EMPLOYMENT TRIBUNALS

Claimant: **Fatima Thorn**

Respondent: **Nationwide Building Society Ltd**

Heard at: **Bristol ET, via CVP** **On:** **14 July 2023**

Before: **Employment Judge G. King**

Representation
Claimant: In person
Respondent: Mr P. Michell

JUDGMENT having been sent to the parties on 17 August 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Tribunal was assisted by a bundle of documents, prepared by the Respondent, for the preliminary hearing. Page numbers of the bundle are denoted in [square brackets].

Background

2. The Claimant was employed by the Respondent as a Transition Consultant from 8 September 2014 until the termination of her employment by reason of redundancy on 15 September 2021.

3. The Claimant raised four claims against the Respondent under case numbers 1402955/2020, 1404843/2020, 2405619/2021 & 1404750/2021 (the "Original Claims") [6-20; 34-56; & 151-162], the third of which (alleging disability discrimination) was withdrawn.

4. The Original Claims were drafted in whole or in part by the Claimant's lawyers, and were determined at a final hearing from 9 – 27 January 2023. The Claimant was represented by experienced counsel throughout the disclosure process, during witness statement preparation, and at the final hearing.

5. The claims raised in the Original Claims (excluding the withdrawn claims) were direct race discrimination, victimisation, and unfair dismissal. In a Judgment dated 26 January 2023 [186-248], the Tribunal rejected all claims in the Original Claims save for the 'ordinary' unfair dismissal claim, in respect of which the Respondent had previously conceded liability, and a 90% Polkey finding was made.

6. The Claimant's reconsideration application [249-256] was rejected by the Tribunal (EJ Bax) on 8 March 2023 [257-263]. The Claimant has lodged an appeal to the Employment Appeal Tribunal ("EAT"), and has been notified by the EAT that the appeal was lodged 11 days out of time (which may well cause the appeal to be rejected) [264-265]. The Respondent's 28 April 2023 response to the EAT application, made at the EAT's request [27], is at [273-275]. That response explains why the Claimant's appeal ought to be dismissed as out of time.

7. A remedy hearing in the Original Claims has been requested by the Claimant - notwithstanding the Tribunal's observations at paragraph 250 of its reasons [247] that it is "highly unlikely that the Claimant will receive any additional sum" - and is yet to be listed by the Tribunal.

8. This claim ("the New Claim") – 600250/2023 - is for alleged victimisation of the Clamant by the Respondent during her employment (including her dismissal), and/or for unfair dismissal. The Grounds of Complaint are at [291]. The Grounds of Resistance are at [308].

9. In the New Claim, the Claimant takes issue with internal 'grievance' (sic) process against her, which was finalised in December 2020. She says it led to her "eventual unfair dismissal", as well as various detriments [292]. Today, she said it was the fact that there was a disciplinary procedure "changed everything".

<u>Respondent's Application</u>

10. The Respondent argues, in summary:

    a. The New Claim is frivolous, vexatious, an abuse of process and/or has no reasonable prospect of success.

    b. The Claimant has not complied with early conciliation requirements.

    c. The New Claim was presented out of time.

11. The Respondent argues that the New Claim should therefore be struck out.

12. The Respondent also applied for a costs order on the grounds the New Claim is vexatious and/or has no reasonable prospect of success.

The Law - Strike Out

13. The Tribunal Rules of Procedure are all subject to the terms of Rule 2. It states as follows:

    Rule 2 - Overriding objective

14. 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.

15. 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.

    Rule 37

16. Rule 37 provides as follows:

    (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.

17. The Employment Appeal Tribunal held that the striking out process requires a two-stage test in *HM Prison Service v Dolby* [2003] IRLR 694, and in *Hassan v Tesco Stores Ltd* UKEAT/0098/16. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the Tribunal to decide as a matter of discretion whether to strike out the claim. In *Hassan* Lady Wise stated that the second stage is important as it is "a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit" (paragraph 19).

18. Striking out is not automatic and care is needed given the draconian nature. In *Hassan* the Employment Appeal Tribunal held that relevant factors in the exercise of that discretion that might have weighed heavily included the early stage of the proceedings, the ability to direct that further and better particulars of each claim be specified, and the absence of any application on the part of the respondent for striking out.

19. In considering failure to comply with orders, the Tribunal should ensure the decision is proportionate. Hence in *Ridsdill v D Smith and Nephew Medical* UKEAT/0704/05 it was held to be disproportionate to have struck out a claim for failure to provide witness statements and schedules of loss where a less drastic means of dealing with the non-compliance was available, such as unless orders and costs orders.

20. 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) which requires the Tribunal to 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" (see paragraph [17]). The Tribunal must consider the matter objectively and weigh the factors in the balance on an assessment of fairness. A sanction short of strike out may be appropriate.

21. In *Harris v Academies Enterprise Trust* [2015] IRLR 208, the Employment Appeal Tribunal (at [26]) referred to the fact 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", but the Employment Appeal Tribunal noted that if the failure was an "aberration" and unlikely to re-occur, that would weigh against a strike out. At [33] the Employment Appeal Tribunal described another relevant principle as "each case should be dealt with in a way that ensures that other cases are not deprived of their own fair share of the resources of the court. If a case drags on for weeks, the consequence is that other cases, which also deserve to be heard quickly and without due cost, are adjourned or simply are not allotted a date for hearing".

22. Consideration of a striking out order under rule 37(1)(c) must include consideration of whether a fair hearing is still possible.

23. Proportionality, and consideration of whether there are alternative orders to a strike out that would better address the breach of Rules or orders, will be a necessary consideration before the power under r 37(1)(c) is exercised by a Tribunal.

Costs

24. Rule 75 of the Employment Tribunal Rules of Procedure 2013 sets out the definition of a preparation time order: -

> (1) …
>
> (2) A preparation time order is an order that a party ('the paying party') make a payment to another party ('the receiving party') in respect of the receiving party's preparation time while not legally represented. 'Preparation time' means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.
>
> (3) A Costs Order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

25. Rule 76 sets out the test to be applied by the Tribunal in considering whether to grant a costs application: -

> (4) A Tribunal may make a Costs Order or a preparation time order, and shall consider whether to do so, where it considers that—
>
> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;
>
> (b) any claim or response had no reasonable prospect of success;
>
> [or
>
> (e) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.]
>
> (5) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.
>
> …

26. Rule 77 sets out the procedure for determining such applications: -

> *A party may apply for a Costs Order or a preparation time order at any stage up to 28 days after the date on which the Judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.*

27. The principle in the Rules is that "costs" (the Tribunal will use this term as shorthand for both costs and preparation time) do not follow success as they do in other areas of civil litigation. Rather, the Tribunal has power to make awards of costs in the circumstances set out in the Rules. In this case, the relevant provision is Rule 76(1)(a) which gives the Tribunal a discretion to award costs of the conduct of a party meets the threshold test set out in the Rule.

28. The Tribunal's discretion to award costs is not fettered by any requirement to link any unreasonable conduct to the costs incurred (*McPherson v BNP Paribas (London Branch)* [2004] ICR 1398 and *Salinas v Bear Stearns International Holdings Inc* [2005] ICR 1117, EAT). However, that is not to say that any issue of causation is to be ignored and the Tribunal must have regard to the "nature, gravity and effect" of any unreasonable conduct (*Barnsley Metropolitan Borough Council v Yerrakalva* [2012] IRLR 78).

29. The Tribunal takes into account that the "no reasonable prospect of success" provision is not the same as that when assessing whether a claim should be struck out or not. In those cases, the Tribunal as not heard full evidence, and so the test for strike out is a high bar. In assessing whether or not a claim has no reasonable prospect of success when considering an argument for costs the Tribunal has the benefit of having heard all the evidence in relation to the Claimant's claims and the Respondent's response to those claims

Deliberation

Abuse of Process

30. The law as it stands is that a Claimant may be barred from raising a different type of claim from that which has been decided, if the subject-matter of the New Claim is related to the original proceedings, and is one which could, with reasonable diligence, have been put forward at the original hearing. (see *Henderson v Henderson.)*

31. The rule in *Henderson v Henderson* applies just as much to claims in Employment Tribunals as to claims in the civil courts (*Divine-Bortey v Brent London Borough Council* [1998] IRLR 525, CA)

32. The Claimant has accepted that she had knowledge of this "duty of care" investigation from summer 2022. She also accepts that it was mentioned in her witness statement, and these are exchanged on 17 November 2022. The Tribunal is satisfied that the Claimant had knowledge of this event from, at the latest, the middle of November 2022.

33. The Claimant has spoken at length about the difficulties she faced in her hearing and her issues with her own counsel. Unfortunately for her, the Tribunal does not find this assists the Claimant. This hearing is not to make any findings about the conduct of the Claimant's counsel, Mr Bletchley, at the final hearing. It is sufficient for the purpose of this hearing that the Claimant was represented and had the benefit of legal advice for the hearing.

34. A Tribunal cannot exercise a discretion in deciding whether or not has been an abuse of process. The Tribunal must weigh up all the factors and reach a conclusion.

35. The Tribunal finds that the Claimant was aware of the "duty of care" investigation by the time of the final hearing, and the caselaw on this point makes it clear to the Tribunal that the principles of issue estoppel, as per *Henderson v Henderson* , apply to "those [claims] which might have been brought forward at the time, but were not" (see *Talbot v Berkshire County Council* [1994] QB 290 at 294, CA Talbot at 294, per Stuart-Smith LJ).

36. The Claimant was in a position to bring this New Claim at the final hearing of her original claims, and as such the Tribunal finds that this New Claim is an abuse of process and should be struck out.

Res Judicata

37. The Claimant is alleging, as part of the detriments that she brings in the New Claim, that the Respondent's actions led to her "eventual unfair dismissal". The Tribunal has already made findings on the Claimant's dismissal at the final hearing of her original cases. The Tribunal therefore also find that the principle of *res judicata* applies. The Tribunal finds that it is a vexatious claim and an abuse of process and on this ground the Tribunal would also strike out the claim.

38. The Tribunal does not find that there is any evidence of fraud on the part of the Respondent. The Claimant showed the Tribunal some pages of the previous bundle in which her name appeared at the top of the list but without a score. It is her contention that this shows that she was the highest scoring candidate but the evidence has been manipulated. The Tribunal finds that this falls well short of the evidence that would be required to show any fraud or misconduct on the part of the Respondent.

39. The Tribunal does not accept that the Claimant's New Claim is any sort of special case where the rules of *Henderson v Henderson* or *res judicata* should not apply.

Reasonable prospects

40. When asked, the Claimant said that she was never called to a disciplinary hearing. Looking at the recommendations in the duty of care report [362], the recommendation says "if any further inappropriate contact attempts are made with her previous managers, further action may be taken under the societies fair treatment at work policy". There is no mention of a disciplinary process being initiated. This is also clear from the witness evidence of Paul Walsh, that there was no disciplinary process. Mr Walsh refers to "despite a disciplinary *being suggested* as the next part of the process" (emphasis added).

41. In addition, the Claimant is relying on the same protected acts as in her original claims, and on the same key detriment namely her dismissal. As noted above, the Tribunal has already made detailed findings on the Claimant's original claims, and the Tribunal has concluded she was not subject to any detriments because of any protected acts.

42. The purpose of today's hearing is not to hear the merits of this case, but the Tribunal finds that if this case were to proceed to a final hearing, it would have no reasonable prospects of success. On that basis, the Tribunal would also strike out the claim.

Early Conciliation

43. Turning to the issue of the Early Conciliation Certificate, whilst the Tribunal has some sympathy with the mental state the Claimant says she found herself in at the beginning of this year, the rules regarding early conciliation are very strict. The Claimant did not get a new Early Conciliation Certificate before she issued her claim. Her reasoning is that ACAS had previously told her, when she contacted them in relation to her fourth claim, that they would not be contacting the Respondent and would simply issue a new certificate. She says she therefore assumed she did not need a certificate for the fifth, new, claim. The Tribunal cannot accept the Claimant reasoning here. If she was intending to bring a new claim, which she says the fifth claim is, then she should have known that she needed a new Early Conciliation Certificate. If she is arguing that she did not need a new Early Conciliation Certificate because this matter form part of the previous claims, then it is not a new claim and should have been dealt with by an application to amend and added to her original claim. The Claimant cannot have it both ways.

44. In any event the Claimant accepts that the claim was issued without Early Conciliation Certificate. She has since provided one, but that is not how the process works. A claim must be resubmitted after the appropriate certificate has been received. A certificate obtained after a claim has been issued cannot rescue that claim. Accordingly, the Tribunal also find that the Tribunal has no jurisdiction to hear the New Claim and so on ground it should also be struck out.

Time Limits

45. Turning to time limits, the Tribunal does not accept that the Claimant's dismissal was an open issue until the £30,000 payment was made to her. Caselaw on unfair dismissal says that the effective date of termination is a matter of fact. It occurs when the Claimant is actually dismissed, and in this case, this was 15 December 2021. Any victimisation claim is therefore considerably out of time. The Tribunal does have a discretion, in the claims brought under the Equality Act 2010, to extend time limits if it is just and equitable to do so. This is not an automatic right, and it is for the Claimant to persuade the Tribunal that it is just and equitable to do so. There is nothing that the Claimant said that would persuade the Tribunal that it would be just and equitable to extend the time limit in respect of this New Claim, and so the Tribunal would strike out the claim on that ground as well.

Costs

46. The Tribunal must now turn to the issue of costs. In the Employment Tribunal, costs are the exception, not the rule. Costs can be awarded if a party acts unreasonably or vexatiously. The Tribunal needs to look at the whole picture in assessing any unreasonable or vexatious conduct. Such conduct of itself does not automatically give rise to an order for costs. It merely means that the Tribunal must consider an award of costs and exercise its discretion in deciding whether to make such an award.

47. For the reasons given above the Tribunal finds that the Claimant's New Claim is misconceived and should never have been brought. This is vexatious and unreasonable conduct and therefore does open the gateway to an order for costs being made.

48. In looking at whether the Tribunal should exercise its discretion in making a costs order, the Tribunal considers it particularly important to look at the Case Management Order of Employment Judge Midgley of 5 May 2023. Judge Midgley went to some lengths to explain the law to the Claimant, and he expressed, as he put it his "concerned that on the face of the papers there was a high likelihood that the Respondent's arguments may prevail". He encouraged the Claimant to seek legal advice and explained that she did run the risk of a costs application. He set out the law in detail so it was there in writing for the Claimant. He also gave the Claimant until 9 June 2023 to consider her position and withdraw her New Claim if she wished, having considered his comments.

49. The Tribunal finds that Judge Midgley did everything he could to make it very clear to the Claimant that she was running a considerable risk if she continued with this matter.

50. The Tribunal has also considered the email chain between the Claimant and her barrister, Mr Bletchley, that the Claimant submitted. The Tribunal does not think this assists the Claimant. If anything, it shows that the Claimant has a tendency to want to make the same application multiple times, in the hope that she gets the result that she is hoping for. The

Tribunal finds that this is what the Claimant is doing in this instance with her New Claim. She is attempting to revisit issues that have already been decided on. The Respondent should not have to be put to considerable expense in defending itself from matters on which the Tribunal has already ruled.

51. The Tribunal therefore allows the Respondent application for costs. The Tribunal gave some consideration to disallowing counsel's attendance fee for the first preliminary hearing on 5 May, on the basis that a preliminary is needed in discrimination claims any event. However, as the Tribunal's findings are that the claim never should have been brought in the first place, the Tribunal considers that the Respondent would not have had to have gone to any expense, but for the Claimant's actions of bringing this New Claim.

52. The Tribunal has considered the Claimant's arguments about the relative positions of wealth between her and the Respondent, but the Employment appeal Tribunal's decision in *Brooks v Nottingham University Hospitals NHS Trust* EAT 17 Oct 2019 makes it clear that the financial position of the party receiving costs is not a barrier to the making of a costs order, so long as costs have been probably incurred in the course of the litigation. The Tribunal has considered the Claimant's financial position and note that she has a relatively well-paying job. The Tribunal understand her comments about the financial burden and likelihood of having to remortgage her home that the making of a costs order would impose upon her, however the Tribunal also note the Respondent's willingness to accept payment in instalments. The Tribunal finds the Respondent's costs have been properly incurred by the behaviour of the Claimant in bringing this New Claim is such that an order for the Claimant to pay those costs is appropriate.

53. The order of the Tribunal is therefore that the claim is struck out as an abuse of process, and that the Claimant must pay the Respondent's costs of £14,542.40.

_____

Employment Judge King
Date: 18 October 2023

Reasons sent to the Parties on 13 November 2023

For the Tribunal Office