



EMPLOYMENT TRIBUNALS

Claimant:

And

Respondents:

Mr J Johnson

- (1) The Harrow Club
- (2) Ms R Oxley
- (3) Mr S Davies
- (4) Mr M Defoe
- (5) Ms P Chappatte
- (6) Ms M Watkis
- (7) Mr C Martin
- (8) Ms K Brokenshire

Heard in-person

On: 28 March 2023

Before: Employment Judge Nicolle

Nonlegal members: Mr I McLaughlin and Mr M Simon

Representation:

Claimant: In-person

Respondent: Ms S Bird, of Counsel

JUDGMENT

The claims for direct race discrimination, harassment and victimisation under case numbers 2204796/2021, 2206 1180/2021 and 2200227/2022 (the Claims) are dismissed under Rule 47 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations (the Rules) and/or under Rule 37 (1) (a), (b), (d) and (e).

REASONS

Introduction

1. The Claims were listed for a 10 day in-person hearing commencing on Monday 27 March 2023. The parties were informed that they need not attend on Monday 27 March 2023 as the Tribunal would spend the day reading relevant

sections of a bundle of documents comprising of 1841 pages together with the witness statements and the parties' respective skeleton arguments.

2. The Tribunal was ready to hear the evidence at 10am on 28 March 2023. Employment Judge Nicolle explained to the parties what documents the Tribunal had read and then invited Ms Bird to highlight which issues in the Case Management Order of Employment Judge Gordon Walker dated 11 May 2022 remained extant. Before she had the opportunity to do so the Claimant abruptly stated that he was unwell and left without any indication as to what he was suffering from and whether, and if so when, he would be returning.

3. At 10:15 EJ Nicolle telephoned the Claimant on his mobile number as stated on his claim form and went straight to voice mail but left a message explaining that the Tribunal intended to reconvene at 1030 to hear the Respondents' submissions regarding the future conduct of the case. He advised the Claimant that if he contacted the Tribunal this would be deferred until 11am. There was no phone communication from the Claimant.

4. EJ Nicolle was informed by the reception staff that the Claimant had left the Tribunal building at approximately 10:15 and had given no indication of his return.

The Respondents' submissions

5. The Respondents say that the claim should be struck out under Rule 37 or dismissed under Rule 47. Ms Bird says that whilst their previous strike out applications had largely been declined by EJ Gordon Walker that the position had changed in that when she considered the application it was not clear what evidence the Claimant would produce to support his allegations of direct race discrimination, harassment, and victimisation. She says that now the totality of the evidence has been produced that it is evident that the Claims have no reasonable prospect of success and should be struck out. She also contends that the Claimant's conduct of bringing the Claims and their subsequent conduct has been vexatious and unreasonable.

6. She says that the Respondents have previously expressed concern in correspondence regarding the likelihood of the Claimant either not attending the hearing or attending then walking out. At a preliminary hearing on CVP before EJ Gordon Walker on 22 May 2022 the Claimant apparently disconnected when one of the strike out applications was accepted and then did not return. This conduct caused the Respondents to consider that an in-person hearing would be preferable. The Claimant objected to an in-person hearing. Nevertheless, it was ordered by the Tribunal that the hearing should be in-person.

7. Ms Bird says that the Claimant sent an email response to the Tribunals letter dated 23 February 2023 to say that he would attend. Nevertheless, within five minutes of the hearing commencing he had left without giving an explanation at the time of his departure. She describes this as manifestly unreasonable conduct.

8. Ms Bird says that the Claimant has a history of not attending meetings and hearings. She refers to his failure to attend his grievance appeal and the disciplinary hearing during his employment with the 1st Respondent.

9. She says that it is manifestly unfair that the 1st Respondent, as a small charity, together with the individual named Respondents, should be put to further time and anxiety with the continuation of the Claims. Three of the Respondents' witnesses are voluntary trustees and two have full time jobs outside their involvement with the First Respondent.

10. She says that anything other than the striking out of the entirety of the Claims pursuant to Rule 37, or their dismissal pursuant to Rule 47, would be inconsistent with the overriding objective. She refers to the very significant time incurred in the conduct of the Claims by the Respondents and the Tribunal.

11. She says that the Claimant's conduct in previous tribunal cases against other respondents is relevant as it points to an ongoing pattern of unreasonable behaviour.

How we should deal with the Respondents' applications

12. Ms Bird invited us to strike out the claims and/or dismiss them without further notice to the Claimant. The Respondents are concerned that any notice to him of the Tribunal's possible intention to do so would invite further prevarication.

Emails sent on behalf of the Claimant at 11:17 on 28 March 2023

13. At 11:17 on 28 March 2023 a Mr A Oyem sent an email to the Tribunal, but not copied to the Respondents in accordance with Rule 92, on behalf of the Claimant. He stated:

"I am writing to inform you that after attending the Tribunal hearing, for the above case, today 28 March 2023, the Claimant suffered a mental breakdown brought about:

- PTSD as a result of discrimination suffered at the hands of the Respondent.
- Abuse at the hands of numerous Tribunal representatives evidence of which come in the form of numerous complaints that have either been ignored or wrongly rejected.

It should be noted that several times before the hearing, the Claimant informed the Tribunal that as well as taking care of an elderly mother, severe strain on his mental health meant attending the hearing via video call was more suitable, and preferred.

The Claimant's episode has been pretty severe, and as such will not be able to take part in any hearing for at least a month".

Procedural history

14. On 16 March 2022, the Respondents made an application for the strike out of the Claims and for a deposit order. The strike out application was made on the following grounds:

15. That the Claims are scandalous and vexatious. In particular:

(a) The Claimant had a history of bringing discrimination, victimisation and harassment claims in the employment tribunals, making allegations strikingly similar to those against the Respondents in the Claims. He had made four such claims in a space of only four years, each of which have been unanimously dismissed.

(b) The Claims were designed to cause maximum disruption and distress to the Respondents and included claims against individuals who were only tenuously connected to the facts and who had extremely limited interaction with the Claimant.

(c) The Claims involved the repetition of the same allegations against all Respondents, rather than considering whether particular grounds of complaint applied to different individuals.

(d) The Claimant making complaints to the police alleging criminal harassment upon receipt of civil and professional correspondence from the 1st Respondent was further evidence of his vexatious approach.

16. The Claims have no reasonable prospect of success in that they are overly general and repetitive.

17. The Claims in relation to events prior to 1 June 2021 are out of time.

18. There is no prospect of the Claimant meeting the legal requirements for claims of direct race discrimination, victimisation, and harassment.

19. At a preliminary hearing before Employment Judge Walker on 11 May 2022 the third claim against Ms Walker and Mr Stoddard-Scott was struck out as having no reasonable prospect of success. The victimisation claims at paragraph 4.2.1 – 4.2.8 of the list of issues in the 25 April 2022 case management order were struck out as having no reasonable prospect of success. A deposit order was made in respect of the victimisation claims at paragraphs 4.2.9 - 4.2.21 of the list of issues. The other applications for strike out and/or deposit orders were allowed to proceed partly because EJ Gordon Walker considered that the Claimant's previous unsuccessful claims did not have a bearing on the present claims arising from new employment in a different work place and there were

disputes of fact to be heard. EJ Gordon Walker adopting the established practice at a preliminary hearing of taking the Claimant's case at its highest.

20. In an email of 16 May 2022 the Claimant stated that he would like a video hearing due to health reasons.

21. In a response dated 27 May 2022 the Respondents noted that the Claimant had provided no evidence of his need to attend a video hearing for health reasons. They went on to state:

"If the Tribunal wishes to entertain this requested should request a doctor's note, or other form of medical evidence, on account of the prejudice that will be suffered by the Respondents if the Claimant attends the hearing remotely".

22. On 10 June 2022 EJ Gordon Walker listed an in-person hearing. However, as a result of further representations made by the Claimant regarding his alleged health issues she advised the parties on 14 July 2022 that the hearing would take place by video as an adjustment to accommodate his health.

23. On 15 February 2023 the Respondents made an application to have the hearing in-person as, inter alia, no medical evidence had been provided by the Claimant to support the need for a virtual hearing. They also referred to issues with his participation in three earlier case management hearings which had taken place via CVP. This included his apparent difficulty accessing documents but also his disconnecting from the hearings, to include that on 11 May 2022 when he did not re-join despite attempts by the clerk to contact him by telephone.

24. In a response on 15 February 2023 the Claimant said that the reason for his request for a video hearing was because he had to care for his elderly mother.

25. In an email of 18:14 on 16 February 2023 sent by the Claimant to the Tribunal, but not copied to the Respondents, he stated:

"I cannot and will not attend hearing in-person as both reasons I have presented the Tribunal are true.

Plus previous complaints made by me clearly show Respondents have been shown preferential treatment to the cost of justice".

26. In response to the Claimant's email EJ Baty in a letter from the Tribunal dated 17 February 2023 stated:

"In the absence of any medical or other compelling evidence as to why the Claimant cannot attend the final hearing in-person, beyond the Claimant's own assertions, that hearing remains in-person for the reasons already given.

The Claimant stated in his email that he cannot and will not attend an in-person hearing. If he is not going to attend the hearing, he should notify the Respondent and the Tribunal as soon as possible that he is withdrawing his

claim; if he does not do so but simply does not attend the hearing such that the Respondent unnecessarily incurs the costs of further preparation for an attendance at the hearing, the Claimant risks being ordered to pay those costs”.

27. In an email from the Claimant to the Tribunal of 17 February 2023 (again not copied to the Respondents) he stated: “I the Claimant and not withdrawing my claim, but I am asking not to be treated less favourably than the Respondent, because I am a black man”.

28. In a letter sent by the Tribunal dated 23 February 2023 EJ Baty noted the Respondents’ concerns about the Claimant not attending the hearing. He referred to previous correspondence touching on the implications for the Claimant if he simply did not attend the in-person hearing in March 2023. He advised the Claimant that if the Tribunal considers that such non-attendance is unreasonable, it can make an Order that he pays the Respondents’ costs or a preparation time order. He said:

“The Claimant has therefore been warned of the consequences of his not attending”.

29. He went on to state:

“I appreciate that the Claimant would prefer a CVP hearing to an in-person hearing; however, the decision has been taken that it will be in-person. What is striking here is that the Claimant has in previous correspondence declared that he will not attend the in-person hearing. For that position to remain is unreasonable conduct by the Claimant. I am therefore considering striking out the claim”.

30. Further:

“The Claimant is therefore ordered within seven days of this email to confirm in writing to the Tribunal and the Respondent that he will be attending the in-person final hearing on 27 March 2023. If he does not comply with this Order, the claim will be struck out automatically”.

Tribunal’s email to the Claimant of 29 March 2023.

31. Following receipt of the email sent on behalf of the Claimant of 11:17 on 28 March 2023 the Tribunal sent an email to him on 29 March 2023 notifying him that the Tribunal was considering dismissing the Claims under Rule 47 and/or striking them out under Rule 37. The Claimant was asked to provide any written representations in relation to this intention by 4pm on 4 April 2023 or alternatively to request a hearing and if so whether he would wish any such hearing to be heard by CVP or in-person.

32. The Claimant did not reply to the above email by 4 PM on 4 April 2023.

Previous tribunal claims brought by the Claimant

33. in the Respondents' solicitors' application for a strike out dated 4 May 2022 they made extensive reference to what they described as "similar failed litigation brought by the Claimant against previous employers". They referred to the following tribunal proceedings brought by the Claimant since 1 January 2018:

34. Case number 3346837/2016 claims of sex discrimination brought against a primary school.

35. Consolidated case numbers 2303752/2018, 2301282/2019, 2301283/2019 and 2301284/2019 against a charity youth club and its trustees which were withdrawn by the Claimant and dismissed by the tribunal on 20 January 2020.

36. Consolidated case numbers 3201220/2019, 3201221/2019, 3201222/2019 and 3201223/2019, claiming age, race and sex-based discrimination, harassment and victimisation against a charity youth club and its employees. The tribunal dismissed all claims and concluded that the Claimant's own actions were at the core of his problems with his then employer.

37. Case number 3201592/2020 claims of age-based discrimination, harassment and victimisation against a charity engaging with young people in the fight against hate crime, and its Chief Executive Officer. All the claims were dismissed by the tribunal, which found that the root of the Claimant's grievances was his own uncooperative stance and lack of understanding of his duties.

38. Consolidated dear case numbers 2307618/2020, 2307851/2020 and 2308282/2020 against a charity supporting disadvantaged youths, the Devas Club and 6 individual respondents. The claim was struck out in a judgment dated the 26 May 2022.

39. The Respondents' solicitors included judgments from the above tribunal cases at pages 205 to 277 of the bundle of documents (collectively referred to as the Previous Claims). Whilst we did not consider the Previous Claims in detail we nevertheless considered that their number and nature pointed to a pattern of conduct consistent with the Claims and therefore relevant in the context of the Respondents' application to strike out the Claims because the Claimant's conduct of them has been scandalous, unreasonable or vexatious.

Relevant law

40. Rule 47 provides that if a party fails to attend or to be represented at the hearing the tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so it shall consider any information which is available to it after any inquiries that may be practicable about the reasons for the party's absence.

41. Rule 37 provides:

(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 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 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 is not being 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 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.

42. The Tribunal reminded itself of the well-established principles in relation to strike out under Rule 37(1) on the basis that a case has no reasonable prospect of success. Mechkarov v Citibank NA [2016] ICR 1121 is authority for it should only being in the clearest case that a discrimination case should be struck out and that a tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.

43. In Anyanwu v South Bank Students' Union [2001] IRLR305, HL per Lord Steyn at para 24 to the effect that it should be only in the most obvious and plainest cases that a discrimination claim should be struck out and that such cases are generally fact sensitive.

44. Tribunals should be reluctant to strike claims out other than in the clearest cases and as set out in Citibank a Claimant's case must ordinarily be taken at its highest.

Conclusions

Rule 47

45. The Tribunal considered that whilst the Claimant had attended the commencement of the hearing he departed within five minutes without

explanation. Therefore, we considered that this did not constitute attendance given that the Claimant had not even been sworn in to commence his witness evidence. Further, he left without giving any explanation as to his the reasons or indication as to his possible return. He simply stated that he was feeling unwell and walked out.

46. We are mindful that there had been previous correspondence regarding the Claimant's apparent unwillingness to attend an in-person hearing. He had been given prior notice by EJ Baty as to the consequences of his non-attendance.

47. The Tribunal took account of the email sent on behalf of the Claimant at 11:17 on 28 March 2023. The suggestion that the Claimant suffered a mental breakdown is, absent any supporting medical evidence, an assertion rather than a professionally diagnosed medical condition. Further, given that the Claimant is claiming PTSD as a result of alleged discrimination suffered at the hands of the Respondents, and what he contends constitutes abuse at the hands of Tribunal representatives, even if it is accepted that he has a genuine medical condition, he would have been aware of it prior to attending the Tribunal.

48. Further, it is difficult to see that this situation will change to enable any subsequent listing of the case whether by CVP or in-person. Therefore, this is not a case of a postponement application for a finite period but rather a potentially open ended postponement of what had been listed for a ten day hearing. This is particularly so given that the Claimant is referring to PTSD deriving from his employment by the 1st Respondent when his active employment ceased in September 2021. It is also relevant that none of the Claimant's complaints regarding the conduct of judges at London Central had been upheld. Further, from our review of the previous case management orders of EJ Gordon Walker we consider that his complaints are entirely without foundation.

49. It is relevant to consider the previous assertions made by the Claimant regarding his opposition to an in-person hearing. We consider that the grounds of objection are inconsistent given that he has referred to health issues, but with no medical evidence being supplied, and performing and caring for his mother. We consider this indicative of the Claimant's unwillingness to attend an in-person hearing

50. We do not consider that Mr Oyem's email discloses legitimate reasons explaining or justifying the Claimant's behaviour.

51. This is not a case of the Claimant suddenly and unexpectedly being taken unwell. We consider that his actions are consistent with a pre-existing unwillingness to participate in an in-person hearing. We do not consider that there was anything that took place within the five minutes the Claimant was present which could have contributed to him having the "mental breakdown" he claims to have suffered. He had not yet been called to the witness stand and the Employment Judge was merely addressing preliminary organisational issues and was about to discuss the list of issues with the parties.

52. The Claimant has a past history of putting forward various reasons for his non-participation in-person hearings. We consider that the Respondents had good reasons to request an in-person hearing and this was agreed by EJ Baty. The default position is that multi-day discrimination cases are heard in-person unless both parties are otherwise agreed. This is particularly so with a bundle of over 1800 pages particularly where the Claimant has previously had difficulties accessing and navigating documents online.

53. The Claimant has not provided any medical evidence at any stage in the proceedings in respect of his purported ill health. We consider this surprising given that he contends that the PTSD which he suffers from is at least in part attributable to his experiences whilst employed by the 1st Respondent. Given that his active employment ended in September 2021 there has been plenty of time for him to obtain medical evidence. He failed to do so. We also consider it relevant that he attributes the alleged abuse by EJ Gordon Walker and Regional Employment Judge Wade as contributing to his PTSD. Given that the Claimant's complaints were rejected as being wholly without foundation we consider it implausible that that the performance of their judicial functions caused, or contributed to, his purported PTSD.

The Claimant's postponement request

54. The email sent by Mr Oyem at 11:17 on 28 March 2023 arguably constitutes an application for a postponement of the hearing. However, it is deficient in that it does not comply with the Presidential Guidance on Seeking Postponement of a Hearing, which reminds parties that any application for postponement should state both why it is made, and why it is considered that it would be in accordance with the overriding objective to grant the postponement. Further, all documents relevant to the application (i.e. medical certificates and evidence) should be provided. None were provided. Further, no explanation was provided as to why the Claimant's medical condition would improve within a month given that the events he claims have caused, or contributed to, his PTSD emanate from his relatively brief period of active employment with the 1st Respondent between May and September 2021 and previous experiences with judges at London Central during CVP hearings in 2022.

55. For the above reasons it would not be appropriate to grant the Claimant a postponement. We consider that there would be a very substantial risk that his future conduct of the Claims, if such a request were to be granted, would be characterised by the same, or similar, issues thereby giving rise to further inconvenience, cost, and anxiety for the Respondents. This would be unreasonable and inconsistent with the overriding objective. Further, we are conscious of the utilisation of Tribunal time and resources. The Tribunal has already spent a full day reading a substantial volume of documentary material prior to what was anticipated to be the commencement of the evidence on Tuesday 28 March 2023. That day was in effect wasted as result of the Claimant's abrupt departure. There have been three case management hearings and also significant correspondence from the parties regarding arrangements for the hearing necessitating Tribunal decisions.

56. We therefore consider that it is appropriate to dismiss the Claimant's case for non-attendance under Rule 47.

Rule 37

57. The Tribunal considered whether it was appropriate to strike out the Claims.

(1) (a) That it is scandalous or vexatious or has not reasonable prospect of success

58. The Tribunal is mindful that the majority of the claims were not struck out by EJ Gordon Walker on 11 May 2022. She did not have the benefit of evaluating the totality of the Claimant's witness evidence and relevant documents in the bundle. We had that opportunity on 27 March 2023.

59. We consider that the 27 individual complaints raised by the Claimant, which he alleges constitute direct race discrimination and harassment, and six which he also claims constitutes victimisation, arose from various minor and routine workplace issues in respect of which he felt dissatisfied and not on account of his race. For example, his contention that he was provided with an I-pad only having 3G rather than 4G and that this constituted an act of race discrimination. We consider it wholly implausible that the Respondents deliberately provided the Claimant with a sub-standard I-pad and, in any event, they acted with all possible expedition to assist him and provide a replacement.

60. Whilst we have not heard from the Claimant we have nevertheless read his witness statement and considered the rebuttal statements on behalf of the Respondents. On the basis of the witness statements, and the contemporaneous documentation, we do not consider that the Claimant has put forward any evidence which infers race discrimination and/or which supports claims of harassment and victimisation.

61. We consider that the evidence shows that the 2nd, 3rd and 4th Respondents supported the Claimant, communicated with him professionally and positively and answered his complaints and queries appropriately. The 6th and 7th Respondents carried out a fair and impartial investigation of his grievance against the 2nd, 3rd and 4th Respondents. The 5th and 10th Respondents had very peripheral involvement being limited, respectively, to delegating responsibility for investigation of the Claimant's grievance, and sending him a zoom invite to his disciplinary hearing by email.

62. Whilst the Claimant has made numerous assertions of direct race discrimination, harassment, and victimisation he has provided no evidence to support inferences that what he contends constitutes less favourable treatment, harassment and detriments were on account of his race. We therefore find that on their merits the Claims have no reasonable prospect of success.

(1) (b) That the manner in which the proceedings have been conducted by or on behalf of the Claimant has been scandalous, unreasonable, or vexatious

63. We find that the Claimant has conducted the Claims in an unreasonable and vexatious manner. We make this decision for the following reasons:

- (a) The Claimant issued four separate claims based on identical material, but progressively adding additional employees, trustees or other representatives of the 1st Respondent. Some of these individuals were very tangentially or peripherally related to the acts or omissions relied on by the Claimant. We consider that the Claimant's primary objective in adding additional Respondents was to maximise disruption and cost to the Respondents rather than because he genuinely considered that it assisted in advancing the Claims.
- (b) The Claimant had a proclivity to disconnect from hearings when matters went against him, for example, disconnecting from the CVP hearing conducted by EJ Gordon Walker on 11 May 2022.
- (c) He has a history of raising complaints of alleged bias or other inappropriate conduct by representatives of the Tribunal to include EJ Gordon Walker and REJ Wade which were found to be without substance.

(1) (d) That it has not been actively pursued

64. Given that a 10 day hearing had been listed with significant notice to the parties, and the Claimant only remained in attendance for five minutes, we consider that there is significant doubt whether he has a genuine intention to actively pursue the Claims.

(1) (e) That the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim

65. We consider that the ability to have a fair hearing is doubtful given that it would appear unlikely that the Claimant would be in a position to attend any reconvened hearing and remain for its duration. This would create unreasonable and disproportionate additional disruption, cost, and anxiety for the Respondents.

Final Conclusions

66. For the above reasons we consider it appropriate to dismiss the Claims as a result of the Claimant's non-attendance under Rule 47, but in the alternative to strike them out under Rule 37. We have taken into account various factors in reaching this decision to include our view that the Claimant did not ever want to engage with the direction that there should be an in-person hearing and on balance was likely to have had a pre-ordained intention not to participate in the hearing. We consider that this constitutes wholly unreasonable conduct. We have

also taken into account the history of his conduct both in respect of the Claims but also the Previous Claims, against respondents in the voluntary and public sector, which are very similar to the Claims and which have been wholly unsuccessful. We also considered the lack of merit of the Claims based on the totality of the evidence.

67. In relation to Rule 47 whilst the Claimant physically attended his appearance was so brief, and his departure so abrupt and without explanation, that we conclude that he did not attend the hearing in any meaningful way and the Claims are therefore dismissed.

Employment Judge Nicolle

11 April 2023

Sent to the parties on:

11/04/2023

For the Tribunal: