



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4123706/2018

5

Held in Glasgow on 12 August 2019

Employment Judge L Wiseman

10 Mr J P Stothard

Claimant  
In Person

15 Erskine Hospital

Respondent  
Represented by:  
Mr L Entwistle -  
Solicitor

### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The tribunal decided:-

- (i) to dismiss the claimant's application for strike out of the response and
- (ii) to dismiss the respondent's application for expenses.

### REASONS

1. The hearing was a preliminary hearing to determine the claimant's application  
25 to have the response struck out. I heard submissions from the claimant the  
Mr Entwistle, the respondent's representative.

#### Claimant's submissions

2. The claimant had, by email of the 4 June 2019, made an application to have  
the response struck out in terms of rule 37 of the Employment Tribunal  
30 (Constitution and Rules of Procedure) Regulations 2013 (the Rules). The  
claimant referred, in that email, to directions given by an Employment Judge  
at a case management preliminary hearing on the 1 March 2019, regarding  
production of a joint set of documents for the hearing.

**E.T. Z4 (WR)**

3. The Note issued following the preliminary hearing referred to parties working together “to agree a final list of productions and produce a joint bundle of productions for use at the hearing” by the 12 April. Mr Stothard submitted he had sent his list of documents to the respondent on the 10 April and a zip file of documents on the 12 April. There had been an issue with the zip file, and so copies of documents had been provided on the 24 April. Mr Stothard considered this acceptable in circumstances where he understood the respondent had sought an extension of 28 days for this task.
4. Mr Stothard submitted he had heard nothing further from the respondent until the 7 August. He considered the delay had been deliberate on the part of the respondent and this had caused him added stress and pressure.
5. Mr Stothard submitted there was a pattern of delay and this was evidenced by the fact the claimant had granted the respondent’s request for a two week extension to the early conciliation process, but he had heard nothing further from them. Similarly in the Subject Access Request (SAR) there had been a request for more time and then a failure to produce all of the documents.
6. Mr Stothard also referred to the standard orders issued by the tribunal where it stated that parties had to provide copies of their documents to the other side no later than 28 days prior to the final hearing. The respondent had not complied with this.
7. Mr Stothard referred the tribunal to the cases of **Richards v Manpower Services Ltd UKEAT/0014/13; Scottish Ambulance Service v Laing UKEATS/0038/12; National Grid Co Ltd v Virdee UKEAT/30192/07 and Harris v Academies Enterprise Trust 2015 IRLR 208.**
8. Mr Stothard, in response to the application for expenses, stated he had taken on a job with a much lower salary and was still in receipt of Universal Credit. He could not pay any further costs.

### Respondent’s submissions

9. Mr Entwistle noted the claimant had, this morning, received the joint set of productions for the hearing which was arranged for five days starting on the 2 September 2019.
10. Mr Entwistle also noted the claimant had not stated during his submission that he had been prejudiced by any delay or that it prevented a fair trial.
11. Mr Entwistle submitted the standard order referred to by the claimant had been sent to the parties prior to the preliminary hearing, and accordingly it had been superceded by directions issued at that hearing. It was submitted the 12 April time limit was never going to be met because the claimant only sent his documents through on the 10 April. These were in a format which could not be opened and the respondent, in fact, received the documents on the 24 April. The respondent had tried to send documents to the claimant several times, but it had proved difficult for various technical reasons.
12. Mr Entwistle referred to the SAR and invited the tribunal to note all documents – with the exception of two emails – had been sent to the claimant prior to April 2019 as a result of the SAR.
13. The key issue for the tribunal to consider was whether a fair trial was still possible, and whether the claimant had been prejudiced. Mr Entwistle submitted the claimant had not, during his submission, made reference to any prejudice caused by the delay, and he had not suggested a fair trial was no longer possible. The claimant was aware of the respondent's documents before they were produced.
14. Mr Entwistle submitted the reference by the claimant to ACAS early conciliation was not relevant to the strike out application because it occurred prior to the proceedings. Further, if the claimant had any issues regarding the SAR, they should be raised with the Information Commissioner.
15. The sanction of strike out was a draconian measure. The respondent's conduct had not been scandalous, vexatious or unreasonable in terms of rule 37 of the Rules.

16. Mr Entwistle referred to the cases cited by the claimant and submitted the first two cases concerned unless orders; the third case made clear that *“a claim form or response should be struck out if, as a result of the failure to comply with the Tribunal’s order, a fair trial of the case is no longer possible”* and in the fourth case strike out had been refused even where the tribunal judge found the delay to have been *“intentional and contumelious”*. Mr Entwistle referred the tribunal to the case of **Bolsh v Chipman 2004 IRLR 140**.
- 5
17. Mr Entwistle submitted striking out the response would have disastrous consequences for the respondent, and that it was out of proportion to what the respondent was alleged to have done. He invited the tribunal not to strike out the response.
- 10
18. Mr Entwistle submitted the claimant had, in bringing the application for strike out, acted unreasonably. The claimant must have known, from the case authorities cited, how hard it was to strike out a claim or response, but he still pursued it. Mr Entwistle invited the tribunal to make an award of expenses in the sum of £500.
- 15

## Discussion and Decision

### *The application for strike out of the response*

19. I firstly had regard to the terms of rule 37 which provides that a claim or response can be struck out on several grounds which include *“that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent has been scandalous, unreasonable or vexatious; or for non compliance with any of the tribunal rules or with an order of the tribunal”*.
20. The claimant’s position was that the respondent had failed to comply with the order of the tribunal issued at the preliminary hearing, and that the delay in producing documents amounted to unreasonable conduct of the proceedings.
- 25
21. I noted three material points before I turned to consider the claimant’s submissions. Firstly, I noted the claimant had, in response to the SAR, been provided with all documents (except two emails) prior to April 2019; secondly, the claimant now had the joint set of documents for the hearing and thirdly,
- 30

the claimant did not suggest at any time that either he would not be ready for the hearing because of the delay or that he had been prejudiced by the delay.

22. I further noted that in deciding whether to strike out a party's case for non compliance with an order, a tribunal must have regard to the overriding  
5 objective which requires the tribunal to consider all relevant factors including:-

- the magnitude of the non-compliance;
- whether the default was the responsibility of the party or his/her representative;
- what disruption, unfairness or prejudice has been caused;
- 10 • whether a fair hearing would still be possible and
- whether striking out or some lesser remedy would be an appropriate response to the disobedience.

23. I, in considering the magnitude of the non compliance, noted the claimant had been reminded by the respondent's representative, of the need for him to  
15 provide the respondent with his documents. The claimant's documents did not in fact reach the respondent until the 24 April, which was already past the time limit. The respondent's documents did not reach the claimant until August, a delay of some four months. I acknowledged that on the face of it, that was a lengthy delay. However I balanced this with the fact the claimant had already  
20 received copies of the respondent's documents from the SAR. Further, the claimant did not suggest the delay had caused him difficulty with preparation for his case.

24. The responsibility for missing the deadline of 12 April appeared to lie with both sides, and I say this because in order for the documents to have been finalised  
25 for the 12 April, they needed to have been provided, collated and formatted prior to that date.

25. I was entirely satisfied a fair hearing would still be possible. The claimant now has the set of productions for the hearing, and has a period of two weeks in which to familiarise himself with the documents.

26. I decided, for these reasons, to refuse the application to strike out the response.

*The application for expenses*

5 27. I had regard to the terms of rule 76 of the Rules which sets out the circumstances in which a tribunal may make an order for expenses: those circumstances include where a party has acted unreasonably in conducting the proceedings.

10 28. Mr Entwistle invited the tribunal to find the claimant had, in pursuing the application for strike out of the response, acted unreasonably. It was said the claimant must have known the application would not succeed, and that he had, by proceeding, caused the respondent to incur financial costs.

15 29. The claimant is a party litigant and must be allowed considerable leeway in terms of his knowledge, and their operation, of the Rules. The claimant had clearly done some research prior to today's hearing because he correctly identified the relevant rules of procedure, and cited several case authorities. I considered, however, that that did not demonstrate an understanding of the operation of the rules and the circumstances in which strike out could apply.

20 30. I decided not to order expenses on this occasion. I reached that decision because the respondent had, in strict terms, not complied with an order of the tribunal and, by the time the claimant's application for strike out was made, some two months had elapsed since the time limit for compliance and nothing had been heard from the respondent. The claimant was entitled to make the application for strike out, although the fact he did so demonstrated to me that he was not familiar with the fact it is viewed as a draconian measure rarely used by tribunals, and that in fact he would have been better served raising  
25 the issue of delay with the tribunal in the first instance.

31. I, in conclusion, decided to dismiss the respondent's application for expenses.

**Case management**

32. Mr Entwistle confirmed he will be calling 8 witnesses to give evidence at the forthcoming hearing:- Alan Hewitt, Douglas Beattie, Ronnie Black, Sharon Alison, Ashely Kvosiliene, Robert Booth, Robert Swan and Jane Scobie.

5 33. Mr Ronnie Black will be the respondent's first witness.

34. The claimant will give evidence and is not calling any witnesses.

35. I explained it will be for the claimant to go first. I also suggested he use the agreed Timeline as an aide memoire to assist in giving his evidence.

10 36. The claimant is, by the 19 August, to provide an updated schedule of loss to the respondent's representative.

37. I granted Mr Entwistle's application for a witness order for Mr Robert Swan.

15

**Employment Judge: L Wiseman**  
**Date of Judgment: 15 August 2019**  
**Date sent to parties: 16 August 2019**

20

25