EMPLOYMENT TRIBUNALS

Claimant: Mr Nosakhare Igiehon

Respondent: Nationwide Care (Finchley) Ltd

Heard at: Watford Employment Tribunal
On: 28 January 2025

Before: Employment Judge Young

Representation
For the Claimant: Mr Tola Atanda (unregistered barrister)
For the Respondent: Ms Victoria Von Wachter (Counsel)

JUDGMENT having been sent to the parties on 29 January 2025 of Employment Judge Young and written reasons having been requested by the Claimant on 29 January 2025 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant was employed by the Respondent, a company that carries out residential care activities for people with learning difficulties, mental health, and substance abuse, as a registered manager, from 23 June 2021 until 28 August 2022. Early conciliation started on 27 September 2022 and ended on 8 November 2022. The claim form was presented on 8 December 2022.

2. The claim is about race and sex discrimination, notice pay, holiday pay, unauthorised deduction of pay and a failure to provide statement of particulars. The Respondent's response to the claim is they deny any race or sex discrimination and that they subjected the Claimant to any detriments because of protected disclosures.

3. The public preliminary hearing was listed in person for **3 hours** to deal with the Claimant's application for a strike out the Respondent's response by letter dated 4 March 2024 [107] initiated by the Employment Tribunal's strike out warning [98]. The Employment Tribunal was provided with a bundle of 202 pages and an index, and the Claimant provided a written submissions/ skeleton. Contained in the bundle of documents was a document titled an affidavit from the Respondent and the Claimant in the bundle.

4. Mr Atanda made oral submissions in support of the Claimant's applications. Mr Atanda also provided a skeleton argument. The Claimant also made an application for a preparation time order ('PTO'). Ms Von Wachter made oral submissions in respect of the Respondent's objection to the Claimant's applications.

5. All reference to page numbers in square brackets are a reference to the preliminary hearing bundle provided by the Claimant.

Background

6. On 8 December 2022, the Claimant presented the claim form. The Respondent filed its response on 16 January 2023. The parties had a Telephone Case Management Preliminary Hearing (CMTPH) on 8 June 2023 before EJ Tobin. At the preliminary hearing EJ Tobin issued case management orders. However, due to the delay of the case management order being sent to the parties, EJ Tobin adjusted the dates for compliance with his case management order which was sent out on 20 September 2023 [paragraph 11 of Employment Judge Tobin's case management order]. In particular EJ Tobin's case management order stated:

2.1 The respondent shall confirm its agreement to the claimant's draft list of issues by no later than 29 November 2023 or provide the respondent with a draft version of its list of issues….

3.1 On or before 14 December 2023 the claimant and the respondent shall send to each other a list of all the documents, together with copies of the documents contained therein, that they may wish to refer to at the final hearing and which are relevant to the issues in the case. This shall include all documents in respect of remedy…..

4.1 By 4 January 2023 the parties must agree which documents are going to be used at the final hearing. The respondent must paginate and index the documents, put them into one or more files ("bundle"), and ***provide the claimant with an electronic copy of the bundle by the same date****….[bold is my emphasis]" [37 & 38]*

7. EJ Tobin's case management order also stated at paragraph 7: "

7.1 Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.

7.2 The parties may by agreement vary the dates specified in any order without the Tribunal's permission except that no variation may be agreed where that might affect the hearing date. The Tribunal must be told about any agreed variation before it comes into effect."

8. On 7 July 2023, the Claimant's representative wrote to the Respondent's solicitors to extend the dates for case management orders made at the preliminary hearing on 8 June 2023, by a period of 2 weeks [159]. On 13 July 2023, the Respondent's solicitors responded to the Claimant's representative's email stating that, Mr N Berlevy (co- founder and director of the Respondent) was in hospital for an operation and was to remain there for a few days [158]. The Respondent's solicitors suggested that the parties

agree revised deadlines after the Respondent's solicitors had spoken to the Respondent. The Respondent's solicitors acknowledged this was not ideal but would keep the Claimant's representative informed.

9. By email dated 17 July 2023 the Claimant's representative wrote that should the Respondent's director hospitalisation continue beyond 20 July 2023, the party should make an application to the employment tribunal, as it would otherwise mean 'flouting the Tribunal's Orders, which have consequences' [163]

10. On 18 July 2023, the Respondent's solicitors responded to the Claimant's representative's 17 July 2023 email and informed the Claimant's representative of the name of the witness who accompanied the Respondent at the time of the Claimant's dismissal as ordered by EJ Tobin in paragraph of the case management order dated 20 September 2020. The Respondent's solicitors and stated that phone evidence would be provided as soon as this was received. In their email the Respondent's solicitors stated, *"As you will know, the employment tribunal system is currently extremely overloaded and, as such, the tribunal is rarely either interested in, or at all engaged with, relatively trivial matters such as deadlines for matters such as individual elements of disclosure."* [162] And then *"…in practice, there are no "consequences" for relatively slight delays in meeting tribunal directions, as tribunals are rarely concerned with such matters, provided that a case is ready for a hearing on the dates listed."* [162]

11. By email dated 24 July 2023, the Claimant's representative wrote to the Respondent's solicitors asking when the Claimant would receive the Respondent's disclosure [168]. The Respondent did not respond to this request.

12. The Claimant sent the Respondent their remedy bundle on 12 September 2023. [175]

13. By email dated 1 November 2023, the Respondent provided disclosure of some WhatsApp messages [182]. On 2 November 2023, the Claimant wrote to the Respondent requesting that they provide full disclosure of the WhatsApp messages. The Respondent did not disclose the further WhatsApp messages until 1 May 2024 [185].

14. By email dated 15 January 2024, the Claimant's representative proposed alternative dates for the Respondent to provide a draft list of issues, disclosure of documents and a bundle [86]. The Claimant received no response to this proposal.

15. The Claimant wrote the Employment Tribunal by letter dated 6 February 2024 explaining that the Respondent had not complied with the order to provide a list of issues, a list of documents with copies and agree documents for the bundle and provide the Claimant with a final hearing bundle. The Claimant requested that the Employment Tribunal make an unless order and applied for costs. [84-85]

16. The Respondent responded to the Employment Tribunal and Claimant by email dated 22 February 2024 16:28 [96-97] arguing that "*it is perfectly normal for the parties to agree extended deadlines between themselves, without placing additional undue burden on the Tribunal, he has declined to*

do so, but has instead made another unnecessary formal application to the Tribunal." [96] And then added further *"Not only does this, in our respectful submission, waste the tribunal's time and resources, but also incurs unnecessary costs for both his client and ours, and we submit that this is contrary to the principles of the Overriding Objective."* [96] The Respondent stated that having provided the Claimant with a list of documents the Claimant had not provided the Respondent with the Claimant's list of documents and objected to the Claimant's application.

17. Before responding to the Claimant's application, by email dated 22 February 2024 16:19 the Respondent's solicitors acknowledge the Claimant's remedy bundle and attached a list of the Respondent's documents, but no copies of those documents. [183] The Respondent's solicitors requested that the Claimant provide a list of the Claimant's documents to be disclosed. The Respondent acknowledged to the Claimant in that email that there was further disclosure in respect of WhatsApp messages [183]

18. Following the parties' correspondence regarding compliance with order, EJ Quill wrote to the parties by letter dated 23 February 2024 warning the Respondent that the Employment Tribunal was considering striking out the response because of their failure to comply with the Employment Tribunal's order dated 20 September 2023 and that the case had not been actively pursued.

19. The Respondent's solicitors responded to the Employment Tribunal's strike out warning by email dated 4 March 2024 12:24 [100] objecting to the proposal to strike out. The Respondent claimed to have agreed to extend deadlines with the Claimant's representative and that the Claimant had also failed to comply with the Employment Tribunal's order by not providing a list of documents or providing copies of relevant disclosure. The Respondent disputed that the case had not been actively pursued and argued that to strike out was disproportionate and unfair.

20. The Claimant's representative responded to the Respondent's solicitors email 4 March 2024, by letter dated 4 March 2024 sent by email [104]. The Claimant's representative said that the Respondent's solicitors had not been full and frank with the Employment Tribunal. The Claimant's representative pointed out that that the Respondent still had not provided a list of issues.

21. By letter dated 29 November 2024 [44-45], EJ Quill ordered that *"witness statements must be exchanged prior to 20 December 2024 or else affidavits must explain why not".* [44]

22. On 5 December 2024, the Claimant requested that the Respondent provide the final hearing bundle and whether the Respondent would provide their witness statements by 20 December 2024 [187]. The Respondent did not respond to the Claimant's correspondence.

23. Neither party exchanged witness statements by 20 December 2024. Neither party had provided a witness statement to the other by the date of the hearing.

Submissions

24. The Claimant's representative relied on his written skeleton. In summary the Claimant's representative oral submissions were that the Claimant had not received copies of any documents from the Respondent except WhatsApp messages. The Respondent did not agree to any of the Claimant's proposals. The Claimant was able to produce a witness statement in skeleton but could not complete it as the Claimant had no disclosure i.e. a contract that the Respondent said that the Claimant agreed to and a loan agreement.

25. The Claimant did not exchange his statement because he considered that it was prejudicial to him to exchange when the Respondent had not exchanged. Even though the Claimant's representative was aware of the possibility of exchanging the witness statement either with a password or with a request for the Respondent not to read the Claimant's witness statement, the Claimant did not want to exchange because the Claimant was not able to reference any page numbers, and the Claimant was aware that they could have complied with EJ Quill's order, they suggested to the Respondent that they both comply.

26. The Respondent's lack of response to the 05/12/24 & 15/01/24 correspondence is unreasonable. The Respondent's solicitors' correspondence dated 22/02/24 is also unreasonable by calling the Claimant's applications unnecessary and calling it a waste of Employment Tribunal resources, against the overriding objective and an unnecessary cost. The Respondent's email dated 04/03/24 contents and tone are unreasonable and again accusing the Claimant of increasing costs. Furthermore calling the Claimant's remedies bundle irrelevant was also unreasonable. The Respondent tried to belittle their default. The Claimant had no further documents to disclose. The Respondent should not be able to rely on their affidavit as it is not an affidavit. The Claimant is out of the country from 18- 28 February 2025. But the Claimant's representative accepted that if the Respondent produced the bundle by 30 January 2025, the Claimant could produce a witness statement either before 17 February or after 6 March 2025. A fair trial is not possible because of the amount of time that has transpired and so memories are faded and additional costs.

27. The basis of the Claimant's preparation time order ('PTO') is unreasonable behaviour. The Claimant does not have a schedule of costs. The PTO is for £750 in total at a rate of £43 ph. The Claimant prepared the bundle for the current hearing and the Claimant had to make the applications and attend today. Mr Atanda confirmed that he was an unregistered barrister.

28. The Respondent's response to the Claimant's application was that Ms Von Wachter could not explain why the reasonable prospect of success had not filed a proper affidavit, why there was no draft list of issues. Mr Emery who was the solicitor who had conduct of the case left the Respondent's solicitors on 6 December 2024. Ms Von Wachter believed based upon conversations that she had with Mr Emery before he left, he was unwilling to do disclosure until he was aware what the protected disclosures were going to be, it was to be hoped that WhatsApp would disclose what the protected disclosures were. Ms Von Wachter stated that there was a reply to the Claimant's 15/01/24 and that was the Respondent's solicitors' 21 January 2025 response, but she did not know why the Respondent's solicitors did not

respond earlier than a year. Ms Von Wachter said that the Respondent's conduct was not unreasonable, but it was regrettable, and it is cumbersome that it takes a long time for the Employment Tribunal to respond to parties' correspondence. Once a party makes an application, it tends to chill any further action. For example EJ Quill's order killed any action. The Respondent waited to see what would happens and it takes months. The Respondent wanted the Claimant to come to it to sort it out.

29. The trial is not until April 2025 and that is 3 months within which to sort out the case. The language used in Mr Emery's correspondence is commonplace between lawyers. The Respondent expected that there would be cut and thrust. The Respondent's solicitors did not call the Claimant's representative a liar or unprofessional, it is the Claimant who has been unreasonable. The Respondent's conduct is perfectly normal, there is nothing outrageous. The Respondent did not respond to the Claimant's proposals as they were waiting to hear from the Employment Tribunal response to the Claimant's 06/02/24 application. It is not an excuse for the Respondent's conduct, but the reason is that the Respondent's position was why incur costs when the trial date was so far away and that is why disclosure had not taken place. The Respondent accepts that the delay in complying with orders had been too long. If the Employment Tribunal made an unless order for the Respondent to produce the bundle 30 January 2025, the Respondent could comply there was not a lot of documentation. The decision to strike out must be proportionate. One of the Respondent's directors was sick, the Respondent had to disclose 300 pages of WhatsApp and the uncertainty of the nature of the claim should also be considered. There is plenty of time to prepare for trial. A strike out is not appropriate.

30. In respect of costs, the Respondent accepted that it is an application genuinely made. But the hearing was not necessary it could have been dealt with in a further case management order.

Relevant Law

Strike Out

31. Rule 38 of The Employment Tribunal Procedure Rules 2024 ('ETPR') states:

> *"(1)* At any stage of the proceedings, either on its own initiative or on the application of a party, *the 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 Respondent, at a hearing."*

32. In order for an Employment Tribunal to strike out for unreasonable conduct under rule 38(1)(b), the Employment Tribunal must be satisfied either that the conduct involved was deliberate and persistent disregard of required procedural steps or that it has made a fair trial impossible; in either case, striking out must be a proportionate response (see Blockbuster Entertainment Ltd v James 2006 IRLR 630, CA)

33. In Bolch v Chipman 2004 IRLR 140, the EAT set out the steps that an Employment Tribunal must follow when determining whether to make a strike-out order in respect of rule 38(1)(b). The EAT lists firstly that an Employment Tribunal must find that a party or his or her representative has behaved scandalously, unreasonably or vexatiously when conducting the proceedings; secondly, once such a finding has been made, the Employment Tribunal must consider, in accordance with De Keyser Ltd v Wilson 2001] IRLR 324 whether a fair trial is still possible, as, save in exceptional circumstances, a striking-out order is not regarded simply as a punishment. If a fair trial is still possible, the case should be permitted to proceed; - even if a fair trial is unachievable, the tribunal will need to consider the appropriate remedy in the circumstances. It may be appropriate to impose a lesser penalty, for example, by making a costs or preparation order against the party concerned rather than striking out his or her claim or response.

34. In Emuemukoro v Croma Vigilant (Scotland) Ltd [2022] ICR 327, the EAT confirmed that whether a fair trial is possible does not require an Employment Tribunal to determine the question in absolute terms. In that case, the EAT approved the ET's approach that the question of a fair trial was in respect of that trial window allocated.

35. In deciding whether to strike out a party's case for non-compliance with an order under r38(1) (c), a tribunal must have regard to the overriding objective set out in rule 2 ETPR of seeking to deal with cases fairly and justly. The EAT's decision of Weir Valves and Controls (UK) Ltd v Armitage [2004] ICR 371 explains that this requires a tribunal to consider all relevant factors, including: a. the magnitude of the non-compliance; b. whether the default was the responsibility of the party or his or her representative; c. what disruption, unfairness or prejudice has been caused; d. whether a fair hearing would still be possible; and e. whether striking out or some lesser remedy would be an appropriate response to the disobedience.

36. Lindsay P, in De Keyser Ltd v Wilson [2001] IRLR 324 does make the point that that there can be circumstances in which a finding can lead straight to a debarring order. Such an example, we note paragraph 25 of Lindsay P's judgment, is "wilful, deliberate or contumelious disobedience" of the Order of a court.

37. When considering strike out of in respect of abuse of process, although most of the case law applies to the striking out of claim forms, the case law applies equally to response forms.

38. In the Birkett v James [1978] AC 297, the House of Lords set out the general principles to apply to where a when tribunal can strike out a claim which has not been actively pursued (this would apply also to a response) where there has been delay that is intentional or contumelious (disrespectful or abusive to the court), or there has been inordinate and inexcusable delay, which gives rise to a substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the respondent, but in this matter as applied to the Claimant.

Costs – Preparation Time Order

39. The relevant parts of Rule 74 ETPR state:

"(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;
…..

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party."

40. Rule 77 ETPR states:

"77 The amount of a preparation time order

(1) The Tribunal shall decide the number of hours in respect of which a preparation time order should be made, on the basis of—

(a) information provided by the receiving party on time spent falling within rule 75(2) above; and
(b) the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required.

(2) The hourly rate is £44 and increases on 6 April each year by £1.

(3) The amount of a preparation time order must be calculated by multiplying the number of hours assessed under paragraph (1) by the rate under paragraph (2) which is applicable to the year beginning 6 April in which the preparation time was spent."

41. In deciding whether to make an order under the ground of unreasonable conduct, the Court of Appeal decision of McPherson v BNP Paribas (London

Branch) [2004] ICR 1398 concluded that a tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct.

42. In Yerrakalva v Barnsley Metropolitan Borough Council and anor [2012] ICR 420 the Court of Appeal, clarified the principle that that in the Employment Tribunal costs are the exception not the rule.

Conclusions

Strike Out

43. The Claimant application written application was that the Respondent had conducted the proceedings in an unreasonable manner under rule 38(1)(b) ETPR and the Claimant relies upon the content of specified emails which essentially say that the Claimant is wasting Employment Tribunal time when making applications (Respondent's 22/02/24 16:19 email [96] & 04/03/24 email [100]). The Claimant also referred to the Respondent's lack of response to email (i.e. the Claimant's 05/12/24 [187] email and 15/01/24 email [86]). The Claimant also made the application on the basis that the Respondent's response was not actively pursued under rule 38(1)(d) ETPR and that there could no longer be a fair trial under rule 38(1)(e) ETPR.

44. The Claimant also contended that the Respondent had failed to comply with the Employment Tribunal's order (rule 38(1)(c) ETPR) to agree to the Claimant's list of issues or provide a draft version by 29 November 2023 [paragraph 2, [37]] and the Respondent failed to comply with Employment Judge Tobin's order to provide disclosure of documents (save WhatsApp messages) by 14 December 2023 [paragraph 3, [37]], the final hearing bundle by 4 January 2024 [paragraph 4, [38]], and the Respondent's witness statements by 28 February 2024 [paragraph 5.2 [38]. The Claimant relied upon the same arguments in support of rule 38(1) (c) ETPR in respect of the application under rule 38(1)(d) ETPR.

45. Dealing with rule 38(1)(c) ETPR first, I considered that EJ Tobin's order under paragraphs 7.1 & 7.2 [39] that required the parties to make an application to the Employment Tribunal whether they had agreed changes to the orders or not if they wanted to change the orders. It was unreasonable for the Respondent to have criticised the Claimant for complying with the Employment Tribunals order in trying to achieve this.

46. Furthermore, the Claimant said the Respondent was unreasonable in not responding to their correspondence. The Respondent accepted that they have no explanation for their failure in this regard. I conclude that it was unreasonable for the Respondent not to respond to requests for agreement to change the orders, after all that is again what the Respondent claimed to have done and expected the Claimant to do. The Respondent accepted that they failed to comply with the Employment Tribunal's order and that there had been a delay. I find that there was no reasonable excuse for the Respondent to have not complied to date with EJ Tobin's orders. The Respondent has flagrantly ignored the Employment Tribunal's orders and the fact their excuse is that they did not comply so as to avoid incurring costs where I was told that there is not a significant amount of documentation was not reasonable.

47. However, it is clear to me that the Claimant had also failed to comply with EJ Tobin's case management order and EJ Quill's order by not providing a witness statement ready to exchange by 20 December 2024 and I take this into account.

48. However, the Claimant's failure and the Respondent's failure are not comparable as the Respondent's failure is significant. I do not consider that the threshold in respect of the Respondent not actively pursuing their defence has been reached, the Respondent has responded to the Claimant's applications to the Employment Tribunal and had provided some disclosure limited thought it is and a list of documents for disclosure.

49. Although not in the Claimant's application to strike out [104-107] and not raised in oral submissions, the Claimant had referred to rule 38(1)(a) in their written submissions as a ground for the response to be struck out. I did not state this in my oral reasons; however, the Claimant's arguments require a consideration of the evidence in order to determine whether the Respondent defence has no reasonable prospect of success. I was not in position to determine any disputed facts. On the face of the Respondent's response form there was more than a bare denial to the Claimant's allegations. In the circumstances, the threshold was not reached in respect of rule 38(1)(a).

50. Although I consider that the threshold for rule 38(1) (b) and (c) have been reached I do not consider that a fair trial cannot take place. It follows that rule 38(1) (e) threshold has not been reached. The parties accepted that a bundle could be produced in a day and the Claimant can produce a witness statement in 3 weeks having already accepted that he has a skeletal version. I consider that an unless order is a more proportionate and more in accordance with the overriding objective. In those circumstances I do not strike out the response.

Costs

51. The threshold for unreasonable conduct has been reached under rule 74(1) for the reasons I have already referred to in respect of the strike out, and I consider that a preparation time order is appropriate. The Claimant makes an application for a preparation time order of £750 to include the time in respect of the 2 applications made to the Employment Tribunal, and emails to which there was no response, over the course of a year and the attendance at hearing and preparation of the preliminary hearing. I consider that only the application for the unless order and costs would be relevant to costs here. I consider that it is reasonable for the Claimant to have spent 17 hours in total, (including attendance at the hearing). I award the Claimant £734 in costs to be paid within 14 days of receipt judgment.

Approved:
Employment Judge Young
Dated: 25/2/2025

REASONS SENT TO THE PARTIES ON 28/2/2025

N Gotecha
FOR THE TRIBUNAL OFFICE

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