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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	AND	Respondents
Veronica Argentini		Trinity London Concierge Ltd (1) Dexin Chen (2)

Heard at : London Central Employment Tribunal **On**: 9 February 2024

Before: Employment Judge Coen

Representations

For the Claimant: In person
For the Respondents: Mr. F. Farhat, Senior Legal Officer

WRITTEN REASONS

Introduction and Background

1. A public preliminary hearing was held in person at London Central Employment Tribunal on 9 February 2024 where I heard (and subsequently refused) an application by the

claimant for strike out of the respondents' defence. The claimant requested written reasons for the decision.

2. The claimant was employed by the respondent in the role of HR manager between 13 June 2022 and her dismissal on 12 December 2022. By a claim form dated 27 February 2023, the claimant brought claims for automatic unfair dismissal (because of protected disclosures), discrimination on grounds of race, religion and sex, harassment on grounds of sex, and claims for breach of contract and unpaid wages.

3. A first preliminary hearing was held before Employment Judge Heydon on 13 June 2023. The case management orders provided for various steps to be taken including for disclosure to take place by 1 July 2023, amended grounds of resistance to be filed by 18 July 2023, the preparation of a bundle by 8 August 2023, witness statements to be exchanged by 29 August 2023 and a final hearing to be listed for nine days from 9 February 2024. The case management orders also added the second respondent (who is an individual) as a party.

4. The claimant complied with disclosure obligations by 1 July 2023 but the respondent did not comply. Correspondence from Gulbenkian Andonian (the solicitors to the respondents) to both the Tribunal and the claimant ceased on 18 July 2023 and the claimant made applications for specific disclosure, an unless order, a deposit order and costs on 1 August 2023.

5. The final hearing listed for nine days from 9 February 2024 was vacated and converted to a one-day public preliminary hearing on 9 February 2024 to consider the claimant’s application for strike out of the respondents’ defence and subsequent case management.

6. On 8 February 2024, the respondents’ solicitors submitted a written explanation to the Tribunal as to why the respondents had not responded to correspondence from the Tribunal or the claimant since 18 July 2023. The document explained that the solicitor responsible for the matter had mental health problems, which resulted in termination of his employment in October 2023 with the case having subsequently been wrongly identified as being closed and not requiring attention.

Procedure, Documents and Submissions

7. Both parties provided written submissions and also made oral submissions. The claimant applied for strike out on the basis of all five grounds of Rule 37 of the Employment Tribunals Rules of Procedure 2013. I have summarised below some of the claimant’s key submissions.

8. The claimant’s submissions in respect of ground a) related to her view that the respondents’ response represented a baseless denial of facts (which she said she was able to refute), with some points being, in her view, lies which were aimed at hurting her. Examples provided included the respondents’ denial of the complaints which she made

during her employment, and an assertion that the claimant had unilaterally amended her contractual arrangements. To that extent, the claimant's view was the respondents' defence was scandalous and lacked any reasonable prospect of success.

9. The claimant's submissions in respect of ground b) related to the manner of the respondents' conduct of the proceedings which she believed to have been scandalous and unreasonable. In support of this, her view was that the defence had only been filed on the basis of the respondents' erroneous assumption that the claimant had no evidence to support her complaints. She pointed to Mr Farhat's unannounced appearance at the preliminary hearing on 13 June 2023 and was of the view that the respondents were attempting to bully her by not having provided advance notice of his appearance. She also cited the failure to respond to any correspondence between 18 July 2023 and 5 February 2024 as unreasonable.

10. The claimant's submissions in respect of ground c) related to non-compliance with Tribunal orders. The claimant cited a range of failures, including the fact that the respondents had filed an inadequate response, had not agreed a hearing agenda in advance of the preliminary hearing on 13 June 2023, did not copy the claimant into emails to the Tribunal, did not provide disclosure, did not prepare a bundle by 8 August 2023, did not prepare witness statements by 29 August 2023, did not indicate whether they were interested in judicial mediation, and did not reply to Tribunal correspondence.

11. The claimant's submissions in respect of ground d) were effectively that there had been no correspondence from the respondents' solicitors after 18 July 2023 and that she had been left to understand that the respondents were not pursuing their defence.

12. The claimant's submissions in respect of ground e) were, broadly, that a fair hearing was not possible on 6 February 2024 as the grounds of resistance had not been clarified, no disclosure exercise had been followed, there was no bundle and that she did not understand the basis for the respondents' defence. She accepted that her witness statements had not been seen but said that all her disclosure had been seen.

13. In respect of the issues raised by the respondents' solicitor the claimant was of the view that it was unbelievable that the respondent had not thought that it needed to act in response to the case management orders, particularly as Mr Farhat had attended the preliminary hearing in June 2023 and knew about the orders. She also explained that she had 'read-receipts' of emails sent to the respondents' solicitors in October and November 2023. The claimant also made submissions about the continued impact on her mental health of both her employment with the respondents and the conduct of the litigation.

14. Mr Farhat's submissions acknowledged that what had occurred was unfortunate and that the claimant had complied meticulously with the Tribunal's orders and had been seriously inconvenienced by what had happened. His submissions about the content of the grounds of resistance were that they denied the claimant's allegations and sought to put her to proof. Mr Farhat explained that he had attended the preliminary hearing on 13 June 2023 not as an employment law specialist but in his capacity as a self-employed

consultant who specialises in advocacy work for Gulbenkian Andonian. After the hearing, he passed the case back to Mr Lau, a solicitor at Gulbenkian Andonian who had conduct of the matter. Mr Lau had ongoing mental health issues (of which the firm was aware) and he abruptly ceased coming to work in late August 2023 and was not contactable by his employer. Advice from the Solicitors Regulation Authority resulted in Mr Lau's employment being terminated in October 2023 as, by that time, he had not attended the office and had made no contact with his employers. Regrettably, the current case was incorrectly listed on the firm's case management system as having been completed (which of course was not the case) and the matter was, therefore, left unsupervised. Mr Lau's emails were not, however, read by anyone at the firm, on the basis that the case management system alone was relied upon to identify and manage ongoing matters. Had emails been read in October 2023 they would have been read by Mr Lau only as he had access to emails until termination of his employment. Mr Lau's conduct is now the subject of an investigation by the SRA, particularly in respect of the fact that the case was notified on the case management system as having been completed. The firm became aware that there was an issue on 24 January 2024 when the first respondent contacted the firm following a telephone call from a member of staff at the Tribunal enquiring as to progress of the case. The matter was followed up by the firm following the telephone call.

15. Mr Farhat acknowledged, and apologised for, the difficulties caused to the claimant and explained that the deficiency arose from unexpected conduct by an individual and that it was a source of professional embarrassment to the firm. He referred to the respondent's Article 6 rights and made submissions in respect of the surrogacy principle (being the principle that a Court does not usually distinguish between a litigant and their legal adviser) explaining that the principle was not universally applied in cases where it would be unjust to do so. He requested that other measures be taken as an alternative to strike out and suggested an unless order and an award of costs as a more proportionate response to strike out. He also provided assurances that the matter would be managed by specialist counsel going forward, assuming, of course, that the respondents continued to instruct the firm.

Law

16. Strike out is a draconian measure which should only be taken in exceptional circumstances because the fundamental freedom of access to justice is at stake (**Mbuisa v Cygnet Healthcare Limited EAT 0119/18**). In the case of a claimant, it means that a claim can no longer be brought. In the case of a respondent it means that a defence is deemed not to have been made. In **Anyanwu and Anor v South Bank Student Union and anor 2001 ICR 391, HL** the House of Lords emphasised the importance of not striking out discrimination claims except in the most clear-cut cases because these cases are fact-sensitive and it is a matter of public interest that they be properly examined to make a determination.

17. Rule 37 of the Employment Tribunals Rules of Procedure 2013 deals with striking out a claim or response. It provides as follows:

37(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim on any of the following grounds:

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(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;

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

(d) that it has not been actively pursued;

(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).

18. When deciding whether to strike out a claim or response, the Tribunal must first consider whether any of the grounds set out in Rule 37(1) has been established and then, having identified any established grounds, consider whether to exercise its discretion as to strike out. The second stage exercise is important as the discretionary element reduces the risk of claims or responses being struck out where they potentially have merit.

19. In deciding whether to order strike out, the Tribunal should have regard to the overriding objective of dealing with cases fairly and justly as set out at Rule 2 of the Employment Tribunals Rules of Procedure 2013.

20. Where strike out is applied for on the basis of non-compliance with an order, **Weir Valves and Controls (UK) Limited v Armitage 2004 ICR 371, EAT** requires the Tribunal to consider all relevant factors including the magnitude of non-compliance; whether the default was the responsibility of the party or a representative; what disruption, unfairness or prejudice has been caused; whether a fair hearing would still be possible; and whether striking out or some lesser remedy would be an appropriate response to the matter.

21. I have provided brief information on the meaning of some of the words in the various grounds. The word ‘scandalous’ means irrelevant and abusive of the other party and is not to be given its colloquial meaning of ‘shocking’ (**Bennett v Southwark London Borough Council 2002 ICR 881**). A vexatious claim or defence is one that is not pursued with the expectation of success but to harass the other side or out of some improper motive (**ET Marler Limited v Robertson 1974 ICR 72, NIRC**). The term also includes anything that is an abuse of process, being the use of the court process for a purpose or in a way which is significantly different from an ordinary and proper use of the court process (**Attorney General v Barker 2000 1FLR 759, QBD (Div Ct.**).

22. For ‘no reasonable prospect of success’ to be applied successfully it requires a Tribunal to form a view on the merits of the case. The Tribunal is required to take the claimant’s case (or the respondent’s defence) at its highest and it is not permissible for

the Tribunal to conduct a mini-trial of what should properly form part of a final hearing. Particular care is needed where cases have been badly pleaded (or responded to). In **Cox v Adecco Group and ors UK EAT/0339/19/AT** the Employment Appeal Tribunal provided guidance emphasising that if there are factual issues in dispute, it is highly unlikely that strike out would be appropriate.

23. For a Tribunal to strike out a claim or response for unreasonable conduct, it must be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible; and in either case, the striking out must be a proportionate response (**Blockbuster Entertainment Ltd v James 2006 IRLR 630, CA**).

24. For a fair hearing to be possible it is important that the parties are able to participate effectively in the proceedings. A lapse of time which means that evidence or documents are no longer available could prejudice a fair hearing.

Analysis

25. The claimant applied for strike out on the basis of all the grounds listed under Rule 37. To that extent, I have first considered whether each ground was satisfied and, where that was the case, I then exercised the required discretion.

26. Taking ground a) I find that the claimant has not established that the respondents' defence was scandalous or vexatious as I was not able to conclude, having read the grounds of resistance, that they amounted to an abuse of process or manifested an improper motive. It is unusual, in contested proceedings, for a defence to agree with a claimant's assertions. To that extent, the respondents' defence operated to negate what the claimant had asserted and to put forward the respondents' version of events. Many assertions were put forward in negative terms (e.g. that the claimant had not raised particular issues with the respondents). It will be for the parties to produce oral and written evidence at a final hearing in order to enable a Tribunal to make findings of fact on the matters which are the subject of the claim.

27. Neither do I believe that it is possible to establish at this stage that the respondent's defence has no reasonable prospect of success. I accept that the factual matters to which the claimant referred in her submissions may well be capable of being refuted by evidence which the claimant had in her possession. However, it is not open to the Tribunal to conduct a mini-trial of the issue and make a determination at this preliminary stage, particularly as the specific matters complained of by the claimant do not amount to the totality of the respondent's defence or all aspects of its case. It had been anticipated by the case management orders made at the preliminary hearing on 13 June 2023 that the respondent would file an amended response providing further details in respect of its defence. The amended response was not filed because of matters arising at the respondent's solicitors. In addition, the Tribunal at a final hearing will need to consider evidence in conjunction with the applicable statutory tests to decide the case.

28. I do not consider ground e) to have been established as my view is that it is indeed possible to have a fair hearing in respect of the response. While I agree with the claimant that a fair final hearing could not have taken place on 6 February 2024 (owing to the case not being ready for a final hearing) I do not accept that a fair hearing is not possible at a future date. In reaching this conclusion, I have taken account of the fact that the claimant's witness statements were not read by the respondents (as they were password protected). I have also taken account of the fact that while the delay to date is regrettable, I have been able to list a final hearing for September 2024 meaning that the case will have been brought to a final hearing within approximately nineteen months of commencement of proceedings. This is not such a long period of time that evidence will have been lost or forgotten or witnesses unable to attend.

29. I consider that grounds b), c) and d) have been established. I deal with each in turn.

30. In respect of ground b) the manner in which the proceedings have been dealt with has indeed been unreasonable. All correspondence with the claimant and the Tribunal ceased for a six month period without any explanation. The claimant's time has been spent in fruitless correspondence and preparation for a final hearing without participation by the respondents. I find that ground c) has been established as there has been non-compliance with orders of the Tribunal since July 2023 including in respect of disclosure, witness statements and attendance at a final hearing. I consider ground d) to have been established as the case has not been actively pursued for at least six months.

31. The Tribunal is required to exercise its discretion as to whether to strike out the defence in connection with those grounds which have been established (being grounds b), c), and d)). In exercising this discretion, I am required to consider the overriding objective and the interests of justice. In the circumstances, I am not satisfied that it would be in the interests of justice for the Tribunal to strike out the defence. In short, the respondents' failure to communicate with the Tribunal was caused by a complex and unexpected set of circumstances within a firm of solicitors. A solicitor became uncontactable following which his employment was terminated. This was followed by a further error in the case management system. None of this is the fault of the respondents and I am satisfied that the various defaults which were caused by the set of circumstances were unintentional. Ordinarily, it would be reasonable for the respondents to rely on their solicitors to progress the case and communicate with them about its conduct. The events described to me meant that the respondents did not know that their case was not being progressed until they were telephoned by the Tribunal in January 2024 following which they took action and contacted their solicitors. I do appreciate the difficulty which this has caused to claimant. However, when balancing the relevant interests, the hardship to the respondents of having their defence struck out because of circumstances beyond their control at their solicitors' firm is, to my mind, greater than the hardship to the claimant of the delay and additional work caused by that delay. I also consider that it is in the interests of justice for a Tribunal to have the opportunity to consider evidence put forward by both parties (rather than one party) at a final hearing particularly where the case involves allegations of discrimination which require detailed consideration of facts. In refusing the strike out application I have considered lesser applicable sanctions and have, therefore,

made a separate unless order in respect of filing an amended response, a costs order and have given the claimant leave to apply for a preparation time order.

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Employment Judge Coen

Dated: 19 March 2024……..

Reasons sent to the parties on:

3 April 2024

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