EMPLOYMENT TRIBUNALS

Claimant: Miss E Cartwright

Respondent: (1) Hillbrae Rescue Kennels
(2) Margaret Burrell
(3) Peter Burrell

Heard at: Birmingham (in private, by CVP) **On:** 29 July 2024

Before: Employment Judge Maxwell

Appearances
For the Claimant: Mrs Sheldon, HR Consultant and Friend
For the Respondent: Ms Anderssen, Consultant

JUDGMENT

1. The Response is not struck out.

2. A preparation time order is made in the Claimant's favour, the number of hours to be determined by a Judge if not agreed between the parties.

REASONS

Background

1. The background to this matter, the claims at large and issues arising, are addressed in a case management order made by EJ Choudury on 4 December 2023. The Judge gave directions and listed a final hearing over 5 days, due to begin today. The Claimant's application to join the second and third Respondents was granted. In light of this step, the Respondents were given permission to serve an amended response by 8 January 2024.

2. On 9 January 2024, the Respondents wrote to the Claimant apologising and saying the amended response would be provided by the end of the week.

3. On 10 January 2024, the Respondents applied for an extension of time for the amended response to 15 January 2024.

4. On 15 January 2024, the Claimant applied for a strike out order. On the same day, the Respondents provided an amended response (strictly, this appears to be a supplemental pleading rather than a replacement).

5. On 5 February 2024, the Respondents applied for a strike out order, complaining the Claimant had not provided her disclosure documents.

6. On 6 February 2024, the Claimant applied for strike out, adding to her previous complaints that the Respondents had now failed to provide their disclosure documents to her.

7. The Claimant made a further strike out application on 8 February 2024 and sought specific disclosure by means of an unless order. She chased on 14 February 2024.

8. On 20 March 2024, the Respondents wrote to the Tribunal indicating that a hearing bundle would be provided by 22 March 2024, as opposed to the date fixed of 29 February 2024. The Respondents also applied to extend time for the exchange of witness statements to 12 April 2024.

9. By an email of 2 April 2024, the Claimant complained of various failures by the Respondents: the lateness of the bundle; evidence she had disclosed was not included; documents she had requested specific disclosure of were not included.

10. Legal Officer Parmar considered all of the various applications and arguments made in correspondence between 24 August 2023 and 2 April 2024. She refused strike out and granted an extension of time for the Respondents' supplemental pleading. Separately, she required the Respondent's comments on the Claimant's most recent email.

11. The Tribunal sent letters to the Respondents seeking their views on 10 May and 7 June 2024. In the absence of any response the matter was referred to a Judge.

12. On 22 July 2024, a letter was sent to the parties on the direction of EJ Broughton:

> **Employment Judge Broughton is considering striking out the response because**
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> **• you have not complied with Employment Judge Choudry's order dated 4th December 2023, and Tribunal letters dated 10th May 2024 & 7th June 2024.**
>
> **• it has not been actively pursued.**
>
> **If you wish to object to this proposal, you should give your reasons in writing or give your reasons at the forthcoming Public Preliminary Hearing on 29th July 2024.**

13. EJ Broughton vacated the final hearing and listed a preliminary hearing in public to determine:

13.1 whether to strike out the response;

13.2 further case management if necessary;

13.3 dispute resolution if the Judge today decided that was appropriate.

Hearing Today

14. The Claimant pressed vigorously for a strike out based upon a pattern of non-compliant behaviour.

15. Ms Anderssen apologised for the default. She said this was not the fault of the Respondents themselves but rather had been caused by an IT issue affecting the former case handler, Mr Hussain. She said the Claimant's claim had been removed from his diary and he no longer believed the matter to be assigned to him. I asked how it was that the various emails sent to him by the Claimant or Tribunal went unanswered and how it was Mr Hussain did not ask his manager why all of this correspondence was still coming to him. Ms Anderssen could not give me an explanation. As I said during the hearing, this appeared to be deeply unprofessional.

Law

16. So far as material, rule 37 provides:

> **37. Striking out**
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> **(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—**
>
> > **(a) that it is scandalous or vexatious or has no reasonable prospect of success;**
> >
> > **(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;**
> >
> > **(c) for non-compliance with any of these Rules or with an order of the Tribunal;**
> >
> > **(d) that it has not been actively pursued;**
> >
> > **(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).**
>
> **(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.**

17. Guidance on strike out orders was given by the Court of Appeal in **James v Blockbuster Entertainment Ltd [2006] IRLR 630 CA**; Per Sedley LJ:

18. 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 will be for the new tribunal to decide whether that has happened here.

19. In deciding this, the tribunal needs to have in mind that the application before it is one that was made, in effect, on the opening day of the six days that had been set aside for trying the substantive case. The reasons why this happened are on record and can be recanvassed; but it takes something very unusual indeed to justify the striking out, on procedural grounds, of a claim which has arrived at the point of trial. The time to deal with persistent or deliberate failures to comply with rules or orders designed to secure a fair and orderly hearing is when they have reached the point of no return. It may be disproportionate to strike out a claim on an application, albeit an otherwise well-founded one, made on the eve or the morning of the hearing.

20. It is common ground that, in addition to fulfilling the requirements outlined in §5 above, striking out must be a proportionate measure. The employment tribunal in the present case held no more than that, in the light of their findings and conclusions, striking out was "the only proportionate and fair course to take". This aspect of their determination played no part in Mr James's grounds of appeal and accordingly plays no part in this court's decision. But if it arises again at the remitted hearing, the tribunal will need to take a less laconic and more structured approach to it than is apparent in the determination before us.

21. It is not only by reason of the Convention right to a fair hearing vouchsafed by article 6 that striking out, even if otherwise warranted, must be a proportionate response. The common law, as Mr James has reminded us, has for a long time taken a similar stance: see Re Jokai Tea Holdings [1992] 1 WLR 1196, especially at 1202E-H. What the jurisprudence of the European Court of Human Rights has contributed to the principle is the need for a structured examination. The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact if it is a fact that the tribunal is ready to try the claims; or as the case may be that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist. If a straightforward refusal to admit late material or applications will enable the hearing to go ahead, or if, albeit late, they can be accommodated without unfairness, 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.**

18. The need for caution when considering whether to strike out, especially in discrimination or whistleblowing cases, was emphasised in **Abertawe Bro Morgannwg University Health Board v Ferguson [2013] ICR 1108 EAT**, per Langstaff P:

> **33. We would add this final note. Applications for strike-out may in a proper case succeed. In a proper case they may save time, expense and anxiety. But in a case which is always likely to be heavily fact sensitive, such as one involving discrimination or the closely allied ground of public interest disclosure, the circumstances in which it will be possible to strike out a claim are likely to be rare. In general it is better to proceed to determine a case on the evidence in light of all the facts. At the conclusion of the evidence gathering it is likely to be much clearer whether there is truly a point of law in issue or not.**

19. Default with respect to Tribunal orders will not automatically result in a strike out and the Tribunal must consider whether there may still be a fair trial; see **De Keyser Ltd v Wilson [2001] UKEAT/1438/00**, per Lindsay P:

> **24.. As for matters not taken into account which should have been, the Tribunal nowhere in the course of their exercising their discretion asked themselves whether a fair trial of the issues was still possible. In a case usefully drawn to our attention by both sides' Counsel, namely Arrow Nominees Inc -v- Blackledge [2000] 2 BCLC 167 the Court of Appeal had before it a case where the Judge below had more than once declined to strike out the proceedings on the basis that whilst one party had, in the course of discovery, disclosed forged documents and had lied about the forgeries during the trial, a fair trial was, in his view, still possible. We pause to reflect on the magnitude of the abuse there in comparison with Mr Pollard's and De Keyser's. Whilst in other respects the context of the Arrow Nominees case is very different, there are passages in the judgment in the Court of Appeal of relevance. Thus at page 184 there is a citation from Millett J.'s judgment in Logicrose -v- Southend United Football Club Ltd (1988) The Times 5th March 1998 as follows:—**
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> > **"But 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."**

Conclusion

20. The Respondents were represented today and evince an intention to actively engage with and contest the Claimant's claim.

21. The Respondents have had the same representative, Croner, throughout. Whilst the Claimant may think this is consistent with the behaviour she encountered directly when dealing with the Respondents themselves, the lack of any reply

whatsoever to letters from the Tribunal can really only be down to professional failure on the part of Croner. I cannot, without more, construe this as deliberate and contumelious default.

22. Whilst the conduct of this matter by the Respondents' representative has been lamentable and I can understand the Claimant's sense of frustration and anger at the pattern of non-compliance, I am not satisfied the point has yet been reached when a fair trial is no longer possible. There is a lesser and more proportionate sanction available to me, namely relisting this matter for an early date and making an unless order with respect to the remaining steps required of the Respondents necessary to get this matter ready for a final hearing.

23. I am also satisfied it is appropriate to make a preparation time order in the Claimant's favour for the additional time spent on preparing this matter, including for the hearing today, necessitated by the Respondents' repeated failure to comply with case management orders and respond to correspondence, the conduct of the Respondent's representative has been unreasonable within rule 76(1)(a).

Signed by: EJ Maxwell

Signed on: 29 July 2024