EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107670/2020

Employment Judge: M A Macleod

Miss Aniko Putter — Claimant

The University of Edinburgh — Respondent

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's application for strike-out of the respondent's response is refused.

REASONS

1. On 2 February 2021, the claimant sent an email to the Tribunal in which she applied for the respondent's response to be struck out, for a number of reasons set out therein. The respondent opposed this application.

2. Following a Preliminary Hearing for the purposes of case management, the Employment Judge issued a Note dated 5 and issued 11 February 2021, in which it was recorded that the claimant's application for strike-out would be dealt with by written submissions alone.

3. It is therefore appropriate to set out the application and the basis for it, put forward by the claimant, and the response by the respondent, the relevant law and the decision of the Tribunal and the reasons for it.

The Application

ETZ4(WR)

4. The application was included within a lengthy email by the claimant dated 2 February 2021.

5. The basis for the application was:

- That the respondent (Susan McNeill) contacted the Tribunal to request an electronic copy of the claim form on 22 December 2020, but failed, in breach of Rule 92 of the Employment Tribunals Rules of Procedure 2013, to intimate a copy of that email to the claimant. Susan McNeill was well aware of the claimant's email address.

- That the respondent is aware of the adverse effects of uncertainty inflicted upon the claimant when plans are likely to change. The respondent's representative submitted a request for delays on Christmas Eve, which could have caused her sustained uncertainty. She submitted that the respondent could have done this without a legal representative long before 24 December 2020. The respondent was aware that the Tribunal office would be closed for a number of days over the Christmas and New Year period and thus that she would be caused uncertainty over that period. She stressed that from her employment the respondent was aware of the potential impact of uncertainty upon her and therefore the impact on this occasion could have been anticipated by the respondent.

- That the respondent was thereby guilty of unreasonable and vexatious behaviour, in delaying the proceedings and failing to comply with the requirement to copy correspondence to her.

- That the respondent's response should therefore be struck out under Rule 37(1)(b) and/or (c), and the respondent and their representative barred from taking further part in the proceedings.

- That the respondent knowingly included bright yellow highlighting in the draft list of issues presented to the Tribunal, in the knowledge that this would be something she would find difficult. She therefore applied for the list of issues to be struck out under Rule 37(1)(b).

- That the respondent's assertions in their ET3 are contradicted in their entirety by a number of documents presented by the claimant entitled "OH Referral", "Laptop collection" and "Sabotaged Interview"; and in addition, the respondent's agenda for the Preliminary Hearing on case management stated that they did not accept that they knew or ought to have known that the claimant was a disabled person at the time of the alleged discrimination; and the agenda said that the respondent was unclear as to which allegations correspond with which legal claim, despite their being aware that the claimant has difficulties with processing information and it was vexatious to make her rewrite the agenda. In consequence, the claimant applied for the respondent to be struck out owing to "vexatious conduct proven above".

6. The claimant therefore applied for strike out of the respondent's response, in line with Rule 2 (the overriding objective), Rule 37(1)(b) and (c), and Rule 6(b) and (c), due to non-compliance and vexatious conduct to avoid delays and save expense.

7. The remainder of that email dealt with a number of other outstanding case management issues which are not relevant to this decision.

The Respondent's Response

8. By letter dated 23 February 2021, Ms Coutts, for the respondent, set out her response to the application for strike out.

9. She explained that on 18 December 2020 the respondent's representative received an email from the respondent that they had received a Tribunal claim from the claimant. They advised their representative that they had written to the Tribunal to request an electronic copy of the claim form, and had been unaware of the requirement to copy in the claimant to such a request.

10. On 22 December 2020, the representative emailed the respondent to find out whether or not they had received an electronic copy of the claim form,

but the respondent's offices had closed on 18 December 2020 for the festive period and so no reply was received to that email.

11. The respondent's representative was concerned as the information she had received did not disclose the deadline for submission of the ET3. She wrote to the Tribunal on 22 December 2020 confirming that they had been instructed by they did not have a copy of the claim form and were unaware of the date by which the response was due. They did not have the claimant's contact details at that stage, nor did they have a copy of the case number, and as a result they did not copy that correspondence to the claimant.

12. On 24 December 2020, the representative received a copy of the claim form from the Tribunal, and noted that the last day for a response was 6 January 2021. The representative sought to obtain instructions to seek an extension of time for the presentation of the ET3, but received no rely. She therefore made an application to extend the time for presenting the response on 24 December 2020, and copied the application to the claimant. The respondent was unaware of this and was therefore unable to advise their representative of any potential impact this may have upon the claimant.

13. She submitted that the respondent's representative, in issuing the draft list of issues with the agenda, was unaware that the claimant had any difficulty with yellow highlighting. She observed that nothing was said about this in section 12.1 of the claim form.

14. She argued that the terms of the ET3 were not unreasonable. There are disputes between the parties as to the factual accuracy of the respondent's position but it does not mean that they have acted unreasonably in putting this position forward.

15. At the point when the response was submitted, she said, the respondent was unaware that the claimant was disabled at the relevant time under the definition in the Equality Act 2010, but now has sufficient information to concede that point.

16. The respondent, she said, sought to clarify the complex claims being put forward by the claimant in a difficult area of law by suggesting a list of issues to allow the claimant to consider them. She said that these points did not amount to a criticism of the claimant.

17. It was therefore submitted that the respondent's conduct in the proceedings was not vexatious or unreasonable. It would be, she said, an error of law for the Tribunal to strike out the response on the basis of the application.

The Claimant's Further Submission

18. The claimant considered it necessary to respond to the response to her application by the respondent, and did so by email dated 23 March 2021.

19. She reiterated that the respondent was well aware, from complaints submitted in August/September 2020 to them by the claimant, that uncertainty affected her disabilities negatively, to the extent that on one occasion she required to attend her GP and be signed off work for some weeks; that she had difficulties working with yellow highlights, and that she had difficulties working with multiple documents of the same content. She stressed that the respondent was aware of her contact details since 27 August 2020.

20. The claimant then spent time laying out the information which is available on the respondent's website advertising its own Legal Services, and said that 17 solicitors are listed with the Law Society of Scotland as being employed by the respondent as solicitors, including employment law specialists. They have their own Law School and a Free Legal Advice Centre. She listed names of solicitors together with information attached to them on the website, and pointed out that the two solicitors who have been involved in representing the respondent both studied at the respondent's Law School.

21. The claimant went on to make certain assertions ("Facts about client – legal representative relationship"), and her experience in calling the Employment Tribunal in either Edinburgh or Glasgow.

22. The claimant sought, under her summary, to make detailed observations about the respondent's response, repeating much of what was contained in her original application. She sought to suggest that it was proved that the respondent was aware of Rule 92 and breached it.

23. She said it was clear that the respondent and their legal representatives had been working together for years, and that 18 December 2020 could not have been the first occasion when they contacted their representative. She raised the question whether it was just a tactic to create an acceptable reason to enable them to ask for an extension of time as the only other reason for them would have been that they did not do enough investigation since she submitted her formal grievances in August/September 2020.

24. The claimant made clear that she was alleging that there was a "well engineered tactic" to serve the interest of the respondent by obtaining more time to submit a response to the claim.

25. She believes that she was prejudiced by the timing of the application as it meant she could not obtain advice as to how to oppose it.

26. She suggested that it was vexatious conduct on the part of the respondent to say that the claim did not mirror the terms of the grievance, thus making clear that the representative who wrote this was aware of and had read the grievance. They exploited the impact upon her which uncertainty would cause her by delaying sending her documents 17 days after her request.

27. She invited the Tribunal, therefore, to strike out the respondent so as not to allow "this vexatious conduct to continue and further harm me. As I mentioned in my formal grievance – my life matters too."

The Respondent's Further Response

28. The respondent replied to this email on 31 March 2021.

29. Ms Coutts submitted that Ms McNeill is not a solicitor and was unaware of the requirement to copy the claimant into her email to the Tribunal on 16

December 2020, and in any event it was a minor request which caused the claimant no prejudice.

30. She reiterated that the respondent's representative did not have a copy of the claim form when she wrote to the Tribunal on 22 December 2020 and therefore could not copy her email to the claimant.

31. She reiterated that the representative was unaware of the impact of uncertainty upon the claimant, and had no intention of causing her any anxiety.

32. The claimant had an opportunity to object to the postponement application but did not do so. The Tribunal granted the extension of time on 31 December 2020, in the interests of justice and balancing the prejudice to each party.

33. She then set out submissions seeking to demonstrate that it would be contrary to the interests of justice to strike out the response.

Discussion and Decision

34. Rule 37(1)(a) and (b) of the Employment Tribunals Rules of Procedure 2013 provides:

"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…"

35. Rule 37(2) provides:

"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."

36. In **Blockbuster Entertainment Ltd v James 2006 IRLR 630 CA**, the Court of Appeal found that for a Tribunal to strike out a claim based on unreasonable conduct, it has to be satisfied that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible; and in either case, striking out must be a proportionate response.

37. The court went on to say (paragraph 21): *"The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact – if it is a fact – that the tribunal is ready to try the claims; or – as the case may be – that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist."*

38. In **Ashmore v British Coal Corporation 1990 ICR 485**, Stuart-Smith LJ said, *"With all respect to Stephenson LJ, I do not agree that the claim can only be struck out as being an abuse of the process if it is a sham, not honest or bona fide. On the contrary, I prefer the views of the other members of the court that it is dangerous to try and define fully the circumstances which can be regarded as an abuse of the process, though these would undoubtedly include a sham or dishonest attempt to relitigate a matter. Each case must depend upon all the relevant circumstances."*

39. Sedley LJ, in **Bennett v Southwark LBC [2002] ICR 881**, considered the question of proportionality in the context of that appeal: *"But proportionality must be borne carefully in mind in deciding these applications, for it is not every instance of misuse of the judicial process, albeit it properly falls within the descriptions scandalous, frivolous or vexatious, which will be sufficient*

to justify the premature termination of a claim or of the defence to it. Here, as elsewhere, firm case management may well afford a better solution…."

40. Although it has taken some time to lay out the different points raised by both parties in this matter, I regard this as a relatively straightforward application.

41. The claimant has asked the Tribunal to strike out the response, and at one point the list of issues, on the basis that the conduct of the respondent has been vexatious and unreasonable throughout the process.

42. I deal with each of the points made by the claimant below, taking into consideration the principles outlined in the authorities above.

43. It is appropriate, first, to make clear that the list of issues cannot be struck out by the Tribunal. It represents an attempt to assist the Tribunal by defining the claim, and in this case was an attempt by the respondent to assist the claimant in clarifying her claim. It is perhaps a redundant point, in that if the application for strike out of the respondent were granted the respondent would take no further part in the proceedings. However, I make clear that this is not a competent application.

44. The claimant then asserted that Ms McNeill, who was initially a respondent to the proceedings, acted in breach of Rule 92 by failing to copy her email requesting an electronic copy of the ET1 to the claimant.

45. She went to considerable lengths to try to "prove" that Ms McNeill and indeed, so far as I can gather, the entire staff of the respondent, were aware of Rule 92 and that this amounted to a deliberate breach.

46. In my judgment, the claimant has fallen far short of proving any such thing. There is no reason, in my view, why Ms McNeill would herself be aware of Rule 92, and in any event, it is plain that she and those who received the ET3 were anxious to pass it to their instructed legal representatives as soon as possible. Asking the Tribunal for an electronic copy of the ET1 was a minor administrative request. Rule 92 gives the Tribunal the power to order a departure from the rule where it considers it in the interests of justice to do so. There can be no possible basis for suggesting that the claimant has in

any way been prejudiced or disadvantaged by not being aware that a request was made for an electronic copy of the ET1, and she does not, in all her lengthy submissions, suggest that she has been disadvantaged in reality.

47. The claimant then argued that the respondent's representative's request for an extension of time to present the ET3 was a vexatious act, and again sought to demonstrate, by lengthy submission, that it was "proved" that the representative knew about, or should have known about, the claim and its details when it arrived, and thus the application was, if I understand it, unnecessary.

48. This suggestion appears to me to represent a misunderstanding of the sequence of events. That the claimant had submitted a lengthy and detailed grievance some months before does not mean that their legal representative was aware of that detail before she received the ET1. Knowledge on the part of the respondent does not amount to knowledge on the part of their representative. It would be very surprising indeed if the University were to share every grievance with its solicitors, whether a claim had been raised or not. It is entirely legitimate, in my view, for the representative, knowing that the University was shutting down for the festive period, to seek an extension of time, and the reasonableness of that application is demonstrated by the fact that it was granted by the Tribunal on the basis it was sought.

49. The claimant suggests that the respondent's representatives should have known that she would be badly affected by uncertainty and that such a delay would be harmful to her. Again, in my judgment, there is no basis for such an assertion. That the claimant thinks this is so does not mean it is so. The representative's position is that they were unaware of this, and that the claimant herself did not raise this issue on her claim form. That is an entirely fair response, in my judgment. In any event, there is nothing in the claimant's application to demonstrate whether any delay at all, or a delay of a particular period, would be the cause of a negative impact. It appears to be the claimant's contention that the respondent's representative should not

have been allowed to ask for an extension of time. That is not a suggestion which I am prepared to sustain. The respondent is entitled to take reasonable steps to protect its own interests. In any event, it appears that the claimant did not object to the extension being granted.

50. The claimant also says that in highlighting parts of the list of issues in bright yellow the respondent knew that it would cause the claimant difficulty. In my judgment, it is unfair to impute that knowledge to the representative of the respondent at that point, when further investigations were being carried out into the claimant's disabilities. While it is unfortunate that the claimant was inconvenienced by this, it appears to me at best to represent a minor matter, rather than an issue of any significance. In any event, there is no basis upon which I could find that this was a deliberate attempt to "get at" the claimant.

51. That the respondent did not initially admit that the claimant was suffering from conditions amounting to disabilities within the meaning of the Equality Act 2010 falls very far short of unreasonable or vexatious conduct. The claimant was clearly very unhappy that this was not admitted immediately but the definition within the Act is a complex one, and the respondent acted reasonably in seeking further information on which to base its assessment of this matter. As it turned out, they admitted the point as soon as that information was provided to the claimant.

52. In summary, it is difficult to avoid the conclusion that the claimant is seeking to have the response struck out in order to gain an advantage in this litigation, but is exaggerating and inflating the actions of the respondent to try to paint them in the worst possible light. Some of the allegations made by the claimant in this application and correspondence are truly bizarre. That the two solicitors who have represented the respondent studied at the University has no bearing on this matter whatsoever, and it is incomprehensible that the claimant should think it would.

53. In my judgment, the actions of the respondent do not amount to significant breaches of the requirements of the Tribunals Rules of Procedure, if indeed

they amount to breaches at all, but of greater importance is that there is no possible prejudice or unfairness which has accrued to the claimant as a result of any of the allegations which she makes.

54. The Tribunal has an obligation to attend to the interests of justice in respect of both parties, and not just the claimant, and in this case the respondent has simply sought to place before the Tribunal in a professional manner its defence to the serious allegations which the claimant has made. The application has the flavour of a personal attack upon the integrity of the solicitors acting for the respondent, and the Tribunal has a responsibility to protect that integrity when there are limits to what a solicitor can do to defend themselves when acting for a client such as in this case. There is simply no basis upon which it can be found that the respondent or its representatives have acted in any way approaching the kind of conduct which the Tribunal could categorise as vexatious or unreasonable conduct.

55. Accordingly, it is my firm conclusion that the claimant's application for strike out of the respondent's response or of its draft list of issues must be refused as being without foundation or basis. This is a case in which a fair trial is still abundantly possible and there is no reason advanced before me upon which they could or should be excluded from defending themselves in this case.

Employment Judge: Murdo Macleod
Date of Judgment: 07 May 2021
Entered in register: 18 May 2021
and copied to parties