CASE NO: 2600206/2023 & 2601160/2023

EMPLOYMENT TRIBUNALS

Claimant: Mr R. Sharma

Respondent: University of Nottingham

Heard at: Midlands (East) Region at Nottingham
On: 29 August 2024
Reserved

Before: Employment Judge R Broughton

Representation
Claimant: No Attendance
Respondent: Mr Frew of counsel attending with Mr Tataobuzogwu, solicitor.

RESERVED JUDGMENT

The claims **are struck out** in their entirety pursuant to Rule 37 (1)(b) and (d).

The hearing which listed for 23 September to 4 October 2024 is vacated.

REASONS

Background

1. The first claim, case number **2600206/2023**,was presented to the employment tribunal on 27 January 2023. A second claim was presented on 19 May 2023, it was given initially a case number of 600898/2023 which was then changed to **2601160/2023** following consolidation with the first claim.

2. The claimant's employment ended on 29 August 2022 (the agreed EDT) and the claims relate to events dating back to August 2021.

3. The claimant had been employed by the respondent as a Contract and Supplier Manager and raised various complaints, initially, of unfair dismissal and discrimination including of age, race and disability, breach of contract and unauthorised deduction of wages. The second claim is a claim of victimisation pursuant to section 27 Equality Act 2010 (EqA), in which he alleges that the first claim was a protected act and that he was

subject to the detriment of not being shortlisted for a post advertised by the respondent. He was notified that he had not been shortlisted on13 December 2022.

Final Hearing

4. By notice of claim dated **22 February 2023**, the parties were notified that the final hearing would be listed in September 2024; for 3 days from **23 to 25th September 2024.**

First Preliminary hearing

5. There was a preliminary hearing before Employment Judge Shore on **12 September 2023,** the claimant was represented by counsel.

6. The final hearing dates were extended to accommodate a 10 day listing, from **23 September to 4 October 2024 inclusive.**

7. Neither party expressed any difficulties with those dates.

8. This first preliminary hearing dealt with a number of issues and various orders were made including listing an open preliminary hearing on 30 November 2023 to consider applications by the claimant to amend his claim, determine whether he was disabled within the definition in section 6 EqA, determine applications for strike out or deposit orders made by the respondent and make any case management orders.

9. The claim of ordinary unfair dismissal and breach of contract were dismissed upon withdrawal at the hearing and confirmed in a judgment of the same date.

10. The claimant applied to change the date of the preliminary hearing on 30 November 2023 because he would not be in the country.

Second Preliminary hearing

11. The next preliminary hearing was re-listed and took place on **30 April 2024** before Employment Judge Fredericks- Bowyer. The claimant was represented by counsel, instructed by the claimant's solicitors, Irwin Mitchell.

12. The applications to amend the claim were dealt with and the claims of disability discrimination were dismissed because it was determined that the claimant was not disabled within the meaning of section 6 EqA at the relevant time.

13. Case management orders were also made including confirmation that the hearing would take place over 10 days from **23 September to 4 October 2024** and would deal with liability only.

14. There were no concerns raised by either party at this hearing about the dates of the hearing or the case management orders which were made.

15. Although the claimant had send in a document on **19 May 2024** (lengthy and consisting of 69 pages) which included what compensation he was seeking, other than what sum he wanted for injury to feelings and a sum for breach of contract, the rest of the headings stated 'TBC' and he reserved the right to provide updated losses. That was not a completed schedule of loss.

16. The case management orders which were made, in summary, included the following

*16.1 A list of issues to be provided by the respondent by 10 June 2024 and the claimant to comment on those by **12 June 2024.***

*16.2 The claimant to provide a schedule of loss by **24 May 2024.***

*16.3 The parties to send each other a list and copy of their documents by **21 June 2024.***

*16.4 The respondent to prepare the joint bundle by **22 July 2024**.*

*16.5 Witness statements to be exchanged by **16 August 2024**.*

17. The parties expressed an interest in Judicial Mediation and Employment Judge Fredericks- Bowyer agreed to list it for a Mediation. The parties were required to provide their dates of availability.

18. The parties provided their dates and a letter was sent out from the Tribunal on 9 May 2024 listing the **Judicial Mediation for 25 June 2023.** A full day was allocated to the mediation.

29 May 2024 letter

19. The claimant wrote into the Tribunal on **29 May 2024** and explained that he would be representing himself going forwards. From this date matters went awry.

20. In the same letter of the 29 May 2024, the claimant asked to extend all the deadlines for the case management orders made at the last hearing, by 3 months. That length of extension would jeopardise the final hearing and if adjourned, would have led to a significant delay in bringing the case to a final hearing. The case had been listed for dates in September since February 2022 and for 10 days, since September 2023 for a case which related to events dating back to 2021.

21. The claimant explained that he wanted this extension to obtain his files from his solicitors and carry out research on employment law. He did not provide any evidence or indicate when he had applied for or expected to obtain his files from his previous solicitors.

22. The claimant also referred to his medical conditions of constant body pain, severe stress, anxiety, depression and obstructive sleep disorder and the effects of strong medication and that English is not his first language.

23. He also referred to wanting to obtain support from voluntary organisations and that he was pursuing a formal complaint about his previous solicitors to the SRA and other bodies. He gave no indication of when he was likely to obtain support from voluntary organisations.

24. The claimant also set out adjustments that he wanted which included a long list of adjustments for any hearings.

25. There was no medical evidence submitted with his application.

30 May 2024 letter

26. On the **30 May 2024** the claimant wrote to the Tribunal again, this time he referred to having cataract surgery on **4 June 2024** and that it would take him 6 weeks to recover. He stated that he would **not access** his emails from 4 June 2023 for **about 6 to 7 weeks** while he was recovering (i.e. to 16/23 July)

27. Other than a photocopy of an appointment card for an appointment on 4 June at 3pm (it did not state what the appointment was for) from NHS Community Eyecare, the claimant did not include any other medical evidence. There was no medical evidence about the period of recovery and the potential impact on his ability to prepare the case during that period.

28. The claimant had not provided the respondent with a schedule of loss by 24 May 2024 as ordered. The date for compliance predated the date of his surgery. It also appeared from his letter, that it was not his intention to comply with the directions to comment on a list of issues by 12 June 2024 or send his documents by 21 June 2024. He made no reference to those orders or what preparation he had so far carried out.

29. Employment Judge Heap informed the claimant by letter of **11 June 2024** that his communications would be discussed at the conclusion of the Judicial Mediation on **25 June 2024** but if he could not attend, he needed to confirm that and whether he wanted the Judicial Mediation to be relisted. His extension to comply with the case management orders had not been addressed at this stage.

30. The claimant did not respond.

31. The respondent proceeded to comply with the case management orders and on 7 June 2024 sent to the claimant a proposed list of issues. He did not respond to them.

Judicial Mediation : 25 June 2024

32. The claimant did not write to confirm that he would not attend the Judicial Mediation and therefore the day remained allocated however, he did not attend. I was allocated to conduct the Judicial Mediation and at my request, attempts were made by the tribunal clerk to contact him by telephone on the numbers set out in his claim form. I also asked that the clerk read Employment Judge Heap's letter of the 11 June 2024 to the claimant over the telephone if he answered. The clerk informed me that a woman had answered the telephone but then terminated the call when the clerk explained who she was. The mediation was abandoned.

33. I then wrote to the claimant on **25 June 2024,** I explained the attempt to contact him by telephone and that he must provide the Tribunal with a suitable telephone number which would enable contact to be made (given that he had stated he would not be answering accessing emails) as a matter of urgency. The letter set out that the claimant had failed to provide a schedule of loss, comment on the draft list of issues or supply his documents to the respondent.

34. It was further pointed out that the claimant was not actively pursuing his claim by not complying with the case management orders and that the case management orders remained in place (except the order for the respondent to provide a joint bundle which was stayed).

35. I then decided to list the case for an urgent preliminary hearing. I was concerned that the final hearing was due to take place in approximately 12 weeks and the parties were yet to have an agreed bundle or exchange witness statements. The final hearing was

at risk unless there was cooperation from the claimant to comply with the case management orders in time. I listed the case for a date after the end of the period of 6 to 7 weeks after his cataract operation. The claimant had stated that he would not be accessing his emails only during this period of recovery. I wanted to ensure that the claimant was aware of the urgent hearing and thus it was not listed until **12 August 2024.**

36. I headed the letter 'urgent' to ensure that the claimant understood the urgency and made the following point:

"Should the claimant not attend the next telephone case management hearing, his claim may be struck out for a failure to actively pursue his claim *.The claimant cannot simply decide not to comply with case management order., If for whatever reason he cannot comply, he must make a formal application and submit any relevant medical evidence in support of that application"*

37. The claimant was advised that the Judicial Mediation had been relisted for 29 August 2024.

Letter 29 July 2024

38. The claimant wrote to the employment tribunal on 29 July 2024, attaching some evidence relating to his cataract operation and stating that he still has some redness which will take 2 to 4 weeks to get better but that he was now ready to take his case forward. He did not say that he was not well enough to proceed. He had however, taken no further steps to comply with the case management orders and gave no indication of when he would be in a position to do so.

39. Although he states that he is ready to take his case forward, further on in the letter he explains that he is not going to be available for **next 6 months** (after the final hearing).

40. The reasons given for his non availability were numerous and in brief are:

- That his wife who is his carer, had a cataract operation on her right eye on 9 July 2024 and she was still recovering. He attached a copy of a letter which appears to be from a medical centre and refers to Mrs Sharma having an operation on 9 July 2024 for cataract and being prescribed medication (drops) until **9 August 2024.** The Tribunal note that If her recovery time is similarly 6 to 7 weeks, that would end by 20/27th August. He did not explain however, how that would impact on his ability to prepare for and attend the hearing at the end of September.

- That his son who is supporting him in the case, was getting married on **30 July** . He attached an email about a booked venue for a civil ceremony on 30 July 2024, which it appears have been sent on 13 May 2024. He also states that his son will be on his honeymoon until **11 August 2024.** He did not seek to explain why he had not notified the Tribunal of these plans previously, when his son had booked the honeymoon or why if he was returning on the 11 August, the claimant could not prepare for and attend the final hearing in September.

- That the claimant was arranging to travel to India for the marriage ceremony with family and friends and would be travelling there but was yet to arrange the dates.

- That the claimant will be travelling to Sir Lanka for other marriage ceremonies and was yet to arrange those dates.

- His sister is visiting from India and will be with him until **26 September 2024** . He attached her flights tickets for a flight from Delhi on 25 July and a flight out form London to Delhi on 26 September 2024. He did not comment on when those plans had been made and nor did he provide any proof of that.

- That a friend is visiting the claimant from Chicago, from **11th October to 17 October 2024,** and thus those dates were not convenient for him either.

41. The claimant refers to his health and being advised by his GP and community psychiatric nurse that he must be very careful not to take on too many things at any one time. He does not say he will not be well enough to attend the hearing and did not attach any medical evidence to that effect. He attached a letter from his GP about adjustments for the hearing.

42. The clamant states that he will not be available until 26 September and then will be available again only from 11 October to 17 October, and during the periods when he is not available, he will not have access to his emails and will not be contactable. He does not say that he will be unable to access his emails and it is therefore reasonable to infer from his letter, that he has simply chosen not to be available because he is entertaining his sister and then his friend.

43. Further, he states that he will provide further dates when he will be travelling as and when he has arranged his travelling plans. The clear inference being, that there will be other dates when he will not be available but giving no indication of when those dates are likely to be or how long he will be away.

44. The claimant attached a letter from Doctor Addis dated **1 July 2023** stating that the claimant needs a minimum extension of 3 months for the tribunal proceedings to transition from his previous solicitors and become familiar with the tribunal; proceedings and that this was 'crucial due to his impairments which include constant body pain, severe stress, anxiety and depression'. It provides no further detail as to why the claimant's health conditions would necessitate the extension. A 3 month extension would cover the period up to end **September 2024**. In any event, the claimant was not asking for a 3 month extension, he was now saying in his letter, that he will be unavailable for 6 months (and the Tribunal note that this could potentially be substantially longer depending on his travel arrangements). The letter also lists 20 other types of adjustments he would require.

45. The respondent applied to strike out the claim on 5 August 2024 and copied the claimant into that application. This application was updated on 6 August 2024.

Third Preliminary Hearing

46. Employment Judge Butler on the 2 August 2024 informed the parties that the urgent preliminary hearing on **12 August 2024** would proceed and the claimant's application will be dealt with at that hearing.

47. The hearing went ahead on 12 August and was heard by Employment Judge Butler however, the claimant did not attend or write in to say that he would not be attending.

48. Orders were sent out on 14 August 2024, following that hearing, and the case

management summary which was sent to the parties referred to the respondent now making an application to strike out the claim under rule 37 on the grounds that the claimant's conduct is scandalous, unreasonable or vexatious and the claims are not being actively pursued. The orders confirmed that the Judicial mediation 29 August 2024 would be cancelled and that date used to consider the respondent's strike out application. An attended hearing was listed for 10am today to consider the respondent's application. The claimant was therefore on notice of the application and that it would be dealt with today.

Today's Hearing

49. The respondent attended the hearing today. The claimant did not attend and nor had he written in to the Tribunal to confirm that he would not be attending or to comment on the application.

50. It may be presumed that the claimant, after what he had written on the 29 July 2024, has simply chosen not to engage in any communication with the respondent or the Tribunal or take part in these proceedings and has not looked at, or otherwise decided not to respond to, any communication from the Tribunal, until it is convenient for him to do so (i.e. after his sister's visit and before and after his friend's visit).

51. I considered that, taking into account the claimant's recent conduct and correspondence, that there was no good reason to warrant an adjournment and decided to proceed to deal with the application pursuant to Rule 47. The oral submissions were brief. The respondent had prepared a full letter of application on 5 and 6 August and counsel had prepared a written skeleton argument, based on the same grounds as the written application.

52. I explained at the outset my intention to consider the application and reserve judgment to allow me the time to reflect on the case law and submissions presented but also because the claimant is not present, I wanted to set out the reasons for any decision, in detail and in writing.

53. Counsel for the respondent was content with that approach other than a concern about any delay in receiving the decision because the respondent will incur a significant brief fee on 2 September 2024 for the final hearing. Given that it is clear that whatever my decision, the final hearing cannot now proceed, there is insufficient time for the case management orders to be complied with and the claimant made it clear in his recent correspondence and conduct since, that he will not be attending the final hearing, the final hearing is vacated and the current case management orders stayed . It would be unjust for the respondent to incur a significant brief fee in the circumstances.

54. I shall set out the legal principles I have considered, briefly summarise the respondent's application and set out my decision.

Legal Principles

Manner in which proceedings are conducted

Vexatious /Scandalous

55. Rule 37(1)(b) of the Tribunal Rules provides that a claim (or part) may be struck out if '*the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent… has been* ***scandalous, unreasonable or vexatious'***.

56. The word 'scandalous' means irrelevant and abusive of the other side: ***Bennett v Southwark London Borough Council 2002 ICR 881, CA*.**

57. A 'vexatious' claim or defence has been described as one that is pursued not with the expectation of success but to harass the other side or out of some improper motive ***ET Marler Ltd v Robertson 1974 ICR 72, NIRC*.** The term is also used more widely to include anything that is an abuse of process.

58. In ***Attorney General v Barker 2000 1 FLR 759, QBD (Div Ct)***, Lord Chief Justice Bingham said that the hallmark of a vexatious proceeding is that it has 'little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process'.

Unreasonable conduct

59. For a 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 has made a fair trial impossible; and in either case, the striking out must be a *proportionate response;* ***Blockbuster Entertainment Ltd v James 2006 IRLR 630, CA*.**

60. In considering whether a claim should be struck out on the grounds of scandalous, unreasonable or vexatious conduct, a tribunal must consider whether a fair trial is still possible; ***De Keyser Ltd v Wilson 2001 IRLR 324, EAT*.** In that case the EAT made it clear that certain conduct, such as the *deliberate flouting of a tribunal order*, can lead directly to the question of a striking-out order. However, in ordinary circumstances, neither a claim nor a defence can be struck out on the basis of a party's conduct unless a conclusion is reached that a fair trial is no longer possible.

61. In ***Laing O'Rourke Group Services Ltd and ors v Woolf and anor EAT 0038/05*.** The employment tribunal struck out the employer's response on the ground that it had conducted the proceedings in a manner that was scandalous, unreasonable or vexatious. This occurred after the employer's representative had failed to attend a hearing in the mistaken belief that it would be adjourned by consent. When the matter was appealed, the EAT noted that although the employer's conduct could be described as unreasonable, it was not wilful, deliberate or contumelious. It opined: '*Courts should not be so outraged by what they see as unreasonable conduct as to punish the party in default in circumstances where other sanctions can be deployed and where a fair trial is still possible.'* In the EAT's view, the tribunal should also have considered whether striking out the claim was a proportionate sanction and whether an alternative, such as allowing the hearing to proceed without evidence from the employer, would have been more appropriate.

62. In ***Emuemukoro v Croma Vigilant (Scotland) Ltd 2022 ICR 327, EAT*,** the EAT rejected the proposition that the question of whether a fair trial is possible must be determined in absolute terms; that is to say, by considering whether a fair trial is possible at all, not just by considering, where an application is made at the outset of a trial, whether a fair trial is possible within the allocated trial window. The EAT considered that,

where a party's unreasonable conduct has resulted in a fair trial not being possible **within the allocated window**, the power to strike out is triggered. Whether the power ought to be exercised depends on whether it is **proportionate to do so**. The EAT found no error in the tribunal's approach to proportionality. It had correctly directed itself that strike-out was a severe sanction to be used with restraint and had concluded that it was necessary in the interests of justice to strike out CV Ltd.'s response. Striking out was considered to be the least drastic course to take in this case. It was a highly relevant factor 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.

63. The focus is on the fairness or otherwise of the trial that is contemplated, rather than some other, hypothetical trial, was emphasised in ***Itulu v London Fire Commissioner EAT 0298/18*.** ; The fairness of the trial was the fairness of the contemplated trial involving the experts who had already been identified. Furthermore, the judge had correctly concluded that a lesser sanction, such as an unless order, was inappropriate, given the claimant's repeated refusals and the further unnecessary delay and expense such an order would cause.

Rule 37 (1) (d) the claim has not been actively pursued.

64. A tribunal has the power under rule 37(1)(d), either on the application of a party or on its own initiative, to strike out the claim or response if it has not been actively pursued.

65. In ***Evans and anor v Commissioner of Police of the Metropolis 1993 ICR 151, CA***, the Court of Appeal held that an employment tribunal's power to strike out a claim for want of prosecution must be exercised in accordance with the principles that (prior to the introduction of the Civil Procedure Rules 1998 SI 1998/3132) governed the equivalent power in the High Court, as set out by the House of Lords in ***Birkett v James 1978 AC 297, HL*.** Accordingly, a tribunal can strike out a claim where:

- there has been delay that is intentional or contumelious (disrespectful or abusive to the court), **or**

- there has been inordinate and inexcusable delay, which gives rise to a **substantial risk that a fair hearing is impossible**, **or which is likely to cause serious prejudice to the respondent.**

66. 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 the Tribunal Rules or an order of the tribunal.

67. The second category requires not only that there has been a delay of an inordinate and inexcusable kind, but also that the respondent can show that it will suffer some prejudice as a result. Court of Appeal in *Evans and anor v Commissioner of Police of the Metropolis* : per Lord Justice Hoffmann; prejudice may not be difficult to show, as it will often be necessary 'to investigate the facts before memories have faded, not to allow hurt feelings to fester and to provide as summary a remedy as possible'.

68. In ***Rolls Royce plc v Riddle 2008 IRLR 873, EAT*,** an employment tribunal erred when it declined to strike out a claim after the claimant falsely informed it that he had been medically unfit to attend the hearing and failed to comply with its various directions. In so holding, the EAT noted that what is now rule 37(1)(d) is not drafted in such a way as to oblige a tribunal to take account of any particular considerations but added that, in accordance with the principles laid down in *Birkett v James* (above), as applied in the

employment tribunal in *Evans and anor v Commissioner of Police of the Metropolis* (above), strike-out applications on this ground will generally fall into one of two categories: either the default is intentional and contumelious (showing disrespect or contempt for the tribunal and/or its procedures); or the conduct has resulted in inordinate and inexcusable delay such as to give rise to a substantial risk that a fair trial would not be possible or there would be serious prejudice to the other party. Both categories recognise that a claimant's conduct may result in his or her losing the right to continue with a claim. Overall, the EAT felt that the claimant had shown considerable disrespect to the tribunal and its procedures, and to the respondent's interests. The EAT held that although striking out a claim on the basis of a claimant's failure to actively pursue it is a draconian measure, it is one that can be ordered where the claimant's default is intentional and shows disrespect for the tribunal and/or its procedures.

The respondent's application and submissions

69. I have considered the written application, the skeleton arguments and oral submissions.

70. In essence the respondent's seeks a striking pursuant to rule 37 (1) (d) and (b).

71. In terms of the manner in which the proceedings have been conducted, the respondent submits that the claimant made a unilateral decision to make himself available, after 30 May 2024, and has exempted himself from the process without permission to do so. That he has prioritised his personal life and planned activities at the expense and with disregard for the preparation of the hearing.

72. In oral submissions respondent refers to the impact of a failed hearing on the memory of witnesses to recall events and the pressure on those witnesses of unreasonable delay which amounts to prejudice. That the claimant has acted in a 'cavalier' fashion, been 'unacceptably indulgent' in prioritising other plans and made unilateral demands

73. Counsel refers to the 29 July letter being 'exceptional' and the claimant being candid over his reasons for deciding to disengage from the tribunal process.

74. Counsel refers to **Hasan v Tesco Stores Ltd UKEAT/0098/16, Bennett V London Borough of Southwark [2022] IRLR 407, AG v Barker [2000] EWHC 453, Birkett v James [1978] AC 297, Rolls Royce Plc v Riddle UKEATS/0044/07, Smith v Tesco Stores Ltd [2023] EAT 11 .**

Conclusions and Analysis

75. The claimant has been provided with a reasonable opportunity to make representations in response to the respondent's application to strike out his claims , however, he has chosen not to do so, whether because he has read the correspondence and decided not to engage with the process or because he has chosen not to read any correspondence from the tribunal or respondent. I consider that Rule 37 (2) has been complied with in these circumstances.

76. I must consider whether any of the grounds set out in rule 37 (1)(b) and (d) have been established and then decide whether to exercise my discretion to strike out the claim.

77. I have had regarded to the claimant's conduct in this management of this case. The claimant had requested on 29 May 2024 to extend all the case management time limits by 3 months. The medical evidence, though scant, also referred to an extension of 3

months. That extension was not granted and yet even now, at the end of what would have been that 3 month period, the claimant has taken no further steps to comply with the case management orders made on 30 April 2024.

78. The claimant has not supplied a completed schedule of loss, he has made no contact with the respondent to comment on the proposed list of issues or provided any of his documents. He has, it appears from his correspondence and conduct, simply decided that it is not convenient for him to engage with the tribunal process and make any attempts to move the case preparation forward until a time which suits his various plans and private commitments. He has not sought the permission of the Tribunal but simply made the decision to terminate all contact for the time being.

79. At present it appears from his 29 July letter, that he is not willing to engage in the process until the end of September and then only for a limited period in October, because he is entertaining his visiting sister and then a friend. That is simply unacceptable and it is wholly unreasonable behaviour.

80. The claimant in his conduct of these proceedings, since 30 May 2024, has shown no regard for the respondent, or for their witnesses against whom serious allegations of discrimination have been brought, for the tribunal or indeed for other users of the tribunal who are waiting for their cases to be allocated tribunal time.

Rule 37(1)(b): is *manner in which the proceedings have been conducted by or on behalf of the claimant scandalous, unreasonable or vexatious'*?

81. I do not consider that the conduct of the claimant amounts to vexatious conduct, in that it does not meet the criteria as directed by Lord Chief Justice Bingham in the Barker case. The claims have a basis in law and I do not consider that he is using the process to harass or inconvenience the respondent, although he is clearly not concerned with whether the respondent or indeed the tribunal, are inconvenienced or not by his conduct .

82. In terms of whether the conduct is 'scandalous', while the conduct of the claimant is impertinent and discourteous to the tribunal, I do not consider that it meets the threshold of a 'gratuitous insult': ***Bennett v Southwark London Borough Council 2002 ICR 881, CA.***

83. I do however consider that the conduct is unreasonable, in that not only does it involve deliberate and persistent disregard of required procedural steps, it has also made a fair trial, within the current trial window, impossible. In terms of the former, the claimant did not attend the hearing on 12 August, despite the warning that his claim may be struck out if he did not do so. He had, without being granted permission or providing sufficient medical evidence, cease communication from 30 May indicating that he needed time to recover from his operation until around mid to late July. The 12 August urgent preliminary hearing was listed for a date outside of the 'recovery' period and yet he did not attend.

84. He has failed to comply with the case management orders made in April 2024, in that he has not provided a schedule of loss, commented on the list of issues or provided his documents and there is no indication form him that he is prepared to comply with any of the remaining case management orders, indeed it is clear from his 29 July letter that he does not intend to and that he also has decided not to attend the final hearing.

85. He did not attend today's hearing, because he has deliberately chosen not to engage

in these proceedings until it is convenient for him to do so.

86. The claimant has deliberately flouted tribunal orders. It amounts to wilful, deliberate and contumelious conduct.

87. The claimant has known that the case would be heard in September 2024 since September 2023. The final hearing, because solely of the claimant's default, has now been vacated. The claimant is patently not willing to even read correspondence from the tribunal or be contactable until after his sister leaves the UK on 26 September and then he intends to engage and be contactable only for a limited time before his next visitor arrives in October. He does not ask the tribunal to communicate with someone on his behalf, such as his son, he has simply decided not to cooperate until it suits him to do so.

88. The claimant does not explain (if indeed this were to be alleged), why the operation his wife his undergone, should have prevented him attending the hearing on 12 August. His wife according to the medical evidence, was prescribed medication only until 9 August 2024. He also refers to his son assisting him, but his son was due to return from his honeymoon the day before the 12 August hearing. If he needed more time to prepare, the claimant did not ask for a short adjournment of that hearing.

89. This attitude toward the tribunal and the respondent is discourteous and impertinent. Entertaining family and friends, is something the claimant has decided to prioritise without regard to the impact on the respondent, its witnesses and without regard to the resources of the tribunal and other users.

90. The claimant has not produced any medical evidence which suggests that he is not fit to pursue his claim. In his letter of the 29 July he said he was ready to pursue his claim, subject to the dates he when has other commitments which he intends to put first.

Rule 37 (1) (d): has the claim not been actively pursued ?

91. I also consider that the claimant has failed to actively pursue his claim as set out above.

92. His conduct as set out above, is intentional and contumelious, the claimant has shown a lack of respect for the tribunal and it procedures. Further, there has been inordinate and excusable delay in dealing with the case management directions. The hearing cannot proceed on the 23 September, and indeed the claimant has made it clear that he does not intend to take part in a hearing on the listed dates.

93. The claimant's conduct causes serious prejudice to the respondent. The respondent has been put to the cost of attending two preliminary hearings which the claimant did not attend, but further this case dates back to events in 2021 and despite the claim being presented in January 2023, it has progressed little in that time (over 18 months ago). Memories of witnesses do fade and become less reliable

94. There is also good reason to believe that this disruptive and uncooperative behaviour is likely to be repeated. The claimant has already indicated that he intends to prioritise other family plans and intends to travel abroad, and thus there is every likelihood that there will be a repeat of this conduct and further delays with failures to comply with case management orders and difficulties relisting the case. This may well mean that the case is not heard until late 2025 or 2026, if at all. That is not acceptable for a case

presented in 2023 which relates to events back to 2021. It is important to the respondent and their witnesses accused of discrimination, to have the matter dealt within a reasonable timeframe and that is their right. Article 6 of the European Convention on Human Rights, lays down the right to a fair trial, including the right to have a trial within a reasonable time.

Is a fair trial still possible?

95. A fair trial within the existing trial window is no longer possible. The hearing has been vacated. It was listed to commence in 3 weeks and the claimant has made it clear he will not attend and he will not comply with the case management orders in time.

96. There is also no prospect of the case being ready for trial in the foreseeable future. There have been four preliminary hearings and none have moved the case significantly forward.

97. The claimant has not produced a witness statement, no documents have been disclosed, the issues are not agreed. The tribunal had made a very substantial number of interventions to try to get the case back on track but to no avail. It cannot move the case forward with a claimant who simply choses to disengage for significant periods of time.

Is it proportionate to strike out?

98. I have considered whether some lesser action should be taken rather than the draconian step of a strike out. However, I consider that issuing an Unless Order to compel compliance with the case management orders would be futile. The claimant has made it clear that he is not even prepared currently to access communications from the tribunal.

99. The claimant has demonstrated that he is not prepared to cooperate with the respondent and the employment tribunal to have his case heard within a reasonable time.

100. In all the circumstances, I consider that is in the interesting of the overriding objective to exercise the discretion to make an Order striking out the claimant's claims in their entirety, it is the only proportionate and fair course to take in this case given that a fair trial is not possible within the existing trial window, and, having regard to the findings, including that the claimant has wilfully and deliberately flouted the Orders of the Tribunal and there is every reason to believe his conduct will be repeated. This is quite an exceptional case.

Employment Judge R Broughton

Date: 29 August 2024

JUDGMENT SENT TO THE PARTIES ON

.....05 September 2024.....

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FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

"Recordings and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

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