EMPLOYMENT TRIBUNALS

Claimant: Ms L Gallagher
Respondent: Essity UK Ltd
On: 24 April 2024
Before: Employment Judge Daniels

Appearances
Claimant: In person
Respondent: Mr S Crawford (counsel)

REASONS FOR STRIKE OUT JUDGMENT

NOTE: The Employment Tribunal struck out all claims by reason of (a) scandalous and/or unreasonable conduct of these proceedings and/or (b) the claims having no reasonable prospect of success, with regard to:

1.1 The claim for (constructive) unfair dismissal under s98 ERA 1996:
1.2 The claim for notice pay/wrongful dismissal:
1.3 The claim for disability discrimination**:**(or any part thereof).
1.4 The claim for breach of contract;

These are the reasons.

1. <u>The evidence</u>

I had before me a bundle of 321 pages.

Prior to giving evidence Ms Gallagher was given the warning against self-incrimination with regard to possible criminal proceedings. She was also asked if she had received legal advice. She said she had received advice from her union. She expressly waived any right to remain silent or with regard to any self-incrimination by her comments and said she understood the position and was happy to proceed and that she nevertheless wished to give her evidence.

Ms Kapp gave evidence for the respondent. The claimant served a witness statement (and signed it at the Hearing) and the respondents a signed statement

from Ms Kapp. Both witnesses gave evidence accompanied by an oath or affirmation as to the truth of their evidence.

The Bunzl proceedings

1.1 A prior claim by the claimant against Bunzl Ltd is of significant relevance in this case.

1.2 The Claimant had previously worked for Bunzl Ltd as a Territory Account Manager between 29 June 2016 and 2 March 2018 (when she resigned). Within her claim against Bunzl, the Claimant alleged that she had been sexually harassed/assaulted by one of Bunzl's employees. This allegation had first arisen when the Claimant's line manager began investigating an allegation that she had fraudulently created a receipt indicating that she had paid for a hotel room when she in fact had not, during the course of her employment.

1.3 During the course of the Bunzl litigation, the Claimant sent an email indicating that she had sent a subject access request form to Transport for London ("TFL") to request a copy of CCTV footage that she said would demonstrate the alleged sexual harassment/assault. She provided a copy of the subject access request form in Word format as an attachment to this email. This subject access request form was signed by her and dated 1 December 2019. The metadata of the subject access request form suggested that the Claimant had been the last person to modify the document and that it had been created and modified by her on 18 February 2020 (more than 2 months after it was alleged to have been signed and dated).

1.4 On 18 May 2020, the Claimant sent the respondent an email stating that TFL had told her that they had CCTV footage evidencing sexual harassment/assault. On 20 May 2020, the Claimant forwarded to Ms Kapp the email she alleged to have received from TFL on 24 March 2020. The email that the Claimant alleged to have received from TFL allegedly confirmed that CCTV evidence had captured the sexual harassment/assault and had been retained. The respondent's solicitor Ms Kapp telephoned TFL on the same day. TFL stated to her that no correspondence had been sent by them to the claimant during 2020. TFL also stated to her that CCTV footage was only retained by them for a period of 14 days and indicated that aspects of the claimant's email of 20 May 2020 appeared to be incorrect based on their emails which are automatically generated. On the same day, Ms Kapp therefore requested that the claimant provide her with the original copy of the alleged email from TFL as an attachment to an email rather than forwarding it (which would allow her to amend the email).

1.5 On 26 May 2020, the respondent wrote to the Employment Tribunal indicating that it considered the Claimant had submitted documents as

part of the proceedings that were not in their original form and requesting that they make an Order for specific disclosure of original documents.

1.6 A preliminary hearing was held on 27 May 2020, following which the Employment Tribunal made a Third Party Specific Disclosure Order to TFL. This Order was complied with and the reply from TFL suggested that the email the Claimant had disclosed was not genuine and that they had never received the subject access request form.

1.7 The respondents made an application to the Employment Tribunal to strike out the Claimant's claims on the basis that she had fraudulently created documents during the course of the Employment Tribunal proceedings and had lied to the Employment Tribunal. This conduct was said to amount to scandalous and/or vexatious and/or unreasonable conduct.

1.8 On 29 November 2020, the Employment Tribunal wrote to the parties and notified them that a one day hearing had been listed to take place on 01 July 2021 to consider striking out the Claimant's claims.

1.9 On 28 February 2021, the Claimant wrote to the Employment Tribunal requesting that the strike out hearing on 01 July 2021 be postponed until at least September 2022 on the basis that she had been diagnosed with cancer and would need 12-18 months of treatment and would not be well enough to attend any hearings.

1.10 On 3 May 2021, the Employment Tribunal refused the Claimant's request to postpone the hearing on the basis that it felt she had not provided sufficient evidence to confirm that she was not able to attend any hearings.

1.11 In response, on or about 1 June 2021, the Claimant wrote to the Employment Tribunal and attached a sick note purportedly "signing her off for two years' [243]. The respondent wrote to the Employment Tribunal to object to the Claimant's application for postponement.

1.12 On the same day, the Claimant wrote to the Employment Tribunal and the respondent and stated:

> *"The claimant's consultants agreed to sign the claimant off for two years to cover these hearings as requested by the court (her current employer didn't need the sick note as she is on full pay for two years it was done to cover these court hearings)……The claimant is very sick with breast cancer which has spread to other parts of the body so needs years of treatments and some of the tumours can't be operated on until the treatments shrink them. The prognosis is that some survive this type of cancer and others do not make it through treatment so to expect the claimant to attend even a virtual hearing whilst going through chemo and radiotherapy is very unsympathetic……..The claimant needs to avoid stress*

and concentrate on getting better so she can still be around for her daughter. Her health must come first and she is currently fighting for her life and this is why we have asked for this case to be postponed for two years at the request of the claimant's consultants who know what is best for their patient and why they wrote a sick note to cover two years."

1.13 Following receipt of this email, the respondents undertook an investigation into the fit for work note provided. This investigation led it to believe that it had not been obtained from a registered medical professional because it had not been completed with the Doctor's address details (it had been left blank with no details of who completed or signed it) and it did not contain a unique ID number at the bottom of the certificate which is assigned to everyone. They therefore wrote to the Employment Tribunal to bring this matter to the Tribunal's attention. The Claimant responded to the email stating:

"Louise Gallagher is very sick and this is a genuine sick note produced by consultant Dr De Silva Minor at Genesis care who is a registered medical professional. We will send the back of the sick note as well to show this is genuine. (Will be sent later today when the claimant is home from treatment today)".

1.14 The Claimant then wrote again to the respondent and the Employment Tribunal stating:

"Louise has just spoken to Dr De Silva Minor and she has informed us that only computer generated sick notes have the barcode and 32 digit reference number on. The one that Dr De Silva has given to the claimant was hand written by Dr De Silva Minor as she does not have access to the digital ones only GP's have these."

1.15 The Claimant then wrote again to the Employment Tribunal alleging:

"We write again to prove that the sick note is genuine. We have attached a picture of the back (you already have the front) We have also attached a video showing it is genuine. We have provided - 6 - the name of the consultant who signed it. So we are requesting that you take this evidence and postpone the hearings for two years as requested by the claimants consultant. The claimant will be in treatment on 1st July (treatment schedule already sent to the courts) and on and off for two years. The fact that the respondent is questioning the advice of medical professionals and questioning that the claimant is ill with cancer just shows how she was treated whilst working for the respondent that they have no care for employees so just reiterates what this case is about and why she brought a case against them. There is a second attached video showing some letters, info etc showing that the claimant is telling the truth."

1.16 On 25 June 2021, the Employment Tribunal again refused the Claimant's request to postpone the strike out hearing. On the same day, the Claimant responded

> *"I am not able to attend this hearing as I am in treatment for cancer on 1st July. My consultant will write to the tribunal by Monday explaining that I medically can't attend. She has already provided a sick note which she will add that I can't attend to any hearing for two years on Monday."*

1.17 The Claimant then wrote again stating:

> "*We object again to the hearing on 1st July we have sent information in showing the claimant is in treatment on 1st July. The consultant will now send an email confirming that she is in treatment and will not be well enough for two years to attend any hearing. She will also add to the sick note that she will not be able to attend. This will all be with you on Monday."*

1.18 The claimant then wrote again to the Employment Tribunal and the respondent stating:

> *"We write again to show that the claimant can't attend any hearing on 1st July as she has a radio chemotherapy in the morning and stays at Genesis Care all day after as the treatment makes her very ill. The treatment has to be given every day so it is physically impossible for the claimant to attend the hearing on Thursday 1st July. We are shocked at the courts treatment of the claimant as we have proved with medical letters, private health insurance payments, NHS letters etc. We have attached the treatment schedule and the consultant has just filled in the sick note with more details. As you can see from the treatment schedule that the claimant is at Genesis Care today and so is Dr De Silva Minor."*

1.19 Attached to this email was an amended version of the previous fit for work note provided by the claimant. The fit for work note had been amended to state that she was unable to attend any hearings or court appointments for two years and to include the doctor's name and address. No email was provided by Dr Silva De Minor though. The respondent obtained the email address for the medical practice that the doctor who was alleged to have completed the certificate (Dr Shiroma De Silva-Minor) worked at and emailed them (with a copy of the certificate) asking them to confirm if the fit for work note was a legitimate document.

1.20 On 30 June 2021, and following receipt of the 'amended' fit for work note from the Claimant, the Employment Tribunal granted a postponement of the hearing. Later that day, the respondent aver they received an email from Dr Shiroma De Silva-Minor who confirmed:

"I can confirm categorically that I did not issue this fit note. I would never issue a note for such an extended period of time in any case." Dr Shiroma De Silva-Minor also later followed up to say "I know my hand writing is bad- but not that bad! (My secretary Joyce can vouch for that!)".

1.21 On 1 July 2021, the respondent wrote to the Employment Tribunal to notify them of the situation and to again request a strike out of the Claimant's claims. It alleged there was evidence that the Claimant had submitted a fraudulent document in the course of the Tribunal Proceedings and that the Tribunal had issued a Postponement Order based on a review of a fraudulent document as evidence of the Claimant's inability to attend a Tribunal hearing.

1.22 On 4 October 2021, the Employment Tribunal wrote to confirm that the case had again been listed for a strike out hearing on 01 November 2021. Despite numerous attempts by the respondent to contact the Claimant in advance of this hearing, no further response was ever received by the respondent or the Tribunal from her again in relation to this case. The Bunzl strike out hearing went ahead in her absence and her claims were struck out and she was ordered to pay £8,000 in costs.

1.23 The full Judgment from the hearing is at [43 - 58] of the Bundle. The Employment Tribunal found that:

"In the course of disclosure the claimant has knowingly misled both the respondent and the Tribunal regarding the Transport for London document. That is a forged or doctored document. –

It is not what it appears to be. She has sent correspondence indicating that she has evidence which she knew she did not have and could not disclose. She has also threatened to refer matters to the newspapers for media coverage. This again suggests that she has more evidence to support her claim than is actually the case. It is also relevant to the way she has conducted the litigation and indicates a propensity to lie and manipulate both the respondent and, crucially, the Tribunal, in order to get what she wants. The medical certificate is clearly an untruth. It is an example of lying to the Tribunal to manipulate the process to her advantage. In order to do that she has doctored documents coming from medical professionals and medical records. She has thereby acted in such a way as to undermine the credibility and the professional reputation of a third party."

2. <u>The commencement of these proceedings</u>

2.1 The claimant on 26 April 2023 brought an Employment Tribunal Claim against Essity Ltd for Constructive Unfair Dismissal; Disability Discrimination and Breach of Contract/Unlawful Deduction from Wages. Within this Employment Tribunal Claim, the Claimant stated that she had

been subjected to sexual harassment and sexual assault which had been raised with the Police.

2.2 On 25 May 2023, prior to filing the Respondent's defence, the respondent sent the Claimant a cost warning letter. Within this letter, it was explained to the Claimant that the Respondent would be making an application for strike out of her claims on grounds of scandalous and vexatious behaviour and inability to have a fair trial. It was stated to the Claimant that if she withdrew her claims by 1 June 2023, the Respondent would not make an application for costs against her. The Claimant was urged to take legal advice or speak to ACAS or the Citizens Advice Bureau. The Claimant did not withdraw her claim.

2.3 On 6 June 2023, the respondent wrote to the Employment Tribunal to file the Respondent's defence to the Claimant's Claim and also to make an application for strike out on the basis that her Claim was scandalous and/or vexatious and had no reasonable prospects of success and also on the basis that it was not possible to have a fair hearing due to her scandalous, unreasonable and/or vexatious behaviour and/or because she had provided false evidence both during the course of previous Employment Tribunal proceedings and during her employment with the Respondent. The Claimant was copied into this correspondence. In response to this application, on 7 June 2023, at 10;13 am the Claimant emailed the Employment Tribunal and provided them with (amongst other documents) a copy of a witness statement she gave to Police on 11 October 2022 detailing the alleged sexual harassment/sexual assault.

2.4 At this time, Ms Kapp remained in contact with PC Rick Smith. She had previously given a witness statement to PC Smith on 20 March 2023 in respect of the ongoing Police investigation into the Claimant for perverting the course of justice. On 18 June 2023, PC Smith stated that the Police were no longer investigating the sexual assault allegation raised by the Claimant and this investigation was closed with no further action and also that the Police have an open and ongoing investigation in relation to the Claimant for allegedly perverting the course of justice.

2.5 The Claimant responded to this email on 19 June 2023 at 18:15. Within this email, the Claimant submitted to the Employment Tribunal that

> *"The sexual assault took place and this was never in doubt, it has gone to the CPS. Please see attached witness email from Ian to met police (email headed sexual assault)".*

2.6 The Claimant then attached an email thread to her email to the Employment Tribunal as alleged evidence. This email thread was between PC Sanna, 3462 CN, Ian Lawrence (ilawrence76@yahoo.com) and the Claimant. Within this email thread a Mr "Ian Lawrence" purported to have witnessed the alleged sexual assault on the Claimant.

2.7 An investigation is understood to be ongoing in relation to charges of perverting the course of justice relate to the email from 'Ian Lawrence' and allegations that this is a false 'statement'. The matter is currently with the Crown Prosecution Service.

2.8 On the balance of probabilities, I find this was a false statement. I do so as, amongst other things, it emanates from an email for which I find there is likely to be cogent evidence (held by the Police) that it was likely to have been made from an IP address located at the Claimant's home; that such an email could easily be constructed after the event; in view of the claimant's very poor credibility and her likely fabrication of various other documents (see the rest of these reasons); the fact that no evidence has been adduced from "Mr Lawrence" to show who he was or to corroborate his alleged statement and the striking similarity of this with another complaint made in the Bunzl matter that was found to be dishonest by another Judge.

2.9 During the course of an investigation into the Claimant's grievance, she also submitted two emails as evidence, that she alleged to have sent to her line manager, Stuart Hands, during her employment, attaching copies of sick notes [page 245, 247 of the Bundle]. The respondents gave credible evidence that they have no record of these sick notes on their internal systems. When employees return from any period of sick leave, the obligation is on them to log their time off in the internal systems and upload any sick notes. The Claimant had not logged any sickness absence or uploaded any sick notes. The Claimant's inbox sent boxes and deleted folders were searched and Stuart Hands also confirmed he had no record of these emails or sick notes.

2.10 The respondent then carried out an investigation into the metadata of these emails which are purported to have been sent by the Claimant to Stuart Hands on 19 November 2020 and 3 December 2020. In respect of the first email dated 19 November 2020, there was a photograph of a sick note attached to it page 65. The photograph of this sick note is unusual as the writing appears to have been traced over and there is no doctors name and address on it. The metadata of this photograph showed a location of where the photograph was taken and the time and date the photograph was taken on an iPhone. The metadata records that this photograph was taken at 15:22 on 16 October 2022 (almost two years after the email was alleged to have been sent and during the course of the grievance investigation). The second email dated 3 December 2020 also attached a photograph of a sick note (p 64). The metadata of this photograph also confirmed the date and time that the photograph was taken. This photograph was taken at 15:33 on 14 October 2022.

2.11 In the Bunzl proceedings the sick note was alleged by the claimant to have been written and signed by Dr Silva De Minor at Genesis Care. In these current proceedings, the Claimant alleges that the sick notes were written and signed on behalf of Dr Nathan Coombs by an unspecified nurse.

2.12 By comparing the sick notes at pages [64, 65] from these proceedings, with the sick note provided in the Bunzl proceedings [63], I find that on the balance of probabilities these were written by the same person. The handwriting and signatures on the sick note are identical, despite the Claimant alleging that they have been completed by two different doctors or two different medical centres.

2.13 On balance I find these notes were also compiled by the claimant falsely.

The Law

3. Direct Discrimination

3.1 Section 13 EqA 2010 defines direct discrimination in the following terms:

> "(*1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

3.2 Direct discrimination in employment is rendered unlawful by s.39 EqA, which states as follows:

> "(2) *An employer (A) must not discriminate against an employee of A's (B)—*
>
> *(a) as to B's terms of employment;*
>
> *(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
>
> *(c) by dismissing B;*
>
> *(d) by subjecting B to any other detriment."*

4 Time limits

4.1 A discrimination claim must normally be submitted to an employment tribunal before the end of "the period of three months starting with the date of the act to which the complaint relates" - (section 123(1), EqA 2010). However:

- Time will be extended where a claimant has referred the dispute to the Acas early conciliation process.
- Acts occurring outside the time limit may still form the basis of the claim if they are part of "conduct extending over a period". In such cases time starts running at the end of that period - (section 123(3)) (see Continuing acts).
- Time in any discrimination case can be extended by such a period as the tribunal thinks just and equitable - (section 123(1)(b) and (2)(b)).

5 Continuing acts

5.1 Section 123(3)(a) of the EqA 2010 stipulates that, where an act or acts of discrimination extend over a period (commonly referred to as a "continuing act"), they are treated as having occurred at the end of that period. Therefore, time does not start to run until the end of the course of discriminatory conduct.

6 Omissions

6.1 An "act" under the EqA 2010 includes an "omission" (section 212(2), EqA 2010). A reference to an omission includes a reference to:

- A "deliberate omission" to do something.
- A refusal to do it.
- A failure to do it.

6.2 Where a claim arises out of an omission:

- The employer's failure to do something is to be treated as occurring when the employer decided not to do it (section 123(3)(b)).
- In the absence of evidence to the contrary, the employer is to be taken as deciding not to do something when it does an act inconsistent with doing it (or, if there is no inconsistent act, at the expiry of the period in which the employer might reasonably have been expected to do it) (section 123(4)).

6.3 Where an employer fails to make reasonable adjustments for a disabled employee simply because it fails to consider doing so, time runs at the end of the period in which the employer might reasonably have been expected to comply with its duty.

7 Extending time where just and equitable

7.1 A tribunal can extend time for bringing a discrimination claim by such period as it thinks just and equitable (*section 123(1)(b), EqA 2010*). Nevertheless, tribunals should not extend time unless the claimant convinces them that it is just and equitable to do so: the exercise of discretion should be the exception, not the rule (Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576).

7.2 The EAT, in both British Coal Corporation v Keeble [1997] IRLR 336 and DPP v Marshall [1998] IRLR 494, held that the tribunal's discretion is as wide as that of the civil courts under section 33 of the Limitation Act 1980. This requires courts to consider factors relevant to the prejudice that each party would suffer if an extension were refused. These include:

- The length of and reasons for the delay.
- The extent to which the cogency of the evidence is likely to be

affected by the delay.

- The extent to which the party sued had co-operated with any requests for information.
- The promptness with which the claimant acted once they knew of the possibility of taking action.

(i) The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

8 Proving discrimination

8.1 An actual or hypothetical comparator will be required in discrimination claims. The comparator must not share the protected characteristic, but the circumstances of the comparator must be the same as or not materially different from the Claimant.

8.2 It is for the Tribunal to objectively determine, having considered the evidence whether treatment is "less favourable". While the Claimant's perception is, strictly speaking, irrelevant, the Claimant's subjective perception of their treatment is likely to inform the Tribunal's conclusion as to whether, objectively, the impugned treatment was less favourable.

9 Burden of Proof in Discrimination Claims

9.1 Burden of proof provisions in EqA Claims are set out in s.136(1)-(3) EqA:

"(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

9.2 In Igen v Wong [2005] ICR 931 the Court of Appeal provided the following guidance which, although it refers to the Sex Discrimination Act 1975, applies equally to the EqA:

"(1) *Pursuant to section 63A of the 1975 Act, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the claimant which is unlawful by virtue of Part 2, or which, by virtue of section 41 or section 42 of the 1975 Act, is to be treated as having been committed against the claimant. These are referred to below as "such facts".*

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in section 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the 1975 Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the 1975 Act.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) of the 1975 Act. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the employer has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the employer.

(10) It is then for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

9.3 In Madarassy v Nomura International plc [2007] IRLR 246 Mummery LJ held at [57] that "could conclude" [The EqA uses the words "could decide", but the meaning is the same] meant:

> […] that "*a reasonable tribunal could properly conclude*" from all the evidence before it.

9.4 A mere difference of treatment is not enough to shift the burden of proof, something more is required: Madarassy per Mummery LJ at para [56]:

> *"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination*."

9.5 However, as Sedley LJ observed in Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279 at para [19],

> *"the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred."*

10 Unfair dismissal

10.1 An employee has the right under s.95 sub-s (1)(*c*) ERA 1996 to treat himself as discharged from his contractual obligations only where his employer is guilty of conduct which goes to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; see Western Excavating (ECC) Ltd v Sharp.

10.2 In determining this factual question, the tribunal is *not* to apply the range of reasonable responses test (which applies instead only to the final stage of deciding whether the dismissal was unfair), but must simply consider objectively whether there was a breach of a fundamental term of the contract

of employment by the employer: Buckland v Bournemouth University [2010] IRLR 445 CA, disapproving Abbey National v Fairbrother [2007] IRLR 320 EAT.

10.3 The particular incident which causes the employee to leave may in itself be insufficient to justify his resignation but may amount to constructive dismissal if it is the 'last straw' in a deteriorating relationship: see eg Garner v Grange Furnishing Ltd [1977] IRLR 206 EAT.

10.4 The employee must leave because of the relevant repudiatory breach by the employer. However, where there were several reasons for leaving (some of which were not repudiatory) it is enough that the claimant left at least partly due to the repudiatory breach or breaches; there is no further requirement that that breach or those breaches were the principal reason for leaving: Meikle v Nottinghamshire County Council [2004] IRLR 703.

10.5 Delay in accepting a repudiation may amount to affirmation of the contract: the employee must resign promptly once the employer's behaviour or intransigence is clearly established.

Strike Out: General Principles

Rules 37 ET Rules 2013 provides materially as follows that a claim may be struck out on the basis:

(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).

Blockbuster Entertainment Ltd v James [2006] IRLR 630 provides the ET with authoritative guidance as to how any such decision should be approached. Per Sedley LJ at [6], [18] and [21] (emphasis added):

This power, as the employment tribunal reminded itself, is a draconic power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the

unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response. The principles are more fully spelt out in the decisions of this court in *Arrow Nominees v Blackledge* [2000] 2 BCLC 167 and of the EAT in *De Keyser v Wilson* [2001] IRLR 324, *Bolch v Chipman* [2004] IRLR 140 and *Weir Valves v Armitage* [2004] ICR 371, but they do not require elaboration here since they are not disputed. It will, however, be necessary to return to the question of proportionality before parting with this appeal.

The first object of any system of justice is to get triable cases tried. There can be no doubt that among the allegations made by Mr James are things which, if true, merit concern and adjudication. There can be no doubt, either, that Mr James has been difficult, querulous and uncooperative in many respects. Some of this may be attributable to the heavy artillery that has been deployed against him - though I hope that for the future he will be able to show the moderation and respect for others which he displayed in his oral submissions to this court. But the courts and tribunals of this country are open to the difficult as well as to the compliant, so long as they do not conduct their case unreasonably…

It can only be in a wholly exceptional case that a history of unreasonable conduct which has not until that point caused the claim to be struck out will now justify its summary termination. Proportionality, in other words, is not simply a corollary or function of the existence of the other conditions for striking out. It is an important check, in the overall interests of justice, upon their consequences.

In *Weir Valves and Controls (UK) Ltd v Armitage* [2004] ICR 371 the EAT held that an ET had erred in striking out the whole of the employer's response for failure to comply with an order for simultaneous exchange of witness statements. In deciding whether to strike out a party's case for non-compliance with an order under rule 37(1)(c), an ET must have regard to the overriding objective set out in Rule 2 of seeking to deal with cases fairly and justly. This requires an ET to consider:

i. The magnitude of the non-compliance;
ii. The disruption, unfairness or prejudice *the non-compliance* has caused;
iii. Whether a fair hearing would still be possible; and

iv. Whether striking out or some less severe measure would be an appropriate response to the disobedience

Per HHJ Richardson at [27]

> *It seems to us that whether a fair hearing is impossible is to be judged objectively by the employment tribunal. The feeling of one party or the other, whether soundly based or not, is not in itself a decisive factor. What the employment tribunal must do is address its mind to the issues in the case, address its mind to the fairness of allowing the case to proceed in the face of the default and reach an objective decision as to whether a fair trial is possible*.

In *all* circumstances, the fundamental question is whether a fair trial is possible. It is of no less importance when considering strike out pursuant to Rule 37(1)(c) ET Rules 2013. Per Simler P at [13] in *Baber v Royal Bank of Scotland plc* EAT 0301/15 (my emphasis added):

> The fundamental question for any Tribunal considering the sanction of a strike out is whether the parties' conduct has rendered a fair trial impossible: see ***Bolch v Chipman*** **[2004] IRLR 140 EAT** where, having cited *De Keyser v Wilson* [2001] IRLR 324 EAT and *Arrow Nominees Inc v Blackledge* [2000] EWCA Civ 200 , Burton P set out guidance for Tribunals when determining whether or not to make a strike out order, as follows:
>
> (i) There must be a finding that the party is in default of some kind, falling within Rule 37(1).
> (ii) If so, consideration must be given to whether a fair trial is still possible and *save in exceptional circumstances, if a fair trial remains possible, the case should be permitted to proceed*.
> (iii) Even if a fair trial is unachievable, consideration must be given to whether strike out is a proportionate sanction or whether there may be a lesser sanction that can be imposed.
> (iv) If strike out is *the only* proportionate and fair course to take, reasons should be given why that is so.
>
> See also *James v Blockbuster Entertainment Ltd* [2006] IRLR 630 CA to similar effect, where Sedley LJ recognised the draconian nature of the strike out power and that it is not to be readily exercised. He held, even where the conditions for making a strike out order are fulfilled, it is necessary to consider whether the sanction is a proportionate response in the particular circumstances of the case, and the answer to that question *must have regard to whether the claim can be tried because time*

> *remains in which orderly preparation can take place, or whether a fair trial cannot take place*.

In the ordinary course proportionality will only admit of one answer: *Bolch; De Keyser; Baber*. Per Choudhury P at [26] in *Emuemukoro v Croma Vigilant (Scotland) Ltd and ors* [2022] ICR 327:

> 26. If there are several possible responses to unreasonable conduct, and one of those responses is "less drastic" than the others in achieving the end for which the strike-out power exists, then that would probably be the only proportionate response and the others would not. There may be cases, which are likely to be rare, in which two or more possible responses are equal in terms of their efficacy in achieving the desired aim and equal in terms of any adverse consequences. However, in most cases there is likely to be only one proportionate response which would be the least drastic of the options available.

The strike out power should not therefore be used punitively. Per Millet J in *Logicrose v Southend United Football Club Ltd* [1988] The Times 5 March 1998 (approved in *Arrow Nominees* and in turn by the EAT *in Bolch* and *De Keyser)*:

> *I do not think that it would be right to drive a litigant from the judgment seat without a determination of the issues as a punishment for his conduct, however deplorable, unless there was a real risk that that conduct would render the further conduct of proceedings unsatisfactory. The court must always guard itself against the temptation of allowing its indignation to lead to a miscarriage of justice.*

The evidence

11 Unfortunately, the claimant's evidence was vague, evasive and extensively lacking in corroboration. She repeatedly said that she had all sorts of evidence "to prove everything" in the form of messages or WhatsApps or statements to support her case and that a series of doctors and other witnesses "would support her at the hearing".

12 However, unfortunately, she produced not one piece of cogent evidence or information to support such contentions or referred me to any documents supporting this scenario. Her case appeared to be based on huge generalities and bare assertions that witnesses would all appear later, with various unpersuasive excuses as to why they could not appear or give evidence now.

13 I am unable to draw any comfort from her arguments that "all this evidence" might be available later, where there appears to be nothing of substance to support her arguments now and that I should, as she asks me to, to ignore the large weight of evidence against her that is before me now.

14 The claimant also claims that documents were deliberately deleted by the respondent but provided no credible case to support this contention.

15 Importantly, the claimant had very little indeed to say about the key issues around her alleged fabrication of documents. She made a general comment that these things were "untrue and false" but did very little to try and show this. Indeed, she appeared to wish to repeatedly avoid the issue. The weakness of her evidence was striking to me. Many of her attempted explanations simply did not hold water and she frequently did not seek to mount a serious challenge to the many inconsistencies and implausibilities of her attempted explanations, on the "fabrication issue" but frequently moved off the topic or referred to something unrelated. For example, when questioned about the apparently fabricated hospital medical notes she said that she "could prove she had the operations she had referred to" which ducked the question about the apparently fabricated signatures (and almost appeared to be an admission that she could not as such prove the medical notes themselves).

16 Unfortunately, I found her to be an unreliable witness.

17 I found the evidence of Ms Kapp to be very carefully and diligently prepared, repeatedly supported by documents and precise and reliable.

18 Importantly, time and again the respondent's case was strongly supported by documents in the Bundle, but the claimant's case was not.

19 I have no hesitation in fundamentally preferring the evidence of Ms Kapp on all material conflicts of fact.

Conclusions:

20 <u>The Claimant's lack of credibility and her alleged dishonesty</u>

<u>The Bunzl fabrications</u>

17.1 Firstly, the respondents unsurprisingly rely on the written Judgment dated 12 February 2022 given by Employment Judge Eeley in respect of a claim brought by the Claimant against her previous employer, <u>Bunzl UK Limited, under case number 3331321/2018</u>**.**

17.2 I rely on such findings and find there are strong similarities between the factual matrix of the Bunzl Judgment and the substance of the Claimant's present claims in these proceedings.

17.3 The current claim is a case whereby the Respondent commenced disciplinary proceedings against the Claimant in respect of allegations including, the deliberate falsification of documents and dishonesty. In response to an invitation to a disciplinary hearing, the Claimant raised allegations of bullying and harassment (including sexual harassment by a third party), such that the Respondent was forced to suspend the proceedings whilst it fully investigated her allegations (which were not

upheld). Indeed, in the Bunzl Proceedings Employment Judge Eeley commented as follows:

> *"It is notable that the claimant had been suspended for failing to pay her hotel bill before she first reported the allegations of sexual harassment. So, at the date of that first report she knew that she was under investigation for a disciplinary offence".*

17.4 The Claimant was found to have deliberately falsified documents, including medical certificates, and lied during the course of the Bunzl Proceedings.

17.5 This Tribunal is entitled to take these findings now and into account at the Full hearing, with such weight as I/they consider appropriate.

17.6 As set out within the Bunzl Judgment, Employment Judge Eeley found the following:

i. "*The conclusion is that, in the course of disclosure the claimant has knowingly misled both the respondent and the Tribunal regarding the Transport for London document. That is a forged or doctored document….It is also relevant to the way she has conducted the litigation and indicates a propensity to lie and manipulate both the respondent and, crucially, the Tribunal, in order to get what she wants";*

ii. *"The medical certificate is clearly an untruth. It is an example of lying to the Tribunal to manipulate the process to her advantage. In order to do that she has doctored documents coming from medical professionals and medical records. She has thereby acted in such a way as to undermine the credibility and the professional reputation of a third party";*

iii. *"….her credibility as a witness is fatally undermined; the reliability of any documents she puts forward is undermined"; and*

iv. *"The way she has conducted proceedings is clearly scandalous, vexatious and unreasonable……I go further and conclude that it is impossible to have a fair trial when the claimant is prepared to manipulate the Tribunal in the way that she has, not to mention her dealings with the respondent".*

The fabricated Ian Lawrence email

17.7 Secondly, on the balance of probabilities, I have found that the Ian Lawrence email is fabricated and that it was not sent by the purported witness but by the Claimant via a constructed email address.

The further fabricated medical certificates relied upon and allegedly dated 2020

17.8 Thirdly, during the course of the Respondent's investigation into the Claimant's grievance, she submitted two emails that she alleged she sent to her line manager attaching copies of medical certificates. When conducting these proceedings in June 2023 she relied on these documents to try and prevent the strike out of her case in correspondence copied to the ET. That conduct plainly was conduct of these proceedings. Having investigated the metadata of these emails which are purported to have been sent by the Claimant on 19 November 2020 and 3 December 2020, the Respondent contends that these emails and the medical certificates have been deliberately falsified. The respondents point out that the metadata from the photographs of the medical certificates that are attached to those emails were taken on 14 and 16 October 2022 (almost two years after the emails are purported to have been sent). These documents were in the bundle before me. The Respondent compared the two medical certificates provided by the Claimant during the grievance process with a medical certificate the Claimant provided as evidence during the Bunzl Proceedings. This medical certificate was found to be fraudulent by Employment Judge Eeley. The Claimant has now alleged that two different doctors from Ridgeway Health created the medical certificates which is inconsistent with what she said before. Moreover, this appears to be a striking change in her case. It is not credible.

17.9 On the balance of probabilities, I also find that these documents were fabricated by the claimant. The fact the metadata strongly appears to place these photos as made in October 2022 (not 2020) is firstly crucial.

Finding of scandalous and unreasonable conduct

17.10 I find that for all these reasons the proceedings have been conducted scandalously or unreasonably because the claimant has repeatedly provided false evidence during the course of these Employment Tribunal proceedings. She has directly deployed and tried to rely on such dishonest evidence in letters to the Tribunal and in her claim.

18 Is a Fair trial possible

Following the guidance in *Bolch v Chipman* [2004] IRLR 140 EAT**:**

(i) I have given consideration to whether a fair trial is still possible and how exceptional it is to strike out a case. I have concluded a fair trial is now plainly unachievable. I conclude in this case that any written or oral evidence the claimant provides in respect of her current claims cannot really be considered reliable or be considered trustworthy. Any document or fact she relies upon may in reality not be capable of being given any weight unless unimpeachably corroborated by an alternative source of evidence and forensic examination of every matter. This would also make a trial effectively impossible to hold.

(ii) Here, the respondent says that the substance of the related police investigation arises from the Claimant's false allegation that she was the victim of a sexual assault and the provision by the claimant of an email to the police purportedly to be from a witness to the alleged incident. And there are numerous other examples of lack of credibility or apparent

dishonesty I have found on the balance of probabilities. This is not a one-off situation but a series of very serious issues which place an overriding hole in her whole case and her evidence.

(iii) A fair trial is now impossible in my view. This is not marginal but clear to me. A case simply cannot proceed fairly when one side, based on multiple examples of seriously unreasonable conduct, cannot be trusted to give truthful or reliable evidence under oath. There cannot be a fair hearing where one side acts with integrity but the other side is prepared not to do so.

Proportionality

(iv) I then gave consideration to whether strike out is a proportionate sanction or whether there may be a lesser sanction that could be imposed.

(v) Here, strike out is *the only* proportionate and fair course to take.

(vi) Nothing else could solve these multiple and very serious issues in a way which could allow a fair trial to progress.

(vii) I therefore strike out the case for scandalous and unreasonable conduct, by the claimant, where a fair trial is now impossible and where I conclude this is a wholly proportionate approach to adopt.

18 No reasonable prospects of success

18.1 The claims have also been struck out for having no reasonable prospect of success.

18.2 I repeat the above analysis in full which is also relevant to the question of whether the claims have no reasonable prospect of success.

18.3 In essence, the claimant's evidence cannot be considered credible or reliable. Hence, any contention she now may make is open to very considerable doubt. This finding has a massive impact on her prospects of success.

18.4 But I also add some further points which are relevant to prospects and my conclusion that all of the claims have no reasonable prospect of success under each head of claim.

Unfair dismissal:

20. Alternative reason for resigning-gross misconduct and fraud allegation

20.1 The respondent had also relied on the contention that the employee had resigned due to being suspended and subjected to discipline process because an act of serious misconduct had arisen. This apparent misconduct appeared to relate to the claimant allegedly defrauding the employer by submitting documents and customer accounts that were false and were

known to be false. There appeared to be significant evidence potentially available in support of these contentions.

20.2 This would suggest that the reason the employee resigned was wholly or mainly to avoid the disciplinary process and dismissal for gross misconduct and not because of any alleged breach of contract. This presented a further hurdle in her case.

21. Alternative job

21.1 I also note that the claimant had obtained another job (in November 2022) before she decided to resign and that this also seriously undermines her alleged reasons for claiming constructive dismissal or that she resigned in response to any such breaches. The claimant's arguments that she rejected this job offer but later changed her mind and decided to take the job on 3 March 2023 and called the prospective employer that day and they agreed she could start immediately on Monday 6 March 2023 are not likely to be found credible either.

21.2 For all of these reasons, it appears clear to me that there is no reasonable prospect that the claimant will establish that she was constructively dismissed or that her dismissal was unfair.

21.3 It appears highly likely from what I can see so far that she will be found to have resigned without giving notice, in breach of contract by her.

22. **Direct discrimination claim.**

22.1 From the Preliminary Hearing on 2 November 2023 and the Case Management Orders, and the hearing on 11 January 2024, the Claimant's allegations of direct discrimination with reference to a disability of cancer are limited to the following:

1.1 Sending an email to the claimant on 20 November 2020 when the claimant was signed off sick at work.
1.2 For a two week period around 20 November 2020 Mr Hands making repeated calls and sending emails on work-related matters to the claimant.
1.3 On 2 December 2020, the date when the claimant underwent an operation, telephoning the claimant requested how to work
1.5
Mr Hands sending an email to the claimant on 4 December 2020.
1.6 Mr Hands making several phone calls to the claimant in the two-week period around 4 December 2020.
1.7 From 4 January 2021 for a four week period during the period of radiotherapy, Mr Hands making repeated telephone calls to the claimant

The application to amend her claim to add other detriments with regard to PTSD, anxiety and/or depression was previously dismissed.

23 Out of time-no jurisdiction

23.1 The 'material time' for the Claimant's allegations with reference to a disability of cancer is from 20 November 2020 to 4 January 2021. It seems clear from the Claimant's medical records that she was diagnosed with breast cancer in November 2020 and underwent a period of treatment in the following months. The Respondent therefore accepted that the Claimant did suffer with cancer at the material time of 20 November 2020 to 4 January 2021, and that this constituted a disability by virtue of Section 6(6) Equality Act 2010.

23.2 However, although the Respondent concedes that the Claimant was disabled at the material time as set out above, their email dated 1 December 2023 contended that the Claimant's allegations in reference to the disability of cancer are grossly out of time and it is very unlikely the Tribunal will conclude it has jurisdiction to hear them.

23.3 The Claimant commenced Acas early conciliation on 3 March 2023 and filed her ET1 on 26 April 2023. Accordingly, it is clear to me that all her allegations relating to a disability of cancer (which span from 20 November 2020 to 4 January 2021) are also likely to be time-barred by a long time.

23.4 I carefully considered the above case law in respect of time limits. The claimant provided no good explanation for the major delay in the claim in this regard. She provided no cogent argument that there was any continuing act of discrimination until her dismissal either or any reason or a reason for a just and equitable extension. She also had union support at relevant times in this case and was not a litigant in person.

23.5 Therefore, there is also very little or no reasonable prospect of the claimant establishing any of her disability claims are in time.

24 Proving less favourable treatment

24.1 I also consider there is no reasonable prospect the claimant will shift the burden of proof to the respondent and/or the respondent will show, at stage one, that the real reason for treatment was unrelated to disability.

24.2 This is in part due to the very serious doubts about her credibility and honesty, for the same reasons as set out in detail above. Notably, this included the apparent provision by her of fabricated medical documents to support her grievance and her disability case in October 2022. This is a further factor which suggests the prospects of success in this claim appear to me to be very low.

25 For all these reasons, this claim also has no reasonable prospect of success and the issue of a strike out order in this regard would also be in the interests of justice.

Breach of contract-notice pay claim

26 In order to succeed in her claim for breach of contract for notice pay the test is quite simple, the claimant needs to establish that, on the balance of probabilities, the employer had committed a repudiatory breach of contract as above.

27 In view of the same points above with regard to unfair dismissal and also the very low credibility of the claimant these claims have no reasonable prospect of success too.

_____

Employment Judge Daniels

Date: 7 June 2024

SENT TO THE PARTIES ON

13 June 2024

FOR THE TRIBUNAL OFFICE