EMPLOYMENT TRIBUNALS

Claimant: Mr K Jedlovsky

Respondent: Securitas Security Services (UK) Ltd

Heard at: Watford Employment Tribunal
(In public; By Video)

On: **2 September 2024**

Before: Employment Judge Quill (Sitting Alone)

Appearances
For the claimant: Mr Samuel Martins of The Employment Law Service
For the respondent: Mr John Lee, Solicitor

Interpreter Ms S Tarling (Slovakian)

JUDGMENT

(1) The complaints alleged unauthorised deduction from wages are dismissed on withdrawal.

(2) None of the remaining claims are struck out.

REASONS

Introduction

1. This had been due to be the first day of a 5 day final hearing, on dates fixed last November (so 10 months ago).

2. By order sent to parties on 29 August 2024, EJ Hyams vacated the final hearing dates, and ordered that there would be a 3 hour public preliminary hearing instead. This hearing was to consider the Respondent's application to strike out the claims.

3. That was a reference to the Respondent's representative's email at 11:44 on 19 August 2024 which set out (some of) the background material and arguments which the Respondent intended to rely on, and described the applications that it wanted to make at the hearing as:

> 1. Strike out/deposit orders in respect of the claim for direct race discrimination pursuant to:
>
> a. R37(1)(a) - on the ground it has no reasonable prospect of success
>
> b. R37(1)(b) - for non compliance with the orders of the tribunal
>
> c. R37(1)(c) - as the claim has not been actively pursued
>
> d. R39(1) - as the claim as little prosect of success.
>
> 2. Deposit orders in respect of the claim for harassment pursuant to:
>
> a. R39(1) - there is a longstanding history to the claimant's conduct, which resulted in his being subject to a final written warning in August 2020. His repeated misconduct of a similar nature in November 2020 led to his dismissal. There appears no even potentially sound evidential basis for the claimant's allegation that this was motivated or influenced by his race, not least given he does not assert that his ultimate dismissal was itself discriminatory. Further, the allegation is flatly contradicted by clear and contemporaneous evidence, put in place at the time.
>
> 3. Strike out of the claims for unpaid wages (both holiday pay and in allegedly being stood down from shift) pursuant to:
>
> a. R37(1)(b) for non compliance with the orders of the tribunal; and
>
> b. R37(1)(c) as the claim has not been actively pursued.

The Hearing and the Documents

4. I was provided with the documents attached to the Respondent's representative's emails of 30 August at 16:42 and 16:57 and those attached to the Claimant's representative's email of 1 September at 19:16, and I separately itemised these to the two parties at the outset of the hearing. As I mentioned, I also had the Tribunal's file, and they were free to refer me to other documents from there where necessary.

5. There seemed to be some technical issues (accessing the CVP room) near the start of the hearing which caused some slight delays. However, by a few minutes after 10am, I, the Respondent's representative, the Claimant's representative and the Claimant had all been able to join and were able to see and hear each other.

6. An interpreter had been booked. She seemingly had greater difficulty in accessing the room, but had been able to join prior to 10.30am. The Claimant and his representative had been content to start the hearing and have the initial discussions without awaiting the interpreter's arrival. Once she did arrive, the

Claimant was content to proceed without everything being translated, but on the basis that he could interrupt at any point and ask to have a particular comment / submission interpreted. In the event, there was only one part of the hearing in which the interpreter's services were required, and that is discussed in more detail below.

7. Once the initial technical difficulties have been overcome, the hearing started, as usual, with my asking for the representatives' names and status. I asked the Claimant's representative if he was a legal representative, and he said he was. I asked for clarification of whether he was a solicitor or a barrister or a FILEX. He said that he was none of the above and that he was an employment law consultant. I suggested that, in future, to avoid inadvertently misleading the tribunal, he should not answer "yes" when asked if he was a legal representative.

8. I asked if Mr Martins was charging the Claimant for his services. He confirmed that he was. I asked if he had checked that he was complying with any regulatory requirements for charging money to represent a person at an employment tribunal hearing, and in employment tribunal litigation generally, and he confirmed that he has done so.

9. I then proceeded to check which documents everybody had sent in, and had received from the other side. It was a concern that Mr Martins denied receiving the bundles from Mr Lee, and the first couple of times I asked him to check his emails, he was reluctant to check, stating that he checked his emails everyday and knew that he had not received the emails. After some discussion, he confirmed that he had now traced one of the emails (with the main bundle, at 16:57 last Friday), and suggested that the slowness of his internet connection was responsible for the fact that he had not previously seen it. He was unable to trace the other email (with the smaller bundle, prepared specifically for this hearing) but was able to access that bundle when attached to a new email from Mr Lee sent during the hearing.

10. We discussed that the Claimant's representative's email sent after 7pm on Sunday 1 September 2024 email commenced "*We apologise for our late amendment application, there are valid reasons behind these circumstances*". It was confirmed that there was no application from the Claimant to amend the claim, but rather this was Mr Martins' attempt to supply information which he believed the Claimant was obliged to supply because of an earlier Tribunal order (from EJ Frazer).

11. After those various delays, Mr Lee started his oral application at around 10.35am (by which time the interpreter was present). There were some interruptions from me where I attempted to make sure that I and/or Mr Martins could properly understand which documents/orders were being referenced, and/or where I encouraged Mr Lee to make sure to address which orders he was alleging had been breached by the Claimant, and when the Respondent had complied with the

orders itself, and when it had chased up the Claimant. From around 11.16am to 11.19am, there was a discussion in which I invited Mr Lee to move on to his arguments in relation to breach of orders/conduct of proceedings and that, in any event, he would have to conclude his oral submissions by no later than 11.30am to allow time for (i) a break for Mr Martins to take instructions, (ii) Mr Martins to make his submissions, (iii) me to deliberate, (iv) me then to give oral decision with reasons, all to finish by 1pm. Mr Lee said that he would try. I said that he would have to stop speaking at 11.30am, and so he did not have the option of merely trying to finish by 11.30am, but actually continuing after that time.

12. At 11.30am, there were still some points that I thought needed to be stated expressly by the Respondent so that Mr Martins knew that he might need to take instructions/comment on them. So I asked Mr Lee some additional questions, after which we had a break.

13. After the break, the Claimant's representative made his comments in response. He confirmed that the complaints of unauthorised deductions (as set out in section 8 of list of issues drawn up by EJ French) were withdrawn.

14. The Claimant also wished to make some additional comments. This was reasonable because Mr Lee's assertions had straddled both the earlier period in which the Claimant was litigant in person as well as the later period in which Mr Martins was his representative.

15. It was during this part of the hearing that the Claimant called on the services of the interpreter. He wished to address the fact that the record from each of the earlier preliminary hearings (and the list of issues drawn up by EJ French) stated that he was not alleging the dismissal itself was discriminatory. He said that this was because of the language barrier and that his claim did, in fact, allege that the dismissal was discriminatory.

16. In response, Mr Lee accepted that the claim form could potentially be read as alleging discriminatory dismissal, but, even if such a claim had been originally presented, it had been withdrawn at the hearing before EJ Frazer, a position which had been reinforced by the comments to EJ French.

17. Following a break for deliberations, and then my decision with reasons, I scheduled the final hearing and made case management orders for it. The Respondent requested written reasons, and these are those written reasons. The hearing finished about 1.20pm, so about 20 minutes over the allotted time.

The Law on Strike Out / Deposit Orders

18. Rule 37 deals with strike out.

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).
>
> (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.

19. Strike out is a Draconian power, "not to be too readily exercised." (Blockbuster Entertainment v James [2006] IRLR 630).

20. Rule 37(1)(a) stands apart from the others in that it covers situations in which deals with the substantive merits of the claim itself. The other 4 sub-paragraphs do not deal with the merits of the underlying claim, but rather with the way in which the litigation (for the specific claim or claims in question) has been pursued.

21. Rule 37(1)(e) is a freestanding ground for strike out, and can potentially apply even if none of the conditions in Rules 37(1)(b) to (d) are met. Where, however, the conditions in any of the Rules 37(1)(b) to (d) are met, the issue of whether there could, nonetheless, still be a fair trial is likely to be a relevant consideration.

22. Similarly, Rule 37(1)(d) is a freestanding ground for strike out, and can potentially apply even if none of the conditions in Rules 37(1)(b) to (c) are met.

23. In terms of Rule 37(1)(b), the case law includes, for example, De Keyser Limited v Wilson [2001] IRLR 324. At paragraph 55 of Bolch v Chipman [2004] IRLR 140, a four step process is recommended.

> (1) There must be a conclusion by the Tribunal not simply that a party has behaved unreasonably but that the proceedings have been conducted by or on his behalf unreasonably. …
>
> (2) Assuming there be a finding that the proceedings have been conducted scandalously, unreasonably or vexatiously, that is not the final question …. …. De Keyser makes it plain that there can be circumstances in which a finding can lead straight to a debarring order. Such an example … is "wilful, deliberate or contumelious disobedience" of the Order of a court. But in ordinary circumstances … before there can be a strike out of … an Originating Application [there must be] a conclusion as to whether a fair trial is or is not still possible. …
>
> (3) Once there has been a conclusion, if there has been, that the proceedings have been conducted in breach of [what is now Rule 37] and that a fair trial is not

> possible, there still remains the question as to what remedy the tribunal considers appropriate, which is proportionate to its conclusion. ...
>
> (4) But even if the question of a fair trial is found against such a party, the question still arises as to consequence.

24. In other words, as well as making clear that it is important to make findings of fact about the conduct, and to precisely analyse the effects of the (allegedly) unreasonable conduct on the proceedings, it is crucial to bear in mind that the sanction of strike out does not exist so that the Tribunal can show disapproval of the conduct. A thought process that the conduct is so unreasonable that the party must be punished by having their claim struck out is impermissible. Instead, if there is found to have been unreasonable conduct of the proceedings, the focus must be on what effects that conduct has had on the proceedings. Generally speaking, where a fair trial is still possible, despite the unreasonableness, strike out is inappropriate; this general principle is subject to the fact that, as per De Keyser, there can be some circumstances which lead straight to strike out (including "wilful, deliberate or contumelious disobedience" of the order of a court or tribunal).

25. If making a decision under Rule 37(1)(b), the Tribunal can and should take account of the way in which the proceedings have been conducted, not just by the party, potentially but by somebody acting on their behalf. That is what is said in the express wording of Rule 37(1)(b). This avoids there being a loophole whereby the party does not waive privilege, but argues that there is insufficient evidence that they (rather than their representative) is to blame for the conduct in question. However, the Tribunal must not leap to any conclusions about whether the party has specifically authorised the conduct in question. Before making a decision, it might be appropriate to allow the party themselves to have the opportunity to dissociate themselves from the conduct, and/or to rectify it, and/or to instruct their current representative to modify their behaviour and/or to decide that they will make alternative arrangements (to appoint a new representative or to become a litigant in person) for representation.

    25.1 As per Bennett v Southwark [2002] EWCA Civ 223, Tribunals must make specific findings about the representative's conduct and decide whether that was conduct that was related to the way in which the litigation was being conducted on the party's behalf. Having done so, the Tribunal must make decisions about: (a) the way in which the proceedings have been conducted, (b) how far that is attributable to the party the representative is acting for, and (c) the significance of the "scandalous" conduct. Strike out must only be done if proportionate, having considered the conduct itself and the degree to which the party itself is to blame, and whether there could be a remedy which rectifies the conduct.

25.2 In Phipps v Priory Education Services [2023] EWCA Civ 652, (a case in which strike out had been under Rule 37(1)(c) and (d), rather than Rule 37(1)(b)), the Court of Appeal emphasised both (a) that the potential existence of a negligence claim for the party against the representative is not a powerful argument that strike out is proportionate and (b) that Tribunals need to consider whether the party itself was aware of that the representative's acts and omissions were risking strike out. In Oyebisi v Hyde Housing Association Ltd [2024] EAT 124, the EAT emphasised that fairness might require the party to have sufficient warning, before a decision is made, that they can consider their own stance, including whether to dismiss the representative and make alternative arrangements.

26. In considering whether a strike out should be made for non-compliance with any orders of the tribunal, relevant factors are discussed in Weir Valves and Controls (UK) Ltd v Armitage [2004] ICR 371. They include: the magnitude of the non-compliance; whether the default was the responsibility of the party or of their representative; what disruption, unfairness or prejudice has been caused; whether a fair hearing would still be possible; whether striking out or some lesser remedy would be an appropriate response to the disobedience.

27. Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684, [2006] IRLR 630 contained an example of where, on the facts, the Tribunal did decide that the claimant had deliberately flouted the orders of the tribunal and that strike out was appropriate. The Employment Appeal Tribunal overturned that decision (and the Court of Appeal agreed) on the basis that the Tribunal had not correctly analysed the extent of the claimant's failures to comply with its orders, or the effects that the conduct would be likely to have on whether a fair hearing was possible. Amongst other things, there had been no (or insufficient) analysis of whether, in fact, even though the Claimant had brought new documents and a revised statement on the first day of the hearing, it might have been possible to simply proceed with the hearing within the listed (six day) hearing slot. The Court of Appeal also pointed out the importance of the right to a fair trial as guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (which is set out in Schedule 1 of Human Rights Act 1998) and by common law.

28. In Emuemukoro v Croma Vigilant (Scotland) Ltd [2022] ICR 327, it was made clear that the issue of whether a fair trial is still possible should be considered (for Rules 37(1)(b) and (c), at least) by reference to whether the trial can take place on the dates that have been fixed for it. If the answer is "no", then the criteria in Rule 37(1) are met, and there might be a strike out even if a fair trial could potentially take place at a later date. The latter consideration would be relevant to the exercise of discretion, but the mere fact alone that a hypothetically fair trial could still take place on some future date, provided sufficient time, effort and resources were allocated, is not a knockout blow to a strike out application.

29. Under Rule 37(1)(b) to (e), it is necessary, as with any other decision that a tribunal must make, to have regard to the overriding objective. The Tribunal must take into account all relevant factors, and ignore anything which is not relevant. The Tribunal must make a decision which is in the interests of justice and which is proportionate. It must have proper regard to the Article 6 rights of all the parties.

30. Where the argument is that Rule 37(1)(a) applies, Article 6 rights are also relevant, but Article 6 can potentially be satisfied by a fair hearing (or fair decision on the papers) that determines that the claim or response has no reasonable prospects. Article 6 does not demand that every litigant always has the right to a full hearing at which evidence is heard before the claim/defence is adjudicated.

31. Striking out a claim of discrimination is a step which is only to be taken in the clearest of cases: see Anyanwu & Another v South Bank University and South Bank Student Union [2001] ICR 391.

32. The applicable principles were summarised in Mechkarov v Citibank N.A [2016] ICR 1121:

    32.1 only in the clearest case should a discrimination claim be struck out;

    32.2 where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;

    32.3 the Claimant's case must ordinarily be taken at its highest;

    32.4 if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and

    32.5 a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.

33. However, the guidance given by the appellate courts makes clear that these principles are there to remind Tribunals to take extra care before striking an Equality Act complaint, and are not intended to imply that such a case can never be struck out.

    33.1 In Community Law Clinics Solicitors Ltd & Ors v Methuen UKEAT/0024/11, it was stated that in appropriate cases, claims should be struck out and that "*the time and resources of the ET's ought not be taken up by having to hear evidence in cases that are bound to fail*."

    33.2 In ABN Amro Management Services Ltd v Hogben UKEAT/0266/09, it was stated, "*If a case has indeed no reasonable prospect of success, it ought to be struck out*."

34. In Cox v Adecco UKEAT/0339/19/AT, the Employment Appeal Tribunal reviewed the case law and gave some important guidance. It is always necessary for the

Tribunal to be sure that it understands the party's case properly, before deciding whether to strike out. It is always necessary to take account of the overriding objective; ensuring that parties are on an equal footing may require active consideration of the principles in the Equal Treatment Bench Book, and any other appropriate guidance. In Cox, the following principles were suggested:

> (1) No-one gains by truly hopeless cases being pursued to a hearing;
>
> (2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;
>
> (3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;
>
> (4) The Claimant's case must ordinarily be taken at its highest;
>
> (5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;
>
> (6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;
>
> (7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;
>
> (8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;
>
> (9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.

35. Rule 39(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 deals with deposit orders.

> Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

36. In summary, Rule 39(1) means that where the tribunal considers that any specific allegation or argument in a claim has little reasonable prospects of success, it may

make an order requiring the party to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument.

37. If the criteria set out in Rule 39(1) are not met, then no deposit order can be made. However, if the criteria are met, then it does not follow that a deposit order necessarily should be made. A judge should decide whether or not a deposit order is appropriate taking account of all relevant factors (and ignoring irrelevant ones). In an appropriate case, the consideration can include an assessment of how likely it is that a claimant will be able to prove disputed facts, but only where there is a proper basis for doubting the likelihood of the claimant being able to establish such essential facts.

38. The rule also requires that the tribunal shall make reasonable inquiries into the paying party's ability to pay the deposit and have regard to that when deciding the amount of the deposit. The date for payment is something to be considered by the judge and to be specified in any deposit order.

39. If the paying party fails to pay the deposit by the date specified, then the specific allegation or argument to which the order relates shall be struck out.

40. If the amount is paid and the claim continues, then there are circumstances in which the sum paid on deposit could eventually be paid over to the other side, and furthermore, there could be other costs consequences too. Alternatively, at the end of the claim, the deposit might be refunded to the paying party. The eventual outcome will depend on whether the paying party is successful or unsuccessful in relation to the particular allegation or argument, and, if unsuccessful, will depend on the reasons for that.

41. In other words, the making of a deposit order has two consequences. Firstly, a sum of money must be paid as a condition of pursuing or defending the claim. Secondly, if the money is paid then the deposit order operates as a warning that costs might be awarded against paying party in some circumstances.

42. The making of deposit orders, in appropriate cases can be in the interests of justice, because claims or defences which have little prospects of success cause costs to be incurred and time to be spent by the opposing party, when it is likely that this is unnecessary.

43. If the Tribunal's assessment is that a complaint will fail even if all the facts alleged by the Claimant are proven, then it follows that that particular complaint will have little reasonable prospects of success.

44. However, the tribunal can also take into account the likelihood of the Claimant proving facts which are in dispute. The assessment of whether there are "little reasonable prospects of success" can take into account both the factual and legal matters which the tribunal will have to determine at the final hearing. There would

have to have a proper basis for doubting the likelihood of the Claimant being able to establish the facts essential to the claim. However, the tribunal is not obliged to make an assumption, in the Claimant's favour, that the Claimant will be able to prove every factual assertion. The requirement to show that there are "little reasonable prospect of success" is not as exacting as the requirement to show "no reasonable prospect".

45. A tribunal can order a deposit in circumstances where strike out – under Rule 37(1)(a) - would be inappropriate. The grounds set out in Rules 37(1)(b) to (e) do not open up the possibility of a deposit order being made as an alternative to strike out on any of those grounds.

Parties' submissions and application of the law to facts of this case

46. The claim was presented on 18 February 2021. It alleged unfair dismissal (in November 2020) and race discrimination during employment.

47. Through no fault of the parties, the first preliminary hearing was not until 12 August 2022. At that hearing, EJ Frazer ordered that there would be a further preliminary hearing and that a Slovakian interpreter would be arranged for it. That hearing was to decide, amongst other things, the Claimant's application to amend. The Claimant was ordered to provide some additional information.

47.1 The summary stated:

> 8. I have therefore directed that the Claimant supply further information as to his claims as set out below and if he wishes to pursue the COVID related claims, to make an amendment application to the Tribunal. The Respondent will then have the opportunity to respond. I have not directed that the Respondent provide an amended response at this stage because the amendment application has not been heard but it may provide a draft if so advised for the judge at the next preliminary hearing.

47.2 The orders included that, by 30 September 2022:

> Race discrimination claim
>
> 7.1 He shall state the names of any actual comparators; their job titles and the details of when it is said that they used their mobile phones or smoked and were not disciplined including dates, if possible, and the details of anyone else present.
>
> Unpaid wages claim
>
> 7.2 He shall state the dates when he says he was not paid for his claim of unpaid wages between June 2020 and September 2020 for 8 event dates.
>
> 7.3 He shall clarify whether he is bringing a claim for 7 days unpaid wages or 21 days unpaid wages in relation to his claim for payment during the time when he was suffering from COVID. He shall al also state the dates when he says he was not paid but should have been paid.

48. Through no fault of the parties, the next hearing did not take place for more than a year. It took place before EJ French on 21 November 2023. That hearing dealt with the Claimant's amendment application and produced a list of issues. The list of issues named six comparators for the race complaint.

49. Paragraphs 5 to 7 of the summary discussed the hearing that had taken place before EJ Frazer, and the orders that had been made. The summary included:

> Claims and Issues
>
> 9. The claims and issues, as discussed at this preliminary hearing, are listed in the Case Summary below. If you think the list is wrong or incomplete, you must write to the Tribunal and the other side by 14 days of receipt of the order. If you do not, the list will be treated as final unless the Tribunal decides otherwise.
>
> Further information
>
> 10. If the respondent requires further information from the claimant they must request this by 19 December 2023.
>
> 11. The claimant is to reply to any such request by 9 January 2024.

50. The Respondent's representative argued before me that the Claimant was still in breach of EJ Frazer's orders. It was argued that the hearing before EJ French (including paragraph 10 of the summary mentioned above) did not relieve the Claimant of the obligation to provide the information. It was suggested that very recently (email of 25 August at 12:26), Mr Martins had purported to supply information about comparators, but it was incomplete (and allegedly contradicted information supplied previously), and the necessary information about unpaid wages was still outstanding.

51. The Claimant's representative's email to the Respondent on 25 August at 12:26 contained similar information to that in the email to the Tribunal (not copied to the Respondent) at 19:16 on 1 September 2024.

52. Had it been true that these emails were the first / only purported attempts to comply with an order that had been made in August 2022, for which the compliance date had been 30 September 2022, and with final hearing due to commence on 2 September 2022, then this would have been a very serious breach of the orders indeed. Had it been true, as suggested by Mr Lee, that this breach meant that a fair hearing starting on 2 September 2024 had not been possible, then it might have been a potentially strong argument in favour of strike out.

53. However, the argument is rejected. EJ Frazer made various orders in preparation for a further preliminary hearing. Regardless of whether the Claimant complied with those orders on time or not (and, in at least some cases, EJ French's view was that he had not complied with them before the start of the 21 November 2023 hearing), he was not under a continuing obligation to comply with those orders after that second preliminary hearing had taken place. EJ French moved things

on and made new orders. In particular, during the hearing, she had sufficient information to name 6 alleged comparators. As made clear in the documents produced, the Respondent was notified that it could write to the Tribunal to seek to vary list of issues and/or it could write to the Claimant to require further information. The Respondent had every opportunity to seek specific orders, requiring the Claimant to supply specific information by a specific date if it wished to do so.

54. I am satisfied from the summary/orders document produced by EJ French, that it was clear to both sides and to EJ French that EJ Frazer had made the orders (which Mr Lee now relies on) for further information, but that the Claimant was no longer required, by those orders, to write to the Tribunal or to the Respondent after 21 November 2023. In addition, though not in the bundle for my hearing, the Tribunal file contains correspondence sent in by the Respondent prior to EJ French's hearing. The Respondent was alleging, at that time, that the Claimant was in breach of EJ Frazer's orders. If the Respondent sought strike out based on the (alleged) breach of EJ Frazer's orders, it had every opportunity to ask EJ French to arrange a public preliminary hearing for that purpose. The fact that she ordered the matter be set down for a final hearing, with no prior preliminary hearing, is further confirmation that she was satisfied that no further issue about (alleged) breach of EJ Frazer's orders remained as a live issue after 21 November.

55. EJ French's summary included:

> The claimant requires a Slovakian interpreter for the final hearing. An interpreter had been booked for the hearing today, however cancelled at short notice and an alternative could not be arranged. The claimant confirmed that he had a good command of English and was happy to proceed for today's purposes without an interpreter on the understanding that should he not understand at any point he would raise this with the Judge. The claimant confirmed he would need an interpreter for the final hearing, however he would not necessarily require every part of the hearing to be translated. The time estimate for trial was set on that basis.

56. The orders included:

> 14. By 26 March 2024 the respondent must send the claimant copies of all documents relevant to the issues listed in the Case Summary below.
>
> 15. By 16 April 2024 the claimant must send the respondent copies of any other documents relevant to those issues. This includes documents relevant to financial losses and injury to feelings.

57. There is a dispute over whether the Respondent complied with its obligation. However, I am satisfied that it did so.

58. Even if the Claimant had no other item falling within the requirements of paragraph 15 of EJ French's orders, he does have documents relating to income. He would

have to disclose documents about state benefits and job searching, even if he had had no new employment. However, in fact, he confirms that he has had new employment, and so was obliged to send those documents to the Respondent (by 16 April 2024) and that has not happened.

59. The Claimant was acting as a litigant in person when he presented the claim, and at both preliminary hearings.

60. Mr Martins stated that he had not been acting for the Claimant at the time that the Claimant had been required to comply with the orders for disclosure. That comment is inconsistent with documents on the Tribunal file which seem to show Mr Martins writing to the Tribunal in February 2024.

61. I do accept that there was some genuine lack of understanding on the Claimant's part about exactly what was required by the disclosure order. Mr Martins describes himself as "employment law consultant" and says he is a "sole practitioner", with business name "The Employment Law Service"; in those circumstances, it is reasonable to expect him to understand the requirements of paragraph 15 of EJ French's orders, and of the importance of complying with it (a) on time or (b) if there is a good reason for being slightly late, then well in advance the dates for subsequent orders (the hearing bundle, in particular).

62. The Claimant and Mr Martins each seem to lay the blame at the other's door. The Claimant says that he sent documents about his post-termination income to Mr Martins, and Mr Martins denies this. I observed today that Mr Martins was unable (or unwilling) to immediately access his emails and download attachments. Based on his own submissions, he struggles with reading documents on screen and does not have facilities to print documents (or not documents of significant size, at least). Thus, on balance of probabilities, and for today's purposes, I accept the Claimant's account that he sent the documents to Mr Martins.

63. Either way, there has been a breach of EJ French's orders in that the remedy documents have not been provided to the Respondent. The Claimant's position seems to be that he has no other documents (that is, nothing relevant to liability).

64. The orders also included, in relation to agreed bundle:

> The respondent must prepare a file of those documents with an index and page numbers. They must send a hard copy to the claimant by 28 May 2024.

65. I could, of course, potentially be sympathetic to the fact that it is difficult to finalise a bundle when one side (the Claimant, in this case) has failed to disclose their documents. That, however, was not a point which the Respondent sought to press. Rather, the Respondent's representative's position is that it complied with the order to supply a bundle of documents to the Claimant. On 12 July 2024, the Claimant's representative wrote to the Respondent's representative chasing the

bundle (so that statements could be prepared, according to the email). The Respondent's reply the same day stated that "*We can confirm that the bundle was sent to you on the 22nd March 2024 via email*." At the time, in other words, there was no argument by the Respondent that statements could not be done without the Claimant's disclosure; rather the Respondent appeared willing to proceed on the basis that the bundle was already finalised, and it matched the Respondent's disclosure sent to the Claimant in March. On 16 July, Mr Lee followed up, and asked if Mr Martins had any comments on the bundle, or any additional documents. That same day (16 July), Mr Martins replied to say that he would check the bundle and revert with comments, and any missing documents.

66. Around 15 August, further emails were exchanged (and there seems to have been phone discussions at the same time). The bundle was re-sent, and Mr Martins, who had asked about the index, was told that it was at the rear.

67. On the same day, Thursday 15 August 2024, Mr Lee also wrote to the Tribunal to state that he and the Claimant's representative were in agreement that the final hearing should be converted from face to face to video.

68. The following Monday, 19 August, the strike out application was made.

69. On Friday 23 August 2024, the Respondent's representative wrote to the Claimant's representative attaching a pdf, and stating that this was the amended bundle, with some pages added and some removed. It asked the Claimant's representative where the hard copy should be sent.

70. Before during and after that bank holiday weekend, the Respondent's representative sent emails about wanting to exchange statements. The Claimant's representative did not respond to those at the time.

71. On Tuesday, 27 August 2024, the Respondent's representative wrote to the Tribunal again about the strike out application, and referred back to the orders made by EJ Frazer, as discussed above.

72. On the Wednesday, the Respondent's representative informed the Claimant's representative that it was not proposing to send a hard copy bundle to the Claimant; s side (the application for remote hearing having been granted) [1]. After 5pm, the Claimant's representative mentioned (a) not having had the bundle and (b) expecting to exchange statements the following day. Having been asked to clarify, Mr Martins wrote back to say:

> I am a sole practitioner, my printer is not very good, you are clearly in breach of the ET Orders. As discussed we will exchange WS with you tomorrow by 3pm.

[1] The same day, the Respondent's representative wrote to the Tribunal to state that it was not proposing (and believed it was unable) to send hard copies of the bundle to the Tribunal.

73. He added later (at 6.19pm):

> I have a disability, stroke, a mental impairment, I therefore suffer headaches when reading documents on a Pc.
>
> Pls make an adjustment asap to facilitate the judicial process pls.

74. The following day, Thursday 29 August, the parties had further email exchanges, which included the Respondent's representative explaining what he said were the problems with creating the hard copy of the bundle, and (later) stating that it would be delivered the following day. The Claimant's representative at first maintained that witness statement exchange would be at 3pm then (later) noted that the Tribunal had vacated the hearing and arranged this preliminary hearing instead.

75. There was a clear and explicit order by EJ French for a hard copy bundle to be sent to the Claimant's side. That did not happen (at least not until immediately before the date on which the Claimant was due to begin).

76. Witness statements had been supposed to be exchanged by 9 July. I am satisfied that neither side was ready at that date. The Respondent seems to have been ready around mid-August.

77. Today, Mr Martins' position to me was that the Claimant side could not prepare witness statements in the absence of a hard copy bundle. He referred to the same reason given to the Respondent on 28 August.

78. There are some problems with that explanation:

    78.1 Firstly, Mr Martins' disability would not have prevented his forwarding the electronic bundle to the Claimant so that the Claimant could start work on the draft.

    78.2 Secondly, it was only mentioned as an issue for the first time on 28 August (effectively two working days before the hearing, given that it was after 6pm). Mr Martins had asked about the bundle on 12 July and again around 15 August, but on neither occasion did he say that witness statements could not be finalised until after receipt of a hard copy. His 16 July reply implied that he was content to work off the electronic version.

    78.3 Thirdly, even on 28 August, Mr Martins was asserting that witness statements would be exchanged the following day at 3pm.

79. All that being said, as per the guidance in Cox v Adecco, I must take into account the Equal Treatment Bench Book, and I am happy to do so. It is not the Claimant's fault that no interpreter was available on 21 November 2023, and from speaking to the Claimant today, my finding is that the Claimant was not aware of the importance of the written witness statement, or of the exchange of statements, let alone of the importance of complying with the Tribunal's deadline. It is also clear

that, since earlier this year, he has been relying on Mr Martins for advice and assistance, and paying him for that. I am satisfied that the Claimant was not deliberately intending to flout the orders made by the Tribunal. On the contrary, it is clear to me that the Claimant does want his case to be heard, and is not seeking to prevent a fair hearing. I have to take fairness to both parties into account, and I do so. However, I do not think it would be fair to the Claimant, in all the circumstances, to strike out the claim under Rule 37(1)(b) or (c).

79.1 I am not satisfied that the Claimant authorised Mr Martins to purport to tell the Respondent that statements would only be exchanged at 3pm on the Thursday before the hearing.

79.2 I am not satisfied that there was any discussion at all between the Claimant and Mr Martins to the effect that Mr Martins would be unable to print the electronic bundle that had been sent to him, and unable to finalise witness statements until after the Respondent had supplied him with a hard copy.

79.3 I am not satisfied that Mr Martins made the Claimant aware of the strike out application, or of the potential consequences of not having exchanged statements.

79.4 While the Respondent is (far from) wholly to blame for a situation in which Mr Martins claims he cannot exchange without a hard copy bundle, and in which no hard copy bundle had been supplied, it is a fact that it had been ordered to supply a hard copy to the Claimant, and had not done so. It was only after the bundle was finalised on 23 August 2024 that the Respondent informed Mr Martins that there was a problem with sending him the hard copy promptly.

80. I am therefore not striking out under Rules 37(1)(b) or (c). I do, however, warn the Claimant and his representative that any further failure to comply with the orders is very likely indeed to lead to strike out. They have used up these excuses. The Claimant has now been told what the orders require, and that the whole case might be thrown out if he fails to comply with them. Mr Martins, I hope, understands that representing a party to a Tribunal claim, especially when charging that person for it, comes with various responsibilities. His future actions or omissions could lead to his client's case being struck out. If he does not believe that he will be able to avoid that happening, he will need to inform the Claimant in good time for the Claimant to make alternative arrangement; if he seeks that the Tribunal make any adjustments for his disability, he will need to write – in plenty of time – with supporting medical evidence.

81. In terms of Mr Martins' additional argument, in reliance on the attachments to his 1 September email, that the Claimant's family circumstances and/or medical situation provide a good reason for breach of the orders, I reject that argument. I am satisfied, on the balance of probabilities, that the failure to comply with the orders was not due to either of those things. Furthermore, if there is to be any

attempt in the future to rely on health reasons for non-compliance, there will need to be medical evidence, and it will need to be up to date, and it will need to specifically address which aspects of the Tribunal preparation the Claimant is unable to undertake, and why, and for how long the situation is expected to last.

82. For the avoidance of doubt, my decisions mentioned above neither prevent a costs application being made, nor encourage it. However, I am not going to consider a costs award of my own initiative, so it is up to the Respondent to decide if it wishes to make one. Either way, there will be no time to consider a costs application today. Furthermore, I am making no binding decision today as to where the blame lies, as between the Claimant and Mr Martins, for the failure to disclose documents or finalise the witness statement in time for this hearing to proceed [2].

83. Paragraph "37(1)(d)" is not cited in the application by number. However, there is no proper basis for me to strike out the claim as not being actively pursued. The Claimant wishes to proceed and has attended all the hearings. His representative's correspondence in the run up to the hearing date has not been helpful in terms of getting the case ready for final hearing, but there was sufficient engagement to eliminate "not being actively pursued" as a strike out ground.

84. Since I do not strike out the whole claim [under Rules 37(1)(b) or (c) or (d)], I do need to decide what the claims are, before I consider whether there should be strike out under Rule 37(1)(a) [or deposit order].

85. My assessment is that it is sufficiently clear from the claim form (reading it as a whole) that the Claimant was seeking to argue that his dismissal was discriminatory. I do not interpret either EJ Frazer's or EJ French's documents as stating that either of them made a decision to the contrary. An important point is that – as per Rule 51 – a claim can be withdrawn orally in the course of a hearing; no particular formality or exact form of words is required. I do think that a claimant making sufficiently clear during a preliminary hearing (whether in public or in private) that that a particular claim was not pursued could amount to a withdrawal, and that that would automatically have the consequence of bringing the claim to end with immediate effect, and in circumstances in which the claimant could not later change their mind. A judge does not have discretion as to whether to "accept" a withdrawal or not. If words of withdrawal are uttered, then the claim is unilaterally brought to an end, without any input from the other side or the judge being required.

86. However, I accept the Claimant's account, as given to me today via the interpreter. He did not intend to withdraw the allegation that the dismissal was discriminatory. There was a failure – in the absence of an interpreter – to properly understand the

[2] If the final hearing dates had not already been vacated, I would have had to decide whether the hearing could have gone ahead, on the basis of extremely late exchange of statements. It seems that the Claimant's statement is not ready, even today, and so that would have been a factor. However, I did not need to make a decision, as per James and Emuemukoro, about the viability of continuing within the listed hearing slot, because that listing slot had already been vacated.

questions being put, and to answer them accurately. I am satisfied that the Claimant always did intend to argue that the dismissal (as well as being unfair) was discriminatory. I do not issue a judgment confirming that the complaint of discriminatory dismissal is dismissed on withdrawal; on the contrary, as per the orders sent separately, I add it to list of issues.

87. In relation to strike out on basis of "no reasonable prospects of success", the Respondent has not persuaded me. It would be no where near sufficient for the Respondent to show me that it is more likely to succeed in its defence than to fail. I am not going to comment on whether I think the Claimant is more likely to succeed than to lose. He should not, of course, infer that my decision not to strike out implies that I think the claim is likely to succeed. He has had the opportunity to listen to the Claimant's representative going through the contemporaneous documents, including (alleged) warnings given to the Claimant by his employer and (alleged) complaints made about the Claimant by the Respondent's clients. As the Claimant has heard me say, those documents do not persuade me that – without hearing any evidence – there is no prospect of the claim succeeding, but it does not follow that, after a tribunal had heard all of the evidence, and made findings about what the Claimant knew, and when he knew it, the tribunal will be unwilling to decide that the claim had no prospect of success when he presented it (or later).

88. The Claimant's case is less about denying that the Respondent had the written rules and policies that the Respondent claimed to have, and more about how they were applied. It is less about a denial that the Respondent had grounds to suspect that he committed the conduct in question, and more about whether he was treated differently to other people in being more scrutinised and/or more harshly punished than others. Obviously the legal tests that apply (and the findings of fact that are needed) differ between the discrimination claims and the unfair dismissal complaint. However, the documentary material alluded to by the Respondent does not undermine the Claimant's case to the extent that I can decide either (i) that there is no reasonable prospect of success or (ii) that, in the alternative, there is little reasonable prospect of success. The motivations of the decision-makers, and what they knew about how others were treated, can only be assessed after hearing evidence.

    88.1 For the discrimination claims, the Claimant does not have to show that race was the main reason for the treatment, and unconscious motivation is sufficient.

    88.2 For the unfair dismissal claim, the issue is not merely about the dismissal reason (though that potentially requires the evidence of the decision-maker before a decision can be made), but also requires analysis of the process, and of the band of reasonable responses.

89. So there is no strike out or deposit order, but this decision is not intended to prevent the Respondent applying for costs, at the end of the final hearing, it if believes that it can show that the Claimant should have realised that the claim (or part of it) had no reasonable prospects of being successful.

Next Steps

90. Separate orders have been made for the final hearing.

Employment Judge Quill

Date: 9 September 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON
15 October 2024

FOR EMPLOYMENT TRIBUNALS