JJE

EMPLOYMENT TRIBUNALS

Claimant: **Mr D McFarlane**

Respondent: **London Borough of Barking & Dagenham**

Heard at: **East London Hearing Centre**

On: **3 July 2018**

Before: **Employment Judge Russell**
Members: **Mr P Quinn**
Ms J Owen

Representation
Claimant: **Mr A Daddey (Friend)**
Respondent: **Mr R Alford (Counsel)**

JUDGMENT

All claims are struck out for failure to comply with Tribunal Orders and/or failure properly to prosecute the claim.

REASONS

1. By a claim form issued on 16 October 2017, the Claimant brought complaints of unfair dismissal, race discrimination including harassment, victimisation and disability discrimination. The Respondent defended all claims.

2. Case Management Orders were made by Employment Judge Gilbert on 11 December 2017. These directed disclosure of documents by 12 February 2018 and an agreed bundle by 12 March 2018, with the Claimant having notified the Respondent of the documents he wished to be included the week before. Witness statements were to be exchanged by 26 March 2018 and the case was listed for a Hearing due to start on 4 July 2018. The Order included notes which made clear that a party could apply to vary the dates but that in the event of non-compliance, the Tribunal may take such action as it considers just, including striking out the claim in whole or in part in accordance with Rule 37, barring or restricting the parties' participation in proceedings and/or awarding costs.

3. The matter came before me at a Preliminary Hearing on 29 January 2018. The

Claimant was represented by counsel. As the claims were still not fully particularised, the Claimant was given until 12 February 2018 properly to particularise his allegations of race discrimination and harassment. Exchange of witness statements was discussed insofar as it appeared that the Claimant was in part relying on conduct which he thought "may or may not" have been because of race. The issues were agreed, with the allegations of harassment being primarily advanced against Mr Hussain and dating back to events as early as 16 December 2016. At paragraph 13 of the Summary, the Claimant was directed to the Presidential Guidance - General Case Management to assist him in understanding what was required to comply with the case management orders and case preparation. The case management summary included the relevant webpage address. At paragraph 14, I recorded the parties' confirmation that the case management orders made to date were appropriate and achievable. Additional case management orders were made in respect of further particulars and disability.

4. The Claimant complied with the additional Orders made on 29 January 2018 and engaged with the process of disclosure up to February 2018. After 15 February 2018, there is no evidence of any act by the Claimant taken in the prosecution of his claim. He did not notify the Respondent of the documents he wished to be included in the bundle. The Respondent chased the Claimant on 11 April 2018, providing some additional documents and asking that the Claimant confirm his agreement to the content of the bundle and agree a date for mutual exchange of witness statements. The Claimant did not respond.

5. On 15 May 2018, Mr Pinter, the Respondent's solicitor, again contacted the Claimant. He was asked to agree the index of the bundle and was reminded of the need to exchange witness statements. Again, the Claimant did not respond.

6. A further email was sent on 12 June 2018 by Mr Pinter, pointing out that the failures to comply with case management orders were becoming urgent and asking for a discussion with the Claimant. The Claimant replied on 14 June 2018 and his email was in the bundle before us today. In it, the Claimant did not engage with the outstanding requests to agree the bundle index and exchange witness statements. Rather, he made a GDPR request for a considerable number of documents which he required to be provided by 20 June 2018. The request sought copies of all signed one to one supervision notes in the last two years of employment, a copy of the personnel file, copies of all references submitted to the Respondent in support of the Claimant's appointments to his various employment roles (both agency and permanent), copy of his medical records and health reviews prior to dismissal, copies and details of all persons who had an alcohol or drug test before the Claimant's dismissal and an account and copy of the details of staff dismissed whilst on sick leave. The Claimant said that he now had a legal representative, Mr Daddey and that he would consider a settlement prior to the hearing.

7. Mr Pinter replied directly to the Claimant that same day and asked him to advise when he anticipated being in a position to exchange witness statements. Again, there was no response.

8. On 22 June 2018, Mr Pinter sent the Claimant a draft chronology and cast list and asked whether they were agreed. In the same email, Mr Pinter proposed that mutual exchange of statements take place by email, by 4:00pm on 25 June 2018 and asked the Claimant to confirm agreement. The email was also sent to Mr Daddey. Neither the Claimant nor Mr Daddey responded.

9. On 25 June 2018, Mr Pinter sent a further email to the Claimant stating that they needed to exchange witness statements at 4 o'clock that day and impressing on him, and Mr Daddey, the urgency of finalising case preparation. Mr Pinter warned the Claimant and indeed Mr Daddey that the Respondent would be forced to bring the matter to the attention of the Tribunal in the event of non-compliance. As he had received no response to his emails, Mr Pinter telephoned Mr Daddey on 25 June 2018. In the discussion, Mr Daddey gave no assurance that witness statements would be provided. Witness statements were not exchanged.

10. There was a further conversation on 26 June 2018 between Mr Pinter and Mr Daddey, the contents of their discussion is recorded in an email sent the same day by Mr Pinter to Mr Daddey. Mr Pinter referred to the need for exchange of witness statements to take place and asked Mr Daddey to advise by close of play that day when he would be ready to do so. No response was received from either the Claimant or Mr Daddey.

11. On 27 June 2018, the Respondent wrote to the Tribunal asking for an Unless Order to compel the exchange of witness statements. The matter was put before Employment Judge Jones and on her direction, an email was sent to the Claimant and to Mr Daddey in the following terms **"…the Claimant or his representative is to write to the Tribunal by 10:00am on Friday 29 June 2018 to confirm that he has exchanged witness statements with the Respondent. Failure to do so will lead the Tribunal to consider striking out the Claimant's case because he has failed to pursue these proceedings and to comply with court Orders**." Mr Daddey says that he did not receive the email. He confirmed however that it had been sent to his correct email address. The Tribunal did not receive any notification to suggest that there had been a problem with its delivery. On balance, we find that Mr Daddey did receive the email. The Claimant said that he did not look at his emails.

12. On 29 June 2018, the Respondent wrote again to the Tribunal to state that the deadline given by Judge Jones had passed and no contact had been received from the Claimant or Mr Daddey. The Respondent asked that all claims be struck out. The application was referred to Employment Judge Foxwell who directed that the question of whether the claim should be struck out because the Claimant had failed to exchange witness statements, would be considered at the commencement of the Hearing and enclosed a copy of Employment Judge Jones' direction made on 27 June 2018. The Tribunal's email was correctly addressed and copied to the Claimant. On balance we find that it was received by the Claimant and Mr Daddey.

13. The Tribunal was not sitting on this case yesterday (2 July 2018). Neither the Claimant nor Mr Daddey contacted the Tribunal or the Respondent.

14. The Claimant attended today's hearing and is accompanied by Mr Daddey who, despite the Claimant's assertions in emails, states that he is not a legal representative but is appearing without charge as a friend. The Claimant did not have a witness statement with him even today and stated that he intended to give his evidence orally. At the outset of the hearing, we discussed the difficulties caused by the failure to produce a witness statement and before hearing the Respondent's application to strike out we explained that we believed that there were three options open to us. First, we could strike out the claims if so persuaded by the Respondent. Second, we could postpone the Hearing entirely so that the Claimant could produce a witness statement and then exchange with the Respondent, but we warned that that was likely to have cost consequences for the

Claimant. The third option was that we proceed with the Hearing but limit the Claimant's evidence to the two pages attached to his claim form which would then stand effectively as his witness statement. Having outlined these options, we gave Mr Daddey some time to take instructions from the Claimant and to consider his position. We made clear that if the Respondent proceeded with its application to strike out we would consider whether there were any alternative steps short of a strike out which would enable a fair trial, including options which the parties wished to propose.

15. Upon coming back into Tribunal, Mr Alford confirmed that the Claimant had not been provided with copies of the Respondent's witness statements as there had been no exchange. He proposed that today be taken as a reading day and that we would come back tomorrow, in other words that the Claimant would have a full day to prepare. As he pointed out, it was the Claimant who had put himself in this predicament by his failure to engage and he correctly submitted that there was no obligation upon the Respondent to provide its statements unilaterally. Mr Daddey submitted that the only course of action was to postpone the entire hearing as the Claimant would not have had sufficient time to read the Respondent's statements and prepare.

16. Mr Alford made his application for strike out. He set out the chronology of events as summarised above and referred to the overriding objective, the relevant case law and the provisions of Rule 37. Mr Alford submitted that the Respondent would be caused great prejudice if the claims were not struck out, that there was no good explanation for the Claimant's defaults, these were simple directions and that even litigants in person appreciated the need to provide witness statements or at least something in support of their case. Mr Alford did not rely solely upon the failure to exchange witness statements but also the earlier failure to engage with the agreement of a bundle. He said that there had been no prejudice to the Claimant who had previously had access to a barrister; that the steps required of him was straight forward; that this was not a strong case and that it had been poorly particularised and set out to date. Mr Alford submitted that the Tribunal and the Respondent had already shown flexibility to the Claimant but to no avail. In the event that a postponement were granted, the Hearing would not be listed until March 2019 and the Respondent would have been forced to incur fees of £6000.00 in respect of this week's Hearing, which would be utterly wasted. It is a public body and must be careful with its finances. Furthermore, it would cause great practical disruption with seven witnesses required to attend a further Hearing, although he did accept that none of them had left or was likely to leave the Respondent's employ imminently. Mr Alford said that the stress of the proceedings was causing particular problems to Mr Hussain against whom serious allegations of racial harassment had been made and that delay would exacerbate the effects upon him. Even though strike out is an exceptional course for the Tribunal to take, this was an extreme case which did indeed merit strike out.

17. In opposing the application, Mr Daddey apologised for any confusion in the case management process. He said that he had been acting as a friend and that the Claimant should have sought legal representation but could not afford to do so. Mr Daddey suggested that he and the Claimant had considered only the case management orders made at the Preliminary Hearing in January 2018. He was not aware of those made by Employment Judge Gilbert although he accepted that he had received the correspondence from Mr Pinter and that there had been discussions about the need to exchange witness statements. He submitted that it was reasonable to adjourn this hearing as an alternative to strike out so that the Claimant could get legal help. Mr Daddey submitted that race discrimination is a very serious matter and that this was a

major case against a former employer. The Claimant has limited finances, is in receipt of Employment Support Allowance and his health was suffering. He should be given an opportunity to get proper legal help. Mr Daddey submitted that a six month delay before re-listing would be a reasonable time to enable the Claimant to prepare the case and he asked for leniency.

18. With regard to the alternative options, and after taking specific instructions from the Claimant, Mr Daddey confirmed that he did not consider that proceeding tomorrow would enable the Claimant to have a fair hearing as he would not be able fairly and properly to deal with the detail in the Respondent's witness statements with only one day to prepare. In his view, the only way in which there could be a fair trial would be a full postponement and re-listing for a future date even if that would be as late as March 2019. As for costs, the Claimant's means were so limited that he could not afford to pay costs and it would take at least six months before he could do so. Mr Daddey repeated the Claimant's position that only a postponement could enable a fair hearing.

19. In reply, Mr Alford drew our attention to the provisions of Rule 30A(2) of the Employment Rules of Procedure which provides that where a party makes an application for postponement of the Hearing less than 7 days before the date on which the Hearing begins, the Tribunal may only order the postponement where either all parties consent, or the application is necessitated by an act of omission by another party or the Tribunal or there are exceptional circumstances.

Law

20. The Employment Tribunal Rules of Procedure 2013, rule 37 provides that:

> **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 of success;**
>
> **(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;**
>
> **(c) for non-compliance with any of these Rules or with an order of the Tribunal;**
>
> **(d) that it has not been actively pursued;**
>
> **(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).**
>
> **(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.**
>
> **(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.**

21. The factors to be taken into account in an application under rule 37(1)(c) to (e) largely overlap. In **Blockbuster Entertainment Ltd v James** [2006] IRLR 630, the Court of Appeal emphasised that strike out was a draconian power not to be too readily exercised. The cardinal conditions for its exercise must be present; either that the unreasonable conduct is taking the form of a deliberate and persistent disregard of required procedural steps or that it has made a fair trial impossible. If these two conditions are fulfilled it is still necessary to consider whether striking out is a proportionate response or whether there is a less drastic solution which may be adopted.

A strike out application should not be made at the point of trial, rather the time to deal with persistent or deliberate failure to comply with rules and orders designed to secure a fair and orderly hearing is when they have reached the point of no return.

22. In **Harris v Academies Enterprise Trust & others** [2015] IRLR 208, Langstaff P reviewed the rules applicable in the Employment Tribunal and the approach to be adopted in determining a strike out application. Relevant factors will include consideration of why the party in default had behaved as he had and the nature of what has happened. Repeated failure to comply with orders of the Tribunal over some period of time may give rise to a view that if further indulgence is granted the same will simply happen again; equally, what has happened may be an aberration and unlikely to reoccur. Justice is not simply a question of the court reaching a decision that may be fair as between the parties, in the sense of fairly resolving the issues, but it also involves delivering justice within a reasonable period of time. The Tribunal must also have regard to costs and overall justice which means that each case should be dealt with in a way that ensures that other cases are not deprived of their own fair share of the resources of the court. Accordingly it is relevant in an appropriate case for a court to exercise its powers to ensure that the case is heard promptly. Although in many cases an Unless Order will be granted before strike out, it is not an essential prerequisite of an application to strike out and there is no guarantee that one will not follow in an appropriate case. At paragraph 40, Langstaff P held that Orders are made to be observed, breaches are not mere trivial matters and should result in careful consideration whenever they occur. Tribunal judges are entitled to take a stricter line than they may have taken previously but whether or not to strike out a claim should be decided applying rule 37 and existing principles in cases such as **Blockbuster**.

23. The overriding objective in ordinary civil cases, including employment claims, is to deal with cases justly and expeditiously without unreasonable expense. Article 6 of the ECHR emphasises that every litigant is entitled to “a fair trial within a reasonable period”. This is an entitlement of both parties to litigation.

Conclusions

24. We have not accepted that there was any good explanation provided by the Claimant or Mr Daddey for the failure to comply with the Orders to agree the bundle and, most importantly, to exchange witness statements. There are no reasonable grounds for confusion not least as exchange of witness statements was discussed at the Preliminary Hearing and the Summary set out the parties’ express agreement that the earlier Orders were appropriate and achievable. Any failure to provide a copy of the Gilbert Orders to Mr Daddey rests with the Claimant and was itself unreasonable. Further, the Claimant has not only failed to comply with the Orders but also with the clear instruction given by Employment Judge Jones. If there had been any genuine confusion as to what was required, and we think that there was not, it was clear that witness statements had to be exchanged and confirmation given to the Tribunal by 10:00am on 29 June 2018. We have found that the email was received and there has been no explanation provided for the failure to comply. We infer that the Claimant and Mr Daddey have deliberately and intentionally failed to comply with Tribunal Orders and actively to pursue the claims.

25. We considered whether or not strike out was a fair sanction given the draconian nature of such an order. In the Claimant’s favour resisting a strike out, there are strong public policy reasons in race discrimination cases being tested on the evidence and heard

in Tribunal. Moreover there is no evidence that the Respondent's witnesses would not be available if the case were to be re-listed in March.

26. By contrast, the breach has been persistent and the Claimant has resisted repeated attempts by the Respondent's solicitor and the Tribunal to engage him in the preparation of his own case. The only step taken by the Claimant since 15 February 2018 was an attempt to re-open disclosure. The further documents sought were large in number and were not relevant to the agreed issues, not least as the Claimant accepted that conduct and not health was the principal reason for dismissal. The combination of the last minute request, the voluminous documents sought, the very short deadline for compliance and the reference to settlement lead us to infer that the Claimant was not genuinely engaged in preparing his case for hearing but causing disruption and cost in the hope of generating a settlement. The Claimant's conduct shows a disrespect for the Tribunal procedure which he has initiated.

27. We are not satisfied that if given second chance with a sanction short of strike out, the Claimant would engage with the process in a more constructive way. This was evident from his insistence that other steps short of strike out would not be appropriate, for example limiting his evidence to that contained in the claim form or postponing for a day to enable him to produce a witness statement and consider those provided by the Respondent. Both would have avoided strike out, would have been consistent with the overriding objective and would have saved unnecessary delay and cost. Despite being warned by Employment Judge Jones and by this Tribunal that he was at risk of strike out, the Claimant maintained that the only alternative to strike out which would secure a fair trial was an outright postponement of this hearing.

28. The effect of a postponement would be at least a six month delay. The majority of the issues to be decided will depend upon the quality of the oral evidence, for example what was said by Mr Hussain on various occasions since 16 December 2016. By the date this case could be re-listed many of the allegations will be over 2 years old. The Tribunal rules provide for short time limits in part to ensure that evidence is dealt with while matters are fresh in the parties' minds. The effect of a postponement in this case, would adversely affect the ability for the parties to have a fair trial due to the passage of time and the impairment of human memory.

29. We considered whether there was contemporaneous documentary evidence which would enable witnesses to refresh their memories on the matters in dispute sufficient to have a fair trial. We do not think that there was in respect of the harassment complaint. The Claimant raised a grievance against Mr Hussain on 10 May 2017 in which he alleged bullying, harassment, racial discrimination and infringement of his human rights. He gave no particulars of the conduct relied upon in support. A further letter dated 17 May 2017 alleged verbal and physical abuse since October 2016 but again provided no details of the actual conduct of Mr Hussain relied upon. The Claimant was dismissed for gross misconduct on 17 July 2017, following two investigation meetings which he did not attend and a disciplinary hearing which he did not attend. The Claimant did not attend a grievance hearing on 10 August 2017. The Claimant's failure to provide details of his complaints during the internal processes and non-attendance at these hearings limited the extent to which the points he now makes were considered and recorded in documents at the time.

30. There are seven witnesses being called by the Respondent in this case. The

Respondent has expended time and public money in preparing their witness statements and ensuring their attendance today. Their attendance would be required again at a re-listed hearing. The Claimant is not in a financial position realistically to pay the costs incurred by the Respondent as a result of a late postponement. Four days of Employment Tribunal time has been allocated for the hearing. There are many cases waiting to be heard in the Employment Tribunal at the moment. It is well reported that the pressure on the Tribunal's limited judicial and administrative resources has become greater in recent months. As Langstaff P said in **Harris**, we must have regard in the need to do justice, not merely between the parties but also sharing out the resources of the court fairly. This is a factor which militates against a postponement in this case.

31. Another significant factor is the effect of Rule 30A, a relatively recent introduction to the Tribunal Rules and designed to reduce the number of last minute postponements and the additional expense, delay and disruption caused as a result. We are not satisfied that there are exceptional circumstances requiring a postponement in this case. As Mr Alford put it, and we accept his submission, the Tribunal hears claims presented by litigants acting in person on a daily basis, they are generally well able to prepare and present their case. The Claimant is clearly an intelligent and capable man. He has benefited in the past from legal representation by Counsel. He has Mr Daddey assisting him now. In the Preliminary Hearing Summary, the Claimant was expressly directed to the Presidential Guidance to help him to understand what was required and how he could ensure compliance with case management orders. The Claimant has not availed himself of that guidance. In the circumstances, a request to postpone in order to secure legal representation and properly prepare the case is not an exceptional circumstance on the facts of this case.

32. Overall, and with some degree of regret given that the Claimant rejected our proposed alternatives which would have avoided such an order, we are persuaded that this is case in which it is proportionate to strike out all of the claims.

Employment Judge Russell

24 September 2018