EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms K Van-Pitterson	**v**	**James Andrews Recruitment Solutions Ltd (JAR Solutions)**

Heard at: Watford **On**: 4 January 2018

Before: Employment Judge R Lewis

Appearances

For the Claimant: No attendance or representation
For the Respondent: Ms C Jennings, Counsel

JUDGMENT

1. The claimant's application for consideration of strike out is refused.

REASONS

1. The procedural history of this case should be summarised to set the scene for this hearing.

2. Day A, Day B, the date of the early conciliation certificate, and the date of presentation of the claim form were all 21 December 2016. The claim was a claim for one months' notice pay and was listed for a hearing of one hour in April 2017.

3. The response was presented, and an application was made for postponement and allocation of more hearing time. By letters dated 19 April, the parties were informed that the hearing had been postponed and relisted to Monday 7 August for one day. They were told that witness statements should be exchanged three weeks before the hearing, which was 17 July 2017.

4. On 12 June the respondent's solicitors by email proposed exchange at 10am on 17 July. There was correspondence about provision of the bundle. On 18 July the respondent's solicitor wrote to the claimant:

> "I emailed you regarding statements on 12 June, 20 June and 14 July, but I have not had any response from you. Please be aware that you are already in possession of our witness statement from when the hearing had been scheduled to go ahead in April. If I do not hear from you by 4pm on 21 July I will be looking to apply to the tribunal for an unless order."

5. The respondent applied for an unless order on 21 July. On 31 July I authorised issue of an unless order, which in the event was not available to me for signature until Friday 4 August. I signed it that morning. The tribunal file indicates that it was emailed to the parties at 12.16 that day, which left about 1 hour 45 minutes (ie until 2pm) for compliance. The file also showed that at 12.17pm, and in accordance with usual procedure, a member of tribunal staff spoke briefly to the claimant, who confirmed her attendance the following Monday, 7 August.

6. At 4.45pm on 2 August the respondent's solicitors had asked for the claim to be struck out. That was on the misunderstanding that the unless order had already been sent. The request for strike out was repeated at 2.23pm on 4 August, and allowed by letter from the tribunal of the same day, which was sent by email to the parties at around 3.20pm. The hearing was vacated.

7. On 1 September 2017 the tribunal received a handwritten letter from the claimant, dated 'August 2017', which should be considered in full. It stated:

> "I was informed by a clerk on the telephone that I could submit my bundle/witness statement to the court clerk before the actual case on the Monday morning. I believe it was on the Wednesday 2 August before the court case when this discussion transpired.
>
> I received a phone call from another court clerk on the Friday before the court case. During the conversation I informed the clerk I would hand copies of my bundle to the clerk on the morning of the court case as per the previous clerk's instructions.
>
> At 3.29pm on 4 August 2017, I replied to an email which I received from the court. I asked for clarification as the email conflicted with what I was told by the clerk on 2 August 2017. I did not receive a response.
>
> On Monday 7 August, I attended the court case with copies of the bundle. I was informed by the clerk/receptionist that the case would not go ahead. The bundle copies were not accepted.
>
> I wish to appeal the decision to dismiss the case in light of the situation. I was simply following the instructions provided by the employment tribunal clerk on 2 August 2017."

8. This was treated as an out of time application for reconsideration in accordance with Rule 38, and although no application was made for an oral hearing, notice of this hearing date was sent by letter of 26 November.

9. On 13 December the claimant wrote to the tribunal to state that she would be travelling for more than three hours, and asked if the hearing time could be changed to late afternoon. Accordingly the hearing was relisted from 10am to 2pm.

10. Just after 4.30 on 3 January, the claimant wrote to the tribunal to say:

> "I can in no way afford the travel from Canterbury to Watford. I am extremely concerned as I wish for my case to be heard and I would most definitely be there tomorrow if I could. Is there a way my case can still be heard for reconsideration by the ET tomorrow, though I cannot make it? If not I will have to ask for a postponement."

11. This email was referred to me and just after 9am on 4 January the tribunal notified the claimant by email, in accordance with my instructions, that "The hearing will proceed at 2pm as listed. If you wish the tribunal to consider any application or any other written material you must write at once." The claimant replied with a document headed: "When the position was first spoken about" which was cut and pasted extracts from documents. It is possible that the claimant understood that to be her witness statement, but she did not say so, and the document was not identified as such.

12. The first matter for me was whether or not the hearing should proceed. The claimant had in fact not made an application to postpone and Ms Jennings asked that the matter should proceed. That seemed to me correct.

13. The application was treated as an application under Rule 38. It was made well out of time, without any explanation of delay. The claimant's September letter had stated that she had all the information she needed at the latest on 7 August. It was nevertheless in the interests of justice to proceed to deal with the application on its merits.

14. Ms Jennings referred me in some detail to the issue of the claimant's compliance. I find that on 19 April the claimant was told that she was required to provide a witness statement by 17 July. That was not an onerous requirement.

15. The claimant is a teacher with post-graduate qualifications. She plainly has no difficulty in expressing herself in writing.

16. Although this was a claim for a notice payment, it was one in which oral evidence was to be of the essence. There was dispute as to whether there existed a contract between claimant and respondent; and if so, what its terms were, including terms as to notice. It had been listed for a day, and clearly much would turn on the conflict of oral evidence between the claimant and Ms O'Donnell.

17. Ms Jennings pointed out that from 12 June, and certainly by 18 July, the claimant was put on notice of the respondent's response to her failure to serve a witness statement, and that she had at that time the advantage of seeing the respondent's witness statement and of course the bundle.

18. The claimant's conduct on 4 August seemed inexplicable. She had received the unless order, signed by the present judge, but appeared not to understand its plain language, considering that she was entitled to rely on information allegedly given to her over the telephone by a member of the administrative staff. (There was no record of such contacts on the tribunal file).

19. On 4 August, when she received the unless order, the claimant could have complied even at that late stage, as she must by then have been ready to proceed: it seems to me inconceivable that her witness statement was not then to hand. It was not clear why she attended the tribunal on 7 August, having been told that the hearing had been vacated. She gave no explanation for delay in making her application.

20. Ms Jennings also stated that the claimant had failed to engage with the process for this hearing, failed to answer correspondence from the respondent's solicitors (save for apparently making a request not to be contacted); given no explanation for failure to comply with the unless order; and seemingly not complied with it, if at all, until the morning of this hearing, if the document she sent to the tribunal then was indeed her statement.

21. In considering this matter, I have relied on the judgment of the EAT in Enamejewa v British Gas/UK EAT/0347/14, and in particular the quotation at paragraph 17 from Thind v Salvesen/UK EAT/0487/09, which sets out the broad range of interests of justice to be considered in such an application.

22. In considering that the interests of justice lead me to reject the claimant's application, I note the following:

    22.1 I attach no weight to the claimant's non-attendance today. I accept at face value her assertion that she could not afford the travel and I note that under Rules 42 and 47 she in any event had the right not to attend.

    22.2 Ms Jennings cautioned me not to attach weight to the manifest weaknesses in the merits of the claimant's case. Her caution seemed to me well made, and I accept it.

    22.3 I find that the claimant for a prolonged period seemed not to engage with the disciplines of the employment tribunal process, and paid no regard to the direction of 19 April or the unless order.

    22.4 The only explanation given by the claimant, namely that she thought she could rely on what she was told by administrative staff, is neither plausible nor acceptable. I say so for two reasons. The claimant had two written instructions given in the name of two different judges. They were clear and easy to follow. Whatever the claimant thought she was told by administrative staff was in response to questions which she formulated. I had no confidence that the claimant had sought guidance on the precise language of directions/orders from a judge.

22.5 The claimant has given no explanation for her default other than the one which I reject, and appeared to make no attempt to remedy the default until shortly before the day of this hearing.

22.6 In a case where disputes of oral evidence are crucial, it seems to me that delay prejudices a fair trial, and that the respondent is prejudiced by the mere facts (a) that there has not been exchange of statements, and (b) that the claimant has had many months in possession of the respondent's evidence before replying.

22.7 As a matter of proportionality, I am concerned that the claimant's prolonged failure to engage with the tribunal process and with the respondent's solicitors should not be taken lightly. I am concerned that if this claim were to be reinstated, the claimant has given no indication or reason to believe that there would not be recurrence.

23. For all of those reasons, it seems to me that the interests of justice favour not disturbing the existing strike out of the proceedings. The application to reinstate the proceedings is refused.

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Employment Judge R Lewis

Date: …31 January 2018

Sent to the parties on: ...31 January 201

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For the Tribunal Office