EMPLOYMENT TRIBUNALS

Claimant: **Mr M I Ashraf**

Respondent: **EMCOR Group (UK) PLC**

Heard at: **Central London Employment Tribunal (by video)**

On: **1 May 2024**

Before: Employment Judge Annand

Representation
Claimant: No appearance
Respondent: Mr Potter, solicitor

JUDGMENT

1. The Respondent's application to strike out the Claimant's claim is refused.

REASONS

2. On 8 April 2024, the Respondent wrote to the Tribunal to make an application requesting that the Claimant's claim be struck out. I heard the application at a hearing, held by video, on 1 May 2024. Before I set out my reasons for rejecting the application, I shall set out the background to this case.

The background

3. The Claimant was employed by the Respondent as a Security Officer between 1 July 2014 and 21 December 2022. It is set out in the Respondent's Grounds of Resistance that in June 2021, there was a security breach at the Claimant's place of work. The Respondent suspended the security team that were working during the shift in question. The Claimant was required to stay at home while the matter was investigated.

4. In June 2022, the Respondent informed the Claimant and his colleagues of a proposed reorganisation of the security team. The Claimant was appointed an employee representative and attended several consultation meetings in July and August 2022. In late August 2022, the Claimant raised a grievance. He attended several individual consultation meetings. On 19 October 2022, the Claimant was informed his grievance was not upheld. He appealed that decision. On 13 December 2022, he was informed the grievance appeal had not been successful. On 20 December 2022, the Claimant attended a final consultation meeting at which he was informed he was dismissed on grounds of redundancy.

5. On 30 April 2023, the Claimant submitted a Claim Form to the Tribunal claiming unfair dismissal. In his Claim Form, he alleges that there was not a genuine redundancy situation and that he was not made redundant in good faith. He alleged that there was a link between his dismissal and the security breach which had occurred in June 2021.

6. On 15 May 2023, the Tribunal issued a Notice of Hearing for a final hearing. The final hearing was listed for two days on 21 and 22 August 2023 and was to be heard by video. With the Notice of Hearing, the Tribunal sent the parties a set of standard case management orders regarding the preparation for the hearing. The orders stated, for example, two weeks after the date of the Notice of Hearing, the Claimant was to send the Respondent a Schedule of Loss and that six weeks before the date of the hearing the parties were to send each other copies of the documents that were relevant to the claim.

7. On 7 June 2023, the Respondent submitted a Response to the Claimant's Claim Form. In the Grounds of Resistance, the Respondent set out that the Claimant was fairly dismissed either on grounds of redundancy or for some other substantial reason.

8. On 18 August 2023, the Respondent's solicitor applied to postpone the final hearing listed for 21 and 22 August 2023. It was noted that due to an administrative error the Notice of Hearing and the case management orders had been received by the Respondent but not acted upon. The application stated that the Respondent's solicitors had spoken to the Claimant that morning and he had stated he had not received a Notice of Hearing or case management orders and he appeared unaware of the hearing listed the following week. As a result, neither side had complied with the orders or were ready for the final hearing to take place.

9. On 18 August 2023, Regional Employment Judge Freer postponed the final hearing listed for 21 and 22 August 2023.

10. On 28 November 2023, the parties were sent a new Notice of Hearing listing the final hearing for 1 and 2 May 2024. No case management orders were sent by the Tribunal to the parties.

11. On 26 March 2024, the Respondent's solicitors sent an email to the Claimant and attached a letter. The email was sent to the gmail account which the Claimant had set out in his Claim Form. The letter proposed a

series of dates be agreed between the parties in order to prepare for the hearing. The Respondent proposed that the Claimant provide a Schedule of Loss by 2 April 2024, the parties provide each other with the relevant documents by 5 April 2024, the parties agree the contents of the bundle by 10 April 2024, and the parties exchange witness statements by 17 April 2024.

12. On the same day, 26 March 2024, the Respondent's solicitors also called the Claimant's two mobile phones and left voicemail messages asking that he contact them.

13. On 3 April 2024, the Respondent's solicitors sent a further email to the Claimant and a letter by first class post to the address provided by the Claimant on his Claim Form. The letter noted that they had not received a response to the letter of 26 March 2024, and asked that the Claimant send a copy of his Schedule of Loss as a matter of urgency.

14. On 8 April 2024, the Respondent's solicitors wrote to the Tribunal to make an application to strike out the Claimant's claims on the basis that the Claimant had not complied with an order of the Tribunal (Rule 37(1)(c) of the ET Rules) and on the basis that the claim was not being actively pursued (Rule 37(1)(d) of the ET Rules).

15. On 9 April 2024, the Respondent's solicitors emailed the Claimant again. They sent the Respondent's disclosure by list and included a link where the Respondent's documents could be downloaded. The email noted that they looked forward to receiving the Claimant's Schedule of Loss and disclosure as a matter of urgency.

16. On 18 April 2024, the Respondent's solicitors called the Claimant's two mobile phones and left voicemail messages asking that he call them back.

17. On 22 April 2024, the Tribunal emailed the parties a letter, which contained a strike out warning. The Tribunal used the gmail email address the Claimant had set out on his Claim Form, which was the same email address the Respondent had been using. The email was sent from Ms Nathan's email address on behalf of the Tribunal. The letter attached to the email stated that Employment Judge Adkin was considering striking out the claim because it was not being actively pursued. The letter noted if the Claimant wished to oppose the claim being struck out then he should give his reasons by 5pm on 25 April 2024.

18. On 23 April 2024, the Claimant sent the Tribunal an email requesting an adjournment of the hearing on 1 and 2 May 2024. The email was sent from a different email address to the gmail account the Claimant had set out on his Claim Form. The email was not sent to Ms Nathan but was sent to London Central Employment Tribunal. The email made no reference to the Respondent's application to strike out his claim or to the Tribunal's letter of the day before.

19. In the email the Claimant requested a postponement of the final hearing. He gave the following reasons 1) he was currently residing in temporary

emergency accommodation, a Travelodge hotel, with his four children, due to the fact he had been evicted from his home, 2) whilst he had been moving around different addresses in London, he was also undertaking training to be a prison officer, 3) the hearing conflicted with his training schedule and 4) his ability to communicate with the Respondent's solicitors had been hindered due to the fact that the gmail email address given on the Claim Form had been hacked. The Claimant provided a new email address.

20. On 24 April 2024, the Respondent sent an email to the Tribunal objecting to the Claimant's application to postpone his claim. The basis of the objection was that the Respondent suggested the Claimant had sent his request for a postponement in light of the letter from the Tribunal asking him to provide any representations regarding why his claim should not be struck out. The Respondent said this indicated he was receiving some correspondence to the email address which he said had been hacked. The Respondent also noted he had not explained why he had not responded to the voicemail messages they had left for him.

21. At 4.03pm on 30 April 2024, the Tribunal emailed the parties a letter. It was emailed to the gmail account the Claimant provided in his Claim Form, and not to the new email address he had provided in his email to the Tribunal on 23 April 2024. It stated that Employment Judge Baty had refused the Claimant's application for the hearing on 1 and 2 May 2024 to be postponed for the reasons set out in the Respondent's email of 24 April 2024. The letter noted that at the start of the hearing, the judge hearing the case may consider whether the claim should be struck out.

22. On 1 May 2024, at 7.40am the Claimant sent the Respondent's solicitor an email stating that he would not be attending the hearing as he would be undertaking training and assessments/exams from 8am to 5pm regarding his new role. He noted that he had asked the Tribunal to postpone the hearing and said he was still waiting for a response. He provided a new postal address and provided a new personal email address, different to the gmail account he had set out in his Claim Form.

23. On 1 May 2024, Mr Potter attended the hearing to represent the Respondent. The Claimant did not attend the hearing.

<u>The Respondent's application to strike out the Claimant's claim</u>

24. At the start of the hearing on 1 May 2024, the Respondent applied to have the Claimant's claim struck out. Mr Potter provided a Skeleton Argument in support of his application. The Respondent argued firstly that the Claimant had not complied with an order of the Tribunal and secondly, that the claim was not being actively pursued.

25. With regards to the argument that the Claimant had failed to comply with an order of the Tribunal, Mr Potter stated that while the Tribunal had not sent orders in relation to the preparation of the hearing on 1 and 2 May 2024, the Tribunal had sent orders in relation to the previous final hearing originally listed in August 2023. A number of attempts had been made to contact the Claimant between 26 March 2024 and when the application was made on

8 April 2024 and the Claimant had not responded to the Respondent's emails, the letter to his home address, or the voicemail messages left on his phones.

26. When asked specifically what order it was said the Claimant had not complied with, Mr Potter explained that in addition to the standard case management orders sent by the Tribunal for the hearing in August 2023, the most recent Notice of Hearing included some orders in paragraphs 7 and 8 when it stated:

    "7. You must make sure any witness who will be giving evidence for you at the hearing knows when it is and how to join it. You must make sure each witness has a copy of the enclosed information sheet and all the documents they will need at the hearing.

    8. You may produce written representations to be considered at the hearing. If you do so, you must send them to the Tribunal and the other side at least 7 days before the hearing. You will be able to tell the Tribunal your arguments at the hearing in any event."

27. The Respondent stated that at no point had the Claimant said to the Tribunal or the Respondent that he had not received the Notice of Hearing for the hearing listed on 1 and 2 May 2024. The Claimant only responded to any communications when the Tribunal issued a strike out warning on 22 April 2024. When he did get in touch on 23 April 2024, the Claimant did not make any attempt to comply with the orders but just asked for a postponement.

28. In respect of the argument that the Claimant was not actively pursuing his claim, the Respondent asserted the Claimant had failed to contact the Respondent or the Tribunal until 23 April 2024. Yet he was aware of the hearing listed for 1 and 2 May 2024, and aware of the case management orders sent before the previous hearing listing in August 2023. The Claimant's only attempt to engage was to request a postponement. Mr Potter referred to the authority of *Khan v London Borough of Brent* UKEAT/002/18 to remind me that the fact that the Claimant is a litigant in person does not mean he is exempt from complying with orders and engaging in the litigation process. He also referred to the case of *Rolls Royce v Riddle* [2008] IRLR 873 EAT which said it was important for Tribunals to avoid reading the warnings not to strike out as indicative of it never being appropriate to do so.

<u>The law</u>

29. Rule 37(1) of the Employment Tribunals Rules of Procedure 2013 provides that the 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).

30. The power may only be exercised if the claimant has been given a reasonable opportunity to make representations, either in writing or, if requested by the claimant, at a hearing (Rule 37(2)).

31. In *Beacard Property Management and Construction Co Ltd v Day* [1984] ICR 837, EAT, the EAT held that a failure to observe the notice requirements prior to striking out will render any order to strike out invalid.

32. When considering whether to strike out a claim, a tribunal must adopt a two-stage approach. First, it must consider whether any of the grounds set out in rule 37(1)(a)–(e) have been established, and then, having identified any established grounds, it must decide whether to exercise its discretion to order strike-out (*Hasan v Tesco Stores Ltd* EAT 0098/16).

33. In deciding whether to strike out a party's case for non-compliance with an order under rule 37(1)(c), a tribunal will have regard to the overriding objective set out in rule 2 of seeking to deal with cases fairly and justly. This requires a tribunal to consider all relevant factors, including the magnitude of the non-compliance, whether the default was the responsibility of the party or his or her representative, what disruption, unfairness or prejudice has been caused, whether a fair hearing would still be possible, and whether striking out or some lesser remedy would be an appropriate response to the disobedience. In *Weir Valves and Controls (UK) Ltd v Armitage* [2004] ICR 371, EAT, the EAT held that a Tribunal must consider if strike out is a proportionate response.

34. In *Otehtubi v Friends in St Helier* EAT 0094/16 Mrs Justice Laing stressed that, because of the very severe consequences that flowed from a decision to strike out, the power should only be exercised on the clearest grounds and as a matter of last resort. It should never be exercised in a rush or be based on inadequate information.

35. In *Evans and anor v Commissioner of Police of the Metropolis* [1993] ICR 151, CA, the Court of Appeal considered an employment tribunal's power to strike out a claim for want of prosecution (this was the language used in the Tribunal Rules 2001). It held a tribunal can strike out a claim where: (1) there has been delay that is intentional or contumelious (disrespectful or abusive to the court), or (2) there has been inordinate and inexcusable delay, which gives rise to a substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the respondent.

Reasons for decision

36. Under Rule 37, the Tribunal may only exercise the power to strike out a claim if the claimant has been given a reasonable opportunity to make representations, either in writing or, if requested by the claimant, at a hearing. It was not clear to me from the information that I was provided with that the Claimant was aware that the Tribunal was considering striking out his claim. The Tribunal sent the Claimant a strike out warning on 22 April 2024, however it was sent to an email address which he said (in an email sent to the Tribunal on 23 April 2024) had been hacked.

37. The Respondent's position was that the Claimant's email of 23 April 2024 was sent in response to the Tribunal's strike out warning sent the day before, which meant he must have been aware of the possibility that his claim could be struck out. However, I was not sure that was correct. Firstly, the Claimant's email of 23 April 2024 made no reference to the Tribunal's strike out warning. Nor did the email say why the claim should not be struck out. The purpose of the email was to request a postponement of the hearing. Secondly, it was sent by the Claimant from a different email address from the address which the strike out warning had been sent to. Thirdly, the Claimant's request for a postponement was not sent to Ms Nathan's email address. Finally, I noted that on the morning of the hearing, 1 May 2024, the Claimant sent an email to the Respondent which indicated he had not received the email sent by the Tribunal the day before, 30 April 2024. This had also been sent to the email address which the Claimant said, in his email of 23 April 2024, had been hacked.

38. As a result, it was not clear to me that the Claimant had necessarily received the Tribunal's strike out warning, sent on 22 April 2024, nor the letter from the Tribunal emailed after 4pm on 30 April 2024, which set out that his application for a postponement had been refused, and that the Respondent's strike out application may be considered at the start of the hearing the following day.

39. I considered the Respondent's argument that the Claimant had failed to comply with an order of the court. I accept that the Claimant had not complied with the standard case management orders sent to the parties before the final hearing listed for August 2023. However, I took into account the fact that the Respondent had not complied with these orders either and that when the Respondent applied for the hearing listed in August 2023 to be postponed, in the application the Respondent reported that the Claimant had said he had not received the Notice of Hearing or the case management orders, and was not aware of the hearing that was listed the following week.

40. I was not persuaded by the Respondent's argument that the Notice of Hearing, for the hearing on 1 and 2 May 2024, contained "orders". There is nothing in the Notice of Hearing which indicates paragraphs 7 and 8 amount to "Orders". Further, what is set out in those paragraphs does not amount to a mandatory direction which the claimant had to comply with, in that the Claimant may not call any witnesses and may not submit written submissions. Overall, I do not find that the ground set out in rule 37(1)(c) has been established,

41. I considered the Respondent’s argument that the Claimant’s claim had not been actively pursued. I accept that from 26 March 2024 to 1 May 2024, the Respondent had made a number of attempts to contact the Claimant. This was however over a relatively short period of time. The Notice of Hearing had been sent out in November 2023 and yet the first attempt to communicate with the Claimant that I was told about by the Respondent was a letter sent on 26 March 2024, which sought to agree a series of very tight directions in order to prepare for the hearing listed just 5 weeks later. I do accept however that since 26 March 2024 the Respondent has taken a number of steps to try to contact the Claimant by email, letter and by telephone.

42. It was however difficult to assess the extent to which the Claimant’s non-compliance or delay was intentional. The Claimant’s communication to the Tribunal on 23 April 2024 made it clear he had been evicted and was living in emergency accommodation, a Travelodge hotel. It was not clear when his family had been evicted and so it was not clear if he had received the letter sent by the Respondent’s solicitor to his home address. Further, in the same email he said the email address he had put on the Claim Form had been hacked and this had compromised his ability to communicate with the Respondent’s solicitors. It is not clear when that occurred and so from what date he was no longer using that email account. In these circumstances it is difficult to know what the Claimant had received from either the Tribunal or the Respondent and as a result it is difficult to assess whether the Claimant has intentionally not actively pursued his claim, and if so, over what period.

43. I did not have the benefit of hearing from the Claimant in person as he did not attend the hearing. It would appear from his correspondence that he was aware of the hearing, however he was not aware that his application to postpone had been rejected. However, I had been provided with some information about the Claimant’s circumstances from his emails of 23 April 2024 to the Tribunal and his email to the Respondent on 1 May 2024. In those emails the Claimant explained he had been evicted, had a period of residing in emergency accommodation with his four children, and that he was unable to attend the hearing on 1 and 2 May 2024 as he had training and assessments for his new role as a Prison Officer.

44. When considering the Respondent’s application, I considered the prejudice the Respondent faced, given the attempts to contact the Claimant from 26 March 2024 onwards, and that the Respondent had incurred the cost of attending the hearing on 1 May 2024. However, I concluded that if the final hearing were to be postponed, and a series of clear case management orders were sent to the Claimant at the new email address which he has provided then a fair hearing was still possible.

45. On balance, I decided not to strike out the Claimant’s claim. I could not be sure the Claimant had sufficient notice that his claim may be struck out. In terms of procedural fairness, I was not sure he had received sufficient warning. I did not consider it to be a proportionate response when I was not certain what information he had received. Further, I was not able to

conclude that either of the limbs on which the Respondent sought to strike out the Claimant's claim were made out in this case. In any event, I declined to exercise my discretion to strike out the claims, due to a number of concerns, and in particular the lack of clarity about what communications the Claimant had received, and his difficult personal circumstances, as set out above.

46. I have issued case management orders, which are to be sent to the Claimant's new email address. I have made it clear in those orders that the Claimant must comply with the orders, and that if he fails to do so, the Respondent will apply to strike out his claims.

Employment Judge Annand
Date: 10 May 2024

JUDGMENT SENT TO THE PARTIES ON

29 May 2024
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FOR THE TRIBUNAL OFFICE

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/