EMPLOYMENT TRIBUNALS

Claimants		**Respondent**
Mr C Masaquiza Masaquiza & Anor	v	C. Palace Living Limited

Heard at: Watford by CVP **On**: 30 April 2021

Before: Employment Judge de Silva QC (sitting alone)

Appearances

For the Claimant: Danielle Worden, Trade Union Representative

For the Respondent: Joanne Kerr, Counsel

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

"This has been a remote hearing which has not objected to by the parties. The form of remote hearing was video. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing".

JUDGMENT

1. The Claimants' applications to strike out the Response, for the Respondent to be disbarred from proceedings, for the Respondent to be fined for non-compliance with Orders and for costs are refused.

2. The final hearing is adjourned and is re-listed on **1 October 2021**.

REASONS

Background Facts

1. I make the following findings of fact based on the documents in the bundle prepared by the Claimants' for this final hearing and the submissions of the parties.

2. By Claim Form issued on 30 January 2020, the Claimants made claims for unlawful deductions from wages under section 13 of the Employment Rights Act 1996 and denial of holiday pay under regulation 14 of the Working Time Regulations 1998 (**"WTR"**). The Response was filed on 22 November 2020.

3. On 19 December 2020, a Notice of Hearing listing a hearing on 30 April 2021 was sent to the Parties, together with Case Management Orders. These made directions for a Schedule of Loss by 4 January 2021, disclosure by 18 January 2021, a bundle of documents by 1 February 2021 and witness statements by 15 February 2021.

4. It is not disputed by the Respondent that it received this. As for the Claimants, the Notice of Hearing was sent to the address for the Claimants' union given on the Claim Form. However, the union had moved office since the Claim Form was served and it did not notify the Employment Tribunal of the change of address. This only became apparent during the course of the final hearing, the Claimants having originally said in submissions that there was no fault on their part. Ms Worden told me that she believed that mail forwarding was in place but readily and properly accepted that the reason that the Claimants did not receive the Notice of Hearing and Case Management Orders was that the document was not forwarded to the union's new address (which address had not been given to the Employment Tribunal) and that there was no fault on the part of the Employment Tribunal.

5. In mid-March 2021, the Claimants' then representative, Claire Marcel, obtained the date of the hearing from ACAS but apparently not the Notice of Hearing or the Case Management Orders themselves. There is no record of her trying to obtain these from the Employment Tribunal or the Respondent at that time.

6. By email dated 23 March 2021, Ms Marcel sought these from Watford Employment Tribunal (for reasons which are unclear, the request was made to the watfordet.settlements@justice.gov.uk email address). The Tribunal

provided the document the following day from the main watfordet@justice.gov.uk address.

7. By email dated 24 March 2021, Ms Worden contacted the Respondents' solicitors in relation to settlement. Ms Worden accepted at the final hearing that there was 'without prejudice' correspondence in the hearing bundle which, as Ms Kerr submitted, should not have been put before the Tribunal. I did not consider this correspondence in making my decision.

8. Thereafter, Ms Worden sought to progress the matter so that it could be ready for the final hearing. By email dated 1 April 2021, Ms Worden proposed the date of 9 April 2021 for disclosure. The same day, the Respondent's solicitors asked Ms Worden to agree 14 April 2021 to which Ms Worden replied "sounds good".

9. By email dated 6 April 2021, Ms Worden suggested bringing the date for disclosure forward but no reply was received.

10. By email dated 7 April 2021, the Claimants applied to amend the claim to increase the sum claimed for wages and to add a claim in relation to rest breaks under regulation 11 of the WTR. The email further stated that the Respondent would not agree to disclose evidence and exchange statements until 14 April 2020 and requested that the Tribunal order disclosure and exchange of statements *"prior to14 April 2020"*.

11. In their reply to the Employment Tribunal the same day, the Respondent's solicitors stated that Ms Worden had agreed that disclosure take place on 14 April 2020 but had changed her mind and required the Tribunal to consider that the Respondent had failed to agree timelines that Ms Worden had set which had not been agreed. The email also said *"we are not in a position to proceed at this time, as we are without instructions"*.

12. By email dated 14 April 2021, Ms Worden asked whether the Respondent's solicitors intended to exchange documents that day as agreed. By email of the same date, the Respondent's solicitors said that that they were without instructions. They said the matter was not ready for final hearing on 30 April 2021 and the Parties had not complied with the ET directions.

13. By email dated 15 April 2021, Ms Worden told the Tribunal that the Claimants were ready for the final hearing on 30 April 2021.

14. By email dated 22 April 2021, Ms Worden told the Tribunal that the Respondents had failed to comply with the Case Management Order and made applications on behalf of the Claimants for the Respondent to be fined

for non-compliance. She also asked the Tribunal to bar the Respondent from proceedings and award costs in relation to preparation time.

15. On 22 April 2021, the Respondent's solicitors stated that Ms Worden's email was misleading. They stated that the slippage had been initiated by the Claimants who had only provided a Schedule of Loss on 7 April 2021, having been directed in the Case Management Orders to do so by 4 January 2021. The email stated that a proposal had been made by the Respondent's solicitors to give disclosure by 14 April 2021 *"but that proposal was rejected by the Claimants' representative"*. The email asked that the final hearing be dealt with as a preliminary hearing and that no further directions be made before the hearing *"despite the enthusiastic but misguided missives of the Claimant's representative"*.

16. By email of 22 April 2021, Ms Worden stated that the Respondent's solicitors were misleading the Tribunal. The email maintained the earlier applications to disbar the Respondent from proceedings etc. By email dated 27 April 2021, an application was made on behalf of the Claimants to strike out the Response.

The Claimants' Applications

17. The Claimants make the applications to bar the Respondent from proceedings (rule 6 of the Employment Tribunal Rules of Procedure 2013 (**"the ET Rules"**)), to fine the Respondent for non-compliance (section 4 of the Employment Tribunals Act 1996), to strike out the Response (rule 37 of the ET Rules) and to be awarded preparation time costs (rules 74-84 of the ET Rules) on the following grounds:

    a. The Respondent has been unreasonable, scandalous or vexatious;
    b. It has failed to comply with ET Rules and/or Orders;
    c. It has not actively pursued its case;
    d. It is no longer possible to have a fair hearing.

18. The Claimants rely on the following conduct by the Respondent: ignoring the Claimants' settlement offer and attempts at engagement until 30 March 2021; failing to respond to their offer on 7 April 2021; failing to disclose on 14 April 2021 as agreed without explanation; failing to properly engage with the Claimants, failing to comply with Case Management Orders, deliberately failing to disclose any information save what was provided in the Response; failing to take any action to remedy the injustice being caused; deliberately seeing to prolong proceedings by seeking to re-categorise the final hearing as a preliminary hearing, deliberately seeking to mislead the Tribunal.

Relevant Law

19. Rule 6 of the ET Rules states: *"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".

20. In ***Farmah v Birmingham City Council*** [2017] IRLR 785, the EAT held that the Tribunal has a wide discretion under this rule but it must be exercised judicially. In particular, it should consider the seriousness of the breach and any potential prejudice to the various parties.

21. Rule 37(1) of the ET Rules states: *"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). …".

22. In ***Bennett v LB Southwark*** [2002] ICR 881 CA, one of the meanings of gratuitous was held to be *"giving gratuitous insult to the court in the course of legal process"*. In ***AG v Barker*** [2000] EWHC 453, it was held that vexatiousness involves an abuse of process.

23. In ***Bolch v Chipman*** [2004] IRLR 140, the EAT stated that there are four matters to be addressed in a strike out application:

    a. The Tribunal must conclude not simply that a party has behaved scandalously, unreasonably or vexatiously but that the proceedings have been conducted by or on the party's behalf in this manner;

    b. Even if there was such conduct, the Tribunal must reach a conclusion as to whether a fair trial is still possible. In exceptional circumstances (such as where there is wilful disobedience of an order) it may be possible to make a striking out order without such an investigation;

    c. Even if a fair trial is not possible, the Tribunal must still examine what remedy is appropriate which is proportionate to its conclusion. It may be possible to impose a lesser penalty than one which leads to a party being debarred from the case in its entirety.

    d. Even if the Tribunal decides to make a striking out order, it must consider the consequences of the debarring order. For example, if the order is to strike out a Response, it is open to the Tribunal to debar the Respondent from taking any further part on the question of liability but to permit him to participate in any hearing on remedy.

24. Rule 76(1) of the ET Rules states: *"A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*

    (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; …".

25. Section 7(4) of the Employment Tribunal Rules 1996 states: "*(4) A person who without reasonable excuse fails to comply with—*

(a)any requirement imposed by virtue of subsection (3)(d) or (h), or

(b)any requirement with respect to the discovery, recovery or inspection of documents imposed by virtue of subsection (3)(e), or

(c)any requirement imposed by virtue of employment tribunal procedure regulations to give written answers for the purpose of facilitating the determination of proceedings as mentioned in subsection (3A), (3B) or (3C),

is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale".

26. Subsection 3(d) referred to above refers to order requiring persons to attend to give evidence and produce documents and for authorising the administration of oaths to witnesses. Subsection 3(h) applies only to claims under the Equality Act 2010.

The Hearing

27. I heard oral submissions from Ms Worden and Ms Kerr. In addition, Ms Worden submitted a written skeleton argument. The Parties each referred to a bundle of documents prepared for the final hearing by the Claimants.

Conclusions

28. The Respondent put forward no excuse for non-compliance with directions up to 24 March 2021 when the Claimants' representatives started to progress the matter. The explanation put forward by the Respondent's solicitors in relation to at least part of the time after this was that they were without instructions. This is not a good excuse and no real explanation for this was provided. I accept that their conduct was unreasonable for the purposes of rule 37(1) of the ET Rules although it falls short of scandalous or vexatious conduct.

29. The failure of Claimants to comply with directions by the time stated in the Case Management Order can be attributed to them in that it was their representatives who failed to notify the Tribunal of the move of office, whose forwarding system did not ensure that the Case Management Orders reached the correct office and who did not comply with the Case Management Orders in time.

30. Once the Case Management Orders were obtained on 24 March 2021, Ms Worden did everything within her power to get this matter ready for trial and I do not accept the suggestion of the Respondent's solicitors that she was *"enthusiastic but misguided"*. However, this was only a matter of 6 weeks before the final hearing and although the Claimants' were ready for trial, I see the force of Ms Kerr's point that it is not for a party to seek the strike out based on new deadlines when it has itself been in breach of the original deadlines set by the Employment Tribunal. I note that no 'unless orders' were sought or made.

31. Importantly, I accept that a fair trial is still possible. Although the Respondent's has seen the Claimants' statements, there are relatively brief and cover the matters that the Respondent is likely to cover in its evidence in its event.

32. I make these conclusions notwithstanding the agreement of the parties to give disclosure by 14 April 2021 which the Respondent did not do. I also accept that the statement from the Respondent's solicitors in their email of 22 April 2021 that a proposal had been made by the Respondent's solicitors to give disclosure by 14 April 2021 *"but that proposal was rejected by the Claimants' representative"* was misleading. This is regrettable but I do not conclude that the Respondent's solicitors deliberately misled the Tribunal, as the Claimants assert. I am conscious that the Claimants sought to bring forward the agreed date and even applied for an order that the agreed date be brought forward (which led to the objections in the email dated 14 April 2021 from the Respondent's solicitors) so there may have been a degree of confusion about the position.

33. As I have said, Ms Worden acted professionally and expeditiously in her clients' best interests but both Parties had already wholly failed to comply with the directions long after the last deadline had expired.

34. As to the specific ground relied on by the Claimants relation to the alleged failure to address settlement offers, I have not considered the settlement position as this is 'without prejudice'.

35. Given all these circumstances, striking out the Response or disbarring the Respondent from the proceedings would be disproportionate sanctions. Lesser sanctions are available and are more appropriate in the circumstances, for example making 'unless orders' (none previously having been made in these proceedings).

36. Given my conclusions as set out above, including in relation to the Claimants' own failure to comply with the Case Management Orders, it would not be appropriate to make a preparation time order in the Claimants' favour. I accept that, when the applications were made on behalf of the Claimants, their representatives believed that there had been no fault on their part. However, it transpired at the final hearing that this was not the case.

37. Fining a party under section 7(4) of the Employment Tribunals Act is a criminal matter and a fine may only be imposed on conviction in the criminal courts. In any event, the Claimants simply assert that the Respondent should be fined on the basis of *"non-compliance"* (see paragraph 7(b) of the Claimants' Skeleton) and the matters relied on in relation to rules 37 and 76 of the ET Rules (see paragraph 9 of the Claimants' Skeleton); however, these

matters do not of themselves necessarily justify a fine: it would have to be shown that a provision within section 7(4) of the Employment Tribunals Act is engaged and the Claimants have no sought to do so.

38. So far as the Respondent's applying to adjourn the final hearing on 30 April 2021, I considered this even though there was no formal written application. I had to justice between the parties. I bore in mind the matters set out above and also the fact that there was likely to be insufficient time to hear the claims on the afternoon of the hearing. It would be around 3pm by time I had given judgment on the Claimants' applications. Submissions took the whole of the morning which was entirely proper on all sides and the hearing was required to be interpreted. There were also technical issues which were nobody's fault.

39. Although the Claimants would be delayed in having their claims heard, the delay was a matter of around five months and this was outweighed by the potential injustice to the Respondent in not being able to defend the claims. In all the circumstances, the balance of justice favoured adjourning the final hearing.

_____

Employment Judge de Silva Q.C.

Date: ……09th August 2021.

Sent to the parties on: 11th August 2021.

.....THY.....
For the Tribunal Office

.