



EMPLOYMENT TRIBUNALS

At an Open Hybrid Preliminary Hearing

Claimant: Mrs R Grusina

Respondents: (1) Leicester City Council
(2) Governing Body of Marriott Primary School

Heard at: Midlands (East) Region – Hybrid Hearing
On: 11 May 2023
Before: Employment Judge R Broughton (sitting alone)

Representation

Claimant: In person
Interpreter: Philip Hatch-Barnwell

Respondents: Ms H McDade, Solicitor

JUDGMENT

The Respondents application to strike out the claims are refused.

REASONS

1. The case was listed to deal with an application by the Respondents which was submitted on 6 April 2023 for the Claimant's case to be struck out in its entirety. The Respondents pursue the application on four grounds.
 - 1.1. The manner in which the Claimant has conducted proceedings has been scandalous or vexatious under Rule 37.
 - 1.2. The Claimant has not complied with any of the Employment Tribunal Rules or with any Order of the Employment Tribunal.
 - 1.3. The claim has not been actively pursued.
 - 1.4. It is no longer possible to have a fair hearing.
2. The claim was issued on 10 June 2021. It came before Employment Judge Britton on 26 October 2021 at a Case Management Hearing. Employment Judge Britton set out for the benefit of the Claimant, the applicable legal framework, both in relation to the claims of whistleblowing and also the claim of race discrimination, setting out what he understood the potentially relevant sections of the Equality Act 2010 were in terms of the race discrimination,

namely; sections 13, section 19 and section 27. Employment Judge Britton however identified within his orders, that he considered that the claim as described by the Claimant would appear to fall within section 13 and claims of direct discrimination.

3. The claims however required further particularisation by the Claimant and an Order was made that she must provide that particularisation by 4 November 2021. Orders for disclosure were made for the Respondent to disclose its documents on 25 February 2022 and for the Claimant to identify any documents that she considered to be missing from that bundle and then produce those.
4. The Claimant did not provide further particularisation by 4 November 2021; she applied for an extension of time to 21 February 2022, which in the event was granted. She provided her responses however not on 21 February but on 22 February, but that was not a material non-compliance.
5. However, the claims as particularised remained unclear, and the Respondents asked for a hearing to further clarify the whistleblowing and race discrimination complaints.
6. The matter then came before me at another preliminary hearing on 7 September 2022. We spent the entire hearing working through the whistleblowing complaints. I set out within my Case Management Order an appendix making it very clear what I understood from that preliminary hearing were her complaints; the alleged disclosures and the detriments. The Respondents accept that those claims have been clear since that hearing on 7 September 2022.
7. However, because it took such a long time to identify with the Claimant what her whistleblowing complaints were, we did not have the opportunity to go through the race discrimination claims at that hearing.
8. An order was therefore made and it was agreed with the parties, that the Respondents would by 8 September 2022 send the Claimant a Word version of a table setting out the race discrimination claims (Schedule). It was explained to the Claimant that she would need to complete the blank sections in the table and send a copy of that completed document to the Respondents by 29 September 2022. It was made clear to the Claimant, and indeed it was repeated in my order, that if the table which the Respondents provided did not include all the allegations of race discrimination that she was making she must add them to the table and that she must ensure that it is a full and accurate account of her allegations. I attached with that a guidance document from ECHR explaining the different types of discrimination.
9. We discussed the sort of information that she needed to include in the table at the 7 September 2022 hearing and I also informed the Claimant that if there was anything in the Schedule which she did not understand, the Solicitor for the Respondents confirmed that he would assist the Claimant and clarify what information was required to complete it.
10. The Respondents allege today that the Claimant sent an email to the Respondents on 30 September 2022 (not on 29 September 2022 as ordered) in which she stated she was attaching the completed Schedule however no

Schedule was attached. The Respondents complain that they contacted the Claimant and asked her to resend it. There was then some exchanges between the Respondents and the Claimant regarding the Schedule, which she said she had attached to the 30 September email.

11. I asked the Claimant about the 30 September email and whether or not she accepted that she had failed to attach the completed Schedule as ordered at the Hearing on 7 September. The Claimant stated that she could not recall. However, she did not produce when asked about it today, a copy of a completed Schedule.
12. There was a further preliminary hearing on 22 November 2022 before Employment Judge Adkinson. The Claimant did not produce the completed Schedule at the hearing and the record of that hearing specifically records at paragraph 39 that the Claimant has not complied with the order to provide further information by completing the Schedule and goes on to provide at paragraph 40 as follows:

“Discussion with the claimant revealed that the claimant did not properly understand what was expected of her. ...”
13. I conclude therefore that the Claimant had not inserted the required further information into the Schedule in breach of the order of 7 September and although referred to attaching it to an email on 30 September, she had not in fact done so.
14. Employment Judge Adkinson records in his record of that hearing, that he had also gone through the Schedule with her and explained to her what was needed and why the information was needed, namely so that the Respondent would understand the allegations and the Tribunal would understand the issues it had to determine. He went on to set out very clearly the information that would be required at paragraph 16. He explained that in relation to each act she simply had to identify the date it took place, brief details, the identity of any real person that she compared herself to and why she thinks her race was the reason for the difference in treatment. The order was that the information must be provided by **19 December 2022**.
15. Employment Judge Adkinson also ordered that in terms of disclosure of documents, that **each party must** send to the other party copies of all relevant documents by **27 February 2023**. His orders went on to provide that the parties must by 27 March agree the documents that are to be used at the hearing and then the Respondent will paginate the bundle.
16. The Claimant did not assert at today’s hearing that had she remained uncertain about what she needed to do, that she had at any point taken steps to obtain further advice whether that was via solicitors, ACAS, a free advice service or otherwise. She had however been given significant assistance at a number of preliminary hearings and efforts made to explain the simple details required in relation to the remaining claims of race discrimination.
17. Following the preliminary hearing on that same day, on 22 November, the Claimant sent a very lengthy email to the Tribunal and Respondents. It was lengthy and in narrative format and it was difficult to decipher from that the

further information that was required. It was difficult to identify from the way it was presented whether and what were allegations of race discrimination. She did not identify the matters she referred to as acts of race discrimination or explain why she thought race was the reason for any alleged difference in treatment.

18. On the 13 December 2022 the Claimant wrote to the Tribunal asking to amend her claim but she did not set out what amendments she was seeking. Employment Judge Hutchinson then wrote on 12 January 2023 stating that the Claimant had not provided the further particulars that Employment Judge Adkinson had required of her and further explained that if she was applying to amend her claim, she had to do a number of things, namely she had to set out what the fresh allegations were and why they amounted to race discrimination.
19. The Claimant then sent an email on 25 January 2023. It was not clear whether this was an application to amend or not. She did not identify whether these were fresh allegations or not and she did not address any issue of amendment and why the amendments should be accepted.
20. The Respondent then sent a revised Schedule on **10 February 2023** setting out what it understood the claims of race discrimination to be. The Claimant accepts that she received that updated Schedule. She did not however comment on it, add to it, correct it or otherwise make any attempt to work with the Respondent to finalise the Schedule.
21. This case is listed for a 7 day hearing commencing on **19 June 2023** i.e. just over a month from the date of this hearing.
22. The Claimant says at today's hearing that the updated Schedule (which she had by this stage received three months prior) does not in fact include all her claims of race discrimination however she was still not able to identify today the documents where she has set out all the other claims of race discrimination that she alleges should be included in the Schedule. The revised Schedule sets out six claims of race discrimination. I asked the Claimant to confirm whether she is pursuing six claims of race discrimination or more than six, and she confirmed that there were more but when I asked her how many other complaints she wants to include in the Schedule, she stated "*a lot more*". She was not able to identify any document or documents which set out all the additional allegations which she says are not included within the Schedule and she was not willing or able to confirm how many more allegations she wanted to add to the Schedule or provide a satisfactory explanation for making no attempt to comment on the revised Schedule in the last 3 months since she had received it.
23. In terms of the Claimant's understanding, while an interpreter was provided, the Claimant hardly required his assistance and confirmed that she would only call on him if there were certain legal terms she did not understand. It was difficult however to focus the Claimant at times on the matters we were discussing because the Claimant refused to focus on what we were dealing with, referring repeatedly to matters she wanted to raise and complain about, mainly the volume of disclosure from the Respondent, rather than address her claims and reasons for her default.
24. In terms of disclosure, the Respondent sent its disclosure to the Claimant on 17

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March 2023. The Claimant did not send hers.

25. The Claimant was asked by the Respondent for her disclosure by 30 March 2023. The Claimant did not send her disclosure and given the proximity of the hearing and the lack of any indication of when they would receive her disclosure and the Claimant's default to date, the Respondent sought to strike out the claim.
26. Despite Employment Judge Adkinson's order for mutual disclosure by 27 February 2023, by the date of this hearing on 11 May 2023, the Claimant had still not provided her disclosure or confirmed that she had none.
27. The Claimant eventually confirmed that she does have further documents in her possession or control which she considers are relevant to the issues and which she has not yet disclosed to the Respondent.
28. The Claimant was at pains to stress to me throughout today's hearing (often refusing to focus on anything else) that the disclosure that she received from the Respondent on 17 March had come in two tranches, and amounts to 1,337 pages. She complained that there are duplicate documents in the disclosure, that it is not in chronological order which makes it more difficult to read through and she also complains that there are documents disclosed which are not relevant, although she did not identify what those documents were. The Claimant told me that she did not provide her disclosure because she thought she had to check through the Respondent's bundle first and identify any additional documents which were not in it, and she pleads confusion in that regard.
29. The order of Employment Judge Adkinson was clear that disclosure was mutual, albeit looking at Employment Judge Britton's original order which the Claimant referred to back in October 2021, I note that Employment Judge Britton had provided for discovery by the Respondent first, sending the Claimant a draft trial bundle index and for the Claimant to consider whether there were any additional documents and then return that completed index to the Respondent copying any additional documents in their possession. However, as I say, Employment Judge Adkinson in his order made it clear that there would be mutual exchange on 27 February 2023.
30. Whilst I appreciate that being faced with 1,337 pages of documents would take some time for the Claimant to read and consider, if she was operating on the understanding that she needed to identify what is missing, it is still the case that she has had those documents since 17 March. She tells me today that she is only about halfway through reading them. Whilst she is also dealing with some personal issues (the Claimant is going through a divorce), this claim was started back in 2021 and is listed for hearing in a few weeks-time, the Claimant should have given priority and dedicated sufficient time to reading through those documents. The Claimant informs me that she works now only 3 hours per week, and she has two children but they are both of school age.
31. However, even if she simply did not have the time to check through the documents, a reasonable step would have been to provide the Respondent with her documents. She did not do that. Further, she was aware from 6 April 2023, over a month ago, that the Respondent was making this application to strike out

her claim and complaining of the failure by her to disclosure documents and yet still, one month later, the Claimant informs me today she has got about another 60 documents she has still not disclosed to the Respondent but wants to rely on them. The Claimant did not bring copies of those 60 documents with her today or even a list of them.

32. After establishing the current situation, the parties made their respective submissions.

Submissions

Respondent's submissions

33. The application by the Respondent is presented on four grounds. In addition to the written application, the Respondent made some oral submissions. All the submissions were taken into consideration. The Respondent complains that the Claimant has conducted herself scandalously or vexatiously in terms of the proceedings. It does not seek to rely on unreasonable conduct. In summary, in terms of its application it refers to the Claimant's default in terms of the Tribunal orders; the remaining lack of clarity around the race discrimination complaint; the problems it would cause for the Respondent now to prepare for a hearing if there is further disclosure in that the School is going to close on 29 May and it may be difficult therefore to take instructions. The Respondent also complains that three witnesses are no longer employed by the Respondent and there is concern over what they may recollect and the inherent prejudice of memories fading.
34. There is also an allegation, although it is not clear under which ground the Respondent states it is relevant to, or indeed whether much turns on it, but there is also a complaint that the Claimant had approached an employee of the Respondent at the school, the implication being that she was intimidating her in connection with these the Tribunal proceedings. A statement has been produced dated 4 May 2023 which I am told was written by the individual concerned, Ms Joseph, complaining of the Claimant's behaviour towards her. It is not a sworn statement; it is not an affidavit and Ms Joseph has not attended the hearing today to give any evidence.

Claimant's submissions

35. The Claimant's position in terms of Ms Joseph, is that she denies that she behaved in an intimidating way. She accepts that she spoke with her but it was to explain to her that she would be relying at the Tribunal hearing on a statement that Ms Joseph had made during the internal disciplinary hearing and felt that it would be respectful to explain that to her. She denies acting in a way which was intimidatory and on balance, given that Ms Joseph has not attended the hearing today to allow the Claimant to challenge her account, on balance I accept the Claimant's explanation that there was a discussion but that she was not and did not intend to upset or intimidate Ms Joseph.
36. Further, the Claimant complains essentially about the volume of documentation that she has had to deal with on disclosure from the Respondent and was at pains to complain about not only the volume of it but the way it was organised, which has made it difficult for her to process it and check and read through

those documents.

37. She also complains of some non-compliance by the Respondent, but it was not clear to me what that non-compliance was and this appears to be historic; she refers to non-compliance in 2021 and 2022 but nothing that seems to touch on the more recent orders.

Decision

38. The power of an employment tribunal to strike out a claim is set out in rule 37:

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).

The manner in which the Claimant has conducted proceedings has been scandalous or vexatious under Rule 37 (1)(b).

39. I now turn to the grounds of the application, the first being the manner in which the Claimant has conducted proceedings being scandalous or vexatious.
40. Scandalous has been held to be that which is irrelevant and abusive of the other side. In the case of ***Jones v Wallop Industries Ltd ET Case No. 17182/81*** the employee was held to have conducted themselves scandalously because it was found that the individual was intent on creating as much distress, embarrassment and expense as possible for the other party.
41. A vexatious claim or defence has been described as one that is not pursued with the expectation of success but to harass the other side or out of some improper motive: ***Marler Ltd v Robertson [1974] ICR 72***.
42. In terms of the Claimant's actions, she has failed to comply with Tribunal orders; she failed to complete the Schedule by 29 September 2022 and has clearly failed to provide the further particulars as ordered by Employment Judge Adkinson in the manner in which he ordered them to be provided. There has also been a failure to disclose her documents either by 27 February 2023 or indeed at all so far.
43. I do not find, however, that her conduct is intended to harass the Respondent

or that there is any improper motive. I find that she had misunderstood what is required of her and has failed to prioritise the time to deal with the preparation of her claim, it is dilatory and disorganised but I am not persuaded that her conduct can be said to be scandalous or vexatious. At most her conduct of these proceedings is unreasonable, but that is not the ground pursued by the Respondent.

The Claimant has not complied with any of the Employment Tribunal Rules or with any Order of the Employment Tribunal: rule 37(1)(c)

44. 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:
- the magnitude of the non-compliance
 - whether the default was the responsibility of the party or his or her representative
 - what disruption, unfairness or prejudice has been caused
 - whether a fair hearing would still be possible, and
 - whether striking out or some lesser remedy would be an appropriate response to the disobedience: *Weir Valves and Controls (UK) Ltd v Armitage 2004 ICR 371, EAT*. The claim has not been actively pursued.
45. The Claimant has attended the preliminary hearings and made some attempt to provide further information although not in a manner which has assisted in clarifying her claims of race discrimination. I accept there was some confusion on her part around disclosure albeit her explanation and tardiness in dealing with it is not satisfactory. In terms of the magnitude of the non-compliance it is significant but I do not find that she has failed to comply with all the orders which have been made however, the responsibility for the default lies with the Claimant alone.
46. The Respondent has been put to some disruption, it has attempted to understand her claim of race discrimination and revised the Schedule to identify her claims, with a matter of only a few months at that stage before the hearing in the context of a claim started in 2021. Even at today's hearing the Claimant is not in a position to produce a document clearly setting out the claims of race discrimination or even to commit to the number of allegations which she believes should be added to the Schedule.
47. The Respondent has also attempted to deal with disclosure and been compelled to attend today's hearing in the face of ongoing default. The Claimant has not even come prepared today to provide copies of her disclosure.

The claim has not been actively pursued rule 37 (1)(d)

48. ***Evans and anor v Commissioner of Police of the Metropolis 1993 ICR 151, CAA*** : A tribunal can strike out a claim where:
- there has been delay that is intentional or contumelious (disrespectful or abusive to the court), or
 - 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.
49. The first category overlaps with the tribunal's power under rule 37(1)(c) to strike out for non-compliance with tribunal rules or a tribunal order which is addressed above. I do consider that the Claimant's actions while not vexatious or scandalous are intentional, in that she failed to attach a revised Schedule to the 30 September 2022 email though she alleged she had done so and she did not comment on the revised Schedule provided in February 2023 (though she did not consider it contained all the allegations she wanted to pursue). She also failed to comply with the order for mutual disclosure and while that may have been due to some confusion, she took no steps to cooperate with the Respondent in advance of today's hearing despite the applications made by the Respondent to strike out her claims. Such conduct was intentional and disrespectful
50. 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. I address the alleged prejudice below.

It is no longer possible to have a fair hearing: rule 37(1)(e)

51. When considering whether to strike out the claims under each of the rules in section 37, it was made clear in ***De Keyser Ltd v Wilson [2001] IRLR 324, EAT*** and ***Bolch v. Chipman [2004] IRLR 140*** that save in exceptional circumstances, a striking out order is not regarded as simply a punishment if a fair trial is still possible; the case should be permitted to proceed.
52. The Respondent complains that memories of witnesses will have faded and that the School will close on the 29 May making it now difficult to take further instructions in the time remaining.
53. Even if a fair trial is unachievable, the Tribunal would need to consider the appropriate remedy. It may be appropriate to impose a lesser penalty, for example by making a costs or preparation order. The Respondent does not seek an order for costs in the alternative in this case.
54. In terms of whether or not a fair trial is possible, I take into account that the Respondent accepts that it understood what the 'whistleblowing' claims are and has done since that was clarified back in September 2022. In terms of any witnesses and their recollection of events, it has had since September 2022 to take instructions.
55. The Respondent also set out in its amended Schedule in February 2023 what it understood the race discrimination complaints to be. It considered, despite the

fact that it felt there were still parts of those complaints which were unclear it was in a position to proceed to a hearing hence why it continued with the disclosure exercise in March 2023.

56. I am not persuaded that a fair trial is no longer possible in connection with the whistleblowing claim because those claims have been very clear to the Respondent for a significant period of time and the disclosure of circa other 60 pages of documents should not prevent the Respondent being able to prepare for the hearing and take instructions.
57. Although the Claimant has been uncooperative and there has been intentional delay and unreasonable conduct, I consider that a fair trial remains possible and an 'unless order' will encourage the claimant to cooperate. I consider that with an unless order to deal with very prompt disclosure from the Claimant that should enable the Respondent to take any instructions that it needs to take from its witnesses and that should address the difficulty that the Respondent envisages of late disclosure at this stage.
58. The whistleblowing complaint, will proceed and the application to strike out the whistleblowing claims is refused. However, if the terms of the Unless Order set out below are not complied with, the claims in their entirety will be struck out.
59. In terms of the race discrimination claim, even at this late stage in the process, and after so many attempts since October 2021 to obtain from the Claimant particulars of her claim, even today she is not in a position to provide a document setting out clearly what the further claims are. The Claimant was not able or willing to even identify how many more allegations she would want to include, stating only that there are 'a lot' more. In those circumstances I consider that it is in accordance with the overriding objective to deal with cases fairly and justly to make an order limiting the claims of race discrimination to the six allegations that are contained in the February 2023 updated Schedule, rather than striking out all her race discrimination claims.
60. The Claimant has had since 27 February 2023 to contact the Respondent if she was not satisfied that the Schedule included all the allegations that she wanted to pursue and she cannot provide a satisfactory explanation for not doing so.
61. The February 2023 Schedule setting out the six allegations will be the only claims of race discrimination that will be dealt with at the final hearing in June 2023. I consider that this will ensure that a fair hearing of the race discrimination claim is still possible. The Respondent had been prepared back in March 2023 to proceed to a final hearing dealing with those six allegations and prompt disclosure of any additional documents from the Claimant will give the Respondent time before the school closes for the half term to take any further instructions, if required.
62. The terms of an Unless Order to prevent further delay and ensure the cooperation of the Claimant, was discussed with the parties at this hearing. The Claimant did not complain that there was anything which would prevent her from providing her additional disclosure by 15 May 2023.

Unless Order

Unless the Claimant:

1. Sends to the Respondents' solicitors the documents which she currently has in her possession and control and which are relevant to the issues to be determined at the final hearing and which she has not previously sent copies of to the Respondents' solicitors, to be received by them no later than 4.00 p.m. on Monday 15 May 2023.

And

2. Confirms in writing also by 4:00pm on Monday 15 May 2023 (an email will be sufficient) to the Employment Tribunal that she has carried out the step at number 1. above

the claims in their entirety (the race discrimination and whistleblowing claims) will stand dismissed without further Judgment or Order.

63. Further case management orders have been made and are set out in a separate set of orders.

Employment Judge R Broughton

Date: 25 May 2023

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