Case No: 2400006/2023

EMPLOYMENT TRIBUNALS

Claimant: Mr A Abushama

First Respondent: Extons Foods Limited

Second Respondent: Proman Supply Chain Limited

RECORD OF A PRELIMINARY HEARING

Heard at: Manchester Employment Tribunal

On: 25, 26, 27 and 28 March 2024

Before: Employment Judge M Butler
Mr I Frame
Ms S Moores

Representatives

For the claimant: Self-representing

For the first respondent: Mr Wilford (Solicitor)
For the second respondent: Mr Stenson (of Counsel)

JUDGMENT

1. The claimant's application to strike out the responses is refused.
2. The first respondent's application to strike out the claim is refused.
3. The claimant's application to amend his claim is refused.
4. The claimant's application for postponement is refused.

REASONS

5. The claimant requested written reasons for the decisions made at this hearing. These are those written reasons.

Strike Out application: application to strike out responses by the claimant and counter application to strike out the claim by the first respondent.

6. The claimant made an application to strike out the respondents by email dated 19 March 2024. This was made for the following reasons:

    a. They had failed to promptly prepare the case bundle which caused the claimant a severe detriment and prevented him from completing his witness statement before the final hearing.
    b. And this delay unjustly deprived the claimant of the opportunity to seek legal advice.

7. The claimant in this email laid out a chronology of the delays from his perspective, explaining:

    a. The first respondent sought an amended schedule on 06 December 2023, which the claimant agreed to.
    b. The first respondent breached the amended date of 01 February 2024 for producing the bundle.
    c. The claimant only received a copy of the bundle after he had emailed the tribunal.
    d. The bundle was incomplete as it did not contain documents that the claimant had sent to the respondents, with these only being added on 15 March 2023. It is only then that the bundle was complete.
    e. The first respondent also changed the bundle and added documents several times. This affected the numbering, making it difficult to start writing a statement.

8. The claimant was asked on the afternoon of day 2 of the hearing whether he was still pursuing his application to strike out the respondents following discussion of it. And he answered to the effect that he was.

9. The claimant made the following oral submissions in support of his application to strike out the responses of the respondents:

    a. The first respondent was at fault in delaying the preparation of the bundle. This deprived him of seeking and having legal advice.
    b. Delays were impacting upon him a lot. There are fake documents included in the bundle.
    c. The claimant referred to misleading of the court at the previous preliminary hearing, with the claimant not being sent the same bundle relied on.
    d. The claimant raised that the bundle provided by the respondents for the hearing determining disability included his medical reports and documents. And these were relied on rather than the ones the claimant sent in on 03 February 2024.
    e. The claimant accepted when questioned that he had had all of the

documents in his possession since around 01 February 2024 at the latest. He had a draft bundle and copies of the documents that he had wanted included. The claimant explained that his criticism of the draft bundle was that it did not have any page numbers.

10. Mr Stenson, for the second respondent, opposed the application and made the following submissions:

    a. The tribunal was determining disability of the claimant at the previous hearing, and the respondents only had the medical records of the claimant as he had disclosed them. These being included in a bundle cannot support striking out the responses, given these are necessary documents that EJ Tobin needed to see to determine disability.
    b. The respondents had disclosed the email trail which records the delay in preparing the bundle in this case. The headline being that a large fault for the delays lay with the claimant in not co-operating in the preparation for this hearing.
    c. The claimant was capable of preparing a disability impact statement for the previous hearing and a schedule of loss for this hearing. And therefore was capable of producing a witness statement without the need for legal assistance.
    d. And the additional documents the claimant refers to does not seem to have impacted on the claimant's preparation, save for his witness statement today.
    e. There is no basis to strike out the responses. And a fair trial is still possible.
    f. The claimant must be saying that the issues with the bundle and the inclusion of the medical documents have affected this trial, but that cannot be the case in circumstances where the case is now ready to be heard.
    g. The matter affecting this trial is the claimant failing to produce a witness statement.

11. Mr Wilford, for the first respondent, also opposed the claimant's application. And further, he made an application to strike out the claim based on unreasonable conduct. He made the following submissions:

    a. The tribunal has sight of the email sent to the tribunal from Asif, which shows the great lengths the first respondent has gone to, and the difficulties it has encountered in agreeing the final hearing bundle over a period of 3-4 months.
    b. From those, it is clear that the claimant was continually asking for new docs, approximately 180 pages, to be added.
    c. The claimant seemed fixed in his mind that it caused him some prejudice these not being included, despite being advised that he could dela with them in a different way, namely he could bring the additional documents to tribunal himself and refer to them.
    d. The vast majority of the documents do not appear relevant to matters before this tribunal as they are medical documents. And this is in circumstances where it has already been found that the impairment he brought his disability discrimination complaint was not a disability at the material time. These documents go to that

issue.

e. Both respondents engaged with the claimant to explain that it did not consider the additional documents to be relevant and invited the claimant to explain why they were relevant.
f. The claimant did not engage with that correspondence but simply said that they were relevant, without providing any explanation as to why he said they were. The claimant then stated that if the documents were not agreed with then the consequences would lie with the first respondent.
g. The parties agreed to two successive revised dates for witness statement exchange. First 23 February 2024 and then secondly 13 March 2024.
h. Given difficulties with the bundle, the respondents suggested further revised dates of 15 March and 19 March 2024, but these dates were never agreed.
i. The claimant countered with a suggested date of 22 March 2024. However, given that this was merely days from the final hearing, this was not agreed to.
j. And it transpired that the claimant had not even prepared one for the first day of this hearing, despite this suggested date.
k. It is not the first respondent's fault that the claimant had not produced a witness statement. Although it is accepted that the first respondent may have done things differently, in hindsight. But this situation was created by the claimant.
l. It was a willful act by the claimant to not produce his witness statement. And this has damaged the progress of this case.
m. The claimant also seeks to attribute his inability to find legal representation to the conduct of the first respondent. However, this is his responsibility, and he had previously been represented in these proceedings.
n. When considering alternatives to strike out, one of the witnesses is no longer employed by the first respondent and there is no guarantee that that witness would be available. She has agreed to attend this hearing but there is no guarantee that this will change.
o. The claimant's approach to this hearing and his preparation is unreasonable and vexatious. This is the first respondent's opposition to the claimant's strike out application but also an application by the first respondent to strike out the claim on the basis of either unreasonable conduct under Rule 37(1)(b) or for a failure to comply with directions of the tribunal under Rule 37(1)(c).

The Rules on Strike Out

12. The Rules on strike out are contained within Rule 37 of the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013. Rule 37 gives the Employment Tribunal the power, at any stage of proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response. Strike out must fall within one of several expressed grounds for strike out. Those relevant to this applications are:

i. that the manner in which the proceedings have been conducted by the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious
ii. Non-compliance with any of the rules or with an order of the tribunal
iii. That the tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response.

13. The tribunal reminded itself of the approach to be adopted when considering whether to strike out a claim, as approved and applied in the **Hasan v Tesco Stores (2016) UKEAT/0098/16** case:

    i. Has one of the specified grounds for striking out been established?
    ii. Does the tribunal consider, as a matter of discretion, that the claim should be struck out, or should the order be amended or should a deposit be ordered?

14. That highlighted in **Hassan** is the approach that this employment tribunal adopted when considering whether to strike out the claims.

15. However, consideration of whether a fair trial is still possible retains importance when considering whether as a tribunal we ought to use our discretion to strike out for the other grounds, including for conduct reasons and for strikeout for non-compliance with an order. Authority for this proposition is the judgment of Judge Richardson in **Weir Valves and Controls (UK) Ltd v Armitage [2004] ICR 371**, who identified this as a factor to be taken into account, alongside others including the magnitude of the default, whether the default is the responsibility of the solicitor or the party, and what disruption, unfairness or prejudice has been caused (see paragraph 17).

16. In considering whether a fair trial was possible. We as a tribunal need to take account of all relevant circumstances.

17. As part of this analysis, we must include in our analysis the fairness to all parties.

18. This tribunal also considered that, as per LJ Sedley in **Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684**, it would take 'something unusual indeed to justify the striking out, on procedural grounds, of a claim which has arrived at the point of trial'. And further that the tribunal should consider whether there is 'less drastic means to the end for which the strike-out power exists'. This builds on Judge Richardson's decision that '…tribunals should consider whether a lesser sanction might be appropriate in the circumstances' (at paragraph 33 of **Armitage**).

Analysis and conclusion

Claimant's application to strike out responses

19. The claimant's application was brought on the grounds that the

respondents had failed to comply with tribunal orders in respect of the final hearing bundle.

20. The directions for final hearing preparation are contained in Employment Judge Horne's Case Management Orders, that were prepared following the Case Management Preliminary Hearing on 26 September 2023. EJ Horne directed that the parties were to have sent to each other all relevant documents in their possession by 24 October 2024.

21. The first respondent was directed to try to agree the contents of the final hearing bundle by 07 November 2024, and deliver a copy of that agreed bundle to the other parties by 21 November 2023.

22. The parties agreed to vary the delivery of the agreed bundle until 01 February 2024.

23. The claimant was sent a copy of the bundle on 01 February 2024. However, certain documents that had been disclosed by the claimant were not contained in the bundle (largely medical documents relating to disability, which was no longer a live issue in this case) and the bundle was not paginated.

24. The claimant would not agree to the bundle of documents in these circumstances.

25. There was correspondence between the parties, with the respondents explaining to the claimant that the additional documents had not been included as they were irrelevant, and invited the claimant to explain on what basis he said they were relevant. The claimant appears to have failed to engage with that question in any of his correspondence requesting the documents to be added. For the avoidance of doubt, this tribunal considers the question of relevant to be a valid question.

26. The bundle was completed on 15 March 2024. And at that point the claimant gave the impression that his intention was to produce a witness statement. He clearly considered this to be possible and feasible.

27. The claimant's application was refused. The claimant has not satisfied the tribunal that the conduct of the respondents was such to justify striking out the responses, or that there had been a breach of directions such as to justify strike out. The bundle of documents was settled., save for medical documents disclosed by the claimant that do not appear relevant to the issues in this case. The bundle, in any event had been completed by 15 March 2024. The claimant had access to all of the relevant evidence since at least 01 February 2024.

28. Further, the tribunal considers that a fair hearing is still possible. The bundle is now agreed. The parties have produced witness statements. The hearing can be split in two, with matters concerning the protected act and sick pay (documents were in the draft bundle sent on 01 February 2024) can be addressed at this hearing, with the remaining claims determined at a postponed hearing. The delay in the case returning will not be a significant delay. And the claimant can cross-examine individuals on his

allegation of falsified documents at that next hearing.

29. In these circumstances a fair hearing was still possible. And the application to strike out the responses was refused.

First respondent's application to strike out the claim

30. The first respondent's application to strike out the claim is also refused.

31. The claimant at the start of this hearing was not in compliance with tribunal directions in respect of producing a witness statement. And ultimately the claimant's approach has caused difficulties in the preparation of this case, which has affected whether it was ready to be heard.

32. However, the first respondent is at fault too. In that the first respondent sent to the claimant witness statements that he could not open without a password, with that password being withheld until the claimant had produced his witness statement.

33. The claimant's decision not to produce a witness statement has made it difficult to have a fair hearing in this trial window.

34. However, the tribunal considers that a lesser sanction is more appropriate, given that a fair hearing is still possible (for the reasons outlined above).

35. Given a fair hearing is still possible and given that the new trial window is only a short delay. The first respondent's application to strike out the claim is also refused.

Amendment Application: The claimant's application to amend his claim

36. The claimant attended a preliminary hearing in public on 27 February 2024 before Employment Judge Tobin. At this hearing an oral judgment was handed down with a determination that the claimant's Cervical Spondylosis with nerve entrapment was not a disability at the time of the disability discrimination complaints.

37. The claimant made an application to amend his claim by email on 06 March 2024. This email was his formal application to amend his disability discrimination claim to include back pain, which he describes as having impacted his daily life to a greater extent than the Cervical Spondylosis with nerve entrapment.

38. On the afternoon of day 2, the claimant made the following submissions in support of his amendment application:

    a. The claimant had the back pain from the very beginning of these proceedings.
    b. He mentioned it to his then legal representative, back in October/November 2022. It was due to her inexperience that she did not include it in the claim. She told him that there was no need to mention back pain in the claim and therefore it was not included.

c. The cervical issues were causing the back pain as far as he was aware at the time.
d. When it was raised with the judge, he explained that they were distinct from one another. After which the claimant says he made an application to amend his claim to include back pain.
e. The back pain was the worst impact.

39. Mr Stenson, on behalf of the second respondent, and opposing the application made the following submissions:

a. The claimant was right that EJ Tobin had distinguished between the impairment of Cervical Spondylosis with nerve entrapment and back pain, with a clear reason that the medical documents supported a clear distinction.
b. The claimant gave all his necessary evidence in his witness impact statement. This included the impacts that he was suffering including intense headaches and neck pain.
c. EJ Tobin considered the impact statement and supporting evidence and concluded that the claimant did not have a disability as alleged at the material time. As at the time it could not be said to be long term or likely to be.
d. The exact same finding would have been made had the claim included back pain, as the impact statement would have been the same and the same symptoms would have been considered. Especially in circumstances where the claimant says that all of these issues stem from an accident at work on 27 July 2022.
e. The amendment application being pursued is substantial. It is a new factual basis to a claim, rather than relabeling of existing matters.
f. The claimant's position is that the back pain and Cervical Spondylosis are connected. And EJ Tobin has already made findings on that.
g. When professionally represented, his claim should have made reference to a back impairment if that was his claim. It did not. There is no reason not to include it. Especially given that he now says that the back pain caused him the most difficulty.
h. The prejudice to the respondents in allowing this amendment is significant. It would double the number of claims to be defended, which would inevitably add to the length of the hearing. And this is in circumstances where the parties have already incurred costs attending a preliminary hearing to determine disability, which has a sole purpose of ensuring a proportionate approach to hearings and reucing the burden on tribunals where possible.
i. This is the claimant seeking to have a re-hearing of his disability issue, but on a separate condition.
j. This would re-introduce a matter that has already been decided on, or at the very least should have been decided on at the hearing that was listed to determine the precise issue of disability.
k. The claimant has made this application at a similar time to applying for EJ Tobin to reconsider his decision. This is a claimant that is simply unhappy with the decision. That is not grounds to extend the claim to include new facts out of time.
l. To allow the amendment would be to render the findings of EJ

Tobin null and void.

40. Mr Wilford, on behalf of the first respondent, and opposing the application made the following submissions:

    a. He endorsed the submissions made by Mr Stenson.
    b. The appropriate point to have made an application to amend the claim should and would have been at the preliminary hearing where disability was being determined. It is at that hearing where there was an open dialogue about disability and the circumstances.
    c. This would simply give the claimant a second bite of the cherry, in circumstances where his first bite did not succeed.

Law on amendment

41. In considering the application to amend the claim, the tribunal applied the balance of injustice and hardship test (**Selkent**), and took account of important case law, including **Ahuja v Inghams [2002] ICR 1485**, **Vaughan v Modality Partnership UKEAT/0147/20/BA** and **The Commissioner of Police of the Metropolis v Mr A Denby: UKEAT/0314/16/RN**.

42. In considering this matter the tribunal considered and balanced the prejudice that would be caused to the claimant in not allowing the amendment application to succeed against the prejudice that would be caused to the respondent in allowing the application to succeed.

43. In **Selkent**, the Employment Appeal tribunal set out a non-exhaustive list of relevant factors which are to be taken into account in considering the balancing exercise of all the relevant factors, having regard to the interests of justice and the relative hardship that would be caused to the parties by the granting or refusing of the amendment. These were the nature of the amendment, the applicability of time limits, and the timing and manner of the application:

> *"(4) Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.*
>
> *(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:*
>
> *The nature of the amendment*
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> *Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of the minor matters or is a*

substantial alteration pleading a new cause of action.

The applicability of time limits

If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions eg, in the case of unfair dismissal, S.67 of the 1978 Act.

The timing and manner of the application

An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time - before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

44. The Presidential Guidance reaffirms the **Cocking** and **Selkent** guidance, noting that relevant factors include the three matters outlined in **Selkent**, and also noting that tribunals draw a distinction between amendments which seek to add or substitute a new claim arising out of the same facts as the original claim, and those which add a new claim entirely unconnected with the original claim.

45. With regard to time limits, the Presidential Guidance notes that the fact that the relevant time limit for presenting the new claim has expired will not exclude the discretion to allow the amendment, and also that it will not always be just to allow an amendment even where no new facts are pleaded. In particular, the Guidance notes that where there is no link between the facts described in the claim form and the proposed amendment, the tribunal must consider whether the new claim is in time and will take into account the tests for extending time limits. In this case, this was the just and equitable formula in relation to newly brought discrimination complaints.

Amendment Application: analysis and conclusions

46. The claimant made an application to amend his claim by email dated 06 March 2024. This was to include an impairment of back pain for the purposes of a disability discrimination complaint which had previously been brought on a different impairment, namely the physical impairment of Cervical Spondylosis with nerve entrapment. In short, the claimant was

seeking to revive a disability discrimination complaint that had been dismissed following a determination that the impairment on which he initially brought that complaint was not a disability at the material time, through amending his claim to include a different impairment. At the point of making the application there was no live disability discrimination complaint. As this had been dismissed at a hearing before Employment Judge Tobin on 27 February 2024.

47. In these circumstances the amendment was introducing something new, would require the respondents to undertake significant new enquiry and therefore is considered to be a substantial amendment by this tribunal. This weighs against allowing the amendment.

48. The latest of the specific allegations of disability discrimination concern the termination of the claimant's assignment (the claimant says with both respondents) on 16 August 2022. For the purposes of time limits, the tribunal considers the relevant date to be the date on which the application is made. The application being made on 06 March 2024 is therefore at least 16 months out of time. This is a significant period beyond the three-month primary time limit to bring a discrimination complaint contained within s.123 of the Equality Act 2010. The claimant has adduced no evidence and provided no submissions on why it would be just and equitable to extend time in these circumstances. The tribunlal based on the evidence before it and having considered the submissions of the parties has decided that it would not be just and equitable to extend time in these circumstances. Although not conclusive, this is a heavy weight in favour of refusing the application.

49. Turning to the timing and manner of the application. This was made just over a week after Employment Judge Tobin had determined that the claimant did not have a disability by reason of his pleaded impairment, that being Cervical Spondylosis with nerve entrapment, at the material time. And is in direct response to that decision. Further, the application is made only 3 weeks before the final hearing was due to start. This again weighs against allowing the application.

50. There is clear prejudice to the respondents in allowing the amendment, in that they have gone to the time and cost of preparing and attending a preliminary hearing that was listed to determine the disability status of the claimant. To allow the amendment would mean that effort and cost was wasted as it would defeat the purpose and determination of that hearing.

51. The claimant was represented at the time of presenting his claim form. There was a conscious decision not to include the back pain as a separate impairment at the time. And this was explained to Employment Judge Buzzard at the preliminary hearing that took place on 11 July 2023.

52. The claimant represented himself at the Preliminary Hearing before Employment Judge Horne on 26 September 2023. If he disagreed with the impairment being limited to Cervical Spondylosis with nerve entrapment then the claimant could have raised it himself at this point, especially given that at that hearing the listing of a hearing to determine disability was discussed.

53. The claimant has provided no explanation as to why an application to amend the claim was not made sooner. The only explanation is that the claimant disagreed with the decision of Employment Judge Tobin.

54. Furthermore, in respect of the second respondent, part of the disability discrimination allegation is that it terminated the claimant's assignment with itself. The claimant relies on the document at p.175 of the bundle in this regard. This document makes it clear that the second respondent would look for an alternative assignment when the claimant was available for work again. This therefore has no prospects of success based on the evidence before this tribunal.

55. In the above circumstances, the tribunal concludes that the application to amend the claim is refused.

Application by the claimant for postponement

56. The claimant made an application to postpone the hearing on both the first and third day of this hearing.

57. The application made on the first day was for the reasons extended above in respect of preparation of the bundle by the respondents and the impact that the claimant says this had on him in being able to prepare for this hearing and to find and instruct a representative. This was refused. The tribunal made adjustments to the hearing which meant that tribunal time would not be wasted and the hearing dates could be used to progress the case.

58. The claimant had had sight of all of the relevant documents in advance of this hearing (and all the documents relating to the protected act and sick pay were in the draft bundle in February). The hearing was restricted to deal with the victimisation claim only. And the claimant was afforded time to complete a witness statement. In those circumstances, and given that set out above, the application to postpone did not succeed.

59. The claimant repeated his application for a postponement on day 3. The claimant by this time had produced a witness statement. And the ET1 was detailed enough to stand as evidence where there were any gaps. This application in these circumstances was refused.

Case No: 2400006/2023

Employment Judge **Mark Butler**

Date: 07 May 2024

JUDGMENT SENT TO THE PARTIES ON
Date: 13 May 2024

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FOR THE TRIBUNAL OFFICE

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