Neutral Citation Number: [2025] EAT 30

Case No: EA-2023-001258-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date:19 March 2025

Before:

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

Mr E Kamphues

Appellant

- and –

Venator Materials UK Ltd

Respondent

- -
- -

The **Appellant** was neither present nor represented
Milan Dulovic instructed by EEF Limited t/a Make UK for the **Respondent**

Hearing date: 5 March 2025

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JUDGMENT

SUMMARY

Practice and Procedure

The Employment Tribunal erred in law in striking out the claim, because the claimant was guilty of conduct of a type that could result in strike out, without going on to decide whether strike out was proportionate, having regard to the relevant circumstances, including the possibility of a fair trial.

His Honour Judge James Tayler

The proceedings in the Employment Tribunal

1. This appeal is a reminder that where a party is guilty of conduct of a type that can result in strike out of the claim or response pursuant to what is now Rule 38 of the **Employment Tribunal Rules 2024** ("the **ET Rules 2024**") the Employment Tribunal must not move directly to strike the claim out but must exercise the discretion that has arisen to strike out weighing up the relevant factors, which will generally require consideration of whether a fair trial remains possible.

2. This is an appeal against a judgment of Employment Judge Pitt that was sent to the parties on 15 September 2023, striking out complaints of unfair dismissal, unauthorised deduction from wages, public interest disclosure detriment/dismissal and direct race discrimination. The claim has had an unhappy procedural history.

3. The parties are referred to as the claimant and respondent as they were before the Employment Tribunal.

4. The claimant commenced employment with the respondent on 2 July 2018. The claimant resigned with effect from 2 October 2022.

5. The claimant submitted a claim form that was received by the Employment Tribunal on 11 February 2023. At box 8.2, the claimant set out brief particulars of the complaints. In broad terms, the claimant contended that his proper job title should have been German Finance Manager; he was discriminated against as a German national because his management role was not recognised; he had been subject to harassment because he would not appear on a self disclosure letter about a taxation error in respect of which he had blown the whistle; the disclosure resulted in the refusal to recognise his role as a manager; he should have been paid at a higher rate to recognise his role; there had been unauthorised deductions from his wages; he had not been paid overtime; and, after it was made clear that his management role would not be recognised at a meeting on 15 September 2022, he resigned, which constituted a constructive dismissal.

6. While the claim was pleaded by a litigant in person the complaints are reasonably clear.

7. On 17 February 2023, the claimant was sent a notice of a preliminary hearing for case management to be held on 3 May 2023.

8. The respondent filed grounds of resistance on 17 March 2023. The complaints were sufficiently clear that the respondent was able to plead a detailed response on the facts and to contend that some of the complaints were unsustainable in law.

9. For an Employment Judge coming fresh to a claim pleaded by a litigant in person that appears opaque some clarity may be provided by the response because the respondent will have lived through the incidents from which the claim arises. Respondents generally know the cause of a claimant's dissatisfaction.

10. There would have been much to have been said for listing the claim for hearing as swiftly as possible, rather than going down the route of seeking further particulars that ended up with ever more challenging attempts at case management with the prospects of a hearing steadily receding.

11. The claimant made various applications between 24 and 25 of April 2023, seeking an in-person hearing, an anonymity order and transfer of venue. On 26 April 2023, the Employment Tribunal wrote stating that the preliminary hearing would proceed as a telephone hearing and that the application for an anonymity order would be considered at the preliminary hearing. This is the type of claim where an in-person preliminary hearing for case management would probably have been beneficial.

12. On 3 May 2023, at 9.45am, shortly prior to the telephone hearing that was due to start at 10am, the claimant sent an email seeking a postponement.

13. The application was refused and the preliminary hearing went ahead. Various case management orders were made including a requirement, at paragraph 4, that the claimant provide additional information in respect of his complaints of unauthorised deduction from wages, public interest disclosure detriment and direct race discrimination.

14. The written case management orders were sent to the parties on 16 May 2023.

15. On 16 May 2023, the claimant was informed that there would be a further telephone

preliminary hearing for case management on 12 July 2023.

16. On 16 May 2023, the respondent applied for a postponement because their representative would be out of the country.

17. On 7 June 2023, the respondent applied for an unless order to require compliance with the orders made on 3 May 2023.

18. On 23 June 2023, the telephone preliminary hearing for case management was postponed and relisted for 4 August 2023.

19. On 21 June 2023, the Employment Tribunal issued a strike out warning letter.

20. By letter dated 13 July 2023, the Employment Tribunal requested that the claimant resend information about the illness that had resulted in his postponement application of the hearing on 3 May 2023. It does not appear that the claimant had provided the further particulars required by paragraph 4 of the orders at that hearing.

21. On 18 July 2023, a further strike out warning letter was sent by the Employment Tribunal. The claimant replied on 25 July 2023.

22. On 1 August 2023, the claimant sought a postponement of the telephone preliminary hearing listed for 4 August 2023. The hearing was re-listed to 30 August 2023.

23. The claimant sent a detailed letter on 17 August 2023 in relation to the ongoing disputes about his compliance with case management orders.

24. On 18 August 2023, the respondent again requested strike out.

25. On 23 August 2023, the claimant applied for a postponement of the telephone preliminary hearing listed for 30 August 2023.

26. On 24 August 2023 the Employment Tribunal granted a postponement to 11 September 2023.

27. The claimant once again applied for a postponement just before that hearing. The postponement was refused and the claim was struck out. The judgement and reasons were sent to the parties on 15 September 2023.

The Judgment

28. The Employment Judge set out the history of the matter in considerable detail from paragraphs 1 to 23. At paragraphs 24 to 27, the Employment Judge explained her view of the current unhappy state of the litigation:

29. Having reviewed the ET1 and the ET3 and the above information the claimant's case is speculative. He provides no information of any direct detriment or discrimination, rather it is I should have been paid at a higher level, or I should have been given a particular role.

30. In dealing with the application for strike out I into account that the claimant is a litigant in person, assisted by a friend. I also take into account that English is not his first language. I have considered the history of the claim, the written representations from the respondents and the latest correspondence on behalf of the claimant.

31. However, it has been 6 Months since the ET1 was lodged and 11 months since the claimant's employment ended. There is still no cogent response to the Judges order. The claimant has instead engaged in correspondence which makes allegations about the respondents representative behaviour and the Tribunal, refusing at some points to acknowledge that the Tribunal has authority to order disclosure, such as the medical evidence requested.

32. The claimant since filing the ET1 has failed in any meaningful way to engage in the Tribunal process and the Tribunal still does not know how the case is pleaded. It is not for the respondent to provide information at this stage, it is for the claimant to set out the grounds of his complaint which he has failed to do.

33. The Employment Judge then reached her conclusion at paragraph 28:

> 28. I concluded that the claimant had failed to comply with the order of Employment Judge Arullendran and that the claim has not been actively pursued. Therefore, it will be struck out pursuant to Rule 37 (1)(c) & (d).

34. The claimant submitted an appeal to the Employment Appeal Tribunal on 27 October 2023. The matter was permitted to proceed on grounds 2 to 5 that were clarified and summarised in the reasons of Lord Fairley:

(a) whether delay was intentional and contumelious;
(b) whether any delay was excusable;
(c) whether or not a fair trial was still possible; and
(d) whether strike-out was proportionate.

The Law

35. The application for strike out was determined pursuant to the **Employment Tribunal Rules 2013** ("**ET Rules 2013**") then in force.

36. The starting point is the overriding objective set out in Rule 2 of the **ET Rules 2013** (now Rule 3 **ET Rules 2024**)

> Overriding objective
>
> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;
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> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. **The parties** and their representatives **shall assist the Tribunal to further the overriding objective** and in particular **shall co-operate generally with each other and with the Tribunal**. [emphasis added]

37. The power to strike out was provided for by Rule 37 **ET Rules 2013** (now Rule 38 **ET Rules 2024**):

> 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. [emphasis added]

38. It has long been established that when determining an application for strike out the Employment Tribunal must first consider whether there has been conduct falling within the rule, such as a breach of a tribunal order, that gives rise to the discretion to strike out ("the threshold conduct") and, if so, then exercise the discretion to consider strike out having regard to all relevant factors which nearly always will include the question of whether a fair trial remains possible ("the discretionary decision").

39. An Employment Tribunal is likely to fall into error if it does not adopt this simple structure. It is an error of law to jump from determining that there has been threshold conduct to strike out without taking the discretionary decision.

40. Whichever form or forms of threshold conduct is established consideration of whether a fair trial is possible will nearly always be a component of the discretionary decision.

41. In **Blockbuster Entertainment Ltd v James**, [2006] EWCA Civ 684, [2006] IRLR630, where Sedley LJ stated:

> This power, as the employment tribunal reminded itself, is a draconic power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it

> has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response.

42. In considering proportionality the Court of Appeal noted:

> 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**. [emphasis added]

43. In **Arrow Nominees Inc v Blackledge** [2000] 2 BCLC 167 it was held:

> 55. Further, in this context, a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court

44. In **Emuemukoro v Croma Vigilant (Scotland) Ltd** [2022] ICR 327 Choudhury J (President) stated:

> 19 I do not accept Mr Kohanzad's proposition that the power can only be triggered where a 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* [2000] 2 BCLC 167 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.

45. In managing cases judges should do what they reasonably can to avoid contributing to litigants becoming "querulous and uncooperative". In **Smith v Tesco Stores Limited** [2023] EAT 11 I noted:

> 2. Good case management requires strong judicial skills. I appreciate it is

> easier to comment on than to undertake. It is particularly important at the early stages of a case. From the outset, the aim should be to identify the core claims and to manage them through to a full hearing, without the fundamental claims becoming encrusted with lengthy further particulars, in which more and more subsidiary claims and issues get added that obscure the real dispute between the parties. That is why it is best to avoid sending litigants in person away to provide additional information, whenever practicable. …
>
> 4. The longer case management goes on, the greater the risk that a litigant in person will become embattled and fail to engage properly with the employment tribunal. Good case management requires that the parties work with the employment tribunal and each other in a constructive manner. Even litigants in person must focus on their core claims and engage in clarifying the issues. It is not the fault of a litigant in person that she or he is not a lawyer, but neither is it the fault of the other party or the employment tribunal. While the employment tribunal should take reasonable steps to assist litigants in person, this must not be at the expense of fairness to the other parties to the claim, and to litigants in other proceedings who seek a fair determination of their disputes, having regard to the limited resources of the employment tribunal.
>
> 5. Regrettably, those who are confused by, or disagree with, proper case management decisions that are fair to both parties, sometimes jump to the conclusion that the employment judge is biased and that the employment tribunal and its staff are adversaries to be challenged and attacked. If such a mistaken view results in a withdrawal from the required co-operation with the employment tribunal and the other party, necessary to advance the overriding objective, it puts a fair trial at risk.

46. While the Employment Tribunal remains open to the "difficult" there can be circumstances in which a party becomes so antagonistic to the process that proper case management becomes impossible which can mean that a fair trial is no longer a realistic possibility. In **Smith** I concluded that:

> This case is exceptional because, after conspicuously careful, thoughtful and fair case management, the claimant demonstrated that he was not prepared to cooperate with the respondent and the employment tribunal to achieve a fair trial. He robbed himself of that opportunity.

Analysis

47. It is clear that this claim has been extremely difficult to manage. It is unfortunate that rather than trying to bring the relatively brief complaints set out in the claim form to a speedy trial, attempts at further particularisation and case management have resulted in the claimant becoming increasingly

intransigent and unhelpful. While the Employment Judge set out the very unhappy sequence of events the brief conclusion at paragraph 28, which has to be seen in the context of there being no self-direction as to the relevant law, demonstrates that the Employment Judge moved directly from concluding that there had been threshold conduct to strike out without taking the discretionary decision. The respondent did not seriously submit otherwise. The appeal must be allowed.

48. While I consider that the history of this claim is lamentable, I do not consider, and nor did the respondent contend, that there could only be one answer to the discretionary decision, such that I should make the decision in substitution for the Employment Tribunal

The postponement application

49. This hearing took place in the absence of the claimant. There had been some difficulty in producing a bundle of documents, resulting in the late submission of a supplementary bundle by the respondent. On 14 February 2025, the claimant applied for a postponement of this hearing, raising concerns about the documentation and suggesting that it would be difficult to provide any further relevant documentation and prepare for the hearing. I refused the application by letter dated 18 February 2025. I noted that there was ample time to prepare for the hearing and that this was not a particularly complicated appeal. I concluded that a postponement would not be in accordance with the overriding objective because it would result in substantial delay and would result in a hearing slot being lost because it would not be possible to use the slot for another appeal in the time available.

50. On the morning of this hearing the EAT received a flurry of emails from the claimant and his lay representative seeking a postponement, trying to reopen the issue about documentation, contending that preparation had been hampered because of the serious illness of his mother and stating that he had not been able to attend because of flight problems. The claimant is in Germany. Yesterday he booked a flight from Düsseldorf to London. The claimant received an email from British Airways at 03.12 this morning, stating that the flight might be delayed because of air traffic control restrictions resulting from weather conditions in Europe. The flight had originally been due to land at Heathrow at 7.40. Although the claimant had received an email suggesting there might be a delay it did not state

how long the delay was likely to be. I can see no good reason why the claimant did not take the flight and if there was some delay, he could have sought a slightly later start time for the hearing. As it happens a Google search indicated that the flight landed at 8.04, only 24 minutes late. Obviously, the claimant did not know that would be the case at the time he decided not to take the flight. The fundamental point is that he did not know how long the delay would be and I consider it was unreasonable not to take the flight. The issues in respect of the claimant's mother's illness were not supported by any medical evidence, and since the claimant had booked a flight, did not prevent his attendance. This appeal was not complex and I can see no proper reason why any further documentation the claimant wished to produce was not sent to the EAT in good time before the hearing. Accordingly, I refused postponement.

51. The claimant raised the possibility of remote attendance. This is very rarely permitted where someone is outside of the UK jurisdiction because it is important that the EAT has powers to police conduct by those who attend hearings. I considered that there was no good reason why the claimant could not have attended and that an attempt to convert to a remote hearing was likely to result in unnecessary delay and might not be effective as in the Employment Tribunal the claimant had sought in person hearings because of potential technical problems in remote attendance. I refused the application for a remote hearing.

The way forward

52. The respondent should consider whether they wish to proceed with an application for strike out or to engage in further case management in an attempt to bring the matter to a speedy hearing.

53. Notwithstanding that the appeal has been successful, the approach that the claimant adopted, including the characteristic attempt to postpone on the day of the hearing does not bode well for the proceedings.

54. I appreciate that litigants in person can become embattled and may get caught up in the procedure and antagonism towards the respondent and the tribunal, rather than focusing on the requirement that they cooperate to bring the matter to a hearing. But if the claimant does not start to

cooperate there is a real risk that the claim will end up being struck out because a fair trial will not be possible within a reasonable period without undue waste of costs and the limited resources of the Employment Tribunal. Even absent strike out, unreasonable conduct puts the claimant at risk of an award of costs. If the claimant wishes to avoid this he must cooperate with the Employment Tribunal and the respondent. He should attend hearings. He must make arrangements to ensure that he is able to appear at any in-person hearings, even if there are travel delays. He must cooperate in seeking to explain and clarify the basis upon which he puts his complaints. He has to focus on the claim rather than procedural disputes.

55. Although I considered that the complaints that the claimant seeks to advance were relatively clear from the claim form, I make no comment on their merits. The claimant may wish to seek independent legal advice as to the merits of his complaints as he has suggested he proposes to do in correspondence with the Employment Tribunal.

Outcome

56. The appeal is allowed and the matter is remitted to the Employment Tribunal. If the respondent proceeds with the application to strike out the matter should be determined by a different Employment Tribunal because I consider it is important that the matter is considered afresh and remission to the same Employment Tribunal will not significantly save time or expense.