EMPLOYMENT TRIBUNALS

Claimant: Dr M B Khan

Respondent: University of Lincoln

Heard at: Nottingham Employment Tribunal (hybrid by CVP)

On: 22 March 2024

Before: Employment Judge Welch

REPRESENTATION:

Claimant: In person, supported by his son, Mr M Z Khan
Respondent: Mr S Proffitt, Counsel

PRELIMINARY HEARING IN PUBLIC
RESERVED JUDGMENT

The judgment of the Tribunal is as follows:

Strike out of claim

1. The claim is struck out:

    a. under Employment Tribunal Rule 37(1)(b) because the manner in which the proceedings have been conducted has been unreasonable;

    b. under Employment Tribunal Rule 37(1)(c) because the claimant has not complied with the Tribunal Rules or a Tribunal order; and/or

    c. under Employment Tribunal Rule 37(1)(e) because it is no longer possible to have a fair hearing in respect of it.

RESERVED REASONS

Background

1. Following a period of ACAS early conciliation from 9 July 2021 to 17 August 2021, the claimant brought claims of race and religious discrimination by a claim form presented on 15 September 2021. The particulars of claim attached to the ET1 claim form included a table of 84 allegations of discrimination dating from 19 August 2013 until 15 September 2021, although it did not provide the detail needed to understand the legal bases for the claims.

2. On 21 February 2022, following the first preliminary hearing for case management, the claimant was ordered to provide further information on his claims, "*by way of addition to his schedule of acts relied on, set out his comparators for the direct discrimination claims, the protected act(s) relied on for the victimisation claims and the PCP relied on for the indirect discrimination claims*". The claimant prepared a schedule containing 178 allegations of discrimination.

3. A preliminary hearing for case management was held before Employment Judge Adkinson on 15 July 2022. The Judge noted that 89 of the 178 allegations in the schedule prepared by the claimant appeared to predate the presentation of the original claim form, and further that there had been no application to amend the claim to add any new allegations of discrimination.

4. By the time of the hearing, on 15 July 2022, the claimant had resigned from his position with the respondent university and had been paid in lieu of notice, such that his effective date of termination was 13 July 2022. The claimant indicated in this hearing that his dismissal was a constructive unfair dismissal. The

claimant was informed that he could present a new claim or apply to amend his claim to include a claim for constructive unfair dismissal.

5. The case was listed for a two-day public preliminary hearing to consider any applications made by the claimant to amend his claim, to clarify the claims and issues, to consider any applications by the respondent to strike out or make deposit orders in respect of the claims, and to go on to make further case management directions.

6. The claimant presented a second claim on 16 October 2022, following a further period of ACAS early conciliation between 9 October and 20 November 2022. The cases were consolidated.

7. The public preliminary hearing was held by Employment Judge Broughton on 28 and 29 November 2022. The claimant was granted leave to amend his claim to include a further 17 allegations of discrimination. Leave was refused to amend the claim in respect of the remaining allegations.

8. A further preliminary hearing for case management purposes was held by Employment Judge Clark on 25 July 2023. He listed the case for a public preliminary hearing on 17 and 18 of August 2023 to finalise the issues of fact and law, to determine the respondent's strike out applications (referred to below), to determine whether time should be extended for any claims presented out of time, and to make further case management orders.

9. This public preliminary hearing on 17 and 28 August 2023 was again held by Employment Judge Clark, who considered the respondent's strike out applications relating to procedural irregularities in respect of the second claim, and whether a fair trial remained possible based on the age of some of the complaints. Whilst a third strike out application was before the Judge relating

to whether there was any reasonable prospect of the claimant being able to establish a connection between some of the very old allegations of discrimination and those which were presented within time. However, the latter was not pursued at the public preliminary hearing due to lack of time.

10. Much of this preliminary hearing was taken up with identifying and clarifying the issues in the case, which were produced in two separate tables of allegations, with different formats. Employment Judge Clarke made the following observation about the tables of allegations: "*6) If, and only if, the parties are able to sensibly agree a composite format which deals with any remaining aspects of formatting (and does not change the substance of the content beyond correcting any typo's) then I am content that happens. However, I have not made orders to that effect in an attempt to minimise further costs and effort to either side and so as not to generate further grounds for peripheral dispute*." They were not able to do so.

11. In addition, further Case Management Orders were made dated 27 September 2023 [P3-18 of the respondent's bundle for the strike out hearing] and will be referred to below.

12. A joint bundle was provided by the respondent to the claimant totalling over 3,000 pages, which included the claimant's disclosure which had been sent on the 23 November 2023.

13. The respondent provided additional documents to the claimant on 22 December 2023 and 12 January 2024, and therefore provided the claimant with an updated hearing bundle on 18 January 2024. This updated bundle contained over 4,000 pages.

14. The case came before me for the first time on 22 January 2024 for a preliminary hearing for case management purposes. At this hearing, I made appropriate case management orders to progress towards a final hearing due to commence on 19 February 2024.

15. A further preliminary hearing for case management was held before me on 9 February 2024 to check that the case was ready to commence on 19 February 2024 when the five-week final hearing would take place.

16. I will refer to the relevant Case Management Orders made during some of these hearings below, since they are relevant to the respondent's strike out applications.

The strike out hearing

17. The hearing was a public preliminary hybrid hearing, where the claimant attended in person and the respondent's representatives attended remotely via CVP. The hearing was to consider the respondent's strike out applications.

18. The respondent had provided a skeleton argument for use at the public preliminary hearing together with a bundle of documents to which it would refer. Any reference to page numbers in this Judgment refer to page numbers within the respondent's bundle for the strike out hearing.

19. The claimant sent an email at 8.25am on the morning of the hearing attaching witness statements and a bundle of documents for the final hearing which I will refer to below. He did not provide any other documentation for the preliminary hearing, save that he asked to re-send an earlier document which had been prepared for an earlier public preliminary hearing, which he did.

20. There were numerous case management orders made during the course of the proceedings, and I will not set out each and every one, but will refer to particular

ones which I consider to be relevant to the strike out applications.

Relevant Case Management Orders

21. Employment Judge Clark made Case Management Orders relating to the following dated 27 September 2023 [P3-18]:

    a. the parties send a list, together with copies, of their documents to each other by 10 November 2023;

    b. a final hearing bundle must be agreed by 1 December 2023 and provided by the respondent to the claimant by the same date;

    c. witness statements which must be "*cross-referenced to the bundle(s)*…" to be exchanged on or before 15 January 2024.

22. Both parties sent a list together with copies of their documents, although the claimant sent his copies on 23 November 2023.

23. The respondent provided further documents, following a request by the claimant in accordance with its ongoing duty of disclosure, on 29 November 2023 and provided a joint hearing bundle of over 3,000 pages on 1 December 2023. This included documents the respondent had received from the claimant.

24. Following further requests from the claimant, the respondent provided additional disclosure of documents on 22 December 2023 and 12 January 2024 and therefore provided the claimant with an updated bundle of documents and a fresh index on 18 January 2024, which the claimant confirmed he had received in the case management preliminary hearing before me on 22 January 2024.

25. At this telephone preliminary hearing, the claimant confirmed that he had not opened the updated bundle sent to him on 18 January 2024 since he was unsure whether the additional documents which had been included would be

allowed into the final bundle as they were sent late. I explained the ongoing duty of disclosure and made clear in this hearing, that he should review this bundle and that this would form the basis of the final hearing bundle (subject to some additional specific disclosure ordered during the hearing). Having checked the bundle, if the claimant considered that any of his documents were still missing from this bundle, he was to send copies of those documents to the respondent for inclusion in the final hearing bundle.

26. Immediately prior to the hearing on 22 January 2024, the respondent had provided its witness statements to the claimant (which had been password protected until exchange of statements was effected between the parties).

27. The claimant had not provided his witness statement(s) by the time of the hearing, but confirmed that they were ready to send, although they did not refer to the updated page numbers from the bundle sent on 18 January 2024 since the claimant had not opened it. It was agreed that the claimant would send over his witness statements following the case management preliminary hearing, although it was acknowledged, that the page reference numbers would require updating once the hearing bundle had been finalised. These were sent on 23 January 2024. He exchanged two witness statements, both in his name.

28. The claimant was told during the hearing on 22 January to carefully review the bundle sent on 18 January 2024 and the updated bundle due to be sent to him by 29 January 2024, which would include the specific disclosure I had ordered. Should the claimant find that any relevant documents were missing from the bundle, he was to send them to the respondent for inclusion in the bundle.

29. It was stressed that an agreed bundle was required for the forthcoming 25-day hearing and that it would not be practical for the parties to have their own bundles.

30. The respondent provided further disclosure on 29 January 2024 and provided an updated bundle to the claimant on 31 January 2024, as ordered. This updated bundle consisted of 4,508 pages.

31. At the second preliminary hearing for case management before me, on 9 February 2024, the claimant had not complied with the Orders made. He sent to the Tribunal and the respondent a further bundle of his own documents, which had not been checked against the documents already in the final bundle sent to him by the respondent. As a consequence of the claimant's non-compliance, I made the following Orders:

    a. "*The claimant is to send to the respondent by 14 February 2024 any additional documents which are not in the bundle sent to him on 31 January 2024 ('the 31 January 2024 bundle') and which are relevant to the issues in this case. He is to number those documents following on from page 4,508 (being the last page of the 31 January 2024 bundle). The copies sent to the respondent should have the page numbers written on them so that they can be inserted into the 31 January 2024 bundle so that this can become the 'final bundle'.*

    b. *The claimant is to amend his two witness statements only to refer to the correct page numbers within the final bundle. He is to send his amended statements to the respondent by 14 February 2024*".

32. The claimant failed to do this, and the respondent therefore made an application for an unless order on 15 February 2024 [P30].

33. The claimant responded to the respondent's application on the same day and indicated that, as he was in the process of appealing the recent Case Management Orders to the Employment Appeal Tribunal ('EAT'), he looked, "*forward to Employment Appeal Tribunal to determine its appeal before further proceedings can be held*."

34. The correspondence was referred to Employment Judge Butler, who, having confirmed the position as to what had been done by the parties, sent the following correspondence to the parties on 16 February 2024:

"*The Claimant's application to strike out the response has been refused and the case commencing on Monday 19 February 2024 will proceed. He has not lodged an appeal at the EAT as yet but his intention to do so does not affect the final hearing proceeding.*

Strike-out warning - Claimant

The Claimant is ordered to update his witness statement to cross-refer to the joint bundle by 9am on Monday 19 February 2024 at the latest. If he fails to do so, he is warned that the Tribunal may consider striking out his claims because he has failed to comply with the Tribunal's orders and/or a fair hearing is no longer possible and/or the manner in which he has conducted the proceedings has been unreasonable.

Additional documents

If the Claimant fails to provide any additional documents not already contained in the final hearing bundle in a separate paginated bundle by 9am on Monday 19 February 2024 at the latest it is highly likely that he will be unable to rely on them. The Respondent will be put to undue prejudice because of the Claimant's failure to adhere to the Tribunal's orders and will not be in a position to prepare

fully for the hearing. This does not affect the Respondent's right to make any further applications on the production of any additional documents."

35. On Sunday 18 February 2024, the claimant sent four new witness statements to the Tribunal, all in his name. Two of these statements were similar to the ones he had previously exchanged on 23 January 2024, and two appeared to be new ones. He did not send the original statements which he had previously exchanged duly cross referenced to the bundle.

36. The claimant also delivered to the Tribunal files of documents which he had paginated following on from the final bundle sent to him. This was over 1,000 pages of additional documents.

37. However, on reviewing the documents provided, it appeared that he had not checked these against the 31 January 2024 bundle as previously ordered, but had simply included all of his original documents (many of which were duplicates to those already within the bundle) such that the final bundle now stood at over 5,000 pages.

38. The claimant was ordered by me on 19 February 2024 to "*confirm by return and in any event by 12 noon today the following:*

1. Whether the statements he had previously exchanged have only been amended to refer to the correct page numbers from the joint bundle.

2. Confirmation that he has checked that the additional documents he has provided (being page number 4510 onwards) are not already included in the joint bundle."

39. No response was received from the claimant.

40. Having been provided by a comparison document by the respondent relating to the witness statements and having looked at the bundle provided by the

claimant, I arranged for the following to be sent to the parties: "*Employment Judge Welch has looked at the four statements provided by the claimant on 18 February 2024. It is clear that the claimant has not amended the statements he exchanged on 23 January 2024 only to include the page numbers of the final bundle as ordered on 9 February and also on 16 February 2024. Further, having considered the additional documents provided by the claimant, it is also clear that the claimant has not checked whether the documents he has added to the final bundle were already within the final bundle, since many are already included.*

Strike out warning – Claimant

The claimant is ordered to update his two witness statements exchanged on 23 January 2024 to cross refer to the joint bundle by 12 noon on 20 February 2024 at the latest. If he fails to do so, he is warned that the Tribunal may consider striking out his claims because he has failed to comply with the Tribunal's orders and/or a fair hearing is no longer possible and/or the manner in which he has conducted the proceedings has been unreasonable.

Consideration will be given at the final hearing as to:

1. *whether the additional documents the claimant has sought to include into the final bundle (from page 4508 onwards), which do not comply with the Tribunal's previous Orders, can be adduced in evidence; and*
2. *whether any of the claimant's new statements sent on 18 February 2024 may be adduced in evidence*."

41. On 19 February 2024, the 25 day hearing commenced and the panel spent time reading into the case.

42. On this date, the claimant lodged appeals to the Employment Appeal Tribunal (EAT) relating to the Case Management Orders made on 9 February 2024 [P169-173].

43. On 20 February 2024, the claimant emailed the Tribunal [P177] to confirm that as he had appealed to the EAT, "*the claimant understands that these appeals will be catered to by the Employment Appeal Tribunal before further proceedings can be held*." A response was sent to the parties on 21 February 2024 [P178] which confirmed that "*these proceedings are not affected by any appeals to the Employment Appeal Tribunal and therefore the hearing will go ahead tomorrow when the respondent's strike out application will be considered*."

Respondent's Strike out applications

44. The respondent's strike out application was initially made on 20 February 2024, and stated:

"…*that the claims should be struck out under Rules 37(1)(c) and/or 37(1)(d) (sic), due to [the claimant's] unreasonable conduct and persistent non-compliance with the Tribunal's Orders..."* [P174].

45. The case had been listed for a 25-day hearing starting on 19 February 2024. The first three days had been agreed to be used for reading time for the panel. The parties were scheduled to attend on day 4 of the hearing (22 February 2024). The respondent's strike out application was to be considered at the start of that day and the parties were informed of this in advance.

46. The claimant presented a fit note for "*mixed anxiety and low mood*" on the afternoon of 21 February 2024 by email [P179] and confirmed that he wished to, "*request that the ET proceedings be delayed by at least for 4 weeks (per the*

fit note) as I do not want my health to further deteriorate. Furthermore, the tribunal can appreciate that in this state of mind, I am not able to pursue my case in order for a fair trial to be possible."

47. I granted a postponement of the hearing since it did not seem possible for the hearing to go ahead in these circumstances. However, as the fit note did not confirm whether the claimant was unable to attend the hearing, and in accordance with the presidential guidance on postponements and adjournments, the claimant was ordered to:

"..send to the Tribunal and the respondent by no later than 28th February 2024 a medical opinion dealing with:

(a) confirmation of whether the claimant was unfit to attend the hearing listed for 25 days from 19 February 2024; and

(b) when the claimant will be sufficiently recovered to participate in the proceedings along with details of any adjustments that will need to be made during the hearing (if any).

The last day of the current listing (22 March 2024) which is not covered by the claimant's fit note has been converted to a Public Preliminary hearing for 1 day before an Employment Judge sitting alone to consider the respondent's strike out application dated 20 February 2024, and go on to make any case management orders, as appropriate, should the claims not be struck out."

48. I made these Orders as the fit note was insufficient to show that the claimant was unable to attend or take part in the hearing and further evidence was required.

49. The strike out hearing was therefore listed for what would have been day 25 of the final hearing, had it gone ahead, which was not covered by the original fit note provided by the claimant.

50. The respondent provided a further ground for its strike out application in an email dated 22 February 2024 [P185-6] which stated:

"…*under Rule 37(1)(e) that it is no longer possible to have a fair trial. This is in summary on the basis that the right to a fair trial includes the right of the parties to have a trial within a reasonable time period*."

51. The claimant made an application to postpone the strike out hearing by email dated 23 February 2024 [P186-7] which said, "*I will not be undertaking any ET work during these 4 weeks to have some stress free time to regain my health*."

52. The Tribunal confirmed that the claimant's request for a postponement was refused by letter sent by email on 23 February 2024 [P190], which went on to say:

"*The claimant was ordered on 21 February 2024 to provide a medical opinion on by no later than 28th February 2024 dealing with:*

(a) confirmation of whether the claimant was unfit to attend the hearing listed for 25 days from 19 February 2024; and

(b) when the claimant will be sufficiently recovered to participate in the proceedings along with details of any adjustments that will need to be made during the hearing (if any).

Additionally, this medical opinion should also confirm whether the claimant will be sufficiently recovered to participate in the 1 day public preliminary hearing listed for 22 March 2024, along with details of any adjustments that will need to be made during the hearing (if any).

Further strike out warning

The claimant is ordered to:

1. update his two witness statements exchanged on 23 January 2024 to cross refer to the joint bundle by 9am on Friday 22 March 2024 at the latest.

2. Check whether the documents provided to the Tribunal on 18 February 2024 (and brought into the Tribunal on 19 February 2024) are already within the final bundle provided by the respondent. Any of the claimant's documents not within the final bundle are to be sent to the Tribunal and the respondent by 9am on Friday 22 March 2024.

If he fails to do so, he is warned that the Tribunal may consider striking out his claims because he has failed to comply with the Tribunal's orders and/or a fair hearing is no longer possible and/or the manner in which he has conducted the proceedings has been unreasonable.

The hearing listed on 22 March 2024 will consider the respondent's strike out applications as set out in its emails dated 20 February 2024 and 22 February 2024. Namely, whether the claims should be struck out under Rules 37(1)(b) (sic) and/or Rules 37(1)(d) and/or Rule 37(1)(e), on the bases of the Claimant's unreasonable conduct, breach of Orders and/or that it is no longer possible to have a fair trial."

53. The claimant's son sent an email from the claimant's email address on 28 February 2024 [P192] which attached a fit note from the GP declaring the claimant unfit to work for 4 weeks. He stated, he was not sure what a medical opinion entails, but went on to say: "…*as well as the antidepressants he has been prescribed. In terms of a further medical opinion, the GP informed us they*

do not deal with tribunal matters and that a fit note should be adequate evidence regarding [the claimant's] condition."

54. On 6 March 2024, the Tribunal wrote to the parties confirming that I had been referred the claimant's son's email dated 28 February 2024 providing a further fit note. The letter clearly stated once again that the appeals to the EAT did not affect the conduct of these proceedings and that the hearing listed for 22 March 2024 would remain as listed.

55. The letter went on to confirm that the claimant had been ordered to provide a medical opinion and reiterated what the claimant had been ordered to do. It went on to say that in the absence of medical evidence confirming that the claimant is unfit to attend the hearing, and when he may be sufficiently recovered to participate, the hearing would go ahead. He was warned that should he fail to attend, the hearing would proceed in his absence.

56. The claimant failed to comply with the Orders relating to the provision of a medical opinion.

<u>Hearing on 22 March 2024</u>

57. Prior to the hearing commencing, the claimant sent an email to the Tribunal at approximately 8.25am. This email contained 4 witness statements for the claimant, containing some references to the main bundle, and some cross references to documents within the additional documents provided by the claimant (being approximately 1,300 pages). However, the claimant appeared to have used the same PDF document for his bundle of documents provided on 19 February 2024, and had merely redacted pages by blacking out those pages which he considered were duplicated within the main bundle. Whilst his witness statements referred to some page numbers from the final bundle, they

still referred to the same page numbers in his additional bundle as those provided on 19 February. The claimant's case was that if pages had been deleted, this would have messed up his referencing and required him to carry out further work. He confirmed that his son had carried out this task for him due to his ill health.

58. The respondent confirmed that whilst the claimant had done what appeared to be partial compliance with some of the Orders immediately prior to the strike out hearing, the crux of its arguments remained and strike out was pursued on all grounds previously raised.

59. During the hearing, I confirmed that, having checked with the listing department, the earliest this case could be relisted for a 5-week hearing was mid-October 2025.

Law

60. Rule 37 of the Employment Tribunals (Rules of Procedure) Regulations 2013 (the Tribunal Rules) provides:

"*(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;

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

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

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

61. The Tribunal must first consider whether any of the grounds set out in rule 37(1) have been established; and then, having identified any established grounds, it must decide whether to exercise its discretion to order strike-out.

62. In deciding whether to order strike-out, Tribunals should have regard to the overriding objective of dealing with cases '*fairly and justly'*, set out in rule 2 of the Tribunal Rules.

63. Whilst the striking out of discrimination claims should be rare because of the public interest importance of such claims being determined after examination of the evidence, it is possible to strike out such claims where there can no longer be a fair hearing, including within a reasonable time frame.

64. Strike-out must be a proportionate response, and cases alleging abuse of process or discrimination are only to be struck out in the most obvious and plainest of cases. In Anyanwu v South Bank Student Union [2001] 1 W.L.R. 638, Lord Steyn stated that:

"*24*. …*For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest*."

65. Even where it is found that a party's conduct has been such as to strike out the claim under rule 37(1)(b), in ordinary circumstances, a claim should not be struck out unless a fair trial is no longer possible (De Keyser Limited v Wilson UKEAT/1438/00).

66. Article 6 of the European Convention on Human Rights lays down the right to a fair trial, including the right to have a trial within a reasonable time. Peter Gibson LJ in Andreou v The Lord Chancellors Department [2002] EWCA Civ 1192 stated at paragraph 46:

"*The Tribunal in deciding whether to refuse an adjournment had to balance a number of factors. They included not merely fairness to Mrs Andreou (of course an extremely important matter made more so by the incorporation into our law of the European Convention on Human Rights, having regard to the terms of Article 6): they had to include fairness to the respondent. All accusations of racial discrimination are serious. They are serious for the victim. They are serious for those accused of those allegations, who must take very seriously what is alleged against them. It is rightly considered that a complaint such as this must be investigated, and disputes determined, promptly; hence the short limitation period allowed. This case concerned events which took place very many years ago, well outside the normal three months limitation period. The Tribunal also had to take into account the fact that other litigants are waiting to have their cases heard. It is notorious how heavily burdened Employment Tribunals are these days…*"

67. The Tribunal must consider whether striking out the claim is a proportionate response. The Court of Appeal case of Blockbuster Entertainment Limited v

James [2006] IRLR 630 considered a tribunal's decision to strike out a claim based on unreasonable conduct. Sedley LJ at paragraph 21 noted that:

"*It is not only by reason of the Convention right to a fair hearing vouchsafed by article 6 that striking out, even if otherwise warranted, must be a proportionate response. The common law… has for a long time taken a similar stance… What the jurisprudence of the European Court of Human Rights has contributed to the principle is the need for a structured examination. The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact — if it is a fact — that the tribunal is ready to try the claims; or — as the case may be — that there is still time in which orderly preparation can be made*."

68. In Riley v Crown Prosecution Service 2013 IRLR 966 CA, the claimant's depression prevented her from attending to her claim, and this was for a period of indefinite duration. Longmore LJ said as follows in paragraph 27 of his judgment:

"*27. It is important to remember that the overriding objective in ordinary civil cases (and employment cases are in this respect ordinary civil cases) is to deal with cases justly and expeditiously without unreasonable expense. Article 6 of the ECHR emphasises that every litigant is entitled to "a fair trial within a reasonable time". That is an entitlement of both parties to litigation. It is also an entitlement of other litigants that they should not be compelled to wait for justice more than a reasonable time.*"

Submissions

69. The respondent provided written submissions which were expanded upon orally. In brief, they were that the claimant had failed to comply with the

directions on multiple occasions. Notably, 6 times (including 3 strike out warnings) regarding witness statements. Also, the claimant had made no attempt to comply with the Tribunal's orders regarding the provision of medical evidence, despite these being iterated three times.

70. The strike out applications were brought under rules 37(1)(b) (mistakenly referred to as 37(1)(d) in the skeleton argument, but rectified in oral submissions), 37(1)(c) and 37(1)(e) of the Tribunal Rules. They were set out in the skeleton argument as being, "*namely due to claimant's unreasonable conduct, persistent non-compliance with the ET's Orders, and inability for there to be a fair trial in light of the postponement, respectively*."

71. In Blockbuster Entertainment Ltd v James [2006] ICR 630, the Court of Appeal noted "*two cardinal conditions*" for the exercise of strike out in addition to the final consideration of proportionality, being either that:

    a. the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps; or

    b. that it has made a fair trial impossible.

72. Baber v Royal Bank of Scotland plc [2018] 1 WLUK 232 identifies that strike out for non-compliance must have regard to the overriding objective, having regard to the following 5 factors:

    a. The magnitude of non-compliance;

    b. Whether the failure was the responsibility of the party or his representative;

    c. The extent to which the failure causes unfairness, disruption, or prejudice;

    d. Whether a fair hearing is still possible; and

e. whether striking out or some lesser remedy would be an appropriate response.

73. A fair trial in the ET Rules includes the right of parties to have a fair trial within a reasonable time period and there is public interest in the prompt and efficient adjudication of Tribunal cases.

74. The respondent contended that the first of the two cardinal points in James (above) were "*obviously*" made out as the claimant clearly disagreed with the Tribunal's Orders and so did not comply with them. This was both deliberate and persistent disregard.

75. The respondent contended that the claimant's status as a litigant in person needed to be considered in context. He is highly intelligent and capable, he has prepared and attended multiple preliminary hearings, his ability to grapple with the Tribunal process cannot be in doubt, the claimant is technologically and physically capable to engage with the process and the tasks he has persistently failed to do are essentially administrative in nature. They were not complicated to comply with, rather he has chosen to disregard them because he does not agree with them.

76. When considering the 5 factors in Baber, the claimant's magnitude of non-compliance was high, it was entirely his own responsibility, there was severe disruption and prejudice, including that there were now 6 different versions of the claimant's witness statement. Also that a fair hearing was no longer possible within a reasonable time period.

77. Finally, there was no alternative remedy that was proportionate. Some of the claims are almost 11 years old, and the respondent's witnesses are likely to

have little, or vague, recollection of the events complained about. It is therefore no longer possible to have a fair trial within a reasonable time period.

78. I was conscious of the claimant's religious faith and his request to attend the mosque to observe prayers. I enquired how long the claimant would need to prepare his submissions. Following an agreed two hour break, the claimant addressed me orally. He had also provided a document prepared for an earlier strike out hearing, much of which related to striking out claims where there was no reasonable prospects of success, which was not relied upon by the respondent in this case.

79. The claimant's submissions in brief, were that strike out should only occur in the clearest of cases.

80. The claimant referred to the fact that he was a litigant in person, with a PhD in Management , not Law, and was teaching full time. Whereas, the respondent was a large corporate organisation with a lot of employees, a 400 partnered law firm acting for it and an "*established and senior barrister*" able to work on the case.

81. The claimant contended that there had been no issues with him failing to adhere to deadlines during the 2.5 years of the proceedings, other than in recent weeks. The claimant's stress had been increasing at this time, due to the respondent failing to include his documents within the final bundle. There remained considerable duplication within the final bundle, as over the last 2 hours, the claimant and his son had identified 3 duplicate email chains within it. The claimant requested that someone should look at the evidence, which he felt was a "*book on discrimination*". No one was focussing on what evidence of discrimination is contained within the pages, instead they were focussing on the

page numbers. As the bundle had been changed on 18 January, it was not possible to create a witness statement in 4 days incorporating the new page numbers. It was a Herculean task. It was not illegal to have separate bundles for hearings, and there were cases where this had happened.

82. As far as there being no medical evidence, a fitness for work had been provided, and should be adequate. The final hearing was postponed by the Tribunal, not the claimant. He had requested that the strike out hearing be postponed, and that had been refused. He confirmed that he could give proof of medical issues, if requested.

83. It was not right to strike out a claim based on a 2 to 3 week window, but regard should be had to the whole period of the case. The claimant would have to be a very stupid person to persistently disregard orders and sabotage his case. His health had affected his ability to comply with deadlines.

84. A fair trial remains possible, and the hearing had not been postponed by the claimant. He requested the opportunity for a fair trial. There would be injustice if no one looked into his evidence and documents. Justice should be given and not be "*sacrificed at the altar of legal shenanigans*".

Conclusion

85. Firstly, I must consider whether any of the conditions in ET Rules 37(1)(b), (c) or (e) have been met.

86. The claimant has failed to comply, failed to fully comply or refused to comply with the Orders of Employment Judge Clark, Employment Judge Butler and myself.

87. The claimant wished to use his own bundles for the final hearing, and refused to engage with the respondent or the Tribunal in ensuring that a joint bundle

could be finalised. In a case with thousands of pages of documents, it would not be in accordance with the overriding objective to have allowed the claimant to continue to use his own bundles at the final hearing.

88. The claimant has failed to amend his original exchanged witness statements to cross reference them to the final bundle, as ordered on 27 September 2023 by Employment Judge Clark, by myself on 22 January 2024 and 9 February 2024, by Employment Judge Butler on 16 February 2024 and by myself on 19 February 2024. Whilst he has recently provided witness statements, these are not the original ones he exchanged, and which he had been ordered to cross reference to the bundle. Additionally, the four statements he provided on the day of the strike out hearing refer to some page numbers in the final bundle prepared by the respondent, but also refer to the same page numbers from his own bundle as provided for the start of the final hearing, which was added to the back of the final bundle, albeit with duplicated pages redacted.

89. The claimant has failed to comply with strike out warnings issued by Employment Judge Butler and myself as set out above. Despite being clearly told to check whether his additional documents were already within the bundle and then send only those additional documents which were not so contained to the respondent for inclusion in the final bundle, he failed to do so. Instead, he sent large bundles of documents without carrying out any check as to whether they were already contained within the bundle the respondent had sent.

90. I consider, therefore, that his actions amounted to wilful non-compliance. He knew what he was meant to do, but did not do it because he wished to continue using his own bundle, and did not agree with the Tribunal's Orders. I consider that his conduct in this regard was unreasonable.

91. As the claimant has had the main bundle of documents from the respondent since 1 December 2023 (subject to further disclosure which was provided) and has been given numerous opportunities to carry out this administrative task, he has still failed to do so, having only partially complied at the eleventh hour. As a result of the claimant's failure to comply with previous orders, I have no faith that the claimant will ever fully comply with Orders made by the Tribunal.
92. I am therefore satisfied that the claimant has failed to comply with Case Management Orders on multiple occasions. Whilst the focus for the respondent's application was on the latter part of the proceedings, it is clear that this did not occur over a 2 to 3 week period, as the claimant suggested in his submissions.
93. The claimant is an individual with undoubted intelligence; he has a PhD and his role involves teaching university students. Whilst a litigant in person, I am satisfied that he was fully able to comply with the Orders of the Tribunal. He chose not to comply with them, as he did not agree with them.
94. The claimant considered that his appeals to the EAT should have prevented the Tribunal from proceeding with the case, and, despite being told by the Tribunal and the respondent that this was not the case, the claimant did nothing about his case until he received confirmation that his appeals had been rejected on 14 March 2024. Even then, the claimant only partially complied with the Orders relating to the final hearing bundle and witness statements on the day of the strike out hearing. If I were to allow the claimant to continue to use the documents as provided on the day of the strike out hearing, I would be going behind the Orders of Employment Judges Clark, Butler and myself.

95. Further, the claimant has never complied with the Orders relating to providing a medical opinion despite being told to do so on three separate occasions. It has been made clear that his fit notes were not sufficient throughout this period, and that further evidence/ information was required, yet he has still failed to supply this. His assertion during the strike out hearing that his GP felt that a fit note was adequate evidence and that his GP did not engage with Tribunal matters is not acceptable. He was specifically told that further evidence was required, and the claimant was told what was needed and the claimant has done nothing to obtain this.

96. I therefore consider that the claimant's repeated failures to comply with the Orders of the Tribunal, as set out above, take the form of deliberate and persistent disregard of the required procedural steps, as set out in the James case and amounts to unreasonable conduct.

97. In considering the overriding objective, and the factors set out in the Baber case, the claimant's magnitude of non-compliance does not merely extend to the 2 to 3 weeks prior to the strike out hearing. It goes back further than that, and shows how, persistently, the claimant has not done what he was ordered to do, because he did not agree with the Orders made. I am satisfied that in continually failing or refusing to comply with the Orders made, he has acted unreasonably.

98. As the claimant is a litigant in person, he is solely responsible for the failure to comply. He was clearly able to comply, and, whilst he highlighted during the strike out hearing that his health affected his ability to comply, there was no evidence of this other than a fit note saying, "*mixed anxiety and low mood*". He continued to correspond with the Tribunal and made appeals to the EAT during

this period, which indicated that he was able to deal with the litigation at that time. Therefore, I do not accept that his ill health was the reason for his inability to comply with the Orders. I believe that he felt that the EAT appeals should have stopped his need to comply with the Orders so that the proceedings were held in abeyance pending an outcome from the EAT, which, as pointed out on multiple occasions, was not the case.

99. The tasks he was asked to do were not difficult in nature, and whilst they would have taken time, they would have assisted all parties and the Tribunal at the final hearing, to ensure that the overriding objective was adhered to.

100. I accept the respondent's assertions that the failure by the claimant to comply with the Orders has caused significant disruption, unfairness and prejudice to the respondent. As stated in its submissions, the respondent was on day 4 of a 25 day case involving over 135 allegations, with 12 witnesses, without proper witness statements from the claimant to prepare for the hearing. The claimant had had the respondent's statements, which had been properly cross referenced, for over a month prior to the final hearing commencing.

101. I take into account the fact that strike out is a Draconian measure and should not be considered lightly. I also take into account that discrimination cases should ordinarily be heard at a final hearing. However, future behaviour is often able to be predicted by past behaviour. The claimant has still failed to comply with the Order relating to providing a medical opinion, and there appears to be no prospect of him doing so. He has disregarded clear instructions on a number of occasions. On the day of the strike out hearing, I consider that his partial compliance was only done because he had failed at the EAT and knew that he was at imminent risk of his claims being struck out.

However, even at that point, he still did not fully comply with the Orders relating to the bundle and/or witness statements, but rather sought a way to navigate around them, and use his own bundle of documents, albeit with those already within the bundle redacted.

102. As it is not possible to have a hearing until mid-October 2025 at the earliest, I am satisfied that a fair hearing is no longer possible within a reasonable time frame. We have not had the benefit of a medical opinion as to when the claimant will be in a position to attend a hearing, and what, if any, adjustments may be necessary for such a hearing, and as we would need to take into account the availability of 13 witnesses, parties and representatives, it is possible that a hearing would not even be achievable at that time.

103. The claims already go back several years, some allegations dating back to 2013. They are also serious in nature, such that those against whom the allegations are made, will suffer severe prejudice in their ability to recall these events, and also in having these allegations hanging over them for a further 18 months minimum. Therefore, even though I do not do so lightly, I consider it is not possible to have a fair hearing within a reasonable time period.

104. I consider that there are no alternatives to strike out in this case. I am not satisfied that the claimant will comply with future Orders in light of his refusal to comply with previous Orders. Strike out warnings have not worked, and Unless Orders would be unlikely to solve this problem and may indeed cause additional difficulties should there be partial compliance in the future.

105. Therefore, for the reasons set out above, I am satisfied that the claims should be struck out on the basis that the claimant's conduct has been

unreasonable, that he has failed to comply with Orders of the Tribunal and/or that a fair hearing is now not possible.

Employment Judge Welch
13 May 2024

Judgment sent to the parties on:

….14 May 2024……..…

For the Tribunal:

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