EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4103374/2018

Decision made in chambers in Glasgow on 7 March 2023

Employment Judge M Whitcombe

Mr M Cushley — **Claimant**

Enigma Industrial Services Limited — **Respondent**

JUDGMENT

The respondent's application to strike out the claim under rule 37(1)(d) of the ET Rules of Procedure 2013 is refused and the claim will proceed to a final hearing.

REASONS

Introduction

1. This is the respondent's application for a judgment striking out Mr Cushley's claim under rule 37(1)(d) of the ET Rules of Procedure 2013, which applies to cases which have not been actively pursued. Following orders made by EJ MacLean on 10 January 2023 and 22 February 2023, my decision has been made on the available written information without a hearing. By virtue of rule 1(3)(b)(ii) it is a judgment rather than a case management order.

Background - EJ MacLean's orders

2. Mr Cushley's claim was originally one of twenty similar and related claims proceeding as multiple number 8298. Those claims reached a final hearing listed for 3 days on 9, 10 and 11 January 2023 by video before EJ MacLean. Anyone wishing to know the full details should refer to her order and written reasons (sent to the parties on 11 January 2023) but the key points for present purposes are as follows.

   a. All of the claimants in the multiple were initially represented by Ruaraidh Lawson of Allan McDougall Solicitors.

   b. On 22 December 2022 Mr Lawson notified the Tribunal that he was awaiting instructions from Mr Cushley and that it was likely that he would be obliged to withdraw from acting if he did not receive instructions in the very near future.

   c. On 30 December 2022 Mr Lawson notified the Tribunal that he was withdrawing from acting for Mr Cushley.

   d. In response to my query of 4 January 2023, Mr Lawson explained on 5 January 2023 that Mr Cushley was aware that the final hearing was

imminent but had not been given notice of the specific dates because the litigation was proceeding by way of lead claimants, which did not include Mr Cushley and his attendance had not been required.

e. On 6 January 2023 the respondent made the application to strike out Mr Cushley's claim with which I am now concerned. It was made under rule 37(1)(d) of the ET Rules of Procedure, on the basis that it had not been actively pursued. The application was copied to Mr Cushley at his last known address.

f. Also on 6 January 2023, the claimants represented by Mr Lawson applied for a postponement of the first day of the hearing (9 January 2023) so that instructions could be taken on settlement proposals made by the respondent. That application was granted and the revised start of the hearing would be 12:30pm on 10 January 2023.

g. At 13:56 on 9 January 2023 the Tribunal received notification from ACAS that 18 claims in the multiple had settled. One other claim had previously settled on 6 January 2023. That meant that only Mr Cushley's claim remained "live".

h. On 9 January 2023 EJ MacLean also became aware of email correspondence received from Mr Aaron Fisher on 7 January 2023. It was not initially copied to the respondent in accordance with rule 92, but EJ MacLean subsequently directed the Tribunal staff to do that. One of the emails attached a copy of the respondent's application to strike out and appeared to be a response to it. The emails gave the impression that Mr Fisher might be acting as Mr Cushley's lay representative, but that was not clearly stated. They also stated that the email account formerly used by Mr Cushley was "no longer accessible".

i. EJ MacLean then directed that the hearing at 12.30pm on 10 January

2023 would be converted to a preliminary hearing for case management. The final scheduled day of the final hearing on 11 January 2023 was unaffected. A letter containing joining details was sent to Mr Cushley, although EJ MacLean was aware of the short notice and that Mr Cushley might not be able to join. She nevertheless expected him to make contact of some sort with the Tribunal or with the respondent.

j. The preliminary hearing for case management on 10 January 2023 was attended by Mr Lawson for the other claimants and by Mr Roberts, counsel for the respondent Neither Mr Cushley nor anyone acting on his behalf attended. No further contact had been received from Mr Cushley or Mr Fisher. The respondent had made its own efforts to contact Mr Cushley at the email address held for him by Mr Lawson without success.

k. The difficulty faced by the Tribunal was that the capacity in which Mr Fisher was acting was ambiguous, and it was not clear whether he really was representing Mr Cushley. Certainly, Mr Cushley had not contacted the Tribunal to say so. The respondent maintained the application to strike out on the basis that Mr Cushley was not engaging with the Tribunal process.

l. Against that background EJ MacLean directed that by no later than 25 January 2023 Mr Cushley must write to the Tribunal, with a copy to the respondent, stating whether Aaron Fisher was acting on his behalf, if so in what capacity, and his contact details for the Tribunal's records. Mr Cushley was reminded of the respondent's application to strike out and was ordered to set out written reasons for any opposition to an order striking out the claim under rule 37(1)(d) by the same date, 25 January 2023.

m. Mr Cushley was reminded of his right to request a (video) hearing on the issue if he wished, otherwise the application would be decided on

the basis of the available written information. That is the basis on which I am now dealing with it, because Mr Cushley has not requested a hearing. EJ MacLean declined the respondent's invitation to make an "unless order" but appreciated the respondent's desire for the matter to be finalised without unnecessary delay.

n. The final day of the hearing on 11 January 2023 was postponed.

o. On 12 January 2023 Mr Lawson confirmed the withdrawal of the claims which had settled and that there was no objection to their dismissal under rule 52. Rule 52 judgments were duly made by Legal Officer Ellison and sent to the parties on 20 January 2023. The original multiple has therefore now reduced to a single claim: Mr Cushley's claim number 4103374/2018.

Subsequent correspondence

3. The respondent believed that Mr Cushley had failed to comply with the order made by EJ Maclean before the applicable deadline of 25 January 2023. The respondent highlighted that alleged non-compliance in correspondence dated 30 January 2023.

4. However, at 18:59 on 25 January 2023 Mr Fisher had contacted the Tribunal in an email which he failed to copy to the respondent in accordance with rule 92. He described himself as a "friend and representative" of Mr Cushley and undertook to send Mr Cushley's own authority to act the next day, 26 January 2023. That correspondence was copied to the respondent by the Tribunal staff.

5. On 3 February 2023, in breach of EJ MacLean's order and also rather later than promised, Mr Fisher emailed to the Tribunal Mr Cushley's written authority for Mr Fisher to act on his behalf dated 1 February 2023. The Tribunal then added Mr Fisher to its records as Mr Cushley's representative.

6. On 9 February 2023 Mr Fisher was asked by EJ MacLean to provide written comments by 16 February 2023 on the application to strike out and on whether a hearing was requested. No reply was received before that deadline and the respondent highlighted the failure to comply in an email dated 21 February 2023. In response, EJ MacLean directed on 22 February 2023 that in the absence of any request for a hearing, the respondent's application to strike out would be decided on the papers. EJ MacLean set a deadline of 1 March 2023 for any further submissions.

7. On 23 February 2023 Mr Fisher emailed the Tribunal and the respondent saying, '7 *sent an email advising that we do not accept the strike out application? The client was advised from day one that he had a valid claim for this and whilst his original representative no longer acts, surely this does not change the validity of his claim?"* While I interpret that correspondence as firm opposition to an order striking out the claim and an assertion of its substantive merits, there is no engagement with the real issue, which is whether the claim had been actively pursued. However, I do regard it as evidence of an intention to progress the claim in the future.

8. On 28 February 2023 Legal Office Whelehan reminded the parties of the final deadline of 1 March 2023 for further submissions on the issue of strike out.

9. The day after the expiry of that deadline, on 2 March 2023, Mr Fisher emailed the Tribunal saying, *"Why do we need to keep objecting to a strike out? Michael was told many months ago that he would be entitled to redundancy, holiday and work pay. Can this go to a hearing and stop all the attempts for a strike out?"* I repeat the comments made above in relation to the 23 February 2023 in relation to this latest and final email on behalf of Mr Cushley.

Legal principles

10. ***Evans v Commissioner of Police of the Metropolis*** [1993] ICR 151, CA, was a case decided under the equivalent provisions of the 2001 Rules of Procedure, but modern commentaries suggest that it is still a relevant guide to the correct approach. A tribunal can properly strike out a claim under rule 37(1)(d) where there was been delay that is intentional or disrespectful or abusive to the court, or where 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.

11. In ***Rolls Royce v Riddle*** [2008] IRLR 873, EAT, Lady Smith rationalised "intentional and contumelious default" (a phrase derived from pre-CPR civil litigation in England and Wales) as "a persistent disregard for the tribunal, its procedures, and the respondents' interests".

12. Further, all powers derived from the ET Rules of Procedure must be applied in a way which gives effect to the overriding objective in rule 2, which is to deal with a case fairly and justly. Subject to the limits of practicability, that includes ensuring that the parties are on an equal footing, dealing with cases in ways which are proportionate to the complexity and importance of the issues, avoiding unnecessary formality, seeking flexibility in the proceedings and avoiding delay, so far as compatible with a proper consideration of the issues and saving expense.

13. The leading cases on strike out have repeatedly reminded Tribunals that for access to justice to be meaningful, courts and tribunals must be open to ***all*** litigants, and not merely the diligent and compliant. The acid test is usually whether a fair hearing remains possible. If so, then a Tribunal must use its many flexible case management powers to hold one. Only cases in which a fair hearing has become impossible should be struck out (see e.g. ***Abegaze v Shrewsbury College of Arts and Technology*** [2010] IRLR 238, CA and the well-known case of ***Birkett v James*** [1978] AC 297 at 318).

Reasoning and conclusions

14. I find that Mr Cushley has conducted this litigation in a manner which has been far from ideal. Despite Mr Fisher's references to a "transcript" which allegedly shows proper engagement between Mr Cushley and his former representative Mr Lawson, that document has not been provided to the Tribunal. Therefore, there is no evidence before the Tribunal to contradict the information received from Mr Lawson that he was unable to obtain instructions from Mr Cushley at a crucial phase of the litigation.

15. More than once Mr Cushley has failed to comply with deadlines set by the orders of EJ MacLean. Similarly, while he has certainly made clear his *objection* to the striking out of his claims, he has not made any *submissions or supplied any information* relevant to the question whether the claim was actively pursued in the past. While I do not ignore the fact that, as far as I know, neither Mr Cushley nor his current representative Mr Fisher have any relevant legal experience or qualifications, I do not regard that as an acceptable explanation. The orders and deadlines were clear and it should have been easy for a lay person to comply with them. The sending of extremely brief emails on or after the deadlines set by an Employment Judge for comments on a strike out application fails to give the Tribunal the help it needs to decide cases fairly, while also minimising cost and delay. That is the "overriding objective" of the ET Rules of Procedure, set out in rule 2, which also states, "the parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal".

16. That said, I do not think that the shortcomings in the claimant's conduct of this litigation reach the level described in ***Evans v Commissioner of Police of the Metropolis*** (above). There has certainly been delay, but I am not persuaded that it has reached the level of "inordinate and inexcusable", still less intentional, disrespectful or abusive. I am also sure that a fair hearing

remains as possible now as it was in January. Therefore, I will arrange for one to be listed and the parties will receive separate correspondence about that.

17. I encourage both sides to think very carefully about their next steps and their approach to the next hearing. There is now just a single claimant. The other cases have settled. Mr Cushley will now have to call his own evidence to prove the matters which would otherwise have been covered by the lead claimants, had those cases not settled. It is his responsibility to ensure that the Tribunal hears all of the evidence necessary to prove his case. Both sides will no doubt be concerned to keep costs proportionate in this sole remaining claim. In accordance with rule 3, 1remind both parties of the services of ACAS and the many ways in which a claim can be resolved other than by proceeding to a final hearing.

18. It is also important that all understand the consequences of missed deadlines and a failure to engage promptly and fully both with the other side and also with the Tribunal. It is not simply a question of provoking applications to strike out, such as this one. If the Tribunal were to be persuaded that the proceedings had been conducted in a way which was disruptive or unreasonable then it has the power under rules 74 to 84 to make an award of expenses (or, as known in England and Wales, "costs") against the party in default.

Employment Judge: Mark Whitcombe
Date of Judgment: 07 March 2023
Entered in register: 08 March 2023
and copied to parties