EMPLOYMENT TRIBUNALS

Claimant: Miss J Anderson

Respondent: NHS Blood and Transplant

Heard at: London Central **On:** 10 January 2025

Before: Employment Judge Joffe

Appearances
For the claimant: Represented herself
For the respondent: Mr M Smith, solicitor

JUDGMENT

1. The claim is not struck out under Employment Tribunal Rule 37(1)(c).

2. The response is not struck out under Employment Tribunal Rule 37(1)(b).

REASONS

The Applications

1. I heard the respondent's application to strike out the claim under rule 37(1)(c) and the claimant's application to strike out the response under rule 37(1)(b). I gave oral reasons for my judgment and the claimant subsequently requested written reasons.

2. The respondent was seeking to strike out the claim because the claimant had not complied with Tribunal orders. At a case management preliminary hearing in front of Employment Judge Poynton on 11 June 2024, the following order was made:

   3.3 The Claimant must also by 23 July 2024 send to the Respondent:

   (a) copies of the parts of her GP and other medical records that are relevant to whether she had the disability at the time of the events the claim is

about. She may blank out anything that is clearly not relevant;

(b) any other evidence relevant to whether she had the disability at that time.

3. On 23 July 2024, the claimant sent the respondent a disability impact statement and a letter from a consultant cardiologist. She did not disclose her medical records as ordered, but said:

   I have two lifelong disabilities. These are well known to the Respondent. I anticipate the Respondent will persist in challenging my disabilities now they've started. I have offered to show them how quickly my lips turn blue if I stand statically still for a short period of time and said I can forego my heart medication one day to demonstrate the extreme fluctuations in my heart rate from sitting to standing. I can't do any more. I am under the care of some of the best consultants in the country. I was on a waiting list for over two years to be seen by my neurocardiologist. PoTS is becoming more widely recognised, and consultants who have specialist knowledge are in demand to assess very unwell people who are likely suffering a severely reduced quality of life. Delays to their treatment could result in irreversible physical damage. As a disabled person who was once in that position I cannot be instrumental in delaying anyone's care in order to obtain a letter confirming my disability, disabilities which the Respondent is already aware of.

4. The respondent wrote to the Tribunal on 13 August 2024 asking for an unless order. On 14 August 2024, Employment Judge Nicolle made further orders:

   The reason the Claimant has provided for not requesting her medical records is not sustainable as it represents a standard administrative function which would have no bearing on patient care.

   The Claimant should confirm by no later than 4 pm on 20 August 2024 that she has made an unconditional request for her relevant medical records. If the claimant has not provided confirmation of this by this time, she is advised that it is likely that an unless order will be issued without further notice to her.

5. Thereafter the claimant provided some further records in her possession but did not comply with Employment Judge Nicolle's orders. After further correspondence from the parties, Employment Judge Glennie made further orders on 6 September 2024 explaining the importance of compliance with Employment Judge Nicolle's order. There was then further correspondence between the parties in which the claimant asserted she was only required to request records from her GP and the respondent asserted that she was also required to request hospital records.

6. The respondent argued that the claimant was in breach of very clear orders which were explained and reiterated by the Tribunal on a number of occasions. Her breach had caused significant disruption to the timetable and it was said that the Tribunal could have no confidence that the claimant would comply with orders in future. A full merits hearing listed for March 2025 could not proceed as the parties were not ready as a consequence of the claimant's failure.

7. The claimant said that Employment Judge Nicolle's orders did not specify that hospital records were required. She said that she was reluctant after Employment Judge Poynton's orders to provide all the records as she felt it was unnecessary but after that point she had been cooperating; she was trying to work out what was required and asking for clarification. She had only wilfully breached the orders for a short period. She said that she was frustrated as the respondent knew about her impairment and had accepted she was disabled at work so she could not understand why it had not conceded disability. It was also apparent from my discussion with the claimant that she was not clear for what period records were required. I could see why, given that the impairments were longstanding and the orders did not themselves define a timescale, the claimant might reasonably have been uncertain about what was required.

8. The claimant applied to strike out the response on the basis that the respondent had behaved unreasonably:

    a. In not conceding disability;
    b. In allegedly falsifying an order from the Tribunal in an attempt to ascertain private and confidential data about the claimant from its whistleblowing department. The claimant had received an email from Ms B Holder on 2 August 2024. Ms Holder was employed by the respondent as 'Freedom to Speak Up Guardian'. Ms Holder said:

        The document which relates to your FTSU concern has been requested by our legal services team and I am duty bound to comply with this Order for Disclosure by Friday 9th August 2024.

        The claimant had referred to emailing Ms Holder in the particulars attached to her claim form

    c. In relation to some matters which were ongoing in the claimant's employment. The claimant alleged that her medical records were accessed by some of the respondent's staff. The claimant complained about behaviour by the respondent in relation to a grievance appeal meeting and to the removal of a reasonable adjustment and reference to that adjustment as 'Jessica's designated chair'. The claimant complained about the role played by the respondent in complaints the claimant made to the Nursing and Midwifery Council and the Information Commissioners Office.

9. The respondent submitted that it was entitled to take a view on disability based on the entirety of the relevant medical records. The request for correspondence with Ms Holder was within the ambit of the general disclosure order made by the Tribunal. The remaining allegations, which were disputed, were matters relating to the claimant's employment rather than to the conduct of the proceedings; they could not be determined by the Tribunal without the evidence being heard.

Law

10. Rule 37(1) provides inter alia:

> *37(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;*

11. In Weir Valves & Control (UK) Ltd v Armitage [2004] ICR 371, HHJ Richardson said:

> *What are the principles on which the Employment Tribunal should act in deciding whether to strike out in a case such as this, where there has been a breach of a direction?*
> *14. Where the unreasonable conduct which the Employment Tribunal is considering involves no breach of a court order, the crucial and decisive question will generally be whether a fair trial of the issues is still possible: De Keyser Ltd v Wilson [2001] IRLR 324 , at paragraphs 24 to 25 applying Logicrose Ltd v Southend United Football Club Ltd (Times, 5 March 1998) and Arrow Nominees Inc v Blackledge [2000] 2 Butterworths Company Law Cases, 167 . De Keyser Ltd v Wilson was recently followed and applied in Bolch v Chipman [2003] EAT 19 May, a decision which has been starred and is likely to be reported: see pages 21–22.*
> *15. Even if a fair trial as a whole is not possible, the question of remedy must still be considered so as to ensure that the effect of a debarral order does not exceed what is proportionate: see Bolch v Chipman at pages 23–25. For example, it may still be entirely just to allow a defaulting party to take some part in a question of compensation which he is liable to pay: see page 25.*
> *16. Those principles apply where there is no disobedience to an order. What if there is a court order and there has been disobedience to it? This is an additional consideration. The principles which we have set out above do not apply in the same way. The Tribunal must be able to impose a sanction where there has been wilful disobedience to an order: see De Keyser v Wilson at paragraph 25, Bolch v Chipman at page 22.*
> *17. But it does not follow that a striking out order or other sanction should always be the result of disobedience to an order. The guiding consideration is the overriding objective. This requires justice to be done between the parties. The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been cause and, still, whether a fair hearing is still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience.*
> *…*

As Millet J said, in another context, in Logicrose Ltd v Southend United Football Club Ltd :
"The Court must always guard itself against the temptation of allowing its indignation to lead to a miscarriage of justice."

12. In Leeks v University College London Hospitals NHS Foundation Trust 2024 EAT 134, HHJ Tayler observed that:
In considering whether a claim should be struck out on the grounds of scandalous, unreasonable or vexatious conduct, a tribunal must generally consider whether a fair trial is still possible: De Keyser Ltd v Wilson [2001] IRLR 324, EAT. Conduct such as deliberate flouting of a tribunal order, can lead directly to the question of a striking-out order, however in ordinary circumstances, neither a claim nor a defence can be struck out on the basis of a party's conduct unless a conclusion is reached that a fair trial is no longer possible.

Respondent's strike out application,

13. I did not strike out the claimant's claim. I concluded that there was initially a wilful breach in that the claimant took it upon herself to decide what she should disclose rather than having regard to the terms of the Tribunal order. Thereafter and once Judge Nicolle made his order, the claimant was not wilfully failing to comply but was struggling with some genuine ambiguity as to the ambit of the order and a difficulty in understanding the rationale for the respondent not to concede in proceedings what it appeared to have accepted in the workplace. At this point she was making reasonable efforts to comply.

14. A very important consideration was that a fair trial is possible within a reasonable period; as eventually became apparent in the hearing, both parties were content for the hearing in March to be postponed so that these proceedings can be consolidated with the claimant's recent and related claims. The respondent was not saying that a later trial date would not constitute a fair trial within a reasonable period nor did it point to other matters which mean that a fair trial is not possible more generally.

15. Having heard what the claimant has had to say I did not consider that what has occurred meant there was such a significant risk of further default by the claimant that it puts the trial at risk, although the claimant needs to be careful in future to follow the letter of directions and ask for them to be clarified where they are unclear to her.

16. Given the scope of the default, the fact that is has not in the main been wilful, the fact that a fair trial is still possible and considering proportionality, I concluded it was not appropriate to strike out. In particular it was significant that I was able to address the issue by making an order for disclosure of medical records in unambiguous terms.

Claimant's application to strike out the response for unreasonable conduct

17. I would have to find that there was unreasonable conduct of the proceedings and that there was a substantial risk that a fair trial was not possible for strike out of the response to be appropriate.

18. Looking at the allegedly unreasonable conduct pointed to by the claimant:
    a) Not conceding disability: This did relate to the conduct of the proceedings. I could entirely understand why the claimant was concerned, given the evidence she has provided to date. Nonetheless, the respondent is entitled to make its decision on the basis of the material ordered and cannot be said to be unreasonable in waiting until it has that material. I observe that the fact that some respondents might have been satisfied that they had sufficient material does not mean that this respondent was unreasonable in insisting on compliance with the terms of the order.
    b) The respondent asking its employee in the role of Freedom to Speak Up Guardian to provide documents which were referred to in the claim form: That also related to conduct of proceedings. I was not able at this hearing to resolve the issue of whether those documents were certainly relevant to the issues but they appear to be at least arguably relevant. Absent evidence of an improper motive, which I did not have, I could not conclude that asking for a single set of documents which is referred to in the claim form, even if the documents had been of peripheral relevance, would on its own be the sort of conduct which would give rise to consideration of strike out.
    c) The remaining allegations of unreasonable conduct do not appear to relate to the conduct of the proceedings so cannot form part of a reason for strike out. In any event they concerned matters which would need to be determined on the basis of evidence. It would be wholly disproportionate to conduct a satellite trial into those issues. The alleged conduct has not rendered a fair trial impossible.

19. For those reasons, I did not strike out the response.

Employment Judge Joffe

3 April 2025

Sent to the parties on:

15 April 2025

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For the Tribunal Office: