EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100548/20 (P)

Held on 25 January 2021

Employment Judge J M Hendry

Mr D Tanase	**Claimant In Person & Mrs C M Tanase**
Barchester Healthcare Limited	**Respondent Represented by Mr D Gorry Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Claimant's Application for Strike Out is refused.

REASONS

1. An order was made by Judge Hosie on 9 October 2020 in the following terms:

"*4. No later than 2 weeks before the commencement of the Hearing, each party shall send to the other copies of all documents upon which each intends to rely, and any other relevant documents.*"

2. A hearing was due to take place at the Justice Centre in Inverness starting on 26 January.

3. The claimant was represented until the week prior to the hearing by a solicitor in Inverness. A preliminary hearing was due to take place on 19 January. Mr

Tanase wrote to the Tribunal on 18 January advising that his solicitor was stepping down with immediate that day and that he would be represented in the future by his wife.

4. At the preliminary hearing Mrs Tanase complained that the respondents were in breach of the requirement to submit documents on which they relied two weeks before the hearing. Any such document should have been lodged by 11 January. The draft bundle had in fact been sent to the claimant's lawyers on Friday 15 January four days late. At the hearing Mr Gorry who represented the respondents advised that there had been difficulties in collating all the documents following requests made by the claimant's solicitor for additional documentation. The tow solicitors had co-operated in the exchange of a number of pieces of documentation in the lead up to the hearing. Mr Gorry was unaware that the claimant's solicitor was to resign and lodging the documents some four days late should not cause any prejudice to the claimant.

5. At the preliminary hearing that took place on 19 January I explained to Mr Tanase that I would need further information to assess the seriousness of the breach which appeared minor. Without answering that question Mr Tanase e-mailed the Tribunal office later that day saying the following:

"*In light of the Respondent Representative's communication to the Court today it is clearly that they had been recognised by the respondent the fact that the documents had been sent by the respondent on 15 January and not at the date the Court Order requested, by 12th January. More than that being sent after the court had been notified by the Claimant on 15 January about the failure of the respondent with the Court Order.*

I consider that the Respondent Representative is making a confusion between the procedure of disclosing documents voluntarily and the meaning of the Court Order from 9th October 2020 and his obligation to provide the list of all documents they intend to rely on their defence by 12th January to the Claimant. I remind the Respondent representative that by his informal to the Court from 21st December he said "both parties had been ordered to produce all documentation in respect of this case 14 days prior to the start of the final hearing (i.e. by 12th January))".

6. In response Mr Gorry's position was that the strike out application was disproportionate. He pointed out that there are 46 documents in the draft inventory. All of the documents which were included in the email of 15 January would have already been seen by the claimant except documents at pages 11-13: document at page 32: and documents pages 40-42. These were in relation to the respondent's quality improvement review (11-13), supervision records for other staff members and investigation notes 40-42. He had ample time to read and consider these before any hearing.

7. The respondent's solicitor agreed that the application could be dealt with on the basis of written submissions.

Discussion and decision

8. The Tribunal has the power to strike out the grounds of resistance (Response) to an Employment Tribunal claim where the relevant party has failed to comply with any of the Tribunal rules or orders (Rule 37(1)(c)). Before striking out can occur the relevant party must be given a reasonable opportunity to make representations either in writing or request a hearing.

9. Before a Tribunal considers strike out on the grounds of non-compliance it must consider whether striking out is a proportionate response to the non-compliance. In lay terms does the punishment fit the crime. The Tribunal applies the same considerations in applying this section as it does when looking at with Rule 37(1)(b) (where it is alleged that the proceedings had been conducted had been scandalous, unreasonable or vexatious manner) (***Blockbuster Entertainment Ltd v. James*** [2006] IRLR 630, CA). In the case of ***Ridsdill & Ors v. D Smith & Nephew Medical & Ors*** EAT 0704/05 the Employment Appeal Tribunal held that the Tribunal had erred by striking out the claimant's claims on the basis that they had failed to provide schedules of loss and had not exchanged witness statements. The Judgment indicated that a proportionate response required the Tribunal to consider

whether there was a less drastic means of addressing the failures and achieving a fair trial for the parties (my emphasis). It suggested that an adjournment of the hearing with appropriate unless Orders and cost (expenses) penalties would have avoided the conclusion that a fair trial was impossible.

10. In the present case it seems to me that the default is not significant. The documents were a few days late. It caused no discernible prejudice to the claimant. The majority of the documents had been seen by the claimant before and were routine. They did not come as a surprise to him. He had ample opportunity prior to the start of the hearing on 26 January to read the documents and consider their significance.

11. The application also has to be seen in the light of the postponement of the hearing. The claimant in no real sense has lost four or five days within which to consider the documents just prior to a hearing as he will now have some considerable time (probably some months) before the case can be relisted. In short, any prejudice was negligible and transient and striking out the grounds of resistance for such a minor default would be wholly disproportionate. The Application is accordingly refused.

Employment Judge J Hendry

Dated: 26 January 2021

Date sent to parties: 26 January 2021