EMPLOYMENT TRIBUNALS

Claimant: Ms M Jilley

Respondent: Cornerstone Healthcare Group Ltd

Heard at: Bristol (in public, by video) **On:** 6 July 2021

Before: Employment Judge C H O'Rourke

Appearances
For the Claimant: Not in attendance, or represented
For the Respondent: Ms Leonard - counsel

PRELIMINARY HEARING JUDGMENT

1. The Claimant's claim of automatic unfair dismissal/detriment, on grounds of making a protected disclosure, is struck out, subject to Rule 37(1) of the Tribunal's Rules of Procedure 2013.

2. The Claimant is ordered to pay the Respondent's costs, in a sum to be assessed and the parties are directed to the orders made at paragraph 24, below.

REASONS

Background and Issues

1. Following a telephone case management hearing of 20 April 2021, this matter was listed for an open preliminary hearing, the purpose of which was to hear the Respondent's application for costs and also that the claim should be struck out, subject to Rule 37(1)(b),(c) and (d) of the Tribunal's Rules of Procedure, on the grounds that the conduct of it has been unreasonable; and/or for non-compliance with orders of the Tribunal and/or that it has not been actively pursued.

2. The parties were ordered to do the following:
   2.1 By 4 May, the Respondent to clarify/repeat its application, which was done.
   2.2 By 18 May, the Claimant to provide a written response to that application. On 25 April, the Claimant provided a document entitled 'Request for Urgent Review', which she stated met that purpose [97-101].
   2.3 By 8 June, the parties agree the contents of a single joint bundle. The Claimant has not, however, agreed the contents of the bundle provided by the Respondent, stating that she would submit her own bundle, which she has not [144].

3. The Claimant did not attend this Hearing, or give any indication that that was her intention. She was notified by email that in the event of her continued failure to attend, or to contact the Tribunal, the Hearing would re-commence at 2.30pm (having been listed for 2pm) and it would proceed in her absence. No further contact having been received from the Claimant, I considered it appropriate, subject to Rule 47, to proceed, taking into account such relevant written submissions as the Claimant has provided and therefore the Hearing commenced at 2.35pm.

The Law

4. Ms Leonard referred to the following authorities:
   4.1 **Weir Valves & Control (UK) Ltd v Armitage [2004] UKEAT ICR371**, as to strike-out of pleadings and that the guiding consideration is the 'overriding objective'.
   4.2 **Jilley v Birmingham and Solihull Mental Health NHS Trust and ors [2007] UKEAT/0584/06/DA**, a case involving the Claimant herself in respect of costs.
   4.3 **Barton v Wright Hassall LLP [2018] UKSC 12**, as to the level of allowance that should be made for a litigant-in-person.
   4.4 **C v D [2019] UKEAT/0132/19/RN**, as to the level of detail of information required in claims or responses.

5. Rule 37 of the Employment Tribunal's Rules of Procedure 2013, states as follows:

   Striking out

   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.

Facts

6. The history of the progress of this matter was set out in the Order of 20 April 2021, which, for ease of reference, is now reproduced here, updated to take account of this Hearing today. At a case management hearing before Employment Judge

Midgley, on 4 January 2021, an order was made that a further case management hearing be held, to discuss the issues in the claim (subject to further clarification by the Claimant), to determine whether existing orders had been complied with and if appropriate, to list the claim for final hearing, making such other further case management orders as might be appropriate.

7. That hearing proceeded, before me, but unfortunately, it proved impossible to progress this matter, as the Respondent (and the Tribunal) remained unclear as to what, precisely, the Claimant was alleging, despite the Claimant having provided further information on 20 January 2021 [pages 74-81 of the bundle]. As a consequence, the Respondent had been unable to provide its amended grounds of response.

8. To establish that her dismissal, on 8 January 2020, was on grounds of her having made protected disclosures, the Claimant relies on disclosures of information that she states that she made at meetings on 23 and 31 December 2019, to two managers, a Ms Shaw and a Ms Relf. The first of these meetings, on 23 December, seems, from her claim form [18], to contain the bulk of the allegations she made. It is unclear if subsequent references to '*unsafe administration of medication by another nurse'* and that the Respondent '*had not inducted me'* at the 31 December meeting [18] are new, or are repetitions of existing allegations from the previous meeting.

9. The claim form sets out that at the meeting of 23 December, the Claimant raised multiple concerns, including, amongst others, allegations of the withholding of, or unsafe administration of medication; misuse of medication; failure to investigate a fault with a landline; falsification of patient records; rough handling of patients, allowing patients to become dehydrated, aggressive behaviour towards patients; unsafe moving and handling; failure to follow care plans; failure to provide female carers for female patients; misuse of wheelchairs; provision of choking hazard food to patients and delay in calling an ambulance, following which a resident died. Apart from two named staff, Ms Shaw and a Mr Stoenescu, no other members of staff are named. None of the patients concerned are named (even by initials) and no dates of these incidents are provided.

10. At the previous Hearing, I attempted, by taking the first listed allegation above, to establish what it was precisely the Claimant is alleging she said to the two managers, but the Claimant stated that she was unprepared to provide the full information and that in any event, it was contained in other documentation she had previously provided, both to the Respondent and the Tribunal. It was clear that it was not going to be possible to go through these allegations and establish events/actions/inactions, dates, names and other details necessary for the Respondent to know precisely what it was that the Claimant alleges that she told to Ms Shaw and Ms Relf on the 23rd.

11. This inability of the Claimant to set out sufficient detail as to what she says she said to her managers on this date (and if appropriate the 31st also) was mirrored at the last case management hearing, where EJ Midgley recorded [67] that '… *during the hearing the Claimant was not able to concisely identify the matters that she was relying on for her claims, but said that the information had already been provided.'* He also said, referring to the ET1 that '… *the documents referred to in it are evidence which is relevant to the claims made, but do not*

form part of the pleaded case itself …'. He set out, very clearly, in paragraph 2 of his Order [62] what further information was required of the Claimant.

12. The Judge also records that the Claimant did not comply with an order of EJ Cadney of 11 June 2020, for further information. Following that non-compliance, she was again ordered, by another judge, EJ Bax, to provide the information ordered, but, as recorded by EJ Midgley [66] that response '*… was ambiguous …or included earlier disclosures that were referred to on those occasions …'*.

13. Subsequently, on 18 September 2020, EJ Emerton again ordered the Claimant to set out the further information previously requested, but the Claimant was advised that instead of responding in writing, she should be ready to provide the information at the telephone case management hearing of 4 January 2021, but at which EJ Midgley concluded that she was not, hence his subsequent order, listing the hearing of 20 April 2021.

14. Following the hearing of 20 April 2021, the Claimant made two written representations/applications, as follows:
    14.1 The above-mentioned 'Request for Urgent Review' document. In it (as relevant to the issues in this Hearing) she asserted that she had complied with previous case management orders and that '*full detailed information on the individual protected disclosures had already been provided to the Respondent and in key documents, as included in the ET1, with attached grounds (seven pages)*.' She also accused the Respondent counsel of making '*false, dishonest and vexatious'* statements and being '*malicious'.* She stated that the EAT judgment (**Jilley**, as referenced above), on which counsel sought to rely, contained '*wrong, false and untrue information'*. She made various allegations as to my conduct of that hearing, which she described as '*diabolical'* and to making '*dishonest comments'.* The Tribunal responded to that 'Request' in due course, stating that existing case management orders would stand and that any relevant issues raised by her in this Request could be dealt with at this Hearing, today [109].
    14.2 On 1 June 2021, she applied, subject to Rules 51 and 52, to withdraw her claim, reserving the right to bring a further claim against the Respondent. That application was refused, for the reasons given in the Tribunal's response of 22 June 2021 [110].

Submissions

15. Ms Leonard referred to her skeleton argument and made the following additional submissions:
    15.1 That, since the Claimant's bringing of this claim, over a year ago, we are no further forward. The claim is still insufficiently pleaded, no amended response can yet be filed and there is no indication of any possible final hearing date.
    15.2 Since the last hearing and the Respondent's provision of a skeleton argument, the Claimant has simply provided her 'Request for Review' document and application to withdraw and yet more detailed references of her complaints to the Nursing and Midwifery Council (NMC) [114 to 133], none of which address the specific issue raised in past case management hearings, specifically what did she say to her managers at the meetings of 23 and 31 December 2019. Instead, in her 'Request' she uses phrases

such as '*in very broad terms'*, when precisely the opposite is required [97(2)] and simply insists that she has complied with Orders, when she has plainly not (5).

15.3 This is not a case of a claimant not having English as a first language, or some other obstacle, with which, obviously, a Tribunal and indeed the Respondent would be sympathetic, but instead she is a clearly educated and medically-qualified person, who has experience of the Tribunal system, to appeal level. Her stance throughout has been obstructive, making serious allegations against both judges and the Respondent's legal representatives, to include of dishonesty.

15.4 The Claimant has refused to engage in this process, most recently refusing to agree a joint bundle for this Hearing and failing, without explanation, to attend today.

15.5 It is clear that such behaviour has been scandalous, non-compliant with several Tribunal orders and that her claim is not being actively pursued. This is causing prejudice to the Respondent, both in terms of mounting legal costs, with no resolution in sight, or likely final hearing date and the inevitable effect continued delay will have on the cogency of the evidence to be called in the Respondent's defence, with memories fading and staff moving on.

15.6 As stated, this is not the Claimant's first attempt at Tribunal litigation and it is clear from the judgment in **Jilley** that she exhibited similar behaviour in that case.

16. The Tribunal had already read fully the Claimant's 'Request for Review' document and her application to withdraw. Neither of those documents, beyond the bald assertion that she has complied with Orders and provided all necessary information to properly plead her claim, go any further in explaining or excusing the position her claim is now in. Clearly, the Claimant had the opportunity to attend today's hearing, to put her case, or, at very least, to directly address, in written submissions, the issues raised in the Respondent's skeleton argument, but she has chosen not to do so.

Conclusions

17. 37(1)(b) - that the manner in which the proceedings have been conducted by or on behalf of the claimant … has been scandalous, unreasonable or vexatious. I find that the manner of the Claimant's conduct of her claim has been scandalous and unreasonable, for the following reasons:

17.1 It is clearly unreasonable to bring a claim and to refuse, at two case management hearings, despite several orders that she do so, to sufficiently particularise it, in order that the Respondent can know what allegations they are facing, but, instead, to repeatedly simply refer to voluminous documentation and expect the Respondent and/or the Tribunal to delve through it, to attempt to distil what the claim is about. In light of the fact that five Employment Judges (EJs) have requested such clarification, it cannot be reasonable to simply assert that no such clarity is needed and instead that the judges and the Respondent are at fault.

17.2 It is clearly scandalous behaviour to accuse both judges and lawyers of dishonesty, which the Claimant has done on several occasions, without any basis for doing so.

18. 37(1)(c) - for non-compliance with any of these Rules or with an order of the Tribunal. It is self-evident that the Claimant has, without due cause, or excuse and indeed wilfully failed to comply with multiple orders, as follows:
    18.1 In response to a request for clarification of her claim, on 11 June 2020 [58], from EJ Cadney, she simply referred him to her claim form.
    18.2 On a further request from EJ Bax to provide this information, on 25 June 2020, she again simply referred to the documents provided with her ET1 [55].
    18.3 On 18 September 2020, she was ordered by EJ Emerton to be in a position to provide the requested information at the forthcoming case management hearing of 4 January 2021, but was unable to do so.
    18.4 At that Hearing, EJ Midgley ordered her to provide the required information by 18 January 2021 [62]. When, a day late, she responded, she simply suggested that the EJ had failed to take account of information '*carefully explained to him'* and that he had '*missed out key documents'* [80-81].
    18.5 On 3 March 2021, EJ Midgley again ordered her to provide the information, with a deadline of 17 March 2021 [86]. When the Claimant responded, ten days late, she again simply disagreed that she had not complied and accused the EJ of making '*a number of incorrect, wrong or misleading statements on my claim'* and that '*one only has to take the time to actually read my ET1 grounds to see he has recorded this incorrect and wrong information.'* [87].
    18.6 At the 20 April 2021 case management hearing, the Claimant continued to be unable to clarify the nature of her alleged protected disclosures and then subsequently failed to obey the Tribunal's order to agree a joint bundle of documents for this Hearing.

19. 37(1)(d) - that it has not been actively pursued. Again, it is a statement of the obvious that the Claimant, after over a year, has not been actively pursuing her claim, due to her repeated and wilful refusal to clarify it, thus preventing the Respondent from filing an amended response and progressing the claim to final hearing. At the last hearing, when I made it clear that I was prepared to go through each and every allegation with her, as to the nature of the protected disclosures she says she made at the relevant meetings and to set those down in a case management summary and to then order the Respondent to file an amended response, in order that the matter could be progressed, she simply stated that she was unprepared to provide the full information and that in any event, it was contained in other documentation she had previously provided, both to the Respondent and the Tribunal. I can only assume, from this stance that she has no desire to progress the matter, but perhaps hopes to 'wear down' the Respondent sufficiently to obtain some settlement of her claim.

20. Decision. For these reasons, therefore, the claim is struck out.

Costs Application

21. Ms Leonard applied for a costs order, on the basis of my findings of unreasonable conduct of the proceedings and breach of Tribunal orders by the Claimant (Rule 76(1)(a) and (2)).

22. She was not in a position, today, to provide a schedule of the Respondent's costs, but would do so as ordered.

23. Decision. I decided that a costs order is appropriate in this case, for the following reasons:
    23.1 As already found, the Claimant's conduct of these proceedings has been unreasonable, almost from its outset;
    23.2 She is in breach of several Tribunal orders;
    23.3 The Respondent has, as a consequence, incurred unnecessary costs in both attending two hearings, above and beyond what would be normal in a case of this nature and in reading and responding to unnecessary, often voluminous and repetitious correspondence from the Claimant. As set out in **C v D**:

    "This case in my judgment, is a paradigm example of that which can occur when a claim is not set out with sufficient legal precision. Valuable time can be lost. Costs can increase. There may be a delay in the case being heard, because the parties are not clear precisely what issues are in dispute or consider that they have inadequate time to meet the case that is advanced against them, once they have understood it." Para 13

    23.4 I reminded myself of the case of **Kovacs v Queen Mary and Westfield College [2002] EWCA Civ 352** which indicated that ability to pay is not a factor which an employment tribunal is required or entitled to take into account when deciding whether or not to make a costs order. **Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420 EWCA** indicates that a tribunal has a broad discretion in such matters and in exercising that discretion should look at the 'whole picture' and ask whether there has been unreasonable conduct by the Claimant in bringing or conducting his claim and in doing so, to identify the conduct, what was unreasonable about it and what effects it had. While ability to pay is a factor that a tribunal may take into account, it is not determinative as to the amount of costs ordered. **Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797** states that (paragraph 37) '*The fact that her ability to pay was so limited did not, however, require the ET to assess a sum that was confined to an amount that she could pay. Her circumstances may well improve and no doubt she hopes that they will.*'
    23.5 I note that the case of **AQ Ltd v Holden [2012] UKEAT IRLR 648** set out that a tribunal should not judge a litigant in person by the standards of a professional representative, lacking as they will objectivity and knowledge of the law, but, in this case, the Claimant is a more sophisticated litigant-in-person than the average, having previously brought a claim which resulted in a costs order and which she subsequently appealed to the EAT (**Jilley**). I note also the guidance in **Barton**, on a related point, namely (at para.18):

    The rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. Any advantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side, which may be significant if it affects the latter's legal rights, under the Limitation Acts for example. Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take.

24. Amount of Costs Order. In order for the amount of costs to be determined, the parties are ordered to do the following:
    24.1 By no later than **27 July 2021**, the Respondent is to provide a copy of its costs schedule and any related documents to the Claimant and the Tribunal;
    24.2 By no later than **17 August 2021**, the Claimant is to provide a response, or challenge to the amount of costs claimed and also documentary evidence as to her ability to pay any such order (Rule 84), to include recent bank and pay statements and evidence of outgoings and debt repayments, copied to the Tribunal and the Respondent.
    24.3 The Tribunal considers, applying the Overriding Objective (Rule 2) that it would be both proportionate and avoid delay and further expense, for this matter to be dealt with by way of written submissions only. If, however, either party does not agree and considers that a hearing will be necessary, then they should state their position and their reasons for it, at the same time as making the above submissions.

Employment Judge O'Rourke
Date: 06 July 2021

Judgment and Reasons sent to the Parties: 13 July 2021

FOR THE TRIBUNAL OFFICE