EMPLOYMENT TRIBUNALS

Claimant: **Mrs R Mathews**

Respondent: **Concentrix CVG Intelligent Contact Ltd**

Heard at: **Bristol** **On: 23rd October 2023**

Before: **Employment Judge P Cadney**

Representation:
Claimant: No Attendance
Respondent: Mr T Russell (Solicitor)

PRELIMINARY HEARING JUDGMENT

The judgment of the tribunal is that:-

The claimant's claim is struck out as she:

i) Has conducted the litigation unreasonably within the meaning of r37(1)(b) Employment Tribunal (Constitution and Rules of Procedure) Regs 2013;

ii) Has not actively pursued the claim within the meaning of r37(1)(d) Employment Tribunal (Constitution and Rules of Procedure) Regs 2013

Reasons

1. By a claim form submitted on 12th May 2022 the claimant brought claims of disability discrimination, unlawful deduction from wages, and unpaid holiday pay.

2. On 15th November 2023 the claimant submitted an application to amend to add further discrimination claims; and subsequently sent a copy of her letter of resignation although she did not make a specific application to amend to include a claim of constructive dismissal.

3. The case came before EJ Housego for a Telephone Case Management Preliminary Hearing (TCMPH) on 23rd February 2023. The claimant did not attend

despite attempts to contact her (para 1) and EJ Housego ordered the case to be re-listed. He set out (paras 11,12,13) that the claims required further clarification and that the claimant would be given assistance in doing so at the next hearing by the EJ. In addition he gave very specific directions for the claimant to provide further information as to the particulars of her claim by the end of March 2023. These included particulars of the disability itself, the claims of disability discrimination and the monetary claims. These particulars have never been provided (although see below). In addition he directed the claimant to make a formal application to amend if she was seeking to pursue a claim of constructive dismissal. Again no application to amend has been submitted in accordance with his directions, although the claimant is apparently seeking to pursue the claim. .

4. The case was re-listed on 11th April 2023. On 9th April the claimant sought a postponement, which was granted, as she was travelling that day to attend a funeral. She also stated that she had not received EJ Housego's CMO although it had been emailed to her correct email address.

5. On 13th April 2023 the respondent sought an unless order requiring the claimant to comply with EJ Housego's directions in the absence of which her claim should be struck out. No direction was given as to that application , as before it was actioned the claimant's email of 28th April 2023 (see below) was received.

6. On 28th April 2023 the claimant sent a number of documents to the tribunal including one headed "Case Breakdown". It is not all clear whether this is an attempt to comply with EJ Housego's order; by way of example she does not address the point as to whether she is only relying on the physical disability or also a mental health disability and if so to provide the details (CMO para 18), nor does she make any application to amend to pursue the claim of constructive dismissal despite referring to in the document itself (CMO paras 9 and 10 and Further Information para 19); nor is there any attempt to particularise the claims in the form ordered by EJ Housego. Most of the document, at least that part relating to the discrimination claims is in fact the amendment application with additional comments (added in red) identifying the supporting evidence which was does not address EJ Housego's order.

7. EJ Livesey took the view that this arguably constituted attempted compliance with the order and ordered the case to be listed for a PH to determine the issues set out below. In my judgement this was notably generous to the claimant, as the "case breakdown" did not, in a number of significant respects comply with EJ Housego's order, and as it gave her the opportunity to clarify and produce a final list of issues at a hearing with the assistance of an EJ rather than direct her to complete the task herself.

8. There were two further adjournments, neither of which was the responsibility of the claimant, before the case was listed for hearing today.

9. On 15th September a notice of hearing was sent to the parties listing today's hearing to determine the following issues:

i) The extent of the claimant's compliance with case management orders;

ii) The respondent's application to strike out the claim;

iii) A determination of the issues in the case;

iv) The issuing of further directions;

v) The listing of the next (or a final) hearing.

Hearing

10.As with the hearing on 23rd February 2023 the claimant did not attend and did not respond to an email sent by the Video Hearing Officer reminding her of the hearing, or two telephone calls with voicemail messages left by the tribunal clerk. There has been no contact from the claimant seeking any adjournment of today's hearing.

Issues i) and iv) above.

11.Before dealing with the respondent's strikeout application I will deal with issues i) and iv) above which are connected. As identified by EJ Housego the claims require further clarification and he gave very specific directions for Further Information, from which they could be clarified at the next hearing. The claimant has not complied with those directions in any meaningful sense. Even so, EJ Livesey took the view that there had been attempted compliance, at least in part, and listed the case for a further lengthy hearing today in part to identify the issues. As the claimant has not attended it is not possible to do so and as a result the tribunal is no further forward than it was in February

Respondent's Strike out Application

12.The respondent asserts that the claims should be struck out on the basis of rules 37 (1) (b) and 37(1)(d) 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;."*

13.The principles against which a strike out application should be considered are well known. In 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).

14.In respect of the test as to whether a fair trial is still possible, which is an issue relevant to determining the application on either ground there are two 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*.

15.As the passage from Choudhury P's judgement 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.

16. 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.

17.The respondent makes a number of essential points as to why the case should be struck out:

i) The claimant did not attend the earlier TCMPH and has not complied with the case management orders of EJ Housego;

ii) She has not attended today and has made no contact with the respondent or tribunal to seek an adjournment or explain why;

iii) The tribunal has attempted to assist the claimant by identifying precisely the further information needed, and then re-listed the hearing to provide the assistance of an EJ in identifying the issues despite her non-compliance , but the claimant has not complied and not attended the hearing.

iv) This is the second hearing the claimant has simply failed to attend without explanation, and given that it will only be possible to identify the issues with her attending a hearing, she has left the respondent and tribunal at an impasse where it is not possible to go forward with the claim.

v) The respondent has been extremely patient but has incurred significant time and cost already, but still does not know the case it has to meet; and has no

guarantee that any further hearings will not have the same fate and involve it in incurring further unnecessary costs;

vi) As a result the claim should be struck out.

18.In determining this application I have borne I mind:

i) The claimant is a litigant in person, and entitled to some leeway;

ii) However, that does not in and of itself absolve her from responsibility to assist the tribunal and comply with the overriding objective.

iii) Striking out is a draconian sanction which should only be applied when no other sanction is appropriate.

19. In my judgement the claimant has conducted proceedings unreasonably by failing on two occasions to attend a hearing without explanation. This is also necessarily also a failure actively to pursue the claim. In addition although she has supplied the "case breakdown" she has not made any meaningful attempt to comply with EJ Housego's directions.

20.It follows that in my judgement the threshold for considering a strike out has been reached. It follows that the next two questions are whether a fair hearing is still possible; and whether a strike out is proportionate.

21.In respect of a fair hearing, whilst delay necessarily affects the cogency of the evidence, the respondent does not rely on or set out any specific assertions as to prejudice. It follows that there is no evidence of, or any assertion as to specific prejudice caused by any further delay. However it follows, that whilst a fair trial may still be possible in the absolute sense, in the sense set out by Choudhury P in Emuemukoro it asserts is not fair to require the respondent to be exposed to further unreasonable and disproportionate expense in defending the claim, particularly as the claimant has been given every opportunity to have the claims clarified.

22.Moreover, both in respect of a fair trial and proportionality, it submits there is no reason to suppose that the claimants attitude to the litigation will change, and there is no reason to suppose that the claimant will in fact attend any future hearings, and that the point has been reached at which the nettle must be grasped.

23.The difficulty I have is that whilst it is always possible to say that a party should be given a further chance, a point must be reached where that is no longer an option open to the tribunal. In my judgement to give the claimant a further chance at this stage is to allow the triumph of optimism over experience, and I have no confidence that if the case is re-listed for a further hearing that the claimant is likely to attend given that this is the second time she has failed to attend a hearing without explanation. This is particularly so as today's hearing was listed in part to determine the respondent's application to strike out the claim. It follows that she is aware of the possibility that at this hearing her claim could be dismissed, but she has not attended to advance any argument against it. Whilst I do not believe that I can assume from that that she is not disputing the strike out application, if she does

not seek to attend to dispute something so fundamental, it does not inspire confidence that she will attend any future hearings.

24. Whilst I do so with considerable reluctance it follows that in my view the point has been reached at which I have little choice but to strike out the claim.

Employment Judge P Cadney
Date: 25th October 2023

Judgment sent to the Parties: 20 November 2023

FOR THE TRIBUNAL OFFICE