EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Lefevre	v	**Valuation Office Agency**

OPEN PRELIMINARY HEARING

Heard at: London South **On: 20 November 2020**

Before: Employment Judge Truscott QC

Appearances:

For the Claimant: **No appearance or representation**
For the Respondent: **Mr A Allen QC**

JUDGMENT on PRELIMINARY HEARING

1. The claims are struck out under Rule 37(1)(b)(c) and (d).

2. In consequence, the hearing fixed for 17-20 May 2021 is discharged.

REASONS

Preliminary

1. This has been a remote hearing because of emergency arrangements made following Presidential Direction because of the Covid 19 pandemic. The form of remote hearing was fully video. A face to face hearing was not held because it was not practicable and specific issues could be determined in a remote hearing.

2. The Claimant did not participate in the hearing. Mr A Allen QC represented the Respondent. There was a bundle of documents to which reference will be made where necessary.

3. The respondent made application on 16 November 2020 to strike out the whole claim under Rules 37(1)(b), (c) and (d) [90-91, 92-93]. The Respondents have refined its application and no longer pursues a strike out application on the basis that the Discrimination claim has no reasonable prospect of success.

Chronology

4. This Claim was submitted on 18 May 2019, and Case Management Orders were made by Employment Judge Cheetham QC at a Preliminary Hearing on 10 February 2020.

5. On 27 March 2020 the Respondent submitted an application for a strike out of the Claimant's complaints of direct race and sex discrimination, or for a deposit order in the alternative ("The Discrimination Application").

6. The Discrimination Application was to be heard at a Video Case Management Hearing on 22 June 2020, although due to an error in this not having been listed as a public hearing, the Discrimination Application could not proceed and was relisted for 13 July 2020 at the 22 June 2020 Preliminary Hearing. Replacement Case Management Orders were also made by Employment Judge Hyams-Parish on this date ("the JuneJuly CMOs"). Paragraph 13 of the JuneJuly CMOs are summarised as follows:

a. Claimant to serve any witness statement for the Discrimination Application within 7 days of the Preliminary Hearing;
b. Skeleton arguments for the Discrimination Application to be filed within 3 days of the Preliminary Hearing;
c. Claimant's Schedule of Loss to be served on Respondent by 7 September 2020;
d. Exchange of documents by 7 September 2020;
e. Respondent to provide proposed index to Final Hearing bundle by 21 September 2020;
f. Claimant to respond with agreement/requested changes to the Final Hearing bundle index as soon as possible;
g. Final Hearing bundle to be agreed within 7 days of it being sent to the Claimant;
h. Respondent to send hard copy and electronic copy of the bundle to the Claimant by 5 October 2020;
i. Exchange of witness statements by 9 November 2020; and
j. Chronology, cast list, and list of issues (if necessary) to be agreed by the date of the Final Hearing.

7. In an email dated 7 July 2020 the Respondent requested a postponement of the 13 July 2020 Preliminary Hearing as the Claimant's representative had not

provided the witness statement required by Paragraph 13a. of the JuneJuly CMOs, and did not know when his client would be able to provide this, and so as a result the parties could not prepare skeleton arguments as required by Paragraph 13b. of the JuneJuly CMOs.

8. On 17 August 2020 the parties were informed that the Discrimination Application would be heard at a Preliminary Hearing at 10am on 20 November 2020 at 10am.

9. Further to this, the Respondent's solicitors contacted the Claimant's representative regarding the JuneJuly CMOs in telephone conversations and emails dated 3 September, 8 September, 14 September, 21 September, 29 September and 20 October 2020. In telephone conversations, it was informed that the Claimant's representative had not been able to take his client's instructions and considered coming off record. The Claimant failed to comply with any of the orders at Paragraph 13 of the JuneJuly CMOs, and the Respondent therefore paused its own preparation until confirmation could be received that the Claimant intended to continue claim preparation.

10. In an email dated 20 October 2020, copied to the Tribunal, the Respondent's solicitors provided the Claimant's representative with a deadline of 27 October 2020 to provide client instructions. However, no response was received.

Submissions

11. The Tribunal received detailed written submissions on behalf of the Respondent with oral submissions at the hearing.

Law

STRIKING OUT

12. Rule 37 provides:

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).

13. The grounds relied on in this case are, the manner in which the proceedings have been conducted, rule 37(1)(b), for the non-compliance with an order of the Tribunal - rule 37(1)(c) - and that the claim is not being actively pursued – rule 37(1)(d).

14. It has been held that there are two 'cardinal conditions' for the exercise of the power under [SI 2013/1237 Sch 1 r 37(1)(b)], namely, that the unreasonable conduct has taken the form of a deliberate and persistent disregard of required procedural steps, or it has made a fair trial impossible (see **Blockbuster Entertainment *Ltd v.* James** [2006] IRLR 630*, at para 5,* per Sedley LJ). Where these conditions are fulfilled, it is necessary for a tribunal to go on to consider whether striking out is a proportionate response to the misconduct in question. As Sedley LJ put it, the power to strike out under [r 37(1)(b)] is 'a Draconic power, not to be readily exercised'. At paragraph 23, he said:

> "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."

15. The scope of the rule was examined in some detail by the Court of Appeal in **Bennett v. London Borough of Southwark** [2002] IRLR 407.

16. In a helpful summary of what is required to be decided by an employment tribunal before making a striking out order under what is now SI 2013/1237 Sch 1 r 37(1)(b), Burton J, giving judgment in **Bolch v. Chipman** [2004] IRLR 140 EAT, stated that there are four matters to be addressed (see para 55). First, there must be a conclusion by the tribunal not simply that a party has behaved scandalously, unreasonably or vexatiously but that the proceedings have been conducted by or on his behalf in such a manner. As Burton J stated: 'If there is to be a finding in respect of [rule 37(1)(b)] … there must be a finding with appropriate reasons, that the conduct in question was conduct of the proceedings and, in the circumstances and context, amounted to scandalous, unreasonable or vexatious conduct.' Such conduct is not confined to matters taking place within the curtilage of the tribunal, and could comprise, for example, the making of threats as to possible consequences if the proceedings are not withdrawn. Second, even if such conduct is found to exist, the tribunal must reach a conclusion as to whether a fair trial is still possible. In exceptional circumstances (such as where there is wilful disobedience of an order) it may be

possible to make a striking out order without such an investigation (see *De Keyser*), but ordinarily it is a necessary step to take. Third, even if a fair trial is not considered possible, the tribunal must still examine what remedy is appropriate, which is proportionate to its conclusion. It may be possible to impose a lesser penalty than one which leads to a party being debarred from the case in its entirety. Fourth, even if the tribunal decides to make a striking out order, it must consider the consequences of the debarring order.

17. In **Rolls Royce plc v. Riddle** [2008] IRLR 873, it was said, at paragraph 19:
> "…cases of failure to actively pursue a claim will fall into one of two categories. The first of these is where there has been 'intentional and contumelious' default by the claimant and the second is where there has been inordinate and inexcusable delay such as to give rise to a substantial risk that a fair trial would not be possible or there would be serious prejudice to the respondent…"

18. In relation to Rule 37(d), in **Evans v. Metropolitan Police Comr** [1993] ICR 151, the EAT held that **Birkett v. James** [1978] AC 297, the leading case on the equivalent rule in civil cases, applied to employment tribunals. **Birkett v. James** holds that claims should not be struck out unless there has either been intentional or contumelious default by the claimant, or inordinate and inexcusable delay leading to a substantial risk that a fair trial will not be possible, or to substantial prejudice to the respondent.

19. The importance of tribunals adopting a structured approach when considering whether to strike out a pleading, and carrying out a careful and dispassionate analysis of the factors indicating whether a fair trial is or is not still possible and whether a strike out is or is not a proportionate penalty, has been stressed in a number of cases. For example, in **Arriva London North Ltd v. Maseya** UKEAT/0096/16 (12 July 2016, unreported*)* Simler J (as she then was) stated: 'There is nothing automatic about a decision to strike out. Rather, a tribunal is required to exercise a judicial discretion by reference to the appropriate principles' (para 27). That case concerned a tribunal's decision to strike out a response to a disability discrimination claim on the grounds that the respondents had conducted the proceedings in a scandalous and unreasonable manner by pursuing a 'false defence' and deliberately failing to disclose documents. Allowing the respondents' appeal, Simler J held that, on the facts, there was no justification for categorising the response as 'false', and no basis for concluding that there had been a deliberate failure to disclose relevant documents. In reaching these conclusions, the tribunal had failed to analyse the facts properly and had fundamentally misunderstood the nature of the cases put forward by the claimant and the respondent. Moreover, it had crucially failed to consider the authorities on striking out and the principles to be applied. It did not properly investigate whether a fair trial was still possible and did not consider the question of proportionality. Simler J found that the problems regarding amendments to the response and the disclosure of

documents, which were at the heart of the decision to strike out, were all capable of resolution without causing undue delay, so that there was nothing to prevent a fair trial from taking place. Further, and in any event, she held that the draconian sanction of strike out was disproportionate in the circumstances. The case was accordingly remitted to a fresh tribunal for a full hearing on the merits. Again, in **Baber v. Royal Bank of Scotland plc** UKEAT/0301/15 (18 January 2018, unreported), Simler J expressed similar views on the draconian nature of striking out orders when setting aside an order striking out the claimant's unfair dismissal claim for non-compliance with case management orders. Pointing out that such orders are neither automatic nor punitive, she held that not only did the tribunal fail to identify the extent and magnitude of the claimant's non-compliance with the order, merely stating that there had been non-compliance, but it had not examined whether a fair trial was still possible or whether a lesser sanction could be imposed (see para 56).

DISCUSSION and DECISION

20. Although the respondent did not proceed with the Discrimination Application, the Tribunal considered its chronology and the arguments for lack of jurisdiction / strike out / deposit orders on the basis of time limits / merits which are set out in its note for the hearing on 22 June 2020 [68-71]. The Tribunal noted that from the dates provided by the Claimant, the claims were out of time and there was no assertion of a continuing act. Dismissal was not said to be an act of discrimination and no material had been provided to obtain a just and equitable extension of time. This application would likely have been granted.

21. The Grounds for a strike out under Rule 37(b) and (c) are related: the former concerns the situation where the manner in which proceedings have been conducted by or on behalf of the claimant or respondent has been scandalous, unreasonable or vexatious, whereas the latter concerns specific identifiable non-compliance with Rules or Orders.

22. The Claimant has made serious accusations of race discrimination but appears to have ceased all involvement with the claim that he initiated. He failed to attend the hearing on 22 June 2020 which as far as the parties were concerned in advance was an open preliminary hearing at which the Claimant may have been required to give evidence as to his means. He would not appear to have given instructions to his representatives for a number of months. Those representatives themselves have not responded to recent correspondence. The Claimant has failed to comply with any of the case management orders made on 22 June 2020 – which has already been the cause of one preliminary hearing on 13 July 2020 being postponed.

23. Every effort has been made to contact the Claimant and attempt to get the case back on track. The Respondent contacted the Claimant’s representative regarding the June CMOs in telephone conversations and emails dated 3 September, 8 September,

14 September, 21 September, 29 September and 20 October 2020. In telephone conversations the Respondent was informed that the Claimant's representative had not been able to take his client's instructions and was considering coming off record. In an email dated 20 October 2020, copied to the Tribunal, the Respondent provided the Claimant's representative with a deadline of 27 October 2020 to provide client instructions, but no response was received.

24. By this point in time, the parties should have agreed and produced a bundle of documents and exchanged witness statements. No witness statement has been served by the Claimant even for the strike out hearing; no Schedule of Loss has been served; exchange of documents has not taken place and there is no proposal from the Claimant as to when he would be ready to do any of these things. As a result, the hearing bundle and witness statements cannot be prepared and the case cannot be managed properly. Without the participation of the Claimant as required by the overriding objective, a fair trial is not possible.

25. The Tribunal acknowledges, as per paragraph 5 of **Blockbuster Entertainment Limited v. James** that rule 37 is a "draconic power, not to be readily exercised". However, the Claimant has demonstrated unreasonable conduct which "has taken the form of deliberate and persistent disregard of required procedural steps". In relation to rule 37(1)(b), the Tribunal finds that the manner in which the Claimant has conducted proceedings has been unreasonable. In relation to rule 37(1)(c), the Tribunal finds that a number of important orders of the Tribunal have not been complied with. Applying the same structure of reasoning as previously (**Bolch**), the Tribunal concluded that the claim should also be struck out under rule 37(1)(c).

26. The guiding principle in deciding whether or not to strike out a party's case for non-compliance with an order is the requirements of the Overriding Objective. A tribunal must consider all the circumstances of the case, including the need for litigation to be conducted efficiently and at proportionate cost, the need to enforce compliance with rules, practice directions and orders; and the demands of other litigants upon the system. The orders are in accordance with the overriding objective in that they enable the Tribunal to deal with the case fairly and justly in light of the Claimant's repeated non-compliance with Tribunal orders and rules and disregard for participating in and progressing these proceedings. Further, the orders would bring an end to the ongoing delay in preparation for this claim, and save expense for the parties and Tribunal.

27. Therefore, in all the circumstances it is proportionate to strike-out the claim due to the Claimant's conduct of these proceedings. Such conduct is deep-rooted and irreversible and to allow such behaviour unchecked will have a significant impact upon the fairness of the entire proceedings.

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Employment Judge Truscott QC

Date 23 November 2020