These defaults do not revolve around the adequacy of the claimant's compliance with the CMOs, as there was no compliance whatsoever with paragraphs 5.1.5, 5.2, 5.3 or 6. The only attempt the claimant made to provide the information ordered was in response to paragraphs 5.1.1 to 5.1.4. Otherwise, it was a wholesale failure to engage and cooperate with the Tribunal's orders. The claimant then ignored the Tribunal's letter of 2 August, ordering her to "respond fully to Judge Loy's Orders in paragraph 5 & 6 within 7 days of receipt of this Order."

37. I note also that when bringing her claim, the claimant said she had a "dossier with a comprehensive chronology of events and associated evidence". This reinforces my view that she has chosen not to provide her evidence or prepare her case as ordered.

38. It is clear from the chronology of events that the claimant's non-compliance has been wilful, deliberate and repeated conduct, per Ridskill. Applying Emuemukoro, this is unreasonable conduct in the form of a "deliberate and persistent disregard of required procedural steps". It has the potential to make a fair trial not possible within the trial window allocated. In my judgment, the claimant's conduct was sufficiently serious as to warrant consideration of striking out her claims.

39. Before reaching that conclusion, I considered what prejudice has resulted from the claimant's conduct. As of the date of this preliminary hearing, the respondent has been unable to prepare an amended Response, since it still does not know the detail of the case it is being asked to meet. For the same reason, documents have not been disclosed by either party and witness statements have not been prepared. The final hearing is listed for 5 days from 4 December, as the parties have known for over six months.

40. The respondent is entitled to understand the legal and factual basis on which the public interest disclosure claims are made. The claimant's default means neither the respondent nor the Tribunal understands how her disclosures were qualifying and protected disclosures under the Act; how they are matters of public interest; or what detrimental treatment she says resulted. The same can be said about the issues at the heart of the constructive unfair dismissal claim, because this is founded almost entirely on the allegation that the claimant's role was removed from the restructure as a result of making public interest disclosures. The respondent is entitled to expect the basis for the claims to be established with some clarity in advance of preparing its evidence. While there is nothing preventing the respondent from preparing its documents and witness statements dealing with the positive case on the restructuring, this would barely touch upon the substantive allegations raised in the claimant's particulars of claim. Neither the respondent nor the Tribunal yet knows what arguments the claimant wishes to advance as to the alleged breaches of her contract (express or implied), or as to the allegations that protected disclosures led to her dismissal or detrimental treatment.

41. In these circumstances I do not believe it is possible for a fair trial to take place in a few weeks' time as listed. The lack of particulars about the claims has had an impact on the preparation, which has substantially not been done by either party, and I do not consider that it is realistically possible to rectify that in the short time available before 4 December. For the respondent to prepare for a hearing in these

circumstances would undoubtedly require it to incur significant expense of time and money in responding to a case which leaves it largely speculating about the detail of the core allegations.

42. A further aspect of the case is that the alleged disclosures go back to January 2022, some being written but others being oral. The ongoing delays prejudice the prospect of a fair trial, given that a postponed hearing taking place in mid-2024 onwards would entail the respondent preparing witness evidence dealing with disclosures an discussions taking place up to two years previously.

43. I have taken account of the various factors set out in Emuemukoro, including undue expenditure of time and money, the demands of other litigants and the finite resources of the court. It is not necessary for a fair trial to be "rendered impossible in an absolute sense", but rather the question is a more nuanced one. In concluding that a fair trial is not possible, I have weighed up the consequences for the claimant against the prejudice to the respondent, as well as the serious and deliberate nature of the claimant's non-compliance. I have also had regard to the impact upon the Tribunal's resources in allocating time to a 5 day hearing in which the claimant herself has shown absolutely no interest in the four month period since her letter of 21 June.

44. The caution expressed in T v Royal Bank of Scotland has also been considered in reaching this decision. However, in that case the trial preparation was fairly well advanced and the core substance of the case was reasonably well understood. The default was not wilful or deliberate, and the court considered that a fair trial was still possible, with the benefit of alternative orders to get the case ready. I note also that the claimant in that case had responded to previous unless orders.

45. This brings me to the important question of whether there were less drastic means available to me under Rule 6 by making other orders. Before concluding that these claims should be struck out, I gave careful consideration to the alternatives available. One option was to waive the requirement to comply with the orders, or to vary the terms of the orders, but I could see no purpose in doing this. The missing information is fundamental to understanding both of the claimant's claims, and therefore fundamental to both parties' ability to respond or to deal with them through their evidence at the hearing.

46. Had the claims been sufficiently clear, it might have been an option to confine the scope of the forthcoming hearing to the issues as currently pleaded. The respondent would have no difficulty in presenting its case on the restructuring and the potential redundancy of the claimant's post. However, the unfair dismissal claim was fundamentally tied to the allegation that the claimant's post was removed from the new structure because she had made public interest disclosures. She provided no substance to support that argument, and gave the respondent no means of understanding what she believed was the connection between those decisions. The review of the structure had been carried out by two individuals who were independent of the Director of Medical Education.

47. Another option was to bar or restrict the claimant's participation in the hearing, but again that would achieve nothing. To debar the claimant from taking part would

have the same practical effect as striking out her claims. More realistically, I considered whether the scope of the claimant's allegations or supporting evidence could be restricted to reflect the defects in her case, but I do not believe this is realistic or achievable. This is again because of the fact that the default relates to fundamental questions which go to the heart of both claims.

48. A further option would have been to postpone the December 2023 hearing and warn the claimant that she would be at risk of the costs of that postponement. Having considered this, I took into account that there was nothing which would give the Tribunal or the respondent any confidence that the claimant would comply with the orders if only she were given more time to do so. She had simply shown no interest in pursuing her claims.

49. For similar reasons, I declined to make an unless order because the claimant has given the Tribunal no confidence that she would comply. The Further Information has still not been provided in the four months which have elapsed since the correspondence of 21 June. In the face of today's hearing the claimant had nothing to say about how she would comply. She chose to ignore the Tribunal's letter of 2 August. I take into account the fact that if the claimant were to write with some further information, there is a real possibility that the respondent or the Tribunal would consider it inadequate. This in turn would lead to significant problems in determining the question of compliance with any unless order.

50. That said, the most significant reason for not postponing the hearing or making an unless order is that the claimant's conduct has been wilful, deliberate and persistent. In Harris v Academies Enterprise Trust the EAT noted that an aberration which was unlikely to recur would weigh against a strike out. Conversely, I conclude that this principle weighs in favour of a strike out in this case, given that the claimant's non-compliance has been longstanding and substantive. It has been accompanied by an unreasonable failure on her part to cooperate with the Tribunal or the respondent or indeed to engage with her claims at all.

51. For the above reasons, I am satisfied that the appropriate outcome in this case is to strike out the claimant's claims in their entirety relying on rule 37(1)(c) for non-compliance with orders and/or under rule 37(1)(b) due to the claimant's unreasonable conduct and/or under rule 37(1) in that a fair hearing is not possible.

52. The costs of the case are reserved to be considered on a future date, should the respondent make such an application.

SE Langridge
Employment Judge Langridge

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 9 November 2023

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