EMPLOYMENT TRIBUNALS

Claimant: Ms C Parnell

Respondent: Equans Regeneration Limited

Heard at: London Central (CVP) **On: 4 December 2023**

Before: Employment Judge A.M.S. Green

Representation
Claimant: In person
Respondent: Mr N Singer - Counsel

RESERVED JUDGMENT

1. The claimant's claims are struck out under rules 37(1)(b) & (c).

2. The claimant will pay the respondent's costs capped at £3,870 in 60 monthly instalments of £64.50.

REASONS

Introduction

1. By a claim form presented on 21 December 2022, the claimant brought complaints of unfair dismissal, age and race discrimination and failure to pay notice against the respondent.

2. There was a preliminary hearing on 22 August 2022 before Employment Judge Russell. Judge Russell listed a 5-day full merits hearing for 4-8 December 2023. Judge Russell issued case management orders including an order for mutual exchange of witness statements by 6 November 2023. The claimant did not comply with that order. The claimant was also concerned that the respondent did not disclose all documents relevant to the claims and issues as ordered. The final merits hearing was converted to a one-day public preliminary hearing for the following purposes:

To consider, both, whether to strike out the Claimant's claim and also the Claimant's applications for specific disclosure and postponement/relisting of the Final Hearing.

3. On 30 November 2023, the respondent made a costs application which was set out in an email of the same date in the following terms:

We also write to notify the Tribunal and the Claimant (copied) that at the PH, the Respondent intends to pursue an application to recover the wasted costs associated with the postponement of the final hearing (which was due to take place on 4-8 December 2023) from the Claimant, pursuant to Rule 76(1)(a) of the 2013 ET Rules of Procedure.

The basis for the Respondent's application is that:

(a) The final hearing was postponed at extremely short notice, as a direct result of the Claimant's failure to provide a witness statement, in accordance with the Case Management Orders dated 22 August 2023.

(b) The Claimant's failure to provide her witness statement without good explanation or evidence, or any indication that she would provide a witness statement in advance of the final hearing (or at all) amounts to unreasonable and / or disruptive conduct of the proceedings.

(c) The Respondent has incurred time and legal costs in preparing for the final hearing which will not now take place:

i. The Respondent has incurred Counsel's full brief fee in the sum of £8,500 plus VAT;

ii. The Respondent's in-house employment counsel has incurred at least 5 hours of time in preparing for the final hearing (including but not limited to, briefing Counsel, preparing witnesses, updating key business stakeholders) which will need to be duplicated in respect of any re-listed hearing.

In the circumstances, the Respondent's wasted costs associated with the postponement of the final hearing are at least £10,750 plus VAT.

4. At the hearing, we worked from a digital bundle. I took oral evidence in chief from the claimant relating to her financial circumstances. Mr Singer made oral submissions in support of the respondent's applications to strike out the claims and to award costs against the claimant. In accordance with the overriding objective and recognising that the claimant was a litigant in person, I gave the claimant extra time to prepare her submissions. On my returning to the bench, the claimant made oral submissions. I reserved judgment.

Relevant procedural history

5. There was a case management hearing before Judge Brown who listed the 5-day final hearing for 4-8 December 2023. Judge Brown also listed a 1-day public preliminary hearing for 22 August 2023 to determine whether any part of the claim should be struck out under rule 37(1)(a) on the basis that it had

no reasonable prospect of success or made the subject of a deposit order under rule 39. Judge Brown issued a list of issues relevant to the claims.

6. On 17 August 2023, the claimant wrote to Ms Wade, the respondent's in-house counsel regarding the bundle for the open preliminary hearing [82]. She disagreed that not all of the documents she wished to rely on were in the bundle. She wanted to add additional documents.

7. On 22 August 2023, Judge Russell conducted the open preliminary hearing and dismissed the applications to strike out the claims or to make a deposit order. They made case management orders including the requirement for the parties to exchange documents relevant to the issues by 12 September 2023 and to exchange witness statements by 6 November 2023. The respondent was required to send the claimant a hearing bundle by 9 October 2023.

8. Mr Singer informed me that he represented the respondent at the open preliminary hearing on 22 August 2023. A bundle comprising approximately 400 pages had been prepared for that hearing. This was essentially the bundle that would be relied on at the final hearing in December 2023. There had been plenty of time for the claimant to address any additional documents to be included in the bundle.

9. There was further correspondence between the claimant and Ms Wade concerning documents on 12 September 2023 [91]. Ms Wade wrote to the claimant and stated, amongst other things, that:

    - *We have already included the documents you provided which are relevant to the issues in the case in the bundle. This is save for the small pack of medical evidence and the benefits statement which came to light at the recent PH, which will be relevant to the issue of remedy (should the Tribunal be required to consider it).*

    - *I asked you previously (on a number of occasions) to explain the relevance of those additional documents which you wished to include in the bundle, with reference to the specific issues in the case. However, you did not do so. If you are now willing to address this, please provide a numbered list of the documents you say should be added to the bundle and explain the relevance of each, with reference to the List of Issues. In doing so, please confirm the facts surrounding that issue which you contend the document will evidence.*

10. The respondent made further disclosure of documents to the claimant on 12 September 2023 as per Judge Russell's case management order of 22 August 2023 [91].

11. On 2 November 2023, the claimant wrote to Ms Wade agreeing to the proposed extension for her to serve her witness statement on 13 November 2023.

12. On 13 November 2023, Ms Wade wrote to the claimant to inform her that the respondent was ready to exchange its witness statements by 4pm that day. She asked the claimant to confirm if she was going to meet the deadline to exchange her witness statement [97]. The claimant responded at 2.37 pm on the same day to say that she was having serious problems with Microsoft Word and that she had someone "to look at it." She said that she would have to write her statement over again [97]. The claimant then sent another email to Ms Wade at 2.42pm on 13 November 2023 asking for a few more days "preferably by weekend" to serve her witness statement. Ms Wade replied at 15:32 hours, saying, amongst other things [96]:

> *Given the extremely close proximity of the final hearing, I'm afraid we cannot agree to postpone the exchange of witness statements until next week.*
>
> *Our witnesses have endeavoured to meet the agreed deadline, despite their operational and business commitments and you should have taken steps to ensure that you were ready to exchange within the agreed timescale as well.*
>
> *You have had a number of weeks to address the "technical issues" which you had identified previously, in order to meet this deadline.*

13. Ms Wade emailed the claimant on 13 November 2023 at 16:13 [99] setting out her position on additional documents to be added to the bundle (i.e., this had been set out in earlier correspondence and that the documents were not relevant to the issues and would not be included in the bundle). She agreed to a 1-day extension for the claimant to serve her witness statement (i.e., to 4pm on 14 November 2023).

14. On 15 November 2023, Ms Wade emailed the claimant [107]. She noted that the claimant had not served her statement. She noted that the claimant had not provided an update as to when she would be able to serve her statement and the final hearing was less than 3 weeks away. Ms Wade served 4 witness statements on the claimant. She requested the claimant to serve her witness statement by return.

15. On 15 November 2023, the respondent wrote to Tribunal seeking an unless order because the claimant had not served her witness statement as ordered. The proposed unless order was for the claimant to serve her witness statement by 22 November 2022 failing which her claims would be struck out without further notice. The respondent stated, amongst other things:

    a. The claimant had asked for an extension of time because she was having issues with her laptop.

    b. The respondent proposed an extension to 13 November 2023. The claimant agreed to this.

    c. On 13 November 2023, the respondent wrote to the claimant to check that she would be able to comply with the new deadline.

d. The claimant replied to say that she could not comply with the new deadline because of technical issues with her computer.

e. The respondent agreed to extend the deadline by 1 day. No further extension could be agreed, given proximity of final hearing.

f. The claimant wrote to the respondent on 14 November 2023 to say that she could not comply with the deadline, because the laptop issue was unresolved.

g. The claimant had not provided evidence of the alleged laptop issues. The claimant had given no indication as to when she would serve her witness statement.

h. The respondent served its 4 witness statements on claimant.

16. On 17 November 2023, the claimant emailed the respondent regarding her disclosure request, stating that, amongst other things:

> *I have requested copies of the file which contains lots of false and discriminatory allegations against me which also was highlighted in your disclosure. I also request other documents going back as far as 6th June 2022 because Ms Saunders first raised discriminatory comments about me during the month of June 2022.*
>
> *What your client decided to do with that information and what your client decided to do to me in response is clearly relevant to my case and I believe it will be detrimental to your client's case. Therefore, it must be provided in line with the basic principle of disclosure.*

This was a very vague request.

17. On 17 November 2023, the Tribunal wrote to the claimant with a strike out warning in the following terms:

> *Employment Judge Brown is considering striking out the claim because:*
>
> - *you have not complied with the Order of the Tribunal dated 22 August 2023 to exchange witness statements; and*
> - *it has not been actively pursued.*
>
> *If you wish to object to this proposal, you should give your reasons in writing or request a hearing at which you can make them by 24 November 2023.*

18. On 20 November 2023, Ms Wade emailed the claimant [112] regarding her disclosure request. She set out the following:

> *Copies of all of the documents included in the Respondent's detailed disclosure List were provided to you on 4 July 2023.*

The Respondent has undertaken a through disclosure exercise and provided all documents which are in its possession and control which are relevant to the issues in your case. These issues are clearly defined in the Case Management Orders of Employment Judge Brown dated 24 April 2023 (pages 43 – 48 of the Bundle).

As we have previously explained, only relevant documents should be included in the Bundle. We have asked you on a number of occasions to explain the relevance of the photographs and other documents which you have asked to be added to the Bundle, with reference to the defined List of Issues. However, you have not provided this. As such, we have not included them in the Bundle.

It is not clear what you are referring to in your request for a "file which contains lots of false and discriminatory allegations about [you] which was highlighted in [the Respondent's] disclosure." As above, we have provided you with copies of all documents in the Respondent's disclosure List.

Your request for "all documents going back to 6 June 2022 when Ms Saunders first raised discriminatory comments about [you]" is too broad and non-specific. We have asked you previously to clarify this request, but you have failed to do so. Accordingly, we maintain that we have provided all documents which are relevant to the defined issues in the case and included the same in the Bundle.

Notwithstanding the above, given you raised a SAR in August 2022, you will have been provided with copies of any emails which contain your personal data (including any emails from Ms Saunders, whether of an alleged discriminatory nature (which is not accepted) or otherwise). Therefore, if such emails do exist (which is not accepted) you should be able to provide copies yourself. We note that no such documents were included in your own disclosure pack.

In all the circumstances, we maintain that there is no further disclosure due to you and that the Bundle contains all documents which are relevant to the issues in the case.

19. On 28 November 2023, the Tribunal wrote to the parties to inform them:

Employment Judge Brown has asked me to write as follows: The Tribunal will consider whether to strike out the Claimant's claim on the first morning of the hearing on 4 December 2023. In particular, it will consider whether to strike out the Claimant's claim because:

1. it is not being actively pursued;
2. She has not complied with the Tribunal's order dated 22 August 2023 to exchange witness statements;

It is therefore no longer possible to have a fair hearing on 4 - 8 December 2023.

20. On 28 November 2023, the claimant wrote to Tribunal. She stated:

I am asking for the Tribunal to enforce for the release of all the documents I requested from Equans Regeneration Limited which I have not receive to date. As per Court directions we should let the Court knows if we are ready for the Hearing. We are not ready for the hearing on 4 - 8th December because Equans has not comply with releasing the documents to me. These requests are all in my correspondence through the Court. Equans has being failing in the dates provided as well. It seems like a constant bullying and forced to comply with Equans terms of agreement. This has resulted in unsuccessful outcome agreement between the parties with ACAS. I would like the Court to consider that the Companies have resources to cover expenses that is why Equans could have treated me to that detriment / discrimination. HR was not bothered even though I raised the complaint early so at the moment I am only looking for a fair outcome. However they allowed and take part in my sacking. The extent of lies will not be proven and that is why Equans are not releasing the documents.

The claimant's financial circumstances

21. The claimant is currently working under a six-month temporary contract as a housing officer for Hammersmith and Fulham Council. She started on 18 September 2023. Her monthly take-home pay is £652.88. She works 36 hours per week. Before starting the contract, she received Universal Credit of £1,209.33 per month. After leaving her employment on 17 August 2022 with the respondent, the claimant did not work until taking up her current position.

22. The claimant lives in rented accommodation with her son. The accommodation is provided by a housing association. She pays £175 per week in rent. This does not include utility bills. She is in arrears with her water rates. She used to pay £100 per month for gas. Her Council Tax is £175 per month.

23. The claimant has no savings or capital.

24. The claimant is in debt. She estimates that she owes £5000 in arrears of Council Tax and has other debts of £18000.

25. The claimant is not subject to any court orders and has not been bankrupted. She is not a party to any Creditor's Voluntary Arrangement.

The strike out application

Mr Singer's submissions

26. Mr Singer referred me to rules 37(b), (c) and (d). He also referred to the applicable case law in the authorities bundle. In his submission, it was clear that the claimant had acted in breach of the rules and, therefore, the application should be allowed. The claimant's non-compliance should be viewed against the following background:

    a. The Tribunal had ordered the claimant to exchange witness statements with the respondent by 6 November 2023. This deadline had been

extended by agreement to 13 November 2023 and then to 14 November 2023. The claimant had still not complied with the order.

b. When Judge Russell had made the case management orders on 22 August 2023, they had specifically warned the parties of the consequences of non-compliance in paragraph 25 [69]. One potential consequence was that the claim could be struck out.

c. The respondent had constantly reminded the claimant about the dates and the requirements expected of the claimant.

d. The respondent had indulged the claimant twice by allowing two extensions to serve her witness statement.

e. The respondent had sent the claimant their witness statements. The claimant had still not complied with her obligation to send the respondent her witness statement.

f. The claimant had not provided any evidence for the cause of the delay. She had initially said it was because of technical issues. There was no evidence to support that. The claimant had not indicated what steps she had taken to resolve technical issues that had gone on for months. However, she had now relied on a different reason for not meeting the deadline which was making her own specific disclosure application.

g. The claimant had made disclosure requests of the respondent. Significant disclosure had been given to her prior to these proceeding being initiated in response to the claimant's Subject Access Request. A substantial trial bundle had been prepared. If the claimant had issues with the disclosure she could and should have made her application much earlier than she did. She could also have drafted her witness statement and made it clear in the body of the statement that she was still awaiting further disclosure. Instead she breached the Tribunal's order of 22 August 2023 which was a serious breach because the final hearing could not proceed in the absence of her witness statement. This amounted to unreasonable conduct on the part of the claimant.

27. I was invited to find that a fair trial could not have been possible in the absence of the claimant's witness statement and in circumstances where she had already seen the respondent's witness statements.

28. Mr Singer addressed me on the proportionality of making a strike out order. Were there any alternatives to striking out the claim? In his submission, there were no alternatives, and it would be proportionate to strike out the claims. The final hearing had been lost because of the claimant's unreasonable conduct. I was invited to look at the way the litigation had been conducted thus far. I was invited to look at the disclosure requests and how the respondent dealt with them. I was invited to consider the claimant's failure to serve her witness statement despite warnings from the Tribunal and the respondent's representative. The claimant had failed to engage with the Tribunal's recent warning in a timeous fashion. The final hearing had been lost with very significant prejudice to the respondent. It had wasted its time and its money. A meeting with counsel had been cancelled. Counsel's brief fee had been wasted plus in-house counsel's time. The Tribunal had blocked

out 5 days for the final hearing. This lost time not only prejudiced the respondent but also other Tribunal users and other litigants. The Tribunal's time was likely to be wasted going forwards as the respondent had little faith in the claimant complying with case management orders in the future if a lesser sanction was imposed. If the claims were not struck out, there would be delay moving forwards in getting a final hearing re-listed. In the meantime, memories would fade in circumstances where the burden of proof shifts to the respondent in the discrimination claims. The respondent had already waited a year for the original final hearing to be listed. The respondent was entitled to finality. There was also the risk that witnesses could fall ill or move on. This delay would be unacceptable to the respondent. Finally, the respondent was facing reputational damage and further delay would not assist the respondent.

The claimant's response

29. The claimant submitted the following:

    a. She acknowledged that she had not served her witness statement because she had asked for specific disclosure from the respondent. She had asked for documents at an earlier case management hearing in April 2023. She kept asking for the documents and the respondent had failed to produce them for her.

    b. Some of the documents that had been produced had not been included in the bundle. I was referred to an email from the claimant to Ms Wade, dated 17 November 2023 [113].

    c. Ms Wade had been on holiday over the summer when the claimant had requested documents. The claimant had been uncertain about when Ms Wade would return and deal with her disclosure request.

    d. The respondent had changed the dates for exchanging witness statements to a date that suited it.

    e. The claimant continued to have problems with her computer. However, she does not know what is wrong with her computer. She is having to use her daughter's laptop.

    f. Because the claimant did not get her paperwork from the respondent, she could not prepare her witness statement.

    g. The claimant did not ask the respondent to send their witness statements to her.

    h. All the documents should be disclosed to ensure a fair trial.

30. I asked the claimant whether she had prepared her witness statement. She told me that she had. She said that she had prepared her witness statement in August 2022, but she had not given it to the respondent. However, she said that because of problems with her computer she could not find the statement and had started to re-write it.

31. I asked the claimant whether she had taken professional advice. She told me that she had been to see a solicitor from the outset but could not afford their

fees. She got advice for the April 2024 hearing. She got outline advice for the August 2023 hearing, but the solicitor wanted to look at the paperwork. The claimant was trying to get an appointment with Citizens Advice.

The respondent's costs application

Mr Singer's application

32. Mr Singer addressed me on rule 76 and submitted that the application proceeded on the basis of the claimant's unreasonable conduct – flowing from her breach of an order or practice direction. He addressed me on the three-stage test that I had to follow. He was seeking the full amount claimed (counsel and solicitors' costs) plus VAT.

33. Mr Singer acknowledged that a costs order was the exception and not the rule in the Tribunal. If costs were awarded, the purpose was to compensate the respondent and not to punish the claimant. The Tribunal had discretion in deciding whether to consider the claimant's ability to pay. Any costs awarded must be limited to those reasonably and necessarily incurred as a result of the claimant's unreasonable conduct.

34. In his submission, failing to serve a witness statement was a very serious breach of order. The claimant's witness statement went to the heart of her case. There could not be a fair trial without it. It led to the final hearing being converted to an open preliminary hearing.

35. Mr Singer acknowledged that the claimant was a litigant in person, but she was not immune to being ordered to pay the respondent's costs.

36. Regarding the claimant's unreasonable conduct Mr Singer relied on the submissions he had made in support of the strike out application.

37. The claimant was aware of the risk that she could face having a costs order. I was referred to the following:

    a. Paragraph 25 of the case management order issued on 22 August 2023 – noncompliance could lead to an award of costs in accordance with the rules.

    b. The respondent's application for an unless order for the claimant to serve her witness statement dated 15 November 2023 which contained a costs warning [110].

    c. The respondent's email to the claimant dated 20 November 2023 relating to the Tribunal's strike out warning. The respondent had reserved its position on costs if the case was struck out or the hearing was postponed because of the claimant's failure to comply with the orders [113].

38. Common sense also dictated that if an order was not complied with, there could be adverse consequences for the claimant. Given that the final hearing was postponed late in the day it was obvious that the respondent would suffer wasted costs. There was no excuse for not complying with the case management order.

39. I was invited to disregard the claimant's means in their entirety because it was essential that the respondent was compensated given the background of the case and the claimant's egregious breach of the Tribunal's order. The full amount claimed should be paid, even if this was to be over a period of time by instalments.

The claimant's response to the application

40. The claimant acknowledged that the respondent had incurred significant costs. However, the respondent contributed to this by not showing the desire to compromise from the outset. At this juncture, I had to remind the claimant that I could not hear any submissions relating to settlement discussions or without prejudice negotiations.

41. The claimant cannot afford to pay the respondent's costs. Because of the trauma of losing her job, she had not been able to work for many months. She could not afford to instruct a solicitor.

42. The respondent acted unreasonably by withholding disclosure.

43. Her computer had not been working, which is why she could not serve her witness statement. The respondent knew this.

44. The claimant regarded the costs warnings as bullying by the respondent. The respondent knew that the claimant could afford to pay her costs.

Applicable law

Strike out

45. The respondent relies on the following rules in support of its application to strike out the claims:

    a. 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 (rule 37(1)(b).

    b. Non-compliance with any of the Tribunal Rules or with an order of the Tribunal (rule 37(1)(c).

    c. That the claim is not being actively pursued (rule 37(1)(d)).

46. For a claim to be struck out under rule 37(1)(b) for unreasonable conduct the Tribunal 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.

47. A concise summary of the approach to take to consideration of a strike out under what is now r 37(1)(b) was given by Elias LJ in the Court of Appeal in **Abegaze v Shrewsbury College of Arts & Technology [2009] EWCA Civ 96**:

> *In the case of a strike out application brought under [r 37(1)(b)] it is well established that before a claim can be struck out, it is necessary to establish that the conduct complained of was scandalous, unreasonable or vexatious conduct in the proceedings; that the result of that conduct was that there could not be a fair trial; and that the imposition of the strike out sanction was proportionate. If some lesser sanction is appropriate and consistent with a fair trial, then the strike out should not be employed.*

48. These three factors, plus a fourth (the need to consider, where a response has been struck out, what the consequences are, including whether the respondent is debarred from contesting liability but not from involvement in any remedy hearing), were also set out in **Bolch v Chipman [2004] IRLR 140, EAT at [55].** The EAT's four-part approach to rule 37(1)(b) was approved by the Court of Appeal in **Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684**, per Sedley LJ and in **Abergaze v Shrewsbury College of Arts and Technology UKEATPA/0368/12 (10 September 2013, unreported)** at [16] and has been adopted in a number of subsequent cases.

49. As described, one of the four component elements of the test under rule 37(1)(b) is whether a fair trial is possible. That brings an element of overlap with rule 37(1)(e) which permits a strike out where a fair trial is no longer possible. The latter category is a catch-all for circumstances where a fair trial is no longer possible for reasons other than the scandalous, unreasonable, or vexatious conduct of proceedings. Thus where the reasons for a fair trial no longer being possible (or arguably no longer being possible) relate to the manner in which proceedings are conducted, this should rightly be considered under rule 37(1)(b) rather than rule 37(1)(e). A further overlap in grounds of strike out may occur where a party has breached the Tribunal Rules and/or orders of the tribunal. If the breach or breaches are deliberate and persistent it will be appropriate to consider them under rule 37(1)(b) as scandalous, unreasonable, or vexatious conduct of proceedings.

50. The guiding consideration, when deciding whether to strike out for non-compliance with an order under rule 37(1)(c), is the overriding objective (**Weir Valves and Controls (UK) Ltd v Armitage EAT/0296/03**. This requires the judge or 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' (at [17], per Judge Richardson). In **Armitage**, the employer's solicitors served witness statements 17 days later than directed and read the employee's statements before serving those of the respondent. This approach was described as 'cavalier' by the EAT. On the facts, there was insufficient evidence of prejudice to the employee as it was clear that the employer's witness statements had not been influenced or tailored by having viewed the employee's statements. The understandable sense of injustice on the part of the employee was not decisive. 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, such as the exclusion of late witness statements.

51. In **Smith v Tesco Stores Limited [2023] EAT 11** (at [45], per HHJ Taylor), the EAT upheld a strike out order in circumstances were 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 the employment judge was likely to be repeated. The Tribunal had found that the claimant was guilty of continued refusal to cooperate. The claimant would not work towards a trial that was fair in the sense of avoiding undue expenditure of time and money, taking into account the demands of other litigants and the finite resources of the Tribunal. One listing of 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. At paragraph 47, the EAT said:

> *This judgment should not be seen as a green light for routinely striking out cases that are difficult to manage. It is nothing of the sort. We must remember that "tribunals of this country are open to the difficult." Strike out is a last resort, not a short cut. For a stage to be reached at which it can properly be said that it is no longer possible to achieve a fair hearing, the effort that will have been taken by the tribunal in seeking to bring the matter to trial is likely to have been as would have been required, if the parties had cooperated, to undertake the hearing. This case is exceptional because, after conspicuously careful, thoughtful and fair case management, the claimant demonstrated that he was not prepared to cooperate with the respondent and the employment tribunal to achieve a fair trial. He robbed himself of that opportunity.*

52. As stated above, where the reason a fair hearing is no longer impossible is the scandalous, unreasonable, or vexatious conduct of proceedings by one party, this should properly be considered under the rubric of rule 37(1)(b). That was the view of Choudhury P in **Emuemukoro v Croma Vigilant (Scotland) Ltd ICR 327** (at [20]) in which he gave examples of situations covered by rule 37(1)(e) including where a fair hearing is no longer possible because of undue delay or failure to prosecute a claim over a very substantial length of time.

53. **Emuemukoro** was a case where some time before the set five days for a hearing (which was already a considerable time after the events in question), the Tribunal made case management orders in relation to witness statements and the content of bundles which were not carried out by the respondent. The claimant complained of this, and the matter was considered at the start of the hearing. The Tribunal found the respondent in breach and ordered that its response be struck out on the basis that a fair trial was no longer possible; it proceeded to hear the claim and found for the claimant.

54. In its appeal, the respondent argued that the strike out was wrong because it would still have been possible to proceed at a later date. However, the EAT held that that was not the correct approach in these circumstances because the question was whether there could still be a fair trial within the set trial window. At [18] the judgment states:

> *There is nothing in any of the authorities providing support for [the employer's] proposition that the question of whether a fair trial is possible is to be determined in absolute terms; that is to say by considering whether a fair trial is possible at all and not just by considering, where an application is made at the outset of a trial,*

whether a fair trial is possible within the allocated trial window. Where an application to strike-out is considered on the first day of trial, it is clearly a highly relevant consideration as to whether a fair trial is possible within that trial window. In my judgment, where a party's unreasonable conduct has resulted in a fair trial not being possible within that window, the power to strike-out is triggered. Whether or not the power ought to be exercised would depend on whether or not it is proportionate to do so.

55. Going on to the question of proportionality, the employer had again argued for an absolutist approach, namely that with striking out being such a drastic step, if there is any alternative the Tribunal should adopt that instead, with a strike out being disproportionate. Here, the Tribunal should have adjourned for a later hearing instead. Again, the EAT disagreed. There is still a balance to be struck. While the feasibility of an adjourned trial may be relevant (e.g., whether witnesses would still be able to recollect matters), it may also be necessary to consider factors such as undue expenditure of time and money, the demands of other litigants and the finite resources of the court/tribunal. Here, the Tribunal had considered this balance properly (including the effects of another delay on the claimant who had already been waiting a considerable time for resolution of the case) and the decision to strike out was proportionate.

56. In **Evans and anor v Commissioner of Police of the Metropolis 1993 ICR 151, CA,** the Court of Appeal held that a Tribunal's power to strike out a claim for want of prosecution must be exercised in accordance with the principles that (prior to the introduction of the Civil Procedure Rules 1998 SI 1998/3132) governed the equivalent power in the High Court, as set out by the House of Lords in **Birkett v James 1978 AC 297, HL**. Accordingly, a Tribunal can strike out a claim where:

    a. there has been delay that is intentional or contumelious (disrespectful or abusive to the court); or

    b. there has been an inordinate and inexcusable delay, which gives rise to a substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the respondent.

Costs

57. A costs order or a wasted costs order may be made either on the Tribunal's own initiative or following an application by a party. A party may make such an application at any stage of proceedings and 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. Before any order is made, the proposed paying party must be given a reasonable opportunity to make representations, either in writing or at a hearing, as the Tribunal may order in response to the application.

58. Rule 75 (1) (a) of the Tribunal Rules gives the Tribunal the power to make a costs order against one party to the proceedings (the "paying party") to pay the costs incurred by another other party (the "receiving party") on several

different grounds. Rules 76(1) sets out the grounds for making a costs order are which as follows:

a. A party (or that party's representative) has acted vexatiously, abusively, disruptively, or otherwise unreasonably in the bringing or conducting of proceedings (or part thereof).

b. A claim or response had no reasonable prospect of success.

c. A party has breached an order or Practice Direction.

d. A hearing has been postponed or adjourned on the application of a party.

59. Rule 76(1) provides that the Tribunal shall consider whether to make a costs order. Therefore, it has a duty to consider making an order but has discretion as to whether or not to actually make the award. In other words, rule 76(1) imposes a three-stage test: first, the tribunal must ask itself whether a party's conduct falls within rule 76(1)(a) — in other words, is its costs jurisdiction engaged?; if so, secondly, it must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party. The third stage is the determination of the amount of any award.

60. Tribunals have a wide discretion to award costs where they consider that there has been unreasonable conduct in the bringing or conducting of proceedings. 'Unreasonable' has its ordinary English meaning and is not to be interpreted as if it means something similar to 'vexatious' — **Dyer v Secretary of State for Employment EAT 183/83**. In determining whether to make an order under this ground, the Tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct — **McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA**. Reasonableness is a matter of fact for the employment tribunal.

61. When costs are awarded under rule 76(2), there is no need to find that a party has acted 'vexatiously, abusively, disruptively or otherwise unreasonably'. It is sufficient that he or she is clearly responsible for the breach.

62. It is appropriate for a litigant in person to be judged less harshly in terms of his or her conduct than a litigant who is professionally represented. According to the EAT in **AQ Ltd v Holden 2012 IRLR 648, EAT**, an employment tribunal cannot, and should not, judge a litigant in person by the standards of a professional representative. Justice requires that tribunals do not apply professional standards to lay people, who may well be embroiled in legal proceedings for the only time in their life. Lay people are likely to lack the objectivity and knowledge of law and practice brought to bear by a professional legal adviser. The EAT stressed that tribunals must bear this in mind when assessing the threshold tests in the then equivalent to rule 76(1) of the Tribunal Rules 2013. It went on to state that, even if the threshold tests for an order for costs are met, the tribunal still has discretion whether to make an order. That discretion should be exercised having regard to all the circumstances. In this respect, it was not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice. This was not to say that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to

have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity. However, the EAT concluded that, in the instant case, the employment tribunal had been entitled to take into account the fact that H represented himself when refusing the employer its costs.

63. Rule 78 (1) sets out how the amount of costs will be determined. The Tribunal Rules provide that such an order is in respect of costs incurred by the represented party meaning fees, charges, disbursements, and expenses.

64. It is important to recognise that even if one (or more) of the grounds is made out, the Tribunal is not obliged to make a costs order. Rather, it has a discretion whether or not to do so. As the Court of Appeal reiterated in **Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420, CA**, costs in the employment tribunal are still the exception rather than the rule. It commented that the Tribunal's power to order costs is more sparingly exercised and is more circumscribed than that of the ordinary courts, where the general rule is that costs follow the event, and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the employment tribunal, by contrast, costs orders are the exception rather than the rule. If the Tribunal decides to make a costs order, it must act within rules that expressly confine its power to specified circumstances, notably unreasonableness in bringing or conduct of the proceedings.

65. In order to deter an un-meritorious claim, respondents may write to the claimant warning them that they will apply for costs if they persist with the claim. Alternatively, they may apply to the Tribunal for a preliminary hearing if they believe that the claim has no prospects of success. The fact that a costs warning has been given is a factor that may be considered by the Tribunal when considering whether to exercise its discretion to make a costs order. The absence of a warning may be a relevant factor in deciding that costs should not be awarded. A costs warning is not, however, a precondition of making an order.

66. In considering whether to make an order for costs, and, if appropriate, the amount to be awarded, the Tribunal may have regard to the paying party's ability to pay. It is not obliged to do so; it is permitted to do so. The Tribunal is not required to limit costs to the amount that the paying party can afford to pay. However, we remind ourselves that in **Benjamin v Inverlacing Ribbon Ltd EAT 0363/05** it was held that where a Tribunal has been asked to consider a party's means, it should state in its reasons whether it has in fact done so and, if it has, how this has been done. Any assessment of a party's means must be based upon evidence before the Tribunal.

67. A tribunal is not required to limit costs to an amount that the paying party can afford to pay — **Arrowsmith v Nottingham Trent University 2012 ICR 159, CA.** Indeed, the Presidential Guidance on General Case Management for England and Wales states that a tribunal may make a substantial order 'even where a person has no means of payment.' The Court of Appeal in the **Arrowsmith** case noted that the claimant's circumstances 'may well improve and no doubt she hopes that they will.' Although these comments were obiter, they suggest that the likelihood of a party's circumstances improving is a relevant factor when assessing the amount of costs in view of a party's means.

Discussion and conclusions

Strike out

68. I am acutely aware that striking out a claim is a Draconian step to be taken as a last resort and not a short cut. I am also fully conscious of the overriding objective and the fact that the claimant is a litigant in person, although she has had some legal advice, albeit at an apparently high level. However, having carefully considered the matter, I have decided that it would be appropriate to strike out the claimant's claims under rules 37(1)(b) & (c) for the following reasons:

    a. Judge Burn recognised that there could not be a fair final hearing in circumstances where the claimant had failed to serve her witness statement less than 3 weeks before the final hearing was scheduled to start. I agree. Indeed, the claimant has still not served her witness statement. Witness statements form a key element of any substantive hearing, and it is our practice to require parties to exchange their statements in advance of the hearing. This operates on the principle of "cards on the table" litigation which is the advance disclosure of witness and other documentary evidence so that each side can properly prepare for the hearing. In the absence of witness statements, each side cannot properly prepare their case. They will not know what the witness is going to say, and they will not be able to prepare for their cross examination of that witness. If the claimant was permitted to give her evidence without a witness statement she would, in effect, be ambushing the respondent with her oral evidence in chief thereby putting the respondent at a significant disadvantage as to the extent of challenging her evidence under cross examination.

    b. I also cannot ignore the fact that the claimant has been given a potentially unfair advantage by virtue of the fact that she has been served with the respondent's witness statements. This is an asymmetrical position as she can prepare her cross examination of those witnesses in advance of the hearing whereas the respondent cannot prepare its cross examination of the claimant in advance of the hearing. If the claimant was to serve a witness statement, there is also the risk that she could modify it having been prompted by what the respondents' witnesses have said in their statements. That would be unfair to the respondent. That is why we have mutual exchange of statements.

    c. The claimant behaved unreasonably by failing to serve her witness statement. At the time when the respondent agreed to extend time to serve her statement it did so on the understanding that the claimant had computer problems. She has not provided any supporting evidence of what those problems are/were despite saying in correspondent that she was going to get someone "to look at it." The Tribunal does not know whether that happened. For example she could have taken her computer to PC World to ask them to solve the problem and provide a supporting letter or report from them for the Tribunal to consider. She has not done that.

d. I am also concerned that the claimant had already prepared her statement. It is not clear why she could not serve this given that she had written it. I am also concerned that it was only after Judge Burns converted the final hearing into a public preliminary hearing that the claimant raised another reason for failing to serve her witness statement – namely she had issues with the respondent's alleged failure to make full disclosure. I question why this was not raised earlier, for example when Ms Wade was writing to the claimant on 13 November 2023 asking the claimant to confirm is she was ready to serve her witness statement. This undermines the claimant's credibility.

e. Even if it was the case that the respondent had failed to make full disclosure, the claimant could have prepared her statement with the documents that she already had (and there were many – approximately 400 pages) and could have expressly flagged the issue and reserved the right to serve a supplementary statement once in possession of the missing documents. She did not do that.

f. The claimant was fully aware that she was obliged to comply with Judge Russell's case management order. The consequences were fully spelt out in paragraph 25 of the case management orders issued on 22 August 2023 (i.e., her claims could be stuck out).

g. I consider that striking out the claims is proportionate for the following reasons:

    i. I am not required to take an absolutist position. For example it might be said that I should simply re-list a 5-day final hearing. That is not a foregone conclusion on the basis that if there is an alternative, it must be followed.

    ii. Instead, I must strike a balance in determining whether to re-list the final hearing. Of course, it is feasible that there could be an adjourned final hearing. However, it is quite likely that a five-day hearing may not be listed until 2025 to hear a claim that was presented to the Tribunal on 21 December 2022 relating to events that are alleged to have occurred in June and July 2022. Witnesses will be asked to recall events that were maybe three years old. I accept that the respondents' witnesses have settled their statements which they could read in advance of an adjourned final hearing to refresh their memories. However, memory is fallible and fades over time even with the benefit of a statement. This is relevant to cross-examination which goes beyond what is written in a witness statement.

    iii. There are other factors that militate against re-listing the final hearing. The respondent will have to spend more time and more money preparing for that hearing. The witnesses may move on. They may leave the country or otherwise be unavailable (e.g., because of ill-health or death; it does happen).

    iv. I cannot ignore the effect that re-listing the case for a final hearing will have on the demands of other litigants who may not

get their cases heard earlier because of a lack of court time and/or judges available to hear their cases. They will suffer prejudice as a result and risk being denied access to justice. Justice delayed is justice denied. These are real considerations with the London Regions in the Employment Tribunal. They are very busy.

v. I acknowledge the prejudice to the claimant is that her claims will not be tested at a full hearing. That is significant. However, she had the opportunity to prepare for her case to be heard by the Tribunal in early December 2023 but, through her own actions/inaction so close to the final hearing, it could not go ahead. Had it done so, there could not have been a fair hearing.

For the reasons given above, the proportionality balance tips in favour of the respondent and against the claimant.

The claimant's disclosure application

69. As I have struck out the claimant's claims, there is no requirement for me to consider her specific disclosure application.

The respondent's costs application

70. I am satisfied that the costs jurisdiction has been engaged on two grounds:

a. The claimant's unreasonable behaviour in not serving her witness statement as ordered by the Tribunal and as extended by the parties' agreement. I refer to my findings in this regard to my decision to strike out the claims.

b. The claimant's breach of the order to serve her witness statement for which she is wholly responsible. There is no requirement to establish the claimant's unreasonable behaviour for this separate costs jurisdiction to be engaged.

71. I consider that it would be appropriate to require the claimant to pay the respondent's costs. She would or ought to have known that if she did not comply with the order to serve her witness statement by 6 November 2023 she was at risk of a costs order being made against her. This was clearly stated in paragraph 25 of the case management order dated 22 August 2023. Furthermore, costs warnings were made by the respondent thereafter. Having agreed to an extension to enable the claimant to serve her statement on 13 November 2022, she did not honour that agreement. This is egregious behaviour that cannot go unnoticed.

72. The respondent is justified in seeking the sum of £10,750 plus VAT (£12,900 including VAT). Having considered the claimant's ability to pay it is just that the amount should be capped to 30% (i.e., £3,870) and payable in instalments that are affordable. The claimant currently has very limited income and no capital. She has a significant debt to earnings ratio. On the positive side, she has started working again and there is nothing to suggest that she will not continue to work.

Given her current monthly earnings, I consider it appropriate for the claimant to pay the costs awarded over 60 months (i.e., £64.50 per month).

Employment Judge

Date 11 December 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

12/12/2023

FOR EMPLOYMENT TRIBUNALS