



EMPLOYMENT TRIBUNALS

Claimant: Ms A Musa

Respondent:

- (1) Reckitt Benckiser Health Limited
- (2) Reckitt Benckiser Group Plc

Heard at: London North (CVP)

On: 14 October 2022

Before: Employment Judge A.M.S. Green

Representation

Claimant: In person

Respondent: Mr R Moore - Counsel, instructed by Ms N Ward - Solicitor

RESERVED JUDGMENT ON A PRELIMINARY MATTER

The respondents' application to strike out the claimant's claims is dismissed.

REASONS

Introduction

1. This hearing was originally listed as a private preliminary hearing. However, it was relisted as a public preliminary hearing on 9 October 2022 for the Tribunal to consider the respondents' application dated 29 September 2022 to strike out the claims.
2. The hearing was scheduled to start at 10 AM. Shortly before the hearing, the claimant was briefly present in the "waiting-room" facility for the CVP but disappeared. She eventually joined the hearing at 11:10 AM and explained that she had problems logging in.
3. We worked from a digital bundle. Although the claimant had not prepared a witness statement, I heard oral evidence from her during the hearing and she

was cross examined. I heard closing submissions from both sides.

4. The claim is about the following. The claimant is a female Somali Black African. She is a Muslim. She was employed by the first respondent, a company that is part of the Reckitt Benckiser group of global companies which produce and distribute health, hygiene and nutrition products worldwide. The Group's brands include Dettol, Calgon, Harpic, Nurofen, Vanish, Veet and Strepsils. The claimant was employed as a human resources business partner, from 16 September 2019 until 18 November 2021. Early conciliation started on 18 November 2021 and ended on 3 December 2021. The claim form was presented on 4 January 2022.
5. The claim is about constructive unfair dismissal, whistleblowing, race discrimination and discrimination based on religion or belief. The claimant believes that the respondent deliberately failed to pay her designated Band B salary to which she believes she was contractually entitled having been promised this by her then line manager, Tashfeen Islam, in December 2020. She claims that she was not paid the correct salary for the first six months of her employment. It was only after she complained to the respondent in May 2021 and submitted a formal grievance in June 2021 did the respondent pay the claimant her backpay. She believes that this was a reactive step on the part of the respondent because they had received a formal grievance from the claimant. The claimant's grievance was not upheld and she unsuccessfully appealed the decision. She alleges that the respondent raised poor performance issues and also claimed that the role she performed was at Band C and not Band B. The claimant alleges that she had never previously been subject to any poor performance concerns during her employment and no issues had been flagged up with her. She cites better paid comparators who were white British, Indian, South Asian, European and other non-Somali and non-Muslim colleagues in HR. Ultimately, the claimant resigned.
6. The respondents deny liability. It says that the first respondent employed the claimant and that the second respondent should be removed from these proceedings. The respondents contend that it conducted a fair grievance process which did not justify the claimant resigning. It denies direct race discrimination and direct religious discrimination because the claimant was not contractually entitled to be paid according to Band B. The respondents deny that the claimant was harassed having made a protected disclosure in her grievance. The respondents deny that the claimant was victimised when it dismissed her appeal.
7. On 8 June 2022, the Tribunal listed a final hearing in Reading for five days on the following dates: 29 January 2024, 30 January 2024, 31 January 2024, and 1 & 2 February 2024. It also Issued the following case management orders:
 - a. The claimant was required to send a schedule of loss to the respondents by 6 July 2022.
 - b. On 3 August 2022, the parties were to send each other documents relevant to the claim.
 - c. On 11 November 2022, the parties were to agree the bundle.

- d. On 9 December 2022, the parties were to exchange witness statements.
8. The claimant did not comply with the case management orders requiring her to serve her schedule of loss and to disclose documents relevant to her claims.
9. On 29 September 2022, the respondent's solicitor applied to the Tribunal for an order to strike out the claimant's claims under rules 37(1)(c) & (d) or, alternatively to make an "unless order" under rule 38(1) for the following reasons:
 - a. The claimant had not complied with the case management orders requiring her to provide a schedule of loss and to disclose documents relevant to her claims.
 - b. Solicitors representing the claimant wrote to the respondent's solicitors on 5 July 2022 to advise that Mr Singh, the claimant's solicitor with conduct of the litigation had suffered a stroke and the firm was without instructions with which to comply with the case management order to provide the schedule of loss by 6 July 2022.
 - c. The respondents' solicitors emailed the claimant's solicitors to ascertain whether they had instructions relating to the case management order for disclosure. In absence of any response, the respondents' solicitors disclosed their documents to the claimant's solicitors and to the claimant personally. They asked the claimant to provide copies of her documents. They did not receive a reply.
 - d. In the run up to this hearing, the respondents' solicitors contacted the claimant's solicitors to ascertain if they were still instructed. They were informed that Mr Singh had died and they were struggling to contact the claimant.
 - e. On 21 September 2022, the respondents' solicitors wrote to the claimant asking her if she was continuing with her claim. In that letter, they reminded her of the case management orders and warned her that if they did not hear from her by 28 September 2022, they would assume that she no longer wish to pursue her claim and they would apply to the Tribunal to consider striking out the claim on the basis that she had failed to comply with Tribunal orders and her claim is not being actively pursued.
10. Mr Moore confirmed that there had been no further contact with the claimant. The schedule of loss and disclosure of documents had not been provided.

Findings of fact

11. The claimant was originally represented by Mr Jagdeesh Singh, a solicitor with a firm called Cameron Clark Lawyers Ltd ("Cameron Clark"). Mr Singh was identified as the claimant's representative in her form ET 1.
12. The claimant worked closely with Mr Singh from November 2020 and was in regular contact with him.

13. On 3 August 2022, the respondents' solicitor wrote to the claimant [97]. The letter was sent by recorded delivery and was signed for on 4 August 2022. In their letter, they referred to the directions issued by the Tribunal on 8 June 2022 and enclosed copies of their clients' documents relevant to the claim. They also confirmed that they had sent copies of these documents to Mr Singh but understood that he was unwell. They had not received a response from his firm. They asked the claimant to confirm whether she was still instructing Cameron Clark. If she was not, she was asked to confirm if she was representing herself and they would continue to contact her directly. Under cross examination, the claimant confirmed that she first saw this letter in the third week of August 2022. She had been away on business and her sister had signed for it in her absence. She confirmed that she did not reply to the letter. When she was asked why, she said that she had emailed Mr Singh. When he did not reply, she made further enquiries and discovered that he had died.
14. On 20 September 2022, Mr Tony Shergill, a solicitor at Cameron Clark wrote to the Tribunal (copied to the respondents' solicitor) to confirm that his firm had come off the record representing the claimant. They explained that they were not in funds and had come off the record [95]. The claimant's evidence was unclear about whether she knew that Cameron Clerk had come off the record. Notwithstanding this, the terms of the letter are very clear. Not only do they state that Cameron Clark no longer represented the claimant, but also give the reasons why. The claimant suggested in her oral evidence that they were working with her to find alternative representation. That may have been the case, but as of 20 September 2022 they were no longer formally representing the claimant in these proceedings and she knew that or ought to have known that.
15. On 21 September 2022, the respondents' solicitor wrote to the claimant [99]. The letter was addressed to the claimant because they understood that Cameron Clark were no longer instructed. They reminded the claimant of the preliminary hearing and confirmed that they had disclosed documents relevant to the claims as per the case management orders. They reminded her that they had not received a schedule of loss from her or copies of documents that were relevant to her claim. They acknowledged that the claimant had experienced some difficulty with her previous representatives. In the letter, the claimant was also asked to confirm if she was continuing to pursue her claim and, if she was, whether she would be instructing alternative representatives or representing herself. If she was intending to pursue her claim, she was invited to provide her schedule of loss and documents as soon as possible. She was given a deadline of 28 September 2022 and if they had not heard from her by that date, she was warned that they would apply to the Tribunal to strike out her claim on the basis that she had failed to comply with Tribunal orders and/or she was not actively pursuing her claim. It was entirely appropriate for the respondents' solicitor to write this letter directly to the claimant because she was no longer represented by Cameron Clark.
16. The letter was sent by recorded delivery. Under cross examination, the claimant said that the letter was signed for by her sister and she mistakenly believed that it would be dealt with by Mr Singh. She said that she first read the letter in the first week of October 2022 as she had been travelling on business. She then went on to say that she realised that Mr Singh had died

and she had contacted Cameron Clark to ask if Mr Singh would be replaced. She told the Tribunal that she was informed that if Cameron Clark has someone to take over, they would continue to represent her. If not, they would recommend a third party representative. She said that she asked Cameron Clark to communicate with the Tribunal. She said that she believed this did not happen. She is correct, it did not happen. She was vague about when she actually contacted Cameron Clark. At this juncture, the claimant would ought to have known that Cameron Clark were no longer formally representing her and she should have replied to the letter. It was, after all, addressed to her directly. She did not do that.

17. The terms of the letter were very clear and the claimant could not have been under any misapprehension of the consequences of not replying to it herself or instructing a representative to reply on her behalf. Instead, the letter went unanswered.
18. The claimant said that she was looking for alternative representation and acknowledged that, in hindsight, she should not have waited. She acknowledged that she was at fault. When she read the letter of 21 September 2022, she contacted Cameron Clark to find out what was going on.
19. The claimant was taken to the respondent's letter of 29 September 2022 [102] which is the application to strike out her claims. The claimant acknowledged that this letter had gone unanswered. The letter was sent by recorded delivery and it was signed for on 6 October 2022. The claimant said that she believed her mother had signed for the letter and she would have first read it on her return from a business trip. She recalled that she had returned home on or around 4 & 5 October 2022. Under cross examination, she said that she instructed a firm of solicitors called SMAB to represent her. Although she said that she had instructed the firm to represent at the hearing, she was initially unable to name that individual and was rather vague saying that there was a team at the firm who specialise in employment matters and eventually said that a person called Ewan Keen was representing her. She also suggested that notwithstanding her instructions to represent her, and instructing that firm to respond to the letter of 29 September 2022, they had failed to do so. She blamed the firm. When she was pressed on this, she was asked whether she had instructed them to write a very urgent letter in response to the strike out application she answered rather vaguely "I believe I made it clear. If there was different terminology, this was the status of the case and the upcoming hearing". I found that reply puzzling.
20. I did not get the impression that SMAB were formally instructed to represent the claimant at this hearing despite her suggesting to me that she had instructed this on 7 October 2022. Had they been instructed in advance of this hearing; they would have notified the Tribunal they had gone on the record. There is no evidence of that. Furthermore, had they been instructed to represent the claimant at this hearing, they would have been sent a Notice of Hearing and the arrangements for joining it by the Tribunal. There is no evidence of that and, furthermore, they did not attend the hearing. At best, I think it can be said that the claimant was in discussions with SMAB and had not formally instructed them. I accept that they may have sent her a costs estimate and terms of business as stated by claimant in her oral evidence but a formal retainer had not crystallised.

Applicable law

21. A claim can be struck out on different grounds including non-compliance with an order of the Tribunal (rule 37 (1)(c)) and that it has not been actively pursued (rule 37 (1) (d)).
22. Before an order for strike out can be made, a party must be a given reasonable opportunity to make representations either in writing or orally at a hearing as to why such an order should not be made.
23. In deciding whether to strike out a party's case for non-compliance with an order under rule 37(1)(c), a tribunal will have regard to the overriding objective set out in rule 2 of seeking to deal with cases fairly and justly. 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.
24. Whenever a tribunal is considering a strike-out on the ground of non-compliance with prior orders pursuant to rule 37(1)(c), it must consider whether such an order is a proportionate response to the noncompliance.
25. In **Ridsdill and ors v D Smith and Nephew Medical and ors EAT 0704/05** the EAT held that the employment tribunal had erred by striking out the claimants' claims on the basis that they had failed to provide schedules of loss and had not exchanged witness statements. A proportionate response required the tribunal to consider whether there was a less drastic means of addressing the claimants' failures and achieving a fair trial for the parties. It was undoubtedly the case that an adjournment of the hearing, with appropriate unless orders and costs penalties, would have avoided the conclusion that a fair trial was impossible and would thereby have ensured fairness and justice as between the parties without debaring the claimants from a trial altogether. The tribunal had acknowledged, implicitly at least, that adjourning the hearing would have prevented it finding that a fair trial was no longer possible; and it was not in dispute that the tribunal had the power itself under the Rules to order an adjournment. In observing that no request for an adjournment had been made, and then limiting its consideration to the question of whether a fair trial was possible on the dates fixed for hearing, the tribunal had erred.

26. In **Evans and anor v Commissioner of Police of the Metropolis 1993 ICR 151, CA**, the Court of Appeal held that an employment tribunal's power to strike out a claim for want of prosecution must be exercised in accordance with the principles that (prior to the introduction of the Civil Procedure Rules in 1998) governed the equivalent power in the High Court, as set out by the House of Lords in **Birkett v James 1978 AC 297, HL**. Accordingly, a tribunal can strike out a claim where:

- a. there has been delay that is intentional or contumelious (disrespectful or abusive to the court), or
- b. 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

27. The first category is likely to include cases where the claimant has failed to adhere to an order of the tribunal. As such, it overlaps substantially with the tribunal's power under rule 37(1)(c) to strike out for non-compliance with tribunal rules or a tribunal order.

28. The second category requires not only that there has been a delay of an inordinate and inexcusable kind, but that the respondent can show that it will suffer some prejudice as a result. In **O'Shea v Immediate Sound Services Ltd 1986 ICR 598, EAT**, the EAT held that prejudice was inherent in the failure to prosecute a case in time and so it was not necessary for the tribunal to consider this factor separately. However, this was held to be erroneous by the Court of Appeal in **Evans** — although the Court considered that the decision in **O'Shea** was nonetheless correct on its facts. In any event, prejudice may not be difficult to show, as it will often be necessary 'to investigate the facts before memories have faded, not to allow hurt feelings to fester and to provide as summary a remedy as possible' — per Lord Justice Hoffmann in **Evans**.

Discussion and conclusions

29. In her submissions, the claimant told me that she appreciated the requirement to comply with the Tribunal's orders. She accepted that she had not done so. She had not served and filed her schedule of loss and she had not disclosed documents relevant to her claims to the respondents. She attributes this to failings on the part of Cameron Clark. She said that Mr Singh had told her that things would be delayed because of the pandemic and that he had not received any updates from the Tribunal. She said that she trusted Mr Singh to manage things on her behalf. She said that she did not know that he had been unwell or that he had subsequently died until after she had received the letter from the respondents' solicitor dated 3 August 2022. She said that she had always been actively pursuing the claim since day one but took responsibility for not following things up with her representatives. She said that if she was not actively pursuing the claim, she would not have attended today's hearing.

30. Mr Moore invited me to be very sceptical about the claimant's speculations about what had happened. In his view, the claimant had clearly breached two of the Tribunal's case management orders. She had been written to on three occasions in the clearest possible terms requesting compliance. She did not engage in correspondence with the respondents' solicitors. Not only did this point to non-compliance with the Tribunal's orders but it also indicated that the claimant was not actively pursuing her claims.
31. Mr Moore acknowledged that a fair hearing would not be compromised because there was still plenty of time for the claimant to comply with the case management orders. However, the respondents' solicitors had been ignored. There was a lack of engagement. It was extraordinary that the claimant had not made direct contact with the respondents' solicitor or the Tribunal to indicate that she wished to pursue the matter. Instead, she was engaged in discussions about retaining different representation.
32. I struggle to believe that Cameron Clark was somehow responsible for the failure to comply with the case management orders given their email of 20 September 2022 where they quite clearly state that they were coming off the record for two reasons. First, they were not in funds. Secondly, they were having difficulties getting instructions from the claimant. A solicitor cannot act without instructions. I accept that the claimant worked closely with Mr Singh. Very tragically, Mr Singh died. However, it would have been abundantly clear to the claimant that when she received the letters of 21 & 29 September 2022, both of which were addressed to her, she had to act quickly because she knew that the consequences of not doing so could be serious. Furthermore, she could have been in no doubt that she had to respond to those letters because they were addressed to her personally. She did not do that. As far as the respondents were concerned, they were faced with the situation of the claimant doing nothing and disregarding the Tribunal's case management orders. In retrospect, the claimant acknowledges and accepts that she should have done things differently. She is quite right. Rather than engaging in discussions with Cameron Clark and, SMAB about representation, she should also have addressed the correspondence with the respondents' solicitors and made sure it was responded to timeously. She had no sense of urgency about what she was facing which is surprising given that when she was giving her evidence, she came across as an articulate and intelligent person who said she was taking her claims seriously from day one and worked closely with Mr Singh. I give her some credit for accepting some responsibility for her omissions.
33. Whilst I accept that the claimant has failed to comply with case management orders requiring her to provide a schedule of loss and to disclose documents relevant to her claims, I am not persuaded that it would be proportionate to strike out her claim under rule 37 (1) (c). We are still relatively early in the timetable for the proceedings and the final hearing is listed in early 2024. I am not persuaded that the chances of a fair hearing are jeopardized now.
34. I am also not minded striking the claims at under rule 37 (1) (d). There has been delay in these proceedings, but I do not accept that it was intentional or contumelious. The claimant appears to have herself into a muddle and communicated badly with her representatives. She did, after all, attend today's hearing, albeit arriving very late. That points to an intention actively pursue her claims.

35. The delay caused by the claimant's failure to comply with the case management orders is neither inordinate nor inexcusable. At its highest it shows discourtesy to the Tribunal and the respondents' solicitors. The chances of a fair hearing have not been jeopardized (as acknowledged by Mr Moore) I do not think there will be serious prejudice to the respondents. They have plenty of time to prepare for the final hearing.
36. Given the timetable, the more appropriate and proportionate response is to issue an "unless" order requiring the claimant to serve her schedule of loss and to disclose her documents. The claimant must be under no illusions about the significance of an unless order. If she does not comply with the unless order by the specified time, **her claims will be struck out automatically**. If she instructs a representative, she needs to be very clear about what she is instructing them to do so that they can act on her instructions. If they are formally represented to appear on her behalf in these proceedings, they must be instructed to notify the Tribunal and the respondents' solicitors of that fact. If they are not formally instructed to appear on her behalf but are working "behind-the-scenes," as it were, then the claimant is representing herself and **she must respond in a timely manner to any correspondence that she receives from the respondents' solicitors and the Tribunal**.
37. The claimant should never forget this important maxim in relation to the professional relationship that exists between a solicitor and their client namely: solicitors give advice and clients give instructions.

Employment Judge Green

Date 17 October 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

18 October 2022

FOR EMPLOYMENT TRIBUNALS