EMPLOYMENT TRIBUNALS

Claimant: **Miss AB**

Respondent: **The Commissioners for Her Majesty's Revenue and Customs**

Heard at: **Cardiff (by video)** **On: 26 February 2021**

Before: **Employment Judge R Harfield**

Representation:
Claimant: In Person
Respondent: Mr Allsop (Counsel)

Written Reasons

At the interim relief hearing on 26 February 2021 I refused the claimant's application to strike out the respondent's response to her interim relief application or to postpone the interim relief hearing. I gave oral reasons at the time and summarised those in my reserved judgment in which I refused the claimant's application for interim relief. The claimant in an email dated 12 March 2021 asked for full written reasons.

Introduction

1. The claim form was presented on 21 January 2021. On 18 February 2021 the parties were sent a notice listing the interim relief hearing for 26 February 2021. The standard wording in the notice of hearing said "*You may produce written representations to be considered at the hearing, If you do so, you must send them to the Tribunal and the other side at least 3 days before the hearing. You will be able to tell the Tribunal your arguments at the hearing in any event."*

2. On 22 February 2021 the respondent emailed the Tribunal saying they were compiling a hearing bundle and asking whether the Tribunal wanted a paper or electronic copy of the bundle and witness statement. The

correspondence was not immediately placed before a Judge and when it came before me on the afternoon of 25 February 2021 I directed the Tribunal staff to write to the parties to confirm that they had sent each other their respective bundles and statements prior to the hearing. The respondent was also (in answer to their earlier question) directed to provide an electronic bundle to the claimant and the Tribunal ahead of the hearing due to start the following morning.

3. Late that evening of 25 February 2021 the claimant wrote objecting to the fact that she had filed her hearing bundle and written legal argument on 22 February 2021 and that the respondent had filed their bundle and witness statement of Mr Edwards that day. The claimant said the respondent had not complied with the hearing notice and that she had been put at a disadvantage as the respondent had been in prior receipt of her documents. She said that she had not put in her bundle, or her legal argument as much as she otherwise would have done and that she would have prepared a witness statement herself if she had more time. She said there were more documents she would have submitted to show that the decision to dismiss her had been pre-judged long before the actual decision. She asked to have the respondent's defence to her interim relief application struck out. Alternatively, she argued that she could not have a fair hearing as she was taking sedative medication and could not read through the large quantity of material provided. The claimant said that the respondent should not have been caught unawares by her application for interim relief and its urgent listing as she had copied them in when the proceedings where originally presented. She said that her situation should be considered to amount to special circumstances justifying a postponement. I should also add that on the morning of the hearing itself the respondent filed further documents comprising a skeleton argument and a bundle of authorities. I heard oral submissions from both parties at the start of the interim relief hearing before giving my oral reasons for refusing the claimant's two applications.

The legal principles

4. The Employment Tribunal Rules of Procedure say (I did not expressly refer to these at the hearing but they are the Rules I had in mind when deciding the applications):

"*2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*
(a) ensuring that the parties are on an equal footing;
(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;
(d) avoiding delay, so far as compatible with proper consideration of the issues; and
(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

6. A failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal (except for an order under rules 38 or 39) does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following—
(a) waiving or varying the requirement;
(b) striking out the claim or the response, in whole or in part, in accordance with rule 37;
(c) barring or restricting a party's participation in the proceedings;
(d) awarding costs in accordance with rules 74 to 84.

29. The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. [Subject to rule 30A(2) and (3)](a) the particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.

30A.—(1) An application by a party for the postponement of a hearing shall be presented to the Tribunal and communicated to the other parties as soon as possible after the need for a postponement becomes known.

(2) Where a party makes an application for a postponement of a hearing less than 7 days before the date on which the hearing begins, the Tribunal may only order the postponement where—
(a) all other parties consent to the postponement and—
(i) it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement; or
(ii) it is otherwise in accordance with the overriding objective;
(b) the application was necessitated by an act or omission of another party or the Tribunal; or

(c) there are exceptional circumstances.

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.
(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above."

5. The power to strike out a party's case, for example, on grounds of unreasonable conduct of proceedings or non-compliance with tribunal rules is a draconian step, not to be exercised lightly. The Tribunal must be satisfied that the conduct involved deliberate and persistent disregard of procedural steps or has made a fair trial impossible. In any event strike out must be a proportionate response: Blockbuster Entertainment Ltd v James 2006 IRLR 630.

6. Section 128 of the Employment Rights Act 1996 gave the Claimant the right to apply for interim relief. Section 128(2) provides that the Tribunal shall not entertain an application for interim relief unless it is presented to the Tribunal before the period of 7 days immediately following the effective date of termination. Under section 128(3):

"The Tribunal shall determine the application for interim relief as soon as practicable after receiving the application."

7. Section 128(4) required the Tribunal to give the Respondent not less than 7days notice of the hearing and a copy of the application. Section 128(5) provides:

"*The tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so."*

8. In London City Airport Ltd v Chacko [2013] IRLR 610 it was said:

> "*In my judgment the correct starting point for this appeal is to fully appreciate the task which faces an employment judge on an application for interim relief. The application falls to be considered on a summary basis. The employment judge must do the best he can with such material as the parties are able to deploy by way of documents and argument in support of their respective cases. The employment judge is then required to make as good an assessment as he is promptly able of whether the claimant is likely to succeed in a claim for unfair dismissal based on one of the relevant grounds. The relevant statutory test is not whether the claimant is ultimately likely to succeed in his or her complaint to the Employment Tribunal but whether "it appears to the tribunal" in this case the employment judge "that it is likely". To put it in my own words, what this requires is an expeditious summary assessment by the first instance employment judge as to how the matter looks to him on the material that he has. The statutory regime thus places emphasis on how the matter appears in the swiftly convened summary hearing at first instance which must of necessity involve a far less detailed scrutiny of the respective cases of each of the parties and their evidence than will be ultimately undertaken at the full hearing of the claim.*

Reasons

9. I did not grant the claimant's application to either postpone the hearing or strike out the respondent's defence to her interim relief application. I gave considerable weight to the requirement to determine an interim relief application as soon as practical and in respect of any postponement, the requirement for there to be special circumstances.

10. The impact on the respondent in not permitting them to respond to an interim relief application could be serious and disproportionate given the potential orders that could be made if an application is granted. In terms of the proceedings as served by the Tribunal the respondent had little preparation time. They were given exactly 7 days notice of the hearing. The direction that written representations (which is a standard direction in the notice of hearing, and not one that had been specifically set by a Judge in this case) should be sent at least 3 days before the hearing would have given them 4 days' notice. It would not have covered witness statements or documents in any event. Moreover, the respondent had contacted the Tribunal about preparing a bundle and a witness statement which was not responded to by the Tribunal until the afternoon before the hearing. It is the practical reality of interim relief hearings that they are to a certain extent "rough and ready" because of the need for expediency and therefore the limited preparation time available. It is unusual, for example,

for the parties to have time to file joint bundles and it is more often the case that the parties turn up on the day, or just before, with their own documents and witness statements that they wish to rely upon, and the Judge and the parties have to do the best with it that they can. Hence the appellate observations in Chacko.

11. I therefore did not consider that the Respondent had conducted themselves unreasonably in the conduct of the proceedings or that there had been persistent and deliberate disregard of Tribunal directions. I did not consider that the Respondent's conduct made a fair trial of the interim relief application impossible or that to debar them from responding it would be a proportionate step in any way. (I would add that the Claimant would still have had to establish her entitlement to interim relief to my satisfaction in any event – it is not awarded by default). The Claimant's observation that the Respondent had more time to prepare because she had sent them a copy of her proceedings when she presented it, did not change my assessment.

12. In relation to the postponement application, I did not consider there were special circumstances justifying a postponement, or that such a postponement would be in accordance with the overriding objective or that it was necessitated by an act of the respondent or that there were exceptional circumstances (which tests all revolve around the same principles).

13. Again I gave considerable weight to the requirement to determine an interim relief application as soon as practical. I also needed to take time myself that morning to read the relevant documents for the hearing, so I was satisfied there was time for the claimant to have reading time that morning to read the respondent's additional documents over and above that which she already had.

14. I was also satisfied that whilst the claimant would always have been able to prepare a witness statement or produce other documents (she knew since her presentation of her claim on 21 January 2021 that she was bringing a claim for interim relief) she would not be disadvantaged as I would not hearing any actual live witness evidence only reading the statement of Mr Edwards. The claimant would have the full equivalent opportunity, as she was there representing herself, to say what she wanted to say in support of her application or talk about what evidence she says would be available in support of her claim. The respondent's bundle to a large degree contains documents either in the claimant's own bundle or available to her, with the exception of a small number of documents the claimant would have time to read. The respondent's skeleton argument set out that which Mr Allsop would have been able to say by way of oral submissions in any event. There was a large authorities

bundle but I explained to the claimant there was no expectation on her to read them and indeed I did not have the time available to do so myself. Mr Allsop, however, in his skeleton argument drew out the key paragraphs from the relevant case law. The basic principles of the law relating to interim relief the claimant was also aware of in any event and set it out herself in her own legal argument. They are of course the principles I would always have to apply in any event and were in headline terms already within my knowledge.

15. I was satisfied that my approach accorded with the observations in London City Airport Ltd v Chacko [2013] IRLR 610 that an interim relief hearing is an expeditious summary assessment to be undertaken by me as to how the matter looks to me on the material that the parties are able, in the limited time available, to put before me. It is designed to be a swiftly convened summary hearing which involves a far less detailed scrutiny of the parties' positions than will ultimately be undertaken at the full hearing. I therefore decided to proceed and considered that to do so would be sufficiently fair to the claimant and in the interests of justice to do so.

_____

Employment Judge R Harfield
Dated: 14 July 2021

JUDGMENT SENT TO THE PARTIES ON 15 July 2021

.....
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS