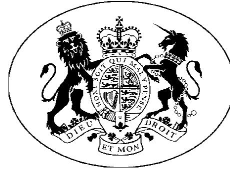
Case No: 2404789/2022



EMPLOYMENT TRIBUNALS

Claimant: Ms A Byczko

Respondent: Manchester University NHS Foundation Trust

Heard at: Manchester Employment Tribunal (by CVP)

On: 17 September 2024

Before: Employment Judge Dunlop

Representation

Claimant: In person, supported by Mrs Thompson (friend)
Respondent: Mr J Quinton (Solicitor)

JUDGMENT

1. The claim is struck out.

REASONS

Summary Reasons

1. The claimant, Ms Byczko, is a litigant in person who has some difficulties with processing information. She has asked for this decision to be short and understandable. I also have to provide a decision which makes it clear to others, who are not familiar with the case, what I have decided and why. It is hard to write one decision which does both of those things. I have therefore provided this summary to help Ms Byczko understand my decision. The full reasons are set out afterwards.

2. I agree with the respondent that Ms Byczko did not comply with EJ Ross's order to consider the List of Issues that EJ Ross had prepared and, if necessary, amend them. Although Ms Byczko wrote to the Tribunal on the date given in the order, the document she produced was a completely new document. In order for claims to progress to a final hearing, the Tribunal (and the respondent) needs to understand

the factual and legal issues in the claim. Despite EJ Horne and EJ Ross attempting to help Ms Byczko, it is still impossible to understand the legal and factual issues in the claim. Ms Byczko's 5 June document did not help with that, and probably made things less clear, rather than more clear. That was because she had not followed EJ Ross's instructions.

3. I also agree with the respondent that Ms Byczko has conducted her claim in an unreasonable way. I find she did not mean to do that, but that is the effect of her actions. That relates especially to the steps taken by the Tribunal to try to clarify the claims and issues – so it relates to the same point as paragraph 2 above – but includes the conduct leading up to EJ Ross's order and conduct afterwards.

4. Those things mean that it is open to me to strike out the claim. However, it is still unusual for claims to be struck out, and I have to consider fairness to both sides, whether there can still be a fair trial, and whether I could do something less serious instead of striking out the claim.

5. In this case I decided that allowing the case to continue would be unfair to the respondent. The fact that the issues are still not clearly understood, and the way the case has been conducted generally, means that they have been prejudiced by a delay and by an amount of work well beyond what this case should have required of them.

6. I also considered that it would be impossible for a fair trial to take place in circumstances where the issues have not been identified and Ms Byczko has rejected the Tribunal's efforts to help her to do this. It is a complex case involving allegations against different people over a number of years, it would not be feasible to simply let the case go to hearing without identifying the issues first. There is nothing to make me think that other Judges would have more success than EJ Horne and EJ Ross in moving the case forward. Indeed, I think that things will have become even more difficult now due to the delay and the fact that both parties are now very frustrated.

7. I considered other options, but decided that there was no other option, apart from striking out the claim, which would realistically resolve the problems I had identified.

8. Given those points, I decided that I should strike out the claim. I know that Ms Byczko will be very upset about this decision. I am sorry about that. Judges have to take the decisions they believe to be right, even where those are difficult decisions. I hope that Ms Byczko might now be able to focus on other things in her life apart from this case and might even, eventually, conclude that this was the right decision for her as well as for the respondent.

Introduction

9. The claimant, Ms Byczko, is a nurse who worked for the respondent from August 2017 until her resignation in March 2022, following which she submitted this claim. She then worked in a different department of the respondent (I understand) until 10 November 2022, when her employment again terminated. Her employment history was not straightforward, and involved moves between different roles in the trust, periods of sickness, and grievance processes/investigations.

10. On 14 June 2022, Ms Byczko presented an ET1 claim form bringing various complaints against the respondent. A fuller procedural background is set out below. For the purposes of this introduction, it is enough to say that four preliminary hearings were held with the primary purpose of clarifying the claims which Ms Byczko wished to pursue. At the third hearing on 6 March 2024 Employment Judge Ross made an Order for the claimant to confirm, or to amend, a List of Issues which the Judge had produced. Instead, the claimant produced a lengthy document of her own, which was not based on the Judge's List of Issues, and attempted to set the claims out afresh.

11. At the fourth preliminary hearing, also in front of EJ Ross, the Judge set out her concerns with the claimant's attempt to comply with the order. The respondent indicated that the claim should be struck out, on the basis of the claimant's failure to comply with the 6 March Order and/or on the grounds that the claim was being conducted in an unreasonable way. EJ Ross ordered that the respondent must set out its application in writing, and set up this public preliminary hearing, in front of a different Employment Judge, to consider the strike-out application.

The Hearing

12. Ms Byczko attended with Mrs Thompson, who had previously been described as a "McKenzie friend". In fact, Ms Byczko chose to represent herself in terms of doing most of the talking on her own behalf. At points she conferred with Mrs Thompson, and, at one point, Mrs Thompson addressed me with her own views on the application. All this was in-keeping with the informal nature of proceedings in the Tribunal.

13. Ms Byczko had told EJ Ross that she could participate in hearings for no longer than 3 hours per day. EJ Ross had scheduled this hearing to take place from 11.30am until approximately 4pm, allowing time for a lunchbreak and additional breaks, and a total hearing time of around three hours.

14. In correspondence with the Tribunal before the hearing, Ms Byczko had indicated that she was, in fact, limited to 3 hours in total (including breaks) and that she wished the hearing to start at 10am.

15. By chance, that application came to me as a duty Judge and I directed that the 11.30am start time would be maintained, having regard to the volume of material that the Judge would have to read to determine the application. I was concerned that the hearing time would be reduced by the Judge having to take significant reading time if it was to start at 10.00, but told Ms Byczko that the hearing time could be discussed further on the day.

16. As it was, with some awareness of the volume of material in the case, I began my pre-reading at 8am. The bundle of documents, prepared by the respondent, was approaching 1,000 pages. Ms Byczko did not agree the bundle but was unable to tell me anything that was missing from it.

17. I also had a helpful skeleton argument prepared by Mr Quinton. Ms Byczko objected to me considering the skeleton argument as it had been sent to her the day before (along with three or four authorities) and she told me she had not had time to process it.

18. Whilst I sympathized with Ms Byczko, and it would have been much better if the skeleton had been sent earlier, I decided that it was appropriate for me to take it into account for these reasons:
    - 18.1 It closely following the respondent's written application, which had been sent to Ms Byczko, as per EJ Ross's Order, on 29 July 2024.
    - 18.2 It was of assistance in setting out the law and helping me to navigate the bundle. I did not detect that Mr Quinton had taken an overly-partisan or misleading approach.
    - 18.3 It is usual, and encouraged by the Tribunal, for legal representatives to produce written arguments. The reality of legal practice means that these are often produced on short notice. To prevent the respondent from relying on that would, in my view, be an over-correction in seeking to put the parties on an equal footing.

19. By the time the hearing started, I had been able to gain a thorough grasp of the history of the case and read the majority of the documents, albeit not all of them in depth.

20. Ms Byczko had also made a request prior to the hearing to be permitted to record the hearing. By the time of the hearing, she had submitted a short report which appears to be from a psychiatrist practicing in Poland which supported her application to record hearings "*due to her symptoms relating to impaired cognition*" (and also noted that she would be unable to participate in online hearings lasting more than 2-3 hours including breaks).

21. I had a brief discussion with the parties following which I made the following Orders by agreement:
    - 21.1 That both parties would be permitted to record this hearing (but that I was not making a decision about the recording of any future hearings by the parties);
    - 21.2 That the parties would cooperate to share their recordings (subject to their technological ability to do so) in the event that the other party requested access to it (for example because their own recording had failed);
    - 21.3 That the recordings would only be used for the purposes of this litigation, and would only be played to those involved in the litigation (including Mrs Thompson).
    - 21.4 That neither party would publish or broadcast the recordings, or any transcript, whether in full or in part, online or anywhere else, and that they would not allow anyone else to do so.

22. I established that there were no other adjustments which Ms Byczko considered she required for today's hearing.

23. Having discussed those preliminary matters with the parties, I invited Mr Quinton to make his submissions in support of the application. I then invited Ms Byczko to make her submissions, and Mrs Thompson spoke for a short while after she had concluded. I reserved my decision and was able to end the hearing before 2.30pm, which meant that it was concluded within three hours.

Procedural History

24. I did not hear any evidence and have made no findings of fact about the matters underlying this claim. Any reference to those matters is therefore provisional and does not bind any future Tribunal.

25. As stated above, Ms Byczko submitted her claim on 14 June 2022. At part 8.1 of the claim form she had ticked boxes indicating her complaints were unfair dismissal, discrimination on grounds of disability, holiday pay and other payments. (The holiday pay claim is now resolved.) In addition, in the text box she had added: "constructive unfair dismissal, automatically unfair dismissal due to whistleblowing, whistleblowing detriment under Employment Rights Act 1996 and failure to make reasonable adjustments under the Equality Act 2010". Those four heads of claim were repeated at box 8.2, along with some information about time limits. There was a page of dense text introducing the claim at box 15 (additional information) and a 10-page attachment, which was described as a "Continuation sheet".

26. The 10-page attachment is also dense and is narrative in nature. It progresses in a chronological order from the start of the claimant's employment to the completion of the Early Conciliation process around four weeks before the claim was submitted. It is possible to pick out certain complaints, but it is hard to understand what are the 'ingredients' of the legal complaints that Mis Byczko is seeking to make, and which sections are simply part of the narrative background. It is worth saying that that is not an unusual situation in this Tribunal, as most claimants are self-represented, the law is complex, and the circumstances giving rise to claims often involve matters taking place over extended periods of time.

27. The response was submitted and the case was listed for a preliminary hearing on 15 November 2022. In advance of the hearing the respondent wrote to the claimant encouraging her to clarify her claims. The claimant's response was that she had already provided the information and that the respondent was in default in relation to a Data Subject Access Request she had made. The preliminary hearing was postponed at the claimant's request, and relisted for 4 January 2023.

28. The Judge who postponed the November preliminary hearing was EJ Holmes. As the postponement was opposed, he gave brief reasons. He noted that the claimant was not fully prepared and was anticipating making an application to amend her claims following the receipt of a letter (I understand this may have been a grievance outcome) from the respondent on 2 November 2022. He directed that the preliminary hearing should be re-listed for three hours (increased from two). So far as I can see, EJ Holmes has had no other involvement in the case, but Ms Byczko told me verbally, and has stated in her letter of 18 September 2024 (and elsewhere), that EJ Holmes allowed her to amend her claim. I believe that this is a genuine misinterpretation of EJ Holmes' letter, although I struggle to understand how Ms Byczko has managed to misinterpret the letter in that way.

29. On 21 December 2022 Ms Byczko emailed the respondent, copying the Tribunal. She attached to this email a completed ET1 form ("the Second ET1"), but explained that she was not submitting it as a new claim but as an amendment to the original claim. She further explained that a new 'continuation sheet' would follow and subsequently sent that to the respondent and the Tribunal on 28 December 2022 ("the Second Continuation sheet").

30. The Second ET1 explained that Ms Byczko had been employed in another department of the respondent Trust, but had been dismissed on 10 November

2022. It set out the four claims she said which had been brought in the existing proceedings (constructive unfair dismissal, automatic unfair dismissal due to whistleblowing, whistleblowing detriment and failure to make reasonable adjustment) and stated that she was not amending those claims, but was seeking to add new information and amend parts of the existing claim (seemingly the parts of the form giving information about earnings, notice pay etc, rather than the claims themselves). At the same time Ms Byczko also submitted a Schedule of Loss which was another long narrative document amounting to 13 pages, mostly of dense text.

31. The Second Continuation sheet says at the start that it "explains the events post-grievance and appeal, during ACAS conciliation and during my work in another department [of the Trust]". It goes on to fulfil that promise, setting out a narrative account which overlaps with the period covered in the first Continuation Sheet, but focuses on events post-dating the claimant's resignation from her role in March 2022. There is also commentary about the respondent's conduct of litigation. The whole document extends to 17 pages and, again, it is closely typed. It is impossible, at least for me, to understand what legal claims Ms Byczko wants to make about that period.

First preliminary hearing – EJ Horne

32. The first preliminary hearing therefore finally took place on 4 January 2023 in front of Employment Judge Horne, by video. EJ Horne records the documents that he had in front of him including the 78-page bundle which had been prepared by the respondent and the documents recently sent in by Ms Byczko. There is correspondence in my bundle showing that the respondent's then solicitor had explained to Ms Byczko that they were unable to add the documents served over the Christmas period to the bundle due to annual leave, but that the Judge would have access to them as they would be on the Tribunal file. EJ Horne's summary confirms this to be the case, although Ms Byczko has persisted in allegations that the respondent is attempting to withhold or conceal 'her' documents to stop the Tribunal paying due regard to them.

33. EJ Horne carefully noted several issues that made the hearing "not easy". All are prescient in view of the later problems in the case, but it is of particular note that EJ Horne recorded:

    > *"When I summarise the point that I think the claimant has made, and ask if I have understood correctly, she often says 'no'. That means one of us has misunderstood the other."*

    He also noted Ms Byczko's preference to put things in writing, and the problem which had arisen whereby she felt her documents are clear and set out what her claim is, and the respondent disagreed.

34. EJ Horne then proposed a process by which he hoped to be able to work through the claims and the issues with Ms Byczko, in a way which would enable the Tribunal to move to the next stage of case management i.e. assessing how long the final hearing would take and making arrangements for this. He encouraged Ms Byczko to think about how she would clarify her whistleblowing claims (by giving information about disclosures and detriments) at the next hearing, but declined to make an Order for the provision of that information, on the basis that such an Order was likely to make the claim harder to understand rather than easier. Finally, EJ Horne listed the case for a reconvened preliminary hearing (meaning it would be before him) a few weeks later on 9 February 2023. He set out the matters which

would be considered at that hearing, including whether any of the allegations required an amendment to the claim, and, if so, whether that amendment should be permitted.

35. I also record that in EJ Horne's case summary he only recounts events up to the claimant's resignation in March 2022, and not the events detailed in the Second ET1/Second Continuation sheet. It is clear from the references to those documents that Employment Judge Horne anticipated that anything contained in those documents which was not already part of the First ET1/First Continuation Sheet would require an amendment to the claim. EJ Horne was unable to consider that amendment at the preliminary hearing, because he was focused on trying to understand the complaints which formed part of the original claim.

Delay

36. Before the reconvened preliminary hearing could take place, Ms Byczko applied for a stay of proceedings on the grounds of her ill-health. This was granted, and the case was stayed by Employment Judge Allen until 1 July 2023. Notwithstanding the careful instructions from Employment Judge Horne about how he proposed to progress the claim, Ms Byczko's stay application included lengthy written correspondence commentating on, and responding to, Employment Judge Horne's case management order. In large part, the focus of this was further requests for the respondent to be ordered to disclose documents. It appears that Ms Byczko had been unable or unwilling to take on board Employment Judge Horne's comments about the fact that she would need to explain why she needed a specific document to be able to articulate her claim, and that general disclosure would take place after the claims were clarified. In part of this letter, Ms Bycko describes EJ Horne's order as "incomprehensible".

37. Ms Byczko wrote to the Tribunal on 30 June 2023 to confirm that she wanted the stay to be lifted. However, she continued to request wide-ranging disclosure orders and stated that the listing of any further preliminary hearing should be conditional on the respondent adequately responding to data subject access requests that she believed were outstanding. Notwithstanding these comments, Ms Byczko also wrote on 30 June 2024 attempting to provide further information as required by Employment Judge Horne. She provided details of 13 alleged protected disclosures dating from February 2017 to January 2023. There were no details of alleged detriments.

38. After the stay was lifted, there was further correspondence about the arrangements for another preliminary hearing. Again, each of Ms Byczko's letters is very lengthy and detailed. The Tribunal eventually listed the matter for a further preliminary hearing on 24 January 2024. This hearing was not reserved to EJ Horne, possibly in part due to a request by Ms Byczko for another Judge. (The Tribunal had informed Ms Byczko that she was not entitled to select a Judge, although the fact the hearing was, effectively, part-heard in front of Employment Judge Horne seems to have been lost amongst the large number of lengthy documents that would have been on the Tribunal's file by that point.)

39. The respondent provided a commentary in relation to documents that it might hold evidencing the 13 alleged protected disclosures. In many cases, the respondent took the position that the protected disclosure had not been mentioned in the claim form, and so it had not conducted any search for documents relating to it. In other

cases, the respondent reported certain documents as being either available (and provided under cover of the respondent's letter), or that it was unable to find the document described.

Second preliminary hearing – EJ Ross

40. The second preliminary hearing came before EJ Ross on 24 January 2024. The claimant was assisted by Reverend Dunbar, whom EJ Ross describes in the preliminary hearing record as being a McKenzie Friend.

41. EJ Ross set out a case summary which outlines matters up to Ms Byczko's resignation in March 2022. The subsequent matters, addressed in her Second ET1/Second Continuation sheet are not mentioned.

42. Under the hearing "Progress" EJ Ross outlined that there had been very little. She recorded that Ms Byczko "did her best" to comply with the orders of EJ Horne, but that the information provided following the first preliminary hearing had expanded the claim considerably.

43. EJ Ross also noted that Ms Byczko "struggled to understand the process" and, in particular, that the Employment Tribunal did not have any jurisdiction in respect of her data subject access request.

44. In order to attempt to progress the claim, EJ Ross put to one side any amendment/expansion of the claim (whether contained in the second ET1/second continuation sheet, or in the information sent to the Tribunal by Ms Byzco after the first preliminary hearing) and attempted to draw up a List of Issues herself, capturing the claims from the information provided in the first claim form and continuation sheet only. She hoped to agree this List with Ms Byczko, before moving on to consider potential amendments to the claim.

45. In preparing a List of Issues for the parties to consider, EJ Ross did not simply provide a template, it is evident that she very much rolled up her sleeves and delved deeply into the material provided by Ms Byczko to try to understand the original claim. The draft List of Issues prepared by EJ Ross contained 5 alleged protected disclosures, 14 alleged detriments and 26 separate matters which were said to amount, separately or cumulatively to a breach of the implied term of trust and confidence (for the purpose of Ms Byczko's unfair dismissal claim). It also included a failure to make reasonable adjustments claim in respect of Ms Byczko's alleged physical disability, with 8 proposed adjustments. EJ Ross had noted that she could not discern a failure to make reasonable adjustments claim relating to Ms Byczko's mental health impairment.

46. The List of Issues prepared by EJ Ross appears to me to encapsulate a complex claim, but one which is coherent and manageable, focused on the matters that were included in the claimant's original claim and therefore, presumably, were at the forefront of her mind when she brought that claim.

47. EJ Ross scheduled a further (third) case management hearing for 6 March 2024 to continue the process. She ordered Ms Byczko to provide any amendments to the draft List by 4 March 2024, so that these could be discussed.

48. EJ Ross also cancelled the final hearing which had been listed for three days in March 2024. By this stage it was clear that the case could not possibly be ready for a hearing on those dates. She replaced it with a 10-day final hearing in September and October 2025.

49. Unfortunately, Ms Byczko did not respond well to EJ Ross's attempts to articulate her legal claims. In another lengthy letter dated 8 February 2024 she said that she would need several weeks to respond to the case management order, but also rejected the attempts to clarify that claims and asserted that her claims remained as set out in her original claim form and continuation sheet and second ET1 and continuation sheet. She sent a further lengthy letter on 27 February 2024.

Third preliminary hearing – EJ Ross

50. As I have indicated, EJ Ross set up a third preliminary hearing to take place in front of her on 6 March 2024. This was the second time that a salaried Employment Judge had reserved the case management of this case to themselves. That means that that Judge is not simply unavailable to take another case on the given day, but also precludes them from conducting a multi-day final hearing during that period. It is an indication of how difficult the case appeared to be, and of how the management of this particular case has taken much more than its proportionate share of Tribunal resources.

51. By this time, the bundle had grown to 469 pages. Those were the documents considered necessary for a preliminary hearing for case management, prior to any formal disclosure exercise taking place. The respondent had also produced a proposed List of Issues including some factual clarifications to the matters set out by EJ Ross. Despite her lengthy correspondence, Ms Byczko had not really engaged with draft List at all. The hearing was essentially ineffective. In her summary, EJ Ross wrote:

> *(14) The Tribunal cannot hear a claim unless the List of Issues have been identified. I explained to the claimant what is required. I have made an order about this below.*
>
> *(15) The claimant has a mental health impairment and says that she requires extensive time before complying with any Case Management Orders. I have therefore granted her a period of almost three months to provide this information.* ***The claimant must now comply. It is important that the claimant understands that failure to do so will be a serious matter.*** *It could result in an application to strike out the claim.*
>
> *(16) The delay in the claimant providing what is required is causing this case to become old.*

52. EJ Ross noted that once the issues in the original claim were clarified, there would need to be a further preliminary hearing to determine the issues in the proposed amendment, and to determine whether the amendment should be permitted. She made a very clear order setting out what Miss Byczko had to do with regards to the List of Issues, as follows:

> 2.1 Employment Judge Ross drafted a List of Issues arising from the claimant's complaints. The claimant must consider this list to make sure that

it accurately records the complaints and issues to be determined at the final hearing arising from the claimant's **original claim form and attachment presented to the Tribunal on 14 June 2022 only**.

2.2 If not, the claimant must notify the Tribunal and the respondent by **4.00pm on 5 June 2024 by amending the List of Issues, attached to this document at Appendix A, what is inaccurate.**

53. EJ Ross set a date for a fourth case management hearing on 8 July 2024.

54. Following the 6 March hearing, on 19 March 2024, Ms Byczko made an application for 'reconsideration' of EJ Ross's Orders. She argued that EJ Ross had rejected the 'second claim'. That was a misunderstanding. EJ Ross had not rejected the 'second claim' she had simply said that the amendment application could not be dealt with until the complaints and issues in the first claim were properly understood. Ms Byczko said that Judge Holmes had granted her application to update her ET1 in November 2022. As I have explained, that is also a misunderstanding. It is one that Ms Byczko has persisted in throughout these proceedings. Employment Judge Holmes simply postponed a preliminary hearing, he made no decisions about amendment, or 'accepting' the second claim form, or 'updating' the first claim with the material set out in the second claim form.

55. Ms Byczko also complained about the ordering of the bundle and/or about documents being missed out of the bundle, but not in a way which enables me to understand the thrust of her complaints. She asked EJ Ross to accept a list of protected disclosures which she had provided in response to an order of EJ Horne. However, EJ Ross had already listed the protected disclosures as she understood them to be from the claim. It was for Ms Byczko, if she considered that any were absent, to add those details into the List. The rest of the lengthy letter set out various issues related to reasonable adjustments Ms Byczko says she needs and criticisms of EJ Ross.

56. The respondent sent a short response pointing out that case management orders were not amenable to reconsideration. The Tribunal sent a short response, on EJ Ross's instructions, confirming that the orders were still to be complied with and any outstanding issues would be considered at the next preliminary hearing.

57. Miss Byczko did subsequently provide a disability impact statement and copies of her GP records in line with EJ Ross's orders in April and May 2024 (although the respondent says that these were defective and did not fully comply with the Tribunal orders).

58. Miss Byczko attempted to comply with the deadline of 5 June 2024 for reviewing EJ Ross's List of Issues and providing her amendments. On that date, she sent the respondent and the Tribunal a document headed "Claimant's List of Complaints and Issues". This document was 37 pages long (EJ Ross's list had itself been 10 pages long). In what is essentially a preface to the document, Ms Byczko complains that EJ Ross has re-written her complaints, and that too much has been changed or omitted to enable her to use that document as the basis for her claim. She contends that she should be permitted to revert to using the original ET1 and continuation sheet.

59. Ms Byczko's document then purports to list the protected disclosures. EJ Ross had a list of 5 protected disclosures, Ms Byczko's document has 32. However, this is not a simple expansion of the list identified by EJ Ross. So far as I can see, the disclosures identified by EJ Ross do not appear at all. Further, the vast majority of the 'disclosures' identified by Ms Byczko are not disclosures at all – some are detriments, some are merely points in the narrative. Although the list may take the form of a list of protected disclosures, this is really simply another narrative account of the claim.

60. The lengthy list of 'disclosures' is then followed by a table of what I take to be alleged detriments. This does not follow, even in terms of bare format, the numbered list of detriments set out by EJ Ross. It is vague, non-specific and, sadly, essentially incomprehensible. Again, it effectively mutates into a narrative account of Ms Byczko's problems at work.

61. In relation to the complaint of failure to make reasonable adjustments, Ms Byczko has abandoned the structure of the list compiled by EJ Ross and, in doing so, has failed to identify the 'provision, criterion or practice' giving rise to the duty to make adjustments. Again, Ms Byczko provides a narrative and it is impossible for me to understand whether she agrees with the potential adjustments that EJ Ross has recorded in the List of Issues and/or whether any additional adjustments should have been made. I do not know whether it is only adjustments necessitated by the claimant's claimed physical disability which are relied upon (as EJ Ross understood) or whether there were separate adjustments necessitated by her claimed mental health disability which will also need to be considered.

62. In relation to the complaint of constructive unfair dismissal, EJ Ross had identified 26 points as being the basis for the allegation that the respondent had breached the implied duty of trust and confidence. Again, Miss Byczko has departed from this format. Instead, she has labelled various other allegations throughout her document with the letters 'AUD' as an indication that she also relies on those matters in support of the unfair dismissal claim. I have not counted them; there are very many. Again, they are often lacking in dates and other specifics.

Fourth preliminary hearing – EJ Ross

63. The fourth preliminary hearing took place on 8 July 2024 in front of EJ Ross. In her summary, EJ Ross explains that the List of Issues supplied by Ms Byczko is not one that the Tribunal can use. She gives a number of reasons for this, broadly in line with the matters I have identified above. EJ Ross decided that the case should be listed for a public preliminary hearing on 17 September 2024 (this hearing) to determine the respondent's application to strike out the claim on the basis that the claimant had not complied with the order to review and amend EJ Ross's List of Issues. She listed a further preliminary hearing for 12 November 2024 to take place if the strike out application was unsuccessful. That hearing would consider how to proceed with the claim in all the circumstances, including whether Ms Byczko's 5 June document should be accepted as an amendment to her claim (albeit that Ms Byczko asserted there was no requirement for amendment).

64. EJ Ross made directions for the respondent to set out its strike out application in writing, and directions about reasonable adjustments in Tribunal hearings. It is worth saying that, alongside the problems with clarifying the List of Issues, there

have also been on-going lengthy discussions and correspondence about medical records, Tribunal adjustments and disclosure, amongst other matters.

65. Following the hearing, the respondent duly made its strike out application in writing by letter dated 29 July 2024. That letter summarises some of the background I have already set out. The application is put on two grounds. Firstly, the failure to comply with the orders made by EJ Ross in respect of the List of Issues (Rules 37(1)(c). Secondly, it is asserted that the claimant's conduct of the proceedings has been scandalous, unreasonable or vexatious (rule 37(1)(b)).

66. In its application, the respondent cited various parts of the Equal Treatment Bench Book, emphasising that judicial efforts to accommodate parties with disabilities must always take into account the fairness to both sides, and should not prejudice the other party. The respondent submitted that there was no medical evidence to suggest that Ms Byczko could not comply with EJ Ross's orders, that the case had made no progress since it was commenced, and that fairness to the respondent now demanded it be struck out.

Public preliminary hearing – EJ Dunlop

67. I refer to the summary provided at the outset for an account of what happened at the public preliminary hearing. It is worth noting that, by this stage, the bundle had grown to just under 1,000 pages. I gave both sides the opportunity to make submissions on the strike-out application and then reserved my decision.

Events following the hearing

68. My view following the hearing was that Ms Byczko was a litigant who was, for whatever reason, experiencing genuine difficulty in understanding what the Tribunal required of her and why. Both EJ Horne and EJ Ross had put a huge amount of effort into trying to 'translate' Ms Byczko's claim into a usable form, but that process had ended up back at square one, with their efforts being rejected by Ms Byczko and a (new) long and confusing narrative claim being put forward. I formed the view that there is nothing to suggest that any other Judge would have any more success in tying to clarify the claims. In fact, if anything the opposite, as Ms Byczko has (to some extent understandably) become increasingly frustrated with this whole process, and her position that her original claim is fine as it is has become more entrenched.

69. Holding in mind the principle that striking out a claim should always be the last option, I decided to try to seek an intermediary assessment for Ms Byczko. Intermediaries are communication specialists, who can be engaged by the Tribunal in much the same way that interpreters can be engaged when a litigant does not speak English well enough to participate in a hearing. Intermediaries are fairly new in the Tribunal, and I do not know whether the possibility was considered by either EJ Horne or EJ Ross. I considered that if an intermediary report indicated that an intermediary may be able to assist with helping Ms Byczko to understand the requirements of the Tribunal, then it might be appropriate to give Ms Byczko another opportunity to respond to EJ Ross's List of Issues in the way that had been envisaged by EJ Ross. I therefore decided to write to Ms Byczko and propose an intermediary assessment, reserving my decision on strike out until that possibility had been explored.

70. Before I had the opportunity to do so, Mr Byczko wrote to the Tribunal on 18 September 2024 raising issues about the content of the bundle that had been before me at the preliminary hearing, and asking for time (until 30 October 2024) to make further submissions.

71. Given that I had already decided to delay my judgment and explore the option of an intermediary, I considered that there was no reason not to allow Ms Byczko the opportunity to make the further representations that she sought. I wrote to both parties on 25 September 2022 outlining the next steps, and including information about intermediaries, and why I had formed the view that an intermediary assessment might be appropriate in this case.

72. In a letter dated 4 October 2022, Ms Byczko told me that she did not want to have an assessment with an intermediary.

73. In a 16-page letter send on 30 October 2024 Ms Byczko made further submissions about the strike out application. In brief, Ms Byczko's position is that she has complied with all orders, that the Tribunal has failed to make reasonable adjustments for her, that the respondent is behaving scandalously and concealing documents. I have carefully read and considered her comments. I also considered the respondent's reply, dated 13 November 2024, where the respondent identifies the location of allegedly "missing" documents in the bundle that was before me. I have assured myself that the chronology I have recorded is correct, and I have drawn on both the Tribunal file and the document bundle to do so. I also note, again, that there seem to be instances of confusion. Ms Byczko seems to suggest that the respondent had removed Employment Judge Holmes's letter of 12 November 2022 'allowing' the claimant to amend her claim. The letter of 12 November 2022 appears in the bundle (page 106). The problem for Ms Byczko is that it does not, as already stated, allow her to amend her claim.

74. Aside from those matters, Ms Byczko's letter contains sweeping complaints about EJ Ross's conduct of the preliminary hearings which took place before her. The rules which govern complaints about judges require such complaints to be filed with the Judicial Conduct Investigations Office (JCIO). The JCIO is a statutory body which can be contacted at this website: https://www.complaints.judicialconduct.gov.uk. Ms Byczko may wish to note, however, that complaints about how a judge manages a hearing, or allegations of bias, are not covered by the judicial complaints procedures because they are matters for an appeal to the Employment Appeal Tribunal.

75. Finally, Ms Byczko attached 8 pages of documents to her email. I have read them. They were all already included in the bundle. They are emails between the parties about preparing the bundle for the hearing in January 2023 in front of Employment Judge Horne. The key issue in this hearing is whether the claim should be struck out because Ms Byczko did not comply with EJ Ross's orders relating to the List of Issues. These documents do not help me to resolve the issue.

Relevant Legal Principles

76. Rule 37 of the Employment Tribunal Rules of Procedure 2013 sets out when a claim can be struck 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).

(2) 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.

77. It is now well-established that in cases brought by self-represented litigants, it is necessary for the Tribunal to take steps to establish, in reasonable detail, what the claims are, and what the legal and factual issues are within those claims, before making any assessment of whether the claims have reasonable prospects of success. Detailed guidance was provided by HHJ Tayler in (**Cox v Adecco Group [2021] ICR 1307**). This includes the point that Tribunals should be aware that if pushed to explain their claims at a hearing, a litigant may freeze like a "rabbit in the headlights" and be unable to do so.

78. Although this strike out application was not put on the basis that the claim itself has no reasonable prospect of success (the respondent would say we have not even got to the point where an assessment of prospects is possible), the principles set out in **Cox** provide the backdrop to the exercise the Tribunal was attempting to undertake through the various case management hearings. Perhaps the most recent example of this line of authorities is **Amber v West Yorkshire Fire and Rescue Services [2024] EAT 146**, where HHJ Beard said (paragraph 34):

    It appears to me that there is no alternative at present to Employment Tribunal judges delving deeply in case management type hearings with parties. This would be to make sure that their cases are properly understood. In such hearings, the judge reducing that analysis to a list of issues, could ask the parties to consider it, giving time to respond if they disagree with the list. That will be time consuming and it could also lead, I am sure, to complaints that judges are taking sides in some way or other. However, there does not appear to me to be any useful alternative to that approach at present given the absence of any external guidance.

79. When considering strike out under Rule 37(1)(c) (non-compliance with orders) a Tribunal must have regard to the overriding objective and consider all relevant factors. These will include:

    79.1 The magnitude of the non-compliance;
    79.2 Who is responsible, as between a party and their advisor, for the default;
    79.3 What disruption, unfairness or prejudice has been caused;
    79.4 Whether a fair hearing is still possible; and

79.5 Whether strike out is proportionate – a claim should not be struck out where a lesser sanction is sufficient to address the party's default. (**Weir Valves & Control (UK) Ltd v Armitage [2004] ICR 371**).

Discussion and conclusions

80. I first considered the application under Rule 37(1)(c).

81. Ms Byczko's position is that she did comply with EJ Ross's order by supplying her list of complaints and issues document on 5 June 2024. I disagree. The order made on 6 March required Ms Byczko to consider the list prepared by EJ Ross. I am not convinced that Ms Byczko really did that at all. She did not want, or consider that she needed, help from EJ Ross in clarifying the claim. She did not try to engage with EJ Ross's attempt, for example by correcting names or date within it.

82. The order went on to require that if Ms Byczko considered that EJ Ross's list did not accurately record the complaints and issues she had to notify the Tribunal and the respondent by amending that list. It is plain to me that Ms Byczko did not comply with that part of the order. Instead, Ms Byczko attempted to create her own list. That list used the same format, in some parts, as EJ Ross's list, but otherwise bears no real relation to it. I am satisfied that Ms Byczko was, and remains, in breach of that order.

83. It is very common in Tribunal proceedings for orders to be breached. Although the Tribunal <u>may</u> strike out a claim where there has been a breach, it is very rare that that would actually happen. In order to determine whether it should happen in this case, I have carefully considered the factors set out at paragraph 79 above.

84. The first and second factors are not particularly relevant in this case. I find that Ms Byczko has tried her best to comply. I do not know whether she has taken advice from one or other of the 'McKenzie friends' which might have been unhelpful, but it is clear that the overall approach to the case, as maintained in correspondence and at hearings over a long period of time, is one led by Ms Byczko herself.

85. The third factor requires me to consider the disruption, unfairness or prejudice caused. I accept the respondent's submission that the delay in clarifying the issues in this case and progressing to a final hearing has caused obvious prejudice. Considerable costs have been expended in conducting this litigation, without making any material progress. The respondent was right to draw attention to the passages of the Equal Treatment Bench Book referenced in its application. This is a case where there is a risk that, in attempting to accommodate the claimant and mitigate the difficulties that she is undoubtedly facing, the Tribunal could lose sight of the need to treat <u>both</u> sides fairly.

86. The respondent also suggests that, as a public body, I should have regard to the fact that the costs it is incurring are drawn from the public purse. I am not sure that is correct. Every organisation which employs people must accept the risk of having to defend claims (meritorious or otherwise) in the Tribunal. That is part of the price of having the workplace protections which our society considers it important to have. However, that does not mean that the cost should be unlimited. Where the manner in which a claim is conducted results in excessive costs to a respondent due to the volume of documentation, correspondence, repeated applications and failures to comply with orders I consider that can properly be viewed as prejudice.

It is undesirable that any employer should face such prejudice – irrespective of whether they are a public sector body funded by the public purse, or a private sector body of the sort which, ultimately, is relied on to contribute to the public purse.

87. Those considerations feed into the fourth, and perhaps most important factor, the extent to which a fair trial is still possible. I cannot conceive of a fair trial taking place in this case. If the claim is allowed to proceed, and even if the claimant was permitted to rely on her 5 June document as an amendment, and on her second claim/second continuation sheet as an amendment, we still have a claim in which the legal and factual issues are impossible to ascertain.

88. Although the judgment in **Amber** was handed down after EJ Ross's involvement in this case it seems to me that her approach exactly reflected the approach advocated by HHJ Beard. She has "delved deeply" and produced an articulation of the claim which is cogent and sensible. Ms Byczko has rounded rejected those efforts. There is absolutely nothing to make me think that any other Judge would have more success. Indeed, as I have already said, the opposite seems rather more likely.

89. Another radical alternative would be to make orders for disclosure and witness statements and let the claim go to trial, trusting the Tribunal at the final hearing to piece together the claims and issues as they went. However, that would not be a fair trial. A fair trial requires the respondent to understand the claim, and the case it has to meet. This respondent would not be in a position to do that, even in broad terms, and is faced with allegations spanning several years and a number of departments. It may be feasible for some types of cases to be conducted without a prior agreement of the List of Issues but not, in my view, a case such as this.

90. It is also relevant to consider *when* a hypothetical fair trial would take place. The final hearing dates originally listed in this case have long gone. Given the volume of material in this case and the huge range of disputes (including preliminary disputes e.g. about medical evidence which I have not gone into in this Judgment), as well as the history of the case to date, I do not consider it remotely feasible that the case will be ready for a final hearing in September 2025. The events in the case stretch back to 2020. A delay of this scale alone would not be sufficient reason to strike out the claim, but it is a relevant consideration.

91. I finally considered whether strike out was a proportionate response, and whether any lesser action could also address the concerns I have identified. Broadly, I conclude that strike out is a proportionate sanction because a fair trial is not possible, and to allow the claim to continue would be to cause an unacceptable level of prejudice to the respondent. I considered three alternatives which would potentially enable me to do something less draconian than strike out the claim:

    91.1 I considered involving an intermediary, in the hope that that might enable Ms Byczko to understand better what was required to clarify the claims. Ms Byczko rejected that proposal.

    91.2 I considered giving Ms Byczko the opportunity to continue with only the claims as set out in EJ Ross's List of Issues. However, Ms Byczko has characterised that List of Issues as bearing no resemblance to her claim and roundly rejects it. It is not realistic to suppose that, even if she reluctantly accepted such an offer as the alternative to strike out, that

she would actually prepare the case and conduct the hearing on the basis of the claims as set out by EJ Ross.

91.3 I considered whether the problems I have identified applied equally to all parts of the case. In particular, I noted that EJ Ross in her final case management summary noted that "*The claimant does not appear to have raised significant concerns in relation to her constructive dismissal claim in the list of issues document*". I wondered whether it might be fair and proportionate to allow the constructive dismissal claim only to proceed. With respect to EJ Ross, when I analysed Ms Bycko's 5 June document closely, it seems to me that she also departs significantly from EJ Ross's formulation of the constructive unfair dismissal claim. By attaching the label 'AUD' to various matters set out in her table, Ms Byczko seeks to draw those matters into the constructive dismissal claim. This is (again) a significant expansion of the matters identified by EJ Ross and (again) includes numerous matters which are vague and omit particulars such as names and dates. Inevitably, extensive significant further clarification would be required.

92. In view of everything I have set out above, I have decided to strike out Ms Byczko's claim under Rule 37(1)(c). I do not need to also consider the application under Rule 37(1)(b). However, if I had, I would also have struck out the claim under that Rule. I do not believe that Ms Byczko has been deliberately unreasonable in the way she has conducted this case. She is frustrated and feels misunderstood. However, her difficulties in engaging with the Tribunal, and accepting the help offered to her, mean that she has acted unreasonably, even if that is not her intention. For all of the reasons set out at length above, the only realistic response to her unreasonable conduct is for her claim to be struck out.

93. I want to make it clear that I have proceeded on the basis that Ms Byczko suffers from a mental health impairment, or impairments, of some sort, which most likely amount to a disability. There is some medical evidence of this, although it is not as detailed as I would have liked. Alongside the medical evidence the history of the case, and my interaction with Ms Byzcko, supports this conclusion. I proceeded on the basis that the Tribunal is under a duty to make reasonable adjustments and I have had in mind the valuable advice in the ETBB. Unfortunately, I cannot identify any adjustment which I could make which would address the difficulties I have described. Ultimately, regardless of the claimant's difficulties, I am required to act in the interests of justice and take account of the position of both parties to the case.

94. In view of everything I have set out above, I have decided to strike out Ms Byczko's claim. No further preliminary hearing will be listed, and the final hearing listed for September 2025 will be cancelled.

Employment Judge Dunlop

Date: 18 November 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

25 November 2024

FOR EMPLOYMENT TRIBUNALS