



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Sarah Bill

**Respondents:** Emergency Personnel Ltd

## JUDGMENT FOLLOWING A PRELIMINARY HEARING

**Heard at:** East London Hearing Centre

**On:** 11 December 2020

**Before:** Regional Employment Judge Taylor

### Appearances

For the claimant: In person

For the respondent: Mr Carlo, Legal Executive

**JUDGMENT** having been sent to the parties on 7 January 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

## REASONS

1. This matter came before the Tribunal at a preliminary hearing listed to determine:

- 1.1 whether the claimant's claim should be struck out on the basis that the proceedings have been conducted unreasonably in that the claimant has failed to comply with any order of the tribunal; and, if appropriate
- 1.2 to determine whether the claimant's employment status is such that she can maintain her claims against respondent; and if appropriate.

- 1.3 to identify the issues in the case and to make any necessary case management orders.
2. This claim has a lengthy procedural history. Any person reading this decision on behalf of either party should ensure they have read case management summaries and orders dated:
  - 2.1 9 March 2020 preliminary hearing (case management) conducted by Employment Judge Lewis
  - 2.2 30 June 2020 preliminary hearing (case management) conducted by Employment Judge Lewis and
  - 2.3 21 September 2020 preliminary hearing (open) conducted by Employment Judge Crosfill.

### **Non-attendance of representative at the (open) preliminary hearing**

3. Following a case management hearing held before Employment Judge Crosfill, this hearing was listed to begin at 10.00am on 11 December 2020. The parties were ordered to attend the Tribunal for the hearing and, at paragraph 2 of the Case Management Order, were required to attend the Tribunal no later than 9.15am.
4. On the morning of the hearing, the claimant's representative, Mr Ogbonmwam, was called by the Tribunal clerk at 9.30am but was not then present. At or after this time, Mr Ogbonmwam telephoned the Tribunal office informing the office that he was then making his way to the tribunal hearing centre. He contacted the tribunal a second time saying that he had arrived at the nearby DLR station (East India), which is less than 5 minutes away from the tribunal hearing centre. Mr Ogbonmwam did not arrive at all for the hearing. The Tribunal waited until 10.45am before beginning the hearing.
5. A second call was made by the Tribunal clerk for Mr Ogbonmwam at 11.15am to check whether Mr Ogbonmwam had arrived late. Mr Ogbonmwam had still not arrived.
6. The non-attendance of Mr Ogbonmwam was surprising given the serious nature of the application to be determined at this hearing. He had been representing the claimant throughout the course of these proceedings and is responsible for the manner in which they have been conducted. The claimant informed the Tribunal that she had engaged Mr Ogbonmwam to represent her. She had paid him a fee to prepare her case and to represent her. The claimant had expected her representative to attend this hearing. References in this judgement to documents sent to the claimant are references to documents having been sent to Mr Ogbonmwam as her representative.
7. Given Mr Ogbonmwam's unexplained absence, the claimant represented herself at this hearing. The respondent was represented by Mr R Carlo, Legal Executive.

## Documents

8. The respondent had prepared a trial bundle (with an index) for the preliminary issue which contained agency worker agreements between the respondent and 14 Group (UK) Ltd and Zabill Ltd each signed by the claimant, the claimant's pay slips, a bank statement and a schedule of shifts worked by the claimant on various dates between 14 October 2016 and 7 June 2019.

9. The claimant explained that she had been ill, possibly with Covid-19 and she had brought some documents with her intended to show her ill-health. These were:

- 9.1 16 May 2020 – an appointment for blood pressure monitoring appointment on 20 May 2020;
- 9.2 10 July 2020 - Hospital discharge certificate following an investigation for neck sprain;
- 9.3 19 November 2020 - Cervical screening appointment; and
- 9.4 10 December 2020 - Urgent Care Centre report on investigations for headaches.

## The background

10. The respondent company provides medical staff to various NHS Trusts. The claimant worked in various locations and at different times as a support worker/care assistant/senior care assistant. The claimant describes herself as black and of Ghanaian background.

11. The claimant presented her first claim to the employment tribunal on 15 October 2020 (3202471/19). The claimant presented a second claim on 18 October 2019 (claim number 320 2472/19). The claims were combined by order of the Tribunal dated 9 March 2020.

## The first claim form

12. In the claim form received on 15 October 2019 the claimant ticked boxes indicating that she brought claims of: unfair dismissal, race discrimination, redundancy payment, notice pay, holiday pay, and 'other' payments. In addition, at paragraph 8.1 the claimant added:

'The claimant claims include but not limited to racial discrimination, doing protected act – brought a money claim against the respondent at the county court. The Claimant also complaint or victimization during the employment (sic).'

13. In the box reserved for setting out the details of claim (box 8.2), the claimant sets out that she is owed a total of £2888 holiday pay and £1200 in 'guaranteed wages'; the claimant claims 25% interest on the unpaid wages. The claimant claims that due to non-payment of wages she has suffered stress and depression. The

claimant claims the respondent harassed her because of her Ghanaian background and says she would rely on 'derogatory and intimidatory statements' made by the respondent's line manager during May – August 2019. The claimant also claimed compensation for the manner in which she was treated which included, but was not limited to the respondent's failure to hear her grievances. The claimant sought damages in the amount of £7,500 for injury to feelings for alleged harassment and other discriminatory conduct.

14. In the box reserved for setting out remedy being sought (box 9.2), the claimant claims she is due payment of outstanding wages for days worked from 13 to 21 May 2019 of £519 and £119 (a total of £638).

15. In the 'additional information' section of the form (box 15) the claimant detailed that she had nine outstanding payments due to her adds that 'the claimant was put to suffer disadvantage and detriment which include stress, depression and finally resignation. The claimant will be relying on section 44 ERA; section 26 and section 27 including but not limited to section 13(1) of the Equality Act 2010'.

16. The claimant brought a second claim, a few days later, on 18 October 2020, which essentially repeated the claims and allegations made in the first claim, but in which the claimant unambiguously claims to have been an employee of the respondent. The claimant provided more information about her money claim.

17. The claimant also sent to the Tribunal 'particulars of claim' to be read alongside her second claim form.

18. These 'particulars of claim' run to 77 paragraphs over 15 pages. Paragraphs 1-51 describe the claimant's claim for unpaid wages. Paragraphs 52 onwards make other allegations and claims. The document is clear and is not easy to read, referring to sections in the Employment Rights Act and Equality Act (sometimes incorrectly) and do not clearly set out the facts or how they are said to relate to the various claims. They significantly expand or seek to expand the scope of the first claim form.

19. The respondent submitted a response to both claims on 6 January 2020 respondent contended that the wages claim should be stayed because a claim had been brought in the county court and resisted all or any of the other claims. The respondent submitted that all of the other (non money) claims were misconceived and stood no prospect of success.

20. At the outset of this hearing the parties were asked by the Tribunal about the status of the outstanding wages claim. The respondent confirmed that it accepted there was an amount of remuneration owed to the claimant in the sum of £696.00 (slightly more than the claimant's claim). The respondent's position was that it had tried to pay the claimant (personally) that amount but she had refused to accept payment and had refused to supply details that would allow the respondent to pay her. It follows that if the claimant supplies those payment details she will receive payment of £696.00.

21. The claimant submitted that she was refusing to accept any payment from the respondent because she was now claiming a total of £2000 for unlawfully deducted wages. Although Mr Ogbonmwam had made a claim for interest on unpaid wages on her behalf, the claimant clarified that this amount did not include such a claim. (It

followed that no progress had been made to clarify the money claim since the case management discussion held at the hearing on 9 March 2020.)

22. The parties were asked about the status of the claimant's county court claim for this amount, that had been started in August 2019. The claimant said that the matter had been stayed in the county court. The respondent said that the claim had been dismissed because the claimant had not paid the county court fee. In the absence of Mr Ogbonmwam the status of this claim in the County Court could not be made entirely clear.

### **Failure to comply with the Tribunal's orders and case management directions**

23. In a letter dated 19 November 2020, the parties were sent notice of a preliminary (case management) hearing to be held on 9 March 2020. The parties were informed that the purpose of the hearing was to 'identify the issues and to make case management orders relating to the conduct of the final hearing'.

24. The respondent sent a comprehensive request for further information to the claimant on or about 10 December 2019. In that document, the respondent asked the claimant to supply details of her claims for holiday pay, the sum of £1200, a guarantee payment, a payment for 'agreed services', and to explain the alleged harassment, detriments, personal injury, less favourable treatment. The claimant was asked to state whether any medical evidence was relied on. The respondent asked for details about the grievances and grievance procedure said to apply to her, the managers she was complaining about and the companies those individual managers worked for. The claimant was asked to state the basis upon which she alleged she was employed by the respondent and how she claims to have 'resigned' from the respondent's employment.

25. On the 23 January 2020, the parties were informed that the final hearing would be held on 2-4 February 2021. An Employment Judge to whom the case file was referred ordered the parties to prepare a list of issues by 2 March 2020.

26. In a letter to the tribunal dated 19 February 2020, the respondent informed the tribunal that the claimant had failed to make any attempt to respond to its request for further information.

27. A case management hearing was listed on 9 March 2020, the Tribunal directed the claimant on 26 February 2020 to provide responses to the respondent's request for further information by 6 March 2020.

28. The claimant's representative provided replies to the request for further information on 6 March 2020. This reply was inadequate. On 9 March 2020 the Judge explained that the claimant had failed to particularise her claim in the 6 March reply, giving reasons. The reply was repetitive, confusing, and the allegations were not organised in date order. The claimant was therefore ordered to provide particulars of her claim in compliance with the Judge's specific orders and guidance.

29. The order for further information was to be complied with by 17 April 2020. The claimant was required to set out only the facts she relied on in her pursuing her claim(s) and not set out the relevant statutory provisions. The claimant was to provide better information of her claim that she is an employee of the respondent and also further information about her claims of:

29.1 Protected disclosures:

- 29.2 Race discrimination
- 29.3 Harassment
- 29.4 Victimisation
- 29.5 Unauthorised deduction of wages
- 29.6 Unpaid annual leave and
- 29.7 to provide a statement of loss.

30. A second preliminary hearing was listed to be held on 30 June 2020 to determine the claimant's employment status, followed by a case management hearing.

31. The claimant did not comply with the Tribunal's order to provide further information by 17 April 2020.

32. In an email dated 12 May 2020, the respondent applied for the claim to be struck out for the manner in which the proceedings had been conducted and for breach of the Tribunal's order. The respondent submitted that the claimant had received a request for further information on 10 December 2020 and despite the Tribunal's order (of 9 March 2020) the claimant had not provided the required responses nor had she applied for an extension of time. The claimant had failed to respond to the respondent's communications, had provided further information that was incoherent, had failed to address questions posed by the respondent, had only sent further information to the Tribunal one hour before the start of the hearing and had 9 March 2020 arrived substantially late for the hearing without providing any reason, which led to wasted time and to the hearing taking longer than was necessary.

33. In emails dated 9, 24, 26 June 2020 sent to the claimant and the tribunal, the respondent recorded that the claimant had still not complied with the Tribunal's order to provide further information. The respondent recorded its concern that the preparation they had made in time for the hearing listed on 30 June 2020 would be prejudiced and the hearing would likely not be effective.

34. Other orders had been made on 9 March 2020 for both parties to comply with, these were:

- 34.1 Exchange a list of documents by 31 May 2020
- 34.2 Liaise to prepare a bundle for the preliminary hearing on status by 5 June 2020
- 34.3 Exchange witness statements on 19 June 2020.

35. The claimant did not comply with any of these orders or liaise with the respondent in respect of them.

36. The listed (open) preliminary hearing was duly held on the 30 June 2020 before Employment Judge Lewis. The claimant still had not complied with the Tribunal's orders. As a consequence of the claimant's failure to comply with the Tribunal's orders to prepare a list of document, liaise to prepare a bundle, exchange witness statement and provide further information, the preliminary hearing to determine the claimant's employment status had to be abandoned, an outcome anticipated by the respondent and with a resultant waste of time and costs.

37. Mr Ogbonmwan appearing for the claimant on that day accepted responsibility for non-compliance with the orders. He blamed his failure to comply with the order on the claimant, and on members of his own family, having been affected by the Covid-19 virus.

38. Employment Judge Lewis adjourned the hearing on 30 June 2020. A second (open) preliminary hearing was listed to be held on 21 September 2020.

39. EJ Lewis extended time until 1 August 2020 for the claimant to provide further information and particulars ordered on 9 March. Dates for compliance with disclosure of documents, preparation of the bundles and exchange witness statements were also extended. The case management summary and order following this hearing was sent to the parties on 24 June 2020.

40. At paragraph 7 of the case management summary Employment Judge Lewis set out by way of a strike out warning:

**'The claimant has been ordered on two occasions already to provide further information to the respondent. If she fails to or is unable to provide the further information ordered by 21 August 2020 she must give a clear reason why not, and explain why that part of her claim should not be struck out as a consequence. The claimant is also reminded that the particulars are to set out the facts she relied upon in support of her claims and not the statutory provisions.'**

41. The respondent sent documents to the claimant on 14 July 2020 and 22 July 2020 complying with the amended order for disclosure. These included a documentary record of all shifts worked by the claimant between November 2016 and May 2019, two handbook declarations signed by the claimant referring to her as an agency worker, a contract between Emergency Personnel and Black Sheep Projects Ltd and a copy of the contract between the claimant's company (Zabill Ltd) and Emergency Personnel Ltd, the respondent's client.

42. In an email to the claimant dated 14 July 2020 the respondent requested documentary evidence to show when the claimant had worked for other companies or organisations between the period October 2016 and June 2019, explaining this was relevant given the lengthy periods during which the claimant was not placed in any work by the respondent.

43. In an email dated 24 July 2020 the respondent informed the claimant that the respondent had completed its disclosure of documents and requested that the claimant comply with the Tribunal's order for disclosure by the close of business on that day.

44. In an email 29 July 2020 the respondent informed the tribunal that:

44.1 The claimant had not disclosed any documents and

44.2 The claimant had not given any explanation for not complying with the Tribunal's orders (sent to the parties on 24 June 2020)

45. The respondent applied for (1) a costs order and (2) an order to strike out that part of the claim that related to the claimant's claim that she is an employee of the respondent and/or such other part or parts of the claim that the tribunal considers appropriate, on the ground that taken together the claimant's failure to comply with any orders amounted to unreasonable conduct of the proceedings on the part of the claimant and/or her representative.

46. On 3 August 2020 a letter confirming the claimant's breach of the Tribunal's orders was sent to the claimant on the direction of Employment Judge Jones:

**'...The claimant has breached the terms of Judge Lewis's order to disclosure documents by 24/7/2020. The consequences of failing to do so were explained to her representative on 30/06/2020.**

**The claimant is to write to the employment tribunal by 07/08/2020 indicating why the claim should not be struck out and to confirm that she has complied with the order.'**

47. The claimant did not reply by 7 August 2020, as directed.

48. On 8 August 2020, the claimant sent documents to the respondent and the Tribunal. In the cover email, Mr Ogbonmwan claimed that the reason for his delay was due to him having been taken ill and also some damage had happened to his laptop equipment, causing him to lose access to some documents.

49. In emails dated 10 August 2020, the respondent made submissions about the claimant's conduct of the proceedings following the 9 March 2020 hearing, including that the documents sent on 8 August 2020 did not comply with the deadline given by EJ Jones; which they said demonstrated a total disregard for the Tribunal's procedure. The reasons given by Mr Ogbonmwan for his late compliance were not evidenced and did not excuse his failure to communicate with the tribunal or the respondent before the deadline. None of the documents provided was relevant to the specific issue to be determined of the claimant's employment status; for example, they did not include a contract of employment or letter of appointment that might support her claim that she was an employee. Mr Ogbonmwan had even included a document wholly irrelevant to the claimant's case, being a detailed document concerning his own immigration status. The claimant had wholly failed to comply with the Tribunal's order, including making more submissions in relation to documents, had continued failing to respond to the respondent's attempts to liaise to prepare the case for hearing breach of the order made by EJ Lewis. The respondent submitted that the contention that the claimant



was an employee was unsustainable and the claim should be struck out. The claimant or Mr Ogbonmwan's personally should be made to pay the respondent's its wasted costs in having to deal with his repeated failure to comply with the Tribunal's orders and directions.

50. Mr Ogbonmwan wrote to the tribunal in response to the respondent's comments in an email dated 10 August 2020 headed 'Application for Data and Information Act 1998 and as amended 2018 and requests for ordered against the respondent's representative for unreasonable behaviours and harassment'. Mr Ogbonmwan complained, amongst other things that by retaining the immigration document the respondent was committing a breach of his data and information.

51. The respondent wrote to the tribunal on 24 August 2020 in reply informing the tribunal that the purported particulars sent by the claimant had been sent a week after the Tribunal's deadline, no schedule of loss had been provided and Mr Ogbonmwan had not responded to the respondent's attempts to liaise to prepare the trial bundle for the hearing.

52. Further information said to be related to the claim was provided the claimant in an email dated 27 August 2020 comprising of 15 pages. In a cover letter Mr Ogbonmwan claimed, but without providing detail or documentary evidence, that the claimant's ill health contributed to the delay in complying with the Tribunal's orders and he also stated the need for the Tribunal to undertake a 'public enquiry' into the 'criminality of organisations who put themselves forward as suppliers of labours...'

53. The respondent wrote to the tribunal on 28 August 2020 repeating that the purported particulars had been sent a week after the deadline contained in EJ Lewis's order, the claimant had still not complied with the order to provide a schedule of loss, and still no effort had been made to agree a trial bundle. The further information had been outstanding for eight months, had been subject to orders on three separate occasions. The information requested by the respondent could and should have been readily available to the claimant's representative from the outset of the case and it was unconscionable that the claimant should continue to flout the Tribunal's orders with impunity.

54. The claimant sent a schedule of loss to the respondent on 2 September 2020.

55. In a letter dated 7 September 2020 Judge Russell instructed that a preliminary hearing be held on 21 September 2020 to consider striking out the entire claim:

**' whether the claims should be struck out for unreasonable conduct and/or for failure to comply with an Order of the Tribunal.**

**If the claimant intends to rely upon her health and present circumstances or those of Mr Ogbonwan as reasons for any default she must disclose medical evidence covering the relevant period by no later than 7 days before the preliminary hearing (open).'**

56. On the application of the respondent the Tribunal confirmed to the parties on 8 September 2020 that the preliminary issue of whether the claimant was an employee or a worker would be considered at the hearing on 21 September 2020 if the claims

are not struck out (in accordance with paragraph 6 the Employment Judge Lewis' sent to the parties on 2 July 2020) and witness evidence would be needed.

57. The respondent provided a chronology of the events of 7 September 2020 and witness statement of Mr O'Connor, Managing Director.

58. Mr Ogbonmwan wrote to tribunal on 8 September 2020 purporting not to have been notified that a hearing had been listed for 21 September 2020. The tribunal replied to Mr Ogbonmwan on 16 September 2020 confirming that notice of the hearing and other tribunal communication had been sent to the email address he provided and the hearing would take place as listed.

59. The preliminary hearing on 21 September 2020 took place via Cloud Video Platform (CVP) and was conducted by Employment Judge Crosfill. The claimant, herself, was not present at this hearing, which was attended by the parties' representatives and a witness for the respondent. Unfortunately, the tribunal experienced technical difficulties with the CVP, such that the hearing had to be abandoned and relisted. Moreover, the claimant denied having received the witness statement and bundle prepared by the respondent. Judge Crosfill doubted Mr Ogbonmwan's veracity.

60. In the case management summary, Judge Crosfill recorded that even at this late stage Mr Ogbonmwan acting on behalf of the claimant had not provided a witness statement on the question of her employment status. The Judge explained to Mr Ogbonmwan that the burden of proof lay with the claimant and she may be in difficulty in proving her case without providing any witness evidence in support of her contention. The Judge suggested that the claimant might wish to prepare a witness statement as quickly as possible and then apply to the tribunal for permission to rely on it, and in time for the next hearing.

61. Mr Ogbonmwan informed the Judge that he is a lay representative and has no legal qualifications. The Judge informed him and recorded that if he is unsure of the significance of providing a witness statement the claimant might consider whether she should seek professional legal advice.

62. The hearing was relisted with both representatives present to be held on 11 December 2020, this time at an in-person hearing, to avoid the technical difficulties experienced. The date of hearing and case management directions were confirmed in the case management summary that was sent to the parties on 29 September 2020. A notice of hearing was also sent to the parties on 15 October 2020.

### **The submissions on the application to strike out**

63. The respondent relied on the background to this case, the chronology it had prepared setting out how this claim had been dealt with by the parties, dated 7 September 2020, in support of the application out strike out the claims. The Tribunal was reminded that a judge had already confirmed to the parties that the claimant had not complied with the Tribunal's orders. The claimant was required to show why the claim should not be struck out. The claimant's representative holds himself out in publicity for his business as having *'strong consulting professional skills in UK Employment law and offers a legal representation and advocacy service at the*

*employment tribunal*. In those circumstances the claimant's representative has had no reasonable excuse for the unreasonable manner which these proceedings have been conducted, in not having properly particularised the claimant's claims or for failing to comply with the orders made by the tribunal.

64. The claimant said that she had asked her representative, Mr Ogbonmwan, to do her case. The claimant said that she had sometimes been sick and had brought some documents with her show this to have been the case. These documents were:

16 May 2020 – an appointment letter for blood pressure monitoring appointment on 20 May 2020.

10 July 2020 - Hospital discharge certificate following an investigation for neck sprain;

19 November 2020 - Cervical screening appointment and

10 December 2020 - Urgent Care Centre report on investigations for headaches.

65. The claimant explained that although she had not been able to see her representative in person, she had been able to contact him and she had spoken to Mr Ogbonmwan on the telephone. The claimant had nothing to say in response to the strike out application except that she had left Mr Ogbonmwan to deal with her case. Mr Ogbonmwan was expected to be at this hearing with her. The claimant said that she believed Mr Ogbonmwan was a professional representative. He was charging her a fee for the work he was doing on her case. The claimant did not agree with the respondent saying that she did not have a case and she wanted the case to continue and not struck out. The claimant felt that she had been treated in a very discriminatory way by the respondent and the respondent had also treated other black employees very badly; she had nothing else to add.

### **The applicable law**

66. The Tribunal's power to strike out a claim is set out at Rule 37 Employment Tribunals Rules of Procedure 2013 ('the Rules):

Rule 37 of the Rules states:

37 (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) that it is scandalous or vexatious or has no reasonable prospect of success;

(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) that it has not been actively pursued;

(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.

67. Before an order to strike out on the ground of non-compliance (or any other ground) can be made, the relevant party must be given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing (either a preliminary or final hearing), as to why such an order should not be made (Rule 37).

68. A party may have their claim struck out if that party has conducted the case in an 'unreasonable' manner. Conduct, such as the deliberate flouting of a tribunal order, can lead directly to the question of a striking-out order. For a tribunal to strike out for unreasonable conduct, it must be satisfied that the conduct involved deliberate and persistent disregard of orders and directions that have been made or that their conduct has made a fair trial impossible.

69. In addition to the claimant's conduct, the manner in which proceedings have been conducted on behalf of the claimant by their representative can be taken into account when considering whether to strike out a claim, under rule 37(1)(b).

70. Some assistance can be gained from considering case authorities relevant to whole of Rule 37. A failure to comply with a direction should not automatically lead to the party's claim being struck out altogether under 37 (1)(c); a tribunal should consider whether a striking out or some lesser penalty is appropriate, having regard to the overriding objective of ensuring a fair hearing: **Weir Valves and Controls UK Ltd v Armitage [2004] ICR 371, EAT.**

71. When the party's representative is responsible for the unreasonable conduct in question the tribunal must consider, the way in which the proceedings have been conducted, how far that is attributable to the party or the representative acting for the party, and the significance of the unreasonable conduct: **Bennett v Southwark London Borough Council 2002 ICR 881, CA.**

72. When deciding whether to strike out a party's case for non-compliance with an order under rule 37(1)(c), a tribunal will have regard to the overriding objective set out in rule 2 of seeking to deal with cases fairly and justly.

73. The striking out of a claim must be a proportionate response and the expectation must be that any striking out order under rule 37(1)(b) would be done before reaching the hearing. It would hardly ever be proportionate to strike out a claim at the beginning of the hearing of the issue, even if a party is in continuing default to comply with orders. **Blockbuster Entertainment v James [2006] IRLR 630, CA.**

## **Conclusions**

74. Orders were first made on 26 February 2020 for the claimant to provide responses to the respondent's request for further information by 6 March 2020. The claimant did not comply with those orders and this history of non-compliance has continued leading to this strike out hearing.

75. It is recognised that tribunals must be open to assisting difficult litigants, but so long as they do not conduct their cases unreasonably or that their conduct has made a fair trial impossible.

76. Having considered the manner in which this case has been conducted by and/or on behalf of the claimant the Tribunal was satisfied that the continual failure to conduct the hearing in a reasonable manner involved deliberate and persistent disregard of case management orders and directions. These orders have been made by several judges in efforts to ensure that the case was properly prepared in time for hearing of the preliminary issue of the claimant's employment status and for a final hearing of any substantive claims.

77. A Judge had cautioned Mr Ogbonmwan to properly prepare for this strike out hearing, including preparing an answer to the question of what reasonable excuse the claimant relied on for being late in complying with the tribunal's orders. The consequence of the failure to comply is that even at this hearing, it was still not clear why the claimant had not complied with Tribunal's orders. It even remains unclear on what basis that claimant purports to be an employee of the respondent company or exactly what the claimant's claims were about. The parties were no closer to being prepared for the final hearing.

78. The claimant's representative did not attend today's hearing in inexplicable circumstances. Therefore, he was not in a position to oppose the strike out application or otherwise assist the tribunal to understand the reasons for non-compliance of the Tribunal's orders. The claimant explained that she had been ill and she provided a number of documents in support of this. The claimant's documents did not provide evidence that she has been unable to consult with her representative. Indeed, the claimant submitted that she had spoken to Mr Ogbonmwan and he was dealing with her case. The Tribunal has seen no evidence that might show either the claimant or Mr Ogbonmwan were incapacitated by reason of their health or in any way unable to comply with the Tribunal's orders.

79. The Tribunal accepts the respondent's submissions and finds that there has been a complete failure on the part of the claimant to comply with the tribunal's orders as set out above. The Tribunal considers that the default is likely to be the responsibility of the claimant's representative. The claimant has explained to the tribunal that she had paid Mr Ogbonmwan to prepare her case and she had spoken to him on the telephone. The respondent has explained that Mr Ogbonmwan advertises himself as in business as an employment law specialist.

80. The overriding objective requires justice to be done between the parties. The claimant and/or the claimant's representative have not attended to these proceedings in a diligent manner, reasonably expected of the parties in preparing a case for hearing. In addition to making a series of orders, the Tribunal has provided every

reasonable assistance to the claimant and her representative. Judges have explained to the claimant's representative what is required to be done to comply with its orders and have made clear and appropriate case management orders. In failing to comply with them, without establishing adequate reason. Therefore the tribunal concludes that the conduct of claimant's in preparing this case is unreasonable.

81. The significance of the unreasonable conduct in this case is that weeks before a final hearing the respondent, who has made every reasonable effort to liaise with the claimant's representative, has been met with a disregarding attitude, so that the respondent has not been able to know the case against it or to properly prepare for a hearing listed in February 2021. The respondent has also repeatedly been forced to waste time and costs. The disruption to an orderly preparation of this case has caused unfairness and prejudice to the respondent.

82. The Tribunal has considered whether some lesser remedy would be an appropriate response to the claimant's disobedience of the Tribunal's orders. The Tribunal bears in mind that the background to the strike out application is that several extensions of time have been made and guidance has already been given by the Tribunal over a period of 10 months. These efforts have not succeeded in the case being effectively progressed.

83. Having regard to the conduct of the case the Tribunal is satisfied that an order to strike-out the claim is a proportionate response in the particular circumstances and that given that the claimant has not complied with the Tribunal's orders that a fair and timely hearing is no longer possible.

84. The Claimant's claims are struck out under rule 37(b) of the Employment Tribunal Rules of Procedure 2013 for unreasonable conduct of proceedings. The claims having been struck out it was not necessary to proceed to determine whether the claimant's employment status is such that she can maintain her claims against respondent or to identify the issues in the case and to make any further case management orders.

85. The hearing listed for three days to commence on 2 – 4 February 2021 is therefore vacated.

**Regional Employment Judge Taylor  
Date: 29 January 2021**