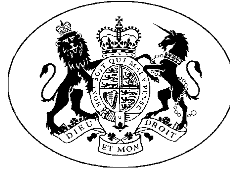

EMPLOYMENT TRIBUNALS

Claimant: Mr R Oaka (as Personal Representative of the Estate of Ms D Oaka Deceased)

Respondent: WKCIC Group

Heard at: Watford Employment Tribunal **(CVP)** **On:** 9 June 2023

Before: Employment Judge Young

Representation
Claimant: Mr Raymond Oaka (Brother of the Claimant)
Respondent: Mr Robert Turner (Solicitor)

RESERVED JUDGMENT

The decision of the Tribunal

(1) The Respondent's application to strike out the claim fails.

(2) The Claimant's application for a postponement is granted.

(3) The full merits hearing listed for 26-29 June 2023 is vacated. The hearing will be re listed as a remote CVP hearing unless there are valid objections. The parties will be sent a listing stencil to obtain further dates to avoid.

REASONS

Introduction

(1) Throughout this judgment I will refer to Ms Diane Oaka as the Claimant. I will refer to Mr Oaka as the Claimant's personal representative by his name to avoid confusion.

(2) The Claimant was employed by the Respondent, a provider of Further Education, as an HR Generalist Officer, from February 1995 until her employment was terminated on the grounds of capacity by the Respondent on

30 November 2018. The Claimant was off work since February 2014 following a diagnosis of cancer, sadly the Claimant was given a terminal diagnosis in December 2019. The Claimant succumbed to that cancer and died in April 2020.

(3) Early conciliation started on 20 February 2020 and ended on 21 February 2020. The claim form was presented on 28 February 2020.

(4) The claim is essentially founded on the allegation that the Respondent failed to communicate with the Claimant from some time in 2016 onwards and that this was discriminatory and/or a detriment imposed on her following a grievance she had made alleging discrimination. She also claims for failures to make reasonable adjustments, lack of consultation in respect of a TUPE transfer arising from a reorganisation of the Respondent's companies and unfair dismissal owing to the lack of communication leading up to the dismissal as well as other factors.

(5) The Respondent's defence is they communicated adequately and that in any case all the claims are out of time. They also deny that any adjustments were requested or that there was any obligation to consult with the Claimant directly about the TUPE transfer.

Applications to be determined

(6) The applications before me were:

a. Whether the claim should be struck out under rule 37 of Schedule 1 of the Employment Tribunal (Constitution & Rules of Procedure) Regulation 2013 ("ET Rules") on the grounds that the Claimant has not complied with the Tribunal's order and or failed to actively pursue the case,

b. Whether the full merits hearing listed for 26-29 June 2023 should be postponed for 6-8 months.

Hearing and Evidence

(7) The hearing was conducted by CVP. Both parties had difficulty logging on in the first instance, so the start of the hearing was delayed until 10:10. The Respondent was represented by Mr Robert Turner of the Respondent's instructing solicitors. The Claimant was represented by her brother Mr Raymond Oaka who unfortunately found himself bedridden and so was addressing me from his bed with a back support so that we could see his face. Mr Oaka connected to the hearing via his mobile phone as he had difficulty balancing his laptop on himself. The consequence of Mr Oaka connecting via his phone was that in order for Mr Oaka to check documents he needed to disconnect from his mobile. There were therefore 2 occasions where Mr Oaka disconnected. The first was to check he had all the documentation needed to proceed with the hearing. We took a 15 minute break. On return Mr Oaka was able to confirm that he had the bundle, the Respondent's skeleton argument and copies of Mr Oaka's fit notes dated 21 April 2023 & 2 May 2023 respectively. This was all the documentation that I had been provided. We took another break of 10 minutes, when Mr Oaka needed to check the dates that he had become bedridden for the first time. Although, Mr Oaka had not disclosed

the emails before to the Respondent or Tribunal, Mr Turner was content for Mr Oaka to check his emails. I gave Mr Oaka a very strict warning that he was not to consult anyone regarding the evidence that he was giving and not to look at any other emails other than the emails that would provide the dates required.

(8) I heard evidence from Mr Oaka on both the Respondent's application for a strike out and Mr Oaka's application for a postponement of the full merits hearing.

(9) I heard submissions from both parties. Mr Oaka's submissions were in summary that most of the case weighed heavily on him and that he was not in physical condition currently to go ahead with the case. He believes there is merit in his sister's case, and he didn't want to lose the opportunity to represent his sister. He would be satisfied that the case was heard, and it was not about money for him. He believed if the people who dismissed his sister were allowed to get away with it on a technicality, they would do it again. He didn't believe that there would be any real prejudice to the Respondent and that the delay was not a real delay. He explained he didn't really understand the points that were made in the Respondent's skeleton. He objected to the case being struck out as a clear denial of justice. The Respondent hadn't incurred costs in preparing for the case as they hadn't had to prepare for the case yet, and they will spend that money when the hearing takes place. Mr Oaka insisted that it was not true that the failure to comply would be repeated in the future. Mr Oaka said it would take some time to get all the matters together, but he said he would be able to do that. He said he would be able to provide a crude Schedule of Loss by the middle of next week, although it would not be fully accurate. Mr Oaka asked if he could submit some documents and I explained that in all likelihood I would have written judgment by the time the documents got to me.

(10) Mr Turner's submissions in summary were that the Respondent has tried to pursue the matter but there has been a brick wall. The Respondent didn't believe that postponement was going to resolve the issues but actually to perpetuate the issues, as to date Mr Oaka still didn't have the figures for the Schedule of Loss that he spoke about. It was unfair and unjust to keep the Respondent in this position. He accepted that the case would have to be postponed because witness statements had not been completed yet, and so the Respondent solicitors would have to speak to witnesses on matters that are 10 years old. The Respondent said that this Schedule of Loss was key so as to understand the Claimant's losses.

Findings of fact

(11) The Claimant was represented by solicitors Bindmans on issuing the claim. However, after the Claimant's death, Mr Oaka took over the case as the sole executor of the Claimant's estate and its personal representative. Mr Oaka has another brother and other close relatives, however as the executor of the Claimant's estate Bindmans took instructions solely from Mr Oaka in respect of the Claimant's case.

(12) Mr Oaka told me that once he took over his sister's case, he received regular contact with Bindmans. There was at some point as change of the solicitor with conduct with the case, but this did not appear to cause any issues in the conduct of the case and Mr Oaka continued to receive regular updates on the case from Bindmans. Mr Oaka was contacted by phone and email by

Bindmans. He confirmed he rarely if ever contacted them himself, other than to respond to missed calls or respond to emails to give instructions.

(13) On 15 June 2022, a preliminary hearing to case manage the case took place by telephone. At that point, Bindmans were representing Mr Oaka and Mr Oaka was in attendance at the preliminary hearing. The usual directions were given regarding case management including an order that the Claimant provide a Schedule of Loss by 6 July 2022. Other orders included the Respondent providing documents to the Claimant by 10 August 2022, the Claimant providing documents to the Respondent by 24 August 2022, and the parties exchanging witness statements on the 15 November 2022. It was at that hearing that the case was listed for a full merits hearing for four days starting on 26 June 2023. The full merits hearing was listed to be heard in person.

(14) Mr Oaka did not have a conversation with his solicitor directly after the hearing on 15 June 2022. Mr Oaka explained that there were difficulties in providing the Schedule of Loss because there was an issue regarding the Claimant’s claim for pension loss because the Claimant had raised a grievance that she had not been upgraded during her employment to an appropriate grade. Therefore, the Claimant’s full loss could not be accurately calculated because Mr Oaka was seeking further information from various organisations as to what that grade was, and the salary associated with that grade would have been over a number of years. Mr Oaka contacted a number of organisations and one of which was a union organisation who advised him that he would be best seeking the information he needed from the relevant employer. Mr Oaka was not able to pinpoint when he corresponded with the union but thought it was in summer 2022. Mr Oaka explained that he was waiting for further information but was never provided with the information he needed to input into the Schedule of Loss.

(15) In any event, on 6 July 2022, Bindmans requested an extension of time to serve the Schedule of Loss until 8 July 2023. The Respondent agreed to this. However, on 8 July, Bindmans requested an extension of time to serve the Schedule of Loss until the following week, which again the Respondent agreed to. On 14 July 2022, Bindmans emailed the Respondent to say that they remained without instructions on the Schedule of Loss. The Respondent's solicitors responded on 18 July 2022 saying that they were willing to wait for the Schedule of Loss on the basis that compliance with later Directions should be pushed back accordingly, to give the Respondent proper opportunity to consider the Claimant’s Schedule of Loss as the first step, as envisaged at the preliminary hearing. Bindmans agreed to this on 19 July 2022. On 22 August 2022, the Respondent's solicitors emailed Bindmans for an update. Bindmans responded on 23 August 2022 proposing an amended directions timetable. On 24 August 2022 the Respondent's solicitors responded on 24 August agreeing to that revised timetable, save that it requested an earlier provision of the Schedule of Loss.

(16) Bindmans responded on 25 August 2022 agreeing to send over the Schedule of Loss “as soon as possible” and said that they hoped to have an update for the Respondent within the next couple of weeks. The Respondent’s solicitors chased Bindmans on a number of occasions in September to no avail. The Respondent’s solicitors chased again on 29 December 2022. The response from Bindmans on 3 January 2023 was to notify them that they were coming off the record, which they then did that day. It was at this point Mr Oaka became

a litigant in person.

(17) Mr Oaka did recall that he did have a discussion with his solicitor at some point after the hearing on 15 June 2022 on the issue of providing the Schedule of Loss. Mr Oaka could not recall when he had that conversation with the solicitor, but he did remember that it was before he spoke to the union about the piece of financial information he needed to input into the Schedule of Loss.

(18) On 16 January 2023, the Respondent's solicitors wrote to the Tribunal asking for an Unless Order.

(19) On 18 March 2023, Employment Judge Hanning wrote to Mr Oaka warning him that he was considering striking out the claim because he had not complied with the Order of the Tribunal dated 15 June 2022 and was not actively pursuing the claim. Employment Judge Hanning asked for a response by 10 April 2023. Mr Oaka stated that he did not receive this correspondence from the Tribunal. He explained he thinks it may have gone to his spam as he was not used to receiving correspondence from the Tribunal. Mr Oaka said that the first time he heard about the strike out warning was when he received an email from Lucy McLynn of the Respondent’s solicitors dated 9 May 2023 titled strike out warning [see page 84 of the bundle]. Mr Oaka thought the email was from his own solicitors Bindmans and responded by attaching 2 fit notes that explained that he was off work due to backpain. Mr Oaka explained in that email that he been bed ridden since February 2023 and would be seeking an adjournment of the hearing as he was not able to travel on his own. On 22 May 2022 Mr Oaka finally sent his application to postpone the full merits hearing to the Tribunal. The application did not state how long the postponement was sought, but before me Mr Oaka confirmed it was for approx. 6-8 months when he thought he would be back on his feet.

(20) Mr Oaka explained to me that during the time he had been incapacitated he did deal with solicitors regarding back payments of the mortgage for the Claimant’s property. Mr Oaka explained that the mortgage required payment physically into the bank and the mortgage company would not take electronic payments. Eventually with solicitors’ assistance they were able to convince the bank to allow electronic payments.

<u>Law</u>

Strike Outs

(21) Rule 37 of the ET Rules gives the Tribunal the power to strike out all or part of a claim:

“37.— 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).”

(22) Rule 37(2) says that a claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(23) The EAT has held that the striking out process requires a two-stage test in HM Prison Service v. Dolby [2003] IRLR 694 EAT, at paragraph 15. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid. See also Hassan v. Tesco Stores UKEAT/0098/19/BA at paragraph 17 the EAT observed: *“There is absolutely nothing in the Judgment to indicate that the Employment Judge paused, having reached the conclusion that these claims had no reasonable prospect of success, to consider how to exercise his discretion. The way in which r 37 is framed is permissive. It allows an Employment Judge to strike out a claim where one of the five grounds are established, but it does not require him or her to do so. That is why in the case of Dolby the test for striking out under the Employment Appeal Tribunal Rules 1993 was interpreted as requiring a two stage approach.”*

(24) In Abegaze v Shrewsbury College of Arts & Technology [2010] IRLR 236 when considering striking out under rule 37(1)(c), at paragraph 17 of that judgment Elias LJ refers to the case of Evans v Metropolitan Police Commissioner [1992] IRLR 570, where *“the Court of Appeal held that the general approach should be akin to that which the House of Lords in Birkett v James [1978] AC 297 considered was appropriate when looking at the question whether at common law a case should be struck out for want of prosecution. (The position in civil actions has altered since the advent of the Civil Procedure Rules). That requires that there should either be intentional or contumelious default, or inordinate and inexcusable delay such that there is a substantial risk that it would not be possible to have a fair trial of the issues, or there would be substantial prejudice to the Respondents”.*

(25) Harvey’s considers at paragraph [657] “*intentional and contumelious default may arise where there has been a failure to comply with a peremptory order of the tribunal (the most obvious example being an 'unless' order), or where the failure to actively pursue the claim or response amounts to an abuse of the process of the tribunal.”*

(26) In *Rolls Royce plc v Riddle [2008] IRLR 873, EAT*, Lady Smith pointed out paragraph 20, that it is quite wrong for a Claimant “*to fail to take reasonable steps to progress his claim in a manner that shows he has disrespect or*

contempt for the tribunal and/or its procedures".

(27) In Harris v Academies Enterprise Trust [2015] IRLR 208, the EAT (at paragraph [26]) held that "*A failure to comply with orders of a tribunal over some period of time, repeatedly, may give rise to a view that if further indulgence is granted, the same will simply happen again. Tribunals must be cautious to avoid that*". The EAT noted that if the failure was an 'aberration' and unlikely to re-occur, that would weigh against a strike out.

Postponements

(28) The power to postpone a hearing is contained within the general case management powers under rule 29 ET Rules and subject to rule 30A of the same rules.

(29) As regards the case law on postponements on the grounds of ill health. I should consider the authorities of Andreou v Lord Chancellor's Department 2002 IRLR 728, CA. and Teinaz v London Borough of Wandsworth [2002] ICR 1471, CA.

(30) The authority of Teinaz suggests consideration must be given to the rights of both parties to a fair trial. The right to a fair trial will usually require a postponement when a litigant cannot attend a scheduled hearing through no fault of his or her own, however inconvenient this may be to the Tribunal or the other parties. In the facts of Teinaz the Tribunal doubted the accuracy of the doctor's letter and decided that the Claimant had chosen to stay away from the hearing and so refused the postponement. Both the EAT and the Court of Appeal ruled that this was an incorrect exercise of the tribunal's discretion. Crucially, the Court of Appeal stated that *"although adjournment is a discretionary matter, some adjournments must be granted if not to do so amounts to a denial of justice".* The Court took the view that if a medical practitioner has advised a litigant not to attend the hearing on the ground of ill health, then the person cannot reasonably be expected to attend.

(31) The Court of Appeal went on to say, however, that a tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the party making the application to prove the need for such adjournment. Where a tribunal is not satisfied with the initial medical evidence with which it has been provided, it has the discretion to give directions to enable such doubts to be resolved. For example, the party seeking to postpone could be ordered to provide further evidence promptly or could be invited to grant the other party's representatives access to his or her doctor. However, a tribunal does not necessarily commit any error of law if such steps are not taken.

(32) In Andreou decided shortly after Teinaz the Claimant was struck out, with the Court of Appeal distinguishing Teinaz on the facts. It noted that the Tribunal had been provided with a medical certificate that did not address the question of whether the Claimant was unfit to attend a hearing something which, in the Court's view, was not an inevitable result of being signed off work. The Court of Appeal went on to say that what was necessary, was for the Tribunal to balance fairness to the Claimant with fairness to the employer and anyone else named in the accusations of race discrimination, and, with this in mind, concluded that the Tribunal's decision

had not been perverse.

Analysis and Conclusion

(33) Dealing first with the Respondent's strike out application as it is a knockout blow, I'm of the view that whilst Mr Oaka's failure to respond to the tribunal's strike out warning by 10 April 2023 does fall within rule 37 (1) (c) , I do not believe that Mr Oaka's conduct of the proceedings falls within rule 37 (1) (d). I do not think that Mr Oaka was not actively pursuing the case. Mr Oaka was under the impression that his solicitors were still acting for him and that they would be complying with the tribunal's directions with his instructions. Bindmans were in contact with the Respondent until they were no longer on the record.

Rule 37(1)(d)- not actively pursuing

(34) I accept Mr Oaka's position that he had no notice that his solicitors were no longer acting for him in January 2023. It seemed to me that as Mr Oaka was under the impression that his solicitors were dealing with the Tribunal's orders that he would not have pursued his solicitors who had historically updated him on the case when necessary. It is also the case that in March and April 2023, Mr Oaka was in considerable pain concerning his back problems and therefore found it difficult in dealing with matters concerning this case. This was not Mr Oaka's claim but his sister's and whilst it is the case, he expressed to me very passionately in his submissions that he believed very strongly that his sister's claim should have an opportunity to be heard, I was conscious that in essence Mr Oaka was acting as a representative for his sister.

(35) When Mr Oaka received the email from the Respondent's solicitors, he did act promptly in responding to that email by making an application for a postponement, although he thought he was responding to the Employment Tribunal. When it became clear that Mr Oaka had responded to the Respondent's solicitors and not the employment tribunal Mr Oaka did forward his email to the employment tribunal soon after.

Rule 37(1)(c)- non-compliance with Tribunal orders

(36) Whilst I accept that Mr Oaka did not receive Employment Judge Hanning's strike out warning, Mr Oaka accepted that he was aware of the requirements to provide a Schedule of Loss, but he had never seen a Schedule of Loss and was not entirely clear what should go in it. Indeed, Mr Oaka explained that he went to great efforts to try and obtain the information necessary to be able to complete the Schedule of Loss as requested by solicitors he instructed at the time, Bindmans.

(37) I did consider the fact Mr Oaka was able to instruct solicitors in respect of other matters and deal with those matters during the time that he was not complying with the Tribunal's orders. But Mr Oaka's non-compliance can be explained at least up until January 2023 as Mr Oaka was under the impression that his solicitors were dealing with the case and would contact him when they needed him. It appears that the reason why Bindmans were unable to finalise the Schedule of Loss was because there was crucial information that Mr Oaka was unable to obtain and was not getting a

response back to be able to feed in the information to the Schedule of Loss. It therefore seems to me that non-compliance was not because Bindmans were unable to get instructions from Mr Oaka. They were in contact with him regularly.

(38) I had to consider whether to exercise my discretion to strike out the claim having found that there had been non-compliance of Tribunal orders by Mr Oaka. I reminded myself that I was not obliged to exercise that discretion. Mr Oaka was a litigant in person and had indicated to me that he intended to obtain legal representation but that in any event it was clear to me that by agreeing to provide the Schedule of Loss by the middle of next week to the Respondent he was taking responsibility for the case. In the circumstances I did not think that non-compliance would happen again as Mr Oaka indicated he was prepared to provide a crude Schedule of Loss by the middle of next week. In the circumstances I do not think strike out was an appropriate exercise of my discretion and so the Respondent's application to strike out the Claimant's claim is dismissed.

Postponement

(39) Mr Oaka provided 2 fit notes, one of which covered the dates of the listing of the full merits hearing in this case. However, Mr Oaka's fit note did not say that he could not participate in an Employment Tribunal hearing, only that he was not fit to attend work. And in actual fact Mr Oaka's attendance at this preliminary hearing confirmed that he was able to participate in an Employment Tribunal hearing, if that hearing was dealt with by CVP.

(40) I had to consider whether there was a risk that a fair trial was not possible in deciding whether to grant a postponement. Mr Oaka has not complied with any of the other orders although he did state that he had a copy of the Claimant's signed witness statement, and he had the documents relevant to this case and he was able to provide a crude Schedule of Loss to the Respondent and Tribunal by the middle of next week.

(41) It might be in the circumstances that it would be possible for the hearing to go ahead on 26 June for four days. The hearing could be converted into a CVP hearing which would not require Mr Oaka to attend in person but to be able to join via video. However, Mr Turner told me in his submissions that the Respondent's solicitors had not obtained witness statements at this stage due to concerns of costs. I was concerned about that submission as it struck me that the Respondent was relying on a successful strike out application to avoid preparing for the case. Mr Turner told me that the Respondent was not ready and would not be prepared by 26 June 2023, to go ahead with the hearing as listed. My view is that a delay of 6 months whilst not ideal in the context of the age of the evidence (approximately 10 years in respect of the Respondent) is not going to make a significant difference. It is in those circumstances I reluctantly grant the Claimant's application for a postponement.

(42) I therefore order the case is relisted for a hearing no earlier than 6 months from now and have regard to the parties' dates to avoid. The hearing will be by CVP.

Employment Judge Young

Date: 19 June 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

20 June 2023

FOR EMPLOYMENT TRIBUNALS