EMPLOYMENT TRIBUNALS

Claimant: **Miss Marrissa Barrett**

Respondent: **St George's University Hospitals NHS Foundation Trust**

RECORD OF A PRELIMINARY HEARING

Heard at: London South (in public, by video) **On:** 18 March 2024

Before: Employment Judge C H O'Rourke

Appearances
For the Claimant: Not in attendance, or represented. For the Respondent: Ms H McLorinan - counsel

JUDGMENT

Subject to Rule 37 of the Tribunal's Rules of Procedure 2013, the Claimant's claims of age, sex and disability discrimination are struck out.

REASONS

Background and Issues

1. The Claimant brought a claim against the Respondent, in October 2022,alleging age, sex and disability discrimination.

2. Following an adjourned preliminary hearing on 12 September 2023, thisHearing was listed to consider whether or not the Claimant's claims should be struck out or have deposit orders made in respect of them.

3. The Claimant, a litigant-in-person, did not attend this Hearing, having indicatedin advance that she would not be doing so.

The Law

4. Rule 37 of the Tribunal's Rules of Procedure 2013 states as follows:

37.— (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 ofsuccess.
(b) that the manner in which the proceedings have been conducted by oron 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 theTribunal.
(d) that it has not been actively pursued.
(e) that the Tribunal considers that it is no longer possible to have a fairhearing 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.

5. I referred myself to the following authorities/guidance:

    a. **Cox v Adecco Group UK & Ireland and ors [2021] ICR EAT** held that a tribunal had erred in striking out a litigant in person's claim without properly identifying the issues and then analysing their prospects of success. Full account should be taken of any written representations by the Claimant and a tribunal should be prepared to 'roll up its sleeves' to identify the issues. However, litigants in person also have responsibilities in this context. So far as they can, they should seek to explain their claims clearly, even though they may not know the correct legal terms, focusing on core claims rather than trying to argue every conceivable point. The more prolix and convoluted the claim is, the less a litigant in person can criticise an employment tribunal for failing to get to grips with all the possible claims and issues. Litigants in person should appreciate that, usually, when a tribunal requires additional information, it is with the aim of clarifying, and where possible simplifying, the claim, so that the focus is on the core contentions. The overriding objective also applies to litigants in person, who should do all they can to help the employment tribunal clarify the claim.

    b. **Hasan v Tesco Stores Ltd EAT 0098/16**, which indicated that in deciding to strike out a claim, a two-stage approach is necessary, firstly to determine whether or not any of the grounds set out in Rule 37(1) have been established and secondly, if so, to decide whether or not the Tribunal should exercise its discretion to order strike-out.

    c. Rule 2 ('the Overriding Objective') and in particular the proportionality ofa decision to strike-out must be at the forefront of the Tribunal's mind. That Rule (as relevant to this Hearing), states:

'2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
(a) ensuring that the parties are on an equal footing.
(b) dealing with cases in ways which are proportionate to the complexityand importance of the issues.
(c) avoiding;
(d) avoiding delay, so far as compatible with proper consideration of theissues; and (e) saving expense.
A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.'

In applying that Rule, the case of **Weir Valves and Controls (UK) Ltd v Armitage [2004] ICR 371 EAT** indicated that in relation to noncompliance with tribunal orders, a tribunal should consider all relevant factors, including:

- the magnitude of the non-compliance
- whether the default was the responsibility of the party or his or her representative
- what disruption, unfairness or prejudice has been caused
- whether a fair hearing would still be possible, and
- whether striking out or some lesser remedy would be an appropriate response to the disobedience

d. '*Scandalous'* in Rule 37(1)(b) means '*irrelevant and abusive of the other side'* – **Bennett v Southwark London Borough Council [2002] ICR 881 EWCA**.

e. In **A v B and anor [2011] ICR D9 EWCA**, it was held that a tribunal was wrong to strike out a claim of sex discrimination on the grounds that it had no reasonable prospects of success, as that claim had '*more than fanciful'* prospects of succeeding, the relevant test not being one of 'the balance of probabilities. Such claims are generally fact-sensitive and should not be struck out, except in the most obvious cases (**Anyanwu and anor v South Bank Student Union and anor [2001] ICR 391 HL**).

f. **Mbuisa v Cygnet Healthcare Ltd EAT 0119/18** noted that strike-out is a 'draconian step' that should only be taken in exceptional circumstances. Particular caution should be taken if the case is badly pleaded by a litigant-in-person and therefore their case should be 'taken at its highest'.

g. In **<u>Smith v Tesco Stores Ltd</u> [2023] EAT 11** there had been difficulty, despite several preliminary hearings, in identifying the issues. This resulted from a course of conduct in which S (a litigant in person) had shown that he was not prepared to cooperate with the tribunal process. The tribunal concluded that he would not abide by his obligation to assist in achieving the overriding objective and that his disruptive conduct was likely to be repeated. One listing of the full hearing had already been lost and no progress was being made in preparing for the second hearing listed. S was not working towards a trial that was fair in the sense of avoiding the undue expenditure of time and money, taking into account the demands of other litigants and the finite resources of the tribunal. The tribunal concluded that S had acted in a manner that was scandalous, unreasonable or vexatious, that a fair trial was no longer possible, and that a strike-out of the entire claim was proportionate.

h. **<u>Birkett v James</u> [1978] AC 297, HL** indicates that a tribunal can strike out a claim where:

- there has been delay that is intentional or contumelious (disrespectful or abusive to the court), or

- there has been inordinate and inexcusable delay, which gives rise to a substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the respondent.

<u>Submissions</u>

6. I heard submissions from Ms McLorinan and read various documents and emails provided by the Claimant (as considered below).

<u>Chronology</u>

7. I set out the following chronology:

9 October 2022 – ACAS EC certificate presented.

17 October 2022 – ET1 presented.

23 November 2022 – ET3 presented and on the same date the Respondent wrote separately to the Claimant requesting Further and Better Particulars (F&BP) of the claims.

21 December 2022 – the Tribunal issued a case management order requiring the Claimant to provide F&BP of both her claims and her claimed disability.

25 January 2023 – the Claimant responded to that Order, annotating both the Order and a copy of the Response.

12 September 2023 – a preliminary hearing was listed for that date, but the Claimant did not attend, on health grounds. This further preliminary hearing, heard today, was then subsequently listed.

15 March 2024 – the Claimant wrote stating that (again on health grounds) she would not be attending the preliminary hearing. She was informed by the Tribunal that nonetheless the Hearing would proceed.

18 March 2024 – the Hearing proceeded, in the Claimant's absence.

Considerations

8. I first consider whether or not any of the grounds for strike-out have beenestablished.

9. No Reasonable Prospect of Success. I am not in a position to say whether or not I consider that the Claimant's claims have no reasonable prospects of success as, despite now having had five opportunities to do so (her ET1; the Respondent's request for F&BP; her response to the Tribunal's case management order and this and the last hearing (which she did not attend either)), her claims are entirely unclear to me (as they are also to the Respondent). Had she, of course, attended either or both hearings, then, as is customary it might have been possible, with the Tribunal's assistance, to establish what her claims are about, but she did not take up that opportunity. I consider this failure on her part within other grounds of Rule 37.

10. 'Scandalous'. I consider that this ground is met, as the Claimant is intemperate in the language she uses in her correspondence and abusive to both the Respondent solicitor and the Tribunal. Examples are as follows (sic) (and with my emphasis):

    a. Emails 13 March 2024 – '*If my documents are not found or produced, I want everyone including CEO and 16 other claims I've made to hand in their notice before this gets really bad. I warned the trust that my case is big. Another Lethby failure for staff who whistleblow.*' … '*If Nicole* (the Respondent's solicitor) *is a great lawyer she will be able to submit all my complaint and appendixes, but she can't submit judge as she's representing thin air trying all these tactics …. In one email you are copied in letter it states who has time to read a 1455 document complaint! If you're a great lawyer, then you read 1455 pages over and over again so you defend your client well so nothing goes unnoticed. I find it very hard for a law firm to represent a trust without no paperwork of my evidence to look through. She's incompetent and her law firm should be sanctioned for taking a case to court without any evidence that I sent to the trust August 2022.*' *… Many thanks ET apologies for my upset as Nicole as you know made me suicidal and I was under the impression she would be off my case as I complained to judicial committee last year of her and judge Andrew's dealing my case and Ryan the clerk. It's all fraud who you know in ET and my Baroness dislikes anyone who abuses their position especially coming from a*

justice background.' … I've copied Nick from ACAS. Nick the lawyers are lying said I was out of time first claim they say Oct 2022 when my claim was registered August 2022! Can you let ET judge know please all my case numbers etc my mental health is on the decline because of this lawyer who can't get her facts or get it together. Very weak lawyer I'll be writing to her firm too incompetent with backing of my MP and baroness who sits in the House of Lords. They know I'm too powerful! Karma! Nicole to be a great lawyer get your dates and evidence right. You are laughable so will the judge with all my overwhelming evidence and your 1K deposit. … Nicole is nasty piece of work vile who should not practice law I will make it my mission for her to never practice again. It's not a threat! As you said in your letter repeating your words you said to me in a letter. Do not take this letter as threat you wrote to me in September. … Nicole you're a disgrace to even be on the bar. You're a liar like the trust and you're forcing me to go ahead despite my mental health. You can't break me. I've seen your stats. Just another wannabe lawyer.

b. Email 15 March 2024 – the Respondent's '*solicitor who drove me close to suicide is still on the case despite my complaints to the solicitors and the judicial committee.'* In the same email she states that '*Until the Trust find my complaint with all my legal previous cps cases, I will not be attending, hence my request to the ET last year and this week.' …. 'The legal system is corrupt run by Tories who you know!'*

c. Emails 18 March 2024 – '*I will not be attending I sent the ET all my medical information and as it's a criminal case the Trust won't admit the Judge has the powers to postpone as per my documentations. … I will appeal my case if struck off as stated before on medical grounds and I will not be attended until the trust produce my lost evidence.' … I will be making a complaint as this will be the second time judges have been switched on me the day of my PH. Originally it wasn't Judge Andrew's and on Friday was Judge Kim Wright and today it's O Rourke. I find it very disturbing as this has happened twice. I'm aware I can complain to Judicial committee as before but please advise of ET Manager so I can raise these alarming concerns as this switch is detrimental to my case'.*

11. Manner in which proceedings conducted unreasonable. I find that this ground is met, for the following reasons:

a. The Claimant has failed to set out in clear terms what her claims areabout and therefore a year and a half on and after two hearings the claim is no further on. The Tribunal ordered her, in December 2022, to provide F&BP of her claims, sending her a detailed list of questions to answer. However, instead of answering those questions, for example '*how long has the claimant had the impairment*', she referred to a mass of other documents/letters etc., not before the Tribunal, but apparently sent to the Respondent prior to her bringing of this claim. She seems, therefore, to consider that it is for the Tribunal/the Respondent to divine what her claims are about by reference to her '*1455 page'* complaint,

rather than for her to do so. Simply stating, in such a response that e.g. '*I the Claimant sent and attached this information to the respondent … 30.08.2022 @ 4.03 pm* and that '*this can be found in my complaint documents'* or '*Claimant states it is very clear from the 1455-page complaint document that was sent to the respondent on 30.08.20222 bringing a claim for direct disability, sex and age discrimination'* is not reasonable behaviour on her part.

b. I don't consider that the Claimant has provided good reason for herfailure to attend now two hearings, listed at eight months' and three months' notice, respectively. She has stated, on the occasion of both hearings that her medical conditions prevent her attendance but has not provided medical evidence that would support such a contention. While she has provided a 'fit note' from her GP that states that she is not fit to attend work, for the period September 2023 to April 2024 that does not support her contention that she is unable to attend two half-day hearings by video, or why the nature of her illness would prevent her doing so. Further additional medical evidence provided by her, under password protection, at the time of the Hearing, did not add to that assessment. It relates to treatment she received a year ago, when she was recorded, on the basis of self-reporting, as having severe anxiety and depression. Crucially, none of this evidence provides any future prognosis.

c. The previous hearing was listed for 2pm on 12 September 2023, but asits time estimate was three hours (and which if the Claimant had attended was likely to be needed), the Tribunal asked the parties if it could be moved to 10am the same day. The Claimant said, in answer that she was unable to attend the hearing in the morning due to a scheduled medical appointment and accordingly the original start time of 2pm was maintained. The Claimant then advised the Tribunal that she had a medical appointment in the afternoon, being due to receive a telephone call from her GP, between 2 and 4pm. The parties were again asked to confirm, therefore whether they could attend a hearing starting at 10.30, but the Claimant did not respond. The hearing was therefore adjourned. It is clear to me from this chain of events that the Claimant was endeavouring (and succeeded) to have the hearing adjourned for spurious reasons and which constitutes unreasonable conduct on her part.

d. As can be seen from the email extracts above, it is clear, in my view thatthe Claimant has no intention of attending a hearing of this nature and raises spurious reasons for that stance, such as '*Until the Trust find my complaint with all my legal previous cps cases, I will not be attending'* (She asserts that the Respondent has mislaid documents that she provided to them prior to her claim to the Employment Tribunal, which they deny, but, in any event, that is not a reasonable excuse for her to refuse to attend today's hearing.) As a consequence, as outlined above in paragraph 9, it has proved impossible to establish the nature and

detail of her claims, so the Respondent knows the case they have to meet and her case can be progressed to final hearing.

12. Non-compliance with Tribunal Orders. Again, I consider this ground as met, as while the Claimant did respond to the Order of 21 December 2022, she did not do so (as set out above) in any form that was compliant with the Order, or indeed in any coherent fashion. Further, she failed, without good reason, to attend two long-listed hearings.

13. Not being actively pursued. Avoiding repetition, I consider also that that this ground is met, based on my finding above. The Claimant is clearly not seeking to move her case forward to hearing but relying on spurious grounds to delay it.

14. No longer possible to have a Fair Hearing. I see no indication from the Claimant that the stance she has adopted to date (belligerent, abusive, longwinded, reliant on a medical condition unsupported by medical evidence as to its effect upon her ability to conduct litigation and its likely longevity) is going to change in the foreseeable future, leading me to consider therefore that a fair trial, viewed on present circumstances, seems no longer possible.

15. Exercise of Discretion to Strike Out the Claims. Having found, therefore that several of the grounds in Rule 37, to permit strike-out, are met, I should consider whether to exercise my discretion to do so. I find, in this case that that discretion should be exercised and that the Claimant's claims should be struck out and I do so for the following reasons:

    a. This is not a case of one, or isolated, or minor failures to comply withRule 37, but several failures, as set out above, stretching now over a year, with no indication of any change of stance by the Claimant.

    b. As indicated in **Cox v Adecco**, the Tribunal has been more than ready to 'roll up its sleeves' to identity the issues in this case, but has been unable to do so, due to the unwillingness of the Claimant to co-operate with it, or the Respondent.

    c. In applying the 'overall objective', there has clearly been considerabledelay, wasted expense by both the Tribunal and the Respondent and little co-operation from the Claimant. The Claimant appears to be bringing potentially serious claims, which would obviously be important to her, but proportionality applies to both sides, in order that the case can be dealt with fairly and justly. Applying **Armitage**, the Claimant's noncompliance is serious; it has led to two wasted hearings; no doubt much wasted expenditure by the Respondent and I don't consider, on the evidence before me that a fair hearing will be possible, in any reasonable timeframe. I considered whether some other, lesser, sanction might be more appropriate, such as, for example, a deposit order, but due to the lack of clarity as to the nature of the claims, I am not in a position to decide on their prospects of success, limited or otherwise. I don't consider that there is any, other, lesser sanction that could have any effect on the stance taken by the Claimant.

d. I note the guidance in **Mbuisa** and the exceptional nature of such a decision, but I consider that the circumstances in this case meet the test. I am conscious that the Claimant is a litigant in person (although she does refer to having a law degree), but the vast majority of claimants in this Tribunal are litigants in person, but who manage, nonetheless, unlike the Claimant, to present their claims in a comprehensible fashion and to co-operate with the Tribunal and respondents. I can't take her case 'at its highest', as I don't know what her case is.

e. Considering the balance of prejudice to the parties, clearly strike-out isvery prejudicial to the Claimant, as she will be unable to pursue her claims. I consider, however that taking into account her apparent mental state (as judged from her correspondence), the effect this litigation is, she states, having upon her and her inability or unwillingness to progress or even clarify her claim, that, applying **Cox v Adecco** *'no-one gains by truly hopeless cases being pursued to a hearing'.* On the other side of the scale, the Respondent has been obliged to deal with a claim which they don't understand and therefore cannot prepare to meet, but nonetheless are incurring no-doubt considerable costs, at public expense, in having to resist it, without any prospect, as I have found that there will be a fair hearing in due course, when the matter would be finally resolved. I have no confidence that were I to simply list another preliminary hearing that the situation would be any different at that juncture. On that basis, therefore, I consider that the balance of prejudice falls in the Respondent's favor, in this case.

f. I consider that in this case the delay has been intentional and withoutgood excuse (**Birkett**) and which will, inevitably, if it continues, lead to the Respondent being placed in real difficulties (bearing in mind any likely final hearing date not being before mid-2025) in marshalling its evidence to confront this claim, after at least three years, if and when clarified.

g. I find, therefore that strike out of the Claimant's claims is, in this case,proportionate.

Judgment

16. Accordingly, therefore, for these reasons, the Claimant's claims of age, disability and sex discrimination, are, subject to Rule 37, struck out.

Employment Judge O'Rourke

19 March 2024

Sent to the parties on:

21 March 2024

For the Tribunal Office:

P Wing