



EMPLOYMENT TRIBUNALS

Claimant: Ms O Adeyanju
Respondent: Barts Health NHS Trust
Heard at: East London Hearing Centre
On: 28 November 2023
Before: Employment Judge Reid

Representation

Claimant: in person – accompanied by her cousin Ms D Adeyanju as notetaker
Respondent: Mr A Ross, Counsel

JUDGMENT (RESERVED)

Strike out and Costs

The judgment of the Tribunal is that:-

1. The Claimant's claim is struck out in its entirety under Rule 37(1)(b) and Rule 37(1)(c) of the Tribunal Rules 2013. This means that the Claimant's claim does not go any further.
2. A costs award of £2,250 is made in favour of the Respondent under Rule 76(1)(1) of the Tribunal Rules 2013. The Claimant must pay the Respondent this amount by **1 February 2024**.

REASONS

Background

1 This hearing was listed to hear the Respondent's application dated 21 November 2023 for a strike out and for costs (with an associated costs schedule). A strike out hearing (on a previous basis) for 28 November 2023 had already been listed on 6 September 2023. This strike out application was made under Rule 37(1)(b) (manner of conduct of proceedings unreasonable), Rule 37(1)(c) (non-compliance with Rules or Orders), Rule 37(1)(d) (not actively pursued) and Rule 37(1)(e) (fair trial not possible). The costs application was made

under Rule 75(1)(a) (unreasonable conduct in not attending hearing on 19 October 2023 and failing to progress claim since 6 September 2023); the amount claimed was Counsel's fees of £5,750 (corrected from para 30 of the application to reflect the correct amount of £1250 for the drafting fee) and solicitors costs of £2,470.03.

2 The Claimant attended the hearing with her cousin who assisted by taking notes for the Claimant. The following adjustments were put in place for the Claimant:-

- 2.1 A choice of adjustable chair
- 2.2 Before the hearing started, an assessment of the chair options and set up of the chair of her choice assisted by the clerk
- 2.3 Regular breaks which were long enough to enable the Claimant to go outside for a few minutes
- 2.4 A fan.

3 The problems which arose at the hearing on 6 September 2023 when the Claimant became unwell did not arise at this hearing and with adjustments and breaks the Claimant was able to take part fully. The hearing lasted from 10.15 am to 3.55pm with breaks.

4 The Respondent provided a bundle on 21 November 2023 (257 electronic pages). After the bundle had been produced and on 23, 27 and 28 November 2023 the Claimant had provided multiple new documents, some of which were a response to the strikeout application (emails dated 23 and 27 November) and some of which appeared to be a belated attempt to comply with some previously made Tribunal Orders, some time after the deadline for such compliance had expired (email dated 28 November at 3.02am) The multiplicity of late in the day new documents made identifying and managing the documents for this hearing difficult. The Claimant also brought with her two brown envelopes of medical evidence – see below.

5 I heard oral submissions on both sides. Although the Claimant finds hearings difficult she was able to make the points she wanted. At one stage she asked that her cousin speak for her as her cousin was notetaker but I advised that if she was tired it would be better to have a break and then to continue when ready because her cousin was not her representative and it was important I heard from the Claimant herself.

6 In relation to the costs application the Claimant asked that I take into account the Nationwide bank statement she had provided before the hearing and the payslips in the bundle; she is still employed by the Respondent on full pay. She also said during this hearing that she had other documents she could provide about her finances if the Tribunal wanted them but if there were other documents she had not provided them before the hearing as ordered. This was a further example of the Claimant being ordered to provide relevant evidence, not providing it and then subsequently offering to provide it when it was too late for the Respondent properly to consider it – see further below.

Overall history of this claim

7 The Claimant presented this claim on 3 August 2022. There have been four preliminary listed hearings so far (before this hearing), on 10 October 2022 (Judge Burgher), on 5 July 2023, on 6 September 2023, on 19 October 2023 and a further one on 14 February 2023 which was postponed at the request of the Claimant for ill health reasons (page 90).

Her previous application to postpone that hearing on the basis of lack of legal representation had been refused (page 68).

8 Despite four preliminary hearings having been dedicated to identifying the issues (and the hearings after the 6 July 2023 one listed before me to ensure continuity taking into account that the Claimant is unrepresented to assist her in that process), it has not been possible to complete the process of clarifying her claim and assembling a list of issues. As it stands at the moment there has only been part progress on identification of the claims undertaken at the hearings on 5 July 2023 and 6 September 2023 but not completed because the Claimant did not then attend the hearing on 19 October 2023 to complete that process – see below. The Tribunal file amounts to three substantial correspondence files already.

9 The first preliminary hearing on 10 October 2022 (page 55) was unfortunately affected by the fact that it was not evident to Judge Burgher or the Respondent that there had been a 15 page attachment to the claim form, although it appears the Claimant did not alert Judge Burgher to the attachment having been sent with the claim form. The discussion at that hearing was therefore based on the Claimant's own explanation of her claim in her ET1 form only, which was relatively brief and she did not mention all the extensive matters set out in her 15 page attachment spanning several years. She did refer in her claim form to an attachment (page 40) but it appears this was not picked up. When the Respondent had submitted its response on 13 September 2022 it had been on the basis of only what was contained very briefly in the ET1 claim form. The existence of the 15 page attachment came to light in February 2023 (page 71). The claim had not got off to a very good start and this was not entirely the fault of the Claimant.

10 The Claimant made an amendment application on 4 August 2023 (page 170). That could not be decided because her existing claim had to be clarified first.

11 The final hearing had originally been listed for March 2024 (3 days). After the hearing on 6 September 2023 two further days had been added when it became evident that the original listing was too short. By the hearing on 19 October 2023 (which the Claimant did not attend) it was evident that that a final hearing in March 2024 was not feasible given the lack of progress on the claim. Had that final hearing taken place it would have been around 18 months after she presented her claim.

12 I have taken into account that the Claimant is not represented and is not familiar with Tribunal procedure (her previous December 2021 claim having settled). However she is subject, as are all parties, to the Tribunal Rules of Procedure 2013. These Rules are in place so that there can be an orderly step by step and transparent progression of a claim, being fair to both parties and not involving random or haphazard progression of the claim or response at times to suit the parties. Identifying the real issues which are covered by the claim is key to this. Both parties are under an obligation to co-operate both with each other and with the Tribunal. The Tribunal must take into account the factors set out in Rule 2 which includes dealing with cases in a proportionate way as regards the complexity and importance of the issues, avoiding delay and saving expense. Another factor is ensuring the parties are on an equal footing. The consequences of not complying with Tribunal Orders were set out in each of the sets of Orders the Claimant was sent after each preliminary hearing. The Tribunal does not give legal advice and this has been explained to the Claimant. Many claimants do not have legal representation but they still have to comply with

Orders and co-operate with the other party and the Tribunal.

13 I have taken into account chapter 1 of the Equal Treatment Benchbook as regards litigants in person.

The Claimant's approach to this claim

5 July 2023 preliminary hearing (page 162)

14 At the next (video) hearing in July 2023 the Claimant produced a lengthy document which contained matters requiring an amendment. In that document she raised three new disabilities and referred to a further two at the hearing (summary para 5). She had not mentioned these further conditions to Judge Burgher in October 2022 when discussing her claim. Although Judge Burgher did not have the 15 page attachment they did discuss the claimed disabilities and she did not mention these further new ones. She was ordered to make her amendment application by 4 August 2023 which she did, one of the very few occasions she has met the required deadline, but it was in her interests to do so because she wanted to add something to her claim (another example being when she provided her schedule of loss on time). When she made that application it only added the eye condition as an additional claimed disability and did not refer to the other four additional disabilities discussed at the 5 July hearing. It therefore appeared that the Claimant was not going to go ahead with adding in the other new disabilities and only wanted to amend as regards the eye condition.

15 In order to assist the Claimant and to make it easier for her to focus on what was actually in her claim (ie in the 15 page attachment) and given she had struggled at the hearing to articulate things clearly I rolled up my sleeves and prepared for the Claimant's benefit a numbered list of the 62 allegations in her 15 page attachment, to be gone through at the next hearing, advising the Claimant (para 12) that she only needed to consider that list before the next hearing, she was not being required to produce a response to it in advance of the next hearing. The list which took some time to produce was to assist the Claimant to identify what was her claim ie the actual acts complained of as discrimination, it being very difficult from her long and discursive account to see clearly what the claimed acts of discrimination were as opposed to it being a narrative of what she said had happened.

6 September 2023 preliminary hearing (page 217)

16 The Claimant applied for extra time before the next 6 September 2023 hearing, citing health grounds (page 184). The only thing she had been required to do from the previous hearing had been to submit her amendment application, which she had by now done. It therefore appeared she was asking for a postponement of the hearing. The next hearing had been listed for a whole day in person because the Claimant was not represented and had struggled at the previous July 2023 video hearing. That postponement application was refused (page 192) on the basis that no medical evidence had been provided of an inability to attend and the date had been listed by agreement at the previous July 2023 hearing. The letter explained that it was important she attend and why and advised her that she did not need to produce any further documents for the hearing.

17 The day before the hearing at 5.23 pm (page 199) the Claimant sent the Respondent 10 documents (page 200) but saying there would be more. She had previously said they were only drafts (page 199). I discussed the problem of 'drip feeding' with the Claimant at the hearing and summarised that advice at para 49 of the summary of this hearing.

18 The Claimant unfortunately became unwell in the afternoon. By this point I was clarifying item 27 out of 62. The next two preliminary hearing dates therefore had to be fixed in her absence – the first (19 October 2023) to complete the clarification of her claim and the second (28 November 2023) to deal with other strike out issues (now overtaken by this strike out application). These dates were fixed so that the next steps in the claim could be dealt with sequentially and in order.

19 The Claimant had already supplied some medical evidence on the disability issue but had said at the July 2023 hearing that she was not sure she had provided everything. I therefore made an Order at this hearing (albeit after she had left) that she obtain a copy of her GP records. Although the Respondent had conceded disability on 5 January 2023 that was on the assumption that her ET1 claim form as discussed at the hearing in October 2022 covered quite a limited period, whereas in fact her attachment related events back to 2018. This new Order was made partly to assist the Claimant to manage her medical evidence because it would come in a set of documents with numbered pages and would include all hospital and clinic letters in one go. I could see from the file that she had previously provided extracts from her GP records and given she was unclear herself as to whether she had provided everything it would be better to obtain a complete set to which any OH reports produced by the Respondent could be added. Despite the note on the front page of the summary about making that request promptly the Claimant waited till mid-November 2023 even to ask her GP for the GP records. This was despite knowing how to do it (she had done it before) and being in touch with her GP. The Claimant was advised to contact her GP promptly. She did not even make the request of her GP practice until mid November 2023 – see below – some two months later. The deadline for the GP records (assuming there had been no delay at the GP end) and for an updated disability impact statement (explained at paras 14-16 in straightforward language) was 18 October 2023. The Respondent was then to reconsider its position on disability by 15 November 2023. Because the Claimant did not provide the GP records and updated disability impact statement (explained in detail to her at para 15-16) as ordered, the Respondent could not re-address the disability issue. The disability issue is a cornerstone of the Claimant's claim. It was important to establish the position on this issue given it was by now over a year after the Claimant presented her claim. It was also important for the Claimant to grasp that at present her claim did not include everything she said was a disability, but only what was already in her claim (unless permitted to amend).

20 At this stage the hearing for 28 November 2023 was listed for a strike out on another basis (explained to the Claimant at para 22). The basis of that strike out then had to shift following the Claimant's non-attendance at the next hearing on 19 October 2023. Because the Claimant did not attend the next hearing on 19 October 2023 and the situation the Respondent had to deal with had therefore changed, the hearing on 28 November 2023 which would otherwise have dealt with already identified other strike out legal issues had to be converted to deal with this new basis of strike out, involving further work for the Respondent to adapt to the changed circumstances and to make a differently based strike out application.

19 October 2023 preliminary hearing (page 236)

21 The next hearing for 19 October 2023 was listed and the Claimant was informed of the date (page 217, sent to her on 13 September 2020 page 216). A separate note to her on the front page of the preliminary hearing summary of 6 September 2023 was included to alert her to the new date and the fact that she needed to ask for her GP records promptly. A separate notice of hearing was sent to her on 16 September 2023 (page 224). The Claimant said at this hearing she was not aware of this new date because she was not checking her emails but she was able on 20 September 2023 to send in a GP fit note (page 232) so was accessing her emails and she sent this after these documents were sent to her by the Tribunal; if she did not open and read them she was ignoring something obviously from the Tribunal. Even if she was not aware of the date as claimed it was because she was choosing not to open the emails from both the Tribunal and the Respondent's solicitors she could see in her inbox and/or not logging in regularly even though she knew she had a Tribunal claim to progress and knew that she needed to know next steps.

22 The Claimant did not say why she was sending the GP certificate or apply for a postponement but I find it to be a precursor to a decision not to attend, consistent with not replying to the Respondent's solicitors emails dated 20 September 2023 or 12 October 2023 (page 234) which also referred her to the next hearing date. That spanned a period of 22 days the Claimant was saying she was not checking her emails, after sending in the GP certificate – she was failing to check her emails for a prolonged period.

23 I find that the Claimant was aware of the date of the next hearing on 19 October 2023. Even if I accepted her account that she was not opening emails from the Tribunal (or the Respondent's solicitors) at this time that would have amounted to a clear failure to co-operate with the Tribunal ie by ignoring correspondence from the Tribunal.

24 The Claimant has not provided medical evidence to support an inability to open her emails, read them and reply to emails as required; although she may have some restrictions in her health, she is not at work and can take breaks when dealing with an email or documents and is not required to spend prolonged time every day dealing with her claim but can do things in stages if necessary. The only evidence she referred to at this hearing which she said supported her inability to progress her claim and deal with correspondence was she said advice from three doctors to rest but that would not preclude dealing with her claim including checking her emails, reading what is sent to her and responding where required.

25 The Claimant knew or should have known the importance of this hearing (6 September 2023 summary para 2). Her attendance was critical given that the previous hearing had ended early without completion of the clarification of her claim. Although that hearing had been hard work for her, it had demonstrated the importance of her identifying what she said the Respondent had done wrong, even if needing assistance with putting legal labels on the elements of her claim.

26 The Claimant was then ordered to provide a copy of the discharge summary from the hospital for 19 October 2023 by 2 November 2023 (Order 11). She knew how to get documents from her GP if she did not have a copy herself. She had obtained a discharge summary for her A&E attendance on 1 September 2023 by 5 September 2023 when she sent it to the Tribunal. She did not provide one for the 19 October 2023 attendance by the

deadline (or ever).

27 The Claimant was also ordered to tell the Tribunal by 2 November 2023 whether she was saying that she was unwell in the short term or too unwell in the long term to progress her claim. This was the Tribunal giving the Claimant another opportunity to explain herself and so the Tribunal could consider the future progress of the claim which by now had been going on for around 14 months. The Claimant did not respond by the deadline.

28 The Respondent now had to change course regarding a strike out application (Order 14) and the previous deadline set for the previous basis of the strike out had to be changed to reflect the changed situation. It was flagged up to the Claimant that she had not provided her updated disability impact statement and GP records as ordered on 6 September 2023. This summary was sent to the Claimant on 23 October 2023 (page 235).

29 The Respondent had incurred the legal costs of attending the 19 October 2023 hearing which the Claimant did not attend. A day had been set aside by the Tribunal to progress her claim and sleeves rolled up to complete analysis of items 28-62 in the list which had been prepared to assist the Claimant. The opportunity to complete that and establish a list of issues was lost. That had a knock on effect on the next hearing (the Respondent now had to change tack) and on the final hearing which was no longer feasible (para 1).

After the preliminary hearing 19 October 2023

30 On 10 November 2023 the Claimant emailed the Tribunal (page 241) attaching a further GP certificate and saying she had only just picked up her emails. She referred to medical advice about having a complete rest which she did not provide despite the Order that she provide it by 2 November 2023. She did not provide any medical evidence showing that she had been incapacitated throughout the period since the hearing on 6 September 2023, only referring to procedures in September and October 2023 without detail. She asked if the Tribunal needed the notes from the hospital on 19 October but she had already been ordered to provide them. The Tribunal response dated 15 November 2023 (page 246) repeated the advice about not drip feeding documents and extended the deadline for medical evidence about her ability to progress her claim to 20 November 2023 and to respond to the Tribunal question (repeated for her in this letter) to 17 November 2023 because her email dated 10 November 2023 had not been clear. She was reminded again that she would need to respond to the Respondent's strike out application and that the hearing on 28 November 2023 was going ahead as listed.

31 On 10 November 2021 the Claimant sent another email (page 241) applying to reduce the hearing to half a day (page 241).

32 On 18 November 2023 the Claimant applied to postpone the hearing on 28 November 2023 (page 250). She said her medical difficulties 'may be short term' and that she could not specify a time. She asked for more time to obtain information from her doctors. The Tribunal response dated 23 November 2023 sent at 14.38 refused that application, explaining why.

33 Although she had sent a number of emails referring to health problems and ongoing appointments the Claimant had not specifically responded to the Respondent's application

for a strike out and for costs sent to her on 21 November 2023 and the hearing was now only a few days away. The 5pm deadline of the day before the hearing was fixed in the Tribunal letter to enable the Respondent time to at least read any response she sent and to ensure that if the Claimant was not going to attend I at least had her written comments on the application to ensure I had both parties' positions, taking into account that strike out is a draconian measure and costs are the exception rather than the rule and I had no evidence about what the Claimant said was her ability to pay a costs award. A represented party would have been very unlikely to have been given the leeway to provide a response the day before the hearing.

34 The Claimant emailed the Respondent (and copied to the Tribunal) Tribunal on 23 November at 23.44 saying (apparently to the Respondent) she had been unable to read all the documents attached to emails and did not have the strength to read many documents. She now attached a hospital form showing that she had been referred for a blood test at the hospital at 12.37 on 19 October 2023; she did not provide a discharge summary of the type she had provided for 1 September 2023 or an explanation of why there wasn't one, if that were the case. She referred to the GP certificates already provided but she was already aware that a GP certificate did not support an assertion that she could not deal with her claim at all (19 October 2032 summary para 9). She asserted that her GP certificates had been ignored but they had not been. She referred to an appointment on 1st September 2023 which she said had been ignored but it only showed that she had attended A& E on 1 September 2023 at 12.56 (with no shortness of breath, walking normally and appearing systemically well) and was discharged to go home at 16.51 with no follow up and to continue with existing pain relief and nothing further from her GP to support an inability to attend the hearing a few days later (which she had then attended, even if she had to leave early). The email appeared to be asking the Respondent to agree to a postponement (final para) even though one had already been refused by the Tribunal earlier that day, explaining why.

35 The Claimant emailed the Tribunal on 27 November 2023 at 12.58 saying that she was not well enough to attend the hearing the following day but appearing to be saying that she would however be attending. She attached two medical reports from 2022 (OH printed in August 2022 and respiratory consultant dated June 2022) but did not identify what issue these related to. It appeared they related to her issue with room ventilation because both mentioned this. They were therefore not being provided as evidence of an inability to progress her claim or attend hearings (with adjustments) in 2023.

36 The Claimant emailed her response to the Respondent's strike out application at 17.00 attaching a further OH report about arm pain dated January 2023 and resending the August 2022 and June 2022 reports already provided. She also attached documents showing she had a colonoscopy on 26 September 2023 and 26 October 2023. None of these documents evidenced that she was unable to progress her claim or attend hearings. Her response to the strike out referred to her ongoing health problems and lack of representation. She also said that her non-compliance with Orders to date had not been deliberate and that she was willing to do her best. She said she had not failed to actively pursue her claim. She also said that the incident on 6 September 2023 had almost claimed her life and that her non attendance on 19 October 2023 was therefore not deliberate. She said that making a costs order would cause undue financial hardship.

37 The Claimant sent the following documents to the Tribunal and the Respondent at 3.02am on 28 November 2023, the day of the hearing: (1) updated disability impact

statement as had been ordered to be produced by 18 October 2023 covering the existing disabilities but also three of the additional ones raised in July 2023 (anxiety and depression, head injury, foot injury) but not included in the amendment application despite that issue being identified to her before she made the application (2) a second disability impact statement including only the three additional conditions (3) an explanation of why she had not included all her then claims when she presented her first claim in December 2021 (which related to Order 20 made on 6 September 2023 with a deadline of 21 November 2023) also referring to a further claimed disability of trigger thumb, (4) her response to the Respondent's application and (5) a table showing her own version of where the 67 items had got to on 6 September 2023. The Claimant said in her covering email that the Respondent had said in January 2023 that no further medical evidence was required at that stage but she was also aware that I had subsequently made a new Order as to medical evidence (GP records) at the 6 September 2023 hearing which I had noted she had not complied with in the 19 October 2023 summary (para 14). It was disingenuous to refer to the situation in January 2023 because she knew I had made a further Order. She said she would bring what records she had with her at the hearing the next day (the two brown envelopes – see below). If she had other medical evidence in those two envelopes she wanted to rely on (whether on the disability issue or on her ability to deal with her claim), she had not provided it before now despite multiple opportunities to do so and despite reminders. She then said in her email that she was not sure what information was required but the Order made on 6 September 2023 had been clear and she already knew (see below) how to obtain copies of her GP records because she had already done so previously.

38 This 3am email was the Claimant's attempt to catch up with Orders she had not complied with without good reason.

39 This late stage flurry of activity (acknowledging that she said at this hearing she had had her cousin's help – but she could have got that help at other times because her cousin had already helped her at the hearing on 6 September 2023) showed an ability to read quite a lot of material and produce detailed documents when she felt had something to gain. She said at the hearing that although she sent it at 3am she did not expect a response but that misses the point that she was sending documents at a time making it very difficult for anyone to have time to read them for a hearing which was the next day. This was unreasonable and disruptive, the difficulties caused by late evidence and emails having already been identified with her at the hearing on 6 September 2023. This late flurry of activity also meant that it took time at the beginning of this hearing to identify what exactly she had sent and when.

40 The Claimant attended the hearing with two brown envelopes of medical evidence. I reviewed what they contained as did the Respondent's Counsel.

41 Envelope 1 was (1) part of a GP print out done on 8 September 2023 – the total pages of that print out were 20 but not all 20 pages were provided in the envelope only the entries from January 2023 back to October 2017 (2) 3 2021 hospital letters and (3) a GP print out done on 19 January 2023 of 126 pages covering the period 1 September 2018 to 19 January 2023 (extracts of which dated print out had been provided by the Claimant to the Tribunal and the Respondent on 5 February 2023). The 126 page print out was still incomplete because at various stages only every other page was included, there were several other gaps and it stopped at page 119. It was however more of the 126 pages than the extracts provided on 5 February 2023.

42 Envelope 2 was a series of hospital/ clinic letters from various specialists plus some test results and 111 print outs, covering the period November 2022 to October 2023. It was not clear when the Claimant had obtained these.

43 The Claimant said at this hearing she had now applied for her GP notes making the request around 2 weeks before and advised it would take around 3 weeks. She had delayed significantly in even requesting them after the 6 September 2023 hearing when they were ordered. This meant that any possibility of at least the disability issue being reconsidered by the Respondent had been lost.

44 The Order made on 6 September 2023 required the GP records from 1 June 2018 to 3 August 2022. The 126 page print out she already had (and had provided parts of on 5 February 2023) covered the period 1 September 2018 to 19 January 2023. The Claimant already had therefore a substantial part of what was ordered on 6 September 2023. The only missing parts were the hospital/clinic letters for this period (if they had not come with the 126 page print out, which was not clear) and the records for the period 1 June 2018 to 31 August 2018. The Claimant was already in a position on receipt of the 6 September 2023 Order to provide a substantial amount of what had been ordered but she did not provide the 126 page print out when she got that Order or notify the Respondent that she had it and ask if they wanted it now or to wait for the complete set for the slightly longer period from her GP. She did not do this but instead delayed till mid November 2023 to even make a request to her GP for the records.

Relevant law – strike out

45 Rule 37 of the Tribunal Rules 2013 provides as follows:

(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 – not relevant in this application];

(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.

46 I was also referred to the following authorities: *Smith v Tesco Stores [2023] EAT 11* and *Rolls Royce PLC v Riddle [2008] IRLR 873*.

47 *Hasan v Tesco Stores EAT 0098/2016* requires a two stage test namely firstly considering whether the ground in Rule 37 is made out and then secondly considering whether to exercise the discretion to strike out.

48 As regards unreasonable conduct, the Tribunal must be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible; and in either case, the striking out must be a proportionate response (*Blockbuster Entertainment Ltd v James 2006 IRLR 630*). If relying on conduct the issue was still whether if that ground is made out a fair trial is possible (*De Keyser Ltd v Wilson 2001 IRLR 324*)

49 The Tribunal also has to take into account Rule 2 of the Tribunal Rules 2013, the overriding objective to deal with cases fairly and justly. This means fairness and justice to both parties. It includes consideration of dealing with cases in a way proportionate to the complexity and importance of the issues, avoiding delay and saving expense.

Relevant law - costs

50 Rule 76 of the Tribunal Rules 2013 provides as follows:

(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;

[(b)-(c) not relevant in this application].

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

51 Costs in the Employment Tribunal are the exception rather than the rule and there is a high threshold.

52 There is a two stage test, to consider firstly whether the relevant ground under Rule 76 is made out and then if it is, secondly whether the Tribunal should exercise its discretion to award costs.

53 The Tribunal may (but is not required to) take into account the paying party's ability to pay in deciding whether to make a costs order and if so in what amount (Rule 84).

54 *Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420* requires the Tribunal to consider all the circumstances as a whole and *McPherson v BNP Paribas [2004] IRLR 558* establishes the need to consider the nature, gravity and effect of the claimed unreasonable conduct.

55 In *AQ Ltd v Holden 2012 IRLR 648* the EAT stated that the threshold tests governing the award of costs are the same whether a litigant is or is not professionally represented, but that the application of those tests should take this factor into account. However, a litigant in person can be found to have behaved unreasonably even when proper allowance is made for their inexperience and lack of objectivity.

56 There is also Presidential Guidance on costs (Presidential Guidance; General Case management – Guidance Note 7 Costs) which I have taken into account.

Reasons

Relevant factors (strike out)

57 The Claimant has not complied with the Order made on 6 September 2023 to obtain her GP records. She has delayed even requesting them despite the Tribunal deadline and reminders. There is no good reason for this. Those records are important because the Respondent needs to reassess at the earliest opportunity if disability is conceded or not in the light of the much longer time frame of the claim which came to light when provided with the 15 page attachment after it had initially conceded disability on 5 January 2023 (on its then understanding of the claim ie the limited basis discussed at the October 2022 hearing). The claim was presented around 15 months ago and the Respondent does not have this basic information. Even if it has been requested by the Claimant from her GP I am not confident she will simply provide it promptly when she receives it from her GP taking into account her scattergun, drip feeding and dilatory approach so far. See further below under approach to medical evidence.

58 The Claimant was to update her disability impact statement by 18 October 2023. She did so on 28 November 2023. She is still seeking to add in further claimed disabilities but did not include them in her previous amendment application. She has ignored the advice she was given about adding in new claimed disabilities requiring an amendment application set out in the summary dated 5 July 2023 and on the day of this hearing (in the 3.02 am email) was still referring to conditions which are not part of her claim and not included in her August 2023 amendment application.

59 The Claimant's ongoing approach to a central part of her claim (whether disabled or not and if so when and for which condition) suggests that she continues to think that her claim is a moving target to which she can continue to add new disabilities as she goes along if she keeps repeating them. This leads to a lack of focus on the relevant issues actually in the claim and the necessity of repetition of advice already given but ignored.

60 The Claimant either chose not to attend the hearing on 19 October 2023 or ignored the Tribunal correspondence notifying her of the date, without good reason. It was a particularly key hearing to progress her claim and very little could be done without her being there. This hearing had to be used for this strike out application when it had originally been listed to deal with a different strike out application on other legal grounds (but based on the premise that the 19 October 2023 hearing would have completed the clarification of the Claimant's claim by then) meaning the Respondent has lost the opportunity to make that other type of strike out application.

61 The Claimant has throughout provided medical evidence in a partial manner, often saying she has more. In December 2022 in claimed compliance with Judge Burgher's Order she provided 'some evidence' in response to his Order saying she 'should send more following this'. The Respondent then conceded disability on the limited basis on 5 January 2023. Although I appreciate the Claimant may not have understood that she no longer therefore needed to provide further medical evidence she nonetheless did so in two further instalments in January and February 2023. The February 2023 instalment was the extracts of the 126 pages of the GP records (more of which print out was provided at this hearing).

Even if the Claimant had thought she still needed to provide more medical documents about her disability even after the Respondent conceded disability on 5 January 2023, she was providing documents in February 2023 under an Order with a date for compliance which had long passed. They were also provided without the Respondent having had the opportunity to consider them before conceding disability in January 2023. The February 2023 batch of documents was the 19 January 2023 GP print out which was not provided (in extracted form) by the Claimant until 5 February 2023; if the Claimant thought she still needed to be providing medical evidence despite the disability concession she had delayed providing these GP records, when Judge Burgher's order had specified a deadline of 5 December 2022 for all medical evidence.

62 This drip feeding of medical evidence is particularly concerning as it is now some 15 months after the claim was presented and the Respondent does not have a complete set provided on the same date of all the medical evidence the Claimant relies on. The Claimant has compounded that by then not asking for a complete set of her GP records when ordered to do so. Not only are the issues not yet clarified but the Respondent has been prevented from re-assessing disability after its initial concession.

63 Going forward and based on what has happened to date I have little confidence that the Claimant's approach will change regarding complying with Orders on time, providing documents in a timely manner before hearings and providing complete sets of documents by the required deadline. It is likely that her approach will continue for medical evidence and for disclosure of other documents when that is ordered. Even if a list of issues was finalised and the Claimant did not raise any issues with the list, it is likely that she would nonetheless either very shortly before the final hearing or at the final hearing raise new issues and provide new documents she could have provided earlier; whilst that could be dealt with by managing the Claimant it would waste significant time, increase costs and create confusion. Even at this hearing she was still producing new documents and referring to documents she had about her finances she said she had, which she had not produced despite the opportunity to do so. It is not likely that the Claimant even with careful ongoing case management will comply with Orders in their entirety and on time impacting on Tribunal resources and the Respondent's costs. There is also a real risk of her not attending the further necessary preliminary hearings.

64 If this claim is not struck out it is likely there will need to be at least (and possibly more) 4 lengthy further preliminary hearings (1) to complete the list of issues and deal with the amendment application (2) to make necessary case management orders going forward (3) to hear the Respondent's other strike out application (4) to deal with likely problems in the run up to the final hearing as to disclosure, agreeing the bundle and exchange of witness statements on time.

65 The Respondent has incurred significant legal costs (£28,042.38) defending a claim which has not got very far despite the efforts of the Respondent's solicitors and the Tribunal. There are two parties to the claim. The Respondent had to set aside the dates in March 2024 for the final hearing (including witness availability) and those dates are now lost. It has not been appropriate to even try to relist the final hearing until the claim is clarified because it is uncertain as to how many days might be required. A fair trial has to be fair to both parties to the claim and due the Claimant's approach even with ongoing careful case management the Respondent is likely to be prejudiced by never knowing if the Claimant has provided all the relevant documents she has, by the last minute production of documents without good

reason and by late compliance with Orders when the Respondent needs to prepare for the hearing and be confident that the case as put by the Claimant will remain the case as put.

66 The Claimant is described as 'heavily indulged' by the Tribunal in this application (para 25). That is not accurate but the Claimant has been given leeway not afforded to represented parties because she is a litigant in person. The Claimant has had everything explained to her in straightforward language in the preliminary hearing summaries and Orders sent to her and with detailed explanations in the letters sent between those hearings. The time she would need to comply with Orders because of her health has been factored in.

Conclusion strike out

67 Taking the above factors into account and assessing the situation in the round I firstly conclude that the Claimant's approach to this claim falls within Rule 37(1)(b) (unreasonable conduct of claim) and/or Rule 37(1)(c) (non-compliance with the Order dated 6 September 2023 regarding GP medical evidence, disability being a cornerstone of her case and that non-compliance being deliberate and persistent; also not complying with the duty to co-operate with the Tribunal including as regards attendance at the 19 October 2023 hearing and late/partial compliance with Orders by providing documents on 28 November 2023, the day of this hearing).

68 Having concluded that the relevant grounds are made out I have secondly considered whether to exercise my discretion to strike out the claim (that being a draconian step especially in a discrimination claim) taking into account Rule 2 and in particular the factors of ensuring the parties are on an equal footing, dealing with cases in a proportionate way, avoiding delay and saving expense. In relation to the first factor, in this claim it is arguably in some ways the Respondent who is not on an equal footing with the Claimant (despite her lack of representation) because of her disruptive approach to this claim meaning she only complies with Orders (if at all) shortly before a hearing and not in line with the deadlines set and has not clarified her claim despite the time being set aside for her to do so meaning it is as if the Claimant is setting her own timetable and own agenda despite Orders to the contrary. As to the second factor, although this is a complex disability discrimination claim spanning several years, because of the Claimant's approach to her claim the Tribunal has dedicated significant time for the Claimant some way beyond what a claim would ordinarily require for case management and that process has not yet yielded the result of her claim having been clarified and a list of issues produced and disability having been assessed on a complete package of evidence from the Claimant. As to the third factor despite best efforts from the Tribunal and the co-operation of the Respondent once the 15 page attachment was identified, the claim is stuck half clarified some 15 months after it was presented in August 2022. In relation to the fourth factor the Respondent has incurred significantly higher costs than it would have done had the Claimant taken a more co-operative and compliant approach and that is likely to continue based on the Claimant's approach so far, even if some costs are awarded – see costs order below.

69 I have considered alternatives to a strike out namely costs or a deposit order. The issue with a deposit Order under Rule 39 is that it requires the Tribunal to make an assessment of whether an allegation or argument in the claim has little prospect of success. Until the clarification of claim process is complete it is not possible in this type of claim to make that assessment (although the Respondent in its alternative strike out application has

identified two areas namely the previous December 2021 wages claim apparently re-brought in this claim and the abuse of process issue regarding claims which should properly have been brought in the December 2021 claim). A deposit order cannot be made on the basis of lack of co-operation and non-compliance with Orders which is the current state of affairs.

70 Turning to the recent guidance in *Smith v Tesco Stores*, the aim of the preliminary hearings and Orders so far has been to identify the claims and manage them going forward (para 2). That has not been possible. Instead of asking the Claimant to go through her 15 page attachment herself and pick out the actual claims in the form of a further document a list was prepared to assist her and she was specifically advised that she did not in fact have to produce a document in response to that list, to avoid the proliferation of overlapping documents problem (para 2). The Claimant is obliged to be constructive and focus on her core claims (para 4) and while steps have been taken to assist her this should not be at the expense of the Respondent taking into account that the Tribunal has limited resources (para 4). With regard to the ability to have a fair trial the undue expenditure of time and money, the demands of other parties and the finite resources of the Tribunal are relevant (para 42). There has been no avoidance of trying to get to grips with the claim by the Respondent (para 43) who has cooperated with (and incurred the costs of) the (what would have been) two lengthy one day hearings to clarify the claims and get to a list of issues. The Claimant's failure to co-operate with the Tribunal in particular to attend the 19 October 2023 hearing to complete the clarification of her claim, to comply with Orders on time and her failure to co-operate with the Respondent and the Tribunal as regards the provision of her medical evidence means that there cannot be a fair trial because the Claimant has not cooperated and her approach to date makes it likely that that conduct would continue (para 45) ie she would not work towards a fair hearing, one final hearing listing already having been lost.

71 I therefore strike out the claim in its entirety under Rules 37(1)(b) and 37(1)(c) of the Tribunal Rules 2013.

Conclusion – costs

72 The relevant ground under Rule 76(1)(a) is made out namely unreasonable conduct of the proceedings.

73 I have next considered whether to exercise the discretion to award costs taking into account the findings and conclusions already set out above. I have taken into account the Claimant's ability to pay both as to whether to make an order and if so how much. I am not obliged to take into account the Claimant's ability to pay but have done so because the Claimant is off sick from work and is not a high earner.

74 The Claimant's net monthly pay based on the bank statement she provided is £2854.42 (payment 27 October 2023). She provided a statement for this account alone although there are transfers into other accounts (ending 318 and 946) suggesting she also has a savings account or other accounts containing funds. I do not have any information about these other accounts.

75 Taking into account her ability to pay as to whether to make a costs order and if so how much I conclude that the Claimant should pay 100% of Counsel's fees for the hearing she did not attend on 19 October 2023 (£2,250).

76 I set a date for compliance with this Order as **1 February 2024** to enable the Claimant to receive two further salary payments ie the December 2023 and January 2024 payments. I have extended the 14 day default timescale in Rule 66 also to enable the Claimant to assess her finances.

**Employment Judge Reid
Dated: 12 December 2023**