Case Numbers: 2317523/2013
2301199/2014 & 2303072/2014

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	and	Respondent
Mr O Odukoya		**Wandle Housing Association**

HELD AT London South Tribunal

On: 07 October 2016

Before: Employment Judge Freer

Appearances
For the Claimant: In person
For the Respondent: Ms I Reseigh, Counsel

JUDGMENT FROM A PRELIMINARY HEARING

It is the judgment of the Tribunal that the Respondent's application is successful and the Claimant's claims are struck out.

REASONS

1. This is a Preliminary hearing "to consider the application made by the respondent that the claim be struck out and (if the claim not be struck out) to make any appropriate case management orders".

2. The Respondent makes its application under three headings: non-compliance with tribunal orders; the claim has not been actively pursued; and that it is no longer possible to have a fair hearing.

A concise statement of the relevant law

3. Rule 37(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides:

"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)".

4. The Tribunal has reminded itself of the following established law.

5. The striking out process requires a two-stage test. The first stage requires 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 (*see* **HM Prison Service -v- Dolby** [2003] IRLR 694, EAT).

6. In **Harris -v- Academies Enterprise Trust** [2015] IRLR 208 the EAT held: "it would be entirely appropriate for an employment judge in a suitable case to take account of the wider view of justice as I have expressed it, a judge is not required as a matter of law in the employment tribunal to deal with a claim as if the CPR applied when they do not. He must deal with the ET(CRP)R in respect of a strike-out power".

7. In **Rolls Royce plc -v- Riddle** [2008] IRLR 873, the EAT held: "Strike out is the most serious of outcomes for a claimant. It is though one that can competently be ordered by the tribunal and it is important to avoid reading the warnings in the authorities regarding its severity as indicative of it never being appropriate to use it. To do so would be to ignore its inclusion in the 2004 Regulations, evidently for good reason".

8. When considering striking out on procedural grounds the tribunal is required to make a structured examination in order to see whether there is a less drastic means to the end for which the strike-out power exists: '"Proportionality ... is not simply a corollary or function of the existence of the other conditions for striking out. It is an important check, in the overall interests of justice, upon their consequences" (see **Blockbuster Entertainment Ltd -v- James** [2006] IRLR 630, CA).

9. Rule 6 confirms that a number of alternatives are available where a party has failed to comply with a provision of the Tribunal Rules such as waiving or varying the requirement, barring or restricting a party's participation in the proceedings, or making a costs order.

10. The principles derived from the pre-CPR case law in the High Court with regard to want of prosecution continues to apply to 'not actively pursuing' a claim in employment tribunals (see in particular **Evans' Executors -v- Metropolitan Police Authority** [1992] IRLR 570, CA and **Birkett -v- James** [1978] AC 297, HL).

11. There are two potential situations. The first is where there has been intentional and contumelious default by the claimant and the second is if the delay has been "inordinate and inexcusable" and there is "a substantial risk" that it is not possible to have a fair trial or serious prejudice has been caused to the Respondent.

12. Where there is overlap between an issue of a claim not being actively pursued and whether a fair trial is possible, a tribunal may consider them both together.

13. A tribunal should carefully analyse the reasons why it is alleged that a fair hearing is not possible and that there is proper justification for those reasons. Tribunals should not conclude too readily that a fair trial is no longer possible and should consider alternatives (see **Abegaze -v- Shrewsbury College of Arts & Technology** [2010] IRLR 236,CA; and **Riley -v- Crown Prosecution Service** [2013] IRLR 966, CA).

Facts and conclusions

14. This matter has a long and complicated history and the Tribunal refers herein to the essential elements.

15. On 25 February 2013 Claimant presented his first claim to the employment tribunal. It is a claim of race discrimination and victimisation in respect of job applications for two vacancies in 2012.

16. At a preliminary hearing on 29 May 2014 what remained at that time of the Claimant's claim was struck out. The Claimant successfully appealed to the Employment Appeal Tribunal and the matter was remitted to the employment tribunal by a judgment dated 13 July 2015.

17. The Claimant presented a second claim to the employment tribunal on 23 June 2014. This is a claim of race, disability and age discrimination relating to events that date back to February 2013.

18. A third claim was presented to the employment tribunal by the Claimant on 01 December 2014. This is a claim for race and disability discrimination relating to two job applications in July and September 2014.

19. These matters have been consolidated by previous order.

20. The Respondent provided to the Tribunal for the purposes of this hearing a useful chronology of main (although not all) events since August 2015 and the

tribunal attaches it as an appendix to these reasons. The Tribunal has spent some time going through the tribunal files and confirms that the details contained in that chronology appear correct.

21. The result of these protracted proceedings is that over three and a half years after the commencement of proceedings the Respondent still remains unaware of the details of the claims against it. The Respondent also has not fully been supplied with medical evidence and an impact statement relating to the Claimant's alleged disability after almost two and half years since the claims of disability discrimination were commenced.

22. The Claimant was directed by the Tribunal in a detailed order dated 19 August 2015 to provide additional information by 18 September 2015 and that order also helpfully explained how that information could be provided (e.g. in a Scott Schedule type document). Over a year later at the date of this Preliminary hearing the Claimant has still not complied with that order and provided the essential information.

23. By an order made by the Tribunal on 16 October 2015 the Claimant was ordered to provide preliminary medical evidence and an impact statement relating to his disability discrimination claim. A year later at the date of this Preliminary hearing the Claimant has not complied with that order and fully provided the information.

24. The result is after a considerable length of time from the commencement of proceedings the Respondent is still is not in possession of the details of the claims against it or the basic information relating to the alleged disability claim.

25. The Respondent informs the Tribunal that only 2 out of the 12 individuals it considers it has so far been able to identify from the pleadings remain in the Respondent's employment.

26. The Claimant argues that due to illness he has not been in a position to comply with the Tribunal orders. The Tribunal has taken the Claimant's evidence fully into account when assessing those periods of illness as supplied by him in limited documentary evidence at this Preliminary Hearing. This material relates to a mental health condition and a shoulder pain complaint.

27. The Claimant argues that these matters have affected his ability to comply with the Tribunal orders.

28. Only one document produced by the Claimant directly addresses his capacity to engage with the Tribunal process. It is a letter from the Claimant's GP dated 08 March 2016 which was also on the Tribunal file. It identifies that the Claimant was diagnosed with the following conditions "Severe depression in 1 April 2005. Insomnia. Osteoarthritis of the neck and right big toe". The letter states that the Claimant was reviewed in November 2015 and advised to

refrain from work "including paralegal activities" for at least four months. The letter records that the Claimant is "still affected by depression and insomnia". It does not reiterate that the Claimant should continue to refrain from "paralegal activities" or is otherwise unable to engage with the Tribunal process.

29. Most importantly, it transpired from the Claimant's evidence, as confirmed in a document in his own bundle, is that he attended at a full merits hearing at Central London Employment Tribunal for five days on 18 to 22 July 2016 in a claim of race, age and disability discrimination and at which he represented himself.

30. The document presented by the Claimant comprised part of the written reasons of the Tribunal. The Claimant produced it in evidence to confirm that the Respondent in those proceedings conceded that the Claimant was a disabled person with a condition of depression.

31. However, what those reasons demonstrate, together with the Claimant's confirmation at this Preliminary Hearing, is that the Claimant was more than capable of preparing for those proceedings and attending and undertaking his own advocacy at a period when he was apparently unable to comply with the orders in respect of this Tribunal. The Claimant also attended at the hearing at Central London Employment Tribunals with his GP notes, but has apparently not been in a position to provide those to the Respondent in the instant case under the order of the Tribunal.

32. It should also be noted that during the period when the Claimant was representing himself at a full merits hearing at an employment tribunal there was a letter from the Claimant to London South employment tribunals dated 11 July 2016 citing a number of reasons why he could not comply with the Tribunal's order for additional information. Those reasons would equally apply to his proceedings at the Central London Tribunal with which the Claimant did engage.

33. Also importantly, that letter confirms that the Claimant was able to submit an appeal to the Employment Appeal Tribunal arising from decisions at Preliminary Hearings held in the case at London Central during September 2015 and December 2015, in respect of which he attended a Rule 3(10) hearing at the Employment Appeal Tribunal on 22 June 2016. The Claimant confirmed orally to the Tribunal that in fact he lodged two appeals to the EAT in respect of these matters.

34. There was no medical evidence before the instant Tribunal that explained the anomaly of being able to address those matters but not the orders of this Tribunal.

35. The Tribunal could perhaps have made an unless order at an earlier stage in these proceedings, but what the Tribunal files reflect is a generous accommodation of the Claimant and his circumstances. As stated in **Harris**

(above): "Though in many cases an unless order will be granted before there is a strike-out, it is not an essential prerequisite of an application to strike out and is no guarantee that one will not follow in an appropriate case".

36. The Claimant in his oral representations to the Tribunal volunteered that he could expect some threat of sanction, considered the least he can expect is an unless order and understands the Respondent's submissions on a fair hearing as he would be arguing the same thing himself.

37. The Claimant also stated that he had a difficulty with a Scott Schedule and wanted to submit a narrative of his claims.

38. Considering the separate elements of the Respondent's application:

39. With regard to non-compliance with Tribunal orders the Claimant has repeatedly failed to comply with Tribunal orders relating to the provision of details of his claims. In making those orders the Tribunal has taken into account and given allowance for the Claimant's medical situation as communicated to the Tribunal at that particular time. Importantly, during this period the Claimant was able to engage with both his employment tribunal proceedings and hearing in Central London Tribunal and an appeal hearing at the Employment Appeal Tribunal. The Claimant has also failed fully to comply with the provision of medical evidence.

40. The Tribunal therefore concludes that the ground for striking out has been established.

41. In considering whether or not to exercise its discretion and strike out the claim the Tribunal has taken into account that no previous unless order has been made but considers after reviewing all the material on file that an absence of an unless order does not preclude a strike out order being made. The Tribunal also concludes that it is not appropriate to waive or vary the requirement for the information. It is essential.

42. The Tribunal has considered whether the required information should be the subject of an unless order. However, the Claimant has been the subject of a number of orders by the Tribunal with four applications for a strike out/unless order by the Respondent due to non-compliance and a warning from the Tribunal that there may be a time when his claim is struck out for multiple failures to comply with orders. The Claimant was on full notice of the importance of complying with the Tribunal orders and the potential consequences of failing to do so. The Claimant could also have complied with the Tribunal orders in the period from receiving the notice of hearing for this preliminary hearing and the hearing itself. This is particularly the case, for example, as the Claimant had GP notes available for the Central London Tribunal hearing in July 2015. The Claimant was fit to address the matters.

43. Further the making of an unless order is, in this Tribunal's experience, more appropriate for matters in respect of which compliance is easily measurable

(e.g. to produce a certain document by a certain time and date). The Claimant has been repeatedly asked for information on the essential elements of his claim. At this hearing the Claimant confirmed a reluctance to provide a Scott Schedule and wished to produce a narrative version. An unless order requiring additional information often produces a document that raises issues over whether or not it is in full compliance with the order and in respect of which further details and more case management is required. Having regard to the Tribunal file material in this matter, on balance such a position is a predictable outcome.

44. In considering whether or not the issue can be resolved by making a costs order, the Tribunal has taken into account that an order for costs in an employment tribunal does not follow the event, is the exception rather than the rule, governed by prescribed circumstances, the amount of any costs awarded is generally determined in relation to the Claimant's means and requires enforcement proceedings if it is not paid. As such it requires the Respondent to expend costs chasing costs and which ultimately may be of little value. Further, an award of costs does not address the information required by the order.

45. Therefore, when considering the exercise of its discretion the Tribunal has weighed all of the competing factors, assessed the overall interests of justice, including proportionality, and concludes that it is appropriate to exercise its discretion and strike out the Claimant's claims.

46. With regard to the claim not being actively pursued, the Tribunal concludes that there has been intentional and contumelious default by the Claimant. The Claimant chose and was able to pursue his claims at Central London Employment Tribunal and his appeal at the Employment Appeal Tribunal and not engage with the orders of this Tribunal. The Tribunal concludes on balance that this ground for striking out has been established.

47. Further the Tribunal concludes that the delay by the Claimant has been inordinate and also was inexcusable during the time in 2016 that he attended the other employment tribunal and appeal tribunal processes. The Tribunal concludes that as a result there is certainly "a substantial risk" that it is not possible to have a fair trial and also that "serious prejudice has been caused" to the Respondent. The majority of the potential witnesses so far identified are no longer in the Respondent's employment, the matters under review are significantly dated and the detail of which has not yet been confirmed such that the Respondent has not been in a position at an earlier stage to obtain and confirm what is now significantly dated witness evidence. In these circumstances there is clearly a substantial risk that it is not possible to have a fair trial and serious prejudice has been caused to the Respondent.

48. Accordingly, the ground for striking out has also been established on this basis.

49. When considering whether or not to exercise its discretion the Tribunal has

weighed all of the relevant factors, such as the Claimant's medical history; the Tribunal orders that have been made; the Claimant being able to pursue other legal proceedings; and alternatives to striking out, including waiving the requirement, making an unless order and/or a costs order. Having undertaken that assessment the Tribunal concludes that it is appropriate to exercise its discretion and strike out the Claimant's claims.

50. With regard to it not being possible to have a fair hearing the Tribunal has received information from the Respondent that from the twelve potential witnesses it has so far been able to identify; only two remain in its employment. Further, in the absence of the details of the claims, the Respondent has not been in a position to undertake the proof of any relevant witnesses. Importantly, it has not had an opportunity to collate individual witness evidence at an earlier stage of proceedings when matters are more fresh in the minds of those involved. The events are now significantly dated. Recollections fade.

51. The Tribunal has had square in its mind the decision of the Court of Appeal in **Abegaze**. Although guarded against speculation the Tribunal has to make an assessment of the circumstances, which inevitably requires some matters to be assessed on probability. The Tribunal has concentrated on the potential for fair resolution of the issues by evidence through the procedures of the court.

52. The Tribunal has undertaken consideration of all the factual material before it and considers on balance that it is highly likely that the Respondent will not be in a position to rely on evidence from all those witnesses who are no longer in its employment and that recollections of the alleged events, which in some cases will extend beyond the limitation period in personal injury claims, will inevitably be impaired.

53. If an unless order is made now for the provision of the information required and it is provided by the Claimant without further difficulty, given the current high relative workload of London South Employment Tribunals (which has caused the delay in providing this judgment) a hearing of this matter will not occur for a further nine or ten months, which would be extended by a further considerable period if disability is disputed and expert medical evidence required. Although the difficulties in the Tribunal system should not necessarily be visited upon the Claimant with regard to whether a fair trial is possible, they are matters reasonably to be considered when assessing alternative action.

54. Therefore the Tribunal concludes that the ground for striking out has been established and it follows that on that ground the Tribunal exercises its discretion to strike out a claim in respect of which a fair trial is no longer feasible.

Employment Judge Freer
Date: 18 January 2017

APPENDIX.

Chronology of key events since August 2015

19 August 2015- PH at London South Tribunal. Claims are consolidated. Tribunal makes directions, lists PH for 19 October 2016, and full hearing starting on 11 April 2016. The Claimant is ordered to provide further particulars of his claims by 18 September 2015.

9 September 2015- The Respondent confirms that it does not concede disability and asks the Tribunal to make an order that the Claimant provides further information and medical evidence.

18 September 2015- The Claimant fails to provide particulars and comply with the Tribunal order.

25 September 2015- The Respondent makes application for an unless order concerning the requirement for the Claimant to submit further particulars.

15 October 2015- The Claimant requests postponement of preliminary hearing. The Claimant states he hopes to be fit for a hearing in a month's time.

15 October 2015- The Respondent agrees application because the Claimant has still not provided his further particulars. The Respondent requests that the Tribunal makes orders requiring the Claimant to provide information.

15 October 2015- The Tribunal agrees to postpone the PH listed for 19 October 2015.

22 October 2015- The Tribunal tells the Claimant that if he is medically unfit to pursue the claim at that time the Tribunal expects a medical report, and encloses an order dated 16 October 2015 ordering the Claimant to provide a disability Impact statement and medical records or report by 6 November 2015.

6 November 2015- The Claimant fails to comply with the Tribunal's order by the required deadline.

7 November 2015- The Claimant provides some medical information and states the reason for late service of the statement is attributable to constant harassment by the Respondent.

9 November 2015- The Claimant confirms he will forward a GP report in approximately two weeks. The Claimant confirms he has been asked to refrain from work by his GP and preparing a Scott Schedule is paralegal work.

11 November 2015- The Respondent requests an order for the Claimant to comply with the request to provide medical evidence, and provide evidence concerning his lack of ability to pursue the claims.

15 December 2015- The Claimant provides some medical records and informs the Tribunal that he will endeavour to provide the outstanding medical information and details of the claim in early January 2016, and that his GP has recommended a break of four months.

5 January 2016- The Respondent confirms it is unable to confirm whether disability is conceded.

14 January 2016- The Claimant writes to the Tribunal confirming he is unable to provide particulars of his claim due to ill health and asks for the hearing starting on 11 April 2016 be postponed.

1 February 2016- The Respondent confirms that it is reluctantly prepared to agree the application to postpone the hearing.

12 February 2016- The Tribunal informs the Claimant his application will be considered when the Tribunal is provided with evidence concerning the Claimant's ill health.

2 March 2016- The Respondent writes to the Tribunal to express concern as to how the hearing scheduled for 11 April can go ahead.

2 March 2016- The Tribunal confirms the hearing listed for 11 April is being postponed. Employment Judge Baron orders the Claimant by 18 March 2016 to provide a letter including details of his medical condition, a statement that in the opinion of his GP his condition prevents him from both making progress with his claim and attending any hearing, and when the GP considers the Claimant fit enough to progress his claim and attend any hearing. The Tribunal confirms that there may come a time when the Claimant's claim is to be struck out for multiple failures by him to comply with orders or because a fair trial is no longer possible.

17 March 2016- Claimant sends the Tribunal a letter from Dr Ghufoor dated 8 March 2016 which confirmed he hoped to attend a hearing in 3 months' time.

13 June 2016- The Tribunal sends the Claimant an order (dated 9 June 2016) to provide to the Tribunal and the Respondent by 4pm 1 July 2016 a word table setting out the allegations of direct discrimination, harassment and victimisation.

1 July 2016- The Claimant fails to provide particulars and comply with the Tribunal order.

6 July 2016- The Respondent writes to the Tribunal to apply for the Claimant's claim to be struck out as he has not complied with the order dated 9 June 2016.

11 July 2016- The Claimant responds to the Respondent's strike out application, asking for an extension until the end of August 2016 to provide details of his allegations as he had not received the Tribunal's order. Claimant attaches letter from Dr Ghufoor dated 8 March 2016, letter regarding

dental surgery and a receipt for glasses. The Claimant also confirms ongoing home renovation has exacerbated his health problems.

1 August 2016- The Tribunal writes to the Claimant asking him to urgently comply with the order dated 9 June 2016.

24 August 2016- The Claimant writes to the Tribunal to inform that it is still his intention to meet his proposed deadline of 31 August 2016 but has also been admitted into hospital since his last correspondence.

27 August 2016- The Claimant asks for another extension of at least one month, to end of September 2016.

12 September 2016- The Respondent writes to the Tribunal requesting that the Claimant's claim be struck out.

12 September 2016 – The Claimant objects to the Respondent's application.

15 September 2016- The Tribunal acknowledges consideration is to be given as to whether Claimant's claims should be struck out and a PH will be listed.

27 September 2016- PH scheduled for 7 October 2016 to consider strike out.