



EMPLOYMENT TRIBUNALS

Claimant: Mr Frank Elliot

Respondent: Tyne Housing Association Limited

Heard at: Newcastle CFCTC by telephone

On: 1 February 2021

Before: Employment Judge Arullendran

Representation:

Claimant: In person

Respondents: Mr M Dulovic (employed counsel)

RESERVED JUDGMENT ON PRELIMINARY ISSUE

The Judgment of the Tribunal is that the Claimant's claims are not struck out and shall proceed to a full merits hearing.

REASONS

The Hearing

1. This has been a remote hearing which has not objected to by the parties. The form of remote hearing was telephone (A). A face to face hearing was not held because it was not practicable, no-one requested the same and all the issues could be determined in a remote hearing.
2. The issues to be determined by the Employment Tribunal were agreed by the parties and set out in the case management order of Employment Judge Martin on 15 October 2020 as follows:

- i. Whether the claims should be struck out for failure to comply with orders of the Tribunal and/or
 - ii. Whether the claims should be struck out because the Claimant is not actively pursuing the claim?
3. I heard oral witness evidence from the Claimant.
4. I was provided with an electronic joint file of documents consisting of 111 pages, including the index. Mr Dulovic informed me that a supplementary file had been emailed to the Tribunal on 28 January 2021 and a hard copy had been received by the Claimant in the post. However, the Tribunal had not sent the supplementary file to me before the commencement of this hearing and, as I am working remotely and do not have access to the Tribunal file, it was agreed by both sides that I would look at the relevant pages in that file prior to giving Judgment.
5. This hearing was listed with a time estimate of 2 hours and was due to finish at 12 noon. However, the parties did not complete their closing submissions until 12.45pm and it was agreed I would reserve the decision.
6. The Claimant referred to me and Employment Judge Martin as “Lady Judge” throughout this hearing despite the fact I advised him of my correct title at the beginning of the hearing. It is not a matter I raised with him during the hearing because there were other difficulties with the Claimant interrupting both me and Mr Dulovic throughout the hearing and I felt that I should concentrate on the conduct of the hearing itself so that the evidence could be heard within the time estimate. The Claimant should not use the phrase “Lady Judge” because Employment Tribunal Judges are appointed and operate on an entirely neutral and equal basis. I note that the Claimant did not use a gender specific title when referring to a male Judge and that he only chose to do this when referring to female Judges. This is offensive and should not be repeated in any future hearing.

The Facts

7. The Claimant submitted his ET1 form to the Tribunal on 22 January 2020 and made various claims of automatic unfair dismissal and discrimination on the grounds of sexual orientation. The particulars of claim were illegible and the Claimant was Ordered by me to produce further and better particulars of the claim in a typed format by 26 March 2020, as set out at page 21 of the file.
8. The Claimant applied for an extension to submit the further particulars and this was agreed by an Employment Judge. The new date for compliance was 31 May 2020, as set out at page 22 of the file. However, the Claimant failed to comply with the Order to produce further legible particulars and the Tribunal sent a reminder to the Claimant asking for a reply by 4 July 2020, as set out at page 23 of the file.
9. On 6 July 2020 the Respondent made an application for the Claimant’s claims to be struck out for repeated failures to comply with the Tribunal Orders and for failing to actively pursue his claims, as set out at pages 24 to 25 of the file. This forms the basis of today’s hearing. In reply to this application, the Claimant sent a fairly illegible

handwritten letter to the Tribunal, which was received on 23 July 2020, which can be seen at pages 27 to 30 of the file. At the end of that letter, the Claimant asked for a 4-week extension to submit the further particulars on the grounds that the library was closed due to the Covid-19 pandemic and he did not have access to a computer.

10. Employment Judge Sweeney replied to the Claimant on 28 July 2020, a copy of which can be seen at pages 31 to 32 of the file. The Claimant was told that he must copy the Respondent into any correspondence he sent to the Tribunal. He also stated that it had been difficult for the Tribunal to make any sense of what the Claimant had written to date and had been given numerous opportunities to submit a legible copy of his claims and that he must look beyond his local library for assistance. The Claimant was told by Employment Judge Sweeney that he could not “keep putting off complying with the Tribunal Orders” and gave the Claimant until 21 August 2020 to produce the legible document, which would be some 5 months after the date I had originally ordered the Claimant to produce this document.
11. On 18 August 2020 the Claimant sent an email to the Tribunal offices, a copy of which can be seen at page 33 of the file. The Claimant said that the library was closed until September and he could not comply with Judge Sweeney’s Order and he asked for more time. The Claimant forwarded a copy of the Tribunal’s receipt of his email to Mr Dulovic’s email address on 18 August 2020, as set out at page 34 of the file.
12. The Claimant sent another email to Mr Dulovic on 25 September 2020 asking for the dial in details for a Tribunal hearing which was due to take place on 15 October 2020 and a copy of this can be seen at page 37 of the file.
13. The parties attended the preliminary hearing on 15 October 2020 which was conducted by Employment Judge Martin. A copy of the case management Orders made at that hearing can be seen at pages 38 to 40 of the file. Employment Judge Martin set this matter down for a public preliminary hearing to consider the strike out application, which is the matter before me today.
14. The Claimant says he is not computer literate and he does not have access to a computer, other than through his local library. He claims that the libraries have been closed during lockdown and that once the restrictions eased, he was only allowed to use the computers by appointment and only for a maximum of 45 minutes on each occasion and that were not open on the days advertised. He says he attended his local library 3 times in November 2020 and completed a typed version of his particulars of claim which he faxed to the Tribunal on 16 November 2020, however it was not faxed or emailed to the Respondent, but the Claimant claims to have posted a copy to the Respondent around the time it was sent to the Tribunal. Mr Dulovic has never received the posted copy of the further particulars and it is common ground that he and the Claimant spoke of this on the telephone and that the Claimant promised to send a further copy by post. The Claimant said today that he posted the further particulars to the Respondent’s representative on Friday 29 January 2020. He thinks it was by first class post, but he was not sure. The Claimant was asked several times by me and Mr Dulovic why he waited until the last working day before this hearing to post the relevant document to the Respondent. At first, the Claimant was bullish in his stance that he had complied with the Tribunal Orders, even in the light of my explanation that Mr Dulovic could not possibly

receive the documents in advance of this morning's hearing. He then changed his approach in cross examination and said that he did not realise the further particulars were relevant to today's hearing and that he had been critically ill in hospital with Covid-19.

15. The Claimant initially said that he had contracted Covid-19 on or around 18 November and was in hospital for 5 weeks which is why he could not comply with the Orders. Then in evidence the Claimant said that after he had written the further particulars at the library on 16 November 2020 he became ill and was in hospital for 3 weeks and was unwell for another couple of weeks after he came out of hospital. When I asked him if this meant that he was better by the end of December, the Claimant changed his evidence again and said that he was not better until after the New Year and could not go back to the library as the next lockdown commenced at the beginning of January. The Claimant did not seek any advice or assistance from anywhere else throughout the relevant period, apart from a colleague who he says helped him to write a series of emails to the Tribunal and the Respondent in August and September 2020. The Claimant has not tried to access any advice or assistance from Citizens Advice or a Law Centre. The Claimant claims that the details of his claim are private and that he cannot ask anyone else for help as a result.
16. The Claimant claims that he has a new mobile telephone and a new email address which he has not set up on his telephone. However, he accepted in cross examination that the emails he had sent to the Tribunal and the Respondent at pages 34 and 37 of the file were from his current email address. The Claimant said in cross examination that he never read his emails, but when he was reminded that he was under oath he changed his evidence to say that he has only read one email from his new email address and he never responds to messages. The Claimant was then asked to look at the email on page 95 of the file which was a message from the Claimant's to Mr Dulovic, to which the Claimant responded that he was "not up to scratch" and "rarely" uses email. The Claimant then accepted that all the emails from page 95 to 108 are from him to Mr Dulovic.
17. The Claimant spoke to Mr Dulovic by telephone after the preliminary hearing on 15 October 2020 and they discussed what the Claimant was required to do in terms of sending all the relevant documents to the Respondent so that the file of documents could be prepared for the public preliminary hearing. The Claimant knew from all the correspondence he had received from the Tribunal and his conversations with Mr Dulovic that he had to send a copy of his further particulars to the Respondent as well as the Tribunal. The Claimant also knew from a conversation he had with Mr Dulovic on 20 January 2021 that the Respondent had not received a copy of the further particulars and the Claimant promised that he would send a copy in the post, which he did on 29 January 2021, the working day before this hearing.
18. The Claimant was insistent that he had complied with the Tribunal Orders and provided the further particulars to the Tribunal and that Mr Dulovic had told him on 20 January 2021 that the Tribunal would forward a copy to him. The Claimant was asked by Mr Dulovic to provide a letter confirming his hospital admission which the Claimant agreed to do at the same time as provide a further copy of the further particulars. However, at this hearing he said that he found it offensive that he has to prove he has had Covid-19

as a colleague of his died. He also said that sick notes are not issued for Covid-19 but that he could get a letter from his GP if the Tribunal wanted it.

19. The Claimant accepted in cross examination that he had sent the 76 pages of text messages to Mr Dulovic which comprise the supplementary file/bundle. The Claimant claims that the messages are an attempt to discuss the merits of his case with Mr Dulovic. Not all the messages between the parties have been produced in the supplementary file and it is common ground that the Claimant has sent in the region of 1600 messages to Mr Dulovic within a period of around 5 days.

The Law

20. The Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, Schedule 1, provides at Rule 37

“(1) at any stage of the proceedings, either on his own initiative or on the application of a party, a Tribunal may strike out all part of claim or response on any of the following grounds –

- (a) 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 claims or response (or the part to be struck out).

21. I refer to the case of Evans and anor v Commissioner of Police of the Metropolis [1993] ICR 151 in which the Court of Appeal held that an Employment Tribunal’s power to strike out the claim for want of prosecution must be exercised in accordance with the principles that govern the equivalent power in the High Court, as set out by the House of Lords in Birkett v James [1978] AC 297. Accordingly, a Tribunal can strike out the claim where:
- a. there has been delay that is intentional or contumelious (disrespectful or abusive to the Court), or
 - b. there has been inordinate and inexcusable delay, which gives rise to a substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the Respondent.

Conclusions

22. Applying the relevant law to the facts, I find that the Claimant failed to comply with the Orders of the Employment Tribunal between 26 March 2020 and 15 November 2020. Whilst I accept there was a national lockdown in March 2020, restrictions were eased from June 2020 and public places, such as libraries, were accessible to the public, albeit on a limited basis. I do not accept the Claimant’s evidence that the libraries were not open until November 2020. It may well have been the case that individuals wanting to use a computer at the public library had to make an appointment and that their use would be time limited in order to comply with social distancing requirements, but no evidence has been adduced in front of me today that the Claimant made an effort to make such an appointment with his library between June and November 2020. I accept

that the Claimant may have gone to his local library on the odd occasion and found that it was closed at that particular time, but there is no evidence that he made enquiries by telephone with the library services or any other attempts to make the appropriate appointment to use a computer between June and November 2020.

23. I do not accept the Claimant's evidence that he never uses his email, particularly as he changed his evidence during cross examination and the documents from page 95 to 109 of the file clearly show 14 emails written by the Claimant. Whilst I accept that the Claimant may not be particularly confident in using email on his mobile telephone, he has demonstrated that he is capable of sending emails and I do not accept that the Claimant is completely computer illiterate. The Claimant has been able to produce 3 pages of further and better particulars by attending his local library and these documents have been created by the Claimant on a computer. In all the circumstances, I find that the Claimant has a basic understanding of how to produce a text document and how to send an email.
24. I have found the Claimant to be an unreliable witness at this hearing, particularly given the changes he made to his evidence during cross examination, as set out above. The Claimant demonstrated a certain amount of intransigence in his assertion that he had complied with the Orders of the Tribunal by posting a copy of his further particulars to the Respondent's representative on 29 January 2021. Even after I explained that it would be impossible for Mr Dulovic to receive that document on the same day that it was posted or in readiness for this morning's hearing, the Claimant insisted that he had complied with the Order. The Tribunal sometimes send copies of documents to parties and ask for their comments, but this is not standard practice and Rule 92 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, Schedule 1, specifically requires parties to send copies of correspondence to the other party directly precisely because the Tribunal cannot be expected to do this for people, especially when we have staffing reductions due to the Covid-19 pandemic. In any event, the Orders clearly stated the Claimant had to send his further particulars to the Respondent, which he has failed to do until 29 January 2021, exactly one year and one week after he originally submitted his claim form.
25. Having looked at the text messages in the supplementary file, I consider it to be unreasonable on the part of the Claimant to send such a huge volume of messages, the majority of which are indecipherable and make no sense whatsoever, to the Respondent's representative. I explained at the hearing that Mr Dulovic does not act for the Claimant and that he should not be sending such a volume of incoherent messages to him as Mr Dulovic has many other cases to deal with and his priority is to correspond with his own clients. In the circumstances, the Claimant is strongly advised to only send those messages which are necessary in the reasonable preparation of the claim for a Tribunal hearing and to comply with Tribunal Orders.
26. I do not accept that the Claimant cannot obtain assistance with composing and typing up emails and documents required for compliance with Tribunal Orders or to prepare the case for a full hearing because the issues are private. The Claimant has indicated that he has been involved with other Tribunal proceedings in the past and he was perfectly aware that this hearing was a public hearing and that this Judgement would be a public document which will be published on the Internet and can be accessed by the public and

the press accordingly. In the circumstances, asking a friend or colleague to assist him with his use of emails and electronic documents does not appear to be unreasonable. In the alternative, he can contact a professional adviser to represent him.

27. Whilst I have every sympathy with the Respondent's position in the unsatisfactory manner in which the Claimant has approached this case so far, I accept that the Tribunal has received a copy of the Claimant's further particulars and that he says he has posted a copy of that document to the Respondent on 29 January 2021, which should now be in the Respondent's possession. In the circumstances, I find that the Claimant's claim cannot be struck out for non-compliance with the Tribunal Orders.

28. In respect of whether the Claimant is actively pursuing his claim, I find that the parties are now in a position to deal with the further particulars provided by the Claimant, albeit late in the day. I accept that some of the delay has been caused by the Claimant illness and restrictions brought about by the Covid-19 pandemic and, as such, it cannot be said that the entirety of the delay was intentional or contumelious. Although I accept the delay has been inordinate, I cannot find that it was wholly inexcusable or that it has rendered a fair hearing and possible. I have every sympathy with the Respondent's submission that one year has elapsed since the Claimant submitted his claims in respect of a job in which he was only employed for seven and a half weeks and it will be necessary for the Respondent to investigate a number of complaints including sexual orientation discrimination, whistleblowing detriment and health and safety detriment. However, it is not known at this stage whether the relevant employees the Respondent will have to do interview in order to reply to the further and better particulars and prepare this case for a full merits hearing are still employed by the Respondent and it would be unfair if I were to speculate on the availability and accessibility of the relevant evidence today without hearing what the Respondent has the say on these matters after having considered the further particulars from the Claimant. In the circumstances, as at today, I cannot say that a fair hearing is no longer possible.

29. In all the circumstances, I dismiss the Respondent's application for strike out for failure to comply with Tribunal Orders and/or because the claims are not being actively pursued. However, the Claimant must understand that any further delays in this matter could still lead to his claims being struck out. The Claimant may be able to access advice and assistance with his Tribunal claims from Citizens Advice or a Law Centre, many of which are providing telephone assistance at present.

Employment Judge Arullendran

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON**

.....2 February 2021.....

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