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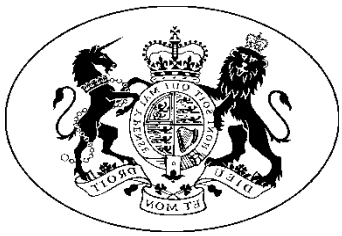

EMPLOYMENT TRIBUNALS

Claimant: **Mrs Charlotte Buckby**

Respondents: **Cumberland Council**

Heard at: **Carlisle Combined Court Hearing Centre**

On: **13 & 14 January 2025**

Before: **Employment Judge G Tobin**
Non-legal members **Ms K Fulton**
Mr S Moules

Appearances
For the claimant: in person
For the respondent: Mr J Searle (counsel)

JUDGMENT

The unanimous decision of the Tribunal is that this claim is struck out under rule 38(1)(e) of the Employment Tribunal Rules of Procedure 2024

WRITTEN REASONS
(INCLUDING THE RECORD OF HEARING)

The hearing – day 1

1. This hearing was listed for 7 days for a final hearing.

The claimant's application to postpone the hearing

2. The claimant had recently made an application to postpone this hearing, which the Employment Judge refused at that time and gave reasons. The claimant's renewed and clarified her application at the outset of the hearing.

3. The claimant said that the IBS and anxiety/depression that she suffered from at the last hearing was largely under control. She said she felt well but was very anxious about her mother-in-law and her son. The claimant's identified 3 close relatives with substantial medical problems which was currently causing her significant stress. As this document will go on the public register, I have not included the detail of the medical position of the claimant's relatives.

4. The claimant said that it was difficult to provide the medical records of others, and we discussed confidentiality and the Employment Judge's previous correspondence regarding privacy orders and other arrangements. He reiterated that the Tribunal only wants to see the medical records of relatives to the extent that these confirm the precise nature of the problem at this time, i.e. that what the claimant said is confirmed, we understand the seriousness of the situation and the impact the claimant contends these issues have upon our hearing. So, we do need to see clear authoritative collaborative information about relatives' relevant medical conditions and that is largely absent here.

5. On behalf of the respondent, Mr Searle, said that he opposed the application to postpone. He said that this hearing was previously described as the “last chance saloon”, that this was and should remain an accurate description, and that if the hearing did not proceed today then a fair hearing was no longer possible. He said that the postponement application ought to consider his consequential application to strike out, which the claimant replied to and both of which we took into account. The respondent’s points were as follows.

a. The respondent had 10 out of 11 witnesses available for this reconvened hearing and that all but one of these witnesses was still an employee of the respondent. He said that the respondent was worried that witnesses would withdraw and no longer agree to attend. He described previously the upset and toll these accusations had taken on the respondent’s witnesses. Even if the respondent or the Tribunal, could compel their attendance again at a reconvened hearing then such was the delays that we have encountered, the evidence of everyone concerned has now reached the stage where their evidence is so significantly and fatally diminished that a fair hearing is no longer possible. The allegations went back to 2019, although some of the factual dispute might go back as far as 2017. If the case is heard next year, then a delay of between 5 years to 7 years or 9 years is so long that we can no longer view the evidence as sufficiently reliable, particularly as the claimant’s witness evidence is so vague that the facts will have to be explored in great detail at the hearing.

b. A substantial number of respondent’s employee/officers had discrimination and whistleblowing retaliation allegations hanging over them for 4 years now. These are serious allegations, and these individuals are entitled to a prompt determination.

c. We have had 5 abandoned hearings [June 2022, December 2022, a Preliminary Hearing in 2024, March 2024 and October 2024], and it had come to the point that enough was enough and that we needed to press on with this last chance.

d. The Tribunal had been very clear at the last occasion that this case needed to be concluded at the next sitting, yet here we were again facing another application to postpone on incomplete, unsubstantiated medical assertions and without any clear indication that these matters will be resolved by the next hearing.

e. The costs of this case have been considerable, and the costs occasioned by another adjournment would be significant also. These additional costs would be unnecessary and have to be borne by a case strapped local authority and council tax payers and that is now unjustifiable.

f. Mr Searle contended that we should proceed in any event and that if the claimant's circumstances changed substantially, we could effectively cross that bridge, if it arose. He said the alternative was that he would need to again apply to strike out the claimant's claim.

6. The Tribunal broke to consider our determination. As previously advised to the parties, the relisting of this case for 3 months at the last hearing was exceptional and could not be relied upon in future. The previous indication from the Employment Tribunal listing team was that we could not accommodate a 7-day hearing until next year, although there was a slight chance of an opening in November 2025.

7. We refused the claimant's application to postpone. The claimant's son was unlikely to have the surgery he required within the next 1½ weeks. We were not satisfied, on the

information presented, that the claimant's mother is likely to pass away during the hearing and we are hopeful that this will not happen for some time. There have been 4 postponements of the final hearing so far, with considerable costs and disruption already incurred in dealing with adjournments, both for the respondent and the Tribunal, which like other sectors of the public service are expected to do more for less resources. The Tribunal was particularly concerned about the effects any further delay would have on the memories of those concerned, particularly for the witnesses who have retired and/or moved out of the geographical and occupational area. Memories of a workplace or around 5 to 7/9 years previously are obviously likely to be rendered less reliable.

8. The Employment Judge was very clear at the last hearing as to what the claimant needed to produce if any future postponement is to be granted. The independent corroboration and detail we require has largely been ignored.

9. Of crucial importance was the fact that if we adjourn now, we could not be sure that we would not confront exactly the same, or substantially similar, problems at any reconvened hearing. We were committed to proceed with the hearing.

Case management

10. We then spent the rest of the morning session in case management discussions. Of particular note, the Judge expressed his concern with dealing with the case in the time available. Day-1 was to proceed as a case management/reading day. We set a timetable, which provided for the claimant's evidence on day-2 and set appropriate slots for the respondent's witnesses.

11. The claimant resisted going first with her evidence. Mr Searle said that the claimant statement was not detailed, and he needed to spend some time in cross-examination to properly

identify and explore matters pertaining to the list of issues. The Judge insisted on the claimant going first, so that any ambiguity in the claimant's case can be explored and then those clarified allegations can be put to the respondent's witnesses. If the claimant was going to go last, then her allegations might not be adequately dealt with. The Judge explained to the claimant that this would benefit her as a self-representing litigant as it afforded the opportunity to explore her case in more detail so that the respondent witnesses would be aware of the precise allegations/case they need to address. We spent around an hour compiling the witness timetable and the Judge advised both parties that he would potentially guillotine witnesses so that we could be able to provide an oral judgement on day-7, because this was within the overriding objective.

12. At the end of the case management discussion, the claimant produced some further bundles of documents and said that she had an application to adduce further evidence. The respondent objected to any further documents being added to the hearing bundle. The claimant confirmed that she had not provided the documents to the respondent yet because the respondent's solicitor declined to deal with any late disclosure. The claimant said the respondent's solicitor had told her that the respondent had run out of money for this case and they would not pay for additional preparation.

13. The Tribunal conferred and made a unanimous decision to refuse to accept additional documents. Such late disclosure would breach the overriding objective. Whilst we have scope for flexibility there must be some degree of certainty in litigation. We have had 6 preliminary hearings/case management hearings. This is the fourth attempt at a final hearing, yet we faced an application to include further documents. If the case proceeded on each occasion or, at least, 3 months ago then these documents would not have featured. The claimant should have made a written application, with appropriate notice to the respondent, prior to this hearing. Our timetable is tight but

additional documentation may derail this hearing. The respondents might seek to adduce further rebuttal or clarifying documents. If not, there might be delays for the respondent to seek additional instructions and also additional witness time to deal with this late documentation. The Judge explored the issue of documentation at the last hearing and said that bundles were settled.

14. The Tribunal refused claimant's application, whereupon she stood up and walked out. When asked where she was going, the claimant he said she was ill. The court manager spoke to the claimant shortly afterwards and ascertained that her diabetes was okay, and the claimant seemed able to depart without needing medical assistance.

15. During the hearing claimant said that she should be treated as a vulnerable party. I take vulnerable to mean someone requiring special measures to assist them giving evidence because of their own circumstances or those relating to the case. The judge said that there had been no determination by the Tribunal that she was *vulnerable*. The claimant, nor anyone else, has suggested that safeguarding issues arise for her. The claimant had full capacity and did not have any learning difficulties. The claimant had held a responsible and demanding job and was, we believe, a registered social worker. She had capacity and was able to fully argue her case. She clearly had some health issues, which the Tribunal had recognised. The Judge had made it very clear that, within the overriding objective and so far as possible, we would seek to accommodate the claimant's needs and make adjustments accordingly. That is largely unproblematic and was explored previously, including at the recent hearing. The Judge had previously explained that his role was to provide for a level playing field, as much as possible, and to ensure a fair hearing in accordance with the overriding objective.

16. At around 12.50pm the Tribunal retired to read the witness evidence and key documents identified by the respondent.

Day 2 – the claimant's non-attendance

17. The Tribunal received 2 emails from the claimant by the outset of day-2, both of which confirmed that she was too ill to attend that day. On the Tribunal's instructions, the Tribunal clerk, tried to contact the claimant. Unfortunately, we did not have the claimant's mobile telephone number and, upon enquiry, neither did the respondent. We thereupon wrote to the claimant to ask her if she intended to attend the following day and if she was able to attend. The claimant's reply was equivocal, in effect, it was unclear whether she would be able to attend the next day.

Proceeding in the claimant's absence

18. The Tribunal then mooted with the respondent whether it was possible to start hearing evidence with the respondent's witnesses first; the Tribunal putting forward the claimant's case neutrally. The Tribunal was informed that the respondent's witnesses were not present at the hearing that morning, and Mr Searle could not be certain when we could start hearing evidence that day, if indeed, it was practical for the respondents to now go first. That said, following our reading of the claimant's evidence, it seemed to the Tribunal even more imperative that we start with the claimant's evidence, rather than begin with the respondent's witnesses because the claimant's case on disability discrimination and whistleblowing was unclear. Her statement, although lengthy, was high in accusations and criticism of the respondent but surprisingly light on factual detail. Mr Searle maintained it was not feasible to change the running order that the Tribunal carefully determined yesterday merely because of the claimant did not attend today. The claimant had appeared sufficiently well yesterday to continue; however, when she did not get her way on the order of evidence and on submitting additional documents that was why she walked out.

Whether or not we accept the claimant was recalcitrant, we concur with the respondent's contention that the claimant must go first.

19. Mr Searle contended that we needed clarity from the claimant that she would be able to commence the hearing the next day (at the very latest) and that was clearly lacking. He said that the non-attendance today made the hearing as timetabled impossible to conclude in 7-days. He renewed his application to strike out the claim.

20. Even if we were able to now complete the evidence by day-7, we would need to come back for deliberation and with the Tribunal members' other commitments that looks likely to delay us for months. Today's non-attendance has forfeited this whole session.

21. The Judge mooted hearing the respondent's application, say, next Monday which would be on day-6. This would give the claimant the chance of attending although it is not clear whether the claimant would in fact be able to, or choose to attend, on this day. Mr Searle said that that might have been within the overriding objective if the claimant had indicated that she would be better and able to attend in future but, frankly, the claimant was so fragile that it was nothing other than wishful thinking or speculation as to whether she might turn up next week or any other date. The claimant had a pattern of avoidance. She did not attend the hearing where she was dismissed. She has made great efforts to avoid 5 now 6 Employment Tribunal hearings. Mr Searle contended that the claimant had a pattern of running away from difficult hearings and if the past is anything to go by then it would be largely pointless delaying further and not to resolve this issue today.

22. He said that the respondent's application regarding the striking out the case had been well trailed in both correspondence and at the last hearing. He said the claimant

could be in little doubt as to the consequence of her non-attendance today and that, indeed, that she said she only attended on day-1 because the respondent had intimated that they would pursue striking out her claim. As well as forewarning of this consequence, he said that the arguments had been well rehearsed both from the last hearing, prior to this hearing and yesterday.

23. The claimant's condition changed as now she says she had nosebleeds and she is ill. This suggests different condition from her described medical condition yesterday. She may well have significant medical problems but these could arise from trying to avoid this type of hearing.

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24. The Tribunal considered hearing the application to strike out today and we unanimously decided to proceed with the respondent's application, notwithstanding the claimant was absent. We accepted Mr Searle's submissions. The claimant did not attend today, and we could not be satisfied that she would attend on day-3, day-6 or any other day. Under the circumstances, we determined that it was within the overriding objective to determine the respondent's application to strike out today.

25. The claimant could not be described as being taken by surprise that the respondent would apply to strike out her claim nor could it be said that she would be unaware of their arguments or that we have not heard her response. The respondent's reply to the claimant's application yesterday (and on previous occasions) was a strike out application in the alternative (see *Collins v Ultimate Finance Group Ltd EA 2019 001272 00*). Indeed, the Tribunal was satisfied that we have heard the claimant's response to these arguments at the last hearing and yesterday. If we were in any doubt then we would not have proceeded at this stage.

26. We are in this position entirely due to the claimant's ill-health, and while that is unfortunate for the claimant and she should not be blamed, it cannot be attributed to the Tribunal or the respondent's behaviour. It is within the overriding objective to determine this application today. We cannot be satisfied that the claimant would attend tomorrow, the day after or next week, or even at all.

The respondent's application to strike out the claimant's claim

27. Under rule 38(1)(e) of the Tribunal Rules 2024 (formerly rule 37(1)(e) of the Tribunal Rules 2013) an Employment Tribunal may strike out a claim or response (or part thereof) where it considers that *it is no longer possible to have a fair hearing*.

28. The case of *Leeks v University College London Hospitals NHS Foundation Trust 2024 EAT 134* determined that a claim could be struck out under the old rule 37(1)(e) (now rule 38(1)(e)) even where the party against whom the application is made has done nothing wrong. For example, the ill health of a party could mean that it is no longer possible to have a fair hearing even though a party cannot be criticised for being unwell.

29. *Peixoto v British Telecommunications plc EAT 0222/07* was described as "a truly extraordinary" case. The Employment Appeals Tribunal ("EAT") held that an Employment Tribunal had not erred in striking out claims of unfair dismissal and disability discrimination made by a claimant suffering from chronic fatigue syndrome on the basis that it was no longer possible to have a fair hearing. P had asserted that she would not be physically able to give oral evidence, the case could not be decided on the documents alone and there was no prospect of P being able to proceed at any time in the future, particularly given the nature of the medical evidence, which had persistently predicted a sufficient recovery that did not in fact materialise. In the absence of any prognosis for recovery, the Tribunal was unable to

establish any point in the foreseeable or even distant future when a trial could take place and concluded that a fair hearing was no longer possible. This conclusion was rooted in Article 6 of the European Convention on Human Rights, which lays down the right to a fair trial, including the right to have a trial within a reasonable time. The Tribunal had considered less draconian measures but was entitled to strike out the claims on the ground that a fair trial was impossible. Accordingly, the EAT could find no error of law in the Tribunal's decision and the appeal was dismissed. In reaching its conclusion, the EAT commented that those who know most about whether a fair trial is possible in an Employment Tribunal are those specialist members and Employment Judges who are there day in and day out.

30. Similarly, in *Riley v Crown Prosecution Service 2013 IRLR 966, CA*, the EAT upheld an Employment Tribunal's order striking out claims of discrimination and whistleblowing brought by a claimant suffering from depression on the basis that a fair hearing was no longer possible. The Employment Judge had reached this conclusion having taken account of (i) the fact that there was no prognosis of when, if ever, the claimant would be well enough to take part in the proceedings, and (ii) the balance of prejudice in respect of each party. The Court of Appeal found no error of law in this decision and dismissed R's appeal against the order. There was an agreement between medical experts that, even after two years, the probability was that R would not be well enough to participate in any hearing. In the Court's view it would be wrong to expect Tribunals to adjourn heavy cases, which are fixed for a substantial amount of hearing time many months before they are due to start, merely in the hope that a claimant's medical condition will improve. It held that if doctors cannot give any realistic prognosis of sufficient improvement within a reasonable time and the case itself deals with matters that are already in the distant past, striking out must be an option available to a Tribunal.

31. In *Whelpdale v Moorfields Eye Hospital NHS Foundation Trust ET Case No.2200336/18*. The Tribunal acceded to the Trust's application. It noted that none of the potential witnesses for the Trust remained employed by it, that 5 to 7 years had elapsed since the events in question, and that the Trust was only able to locate a few relevant documents that might assist witnesses to recall events. Given that a key element of the claim related to protected disclosure, the Tribunal was of the view that accuracy and completeness of evidence was key. Looking at the balance of prejudice, if the case continued, the Trust would be unable to examine its potential defence because of a paucity of relevant documents and the fact that witnesses' recollections of the events would have faded. W's stated aim was to highlight alleged data protection breaches at the Trust so that lessons could be learned. In financial terms, W had received a very substantial pay-out and made no attempt to mitigate his loss, and any potential compensation he might be awarded was unlikely to be significant. The balance of prejudice therefore lay in favour of the Trust. For these reasons, the Tribunal concluded that it was no longer possible for there to be a fair hearing and struck out W's claim.

32. Mr Searle said that this application was made on the basis of his arguments made yesterday – see paragraph 5(a) to (e) above, which he repeated. We understood the claimant's position to be from the earlier discussions.

33. The Tribunal was of the unanimous view that the claimant's case shall be struck out. We regard this as a truly exceptional case such as to justify taking this draconian measure.

a. There appears little or no prospect of the claimant being able to proceed at any time in the future, particularly given the nature of her various medical conditions, which, put simply, we have not been able to properly define. We cannot fully understand the claimant's impairment to proceeding because we have no clear diagnosis and no

clear prognosis. We were told yesterday that the claimant's anxiety/depression was much better, and her IBS was under control. Yet, we now have a serious of medical conditions arising which make proceeding impossible and preclude any forecast for when these problems or similar problem might be resolved or even might arise again. We are concerned that apparently whenever anything arises that does not go in the claimant's favour, she seems to seek to avoid the consequence. This might be due to some form of medical reaction, but that might be mere speculation. The point is that there is no medical prognosis that we can seek to accommodate.

b. If we are realistically looking to re-start in November 2025 (if possible) or in 2026 (which is more likely), then we need certainty. The claimant told us at the last hearing that she was very confident she would be well enough to attend this hearing. However, she cannot proceed. At this stage we need to look for certainty and expect the claimant to be able to accommodate the ebbs and flow of litigation. Following yesterday's example, we cannot see that the claimant will be able to withstand any cross-examination, particularly as Mr Searle said yesterday that he needed to press the claimant on clarifying her vague claims. There is no indication of when, if ever, the claimant would be well enough to take part and accommodate the rigour and demands of the final hearing in this factually complex multi-day case.

c. The Tribunal was unable to establish any point in the foreseeable or even distant future when a trial could take place. So, a fair hearing is no longer possible. Those accused of discrimination and whistleblowing retaliation also have the fight to a fair hearing. Neither the claimant's rights nor the respondent's rights are absolute rights, they are qualified by the right to have a trial *within a reasonable time*. If the past is a clear indicator, we have no confidence

that we will ever achieve a full hearing *within a reasonable time*. Regrettably, we have become convinced that this case will never proceed to trial, there will always be some major obstacle for the claimant.

d. Most important, we are satisfied that the point has now arisen, at 6 years after the key events started (with 4 previous attempts at a final hearing) that the further delay means that this type of evidence is now highly likely to be unreliable with the passage of time. This was fully articulated by Mr Searle yesterday. We accepted his point then and we accept it now.

e. We considered striking out the disability discrimination and whistleblowing claims only and retaining the unfair dismissal claims because the issues for unfair dismissal are more straightforward. However, the discrimination and whistleblowing claims are so interwoven with the dismissal claim that this would make such a measure arbitrary and unjustifiable.

34. Accordingly, under the circumstances we conclude that it is no longer possible to have a fair hearing, and we strike out the claim under rule 38(1)(e).

Approved by Employment Judge Tobin
16 January 2025
Sent to the parties
on: 17 January 2025

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For the Tribunal: