EMPLOYMENT TRIBUNALS

Claimant: Dr C MacKenzie

Respondent: The Principal, Fellows and Scholars of Homerton College in the University of Cambridge

Heard at: Reading Employment Tribunal; by C.V.P. **On**: 16 October 2023

Before: Employment Judge George (sitting alone)

Appearances

For the Claimant: in person
For the Respondent: Ms B Breslin, counsel

JUDGMENT AT A PRELIMINARY HEARING IN PUBLIC

The respondent's application to strike out the claim is refused.

REASONS

1. In this hearing I granted the claimant's application for an extension of time to provide documents and a witness statement directed to the preliminary issues. The reasons for that decision are set out in the record of case management orders sent at the same time as this judgement and reasons. They provide the background to the hearing before me on 16 October 2023 and to this judgment.

2. The respondent argued that, rather than permit the extension of time, I should strike out claims or because the claimant's default was part of a pattern of conduct of these claims which amounted to unreasonable conduct, involved repeated failures to comply with tribunal orders and that that conduct demonstrated a failure to pursue the claims.

3. Under r.37 of the ET Rules of Procedure 2013 the Employment Tribunal may strike out all or part of a claim or response including for the following reasons:
    a. If the manner in which the proceedings have been conducted by or on behalf of a claimant or respondent (as the case may be) has been scandalous, unreasonable or vexatious;
    b. If a party has not complied with an order of the Tribunal or one of the Rules of Procedure 2013;
    c. If the claim has not been actively pursued.

4. Although the claimant has not prioritised her litigation as I consider she should, the evidence does not support a conclusion that she has failed actively to pursue it.

5. The EAT has made it clear that the power of strike out for non-compliance with a Tribunal order should only be considered in the most serious of cases. The discretion to strike out should only be used where to allow a case to proceed to a final hearing would mean that any judgment obtained could not be described as fair between the parties. However, the question whether a fair trial is possible is not the only material factor. The guiding consideration is the overriding objective: Weir Valves & Controls (UK) Ltd v Armitage [2004] ICR 371, EAT.

   "The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience." (Weir Valves para.17)

6. In Emuemukoro v Croma Vigilant (Scotland) Ltd [2022] ICR 327 the EAT considered an appeal in relation to an application to strike out the claim on the basis of unreasonable conduct. For reasons I set out in the record of case management order, I consider that the claimant did conduct the proceedings unreasonably by being three months late in producing the evidence for today's hearing (in breach of a tribunal order) in combination with failing to alert the respondent to any difficulties she was experiencing in compliance at an early stage. The EAT held explained that the requirement for exercising this power was either that the unreasonable conduct was deliberate and persistent disregard of required procedural steps or that it made a fair trial impossible.

7. In para.18 of the judgment it was stated that the question of whether a fair trial is possible is not necessary to be considered in an absolute sense,

   "where an application to strike out is considered on the first day of trial it is clearly a highly relevant consideration as to whether a fair trial is possible within that trial window – not when a fair trial is impossible in an absolute sense."

8. The respondent relies upon the claimant's conduct earlier in this litigation. I do not consider that there had been any breach of an order by the claimant up to the point of the preliminary hearing on 23 August 2022. At that hearing, Employment Judge Anstis directed further and better particulars and, without going into the full details of the correspondence chronology, they were ultimately provided much later than the extended deadline agreed between the parties, after the respondent had made an application for an unless order. The claimant argued before me that she provided them exactly on the date that she had notified the tribunal that she was going to do so, but the point is they were not provided within the timescale there had been directed by the by the tribunal or agreed with the respondent. That is what matters in terms of giving the other party sufficient time to respond to any matters that are produced or prepare for a hearing so that it can be effective.

9. The respondent plausibly argued that the late further information led to a late identification of an amendment application. I would characterise the claimant's actions in February 2023 as a last minute engagement with the task that meant the tribunal and the respondent had to react and adapt when that should not have been necessary.

10. I have taken into account that the guidance Weir Valves and Emuemukoro, including as set out above. Ms Breslin argues that the latter case should lead me to conclude that a fair trial is not possible because the consequence of me granting the claimant's application for an extension of time to present her witness statement means that a fair trial of the relevant preliminary issue is not possible at this hearing. She argues that this provides a basis for the argument that the claimant's claim should be struck out for her failure to comply with Employment Judge Cotton's orders or unreasonable conduct as found above. Ms Breslin also points to late compliance with a Judge Anstis's order to argue persistent failure to comply. My analysis of what happened leads to the conclusion that this is the second occasion on which there have the tribunal and the respondent had to react and adapt as a result of the claimant's failure to comply with the preparation timetable directed by the tribunal. In the circumstances of the present case, I am not satisfied that this amounts to a persistent or deliberate failure; there have been explanations put forward which partially explain the delay and the claimant did produce the information or evidence directed albeit late which had consequences to the conduct of the litigation.

11. I do not think it possible to say that a fair trial of the preliminary issue is not possible. It is true that Emuemukoro suggests that concept can encompass whether a fair trial at the scheduled hearing date is possible so I do not say it could not encompass the situation where a fair hearing of a preliminary issue at the preliminary hearing is not possible. However, whether or not a fair hearing is possible is not the only factor to take into account. I need to set that in the context of the litigation as a whole. Although there is some probable impact, in particular on the costs incurred and the use of resources not only the respondent but of the employment tribunal, it seems to me that the it would be disproportionate at this stage to strike out the claim is because

of the default. Indeed, it would appear more to penalize the claimant for her default which is not the purpose of the discretion under rule 37.

12. I refuse the application for strike out.

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Employment Judge George

Date: …9 November 2023……..

Sent to the parties on: 6 December 2023

For the Tribunal Office