



Case Number: 2303622/2015

## EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

Miss T Williams

and

**Respondent**

Swale Academies Trust

**Preliminary hearing held at Ashford on 20 January 2017**

**Representation**

**Claimant:**

In person

**Respondent:**

Mrs C Ashiru, counsel

**Employment Judge Wallis**

## JUDGMENT

The claim is struck out pursuant to the provisions of Rule 37 (1) (c) on the grounds that the Claimant has failed to comply with the Tribunal orders to prepare a witness statement, despite various extensions to the date for compliance.

## REASONS

Oral reasons were given at the end of the hearing. This judgment was originally sent to the parties on 8 February 2017. The Claimant requested written reasons.

### ISSUES & BACKGROUND

1. By a claim form presented on 10 December 2015 the Claimant, who had been employed by the Respondent for less than one year, claimed that she had suffered detriments and been dismissed because she had made two protected disclosures. She also claimed holiday pay.
2. When the notice of claim was served on the Respondent, the standard letter was sent enclosing a date for hearing (then 31 March 2016) and a timetable for directions, which included the preparation of witness statements and how and when to do this.
3. As the claim form contained very brief information, the Respondent applied for additional information, and a case management discussion was arranged. At a case management discussion on 24 February 2016 (incorrectly dated 2015) the Claimant appeared in person. The issues were agreed and set out in the case management order from Employment Judge Andrews. The order contained directions for the preparation of the trial bundle and witness statements. Witness statements were to be exchanged on or before 11 May

2016. The claims were listed for a full merits hearing for three days commencing on 22 June 2016.

4. On 27 May 2016 the Respondent notified the Tribunal office that the Claimant had failed to provide any witness statements. They pointed out that the claim form was very brief (five lines) and so it was particularly important for the Claimant to set out her claim in a statement.
5. The Claimant notified the Tribunal office that she was waiting to hear whether she would obtain funding for legal advice.
6. On 9 June 2016 Employment Judge Andrews issued what purported to be an Unless Order pursuant to the provisions of Rule 38. I say 'purported' because it read 'The Claimant is to exchange witness statements with the Respondent by 13 June 2016, failing which the claim may be struck out without further notice'. An Unless order should make it clear that unless the specified act is done, the claim (or response) will be struck out without further notice.
7. On 9 June 2016 the Respondent sent its witness statements to the Claimant. The Claimant applied for a four week extension in order to exchange statements.
8. By letter of 16 June 2016, Employment Judge Andrews extended the compliance date to 5pm on 17 June 2016, noting that the four weeks requested by the Claimant would expire after the hearing date.
9. There is an email on the Tribunal file from ECF to the Claimant stating that her application for exceptional funding (legal aid) was received on 13 June 2016.
10. The file was referred to the Regional Employment Judge on 20 June 2016. He noted that the Claimant had not complied with the order and directed that the claim be struck out 'by reason of the Tribunal's unless order'. The parties were informed and the hearing cancelled.
11. On 20 June 2016 the Claimant wrote to the Tribunal office to complain, and asked for her claim to be reinstated.
12. Having considered the Respondent's response to that application, and having looked at the file, the Regional Employment Judge wrote to the parties on 6 July 2016 to say that his previous letter was 'written in error' because the unless order was not in fact such an order. 'Thus the claim has not been struck out...' He also wrote that 'the issue for determination is therefore whether the claim should now be struck out. The Claimant submits that it should not. However, the Claimant is in default in relation to the exchange of witness statements. The Claimant is to urgently clarify within seven days whether there is any realistic prospect of her exchanging witness statements at the present time'. The Claimant did not respond to that enquiry.

13. On 6 July 2016 the Respondent disputed that there had been any error by the Tribunal.
14. The Regional Employment Judge listed the matter for a preliminary hearing to consider, as set out in the notice of hearing sent to the parties on 19 July 2016, 'to consider whether this case was struck out; if so, whether it should be reinstated'. He expanded the issues, at the request of the Respondent, on 2 August 2016, to include consideration of whether the claim should be struck out for failure to comply with a Tribunal order; and/or on the grounds that it had no reasonable prospect of success.
15. The hearing arranged in July 2016 did not proceed because it was vacated by the Tribunal. The parties sent in dates to avoid. It was re-listed for 18 August, but on 17 August the Claimant said that she was unaware of the date, so it was postponed.
16. After receiving further dates to avoid, the preliminary hearing was re-listed on 20 January 2017, which is the hearing to which these reasons refer. The notice of hearing was sent to the parties on 6 October 2016.

#### THE PRELIMINARY HEARING ON 20 JANUARY 2017

17. I made sure that the Claimant was aware of the issues to be decided, and explained the procedure to her. I proposed to hear submissions from the Respondent. Then the Claimant could have some time to consider her response, after which she could make her own submissions. In the event, the Claimant told me that she did not want any time to consider her submissions before making them. I limited the initial submissions to the issues about the purported unless order and the failure to comply, so that the Claimant was not overloaded. In the event, it was not necessary to consider the remaining issue about the merits of the claim.

#### SUBMISSIONS

18. On behalf of the Respondent, Mrs Ashiru referred me to the documents in the trial bundle in some detail in order to set out the history of events. She referred me to the cases of Enamejawa v British Gas EAT/0347/14 and St Albans school v Neary 2010 IRLR 124. She submitted that it had been correct to strike out the claim and that it should not be reinstated. In the alternative, she submitted that the Claimant's continuing failure to comply with the order to produce a witness statement indicated that the claim should be struck out.
19. On her behalf, the Claimant said that she had found it difficult to obtain legal advice and had applied for legal aid through the exceptional fund team. She said that she needed more time to catalogue her claim. She had approached FRU in November 2016, but they had said that they would not consider assisting her until after this preliminary hearing. She told me that she had not

yet written her witness statement and felt that she had not yet received everything she needed to do so. She accepted that Employment Judge Andrews had explained how to produce a statement, but she had not done it because she found the Respondent to be manipulative. She thought that she might be able to produce a statement at the final hearing. She considered that the EDF was responsible for her failure to meet deadlines. She also told me that her claim 'needed to be updated' and that she had a lot more evidence to put forward.

20. In reply, Mrs Ashiru pointed out that disclosure had taken place in March 2016 and in addition the Respondent had responded to the Claimant's subject access request in October 2016, although the documents were returned to the Respondent because the Claimant did not collect them from the post office. They were then re-sent.
21. I adjourned to consider what I had heard, and reminded myself of the relevant provisions in the Rules.

### CONCLUSIONS

22. The first question was whether the claim had been struck out. I noted that in his letter the Regional Employment Judge had said that he had struck it out, but it seemed to me from the subsequent correspondence that he then reconsidered that decision because he noticed that the purported unless order was not properly drafted. He told the parties in a letter, as set out above, that the claim was not therefore struck out. I concluded that the sequence of events indicated that the claim had not been struck out. Accordingly it was not necessary to consider the next point, which was whether if it had been struck out it should be reinstated.
23. I turned to the issue of whether the claim should be struck out because the Claimant had failed to comply with the Tribunal's order, namely the order made on 24 February 2016 that witness statements should be exchanged variously by 11 May 2016, by 13 June 2016 and then by 17 June 2016. The Claimant had clearly failed to do so either by those dates or at all.
24. I concluded that the Claimant had been given a number of opportunities (two case management orders, an unless order and an extension of time for compliance with it), and a great deal of time, to comply with the order; to write a statement and send it to the Respondent. She failed to do so. I considered that had she attended this hearing with a statement, or had given me some reassurance that she recognised the failure and that it would be ready in, say, the next week, I would have readily considered extending the time limit. The Claimant gave me no reassurance at all. She said that she needed legal representation to write a statement; I was satisfied that she did not. Many claimants represent themselves, from all walks of life, and work hard to comply with the orders and write their own statements. The Claimant had

been employed as a teaching assistant at the Respondent school; she was not uneducated or unable to express herself.

25. The Claimant also indicated, which was even less reassuring, that she now wanted to change the basis of her claim. I noted that she had not raised any concern before about the issues set out by Employment Judge Andrews almost one year ago.
26. I weighed the prejudice to either party. If I did not strike out the claim, I considered that the Respondent's position would be prejudiced by the delay. I noted that the time elapsed would mean that memories would have dimmed. I noted that some of the witnesses had now left to work elsewhere. I noted that the Respondent still did not know the details of the claim, other than the brief description in the claim form and the issues agreed at the case management discussion. The witness statement was particularly important in this case.
27. As far as the Claimant was concerned, I noted that if I struck out her claim she would no longer be able to proceed. However, I balanced that against the amount of time that she had been given to comply. I noted the helpful tone of the correspondence from the Respondent to the Claimant. I noted that she said that she had been to see the CAB on various occasions. Yet, she had still not complied with the order and had no idea of when she would do so. She did not seem to acknowledge that there had been a delay, and a requirement to comply. In fact, she was apparently thinking about an amendment of the claim.
28. Noting that it is a draconian step to take, I concluded that the Claimant's prolonged failure to comply with the Tribunal orders, together with the proposed ongoing failure, demonstrated that it was in the interests of justice to strike out the claim at this stage. Rule 37 (1)(c) and (b) refer to non-compliance and unreasonable failure to comply with a Tribunal order.
29. In the alternative, if it could be said that the claim had not been reinstated by the Regional Employment Judge, then I concluded that it would not be in the interests of justice to reinstate it now, for all of the reasons set out above.

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Employment Judge Wallis  
28 February 2017