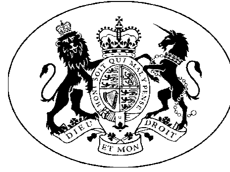

EMPLOYMENT TRIBUNALS

Claimant: Mrs Y Ozyalin

Respondents: (1) Leeds City Council
(2) Kerr Mackie School

Heard at: Leeds **On:** 23 October 2023

Before: Employment Judge T Knowles

Representation
Claimant: Mr T Ozcobon, the Claimant's husband
Respondents: (1) Miss Akers, Counsel
(2) Mr B Willliams, Counsel

RESERVED JUDGMENT UPON APPLICATION TO STRIKE OUT

The Respondents' applications to strike out the Claimant's claim are refused.

RESERVED REASONS

Issues

1. The issues for me to determine at this public preliminary hearing were as follows:

   a. The Respondents' application to strike out the Claimant's claim for non-compliance with the Tribunal's orders for disclosure and preparation of witness evidence.

   b. The Respondents' application to strike out the Claimant's claim because it has no reasonable prospect of success based upon the Claimant's witness evidence.

   c. Any application the Claimant wishes to make to amend her witness statement and/or adduce new disclosure into the final hearing bundle.

d. Any other relevant case management orders, if the claim is not struck out, and

e. To relist the final hearing.

Evidence

2. A bundle of documents was produced, 146 pages.

3. A bundle of witness statements was produced, 54 pages.

4. I heard no evidence during the hearing. The matter has been dealt with on the basis of the submissions made by all parties.

5. The First Respondent produced a written skeleton argument on the morning of the hearing.

6. The Claimant objected to that because they had not seen it before and had not had time to prepare.

7. I dealt with that by instead delaying the beginning of the hearing for 30 minutes in order that the Claimant could read the skeleton argument with her husband.

8. I explained to the Claimant that any party may choose to produce a written copy of their submissions on the day of the hearing and having a written copy would present no more of a disadvantage to them than had the First Respondent made those submissions today without submitting them in writing.

9. I have not dealt with part of the issue set out in 1.c. above because the Claimant has told me today that she does not wish to amend her witness statements, she simply wishes to add page numbers where her witnesses refer to documents.

10. At the conclusion of the hearing, I reserved my decision due to insufficient time.

11. I apologise to the parties for the delay in sending this Judgment to them which has been caused by my lack of immediate availability to give the matter due consideration.

Presenting history

12. I summarise here only the parts of the presenting history relevant to the Claimant's subsisting claim of whistleblowing detriment.

13. The Claimant originally presented her claim on 18 June 2022.

14. The matter was the subject of a private case management hearing on 31 October 2022. Further particulars were ordered.

15. Further particulars were provided 3 February 2023, after extensions in time were granted. But those related only to a claim of race discrimination (for which an amendment was later refused). The Claimant had explained that she had been

unwell and acknowledged that the document was incomplete but promised to send more particulars in the next few days.

16. On 13 February 2023 the Claimant sent far more extensive particulars, including those concerning her whistleblowing claim (in the PH bundle 93-100).

17. There was then a public preliminary hearing 10 March 2023.

18. The Judge at that hearing refused to order a deposit on the whistleblowing detriment claim. The Tribunal order from that hearing records "*It appears that there is a claim brought against the first respondent which is in time and an assertion that detrimental treatment from the respondent continued after the notification of a disciplinary outcome in circumstances where the claimant continued to request additional reasons for the decision, disclosure of any final written warning generated by the second respondent and the transcript of the disciplinary hearing. Such matters were fact sensitive, such that the issue of time limits is best determined at the final hearing, the tribunal having heard evidence and having made appropriate findings of fact.*"

19. The issues were settled in detail.

20. The Respondent was granted leave to file an amended response in the light of the further particulars that had been provided.

21. The case was listed for a 5-day final hearing to begin on 23 October 2023.

22. Orders were made to prepare the matter for that final hearing.

23. I will not repeat all of those orders here. The only orders relevant to today's hearing are that the Claimant was ordered to send her documents to the Respondents by 19 May 2023 and to exchange witness statements with the Respondent by 8 September 2023.

24. The Respondents received no documents from the Claimant by the prescribed date.

25. The Respondents produced a bundle 9 June 2023, without any documents from the Claimant, and served that on the Claimant by way of a link to file over the internet. The Second Respondent warned the Claimant in the cover email about her non-disclosure and that she may need to apply to the Tribunal if she later wishes to add documents.

26. Witness statements were exchanged on 28 September 2023 according to the chronology provided. The Respondents have not raised an issue about them being late.

27. The Second Respondent wrote to the Claimant pointing out that in their view the Claimant's witness statements were inadequate and on 9 October 2023 the Claimant wrote to the Tribunal suggesting that adaptations were necessary to their witness statements.

28. Also, on 9 October 2023, the Claimant served her witness statements on the Respondent.

29. On 10/11 October 2023 the Respondents made a joint application covering the issues before me today and requesting that the final hearing due to begin on 23 October 2023 be postponed.

30. On 12 October 2023 the Claimant emailed the Tribunal to state that they made a mistake over disclosure of documents.

31. On 13 October 2023 the Tribunal postponed the final hearing and listed today's hearing.

Submissions

32. The First Respondent has made written and verbal submissions which in essence are as follows:

a. that the Claimant's witness statements contain no direct evidence from the Claimant about having made a disclosure. She relies on others who were not present.
b. that in relation to the two detriments which are directed at the First Respondent, the witness statements contain no evidence about those or how they were linked to her disclosures.
c. That the late disclosure of documents caused the postponement of the final hearing. There is a breach of the order, therefore the question of whether a fair hearing is still possible is relevant not decisive. This has caused delay and inconvenience to both Respondents and their witnesses. Non-representation does not excuse breach of a simple and clear order which was explained by the Second Respondent when producing the bundle.
d. The Claimant's suggestion that she accidentally emailed her disclosure to herself does not excuse her non-compliance. The First Respondent notes that the addition of these documents at this stage will cause further instructions to be necessary which may in turn mean that the Respondents witness statements will need to be amended.

33. The Second Respondent made verbal submissions which are summarised as follows:

a. The Claimant acted last minute on the disclosures, and made a mistake, but there are other examples of acting last minute.
b. Whilst her apology may be genuine, the Respondents are severely out of pocket and doubt they will ever see any wasted costs.
c. The Claimant has confirmed that there is no application to amend the witness statements.
d. The case is hopeless, the Claimant does not address the evidential points that she needs to.
e. Her claim is based upon inferences and does not address the timing.
f. In the absence of evidence to substantiate the case, public money which would be spent on this matter would be better spent on the school.

34. The Claimant apologised for the error in respect of disclosure. The Claimant submitted that she had been unwell for 2 years because of what happened to her at the second Respondent. They started preparing their documents on 18 May

2023 in advance of the 19 May 2023 deadline but had difficulty sending it and had to break their documents down into separate parts. They sent the emails to themselves to check they were of a size that could be emailed. It was 3am. By the time the documents went through the did not realise that they had only sent them to themselves.

35. The Respondent's communications were not clear upon the issue of disclosure.

36. When the Claimant wrote her witness statement, she had already laid out her case and all of the dates in her claim so did not want to repeat it again.

The Law

On failure to comply with orders

37. Rule 37 of the Employment Tribunals Rules of Procedure 2013 sets out the Tribunal's right to strike out a claim or response.

38. This provides

> *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—*
>
> *(a) that it is scandalous or vexatious or has no reasonable prospect of success;*
>
> *…*
>
> *(c) for non-compliance with any of these Rules or with an order of the Tribunal;*

39. In deciding whether to strike out a party's case for non-compliance with an order under rule 37(1)(c), a Tribunal will have regard to the overriding objective set out in rule 2 of seeking to deal with cases fairly and justly. This requires a tribunal to consider all relevant factors, including:

a. the magnitude of the non-compliance

b. whether the default was the responsibility of the party or his or her representative

c. what disruption, unfairness or prejudice has been caused

d. whether a fair hearing would still be possible, and

e. whether striking out or some lesser remedy would be an appropriate response to the disobedience.

(***Weir Valves and Controls (UK) Ltd v Armitage 2004 ICR 371, EAT***).

40. The Presidential Guidance on General Case Management for England and Wales gives the following guidance: '*In some cases parties apply for strike-out of their opponent at every perceived breach of the Rules. This is not a satisfactory method of managing a case. Such applications are rarely successful. The outcome*

is often further orders by the tribunal to ensure the case is ready for the hearing.'

On prospects of success

41. Strike out is a draconian measure which should only be exercised in exceptional cases.

42. I should take care when striking out a claim brought by a litigant in person (***Mbuisa v Cygnet Healthcare Ltd EAT 0119/18***), particularly where the issue is a poorly pleaded case. In such cases I should consider instead other measures to ensure that the case is clearly pleaded and make a deposit order instead.

43. Strike out may not be appropriate in cases involving disputed facts because it would normally be necessary to hear the evidence first (***Cox v Adecco and ors 2021 ICR 1307, EAT***).

44. Nonetheless cases involving disputed facts may be struck out, for example where the Claimant is making fanciful factual assertions (***Ahir v British Airways plc 2017 EWCA Civ 1392, CA***).

45. Case law on striking out is clear that I should take the Claimant's case at its highest (see for example ***Cox,*** and as the First Respondent refer me to ***Mecharaw v Citibank [2016] ICR 1121***).

46. The First Respondent has also highlighted that in ***Pillay v INC Research UK Ltd UKEAT/0182/11*** the appeal tribunal endorsed the principles set out in ***Anyanwu and another v South Bank Student's Union and South Bank University [2001] IRLR 305***, that whistleblowing claims should not be struck out as an abuse of process for having no reasonable prospects of success, except in the plainest and most obvious cases. In ***Anyanwu***, Lord Hope reiterated that there is a limit and as at paragraph 39 the time and resources of the employment tribunals ought not to be taken up by having to hear evidence in cases that are bound to fail.

47. The power to strike out should only be exercised after careful consideration of all of the available material, including the evidence put forward by the parties and the documentation on the Tribunal's file (***Balls v Downham Market High School and College UKEAT/0343/10***).

In any case at any stage

48. The Employment Tribunal Rules of Procedure remind me of the overriding objective. They state:

> *Overriding objective*
>
> *2. 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.

Conclusions

49. The Claimant is a litigant in person being assisted by her husband.

50. A great deal of work had been done by the Claimant, supported by the Tribunal's case management, and by the Respondents' accommodating approach to the development of the Claimant's case, to enable the Tribunal to set this case down for a final hearing.

51. That work was considerable and at that time it appeared that if the parties could produce a bundle and exchange statements, then the hearing would proceed.

52. The case is now in disarray.

53. The reasons why are not particularly complex.

54. The bundle contains none of the Claimant's documents.

55. The Claimant sent her disclosure to herself rather than to the Respondents.

56. The Claimant's mistake was not picked up on by her until 9 October 2023, despite the Respondent attempting to highlight the issue to her.

57. The Claimant's statements, read in isolation, present a hopeless case. Her statement says nothing material about the asserted disclosures or the detriments. Some of her other witness mention some of the relevant issues, third hand and based on the Claimant's account to them, but they lack detail and are generally hearsay in the absence of direct evidence from the Claimant.

58. The reason for that is that the Claimant having written out her claim form, her further particulars of claim, and discussed those at length to settle the issues at the last hearing, and seeing those issues documented in the resulting orders, did not understand that she needed to repeat in her witness statements what she had already written and explained.

59. Whilst the Claimant has submitted that she does not wish to amend her witness evidence, it is clear that she does not intend her witness statement to stand as her only evidence. She wishes to include what has been set out in her other documents.

60. That would be unforgivable were the Claimant professionally represented. But she is not. She is a litigant in person, inexperienced in litigation (***Mbuisa***).

61. The Claimant's case is fairly clear. The further particulars she submitted (93-100) are extensive and are in a narrative form. They are not a plain pleading, they are in essence her evidence and are set out in a narrative form.

62. Reading the witness statements in conjunction with all of the documentation on the Tribunal's file (***Balls***), it is clear to me that the Claimant has put forwards an arguable case which can only be determined when all of the evidence is presented at Tribunal at a final hearing.

63. I cannot say that this case has no reasonable prospects of success. I could only say that if I only read her witness statements (***Balls***).

64. Reading all the relevant material, I do not consider that this a plan and obviously hopeless case (***Anyanwu***), it simply has suffered some mistakes in preparation by the Claimant.

65. However, the Claimant has failed to comply with the Tribunal's orders for disclosure and in failing to include in her statement everything that she can say relevant to the issues.

66. But it is relevant that the non-compliance appears to me to be down to the Claimant making a human error concerning disclosure and being mistaken about how she should prepare her witness statements for the final hearing.

67. I do not consider that the Claimant has or ever intended to abandon the assertions she made in her claim form, her further particulars and in dialogue at the previous preliminary hearing.

68. These mistakes by the Claimant have caused a final hearing to be postponed near to the time it was due to be heard.

69. The mistakes will cause delay and further expense in time.

70. The fact that they are mistakes and misunderstandings of the Claimant as a litigant in person are matters I think lessen the magnitude of the default. They were unintentional.

71. The addition of the Claimant's documents to the bundle will not cause a great deal more administration to the Respondents than would have been the case had the Claimant not mistakenly omitted to send the documents to the Respondents after she had sent them to herself.

72. I acknowledge that the addition of the documents would cause the need to take instructions, but again that would have been the case had the mistake not been made.

73. I doubt that there will have been any material impact caused by the absence of documents in relation to the Respondent's witness statements.

74. Nobody witnessed the asserted disclosures and the Respondent has pointed out to me that there are no relevant documents.

75. The Respondent will have used the issues, and the further particulars from which they were generated, in preparing its witness statements.

76. In the round I do not consider that the prejudice to the Respondent is too great.

77. I do not consider it would do justice to the parties to strike the Claimant's case out.

78. A fair trial is still possible, but it will suffer delay, further case management and further work on witness evidence from the Claimant and on the bundle.

79. In my conclusion the Respondents' applications for strike out on the grounds of non-compliance and no reasonable prospects of success should be refused.

80. As per the ***Presidential Guidance***, I conclude that this is a case which requires further orders concerning witness evidence and documentation.

81. I made orders which are set out in my Order of even date.

Employment Judge T Knowles
23 November 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

23 November 2023

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FOR THE TRIBUNAL OFFICE