Case No: 2208012/2017; 2208094/2017; 2200419/2018; 2206046/2018; 2206087/2018; 2201354/2019

EMPLOYMENT TRIBUNALS

Claimants: Ms I Petrescu (1)
Mr P Ndongu (2)

Respondent: The Commissioner of Police of the Metropolis (1)
Ms S Batten (2)
Ms S Day (3)

Heard at: London Central **On:** 2 September 2019

Before: Employment Judge Quill (Sitting alone)

Representation
Claimants (1) and (2): Mr N Toms, counsel
Respondents (1) and (3): Mr P Martin, counsel
Respondent (2): Not present and not represented

JUDGMENT

1. The Claimants' application to strike out the responses of the First and Third Respondents' is dismissed.

2. The First Respondent is ordered, under Rule 76(2), to pay £2000 plus VAT to the Claimants as a contribution to the Claimants' costs arising from the First Respondent's failure to comply with the Tribunal's orders for exchange of witness statements, and due to the First Respondent's successful application to postpone the full merits hearing.

REASONS

1. This case was listed for a 20 day full merits hearing starting 2 September 2019. That was to be before a full panel of 3.

2. Last week, as a result of an application made by the respondents on 23 August 2019, that listing was effectively reduced to a 19 day hearing starting tomorrow, 3 September, with 2 September being converted to a preliminary hearing.

3. At the outset of that preliminary hearing, I had effectively 3 applications to consider:
   (1) A postponement request from Second Respondent, Saffron Batten, who is not present and not represented.
   (2) A postponement application from the other two respondents, being the Third Respondent, Ms Day, and the First Respondent, Commissioner of Police of the Metropolis, which is the employer of the other two respondents.
   (3) A strike out application from the two Claimants, relying on rules 37(1)(b), (c) and (e) of the tribunal rules. The strike out application is not pursued against Ms Batten, but is against both the First Respondent and the Third Respondent.

4. The latter two applications largely raise very similar issues to each other.

5. The application from Ms Batten may also have raised some overlapping issues, but she was not present to expand on the points made in her email to the tribunal of 28 August 2019, at 11am. In any event, her application does raise two separate and non-overlapping issues.
   (1) Firstly, she asserts that she needs to arrange legal representation, and that that would not be possible before 2 September.
   (2) Secondly, she has now – on 2 September - supplied medical evidence which says that she could not attend the hearing, or do any preparation for it, until after 21 September 2019. I have no information about how likely it is that Ms Batten would be able to start preparation immediately after 21 September. Her 28 August 2019 email did not refer to medical grounds for a postponement. It seems that, having attended work in the morning, last Friday – 30 August 2019 - she emailed the tribunal at 13:28 to say that she felt unwell and she would be visiting her GP later that day and that she did not think it likely that she would be attending on 2 September. A copy of the certificate which she subsequently obtained from her GP has been brought to the tribunal today by one of the respondent's employees, Ms Batten's line manager.

6. Leaving Ms Batten's application to one side for the time being, the other two applications both relate to the fact that there was an order for witness statements to be exchanged by 14 August 2019 (this being an extension of time – agreed by me at a telephone hearing on 6 August 2019 - to the earlier case management orders which had required exchange of statements by 17 July 2019), and the fact that the Claimants were ready to do so, but that the Respondents were not.

7. All parties present today were in agreement that the hearing does not now need to last 19 days, and can be between 7 and 10 days. The reduction in the time estimate is due to the fact that there were previously four claimants, but claims relating to two of the four (Ms Poyser and Ms Sonyak) are no longer part of these proceedings.

8. The First and Third Respondents are still not ready to exchange witness statements, and would not be ready this week. They seek a postponement until after 31 October 2019. However, if that is refused, they would attempt to exchange statements next week in order to complete a 7 or 10 day hearing within the original listing period.

9. The First and Third Respondents say that the reason for their lack of readiness is that they received additional disclosure from the Claimants on 11 July, which in total was one lever arch file, and within that there were approximately 24 printed pages, alleged to be from a WhatsApp group which they say they had not seen before.

10. I was told that members of the WhatsApp group included, amongst other people, Ms Cheryl Poyser who had previously been a claimant in these proceedings and also Ms Batten, the Second Respondent.

11. Up until approximately 17 July 2019, Ms Poyser shared the same representation as the other claimants in this matter. Up until approximately 28 August 2019, Ms Batten shared the same representation as the other Respondents in this matter.

12. The legal representatives for the parties present today each asserted that their current clients were unaware of the contents of the WhatsApp exchanges before July, and effectively asserted that their current clients should not be held accountable for the failure to disclose this material earlier.

13. The Claimants' strike out application asserted that the First Respondent should, in fact, have been able to acquire these documents for itself (in other words before the Claimants disclosed them). That submission relies on the fact that some WhatsApp messages were disclosed by a Mr Beresford to a DC Thomas who conducted an internal investigation. That disclosure took place – I was told - in December 2018.

14. There is no evidence before me to suggest that the First and Third Respondents did possess, or could reasonably have been expected to acquire, the additional 24 pages prior to 11 July.

15. The First and Third Respondents do not necessarily accept the Claimants' assertion that the pages came from the same WhatsApp group as the messages disclosed to the First Respondent by Mr Beresford. That therefore remains a disputed point, and I make no findings on it one way or the other.

16. Similarly, I was told that Mr Beresford informed the First Respondent that the 4 pages which he disclosed were the only such documents which he had. That may also be a disputed point, and I make no findings on it.

17. However, looking at the 4 pages from Mr Beresford, there is nothing in them which causes me to believe that either the First Respondent or Third Respondent could or should have obtained the disputed 24 pages prior to 11 July. (This finding is for the purpose of deciding these applications today, and not for any other purpose.)

18. I did not hear from Ms Batten, and make no findings as to whether she was indeed a participant in those exchanges.

19. On the Claimant's case, Ms Batten did make certain comments in these exchanges which they say affect Ms Batten's credibility and potentially support the Claimants' case in other ways too. The First and Third Respondent's position is that the documents are potentially relevant and that various witnesses may need to comment on them. They also assert that it is not immediately clear who all the participants were (some being identified only by mobile phone number, not a name, and others being identified by nicknames). The First and Third Respondents therefore say that it is not simply a case of asking questions to some specific people, and drafting some paragraphs for a witness statement, but rather it is a case of casting a wider net to find out who knows what.

20. The First Respondent also refers to some people having left its employment, (for example, a Mr Macdonald), and to the fact that some potential witnesses have been uncontactable recently due to being on holiday.

21. It seems to me that the First and Third Respondents reasons' for not being ready to exchange statements by 14 August are not satisfactory. They did get the document by 11 July. Even allowing a few days to work through the lever arch and see what further instructions were required, they ought to have been able to make urgent enquiries, and follow those up, within the month of July. They knew that the hearing was due to start on 2 September, and that it was due to be a lengthy hearing, and they should have made considerable efforts to attempt to comply with the directions, and to avoid the need for a postponement request.

22. At the telephone hearing on 6 August, the respondents' representative (who was representing all three respondents at the time) did indicate that the respondents would be ready to exchange main statements, and then, later, supplementary statements, in time for the hearing to begin on 2 September. While the respondents did request slightly later dates for exchange than I ordered, at the 6 August hearing there was no suggestion that the respondents would not be ready to exchange main statements until (at the earliest) the second week of September, which is the current position of the First and Third Respondents.

23. All that being said, at present, the exchange of statements is less than 3 weeks overdue.

24. Rule 37 says:

> 37.— Striking out
> (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) …;

> (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) ….;
> (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.

25. In support of its strike out application, the Claimants rely on De Keyser v Wilson (2001) IRLR 324 and Bolch v Chipman (2004) IRLR 140.

26. In particular, the Claimants suggest I consider paragraph 55 of Bolch v Chipman and the four factors mentioned therein.

27. Going through those four factors, the first of them is:

> There must be a conclusion by the Tribunal not simply that a party has behaved unreasonably but that the proceedings have been conducted by or on his behalf unreasonably.

28. As I mentioned earlier, I do think that the First and Third Respondents should have been able to exchange witness statements by 14 August. There was, in any event, a provision for later exchange of supplementary statements.

29. I also think that if a slight extension of time, beyond 14 August, was needed, then these Respondents ought to have been able to formally make an application for such extension to the tribunal sooner than the postponement request which was sent in on 23 August. In other words, no extension of time request was made either promptly, or at all, and, instead, when statements were already 9 days overdue, a postponement request was made.

30. The second point mentioned in Bolch is that I should consider whether or not a fair trial is still possible, but only if I first decide that there has not been wilful, deliberate or contumelious disobedience.

31. I find that the First and Third Respondents have not exhibited scandalous or vexatious disobedience.

32. I reject the Claimants' submission that the First Respondent should be deemed to have acted unreasonably because its in-house legal department is no longer representing Ms Batten. I make no findings as to whether the change of representation was Ms Batten's choice, or was the result of a decision made by the First Respondent, or else by the First Respondent's legal representatives.

33. For that reason, I make no specific finding as to whether Ms Batten's change of representation ought to have happened earlier than it did. But, in any event, my finding is that neither the First Respondent nor the Third Respondent has acted unreasonably in relation to that change.

34. On the Claimants' case, not accepted by the First Respondent, the First Respondent could have informed Ms Batten to make alternative arrangements by no later than end of July. Even if that were true, and even had it occurred, it seems unlikely that Ms Batten would have been immediately able to find legal representatives willing and able to take on a case with a 7000 page bundle, and multiple claimants and multiple respondents, with a 20 day hearing due to start on 2 September.

35. Therefore, if the First Respondent were to have exchanged statements in time for the hearing to commence on 2 September, then it is quite likely that it would have had to do so without a written statement, on its behalf, from Ms Batten. Quite possibly, that is what it could and should have done, given that she is a party to the proceedings in her own right. However, it is not necessarily surprising that the First Respondent sought a postponement of the hearing instead; this was a tactical decision to try to put things off rather than a deliberate attempt to prevent a fair hearing ever taking place.

36. I do think that a fair hearing is still possible. I do not ignore the fact that memories fade over time. A hearing in 2020, relating to claims issued in 2017, is not ideal. However, hearings in other courts can potentially require witnesses to recall events from several years earlier. The difficulty with memory does not, in itself, make a fair trial impossible, especially as a hearing in September 2019 would already have been testing for the memories of those involved.

37. The third point mentioned in Bolch refers to proportionality. I do not think it would be proportionate to strike out the responses of the First Respondent or the Third Respondent for being (say) 4 weeks overdue with witness statements. [4 weeks being the length of the delay if indeed, as I am told, they could potentially be ready by next week. In principle, the First Respondent and the Third Respondent say that they could be ready to proceed and keep the hearing within the original listing period, though that is not their preference.]

38. The fourth point from Bolch is that I have to consider whether there is any alternative remedy. I think that there is an alternative to strike out. The alternative is to postpone the hearing.

39. So, for avoidance of doubt, I do not strike out under 37(1)(b) or 37(1)(c), because the respondents' defaults and failures are not such that – in my judgment - the threshold under those rules is met and I do not think that strike out is a proportionate response, and it would not be in interests of justice to do so. Nor do I strike out under Rule 37(1)(e) because I think a fair trial is still possible.

40. On the First and Third Respondents' application for postponement, I think it is irrelevant that the hearing length can be cut down from 20 days to 7 (as they say) or to 10 days (as Claimants say). That would not be a reason for postponement, as a shorter hearing could take place in the same window, and – indeed - a shorter hearing could have started on 2 September 2019.

41. That being said, given that the responses are not being struck out, some postponement of the start of the full merits hearing is now required, and there has to be some revised direction for witness statements. It makes no sense for me to rule on the potential start date of the hearing without first considering Ms Batten's position.

42. The Claimants, very fairly and correctly, acknowledge the difficulties which Ms Batten would have in obtaining representation at short notice. Had she been here, there are some questions that I would have liked to ask her about when she started looking, why she did not start sooner, and how far she had got with her search.

43. However, again, there is little point in my making detailed findings on those issues given Ms Batten's absence, and the stated reasons for the absence.

44. For present purposes, I accept that the medical certificate dated 30 August, and containing a doctor's signature, is sufficient evidence that Ms Batten will not be able to prepare until some time later than 21 September 2019.

45. If Ms Batten were, hypothetically, to ever seek another postponement in these proceedings on medical grounds, then she should understand that potentially, more detailed evidence might be required on that occasion.

46. However, as I say, I am satisfied that Ms Batten cannot attend until after 21 September, and that, if Ms Batten is to participate, the hearing cannot start until a reasonable period after 21 September in order to allow her time to make suitable arrangements to finalise her statement and prepare for the hearing. She may have to represent herself if she cannot obtain a solicitor.

47. Therefore the hearing will be postponed and re-listed.

After I had given my decision on the strike out and postponement applications, there then followed a case management discussion, including a listing of the full merits hearing. After that, the Claimants proceeded with their application for costs against the First Respondent, notice that this application would be made - in the event of postponement - having been given by email dated 29 August 2019.

48. The Claimants application relied on Rule 76(2) of the tribunal rules, which states:

> A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

49. In this case, the First Respondent is in breach of the order to exchange witness statements. It has also been party to an application to postpone the hearing which has been successful.

50. Under rule 76(2), there is no need to find that a party has acted "vexatiously, abusively, disruptively or otherwise unreasonably". The decision is an exercise of discretion based on consideration of all the relevant circumstances.

51. The Respondent says that it should not have to pay costs, because it could not have made a postponement application any sooner than 12 August 2019, and that, by 12 August 2019, the full brief fee had already been incurred. In other words, according to the Respondent, the Claimants suffered no loss as a result of the failure to exchange witness statements, and the failure to apply for a postponement of the hearing until 23 August 2019.

52. However, 12 August was just two days before exchange of statements was due. By that time, the Respondent must have been aware that it would not be able to comply with the date for exchange of witness statements.

53. In any event, had the exchange of statements subsequently taken place before the hearing was due to start on 2 September, then the First Respondent would not have needed to make its postponement request on 23 August.

54. The Respondent's reasons for not being ready have been explained to me to some extent, but I have not been given a clear and satisfactory explanation. Generally, the First Respondent's position is that (a) it did need its witness statements to deal with the WhatsApp exchanges and (b) it could not ask other witnesses to comment on the WhatsApp exchanges until after Ms Batten had done so.

55. Ms Batten is an employee of the First Respondent, and - to do its best to avoid the need to postpone the hearing – the First Respondent would have been able to do more, in my opinion, to insist that she respond promptly to queries. Furthermore, I do not think that other witness statements could not have been finalised while waiting for Ms Batten's answers.

56. It was not reasonable for the First Respondent to fail to supply any statements at all (by way of exchange) to the Claimants, and to attend tribunal today not having supplied any statements, bearing in mind this was a 20 day case, and it was obvious to the Respondents that the Claimants would incur significant costs in preparing for this hearing date and attending today, and also that some of those costs would be likely to be thrown away if there was a postponement, especially if – as turned out to be the case, and as the First Respondent was aware was a risk – the new hearing date could not be fixed until next year.

57. The First Respondent says that awarding costs would be a windfall to the Claimants because the hearing would have been postponed any way due to Batten's non-attendance.

58. It is not possible for me to assume that Ms Batten would have attended tribunal (and been ready to proceed) had the First Respondent acted differently. However, the First Respondent's application for postponement was made before there was any indication from Ms Batten to the tribunal that she would not be attending due to ill-health. She only gave that indication last Friday after Employment Judge Glennie had already given some preliminary consideration to the First Respondent's application, and, indeed, already postponed the start of the full merits hearing from 2 September to 3 September.

59. The First Respondent's failure to exchange statements is a significant cause of this postponement, and took away any chance that the Claimants' side might otherwise have had to argue that the case could proceed in Ms Batten's absence, and/or to make any other tactical decisions as to how the case could proceed this week.

60. Therefore, exercising my discretion, my judgment was that some contribution to costs would be paid by First Respondent to the Claimants.

61. The total sum sought by the Claimants was £12397.50. (£13057.50 being the figure in their written schedule, but with Mr Toms orally reducing that by £660, which was the amount said to be attributable to the strike out application, which failed). The amounts pursued were:

    (1) Counsel's Brief fee for 20 day hearing of £6500 plus VAT
    (2) Counsel's fee for conference of £962.50 plus VAT
    (3) Counsel's fee for drafting letter of £550 plus VAT
    (4) Counsel's fee for drafting costs application of £68.75 plus VAT
    (5) Solicitors charges: 15 hours at £150 per hour: £2250 plus VAT

62. I would not, in any event, have allowed anything for items (2), (3) and (4) as I would have deemed that these were matters that could have been dealt with by the Claimants' solicitors and, in any event, it would not be appropriate for the First Respondent to have to contribute to those items.

63. I would have been prepared to allow the full £6500 plus VAT for counsel's brief fees, had the fault all been the First Respondent's. I would have been prepared to award 4 hours for solicitors' costs, at £150 per hour, for dealing with resisting the postponement application, and other relevant matters in relation to the respondent's failure to comply with the order to exchange statements. So that would be a further £600 plus VAT.

64. I think it is right and proper to reduce the amount which I would otherwise have awarded to reflect the chances that a postponement might potentially have been needed anyway, and also to be proportionate in all the circumstances.

65. Therefore the total costs award which I make is for £2000 plus VAT.

Employment Judge

Date : 05/09/2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

09/09/2019

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FOR THE TRIBUNAL OFFICE