EMPLOYMENT TRIBUNALS

Claimant: Mrs T Blackmore

Respondent: Schroder Corporate Services Ltd

Heard at: London South Croydon, in public, by Cloud Video Platform

On: 7 May 2024

Before: Employment Judge Tsamados (sitting alone)

Representation

Claimant: Did not attend, was not represented
Respondent: Mr A Ismail of Counsel

JUDGMENT AT A PUBLIC PRELIMINARY HEARING

The Judgment of the Employment Tribunal is as follows:

The claim is struck out under rule 37(1)(d) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 because it has not been actively pursued.

REASONS

1. These reasons are provided for the benefit of the claimant who did not attend the hearing and was not represented.

2. The claimant was employed by the respondent as a Reconciliation Manager from 31 March 2022 until 15 August 2022. Early conciliation started on 18 August 2022 and ended on 29 September 2022. The claim form is presented on 27 October 2022. Essentially the claimant brought a claim of disability discrimination against the respondent.

3. In its response dated 29 November 2022 the respondent denied, the claim in its entirety. The respondent subsequently presented amended grounds of resistance on 23 June 2023.

4. The complaints were specifically identified at a private case management discussion which took place on 19 January 2024. These are of direct disability discrimination by association and in addition the claimant wished to add a complaint of harassment related to disability.

5. Today's hearing is a public preliminary hearing, notified to the parties at that case management discussion. The hearing was set to deal with the claimant's amendment application and the respondent's strike out/deposit order applications. The full hearing was set for 16-18 October 2024. Case management orders were set requiring the claimant to co-operate in the provision of a bundle for use at this hearing and to provide a schedule of loss.

6. In an email dated 30 April 2024, the respondent indicated that it wished to also add an application that the claim be struck out on the basis that it was not being actively pursued. This had been prompted by the lack of response from the claimant to the case management orders.

7. On 2 May 2024, the claimant sent an email to the tribunal (which was not copied to the respondent), stating that since the preliminary hearing she has been unwell, she is undergoing investigations and posed the question, is the case allowed to continue in her absence as she will be unable to attend?

8. By 10 am today, the claimant was not present in the Cloud Video Platform hearing room but giving her the benefit of the doubt, my clerk made enquiries of her by telephone and by email. The claimant did not pick up her phone calls and did not respond to a subsequent email enquiring as to whether she was experiencing technical difficulties joining.

9. I asked my clerk to send her a further email stating that I was going to start the hearing at 10.45 am and if she was not present one possibility was that her claim might be struck out. However, I discovered after the hearing that whilst my clerk had drafted the email, she inadvertently had not sent it. However, I am content that this does not impact on my decision today.

10. At the start of the hearing, I apprised Mr Ishmail of the above circumstances and asked him how the respondent wished to proceed. He indicated that either under rule 47 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("the 2013 Rules") I could dismiss or continue with the claim in the claimant's absence or under rule 37 of the 2013 Rules I could strike out the claim on the basis that the claimant was not actively pursuing it (this being the respondent's most recent application). He further stated that if I believed that this was inappropriate then to consider the existing strike out/deposit order applications.

11. After a short adjournment, I decided that the most appropriate way forward was under rule 37.

12. The respondent provided me with an electronic bundle of documents containing 193 pages and an electronic supplemental bundle containing 34 pages. Mr Ismail had also provided an electronic skeleton argument albeit this related to the original applications in respect of the amendment and strike out/deposit order. However, this was of assistance under the heading Housekeeping at paragraphs 2-7.

13. I heard submissions from Mr Ishmail, in which he essentially set out the relevant chronology of events and submitted that the claim should be struck out under rule 37(1)(d) of the 2013 Rules on the basis of delay by the claimant that was either intentional or contumelious (that is disrespectful or abusive to the tribunal). He referred me to the Employment Appeal Tribunal ("EAT") case of Rolls-Royce plc v Riddle [2008] IRLR 873 at paragraph 20.

14. Paragraph 20 of Riddle states:

> *"These principles appear to have been identified because of there being justifiable cause for concern about two problems of which a failure to actively pursue a claim may be indicative. The first is that it is quite wrong for a claimant, notwithstanding that he has, by instituting a claim, started a process which he should realise affects the Employment Tribunal and the use of its resources, and affects the respondent, to fail to take reasonable steps to progress his claim in a manner that shows he has disrespect or contempt for the Tribunal and/or its procedures. In that event a question plainly arises as to whether, given such conduct, it is just to allow the claimant to continue to have access to the Tribunal for his claim. That is a distinct and different matter from the second problem which is that if a claimant has failed to actively pursue his claim to an inordinate and inexcusable extent so as to give rise to a risk of real prejudice to the respondent if the claim were to carry on, then a question arises as to whether or not there can still be fair trial and if there is doubt about that whether the claim should then be prevented from going any further."*

15. In summary, the EAT noted that what is now rule 37(1)(d) is not drafted in such a way as to oblige a tribunal to take account of any particular considerations but added that, in accordance with the principles laid down in Birkett v James [1978] AC 297, as applied in the employment tribunal in Evans and anor v Commissioner of Police of the Metropolis (1993) ICR 151, CA, strike-out applications on this ground will generally fall into one of two categories: either the default is intentional and contumelious (showing disrespect or contempt for the tribunal and/or its procedures); or the conduct has resulted in inordinate and inexcusable delay such as to give rise to a substantial risk that a fair trial would not be possible or there would be serious prejudice to the other party. Both categories recognise that a claimant's conduct may result in his or her losing the right to continue with a claim. The EAT 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.

16. Having considered rule 37(1)(d) of the 2013 Rules, the above case law and Mr Ishmail submissions I have decided it is appropriate to strike out the claimant's claim on the basis that it has not been actively pursued.

17. I take into account the following circumstances in reaching this conclusion:

    a. The claimant did not attend today having sent an email a few days beforehand, addressed to the tribunal alone and with no supporting medical evidence. The reason given is insufficient in any event.

Furthermore, the respondent was unaware of this email until I raised it in the hearing;

b. This is not the first time that the claimant has behaved in this manner. There was a case management discussion before Employment Judge Aspinall on 5 April 2023. The record of that hearing sets out clearly at paragraph 1 circumstances almost identical to those relating to today's hearing. At paragraph 3 both parties (although this was really directed more to the claimant) were also clearly told of the obligation to copy correspondence addressed to the tribunal to each other. The EJ particularly indicated that the claimant's conduct in not sending a copy of her email relating to her lack of attendance to the respondent was not acceptable. Paragraph 4 also indicated that whilst the EJ was prepared to overlook the lack of medical evidence provided in support of the claimant's lack of attendance at the hearing, if she was unwell again and unable to attend as a result, she must provide evidence to the tribunal and the respondent. Indeed, the claimant did subsequently provide evidence in the form of a photograph of a positive Covid-19 test as evidence for lack of attendance at the hearing. This was sent to the tribunal alone on 10 May 2023;

c. The claimant has not actively pursued the claim since the case management discussion which took place on 19 January 2024. She has not complied with any of the case management orders that were set at that hearing (relating to provision of a schedule of loss and as to the bundle of documents for today's hearing). I note that she has provided some further information of her claim in relation to earlier case managements orders made at the 5 April hearing, but at a glance this appears deficient (although to be fair nothing was made of it at today's hearing);

d. The record of the case management hearing held on 19 January 2024 again reminds the parties of their obligations under the overriding objective at paragraph 42, namely, to assist the tribunal in furtherance of the overriding objective and in particular to cooperate generally with the other parties and with the tribunal;

e. Today's hearing was set largely to deal with the claimant's amendment application before moving onto deal with the respondent's strikeout/deposit order applications (and any resultant further case management for the full hearing);

f. By contrast, the respondent has, as far as has been possible, complied with the orders and has unilaterally disclosed its own documents and provided a bundle for use at this hearing;

g. I can see from correspondence at page 184 of the bundle onwards, sent to the claimant during March and April 2024, that the respondent's solicitors have reached out to the claimant by way of compromise, as Mr Ismail put it, in order to move matters forward but have had no response from her. This led to the respondent advising that the claimant had not complied with the case management orders, a renewal of its strike out/deposit order application and also a request for an unless order;

h. In response, the tribunal wrote to the parties by letter of 22 April 2024 reminding them (although again this is really directed to the claimant) that compliance with orders was not optional, the parties must actively pursue their claims, or they risk being struck out. The letter asked, have all the orders now been complied with and, if not, why not?

i. There was no response from the claimant, who indeed had not complied with any of the case management orders. The only contact from the claimant has been her email of 2 May 2024, as I have said, sent to the tribunal alone and with no supporting evidence of inability to attend;

18. I am satisfied that the claimant has shown intentional and contumelious behaviour towards the respondent but is particularly towards the employment tribunal, notwithstanding being given prior warning as to the need to both copy the respondent into correspondence sent to the tribunal and to provide medical evidence in support of her inability to attend due to ill-health. In addition, the claimant has simply not engaged with the process, complied with case management orders, sought to further her claim. She has failed to respond to correspondence from both the tribunal and the respondent's solicitors. In particular, she has not taken any steps to adhere to case management designed to prepare for today's hearing (which was largely intended to deal with her own amendment application). Indeed, her engagement in the process is minimal (although in reconsideration after the hearing I realise that it is non-existent) since the hearing which took place on 19 January 2024 save for her email of 2 May 2024. This is behaviour which sits quite firmly within the first principle set out at paragraph 20 of Riddle (as quoted above).

19. On this basis I therefore dismiss the claim.

Employment Judge Tsamados
Dated: 7 May 2024