EMPLOYMENT TRIBUNALS

Claimant: Ms P Scott

Respondent: Change, Grow, Live

Heard at: Birmingham (hybrid) **On:** 31 January 2025

Before: Employment Judge Maxwell

Appearances
For the Claimant: in person
For the Respondent: Miss Cheng, Counsel

JUDGMENT

1. The Claimant's claim is not struck out.

2. The Respondent's response is not struck out.

REASONS

1. The procedural history in this matter is lengthy and complex. Time and time again, progress has been delayed by the Claimant’s lack of preparedness, failure to comply with case management orders, failure to cooperate with the Respondent in agreeing disclosure, the exchange of documents or witness statements. Instead of doing that which was she was ordered to, the Claimant has persisted in sending correspondence to the Respondent and Tribunal addressing the merits of the response and her assertions that the Respondent had falsified documents.

2. The Claimant has made multiple allegations of fraud and other criminality against the Respondent's solicitor. Following a telephone discussion at an early stage between the Claimant and the Respondent’s solicitor, which did not result in any agreement or otherwise advance this litigation, the Respondent’s solicitor wrote to the Claimant stating that it would not engage in further telephone discussion with her and all future communication would need to be in writing. Despite this, the Claimant has persisted in telephoning the Respondent’s solicitor. The Respondent’s solicitor has written to the Claimant reminding her of its position on telephone communication, but to no avail.

3. The Claimant frequently stated that she could not access documents provided digitally and yet would not provide the Respondent with a postal address for service. She has sought to use the Tribunal as an administrative assistant to relay documents to and from her, frequently failing to comply with rule 92.

4. During the hearing today, I sought to clarify with the Claimant the position with her access to digital documents, which has never been adequately explained. Because the Claimant was so keen to speak to her own agenda, it was difficult for me to get clear answers to my questions. Eventually, I was able to establish the Claimant had access to the internet by her mobile phone but not otherwise (i.e. she has no broadband at home). Whilst the Claimant has a laptop, this is not connected to the internet. This would seem to explain her tendency to send photos of typed documents she has created (i.e. she creates the document on her laptop, takes a photo on her phone and then attaches this to an email).

5. The Claimant has applied for strike out, on multiple occasions, based principally on assertions that the Respondent has fabricated documents, has no defence and must settle her claim. Several employment judges have explained that these are evidential matters and will be determined by the Tribunal at a final hearing. The Claimant pays no heed to this information and continues in the same way. Her submissions at the hearing today were almost entirely devoted to repeating her allegations of fabrication and representations on the merits of the Respondent's defence to the claim.

6. The Respondent has written to the Claimant repeatedly with its proposed bundle, seeking her agreement or list of specific additions. Her responses to this correspondence have not always been easy to follow. She has asked to be sent the index several times, which the Respondent has done. She has complained that documents in the bundle are fabrications and has proposed additions in vague terms. My impression is that the Claimant had not much, if at all, read or engaged with the content of the bundle provided by the Respondent, but had instead looked at the index and had different ideas at different times about additional documents the Respondent may have failed to include. I note the Claimant asked whether documents she had provided to the Respondent were included. The Respondent replied saying that they had been. This is, of course, something the Claimant could and should have checked for herself.

7. The Respondent sent a digital copy of its updated disclosure bundle to the Claimant by an email link on 10 December 2024. In January of 2025, it sent a hard copy to the Tribunal for the Claimant to collect, which it believed she had. When I asked the Claimant whether she had received this bundle, she said not. I then made enquiries of the Respondent about the possibility of sending a further hardcopy to the Claimant by courier over the weekend, if I were to make such an order. Later in the hearing, however, I noticed that the Claimant was referring to two different paper bundles, the one given to her this morning for the preliminary hearing and another larger volume, which appeared to have post it notes attached. I asked the Claimant about the larger bundle and it became apparent this was the physical bundle sent by the Respondent to the Tribunal in January, which she had previously denied receiving.

8. A vast amount correspondence passed back and forth between the parties on the subject of witness statements. As is almost always the case, the Tribunal

had ordered the simultaneous exchange of witness statements. The Claimant, however, repeatedly sought sequential exchange, saying she needed to receive the Respondent’s evidence first, which unsurprisingly was not agreed. A pattern emerged whereby the Claimant would put forward a time and date for exchange, the Respondent would say it was happy with this but asked her to confirm exchange would be simultaneous, which confirmation was not forthcoming. Belatedly, on 15 January 2025, exchange took place, even though the Claimant had yet to agree the final hearing bundle.

9. The Claimant's approach in this regard also meant the dispute resolution appointment could not take place and had to be vacated.

Law

10. So far as material, rule 38 provides:

> **38. 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.**

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

> **18. The first object of any system of justice is to get triable cases tried. There can be no doubt that among the allegations made by Mr James are things which, if true, merit concern and adjudication. There can be no doubt, either, that Mr James has been difficult, querulous and uncooperative in many respects. Some of this may be attributable to the heavy artillery that has been deployed against him - though I hope that for the future he will be able to show the moderation and respect for others which he displayed in his oral submissions to this court. But the courts and tribunals of this country are open to the difficult as well as to the**

> **compliant, so long as they do not conduct their case unreasonably. It will be for the new tribunal to decide whether that has happened here.**
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> **19. In deciding this, the tribunal needs to have in mind that the application before it is one that was made, in effect, on the opening day of the six days that had been set aside for trying the substantive case. The reasons why this happened are on record and can be recanvassed; but it takes something very unusual indeed to justify the striking out, on procedural grounds, of a claim which has arrived at the point of trial. The time to deal with persistent or deliberate failures to comply with rules or orders designed to secure a fair and orderly hearing is when they have reached the point of no return. It may be disproportionate to strike out a claim on an application, albeit an otherwise well-founded one, made on the eve or the morning of the hearing.**
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> **20. It is common ground that, in addition to fulfilling the requirements outlined in §5 above, striking out must be a proportionate measure. The employment tribunal in the present case held no more than that, in the light of their findings and conclusions, striking out was "the only proportionate and fair course to take". This aspect of their determination played no part in Mr James's grounds of appeal and accordingly plays no part in this court's decision. But if it arises again at the remitted hearing, the tribunal will need to take a less laconic and more structured approach to it than is apparent in the determination before us.**
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> **21. It is not only by reason of the Convention right to a fair hearing vouchsafed by article 6 that striking out, even if otherwise warranted, must be a proportionate response. The common law, as Mr James has reminded us, has for a long time taken a similar stance: see Re Jokai Tea Holdings [1992] 1 WLR 1196, especially at 1202E-H. What the jurisprudence of the European Court of Human Rights has contributed to the principle is the need for a structured examination. The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact if it is a fact that the tribunal is ready to try the claims; or as the case may be that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist. If a straightforward refusal to admit late material or applications will enable the hearing to go ahead, or if, albeit late, they can be accommodated without unfairness, it can only be in a wholly exceptional case that a history of unreasonable conduct which has not until that point caused the claim to be struck out will now justify its summary termination. Proportionality, in other words, is not simply a corollary or function of the existence of the other conditions for striking out. It is an important check, in the overall interests of justice, upon their consequences.**

12. The question of whether there can be a fair trial may fall to be considered within the current window; see the decision of the EAT in **Emuemukoro v Croma Vigilant (Scotland) Ltd [2021] EA-2020-000006-JOJ**, per Choudhury P:

> **18. In my judgment, Ms Hunt's submissions are to be preferred. There is nothing in any of the authorities providing support for Mr Kohanzad's proposition that the question of whether a fair trial is possible is to be**

> **determined in absolute terms; that is to say by considering whether a fair trial is possible at all and 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. Where an application to strike-out is considered on the first day of trial, it is clearly a highly relevant consideration as to whether a fair trial is possible within that trial window. In my judgment, where a party's unreasonable conduct has resulted in a fair trial not being possible within that window, the power to strike-out is triggered. Whether or not the power ought to be exercised would depend on whether or not it is proportionate to do so.**
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> **19. I do not accept Mr Kohanzad's proposition that the power can only be triggered where a D fair trial is rendered impossible in an absolute sense. That approach would not take account of all the factors that are relevant to a fair trial which the Court of Appeal in Arrow Nominees set out. These include, as I have already mentioned, the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court. These are factors which are consistent with taking into account the overriding objective. If Mr Kohanzad's proposition were correct, then these considerations would all be subordinated to the feasibility of conducting a trial whilst the memories of witnesses remain sufficiently intact to deal with the issues. In my judgment, the question of fairness in this context is not confined to that issue alone, albeit that it is an important one to take into account. It would almost always be possible to have a trial of the issues if enough time and resources are thrown at it and if scant regard were paid to the consequences of delay and costs for the other parties. However, it would clearly be inconsistent with the notion of fairness generally, and the overriding objective, if the fairness question had to be considered without regard to such matters.**
>
> **[…]**
>
> **21. In this case, the Tribunal was entitled, in my judgment, to accept the parties' joint position that a fair trial was not possible at any point in the five-day trial window. That was sufficient to trigger the power to strike-out. Whether or not the power is exercised will depend on the proportionality of taking that step. […]**

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

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

citation from Millett J.'s judgment in Logicrose -v- Southend United Football Club Ltd (1988) The Times 5th March 1998 as follows:—

> **“But I do not think that it would be right to drive a litigant from the judgment seat without a determination of the issues as a punishment for his conduct however deplorable, unless there was a real risk that that conduct would render the further conduct of proceedings unsatisfactory. The Court must always guard itself against the temptation of allowing its indignation to lead to a miscarriage of justice.”**

14. In **Bolch v Chipman [2004] IRLR 140** Burton P offered guidance as to the questions which must be answered on an application for strike out under the predecessor to rule 37(1)(b). The factors to be considered where non-compliance with orders is at large was considered in **Weir Valves & Control (UK) Limited v Armitage [2004] ICR 371**: and these may include:

    14.1 the magnitude of default;

    14.2 whether the default is that of a party or their representative;

    14.3 what disruption, unfairness or prejudice has been caused;

    14.4 whether a fair hearing is still possible;

    14.5 whether a lesser remedy would be an appropriate sanction.

15. Presidential Guidance has also been given in this regard:

> **8. Under rule 37 the Tribunal may strike out all or part of a claim or response on a number of grounds at any stage of the proceedings, either on its own initiative, or on the application of a party. These include that it is scandalous or vexatious or has no reasonable prospect of success, or the manner in which the proceedings have been conducted has been scandalous, unreasonable or vexatious.**
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> **9. Non-compliance with the rules or orders of the Tribunal is also a ground for striking out, as is the fact that the claim or response is not being actively pursued.**
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> **10. The fact that it is no longer possible to have a fair hearing is also ground for striking out. In some cases the progress of the claim to hearing is delayed over a lengthy period. Ill health may be a reason why this happens. This means that the evidence becomes more distant from the events in the case. Eventually a point may be reached where a fair hearing is no longer possible.**
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> **11. Before a strike out on any of these grounds a party will be given a reasonable opportunity to make representations in writing or request a hearing. The Tribunal does not use these powers lightly. It will often hold a preliminary hearing before taking this action.**
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> **12. In exercising these powers the Tribunal follows the overriding objective in seeking to deal with cases justly and expeditiously and in proportion to the matters in dispute. In some cases parties apply for strike out of their opponent at every perceived breach of the rules. This is**

not a satisfactory method of managing a case. Such applications are rarely successful. The outcome is often further orders by the Tribunal to ensure the case is ready for the hearing.

Conclusion

16. I am not persuaded the Claimant's conduct has been vexatious. She has attended previous hearings of her claim and has done so again today. Whilst she has sought to persuade the Respondent to settle, she also gives every impression of believing strongly in the justice of her cause and the strength of her evidence.

17. I have little hesitation in concluding that the Claimant, for all the reasons set out above, has conducted the proceedings in a manner which is unreasonable. Her obstructive approach and disregard for judicial direction is amply demonstrated. She has also behaved scandalously, with her allegations against the Respondent's solicitor. Even if she suspects her former employer of wrongdoing, she has advanced no basis for attributing criminality to its solicitors. Limb (b) of the test for strike out is satisfied.

18. The Claimant has also, repeatedly failed to comply with case management orders to provide information, agree the bundle and exchange witness statements. This falls within limb (c).

19. Accordingly, the threshold for a strike out is satisfied.

20. I must, however, go on to consider whether strike out is the appropriate sanction.

21. Notwithstanding the tortuous process by which the parties have come to exchange witness evidence, far later than should have been the case, my conclusion is that a fair trial in this matter is still possible and strikeout would, be disproportionate. The Claimant's statement was very late. That said, my view is the Respondent will have had sufficient time to digest this and prepare cross-examination by the start of the hearing on Monday, 3 January 2025.

22. As far as the hearing bundle is concerned, the time for agreement in that regard has passed. The Claimant's vague and in some respects obstructive approach, has frustrated what ought to have been a straight forward exercise.

23. There is no prospect of the Claimant engaging with the Respondent in a constructive way to agree this before Monday. This issue can, however, be resolved by **my order today that the updated disclosure bundle provided by the Respondent and in the Claimant's possession since at latest mid-January can serve as the final version of the hearing bundle** (save unless the Tribunal at the final hearing decide otherwise). This has been provided to her previously and the substance of it several times. If to any extent this causes the Claimant a difficulty in practice, it is a situation of her own making.

24. The Claimant's application for strike out, made late yesterday afternoon, is refused. She rehearses arguments previously made, which have been considered and rejected. As the Claimant has been told repeatedly by more than one Employment Judge, the veracity of the documents and whether the

Respondent's defence is made out will be matters for the Tribunal at the final hearing.

Employment Judge Maxwell

31 January 2025