EMPLOYMENT TRIBUNALS

Claimant: Mrs Matilda Coker

Respondent: Ministry of Defence

Heard at: London South Employment Tribunal (by CVP)
On: 15 April 2024

Before: Employment Judge Abbott (sitting alone)

Representation
Claimant: Mr C Ezike, solicitor
Respondent: Mr G Probert, barrister, instructed by the Treasury Solicitor

JUDGMENT having been sent to the parties on 10 May 2024 (reasons having been delivered orally on 15 April 2024) and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. By a Judgment sent to the parties on 10 May 2024, the claim was struck out under Rule 37(1)(c) and a costs order made against the claimant in the sum of £2,200.00. By an email dated 12 May 2024 the claimant's representative requested written reasons for the judgment. These are those reasons.

2. The claim comprised complaints of constructive unfair dismissal, direct race discrimination, race-related harassment and victimisation. By a Notice of Hearing sent to the parties on 26 July 2023, the claim was listed for a Final Hearing to take place over 5 days, commencing on Monday 15 April 2024 at 10am, before a full panel (i.e. a judge and two lay members) by video on the CVP platform.

3. The panel members received papers from the Tribunal administration shortly before 4pm on Friday 12 April 2024. On reviewing the papers over the weekend, I became aware of:

a. an application that had been made by the respondent's representative on 25 March 2024, noting that the case was not ready for a Final Hearing allegedly due to the claimant's repeated failures to comply with case management directions, and seeking to convert the Final Hearing to a Preliminary Hearing to hear an application for strike-out and, potentially, for costs;

b. a costs application that had been made by the respondent's representative on 9 April 2024;

c. an email from the respondent's representative dated 12 April 2024 at 2.06pm attaching a hearing bundle and reiterating the application for strike out; and

d. an email from the claimant's representative dated 12 April 2024 at 3.11pm stating no objection to the respondent's application to convert the Final Hearing to a Preliminary Hearing, and resisting the respondent's other applications.

4. In light of this correspondence, at around 9.40am on Monday 15 April 2024 I directed that the Final Hearing be converted to a Preliminary Hearing before me (sitting alone), to commence at 10.30am rather than 10am, to consider the respondent's applications for strike-out and costs, and further case management as necessary.

5. The hearing began shortly after 10:30am. I confirmed at the outset that it was common ground that the case was not ready for a Final Hearing, then proceeded to hear, first, the strike-out application, then the costs application. I am grateful to Mr Probert (who appeared for the respondent) and Mr Ezike (who appeared for the claimant) for their submissions, which I thoroughly considered before delivering my judgments orally.

Strike-out

6. The respondent's application was based on Rule 37(1)(c) of the Employment Tribunals Rules of Procedure 2023, it being said by the respondent that the claimant had been ordered on multiple occasions to provide further particulars of her discrimination, harassment and victimisation complaints, had repeatedly failed without explanation to do so, resulting (despite judicial warning) in the Final Hearing being unable to proceed as listed, causing substantial prejudice to the respondent.

The law

7. The legal principles that the Tribunal must apply in relation to such applications were recently summarised by Mrs Justice Stacey in the Employment Appeal Tribunal decision in *Bharaj v Santander UK PLC & Ors* [2023] EAT 152 at paragraphs 43-50:

> "43. Rule 37(1)(c) provides that at any stage of the proceedings, either on its own motion or on the application of a party, the tribunal may strike out all or part of a claim, or a response, for non-compliance with any of the tribunal's rules or with an order of the tribunal.

44. The use of the verb "may" in the rule indicates a power and a discretion. A decision to strike out a claim or response involves the exercise of a case management power, as has frequently been stated. An often quoted example is that of Langstaff P in *Harris v Academies Enterprise Trust* [2015] ICR 617:

> "1. The exercise of the power to strike out involves a discretion. Where an employment judge exercises a discretion a successful appeal against his decision is likely to be rare. There is a wide ambit within which generous disagreement is possible in many matters of judgment, and this is undoubtedly the case in respect of the exercise of a discretion. As it was put in *Neary v Governing Body of St Albans Girls' School* [2010] ICR 473, para 49 by Smith LJ, there may be two correct answers, or at least two answers that are not so incorrect that they can be impugned on appeal.
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> 2. ……A discretion must be exercised judicially; that is, with due regard to reason, relevance, logic, and fairness. It will usually be only if the judge has misdirected himself on the law that he is to apply, plainly misapplied it, failed to take into account a factor that demonstrably he should have done, left out of account something he should not have, or reached a decision that is so outrageous in its defiance of logic that it can be described as perverse, that his decision may be overturned."

45. Where the exercise of a power which may result in a terminating ruling, such as a decision to strike out a claim or response, the exercise of the discretion must also be approached through the lens of the Court of Appeal authority of *Blockbuster Entertainment*.

> "5. This power [a reference to what is now the power to strike out for unreasonable conduct under rule 37(1)(b)] as the employment tribunal reminded itself, is a draconic (sic) 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, *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."

46. As promised, Sedley LJ returned to the question of proportionality:

> "20. It is common ground that, in addition to fulfilling the requirements outlined in paragraph 5 above, striking out must be a proportionate measure."

He then explained how to approach proportionality in a strike out application:

> "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."

47. The relevant paragraphs in *Weir Valves* in the judgment of HHJ Richardson are worth setting out in full:

> "13. What are the principles on which the Employment Tribunal should act in deciding whether to strike out in a case such as this, where there has been a breach of a direction?
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> 14. Where the unreasonable conduct which the Employment Tribunal is considering involves no breach of a court order, the crucial and decisive question will generally be whether a fair trial of the issues is still possible: *De Keyser Ltd v Wilson* [2001] IRLR 324 , at paragraphs 24 to 25 applying *Logicrose Ltd v Southend United Football Club Ltd* (Times, 5 March 1998) and *Arrow Nominees Inc v Blackledge* [2000] 2 Butterworths Company Law Cases, 167 . *De Keyser Ltd v Wilson* was recently followed and applied in *Bolch v Chipman* [2003] EAT 19 May, a decision which has been starred and is likely to be reported: see pages 21–22.
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> 15. Even if a fair trial as a whole is not possible, the question of remedy must still be considered so as to ensure that the effect of a debarral order does not exceed what is proportionate: see *Bolch v Chipman* at pages 23–25. For example, it may still be entirely just to allow a defaulting party to take some part in a question of compensation which he is liable to pay: see page 25.
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> 16. Those principles apply where there is no disobedience to an order. What if there is a court order and there has been disobedience to it? This is an additional consideration. The principles which we have set out above do not apply in the same way. The Tribunal must be able to impose a sanction where there has been wilful disobedience to an order: see *De Keyser v Wilson* at paragraph 25, *Bolch v Chipman* at page 22.
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> 17. But it does not follow that a striking out order or other sanction should always be the result of disobedience to an order. The guiding consideration is the overriding objective. This requires justice to be done between the parties. The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been cause and, still, whether a fair hearing is still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience."

48. In the unreported case of *Baber v The Royal Bank of Scotland* UKEAT 0301/15/JOJ & UKEAT0302/15/JOJ (EAT) Simler P (as she then was) the issue was considered in some depth in the specific context of an application under rule 37(1)(c).

> "12. It is common ground and accepted by Mr Campbell that in deciding whether to strike out a party's case for non-compliance, tribunals must have regard to the overriding objective of seeking to deal with cases fairly and justly. That is the guiding principle and requires consideration of all the circumstances and, in particular, the following factors: the magnitude of the non-compliance; whether the failure was the responsibility of the party or his or her representative; the extent to which the failure causes unfairness, disruption or prejudice; whether a fair hearing is still possible; and whether striking out or some lesser remedy would be an appropriate response to the disobedience in question."

She had thus adopted the checklist in *Weir Valves*. She continued:

> "13. Even in a case where the impugned conduct consists of deliberate failures in relation, for example, to disclosure, the fundamental question for any tribunal considering the sanction of a strike out is whether the parties' conduct has rendered a fair trial impossible."

49. Of the trio of cases listed by Sedley LJ at [5] of *Blockbuster* she set out the four stages identified by Burton P in *Arrow Nominees*:

> "(i) There must be a finding that the party is in default of some kind, falling within rule 37(1).
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> (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.
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> (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."

And then directed herself by reference to [21] of *Blockbuster* that 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.

50. A further relevant authority relied on by Mr Nicholls, is the judgment of Choudhury P in *Emuemukoro v Croma Vigilant (Scotland)*.

> "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."

Applying the legal principle to the facts of the case before he noted the following:

> "28. It was a highly relevant factor, as confirmed by the Court of Appeal in *Blockbuster*, that the strike out application was being considered on the first day of the hearing. The parties were agreed that a fair trial was not possible in that hearing window. In other words, there were no options, such as giving the respondent more time within the trial window to produce its witness statements or prepare a bundle of documents, other than an adjournment. If adjournment would result in unacceptable prejudice (a conclusion that is not challenged by the respondent), then that leaves only the strike out. The tribunal did not err in considering the prejudice to the respondent; indeed, it was bound to take that into account in reaching its decision."

8. The principles quoted above underpin my approach to this application.

Application of the law

9. The first question to ask is whether rule 37(1)(c) is engaged, *i.e.* has the claimant failed to comply with an order of the Tribunal. This is a question of fact. On consideration of the materials before me, the very clear answer to that question is yes, on at least five occasions.

   a. The respondent applied for further and better particulars of the claimant's case at the same time as filing its response on 3 July 2023. By a letter sent to the parties on 13 July 2023, Employment Judge Leith ordered that the claimant must, within 28 days of that letter, provide the Further and Better Particulars requested by the respondent. That order was not complied with.

   b. A further order was made on the direction of Employment Judge McLaren on 30 August 2023 requiring compliance by 20 September 2023. This was not complied with.

   c. Employment Judge McLaren made a further direction sent to the parties in a letter dated 2 November 2023 requiring compliance by 4pm on 3 November 2023. That was not complied with.

   d. A Scott Schedule of incidents relied upon was ultimately produced and sent to the Tribunal and the respondent at 9:45am on 7 November 2023, the same day as the case was due to come before the Tribunal for a case management preliminary hearing. The respondent contended before Employment Judge Heath at that hearing that the schedule was deficient, and the judge ordered that dates be provided within 7 days. That order was not complied with.

   e. The respondent made a series of efforts thereafter to seek the claimant's engagement, including applying for strike-out. When Employment Judge Heath's order was provided to the parties, it extended the deadline for compliance to 11 January 2024. Importantly, the judge's order includes the following paragraph:

      "The parties are reminded that time is tight, and it is unfortunate that the claimant was not in a position to finalise her case at this hearing. For the hearing in April next year to be effective the parties really have to focus on

hitting the deadlines they have been set. This particularly applies to the claimant."

The claimant did not comply with the extended deadline.

f. The respondent continued to chase, including applications to strike-out and for an unless order. An unless order was made by Employment Judge McLaren on 13 March 2024, requiring compliance by 20 March 2024. On 20 March 2024, the claimant finally provided an updated Scott Schedule in purported compliance with the unless order.

10. The next question to ask is whether a fair trial is still possible in the hearing window allocated (*i.e.* 15-19 April 2024), applying the decision of Choudhury P in *Emuemukoro v Croma Vigilant (Scotland)*. The answer to that is clear: a fair trial in the current window is not possible. This was common ground between the parties. Disclosure has not been completed, a final hearing bundle not produced, evidence not prepared. It was inconceivable that anything could be done that would permit the Final Hearing to proceed fairly and justly in the listed window.

11. The next question is whether strike-out is a proportionate sanction or whether there is a lesser sanction that can be imposed. In considering this, I must consider the overriding objective that requires the Tribunal to deal with cases fairly and justly. I must take account of all the circumstances, including the magnitude of the default, where fault lies, and what disruption / unfairness or prejudice has been caused by the default.

12. In my judgement, the magnitude of the default is high. Despite an order having been made for further and better particulars as early as July 2023, it was not even partially complied with until November 2023 (under the pressure of an impending Preliminary Hearing) and not at least purportedly *fully* complied with until 20 March 2024, in circumstances where the final hearing was due to commence on 15 April 2024. The claimant must have known, at least following the hearing before EJ Heath at which he gave the warning recorded at paragraph 9.e above, that timely compliance was imperative, but failed in that regard.

13. The claimant had provided no explanation for her repeated non-compliance prior to the hearing. Mr Ezike provided an explanation in the course of his submissions: that extensive review of documents was needed to complete the further and better particulars. This explanation was, in my judgement, inadequate to justify the lengthy and repeated non-compliance. Moreover, at no time did the claimant or her representative explain these difficulties to the respondent nor apply for extensions of time on that basis. It is notable that the claimant is a represented party, and her representatives should have recognised the likely implications of delay.

14. There is, in my judgement, clear disruption and prejudice to the respondent, in that if allowed to proceed, the final hearing is likely to come on with a delay of at least a further 17 months. I was informed by the Tribunal administration, and told the parties, that the earliest available 5 day Final Hearing would be in September 2025. Mr Ezike submitted that a shorter final hearing might be possible, which may shorten the delay. I do not accept

that submission – 5 days seems an appropriate estimate based on the information before me. The impact of further delay is particularly pertinent where, as appears from the claimant's Scott Schedule, many of the allegations are already historic (dating back to 2018, 2019 and 2020). This increases the difficulties for the respondent in finding the relevant witnesses and, once found, getting those witnesses to recall events that happened 5-7 years earlier.

15. I accept of course that there will be prejudice to the claimant by the striking out of her claim. In that regard, I have considered whether lesser sanctions may be appropriate. I do not consider there are any. It is highly relevant that this application is being considered on the first day of what should have been the Final Hearing, like in *Emuemukoro*. No directions were feasible that could have preserved the Final Hearing. In my judgement, strike out is the only proportionate and fair course to take in the circumstances.

16. For these reasons, I issued a judgment that the claim be struck-out pursuant to Rule 37(1)(c).

Costs

17. The respondent's application was based on Rule 76(1)(a) of the Employment Tribunals Rules of Procedure 2023 on the basis that the claimant (or her representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in the way that the proceedings have been conducted and/or Rule 76(2) on the basis that the claimant has breached Tribunal orders or where a hearing has been postponed or adjourned on the application of a party.

The law

18. The Rules relied upon create a three-stage process. First, I must ask myself whether Rule 76(1)(a) and/or Rule 76(2) is engaged on the facts; if so, I must go on to determine whether it is appropriate to exercise my discretion in favour of awarding costs against the claimant; and if so, I must quantify the order (Rule 78).

19. In considering whether to exercise my discretion to make an order for costs, I should consider all factors that I regard as being relevant. Rule 84 also permits me to (but does not mandate that I must) consider the claimant's ability to pay. No evidence was produced by the claimant as to her ability to pay, but I was told during submissions (and have no reason to doubt) that she is no longer in employment and her only income is from pensions.

20. I acknowledge that the making of costs orders in the Employment Tribunal is the exception rather than the rule (*Barnsley Metropolitan Borough Council v Yerrakalva* [2011] EWCA Civ 1255 at [7]).

Application of the law

21. I set out at paragraph 9 above the chronology of the claimant's defaults. In view of the repeated and unexplained nature of the defaults, I accept the respondent's submission that the defaults taken together amount to unreasonable conduct of the proceedings. Further, the Final Hearing had to

be postponed as a consequence. Rules 76(1)(a) and 76(2) are both engaged.

22. I consider the following factors to be relevant to my discretion in this case:

    a. The repeated nature of the claimant's defaults, as already described, requiring the respondent to repeatedly have to seek the engagement of the claimant and the Tribunal as appropriate;

    b. That the claimant was represented by solicitors throughout her claim;

    c. That the claimant is no longer employed and her only income is from pensions (though I have no evidence before me as to the amount she receives).

23. On balance, I am satisfied that it is appropriate to make a costs order in this case. The conduct of the claimant in failing to provide further information in a timely fashion was highly unreasonable, has put the respondent to material costs despite (as Mr Ezike acknowledged in his submissions) little substantive progress being made in the claim. This has occurred despite the claimant being represented by solicitors. The claimant's financial circumstances (to the limited extent I have been told about them) does not, in my judgement, outweigh that.

24. I can therefore move onto quantification. The costs claimed are under £20,000, so I can make an order myself (Rule 78(1)(a)).

25. I have considered the respondent's schedule of costs. I accept the claimant's submission that the costs of fee earners other than Mr Blundell should be disallowed. That reduces the solicitors fees to £1,979.92 plus VAT. I accept that these were all incurred as a consequence of the claimant's unreasonable conduct. Counsel has incurred fees of £540 plus VAT in preparation for today and £270 + VAT for attending today. It seems to me that some of the preparatory work would have had to be incurred in any event, but that much of it, including the fee for today, is incurred as a consequence of the claimant's unreasonable conduct.

26. In considering the amount to award, I am minded to make a reduction to account for the fact that the claimant is unemployed and reliant on a pension only, in accordance with Rule 84. However, the reduction is a small one in circumstances where the claimant has not given evidence of how much her pension income is, notwithstanding being on notice of the respondent's costs application since 9 April 2024.

27. Drawing these points together, I issued a judgment that the claimant pay to the respondent the sum of £2,200.00 (exclusive of VAT).

28. It is my understanding that government departments are able to recover VAT and my judgment therefore does not include a sum in respect of VAT. Mr Probert was not in a position to dispute that at the hearing, but if my understanding is incorrect that is a matter that can be raised by way of an application for reconsideration under Rule 71.

Employment Judge Abbott

Date: 16 May 2024