Neutral Citation Number: [2024] EAT 64

Case No: EA-2023-000446-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17 April 2024

Before:

JUDGE SUSAN WALKER

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Between:

MR BRIAN CARVER

Appellant

-and-

(1) LONDON BOROUGH OF NEWHAM
(2) MR JERRY AUSTIN

Respondents

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- -

SIMON SWANSON (instructed by Justice Law Consultants) appeared for the **Appellant**
ABIODUN OLATOKUN (instructed by London Borough of Newham) appeared for the **Respondents**

Hearing Date: 17 April 2024

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JUDGMENT

SUMMARY

Practice and procedure

The judgment striking out the claim did not give adequate reasons why a fair trial was not possible nor consider if strike out was proportionate. It did not refer to the claimant's correspondence and it is likely this was not before the judge when the decision was made.

JUDGE SUSAN WALKER:

1. This is an appeal against a judgment of Employment Judge Brown sitting in East London striking out the claim. The judgment was sent to the parties on 16th March 2023. I will refer to the parties as "Claimant" and "Respondent" as they were before the Employment Tribunal.

2. The reasons given for the judgment are:

i) By a letter dated 18th November 2022, the Tribunal gave the claimant an opportunity to make representation or to request a hearing as to why the claim should not be struck out because:

- The claimant had not complied with the order of the Tribunal sent to the parties on 13th July 2022.
- It has not been actively pursued.
- It is no longer possible to have a fair hearing because the claimant had failed to comply with case management orders. The claimant has also failed to respond to the respondent's application to strike out the claim.
- The claimant has failed to pursue his case.

ii) The claimant has failed to make representations in writing or has failed to make any sufficient representations why this should not be done or to request a hearing. The claim was therefore struck out and the hearing that had been fixed for 11th to 14th July 2023 was cancelled.

3. The claimant was represented before me by Mr. Swanson and the respondent was represented before me by Mr. Olatokun of counsel. I have taken account of the skeleton arguments provided and the oral submissions made before me.

4. The basis for the appeal is that:

i) It is in the interests of justice for the strike out to be set aside and/or revoked and the claims to be allowed to proceed.

ii) The judge erred by failing to take into account relevant considerations or had taken into account irrelevant factors and a reasonable Tribunal, properly directing itself, would not have struck out the claims.

iii) While there was a delay in complying with the Tribunal's order, it was in fact complied with and it was not reasonable to strike out, especially where the respondent had failed to comply with the Tribunal order but no sanction was imposed on it.

iv) It was possible for the delay in compliance to be dealt with in another manner than the extreme sanction of strike out. The delay was not serious or significant and caused no prejudice to the respondent. It was still possible for a fair hearing.

5. Considering the grounds given by the judge, the claimant submitted that the claimant had complied with the outstanding orders within the time required to respond to the strike out warning. The claimant confirmed that the strike out was objected to and provided an updated schedule of loss and list of documents. At that point it is submitted that both parties were behind schedule and the respondent had not provided its list of documents. The claimant proposed that the respondent produce their list of documents and that would allow the case management orders to be back on track and allow witness statements to be exchanged.

6. It was submitted that the claim was being actively pursued. Although there was delay, the claimant had complied with the orders and it was still possible to have a fair hearing on the listed dates that were still four months away. The claimant submitted that the Employment Tribunal had already postponed the hearing and that the claimant had been delayed by the respondent during a long investigation. It was submitted that the claimant did make representations in writing as to why the case should not be struck out, in the email of 25th November 2022 where it was said there was no prejudice to the respondent and that a fair hearing would be possible. It was submitted that the strike

out appeared to have given no consideration to the fact that the claims included claims for race discrimination and it is inappropriate to strike out such cases as they are fact-sensitive.

7. The respondent opposed the appeal. They submitted that the claimant had a history of non-compliance with orders and the claimant had not actively pursued the claim and did not respond to the respondent's correspondence over a three-year period in a manner that was unreasonable. This was particularly problematic as some of the issues relate to allegations from August 2018 and the decay in witness memories is a concern. Any hearing now would be after the maximum six-year limitation period for civil claims.

8. The respondent then set out the detail of the interaction with the claimant. They had initially applied for a strike out on 17th January 2022 when the claimant failed to comply with case management orders; the respondent had chased the claimant on three occasions before making the application for strike out, the claimant then responded over a month later complying with the order and apologising for the delay. The respondent made a further application for a strike out on 7th September 2022 and the respondent had again chased the claimant three times before making that application.

9. This led, on 18th November 2022, to the Employment Tribunal issuing a strike out warning and only then did the claimant provide a response, on 25th November 2022, apologising and complying with the case management order. The respondent submitted that this late compliance does not amount to material compliance.

10. It was submitted that although the claimant did make representation in the email of 18th November, this did not amount to sufficient representations and as a result the court was correct to strike out the claim. The email was itself an admission of unreasonable conduct. The respondent also submits that the email of 18th November did not address the contention that the claim had not

been actively pursued. With reference to **Birkett v James** [1978] AC 297, this was a case where there had been an inordinate and inexcusable delay creating a substantial risk that serious prejudice has been or will be suffered by the respondent. The respondent had made three applications for strike out following non-compliance or no response by the claimant, and this continued after the claimant replied to the strike out warning on 25th November 2022.

11. The respondent pointed to correspondence on 23rd January 2023 when they wrote to the claimant's legal representative confirming they were ready to provide a draft bundle and proposing a draft timetable and on 15th February 2023, having not received a response, they made a third application for strike out.

12. It is accepted by the respondent that the claimant did respond to the application to strike out that was made on 7th September 2022. However, it was submitted that he did not respond to the subsequent application on 15th February 2023 and the respondent submits that this is the failure being referred to by the Employment Tribunal at bullet point 3 in paragraph 1 of the judgment. This is said to be a further instance of the claim not being actively pursued.

13. In response to the case law cited by the claimant, the respondent submits this is a plain and obvious case and that in accordance with **Anyanwu**, strike out would be justified, notwithstanding there was a complaint of discrimination. Finally, the respondent submitted that a reference to non-compliance by the respondent is a red herring as the respondent needed to know the issues that were to be considered before it could make enquiries and consider the documents that needed to be disclosed. Any non-compliance by the respondent is attributable to delay by the claimant.

Relevant Law

14. Rule 37.1 provides that:

> **"All or part of a claim or response may be struck out on the following alternative grounds, that:**
>
> **a) It is scandalous or vexatious, has no reasonable prospects of success;**
>
> **b) That the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent has been scandalous, unreasonable or vexatious;**
>
> **c) For non-compliance with any of the rules or with an order of the Tribunal;**
>
> **d) That it has not been actively pursued or**
>
> **e) That the Tribunal considers it is no longer possible to have a fair hearing in respect of the claim or response or the part struck out".**

15. In the judgment, the claims appear to have been struck out on the grounds that there has been a failure to comply with orders, that the claim has not been actively pursued and that a fair hearing is not possible because of the failure to comply with orders. In deciding whether to strike out a party's case for non-compliance with orders, a Tribunal must have regard to the overriding objective. This requires a Tribunal to consider all relevant factors, including the seriousness of the non-compliance, any prejudice to the other party, whether a fair hearing would still be possible and whether a lesser sanction would be a proportionate response rather than strike out.

16. There is considerable overlap between the ground of failure to comply with orders and failure to actively pursue. In **Rolls Royce Plc v Riddle** [2008] IRLR 873, the EAT noted that 37.1(d) should be interpreted in accordance with the principles laid down in **Birkett v James**. So, strike out applications on the ground of failure to actively pursue will generally fall into one of two categories. Either the default is intentional and contumelious, meaning showing disrespect or contempt for the Tribunal or its procedures, or the conduct has resulted in inordinate and inexcusable delay, giving rise to substantial risk that a fair trial would not be possible or there would be serious prejudice to the other party. The EAT in that case held that although striking out a claim on the basis of a claimant's

failure to actively pursue it is a draconian measure, it is one that can be ordered where the claimant's default is intentional and shows disrespect for the Tribunal and/or its procedures.

17. As with any decision of the Employment Tribunal, a decision to strike out a claim or response must comply with the principles in **Meek v City of Birmingham District Council** [1987] IRLR 250 and should adequately explain to the affected party why their claims were or were not struck out.

Decision

18. It is clear that there has been a pattern of failure by the claimant to comply timeously with orders. That is regrettable. When the strike out warning was issued it may have been arguable that the claimant had failed to actively pursue the claims and that there was a danger that a fair trial was not possible. Had there been no response to that warning, it would not be surprising that a judgment was then issued striking out the claim.

19. However, the claimant did provide a response to the strike out warning. They did comply with the orders and I do not accept the respondents' contention that late compliance is not material compliance. It seems that the claimant, albeit late, did what he had been ordered to do.

20. Rule 37(2) provides that 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. There is no explanation in the judgment as to why the arguments put forward in the 25th November 2022 email did not amount to any sufficient representations as to why the case should not be struck out.

21. The respondent suggests that the representations were considered not sufficient as they did not address the failure to actively pursue the claim. The representations did , however, address the issue of prejudice and whether a fair trial is possible. In the judgment there is simply no discussion about

why it is considered that a fair trial was not possible or whether the judge had considered a more proportionate remedy than striking out the claim.

22. The respondent asks me to accept that the Employment Tribunal was aware of the claimant's correspondence of 25th November but considered that there had not been material compliance and that a fair trial was not possible. The respondent also submits that the failure the judge was referring to in the judgment was the claimant's failure to respond to the respondents' third strike out application made on 15th February 2023.

23. I do not accept those submissions. I have not been shown any separate strike out warning letter relating to the third application that would show that this was what was being referred to in the judgment. I agree with the claimant that the respondent is, in its submissions, speculating about what the judge had in mind in striking out the claim when it is simply not clear from the face of the judgment. It is unfortunate that the application for reconsideration has not been responded to, which would have given an opportunity to the judge to explain their reasoning.

24. However, it seems to me the most likely explanation is that the judge had simply not had sight of the claimant's letter of 25th November 2022. There is no reference to it in the reasons. On the contrary, the judge says the claimant had not complied with the orders of 22nd July when he had, albeit belatedly and that he had not provided any representations as to why the claim should not be struck out, when he had, albeit not in respect of the respondents' latest application.

25. Non-compliance with orders would not itself prevent the claims being struck out and the respondent has made submissions about why strike out would have been appropriate. However, for the judgment to be *Meek*-compliant, it would be necessary for the judge to explain why he considered that strike out (rather than a lesser sanction) was proportionate, especially when the case included a complaint of discrimination. It would have been necessary to explain whether he considered the

default to be intentional and contumelious or why he considered that a trial was not possible when the orders had been complied with in November and the trial was still some months off.

26. The basis of this appeal is that the judge erred in his discretion and failed to take relevant considerations into account, or took irrelevant factors into account. I cannot assess what factors have been taken into account in the judgment. That is not really a criticism of the judge, as it seems most likely the judge was unaware of the claimant's correspondence in response to the strike out warning and issued the judgment on that basis. However, in these circumstances, the appeal must succeed as the reasons are not sufficient to explain what was taken into account in deciding to strike out the claim.

27. The succeed is remitted back to the Employment Tribunal. The effect of this is that the application for strike out has not been determined and if the respondent wishes to renew their original application for strike out, they should confirm that to the Employment Tribunal within 28 days. Otherwise, it will be a matter for the Regional Employment Judge to give directions about further proceedings in the case. Any other applications, including any application for a strike out on amended grounds, should be made in the usual way, to the Employment Tribunal for consideration.