



EMPLOYMENT TRIBUNALS

Claimant

Mrs H Guilliam

Respondent

v Rotherham Metropolitan Borough Council

Heard at: Sheffield

On: 29 and 30 January 2024

Before: Employment Judge James
Mr K Smith
Mr P Langman

Representation

For the Claimant: Not present (see below) and not represented

For the Respondent: Mr K Ali, counsel

JUDGMENT

(1) The claimant's claims are struck out because a fair trial is no longer possible (Rule 37(1)(e) Employment Tribunal Rules of Procedure 2013).

REASONS

The issues

1. This claim was listed for a final hearing, to determine the substantive issues in the claimant's claim. For the reasons set out below, the sole issue became whether the claimant's claims should be struck out because a fair trial was no longer possible.

Background to the strike out application

2. Acas Early Conciliation took place between 18 and 21 February 2022. The claim form was issued on 22 February 2022.
3. A preliminary hearing for case management purposes took place on 9 June 2022, during which the issues were identified. A further preliminary hearing took place on 20 September 2022. The case was set down for a final hearing

commencing 13 March 2023. A written request by the claimant for postponement of that hearing was rejected by EJ Davies on 27 February 2023.

4. On 13 March 2023 however, the tribunal panel postponed the final hearing. It was postponed having regard to the fact that:
 - 4.1. The Claimant was severely disabled, and the medical report indicated she was unfit to engage in litigation without a representative.
 - 4.2. She had only received the final Bundle and witness statements in the last 2 weeks or so.
 - 4.3. A friend who was meant to support her and help her at trial, was no longer able to because his wife had been diagnosed with cancer
 - 4.4. The Claimant sought free representation from the advocates service at the CAB, but they could not offer that unless they had had an opportunity to assess the papers in this case
 - 4.5. Further she was exploring securing legal representation should she get no free assistance from the CAB.
5. Employment Judge James, who was listed to hear the case on that occasion too, warned the Claimant that because she was unable to undertake a final hearing without representation, there was a risk of her claim being struck out because a fair trial was not possible, if the Claimant failed to secure a representative before the next hearing.
6. A second final hearing listed was listed to commence on 17 July 2023. Before that hearing, the Claimant had not responded to the written cross-examination questions which had been provided to her on 22 June 2023 in line with a tribunal order regarding the same, made following a further preliminary hearing on 18 May 2023. Nor had the claimant secured representation. The Respondent was therefore preparing a strike-out application. However on 14 July 2023 that final hearing was postponed by the Employment Tribunal because of a lack of judicial resources.
7. A third final hearing was then listed on 26 July 2023 to start on 18 September 2023. The Respondent made an application to strike-out the claim on the grounds of the Claimant's continuing failure to respond to cross-examination questions, or provide details of a representative. At a preliminary hearing on 13 September 2023, Employment Judge Wade postponed the third final hearing to 29 January 2024 and made Unless Orders to ensure that written cross-examination questions would be answered and a representative would be in place. Employment Judge Wade made it clear that a strike-out was very much in the balance (para 29).
8. This fourth final hearing was listed to start on 29 January 2024. On 25 January 2024 the Claimant's representative applied to have this hearing postponed on grounds that it should take place after the criminal proceedings had concluded. On 25 January 2024 REJ Robertson declined to postpone the final hearing and advised the application to postpone could be considered on the first day of the final hearing.
9. On Friday, 26 January 2024 the claimant's representative wrote to say that she had a hospital appointment on the morning of the hearing, and may be slightly

delayed. The claimant turned up for the hearing, but collapsed in the waiting room. First aiders were called to assist her, who called an ambulance. The paramedic who attended advised that the claimant be taken to hospital and the claimant complied with that suggestion.

10. The tribunal arranged for a letter to be sent to the claimant and her representative the same day, asking them to confirm whether the claimant would be fit to attend the hearing today; and whether the representative, would be attending, in any event. The tribunal also asked Ms Parker for an explanation as to why she did not attend the hearing at all on Monday 29 January (Ms Parker having indicated that she would be delayed, not that she would not turn up at all). The claimant was warned in the tribunal's letter that Mr Ali had indicated to the tribunal that if the claimant or her representative did not attend today, an application would be made to strike out the claim because a fair trial was no longer possible.
11. No response had been received from the claimant, or from Ms Parker, by the time this decision was made. Whilst we understand that the claimant may well be in hospital still, there was no explanation as to why Ms Parker was not able to correspond with the tribunal, or represent the claimant today.
12. The tribunal has since seen an email from Ms Parker, stating that she went straight to the hospital, when she saw the ambulance outside the tribunal. She stated that she had difficulty with her phone, and only saw the tribunal's letter this morning. She repeats the application to postpone this hearing, because it may adversely impact on the claimant's criminal trial. However, that issue was considered by Employment Judge Brain at the preliminary hearing on 20 September 2022. He concluded that there was no risk '*of the Crown Court being embarrassed by any factual findings made by the employment tribunal so far as a benefit fraud allegations are concerned*'. The claimant was dismissed, not because of any finding that she had committed benefit fraud; but because she had failed to inform her employer that she was being prosecuted, and subsequently failed to keep her employer up-to-date in relation to the progress of the criminal proceedings. The fact of the ongoing criminal proceedings is therefore not a good reason to postpone this hearing.
13. Ms Parker also explained that she has contracted Covid. Whilst this now provides an explanation as to why Ms Parker has not attended the hearing today, the tribunal does not consider that the representations made should alter the decision which was taken before the email was received.

The Legal Framework

14. Rule 2 of the Employment Tribunal Rules of Procedure 2013 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.***

- 15. Rule 2 makes clear therefore that parties are not merely requested to assist the employment tribunal in furthering the overriding objective, they are required to do so.
- 16. Rule 37 of the Employment Tribunal Rules of Procedure 2013 provides:

Striking out

(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— ...

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

- 17. In **Blockbuster Entertainment Ltd v James**, [2006] EWCA Civ 684, [2006] IRLR630, 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.

- 18. In **Smith v Tesco Stores Limited** [2023] EAT 11, as well as referring to above ET Rules, HHJ Tayler also referred to two authorities which appear to this tribunal to be relevant to this strike out application, at 41 and 42:

*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.

Conclusion

19. In deciding whether to make a decision today to strike out the claimant's claims, regard has been had as to whether or not a further opportunity should be provided to the claimant to make representations. The tribunal decided that it was not appropriate to do so, in light of the fact that the claimant had been warned that a strike out application would be made this morning's hearing if she or a representative did not turn up.
20. Having carefully considered the representations made by Ms Parker, after the initial decision had been taken, the tribunal does not consider that the contents of the email provide sufficient grounds to change the initial strike-out decision. The importance of the claimant making sure she had representation was emphasised by the tribunal on 13 March 2023, and again, by Employment Judge Wade on 13 September 2023. Had Ms Parker been in touch earlier, arrangements could have been made for her to join the hearing remotely. In any event, the representations made could not have changed our decision.
21. Having decided to deal with the application today, the tribunal took into account the following factors, in relation to which our conclusions are set out.
22. The affect of delay on memory - the tribunal has not considered this to be a major factor in the case, witness statements having been prepared. Further, the disciplinary and dismissal process is the subject of a clear paper trail, with relevant documents having been included in the bundle of documents for this hearing.

23. The willingness of witnesses to co-operate/the effect on witnesses more generally - in relation to the understandable reluctance, of the two witnesses who have now left the employment of the Council, to continue to cooperate, ultimately the Council could obtain witness orders to secure their attendance. More pressing here however, and a relevant factor in the tribunal's judgement in this case, is the ongoing effect on witnesses of the following:- preparing for a long hearing; booking time out of their other work; refreshing their memories from the lengthy bundle and witness statements; continually having to go over the same issues; and the not insubstantial stress and worry of a finding of discrimination of unfair treatment being made against them in due course. Fairness must be considered from the point of view of both parties, and the witnesses called on their behalf.
24. The undue expenditure of time and money - there can be no doubt that a significant amount of extra time and costs for the respondent has been associated with the three previous adjournments. A line has to be drawn somewhere, when the tribunal says, enough is enough. Again, this issue has to be looked at from the point of view of both sides. In this case, it is mainly the respondent which has been put to considerable extra expense due to the unfortunate history of these proceedings. There would be considerable further expense for the respondent to incur, if the tribunal were to postpone this hearing, and arrange a further one, in circumstances where, given the history to date, there can be no guarantee whatsoever that the next hearing will be effective. Indeed, in the light of the representations made by Ms Parker today, but it appears that the claimant is unwilling to go ahead with the employment tribunal claim, prior to the criminal proceedings being finalised. There is no date yet for the full hearing in the criminal proceedings.
25. The demands of other litigants/the finite resources of the tribunal - it is convenient to consider these two factors together. Apart from the July 2023 hearing which was postponed by the tribunal due to lack of judicial resources, tribunal time has been taken up with the claimant's hearing, which was no longer available for other parties, delaying justice for those other parties. The tribunal cannot be satisfied that if the case were not struck out today, and a final hearing listed for the fifth time, the same situation would not arise. The tribunal notes that the claimant's condition is progressive and her health is likely to deteriorate further, not improve. Further, in light of the failure of the claimant to secure representation from somebody who is able to provide effective and reliable representation, there is simply no guarantee that the claimant will be effectively represented were the tribunal to list a further final hearing. Tribunal resources are scarce, and the judicial resources which have so far been allocated to final hearing is for this case are significant. There is a cost involved in that.
26. Bearing in mind all of the above, the decision of the tribunal is that the claim should be struck out because a fair trial is no longer possible.

Employment Judge James

Dated 31 January 2024