EMPLOYMENT TRIBUNALS

Claimant: **MR P GRANT**

Respondent: **(1) JB GLOBAL LIMITED**
(2) FRANK GRADY (discharged from the proceedings on 2 May 2019)

PRELIMINARY HEARING

Heard at: **London South Employment Tribunal**

On: **2 May 2019**

Before: **Employment Judge C Hyde, Sitting Alone**

Representation:
For the Claimant: **Mr J Neckles, Trade Union Official**
For the Respondent: **Mr T Adkin, Counsel**

JUDGMENT

The Judgment of the Tribunal was that: -

1. The Tribunal declined to recuse itself from dealing with this case.

2. The Respondents' application to strike out the claim was refused.

3. The second Respondent was discharged from the proceedings forthwith.

REASONS

1. This hearing was listed to consider an application by the Respondent to strike-out the Claimant's claim. The claim was presented in 2017 and the order that the application should be determined was made in earlier in 2018.

   Recusal application

2. At the commencement of the instant hearing, when the Tribunal enquired about whether there was a list of issues, the Respondent referred the Tribunal to the order of Employment Judge Wallis which was made on 6 December 2017 after a hearing in which she made various case management orders and identified aspects of the claim about which the Claimant was to provide additional information. She further ordered that the final determination of what the issues were, was subject to the provision of that additional information by the Claimant.

3. The Respondents' representative indicated to the Tribunal that it was non-compliance with that Order that had led to the current application.

4. The Tribunal asked the Claimant what the Claimant's position was and this led to Mr Neckles asserting that the Respondents' representative was incorrect and that the application to strike-out was not based on that. The Tribunal then directed that the Respondent should outline the application and then the Tribunal could determine what the nature of the strike-out application was.

5. The Claimant's representative, Mr Neckles, then indicated that there was an application which he had been considering making and that he wished to take instructions from his client about. After taking those instructions within the Tribunal, he then indicated that he had an application to make to ask for me to be recused.

6. The essence of this application was that during a hearing some ten or more years ago, he believed I had been upset by a comment that his former client reported to the Tribunal that he had made. The comment was said by Mr Neckles not to have been flattering to the Tribunal. He accepted that he had appeared before this Tribunal on many many occasions subsequently, and that he had not previously complained about that hearing or any subsequent hearing before me, until this occasion. He explained that his appearance at a hearing before me at another Tribunal towards the end of 2018 had been "the last straw" for him, having resolved after the case ten years ago, to keep quiet. Among the complaints made by Mr Neckles about my treatment of him on previous occasions, he alleged that I had used the Tribunals' Rules to cloak my antipathy towards him.

7. The Tribunal also adjourned of its own motion shortly after the proposed grounds of the recusal application were identified by Mr Neckles, to allow both the Tribunal and the parties to reflect on what was the best way forward. After reviewing the position and also reviewing the test in relation to recusal we resumed the hearing. I indicated to the parties that I thought it best if the

Claimant should complete his application and that I would hear what the Respondents had to say and then make a decision on the recusal application.

8. Mr Neckles also confirmed that he was making an application to recuse not for a postponement. At the end of Mr Neckles' submissions, I had made clear to him that I had earlier raised the issue of postponement because, before we adjourned for reflection, I had told him that if I recused myself there would be no other Judge available to hear the case on 2 May 2019 which Mr Neckles might not know. Thus, if I recused myself the practical effect would inevitably be a postponement and I was conscious that this case had been ongoing for some time. Anyway, Mr Neckles continued that he was not asking for a postponement and that if a postponement was sought, he was concerned that the Tribunal would visit on the Claimant the costs incurred and wasted by the Respondents. He reiterated that he had discussed this matter with the Claimant and that his view was that he did not believe that if I sat on the case, the Claimant would get a fair hearing and that he feared that the case would be struck out and costs awarded, and/or a deposit order made in respect of the Claimant's case.

9. Thus, he concluded, he was asking the Tribunal to recuse itself. I then, as I said, clarified the point about the postponement or recusal.

10. Mr Adkin then indicated that the Respondents, who he represented, opposed the application and he drew to the Tribunal's attention that the relevant test is whether there was bias or whether a reasonable observer would think that there was such bias. He stated that he did not know the history that Mr Neckles had referred to but he thought the fact that Mr Neckles had not previously made an application to recuse undermined his position.

11. He referred to the fact that I had indicated at an early stage that I had no recollection of the case 10 years previously but that Mr Neckles had continued by mentioning the comment and that this was despite the cautionary intervention by Mr Adkin. He repeated his concern that Mr Neckles was using this as a tactic to cause delay in a matter which was already quite old. He submitted that matters of non-compliance are routine in case management and that it is inevitable that representatives would appear before various Judges more than once and that it was impracticable if a representative thought that they had had a bad result that they could effectively ask to veto an appearance in front of that Judge again.

12. Mr Neckles declined the opportunity to reply.

13. I considered the recusal application. I did not consider that the grounds were made out for a recusal. It is now established that Tribunals are required to have broad shoulders. I had no recollection of the case of M initially, and only recollected the costs determination when Mr Neckles referred to it in his submissions. As Mr Neckles acknowledged, he had appeared before me many, many times since, both in this region and in the London East Region. I had no recollection as to whether he had always lost applications made. He put

forward no specific evidence of this. Even if that had been the case, that did not mean to say that that was not an appropriate outcome.

14. I considered that he was very, very far away from showing anything amounting to bias on my part that would lead to him and his clients not having a fair hearing. I noted the timing of the application, which was right at the beginning of the hearing as I was simply trying to establish what was going on. In summary, I did not consider that there were any adequate grounds for me to recuse myself and the Tribunal would proceed to deal with the strike-out application for which the hearing had been listed.

Strike out application

15. The substantive application for which this hearing was listed was an application by the Respondents to strike-out the claim on the two grounds that either the manner in which the proceedings had been conducted on behalf of the Claimant had been unreasonable under rule 37(1)(b) and/or that under Rule 37(1)(c) the Claimant had not complied with the order of the Tribunal. There is a degree of overlap in those two grounds because essentially the Respondents complained that following the hearing in December 2017 before Employment Judge Wallis when clear orders were made for the Claimant to provide specific additional information, the Claimant did not provide that information by the date specified at the end of December 2017. Further, they complained that although some information was provided on 16 January 2018, it was not in compliance with the order. Further, they complained that they only then received the information complying with the order on 9 April 2018, on the same date as it was sent to the Tribunal. In particular, however, the Respondents raised considerable questions about whether the Claimant's representative in the course of corresponding with the Tribunal about this information basically gave a false picture or tried to mislead the Tribunal about the reason why there had not been compliance with the order.

16. I had not heard evidence from anyone and it was clear that this matter concerned the preparation of the case as opposed to the substantive issues which are the subject matter of the complaint. It was accepted by the Respondents that by 9 April 2018 there had been compliance with the order and that even at the earlier hearing before Employment Judge Wallis a considerable amount of clarity was achieved about what the issues were.

17. The question that I had to consider was whether it was appropriate to strike-out the claim if the points being made by the Respondents were substantiated. In the course of my enquiries about what had happened in this case, I also ascertained that despite the fact that this case has been 'in the works' since August 2017, a full hearing listed in May 2018 but was postponed due to lack of judicial resources. Thereafter no new date was fixed.

18. I was satisfied that although there was non-compliance by the date for compliance which had been extended for the Claimant to 22 January 2018. There was no evidence before me that the further information was given by that date at the end of January 2018. Further, there is some force in what the

Respondents submitted to the effect that correspondence up to and after that point was by email which, of course, means it is easily verified. The Claimant's representative stated that the relevant information was sent by first class post to the Respondents, a different method of communication than before. Also, as is customary in these situations, the order of Employment Judge Wallis provided that the document should be supplied to both the Respondents and to the Tribunal. There was no evidence on the Tribunal file that this information was received in January 2018.

19. The next point was that there was some further correspondence from the Respondents' representative to the Tribunal complaining about non-compliance and that they still pursued their application to strike out. However, it did not appear on the face of the correspondence that it was actually copied to the Claimant. In the letter the Respondents' representatives just informed the Tribunal of the position. This then led to a notice of the hearing being sent out and a strikeout warning going to the Claimant towards the end of March 2018. This was followed by the information being provided by the Claimant to the Tribunal and to the Respondents on 9 April 2018.

20. I readily understood why the Respondents said that it would have been very easy a year ago for the Claimant to have given the explanation for the delay which was being given now - about computer systems crashing - if that had truly been the case. Indeed, even on 2 May 2019, there was no documentation being put forward of any sort to substantiate those reasons. Be that as it may however, and putting aside whatever doubts one may have looking at the explanation given by the Claimant's representative, I considered that the focus should be on whether a fair hearing could take place and whether it was appropriate to strike-out the claim. An order striking out a claim is a Draconian step to take in relation to breaches which were essentially procedural relating to the preparation of the case as opposed to reflecting substantively on the allegations being made. I also took into account that no date had yet been fixed for the final hearing, therefore there was ample time to remedy any procedural failings. I was informed that disclosure had taken place and that the only preparatory step which needed to be taken now was the exchange of witness statements.

21. In all the circumstances, I decided to refuse the application for strike-out but to list this case for a final hearing as soon as possible.

22. Mr Adkin asked the Tribunal to consider awarding costs against the Claimant. The Tribunal declined to make an order for costs because it was my view that although highly regrettable, the procedural non-compliance here caused a delay of four months at a time when the Tribunal had had to postpone the hearing because of a lack of judicial resources. Thus, the final hearing date was not delayed because of this non-compliance. Further, the Tribunal had found that there had been some clarification of the case previously.

23. The Claimant indicated through Mr Neckles that he was happy for the second Respondent to be discharged from the proceedings forthwith. Mr Adkin did not object to that step and I therefore made that order.

24. Directions for the preparation of this case, including the fixing of a date for the final hearing are set out in a separate document.

_____

Employment Judge HYDE
Dated: 20 August 2019