



EMPLOYMENT TRIBUNALS

Claimant: Mr R Niththiyananthan
Respondent: Tesco Stores Limited
Heard at: East London Hearing Centre
On: 8 May 2024
Before: Employment Judge A Allen KC

Representation

For the Claimant: Did not attend
For the Respondent: Mr N Singer (counsel)

JUDGMENT

1. **The Claimant's claim is struck out under Rule 37(1)(c) and (d) on the basis of non-compliance with orders of the tribunal and that it has not been actively pursued.**

REASONS

1. This case was listed today for the hearing of the Respondent's strike out application dated 8 February 2024.
2. The Claimant did not attend today. The tribunal clerk attempted to contact the Claimant by email and telephone but there was no response.
3. The Claimant presented a claim of race discrimination and religion/belief discrimination on 20 January 2023. It was not immediately apparent what specific issues were raised. Case management orders were made on 30 March 2023. The Claimant did not comply with those orders prior to attending a Preliminary Hearing on 23 June 2023 at which the specific claims were

identified; case management orders were re-made; and the final hearing was listed to start today for 3 days.

4. The Claimant initially engaged with the case management orders albeit late and did assist with the clarification of the claim. The most recent inter-parties correspondence from the Claimant that I have seen was in August 2023. The email correspondence from him that I have seen does not indicate that the Claimant was not capable of understanding what was required under the case management orders.
5. Throughout the history of the litigation, the Respondent has appropriately chased the Claimant for compliance with the tribunal orders, without insisting on absolute compliance with dates.
6. The Claimant failed to send a list of documents in accordance with the tribunal order; the Respondent chased in September 2023 without success or response. On 5 December 2023, the Respondent warned the Claimant that a continuing failure to comply with the necessary orders of the tribunal could lead to a strike out application. The sending of lists of documents is a relatively early point in the case management orders. There is no agreed bundle. There are no witness statements.
7. There having been no further response from the Claimant, the Respondent applied for strike out of the Claimant's case on 8 February 2024 on the basis that the Claimant has not complied with tribunal orders and is not actively pursuing his claim. The application set out the history of the matter. The application did make reference to Rule 37(1)(c) (which is the unreasonable behaviour ground for strike out) but unreasonable behaviour was not specifically set out in the narrative within the application (save for the specific references to failure to comply with the tribunal orders and failure to actively pursue the litigation) and unreasonable behaviour was not notified to the Claimant by the tribunal as one of the grounds on which the tribunal would be considering strike out today.
8. The Respondent copied the Claimant into a number of emails chasing the tribunal for a response to the Respondent's strike out application. Employment Judge Gordon-Walker issued a strike out warning on 15 April 2024 informing the Claimant that the Employment Judge was considering striking out the claim because it appears that it was not being actively pursued and giving him until 22 April 2024 to object or request a hearing. This order was emailed to the parties on 15 April 2024.
9. The Claimant did not respond. On 24 April 2024 the Respondent requested confirmation as to whether the claim had been struck out. The Tribunal responded on 6 May 2024 adjourning the final hearing stating:

The final hearing on 8, 9 and 10 May 2024 has been changed to a one-day public preliminary hearing to decide the respondent's application to strike out the claim.

The reasons for this decision are:

1) The respondent says that the claimant has not done the things that he needs to do to prepare for the final hearing e.g. send his documents and witness statement to the respondent. Therefore, the case is not ready for a final hearing.

2) The claimant has not responded to the strike out warning letter sent by email on 15 April 2022. The Tribunal could strike out the claim without a hearing. This would mean the claim ends without a hearing. However, as the claimant is a litigant in person (representing himself) and he needs a Tamil interpreter, he may not have understood what the 15 April 2022 letter meant and what he needed to do. It is in accordance with the overriding objective to have a hearing to decide whether the claim should be struck out.

3) The claimant and the respondent must come to the hearing centre on 8 May 2024. The judge will decide whether to strike out the claim because the claimant has not done the things he was told to do to prepare for the final hearing. If the claim is struck out, it will come to an end and there will be no further hearing. The judge may decide not to strike out the claim and to fix a new hearing date instead. The Tribunal will arrange an interpreter in the Tamil language for the hearing on 8 May 2024.

10. There has been no contact from the Claimant to either the Respondent or the Tribunal and the Claimant has not attended today.

11. Rules 37 of the 2013 Employment Tribunal Rules states:

37 Striking out

(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 –

- (a) that it is scandalous or vexatious or has no reasonable prospect of success;
- (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
- (c) for non-compliance with any of these Rules or with an order of the Tribunal;
- (d) that it has not been actively pursued;
- (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(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.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

12. I had the benefit of an 81 page bundle of authorities and I was taken to a number of authorities which included (in the order in which they were cited to me):

- a. *Blockbuster v James* [2006] IRLR 630
- b. *Bolch v Chipman* [2004] IRLR 140
- c. *Weir Valves and Controls (UK) Ltd v Armitage* [2004] ICR 371
- d. *Emuemukoro v Croma* [2022] ICR 327 where Chodhury J stated at paras 18 and 19:

18 In my judgment, Ms Hunt's submissions are to be preferred. There is nothing in any of the authorities providing support for Mr Kohanzad's proposition that the question of whether a fair trial is possible is to be determined in absolute terms; that is to say by considering whether a fair trial is possible at all and not just by considering, where an application is made at the outset of a trial, whether a fair trial is possible within the allocated trial window. Where an application to strike-out is considered on the first day of trial, it is clearly a highly relevant consideration as to whether a fair trial is possible within that trial window. In my judgment, where a party's unreasonable conduct has resulted in a fair trial not being possible within that window, the power to strike-out is triggered. Whether or not the power ought to be exercised would depend on whether or not it is proportionate to do so.

19. I do not accept Mr Kohanzad's proposition that the power can only be triggered where a D fair trial is rendered impossible in an absolute sense. That approach would not take account of all the factors that are relevant to a fair trial which the Court of Appeal in *Arrow Nominees* set out. These include, as I have already mentioned, the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court. These are factors which are consistent with taking into account the overriding objective. If Mr Kohanzad's proposition were correct, then these considerations would all be subordinated to the feasibility of conducting a trial whilst the memories of witnesses remain sufficiently intact to deal with the issues. In my judgment, the question of fairness in this context is not confined to that issue alone, albeit that it is an important one to take into account. It would almost always be possible to have a trial of the issues if enough time and resources are thrown at it and if scant regard were paid to the consequences of delay and costs for the other parties. However, it would clearly be inconsistent with the notion of fairness generally, and the overriding objective, if the fairness question had to be considered without regard to such matters.

- d. *Smith v Tesco* [2023] EAT 11 in which at paras 45 and 47, HHJ Tayler stated:

45. . . . The reliance placed by EJ Cookson on the two matters raised in the grounds of appeal, as clarified by HHJ Auerbach, the fact that the claimant had not engaged with or agreed the latest draft list of issues and that he had made a fresh application to amend, was not that they meant that there could not theoretically be a fair trial of any of the claims because none of the issues in any of the claims were sufficiently clarified; but that there could not be a fair trial because the claimant refused to cooperate with the respondent and employment tribunal. The great difficulty in identifying the issues was part of a course of conduct in which the claimant had shown that he was "not prepared to cooperate with the tribunal process". EJ Flood concluded that the course of conduct showed that the claimant would not abide by his obligation to assist in achieving "the overriding objective and that his disruptive conduct exhibited at the hearing before her was likely to be repeated. EJ Flood found that the

claimant was guilty of a “continued refusal to cooperate”. The claimant would not work towards a trial that was fair in the sense of avoiding the undue expenditure of time and money, taking into account the demands of other litigants and the finite resources of the employment tribunal. One listing of the full hearing had already been lost and no progress was being made in preparing for the second hearing listed. Preparation was moving backwards, not forwards. There was every reason to believe that the lack of cooperation would persist.

47. This judgment should not be seen as a green light for routinely striking out cases that are difficult to manage. It is nothing of the sort. We must remember that the “tribunals of this country are open to the difficult”. Strike out is a last resort, not a short cut. For a stage to be reached at which it can properly be said that it is no longer possible to achieve a fair hearing, the effort that will have been taken by the tribunal in seeking to bring the matter to trial is likely to have been as much as would have been required, if the parties had cooperated, to undertake the hearing. This case is exceptional because, after conspicuously careful, thoughtful and fair case management, the claimant demonstrated that he was not prepared to cooperate with the respondent and the employment tribunal to achieve a fair trial. He robbed himself of that opportunity.

e. **Evans v Commissioner of Police of the Metropolis [1993] ICR 151 CA, in which Balcombe LJ stated:**

The powers of an industrial tribunal to strike out an application for want of prosecution are to be exercised in accordance with the principles set out by the House of Lords in *Birkett v. James* [1978] A.C. 297 and *Department of Transport v. Chris Smaller (Transport) Limited* [1989] A.C. 1197. These principles require that, if the default is not intentional and contumelious, it is necessary to show, quoting from *Birkett v. James* [1978] A.C. 297 , 318:

- “(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and
- (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiffs or between each other or between them and a third party.”

13. I was reminded of the Draconian nature of the strike out power; the importance of taking into account the overriding objective and of asking whether a fair trial is possible on the dates listed; and if not possible when originally listed, whether any alternative to strike out is proportionate.

14. In this case, the final hearing dates have already been lost as a result of the Claimant’s failure to engage with the litigation since August 2023; and his failure to comply with the case management orders.

15. The claimant attended a Preliminary Hearing at which issues could be identified and he has responded to correspondence up to August 2023. I was satisfied that the Claimant was sufficiently able to understand the litigation and the requirements upon him and that the Respondent has periodically reminded him of his responsibilities without response since August 2023.

16. The Claimant has failed to comply with a number of tribunal orders; he has repeatedly disregarded a number of procedural steps; his action (or lack of action) has resulted in the loss of a 3-day final hearing listing. I find that the failure to engage with either the Respondent or the Tribunal for a period of some 8 months amounts to an intentional failure on the part of the Claimant and that it indicates that the Claimant is not actively pursuing this litigation that he commenced. The case is not ready to be heard and without engagement from the Claimant it will not be ready to be heard.
17. It is proportionate to strike out the Claimant's claim. The case cannot proceed without further engagement by the Claimant in his own claim. The Respondent has been prejudiced by the (late) loss of the final hearing dates as a consequence of the Claimant's failure to comply with directions and failure to progress this litigation. Given that the Claimant has been aware for a considerable time of the potential for a strike out, there is nothing on which the tribunal can base any confidence that the Claimant will comply with orders and engage with the litigation in the future. The tribunal in its orders of 15 April 2024 and 6 May 2024 and at this hearing today has given the Claimant the opportunity to engage and / or to explain his inaction. He has not taken up that opportunity. I also take into account the impact on other tribunal users and the proportionate use of tribunal resources and that the Respondent is entitled to finality.
18. Accordingly, the claim is struck out under Rule 37(1)(c) (failure to comply with orders) and (d) (not been actively pursued).

**Employment Judge W A Allen KC
Date: 8 May 2024**