EMPLOYMENT TRIBUNALS

Claimant: **Mrs Audrey Pereira**

Respondent: **(1) Wellingtons Antiques Limited**
(2) John Michael Wellington

Heard at: Reading Employment Tribunal

On: 2-5 September 2024 (in person),
7 and 22 January 2025 (private deliberations in chambers),
31 January 2025 (delivery of oral judgment on liability, by video)

Before: Employment Judge Annand
Ms Telfer
Ms Brown

Representation

Claimant: Mr Van Heck, Counsel
Respondents: Ms Millin, Counsel

CORRECTED JUDGMENT

1.The Claimant's application to strike out the Respondents' Response is refused.

REASONS

An oral judgment and reasons, regarding the Claimant's application to strike out the Respondent's response, having been given to the parties at the hearing on 3 September 2024, and written reasons having been requested at the judgment hearing on 31 January 2025, in accordance with Rule 60 of the Employment Tribunals Rules of Procedure 2024, the following reasons are provided:

Introduction

1. The Claimant applied to strike out the Respondents' Response. She made this application on the basis of all five grounds set out under Rule 37 of the Employment Tribunal Rules of Procedure 2013.

2. Rule 37 of the Employment Tribunals Rules states:

   "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;

   (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).

3. When considering an application for strike out, the Tribunal must first consider whether any of the grounds have been established and then having identified an established ground, it must then decide whether to exercise its discretion to strike out a claim or response. The test of proportionality must be borne in mind by a party considering whether to make an application.

4. The Tribunal has taken into account the comments made by HHJ Taylor in *Mallon v AECOM Ltd* [2021] ICR 1151, EAT, where he commented that it was important before applying for a strike-out order to consider the proportionality of doing so, including the likelihood that it would result in a saving of expense and avoid delay. The Tribunal has also considered the general guidance given in the case law regarding whether a lesser sanction would suffice.

5. Under Rule 37(2) a claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations.

6. The Tribunal accepted that Counsel for the Respondents, Ms Millin, was only made aware on Sunday 1 September 2024 that an application would be made on Monday 2 September 2024 when it was communicated to her by email from Counsel for the Claimant, Mr Van Heck. However, Ms Millin had the whole of Monday afternoon to take instructions. The hearing had finished by noon on Monday 2 September 2024. The Tribunal heard the Respondents' response to the application on Tuesday 3 September 2024 at 10am.

7. Ms Millin indicated she felt she had been given insufficient notice of the intention to make the application. Part of the difficulty with that submission is that the Claimant only received a hard copy of the bundle on Wednesday 28 August

2024 by post and contained within that bundle for the first time was the Respondent's Response to her Further and Better Particulars and the Second Respondent's witness statement. She had not seen those documents previously. They contained new points of defence she was not aware would be relied upon. Also, the documents which the Claimant had provided to the Respondents previously, by way of disclosure, were not in the bundle. Therefore, in the short amount of time before the hearing was scheduled to start, the Claimant produced her own bundle.

8. The Tribunal was of the view that Ms Millin was given sufficient additional time, on Monday 2 September 2024, to be able to respond to the application and was given a reasonable opportunity to make representations.

Procedural background

9. This case has a slightly complicated procedural history.

10. A preliminary hearing was held on 24 January 2024. The Claimant was ordered by EJ Michell to provide Further and Better Particulars of claim. The Claimant complied with that order. The Respondents says it was informally agreed that it would be an amended set of Particulars of Claim, rather than a new additional set of particulars. However, there was nothing in Employment Judge Michell's order which required the Particulars of Claim to be set out in a particular format. The Further and Better Particulars provided by the Claimant set out the information that EJ Michell required that they contain. The Respondents were ordered by Employment Judge Michell to provide a properly particularised Amended Grounds of Resistance by 18 March 2024.

11. At the first preliminary hearing, the Claimant had withdrawn her claim of indirect discrimination and a claim under section 103A of the Employment Rights Act 1996 for automatically unfair dismissal on grounds of having made a protected disclosure. Those claims were dismissed on withdrawal.

12. At a further preliminary hearing, held on 26 April 2024, by Employment Judge McCarthy it was noted that the Respondents had received the Claimant's Further and Better Particulars, the Respondents said the Claimant's case was still unclear and so they were not in a position to amend their Grounds of Resistance. The Tribunal has read the original claim and the Further and Better Particulars and does not consider the Claimant's claims were unclear. In any event, it was agreed at the preliminary hearing that the Claimant would provide a further copy of her original pleadings which would incorporate the information in her Further and Better Particulars. The Claimant was specifically told not to add anything new, she was to delete what had been withdrawn, set out the new additions in red, and it was noted that she may need to make an application to amend.

13. Under the terms of Employment Judge McCarthy's Order, the Claimant was required to provide this further set of amended pleadings by 10 May 2024, and the Respondents were required to provide the amended Response by 7 June 2024.

14. By the end of May 2024, the Claimant had stopped being legally represented and she did not appreciate that the Particulars of Claim had not been provided in the format that the Tribunal had ordered. On 29 May 2024, the Claimant wrote to the Tribunal and the Respondents indicating she was representing herself and seeking the Respondents' disclosure and the properly particularised Response. She wrote again on 10 June 2024.

15. On 12 June 2024, the solicitors firm acting for the Respondents wrote to the Claimant and the Tribunal. In the email, which was sent by Mr Hazelgrove, the Claimant was asked to seek all her documents from her previous solicitors. Mr Hazelgrove's email signature indicates he is the Head of Finance Operations. The Claimant says he is the First Respondent's accountant. The Claimant was seeking the Respondents' disclosure and not her own documents.

16. On 19 June 2024, the Claimant wrote to say she was waiting to receive the Respondent's disclosure and a draft bundle index. There was no response from the Respondent.

17. On 27 June 2024, the Claimant sent an email saying she had received a copy of her papers from her previous solicitors. She noted if the Respondents wanted another copy of her Further and Better Particulars she could send it. There was no response from the Respondents.

18. On 1 July 2024, the Claimant's sister in law, Ms Lewis, wrote an email to the Tribunal and the Respondents setting out comprehensively what still needed to be done under the Orders. She re-sent the Claimant's Further and Better Particulars. She noted that the Respondents had not provided disclosure.

19. On 10 July 2024, Mr Hazelgrove responded to say they could not communicate with Ms Lewis without the Claimant's authorisation and noted they did not have a copy of the Tribunal's latest Order. There was no suggestion in that email that nothing had been done by the Respondent, or could not be done by the Respondent, because the Claimant had not provided the Particulars of Claim showing the amendments in red text.

20. On 11 July 2024, the Claimant provided authorisation for Mr Hazelgrove to communicate with Ms Lewis. On the same day, in a different email, she noted that she had not received a particularised Response. There was no response from the Respondents.

21. On 19 July 2024, the Claimant sent Mr Hazelgrove a copy of the Tribunal's Orders. She pointed out at the end of the email that she had not received a particularised Response. There was no response from the Respondents.

22. On 23 July 2024, the Claimant sent an email to Mr Hazelgrove and the Tribunal which contained a googledrive link which contained her documents for disclosure. She noted the Respondents' lack of response to her various emails. There was no response from the Respondents. The Claimant wrote again the following day, 24 July 2024, and pointed out she had not received a response.

She also sent a Pre-Hearing checklist in which she set out she had not received anything from the Respondents. There was no response to that email from the Respondents.

23. On 31 July 2024, Employment Judge Quill sent the Respondents a Strike Out warning. It noted he was considering striking out the Response because the manner in which the proceedings were being conducted by or on behalf of the Respondents was scandalous, unreasonable or vexatious, the Respondents had not complied with the Tribunal Order of 26 April 2024 and the Response was not being actively pursued.

24. On 9 August 2024, the Claimant emailed the Tribunal noting she had not received a response from the Respondents. The reason this was sent was because although the Respondents' solicitor had responded to Employment Judge Quill's warning on 7 August, they had not sent their response to the Claimant.

25. In the Respondent's response to the Tribunal, it was suggested the Further and Better Particulars provided by the Claimant did not adhere to Employment Judge Michell's Order but did not say how they failed to comply. It was set out that after the Preliminary hearing in April 2024, the Claimant had failed to provide the amalgamated Particulars and that all the other Orders followed from that Order. What is surprising is that at no point prior to 7 August 2024 had the Respondent's solicitors requested this document from the Claimant.

26. There are a number of assertions in the letter which suggest the author had not seen the numerous emails sent by the Claimant to Mr Hazelgrove. For example, the letter sets out the correspondence that had been received by the Claimant but misses out a significant number of the emails that she had sent, and it erroneously suggested the Respondents had only been informed that the Claimant was representing herself on 10 June 2024, when in fact the Tribunal has seen emails referring to this which were sent by the Claimant to the Respondents in May 2024. The letter suggested the Respondents could provide their list of documents, witness statements and a chronology by 14 August 2024, and a Response to the now compliant Further and Better Particulars. Unfortunately, despite this reassurance, the Respondents did not provide those documents by 14 August 2024.

27. On 19 August 2024, the Claimant sent the Respondents and the Tribunal an email. It was apparent she had not received anything further, but said she would send her witness statement the following day.

28. On 21 August 2024, the Respondents sent the Claimant a letter saying she would be provided with a copy of the Statement of Issues, a chronology, a Response and a bundle of documents by the following day. They asked her to confirm which documents she wished to rely on, although she had already provided them with the documents.

29. On 23 August 2024, Mr Hazelgrove emailed the Claimant three attachments, none of which contained the bundle.

30. On 28 August 2024, the Claimant emailed a copy of her witness statement to the Tribunal and the Respondent.

31. On the same day the Claimant received a copy of the Respondent's bundle. This was received on the Wednesday of the week before the hearing. In other words, two working days before the hearing was due to start on Monday 2 September 2024.

32. As already noted, in the bundle was the Respondents' particularised Response and the Second Respondent's witness statement. These were documents that the Claimant had not seen before. As noted before, the Response contained new points of defence, and the bundle did not contain the Claimant's documents.

The Tribunal's decision

33. In reaching our decision we have born in mind the case law referred to by counsel for the Claimant.

34. In *Blockbuster Entertainment Ltd v James* [2006] IRLR 630, CA, it was held that for a tribunal to strike out for unreasonable conduct, it must be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible, and in either case, the striking out must be a proportionate response. The Court of Appeal also confirmed that it would take something very unusual indeed to justify striking out on procedural grounds a claim or response when the parties are at the point of starting a final hearing.

35. In *Emuemukoro v Croma Vigilant (Scotland) Ltd* [2022] ICR 327, EAT, the EAT rejected the proposition that the question of whether a fair trial is possible must be determined in absolute terms, by considering whether a fair trial is possible at all, rather than considering, where an application is made at the outset of a trial, whether a fair trial is possible within the allocated trial window.

The first ground: The Response is scandalous or vexatious or has no reasonable prospect of success

36. The Tribunal first of all considered the first ground, namely whether the Response is scandalous or vexatious or has no reasonable prospect of success.

37. The Tribunal did not find that this ground was established. There are parts of the Response that state that the Second Respondent would need to check points with his accountant. While that does not provide a substantive response it cannot be said that the Response which definitely has no reasonable prospects of success. Further, this only relates to the Respondents' response to some specific parts of the Claimant's claims.

38. Further, the Respondents' suggestion that the Claimant remained in a probationary period throughout her entire employment was only pointed to by the Claimant as not providing a response to her claim for pension loss. However, the Tribunal took into account that the Claimant has brought a wide range of claims, including discrimination claims, where the burden of proof starts with the Claimant in the first instance. As a result, the Tribunal did not concluded that the Response is scandalous or vexatious or has no reasonable prospect of success.

39. There was a further point made by Mr Van Heck that parts of the Response were scandalous or vexatious and this included a reference to the Claimant being hysterical and/or consuming alcohol. The Tribunal did not find that reached the threshold of being scandalous or vexatious. Furthermore, these appeared to be additional comments made about the Claimant, but not part of any actual response to any particular claim.

Second ground: The manner in which the proceedings have been conducted by or on behalf of the Respondents has been scandalous, unreasonable or vexatious.

Third ground: Non-compliance with any of these Rules or with an order of the Tribunal.

40. The Tribunal considered the second and third grounds together.

41. The Tribunal found that the Respondents conduct has been unreasonable in terms of the manner in which they have prepared for the hearing. This is based on the chronology of events that has been set out above.

42. It does not appear to the Tribunal that the Respondents have provided disclosure. There has been a failure to take the necessary steps to comply with the Tribunal's Orders on time.

43. On 21 August 2024, the Claimant was sent a letter from the Respondents asking her to confirm which documents she wanted included in the bundle. But she had not been provided with the draft index or with any of the Respondents documents, and then none of her documents were included in the bundle. The Claimant was unrepresented at this time, and she only had sight of the bundle for the first time on 28 August 2024. She only had sight of the Respondents' amended Response and the Second Respondent's witness statement on this day.

44. The Respondents only explanation for this has been that they did not find the Claimant's claims to be easy to understand and she had not provided the Further and Better Particulars of Claim with the amended parts in red text. The Tribunal did not find this to be a sufficient explanation for the Respondents' conduct. There have been few responses to the Claimant's correspondence, and the Tribunal has not been shown any emails to the Claimant asking her for the version of the Particulars of Claim with the amendments shown in red. The Tribunal did not consider it was reasonable for the Respondents to fail to take

all the next steps to prepare for the final hearing in time. The Tribunal has seen the Respondents' solicitors' assurance to the Tribunal in response to the Strike Out warning, that the documents would be provided to the Claimant by 14 August 20224, but the Tribunal has not been provided with any explanation as to why that was not done. The Tribunal has also not been provided with any explanation as to why there appears to have been a complete failure to provide disclosure.

45. On that basis, the Tribunal found the Respondents' conduct has been unreasonable and there was a failure to comply with the Tribunal's Orders in respect of the provision of disclosure, the preparation of the bundle, and the exchange of witness statements in time.

46. After the Tribunal had reached this conclusion, we then considered whether to exercise our discretion to strike out the Respondents' Response. We considered this carefully but have decided against this course of action. We have concluded that a fair trial is still possible in the hearing window. The Tribunal can allow the Claimant to provide either a written response to the additional points she was not aware of prior to 28 August 2024, or she can be asked additional supplementary questions by her counsel. We consider those questions can be focused on the matters we need to hear evidence on to determine the claims. We do not need to hear supplementary evidence on all the matters she disputes, only on matters that are relevant to the claims.

47. We emphasise that the Tribunal has taken into account the very considerable additional stress placed on the Claimant by the Respondent's conduct. She has been required to prepare hastily and at the last minute. We are also aware of the additional work and pressure this will have placed on both counsel, and we will do what we can throughout the hearing to alleviate that.

Ground 4: The Response has not been actively pursued

48. The Tribunal went on to consider the next ground on which the application was made. We did not find that the Response has not been actively pursued overall. While there have been lengthy delays in complying with the Orders, the Tribunal now has a bundle, and a particularised Response, and the Respondent's witness statement. The Tribunal did not find that this ground was established.

Ground 5: The Tribunal considers that it is no longer possible to have a fair hearing in respect of the Response

49. In terms of the final ground, for the same reasons previously given regarding the exercise of our discretion, the Tribunal did not reach the conclusion that a fair trial was no longer possible in the hearing window.

50. For these reasons, the Respondents' response will not be struck out.

Apology

51. The Claimant requested the written reasons for the Tribunal's decision regarding her application to strike out the Respondents' response at the hearing on 31 January 2025. The Respondents also requested the written reasons for the liability judgment at the same hearing. At the remedy hearing on 24 February 2025, the Respondents also requested written reasons for the remedy judgment. As the Claimant succeeded with some of her claims, I prioritised the provision of written reasons for the liability and remedy decisions, in case the Respondents wished to appeal. When I turned my attention to providing the written reasons for the Tribunal's decision to refuse the Claimant's application to strike out the Respondents' response, I had considerable difficulty locating on my computer my written notes of the decision that had been given. I therefore had to arrange to be provided with a copy of the recording of the hearing that day, from which I have typed out the above written reasons. They have been tidied up to remove grammatical errors and perfected, and so are not a verbatim record of the oral decision, although the reasoning remains the same. I have also had other professional commitments and personal responsibilities which have added to the delay. I offer a sincere apology that it has taken longer than intended to provide these written reasons.

Approved by:

Employment Judge Annand

16 May 2025

Corrected on 30 August 2025

SENT TO THE PARTIES ON

20/5/2025

FOR THE TRIBUNAL OFFICE