EMPLOYMENT TRIBUNALS

Claimant: Mr J Bennett

Respondent: Gristwood and Toms Limited

Heard at: Birmingham **On:** 7 November 2023

Before: Employment Judge Choudry (sitting alone)

Appearances
For the claimant: In person
For the respondent: Mr J Yetman (Counsel)

JUDGMENT

The claimant's outstanding claims for breach of contract, ordinary unfair dismissal and automatically unfair dismissal are struck out on the basis that (i) the claimant has conducted the proceedings unreasonably; (ii) the claimant has failed to comply with the rules; and (iii) the claim has not being actively pursued.

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REASONS

Background

(1) By a claim form received 21 October 2020 the claimant brought claims for unfair dismissal (ordinary and automatically unfair dismissal), discrimination on the grounds of race, disability and religion or belief, redundancy pay and other payments.

(2) The claims for race discrimination and redundancy pay were withdrawn by the claimant at a preliminary hearing on 1 April 2021.

(3) On 27 October 2021 Employment Judge Broughton issued an unless order (the "Unless Order") for the claimant to provide further

information in respect of his claims for disability and religious/belief. At a preliminary hearing on 15 March 2022 Employment Judge Harding found that the claimant had materially failed to comply with the Unless Order resulting in the claimant's claims for disability discrimination and religion/belief discrimination being struck out. Meaning that only the following claims remained: ordinary unfair dismissal; automatically unfair dismissal contrary to section to 103A of the Employment Rights Act 1996 and a claim for unpaid wages (non-payment of a bonus).

(4) The respondent requested a strike out hearing be listed by reason of the failure on the part of the claimant to comply with the Rules (as defined below); not actively pursuing the case and for unreasonable conduct. The respondent relies upon a number of delays in the litigation and the fact that the trial listed for 14 to 18 August 2023 had to be vacated because the claimant failed to confirm that he was in the UK. It transpired during a preliminary hearing on 14 August 2023 before Employment Judge Wedderspoon that the claimant had returned to the UK on 25 July 2023 but he failed to contact the respondent or the Tribunal to inform them of his return. The respondent's position was that a fair hearing was no longer possible and that it would be seeking costs as well.

(5) The claimant resisted the application on the basis that he did not receive emails in Costa Rica where he had been due to his father being unwell (although he later informed Employment Judge Wedderspoon that he received one email). The claimant informed Employment Judge Wedderspoon that his father had passed away in Costa Rica on 9 July 2023 and there were matters related to his death that he needed to deal with as well as visiting family and friends. Whilst the Tribunal was sympathetic to the claimant's position, the claimant did not make any contact with the Tribunal nor the respondent on his return and, as such it was determined that it was in the interests of justice to list the matter for a strike out application alongside a deposit order application. Any application for costs was to be made in writing.

(6) Following the preliminary hearing (case management) held by Employment Judge Wedderspoon on 14 August 2023, the claimant's claim against the respondent was listed for a Preliminary Hearing in public to determine the following issue(s): (a) strike out application of the claimant's claims on the basis that (i) the claimant has conducted the proceedings unreasonably; (ii) the claimant's failure to comply

with the rules; (iii) the claim has not actively pursued the claim; (b) in the alternative a deposit order.

(7) The Notice of Preliminary Hearing for the strike out/deposit order was sent by the Tribunal to the parties in September 2023.

Documents

(8) I was presented with a main bundle of 181 pages.

Reasonable Adjustments

(9) The claimant has dyslexia. Whilst he did not request any particular adjustments to enable him to participate in the hearing I ensured that regular breaks took place during the hearing. The claimant also requested a short adjournment which was granted.

The Law

Strike out

(10) Rule 37(1)(b) of the Rules provides that:

> "(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—*
> *…*
> *(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; "*

(11) In the case of **Abegaze -v- Shrewsbury College of Arts & Technology [2009] EWCA Civ 96** the Court of Appeal noted at [15]:

> *"In the case of a strike out application brought under [r37(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".*

(12) The need for a finding in relation to the claimant's conduct is also important:

"If there is to be a finding in respect of [rule 37(1)(b)]…there must be a finding with appropriate reasons, that the conduct in question was conduct of the proceedings and, in the circumstances and context, amounted to scandalous, unreasonable or vexatious conduct." **[Burton J in *Bolch v Chipman* [2004] IRLR 140, §55.]**

(13) The decision of the Court of Appeal in **Blockbuster Entertainment Ltd -v- James [2006]EWCA Civ 684** makes it clear that "*deliberate and persistent disregard of required procedural steps"* is an example of what would meet the requirements of Rule 37(1)(b).

(i) Fair Trial

(14) Mr Yetman also referred to the case of ***Emuemukoro v Croma Vigilant (Scotland) Ltd*** **EA-2020-000006 (previously UKEAT/0014/20) (22 June 2021, unreported)** in which Choudhury P found that even where a fair trial is possible due to an adjournment and re-listing, Rule 36(1)(b) is still met even where a fair trial could be achieved due to additional case management:

"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".

(ii) Proportionality

(15) In the Blockbuster case the Court of Appeal noted two aspects in relation to proportionality under Rule 37(1)(b). Firstly, it was accepted that the duration and character of any conduct was a relevant consideration. Secondly, the Court of Appeal noted:

"it takes something very unusual indeed to justify the striking out, on procedural grounds, of a claim which has arrived at the point of trial. The time to deal with persistent or deliberate failures to comply with rules or orders designed to secure a fair and orderly hearing is when they have reached the point of no return. It may be disproportionate

to strike out a claim on an application, albeit an otherwise well founded one, made on the eve or the morning of the hearing."

(16) Rule 37(1)(c) of the Rules provides:

"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-
….
(c) for non-compliance with any of these Rules or with an order of the Tribunal;"

(17) The EAT in the case of **Weir Valves and Controls (UK) Ltd -v- Armitage EAT/0296/03, [2004] ICR 371** indicated that the Tribunal should have regard to the overriding objective when considering whether to strike out a claim. This requires a Tribunal to consider all of the circumstances with particular regard for (i) the magnitude of the default; (ii) whether the fault lies with a representative or the party; (iii) what prejudice has been caused; and (iv) whether a fair hearing is possible. The strike out must be proportionate.

(18) In **Harris -v- Academies Enterprise Trust [2015] IRLR 209** noted that:

"A failure to comply with orders of a tribunal over some period of time, repeatedly, may give rise to a view that if further indulgence is granted, the same will simply happen again. Tribunals must be cautious to avoid that".

(19) Rule 6 of the Rules provides:

"A failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal (except for an order under rules 38 or 39) does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following—

(a)waiving or varying the requirement;

(b)striking out the claim or the response, in whole or in part, in accordance with rule 37;

(c)barring or restricting a party's participation in the proceedings;

(d)awarding costs in accordance with rules 74 to 84."

Deposit orders

(20) Rule 39 of the Rules contains the power to make a deposit order. This provides:

"(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument. (2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit. (3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order. (4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21. (5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order— (a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and (b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded. (6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

(21) The purpose of a deposit order is to identify at an early stage, claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails: **Hemdan v Ishmail and Another [2017] ICR 486 27**.

(22) It was noted by Underhill LJ in the case of **Ahir v British Airways Plc [2017] EWCA Civ 1392** that: "*16. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be*

'little reasonable prospect of success'. ... [However,] Where there is on the face of it a straightforward and well documented innocent explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that the explanation is not the true explanation for what happened without the claimant being able to advance some cogent basis for that being so."

Respondent's application to strike out the claim and for a deposit order

Strike out

(23) Mr Yetman explained that the respondent's position was that there were 3 phases to the claimant's unreasonable and vexatious conduct. He submitted that there the claimant had wilfully, deliberately and persistently disobeyed the Tribunal's orders and that he was relying on rule 37(1)(b) and 37(1)(c) in support of his application.

Phase 1

(24) Mr Yetman indicated that Phase 1 of the claimant's non-compliance was the period September 2021 to March 2022. The matter has originally been listed for hearing in March 2022 and this hearing was not effective because of the claimant's non-compliance. Mr Yetman referred me to a preliminary hearing which took place on 1st April 2021 in front of Employment Judge Woffenden at which the matter had been listed for a final hearing between 14-18 March 2022 (inclusive). At this hearing the claimant had also been ordered to :

24.1 provide further particulars of his claim for discrimination on the grounds of religion or belief by 29 April 2021;
24.2 a schedule of loss by 13 May 2021;
24.3 further information in relation to his dyslexia and his medical records by 13 May 2021;
24.4 copies of his documents by 29 June 2021;
24.5 exchange witness statements by 7 September 2021.

These orders could be varied by 14 days by agreement the parties, so long as this would not affect the hearing date. During this hearing Employment Judge Woffenden asked the claimant if he required any adjustments to enable him to participate in the hearing before her. The claimant indicated that the only adjustment he needed was that

the order produced be prepared in font size of no less than 14. During the course of the hearing Employment Judge Woffenden also indicated that she had issued a separate strike out warning in relation to another claim the claimant had brought against an employee of Birmingham City Council, with whom the respondent had a contract.

(25) During the course of the preliminary hearing in front of Employment Judge Woffenden Ms Williams, solicitor for the respondent, has indicated that the claimant had been aggressive in correspondence and telephone calls to the respondent and to her as its representative. The claimant was advised by Employment Judge Woffenden that such conduct (if it has occurred) could be found to be unreasonable conduct and result in an order for costs being made, that the claimant should not make direct contact with the respondent. Employment Judge Woffenden also made it clear that aggression from either side had no place in litigation and was counterproductive. The claimant was advised to read the Presidential Guidance on case management to assist with his understanding of the orders made and how to comply with them. Both parties were reminded of the overriding objective and their duty to cooperate with each other and the Tribunal.

(26) By 15 September 2021 the claimant had not complied with the order to provide further particulars of his claims for discrimination. As such the respondent made an application for an Unless Order. On 27 October 2021 Employment Judge Broughton issued an Unless Order ordering that unless the claimant provided details of his claims for discrimination by 11 November 2021 these claims would stand dismissed without further order. This order was made on the basis that the claim was made by the claimant on 21 October 2020 and was listed for final hearing on 14 March 2022. Due to the lack of particulars the respondent was unaware of the case it had to meet at trial. Mr Yetman pointed out that a year after the claim was issued the respondent did not know the case against it.

(27) By 8 February 2021 the claimant had not provided any disclosure to the respondent nor had he provided any documents relating to mitigation with his schedule of loss not taking into account his employment with Westside Forestry Limited. The claimant was invited to submit an amended Schedule of Loss to take into account his employment. The claimant was also advised that the respondent intended to make an application to amend a paragraph of his grounds of resistance in light of information which had come to light when

taking witness statements. The claimant was also asked to confirm that he would be ready to exchange witness statements by 14 February 2022.

(28) Mr Yetman then referred me to a file note of a conversation between his instructing solicitor on 23 February 2022 in which Ms Williams was trying to ascertain from the claimant whether he had received the bundle of documents which she had sent through, which had been signed for but which the claimant said he had not received. During this discussion the claimant indicated that he was awaiting the paperwork relation to Ward End which Ms Williams this paperwork was not relevant as the claimant had not been dismissed for this issue. Ms Williams asked the claimant about exchange of witness statements to which the claimant responded "*Do you want my inside leg measurement? Do you want my favourite colour?".*

(29) On 23 February 2022 the Tribunal requested an update from the parties by 1 March 2022. The claimant emailed the Tribunal on 27 February 2022 to say that he had complied with the Unless Order, issued by Employment Judge Broughton on 27 October 2021, on 10 January 2022. In relation to disclosure he indicated that he had requested on numerous occasions information from Birmingham City Council but had not received anything. He also indicated that he did not have any witness statements. The respondent replied to the Tribunal on 28 February 2022 setting out the steps they had tried to get the case ready for trial but they still did not the claimant's disclosure nor had witness statements been exchanged. They also sought an order for third party disclosure.

(30) The Tribunal wrote to the parties on 2 March 2022 after the parties' correspondence had been referred to Employment Judge Flood. In its correspondence the Tribunal noted that the claimant had indicated that he had complied with Employment Judge Broughton's order by email on 10 January 2022, this was after the date for compliance but was, in any event the Tribunal had no record of any email of this nature having been received on 10 January 2022. The only email received by the Tribunal from the claimant on 10 January 2022 was the one asking for an update on his claim. The claimant was asked to provide further evidence of another email being sent on 10 January 2022 or any other evidence of compliance with the Unless Order by 7 March 2022 so that the Tribunal could determine whether the claimant had complied with the Unless Order, and if not whether the claim stood dismissed. The claimant was also reminded that anyone

who wanted to give evidence to the Tribunal (including himself) had to have a witness statement. The respondent was asked whether, given the proximity of the hearing it still required a third party disclosure order.

(31) On 9 March 2022 the Regional Employment Judge postponed the final hearing and, instead, listed the matter for an open preliminary hearing instead on 15 March 2022. Mr Yetmin indicated that by this point the respondent had incurred counsel's fees.

(32) The open preliminary hearing duly took place on 15 March 2022 in front of Employment Judge Harding. At this hearing Employment Judge Harding found that the claimant had materially failed to comply with the Unless Order of Employment Judge Broughton issued on 27 October 2021. Whilst no formal application for relief from sanction had been received from the claimant the respondent was content for the hearing to proceed as if one had been made and Employment Judge Harding refused the application for relief from sanction. Mr Yetman referred me to his note of the oral judgment that Employment Judge Harding had given which was referred to in the respondent's application to the Tribunal. During the hearing the claimant had sought to rely on his dyslexia which Employment Judge Harding accepted was likely to affect the claimant's ability to read and understand documents. However, no independent evidence had been provided as to how the claimant's dyslexia affected his ability to understand documents given that the claimant did not have a learning disability as far as was known to the Tribunal. Employment Judge Harding found that the claimant's failure to comply with the case management orders was deliberate and that he had made no attempt to comply with the orders at all. If the claimant had other difficulties he would have mentioned them to Employment Judge Woffenden at the hearing on 1 April 2021 when he had been asked about the adjustments he required.

(33) At this hearing Mr Yetman had wanted to make an application to strike out all of the remaining claims on the basis of non-compliance on the claimant's part with tribunal orders. However, Employment Judge Harding was not minded to deal with such application as it had not been made in writing and the claimant, was not, therefore on notice of it and did not have an opportunity to prepare for it. This was important given that the claimant has dyslexia. However, the respondent was given until 5 April 2022 to make any such application.

(34) Mr Yetman also asked Employment Judge Harding to issue the remaining case management orders on an unless order basis because of the claimants non-compliance with earlier orders. However, the claimant assured Employment Judge Harding that he now understood the importance of complying with tribunal orders and that he would not fail to comply with any further orders. As the trial date was not until February 2023 Employment Judge Harding decided to issue the case management orders on a standard basis, given the claimant's assurances. Fresh case management orders were issued. Paragraph 17 of the case management orders issued by Employment Judge Harding stated:

"**Failure to comply with this order**

17. Failure to comply with any part of this Order may mean that the tribunal has insufficient time to hear the application on the hearing date and may give rise, upon application by a party who has incurred extra costs as a result , to an Order for Costs or preparation time against the offending party. Further, the tribunal may regard any failure to comply with this Order as unreasonable conduct of proceedings in the event of an application for costs or a preparation time order against the party who has failed so to comply."

(35) Mr Yetman submits that the inference to be drawn from EJ Harding's findings is that the claimant's suggestion in evidence that his earlier failings were due to dyslexia was intentionally misleading and that this conduct fell within rule 37(1)(b) as the claimant was exaggerating the impact of his dyslexia so as to explain his persistent non-compliance.

(36) It was submitted that the claimant was also misleading in relation to the email which the claimant alleged he had sent to the Tribunal on 10 January 2022 which Employment Judge Harding had found to be circumspect and which Mr Yetman asserted was conduct that fell within rule 37(1)(b).

Phase 2

(37) Mr Yetman submitted that Phase 2 was post March 2022. It was alleged that in April 2022 the claimant failed to comply with orders in relation to disclosure and in May 2022 in relation to exchange of

witness statements. I was referred to an email sent by the claimant to Ms Williams and the Tribunal in which he asserted that he had no documents and no witness statements to send. As such, on 18 May 2022 the respondent made an application for an Unless Order.

(38) On 20 July 2022 the Tribunal wrote to the parties asking the claimant to respond within 7 days to explain he had not produced a witness statement as ordered to do so by Employment Judge Harding. The claimant responded the following day to state that he did not have any witnesses which was why he had not produced any witness statements and that his statement was "*part of my court bundle*". On 22 July 2022 the claimant emailed the Tribunal again in which he stated "*I have provided my own witness statements if you read the court bundle it has a timeline what I believe happens what I say and it is also electronically signed".* The claimant sent another email on 27 July 2022 in which he had not taken down all the dates of the case management orders and had been chasing for a copy of the order. As the claimant had not complied with rule 92, the Tribunal sent the claimant's correspondence to the respondent for its comments.

(39) The respondent replied on 2 August 2022 noting that Employment Judge Harding had recorded there was no need for an Unless Order because the claimant had understood what he had been told about the directions and assured her he would comply. It was also noted that the claimant had alleged that he was unable to cross reference documents as he had no paperwork yet the respondent submitted that not only had it complied with discovery but that it has also emailed the bundle to the claimant and sent him a hard copy by post which had been returned by Royal Mail on the basis that it had not been collected. Furthermore, the case management orders had been sent to the parties 7 weeks prior to the date for exchange of witness statements. The respondent renewed its application for a strike out/deposit order.

(40) On 7 September 2022 the respondent confirmed that it had now received a witness statement from the claimant but was still awaiting documents relevant to loss from the claimant. The respondent reminded the Tribunal of its outstanding application for a strike out of the claimant's claims. On 30 September 2022 the Tribunal wrote to the parties to confirm that the file had been referred to Employment Judge Meichen who had directed that given the only matter outstanding was the claimant's documents relevant to loss it was not proportionate to list a further hearing to consider strike out but the

respondent could renew its application at the start of the liability hearing, if it considers that there were good grounds for doing so. The claimant was asked to confirm that he now had the bundle and to provide the outstanding documents.

(41) On 10 February 2023 the respondent copies of the bundle and witness statements to the Tribunal and the claimant in readiness for trial. In the event the hearing did not take place due to lack of judicial resources and on 27 April 2023 the matter was relisted for a 5 day hearing commencing 14 August 2023.

Phase 3

(42) On 5 May 2023 the Tribunal granted the claimant a further extension of time until 16 May 2023 to provide his wage slips and contract of employment relating to his new employment.

(43) On 22 May 2023 the claimant wrote to the Tribunal to request an adjournment of the hearing listed in August on the basis that he was due to fly out to Costa Rica to see his father who was terminally ill with cancer. The respondent objected to the application. Whilst expressing sympathy for the claimant noted that the hearing was not listed until August and the claimant may be back in the country by that time. The respondent noted that the claim related to events which had occurred over 3 years prior to the hearing and the respondent already felt prejudiced as the memory of events would have faded in the minds of the witnesses, this would be made worse by a further delay. As such, it was requested that the hearing was not postponed at this time. It was also noted that the respondent's strike out application had still not been heard. In the event the Tribunal decided not to adjourn the hearing.

(44) No contact was made by the claimant with the respondent or the Tribunal during the period May to August 2023. However, I was referred to evidence in the bundle in the form of the claimant's flight book which showed that he returned to England on 24 July 2023. On 4 August the Tribunal wrote to the claimant asking if he was back in the UK. If not, the claimant was asked to update the Tribunal and the respondent and to provide a medical report on his father's condition by 18 August 2023. The claimant did not respond to this correspondence resulting in the Tribunal making the decision on 10 August to postpone the hearing. The Tribunal noted in the Notice of Postponement:

"*In view of the claimant's failure to respond to Employment Tribunal emails to confirm he is back in the UK and ready for the hearing, it is unfair to keep the Respondent on tenterhooks any longer.*

Accordingly, the hearing is postponed and there will be a Private Preliminary Hearing by video on 14 August 2023 to consider what the next steps should be and whether to list the Respondent's application for a strike out warning for a public hearing".

(45) The claimant did not respond to this correspondence but duly attended the preliminary hearing on 14 August 2023. Neither the respondent nor the Tribunal were on notice that the claimant would be attending. It was at this hearing that the claimant initially said he had not received any of the Tribunal's emails and then subsequently said he had received one email from the Tribunal. The claimant advised that his father had passed away on 9 July. The respondent again incurred a brief fee for the final hearing.

(46) Mr Yetman submitted that this case fitted into the paradigm example of the *"deliberate and persistent disregard of required procedural steps"* that the Court of Appeal had indicated would meet the requirements of rule 37(1)(b). He submitted that the claimant's actions during Phase 1 and Phase 2 were a deliberate and persistent disregard of the required procedural steps. In relation to Phase 3 the claimant had failed to explain why he had not made contact whilst he was abroad and on his return to the country on 24 July 2023. In relation to the question of fairness Mr Yetman indicated that the test was not whether a fair trial was possible but whether it would be fair to allow the claimant to proceed with his claim. He also pointed to the fact that one of the respondent's witnesses, Mr Tom Saunders, was not longer employed by the respondent. He was a key witness for the unfair dismissal claim and would have available in March 2022 had the case not be adjourned due to the failure of the claimant to comply with case management orders.

(47) In relation to the issue of proportionality Mr Yetmen indicated that in line with **Blockbuster** the duration and character of any conduct were relevant considerations. He submitted that the duration of the claimant's non-compliance, unreasonable behaviour, and other related conduct had been extant throughout the duration of the proceedings – giving a duration of over 2 years. Further the character of this conduct was one of a wilful, deliberate and misleading nature.

Further that the case was still not trial ready. In addition, a lesser sanction would not be appropriate given the persistence of past non-compliance. The claimant's means meant that it was unlikely that he could satisfy any costs Order. He had already failed to complied with an Unless Order and a strike out was the only way in which to ensure a fair trial proportionately, without the respondence being unduly prejudiced once more by incurring additional time and costs by preparing the case and incurring counsel's fee for a 5 day hearing. Mr Yetman submitted that even if a fair trial was possible this did not undo the correctness of strike out. There should be no further indulgence in this matter.

Claim not being actively pursued

(48) Mr Yetman indicated that he was relying on the same facts as the strike out application in support of this application, this was an alternative window.

Deposit Order

(49) Mr Yetman indicated that this was an application in the alternative. His concern was that the claimant may comply with the deposit order but this would not guarantee that the case would be trial ready.

Submissions from the claimant

(50) The claimant began his submissions by indicating that the respondent had not raised the issue of one of their key witnesses having left the respondent's employ previously. He also asserted that there had been some confusion over his witness statement, he thought it was what was contained in the court bundle and had subsequently put something together. The claimant also alleged that the respondent had not complied with its disclosure obligations and that he had not been provided with the correct risk assessment, this was a document which the respondent had withheld for 3 years which had made it impossible for him to have all the information which he needed to put together his witness statement. The claimant alleged that Ms Williams had made it look like that the respondent had complied with the Tribunal orders but she had not provided the correct paperwork, he had been asking for paperwork relating to Maple Tree. He had sent a number of emails about this but the error had not been corrected. The claimant asserted that he had not been able to provide further

information in relation to claims for discrimination without the Maple Tree documentation.

(51) The claimant also referred to the fact that he had been sent a bundle relating to a different case in error by Ms Williams. This, he alleged, had amounted to a data breach for which he had not received a response for 4 days.

(52) The claimant also referred to the fact his father had been terminally ill and he had had to look after him. He also referred to the fact that he had lost his phone when in transition in New York and the fact that things happened more slowly in Costa Rica. The claimant indicated that on his return to the UK he had to go through the significant amount of information that he had been sent as a part of his Freedom of Information request. He asserted that he was taking the claim seriously which was why he had been requesting information. The claimant urged me not to listen to the respondent's strike out application.

(53) The claimant acknowledged that he had made mistakes as he had been representing himself. No issues had been raised by the respondent about his failure to provide a witness statement until their initial application for a strike out had been refused. The claimant urged me to consider the timeline which he insisted would show who had dragged their feet in the litigation.

(54) The claimant insisted that he had no savings, everything that he had had been used up when he went to Costa Rica to look after his father.

Replies

(55) Both parties were given a right of reply. Mr Yetman indicated that the claimant was misleading the Tribunal. No data had been shared with anyone else and that Ms Williams had responded to the claimant in a timely fashion. In relation to the Maple Tree documents I was referred to an email from Ms Williams in which the relevant documents had been sent to the claimant 0n 8 February 2022. It was also pointed out that the claimant had no asserted that he needed the Maple Tree documents for his witness statement until August 2023 which was prior to the initial strike out application being made.

Conclusions

(56) I have considered the information which has been presented to me and the oral submissions made by Counsel for the respondent and by the claimant in person.

(57) I am satisfied on the information before me that the claimant has shown a deliberate and persistent disregard of required procedural steps throughout this litigation and the three phases as described by Mr Yetman. I accept Mr Yetman's submission that the claimant has wilfully, deliberately and persistently disobeyed the Tribunal's orders and his behaviour falls within the ambit of rule 37(1)(b) and 37(1)(c)

(58) The claimant's conduct has been scandalous, unreasonable and vexatious in the proceedings. I am satisfied that the result of that conduct is that there cannot be a fair trial and even if a fair trial could be achieved with the re-issuing of further directions we have reached the point of no return. Given the claimant's repeated failure to comply with case management orders two listed hearing have had to be adjourned – one in March 2022 and the other in August 2023. On both occasions the respondent has incurred a brief fee and the resultant delay has meant that a key witness of the respondent is no longer in its employ, which the witness would have been had the hearing took place in 2022 as originally envisaged. That hearing was adjourned as a result of the claimant repeatedly failing to comply with case management orders issued in 2021.

(59) The claimant has repeatedly failed to co-operate with the respondent's representative in getting the case ready for trial. He has been aggressive in correspondence, failed to provide any disclosure and has changed his position in relation to witness statements on several occasions – stating initially that he did not have any witnesses and therefore statements were not required, then stating that his witness statement was already in the bundle and then that he was awaiting documents from the respondent which was why he could not complete his statement. I do not find the claimant's varying explanations credible.

(60) I am also satisfied that the claimant has deliberately misled the Tribunal on at least two occasions. Firstly, in relation to an email which he informed Employment Judge Harding he had sent to the Tribunal on 10 January 2022 to show alleged compliance with case management orders (albeit such compliance would have been

significantly after the date of compliance). The Tribunal has no record of this email nor has the claimant ever produced a further copy of it despite being given the opportunity to do so. The claimant also misled the Tribunal when he informed Employment Judge Wedderspoon that firstly that he did not receive any communication from the Tribunal whilst he was in Costa Rica but then changed his position and said he had received one email. Even if he had only received the one email he still failed to make any contact with the Tribunal or the respondent even though he had returned to the country on 25 July 2023. Had the claimant made contact the hearing listed for 14 to 18 August 2023 would not have had to be adjourned and could have progressed to trial.

(61) At the time of the preliminary hearing before me it has been more than 3 years since the claim had been issued. I am also satisfied that given the number of opportunities given to the claimant by the Tribunal in the past and the claimant's complete disregard for any of the case management orders and his lack of transparency that the imposition of the strike out sanction is approportionate in the circumstances. I accept the assertion of Mr Yetman that the duration of the claimant's non-compliance, unreasonable behaviour, and other related conduct had been extant throughout the duration of the proceedings. I am satisfied that any non-compliance with the case management orders was not as a result of the claimant being dyslexic, nor has he produced any evidence to this effect. Further, I accept that the character of this conduct has been one of a wilful, deliberate and misleading nature and the case is still not trial ready. In addition, I am satisfied that a lesser sanction would not be appropriate given the persistence of past non-compliance and the fact that he claimant's financial situation is such that he will not be able to satisfy any costs Order. He has already failed to complied with an Unless Order and a strike out is the only way to ensure fairness.

(62) In light of the above, I am satisfied that the claimant's outstanding claims for breach of contract, ordinary unfair dismissal and automatically unfair dismissal should be struck out on the basis that (i) the claimant has conducted the proceedings unreasonably; (ii) the claimant's failure to comply with the rules; and (iii) the claim not being actively pursued.

Employment Judge Choudry

Signed on 10/03/2024