



EMPLOYMENT TRIBUNALS

Claimant: Mr A Pomfret

Respondent: Learning Clip Limited

Heard at: Manchester (by CVP)

On: 11 March 2024

Before: Employment Judge McDonald

REPRESENTATION:

Claimant: In person

Respondent: Mr Lassey

JUDGMENT

The judgment of the Tribunal is that the claimant's claim is struck out under rule 37(1)(b) of the Employment Tribunal Rules 2013.

REASONS

1. On 11 March 2024 I conducted a public preliminary hearing to consider whether the claimant's claim should be struck out under rule 37 of the Employment Tribunal Rules 2013 because the proceedings had been conducted unreasonably; for non-compliance with case management orders and/or because the claimant had not actively pursued his claim.
2. The respondent had prepared a documents bundle of 85 pages. On the morning of the hearing a further six pages were added. These were medical reports relating to the claimant from Dr Ashworth.
3. After reading the relevant documents and hearing from the claimant and from Mr Lassey of counsel for the respondent gave judgment. I struck out the claim for non-compliance with the orders of the Tribunal. I gave oral reason for my judgment. The claimant asked for those reasons in writing.

Background

4. By a claim form received by the Tribunal on 19 January 2022 the claimant brought claims of unfair dismissal and disability discrimination. Those claims arose from his dismissal by the respondent for gross misconduct on 11 January 2022. That dismissal followed a disciplinary hearing on 7 January 2022. The gross misconduct was said to be unauthorised absence from work and posting a comment on the respondent's public Facebook page on 25 December 2021 accusing the respondent of having dismissed him on 17 December 2021 for no reason.

5. The case was listed for a final hearing on 11-13 March 2024 by a notice of hearing dated 22 February 2022.

6. The claimant's claim of disability discrimination was struck out by Employment Judge Ross at a hearing on 2 May 2023. That was because the claimant had failed to provide his disability impact statement and to disclose medical information by the deadline required on 26 April 2023. That means the only "live" complaint in the claim is one of unfair dismissal.

7. On 29 February 2024 Employment Judge Barker issued a strike out warning to the claimant. It explained the judge was considering striking out the claim for conducting the proceedings in an unreasonable manner; non-compliance with Tribunal orders; and failing to actively pursue his claim. He was given 7 days to object to the strike out.

8. On 1 March 2023 the claimant sent the Tribunal a 4 line email in response. It did not address the strike out warning but did say that the claimant had lost his car and licence due to having a minor stroke. In light of that email, Employment Judge Ross noted that the case was unlikely to be ready for the final hearing. She vacated the final hearing which was replaced by this preliminary hearing to consider whether the claim should be struck out. The notice of hearing dated 5 March 2024 advised the claimant that it was in his interest to disclose to the respondent in advance of the hearing any medical evidence he wished to rely upon to show he suffered a stroke or any other information to show why he did not comply with case management orders.

Relevant Law

9. Rule 37 of the Employment Tribunal Rules of Procedure 2013 ("the ET Rules") gives the Tribunal the power to strike out all or part of a claim:

"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)."

10. Rule 37(2) says that 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.

11. The process for striking-out under Rule 37 involves a two stage test (**HM Prison Service v Dolby [2003] IRLR 694 , EAT ; Hasan v Tesco Stores Ltd UKEAT/0098/16**). First, the Tribunal must determine whether one of the specified grounds for striking out has been established; second, if one of the grounds is made out, the tribunal must decide as a matter of discretion whether to strike out or whether some other, less draconian, sanction should be applied. That means that if any of 37(1)(a) to (e) apply, a tribunal "may" strike out, but is not obliged to do so. In deciding whether to exercise the power the tribunal must have regard to the overriding objective and what is fair and just to both sides (**T v Royal Bank of Scotland [2023] EAT 119, para 38**).

12. The power to strike out a claim is a draconian one – in other words, it should not be used unless there are very clear grounds for doing so. That is because any party to a case should ultimately have the opportunity to have their claim heard at a final hearing. However, in some cases the behaviour of a party can lead to a Tribunal deciding that it is appropriate to strike out a claim.

13. When it comes to striking out for conducting proceedings unreasonably, scandalously or vexatiously (rule 37(1)(b)), the case of **James v Blockbuster Entertainment Ltd [2006] IRLR 630 CA** says that for the Tribunal to strike out for unreasonable conduct it must be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps, or that the conduct has made a fair trial impossible. In either case the striking out must be a proportionate response.

14. When it comes to striking out for failure to comply with a Tribunal order (rule 37(1)(c)), the leading authority is a case called **Weir Valves & Controls v Armitage [2004]**. The important point from that case is that even if there has been non compliance with Tribunal orders this does not automatically lead to a striking out. Instead the guiding consideration is the overriding objective which requires justice to be done between the parties. The Tribunal in other words needs to go on to consider whether a fair hearing of the case is still possible, and in doing so the question is not simply whether the delay which arises from non compliance leads to an impact on the evidence in the case but also takes into account all the other factors set out in the overriding objective, including the costs, the need to avoid delay and the need to deal with a case fairly and justly.

15. When it comes to striking out a claim because it has not been actively pursued (rule 37(1)(d)), In **Abegaze v Shrewsbury College of Arts & Technology [2010] I.R.L.R. 238** the Court of Appeal confirmed that strike out for failing to actively pursue a case raises some different considerations to a strike-out for non-compliance under 37(1)(c). It confirmed that in **Evans Executors v Metropolitan Police Authority [1993] ICR 151** the Court of Appeal held that the general approach should be akin to that which the House of Lords in **Birkett v James [1978] AC 297** considered was appropriate when looking at the question whether at common law a case should be struck out for want of prosecution That requires that there should either be intentional or contumelious default, or inordinate and inexcusable delay such that there is a

substantial risk that it would not be possible to have a fair trial of the issues, or there would be substantial prejudice to the respondents.

16. The first category is likely to include cases where the claimant has failed to adhere to an order of the tribunal. As such, it overlaps substantially with the tribunal's power under rule 37(1)(c) to strike out for non-compliance with tribunal rules or a tribunal order. The second category requires not only that there has been a delay of an inordinate and inexcusable kind, but that the respondent can show that it will suffer some prejudice as a result. The Court of Appeal in **Evans** held that it is necessary for a Tribunal to consider that issue of prejudice separately - prejudice is not necessarily inherent in the failure to actively pursue a case.

17. In this case Mr Lassey submitted that there had been a deliberate and persistent failure to comply and that that was the primary basis for the application to strike out under rule 37(1)(b).

Findings of fact

18. I do find that the claimant has failed to comply with a number of Tribunal orders. In particular he failed to comply with the order to provide a Schedule of Loss by 2 October 2023. He also failed to supply a witness statement by 2 October 2023. In addition, the claimant failed to respond to a request from Employment Judge Cookson in November 2023 to provide a copy of his witness statement or explain why he had not sent it to the respondent.

19. When it comes to whether there was a failure to comply or not, I understand the claimant to accept that there had been a failure to comply in terms of sending a witness statement, a Schedule of Loss or substantively replying to Employment Judge Cookson. I acknowledge that the claimant did send brief emails in response to various matters, but I find that none of them amounted to substantively responding to the orders. In particular, I find that the two line email which he sent on 3 October 2023 to the respondent's representative could not amount to a witness statement as required by the Case Management Orders made by Employment Judge Ross in this case.

20. There was, therefore, a failure to comply. The next decision I needed to make is whether that was deliberate and persistent.

21. In deciding that issue, I take into account that in her case management summary and order produced after the preliminary hearing on 1 March 2023, Employment Judge Dunlop recorded (at paragraph 17 of her summary) that "the claimant could not be in any doubt after that hearing that his failure to engage with orders and correspondence on this issue throughout the history of the case was completely unacceptable and would not be allowed to continue".

22. As Mr Lassey pointed out, Employment Judge Ross also made it clear that if the claimant had any difficulties in complying, he should make sure that he contact the respondent in the first instance. When it came to the requirement to provide a witness statement the respondent's then solicitor, Fiona Chadwick, provided the claimant with guidance as to the exact paragraphs he was being required to comply with in the Case Management Order, together with an indication of the sources of guidance set out in the Case Management Order and a link to the Presidential Guidance on Case Management. In other words, the respondent had throughout attempted to assist the

claimant by providing him with clarity about what he was being required to do. Despite that, the claimant has failed to comply.

23. I asked the claimant at today's hearing what the explanation for that was. He did to some extent indicate that that was because he had not been well. When we explored this further, however, I found that he was not saying that he had been unwell to such an extent as to not understand what was being required of him. In terms of medical evidence to support any finding that he had been sufficiently unwell so as not to be in a position to comply, the claimant had sent three letters, amounting to six pages, to the respondent's representative at the end of last week which had been forwarded to the Tribunal this morning.

24. The claimant referred (in answer to my question) to him having had a brain tumour removed in (he thought) 2022. The medical evidence does not support that date and it seems to me, both from that and also from the information in the respondent's Response, that the removal of the tumour was significantly earlier than that. In any event, as Mr Lassey pointed out, when I asked the claimant about the effect of that tumour on his memory and concentration, he said that it had had an effect for 4-5 months but he was now fine in terms of memory and concentration. The claimant told me there were some ongoing effects of the tumour, namely Bell's palsy and an effect on his balance. They were not impacts on the claimant's cognitive abilities and understanding. Even if I accepted, as the claimant suggested, that the tumour was removed in 2022 and the effects lasted for 4-5 months, that would not provide an explanation for his failure to provide a witness statement in October 2023.

Conclusions

25. Taking my findings in the round, I do accept Mr Lassey's submission that in this case the claimant has conducted proceedings in an unreasonable manner and that amounted to a deliberate and persistent disregard of required procedural steps by the claimant. Given that, the next decision I need to make is whether strike out would be proportionate.

26. I have considered carefully whether it would be appropriate to give the claimant one more opportunity to provide the witness statement and Schedule of Loss required to enable the final hearing to take place. Mr Lassey confirmed that there is already a bundle of documents in the case and therefore it is the witness statement and the Schedule of Loss which are now needed to allow a final hearing to take place.

27. In terms of whether or not making an unless order would be proportionate as an alternative to striking out, I have taken into account the evidence of persistent failure to comply by the claimant. As I noted, Employment Judge Dunlop as far back as March 2023 indicated the importance of complying but despite that the claimant failed to provide his medical records and disability impact statement leading to his disability discrimination claim being struck out. Even after that he has failed to comply with further orders relating to the Schedule of Loss and the witness statement.

28. I consider that in those circumstances I can have no confidence that the claimant will comply with any unless order that I make. It also seems to me that even making the unless order would potentially lead to further delay in the matter being resolved and in costs to the respondent in chasing up the outcome of the unless order. In those circumstances I do find it is appropriate to strike out the claimant's unfair

dismissal claim on the basis that he has deliberately and persistently disregarded the orders of the Tribunal and that a strike out would be proportionate. In doing so I do acknowledge that this is an unusual and draconian step. In this case, however, the repeated and persistent breaches despite assistance and warnings given by the Tribunal and by the respondent do seem to me to mean that this is a case where strike out is appropriate.

29. In case I am wrong that the claimant's conduct of proceedings amounts to deliberate and persistent disregard of required procedural steps, I have gone on to consider whether I would strike out the claim on other grounds.

30. I find based on my findings of fact that even in the absence of deliberate and persistent disregard the basis for making a strike out order, either under rule 37(1)(b) on the basis of unreasonable conduct, or 37(1)(c) on the basis of a failure to comply with orders, does clearly arise.

31. Before striking out on either of those grounds I need to consider whether or not there could be a fair hearing, I accept that the test I must apply is not whether there could be a fair hearing in some absolute sense (if enough resources and time were spent on the case) but whether there could be a fair hearing in this case taking into account not only the interests of both parties but also other tribunal users.

32. In terms of when a final hearing would take place if it was listed today, I checked with our Listing team and a three day hearing would mean that the hearing would take place on 9-11 December 2024. I considered whether, now that the disability discrimination claim has been struck out, a shorter hearing might be feasible. However, I accept Mr Lassey's submission that the three day hearing was listed by Employment Judge Ross in the full knowledge that the disability discrimination claim was not going ahead. There are no changes in circumstances since then and in those circumstances I find that the final hearing would need to be listed for three days.

33. Mr Lassey did not suggest that there was a forensic prejudice to the respondent in terms of the evidence being damaged by (for example) witnesses having left the respondent's employment. A bundle for the final hearing has been prepared and the respondent has already prepared its witness statements. I do accept, however, that inevitably there will be further fading of memories on the part of witnesses given that the hearing will take place more than eight and nearer nine months after it was originally intended to take place. Even if there was minimal impact on the evidence and the forensic prejudice to the respondent, I accept that I need to take into account the factors in the overriding objective. The issue is whether or not there could be a fair hearing in the trial window of 9-11 December 2024.

34. I take into account the factors in the overriding objective. The first is avoiding delay. There would clearly be a further delay if I did not strike out the claim today and instead allowed it to proceed to a final hearing. The delay until December 2024 would mean that matters relating to a dismissal in January 2022 were being dealt with nearly three years after the events taking place. When it comes to saving expense, there would be further costs for the respondent in terms of instructing lawyers to attend that three day hearing in addition to the cost of any of the witnesses who needed to attend in terms of lost time at work. There is, on the other hand, clearly a prejudice to the claimant if I do not allow his claim to go ahead. He would lose the opportunity to bring a claim in relation to the ending of his employment with the respondent. I remind

myself that the claimant had worked for the respondent for a number of years when the dismissal took place. As against that, in dealing with the case fairly and justly I take into account that the only reason I am considering striking out is the claimant's own conduct.

35. Taking matters in the round, had I decided that the claimant had not deliberately and persistently required procedural steps disregarded I would have decided that it was in any event appropriate to strike out the claim under rule 37(1)(b) on the basis of unreasonable conduct falling short of deliberate and persistent disregard or rule 37(1)(c) on the basis of non-compliance with Tribunal orders and that a fair hearing could not take place because of the delay in this case.

Summary and next steps

36. The claimant's claim is struck out.

37. Mr Lassey indicated that the respondent may seek costs against the claimant. He did not make an application at the hearing itself but indicated that any application will be made in writing. Under rule 77 of the Employment Tribunal Rules 2013 that application must be made within 28 days of this judgment being sent to the parties. I confirmed to the claimant that if any application for costs is made, he will be given the chance to respond to it before any decision on costs is made.

Employment Judge McDonald
Date: 30 May 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON
11 June 2024

FOR THE TRIBUNAL OFFICE

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