



EMPLOYMENT TRIBUNALS (SCOTLAND)

5

**Case Nos: 4104095/2020, 4104097/2020, 4107500/2020 and
4107501/2020**

10

Preliminary Hearing held remotely on 17 August 2021

Employment Judge A Kemp

15

Mrs Aileen Harrower

**First claimant
Represented by:
Ms R Jiggins
Paralegal**

20

Mrs Lorraine McVicars

**Second claimant
Represented by:
Ms R Jiggins
Paralegal**

25

Andrew Bourke

**Respondent
In person**

30

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

35

**1. The Tribunal refuses the claimants' application under Rule 37 for a
strike out of the respondent's Response.**

**2. The Tribunal refuses the respondent's application under Rule 37 for a
strike out of the Claims.**

3. The Tribunal grants an order under Rule 38 that unless the ⁴⁰ respondent provides a written witness statement comprising his

E.T. Z4 (WR)

5 **evidence in chief to the Tribunal, with a copy to the claimants, by 4pm on 30 August 2021 his Response on the merits of the claim shall be dismissed without further order, and his participation in the Final Hearing shall be limited to the issue of remedy in the event that either or both Claims succeed.**

4. The Tribunal varies the arrangements made for the Final Hearing in relation to the provision of questions to the respondent in advance of the Final Hearing, and the claimants shall provide such questions by 4pm on 28 September 2021.

10

REASONS

Introduction

1. This was a Preliminary Hearing held to consider applications made by both parties. The hearing was held remotely.
- 15 2. These cases have had a number of earlier Preliminary Hearings including several earlier applications for strike out by each party. Arrangements for a Final Hearing were made at a Preliminary Hearing on 7 May 2021. A number of case management orders were made in the Note following that hearing.
- 20 3. Since then, the claimants have settled their claims against the parties who were originally the first, third and fourth respondents. I addressed that issue in a Note sent to parties on 13 July 2021. The respondent had in effect challenged the competency of proceeding with claims solely against him in such circumstances, and I set out the result of my researches into
25 that issue as I was aware that neither party is represented by a solicitor. I address that issue below. I also set out matters that required attention by the claimants in Orders made with that Note.

4. The case management orders provided for a number of matters to take place. For the reasons set out below not all have been complied with. Each side seeks to secure a strike out of the claim or response respectively for what is said to be a breach or breaches of those case management orders. Each side has sent a number of emails to the Tribunal in relation to their, or the other party's, applications.

Submissions

5. The following contains a basic summary of the submissions that were made, both on the application for the claimants, and that for the respondent. The two issues may be to an extent related as, for example, the respondent seeks an extension for providing his witness statement on the basis that includes his allegation that the claimants were themselves in breach of orders, and the claimants seek strike out for the respondent not providing a witness statement.

(i) Claimants

6. The claimants sought a strike out of the response of the respondent on the essential basis that the witness statement that he ought to have provided has not been sent to them either on the due date to do so under the case management order, or the extended date that they offered to him which was 4pm on 16 August 2021. The respondent had failed to address the claims adequately throughout the long history of them, and whilst they had not produced the Bundle of Documents for use at the Final Hearing in

accordance with the case management orders that that was because firstly the respondent had not provided all documents required under the order set out in paragraph 9 of the Note following the Preliminary Hearing on 7 May 2021, which they raised with him, and secondly that he had not sent any documents on which he intended to rely for that Final Hearing as provided for in paragraph 10 of the orders from the same Note. The documents not provided included key documents such as the contracts of employment, disciplinary procedure, notes of both grievance and disciplinary hearings, notes of meetings with witnesses, investigation reports, summaries of evidence, advice to the employers (the former first

respondent), decision letters, and documents relating to appeals. The respondent had claimed not to be able to produce a witness statement as the pleadings had not been updated properly and they were not provided

timeously but that had been an error which was rectified at 11.02 the following day, and there was no prejudice from that. The Bundle of Documents had not been provided to him at the time as documents were missing from it as set out above, and he had complained earlier about 5 sending emails to him when on annual leave which he had claimed was a breach of his human rights. The respondent had also not provided originals of many documents, but had in effect copied and pasted some emails, or parts of the email trail, and added commentary to them. The documents he had produced had referred to a “plan” to end the
10 employment of the second claimant, but not the documentation in relation to that plan. Documents from related investigations involving grievances by two other employees which were said to be the basis for allegations of gross misconduct had not been provided.

7. The claimants had provided their own witness statements on the basis of
15 a Bundle sent to the claimant on 9 August 2021. They were provided password protected and the password would be released when the claimant’s witness statement was produced. The claimants had complied with the order for the witness statement but not the respondent, and in light of that breach of the order it would not be possible to have a fair
20 hearing. The timescale to do so was already short. Ms Jiggins had emailed the Tribunal on the morning of the hearing before me with arguments as to why late provision of the witness statement caused serious difficulties both for her and for the two claimants who both have serious mental health difficulties which had been set out in documents
25 earlier sent to the Tribunal. She argued that it was proportionate to dismiss the response. The claim would proceed with the evidence of the claimants who retained the burden of proof and the claimant could contest remedy if he wished. Separately she argued that the absence of documents meant that there was no reasonable prospect of the response succeeding and
30 there should be strike out on that alternative basis. The respondent was an HR professional.

8. Ms Jiggins accepted that there had been an error in not complying with orders to produce a new pleading document and revised Schedules of

Loss by 10 August 2021 as required by the Note and Orders issued on 13 July 2021, but she had done so as soon as her error was realised.

(ii) *Respondent*

9. The respondent said that he had not provided the witness statement on 5 the basis of legal advice he had received. He said that he was abroad, in Chicago, USA, and had been so since 19 July 2021. He had expected to see the Bundle on 13 July 2021 when that was ordered, and could have prepared the witness statement before going on holiday. He claimed that he had provided all documents falling under paragraph 9 of the Orders
10 referred to above. When asked to point out where he had done so, for the long list of what were said to be missing documents, he could not do so.

10. He argued that the claimants had not complied with the orders issued on 13 July 2021. That had required the pleadings to be recast by 4pm on 10 August 2021. He saw them at 14.45 on 11 August 2021. He argued 15 that he had had only three working days to prepare a witness statement and that that was not sufficient when the Bundle was 1,250 pages, he could not print it all out when he was abroad, and that although he had read some of it he had not read it all thoroughly. He accepted that he had not started to draft a witness statement.

20 11. He had prior to the hearing before me emailed the Tribunal with his own arguments as to strike out, which are addressed below. In them he also sought an extension of time for his own witness statement and in discussion he clarified that he sought until 3 September 2021 to do so. He explained that he had another case to attend to on his return to the UK on
25 23 August 2021, and that he had taken legal advice, and would take further legal advice on his return. He said that if he had had the Bundle when it should have been provided on 13 July 2021 he could have drafted a witness statement before he went on holiday. His way of working was to print out the Bundle and annotate it, using that to assist his preparations.

30 12. He argued that he had not had adequate notice of the claim against him in the recast pleadings. He said that his legal advice received had been not to provide the witness statement on that basis of the alleged lack of specification of the claims against him in the recast pleadings. He was

asked to point out any new argument against him not earlier pled, but was unable to do so. I suggested to him that the recast pleadings basically provided the same case against him as had earlier been pled but in the 5 new context that he was the sole respondent. He was asked to comment on that suggestion but was not able to do so. He stated that he had thought that the recast pleadings would set out the applicable case law, and I reminded him that pleadings set out the facts relied on. He did not wish to add anything further on that issue.

10 13. His point essentially was that it was prejudicial for him to have a short time frame to provide a witness statement from 11 August 2021 when he saw the revised pleadings to 4pm on 16 August 2021 being the proposed extended time for the exchange of witness statements. He added that his mental health had been adversely affected by the claims against him

15 personally, indicated that his insurers had not provided cover for that, and that he had found difficulty in dealing with the claims made against him. He also indicated that he had not been able to contact the former first, third or fourth respondent, who had not co-operated in providing assistance. He was reminded that if that were the position he could seek 20 a witness order which he acknowledged he was aware of.

14. He was asked if he wished to make any further comment on the issue of the competency of proceeding against him alone after the settlement with the other three respondents, and he did not wish to do so.

15. He referred to absence of a breakdown of the settlement with those 25 respondents in the Schedules of Loss, and alleged that that was a breach of the orders made. It was suggested to him that such a breakdown may well not have been agreed, and that details of what the position was were set out in the Schedules of Loss. He did not comment further.

16. During her response to the respondent's application Ms Jiggins argued 30 that the respondent had waived privilege on the legal advice received and that if her application was not granted an order for release of that should be made. She argued that if the legal advice was as the respondent

represented it to be it would be astonishing if it were not negligent and there may be a remedy against the person concerned, although she

accepted that she was not qualified to comment on the Hunter v Hanley test in that regard. She also argued that as a representative of claimants
5 the respondent required to have insurance cover when pursuing such claims and it was expected that he would have insurance cover for claims against him when representing respondents.

17. The respondent she argued had not provided evidence to support his allegations, and his request for additional time should be refused. He had 10 not properly engaged with the process and there was no basis to consider that he would do so in future. There was clear prejudice to the claimants and the point had been reached where the interests of justice required her application to be granted. She had explained why there was a delay in the production of the Bundle of Documents and the respondent had not prior
15 to going on holiday raised the issue with her. A Bundle had been prepared but it was missing many key documents as set out above, which she had been seeking from the respondent, as well as any documents he intended to found on himself.

The law

20 18. The law in relation to strike out has been set out in detail in earlier Judgments and is to be held as repeated herein for the sake of brevity. In the Judgment given above I make an Unless Order, which is made under Rule 38 and has regard in doing so to the terms of Rule 2. Rule 38 states as follows

25 **38 Unless orders**

(1) An order may specify that if it is not complied with by the date specified the claim or response, or part of it, shall be dismissed without further order. If a claim or response, or part of it, is dismissed on this basis the Tribunal shall give written notice to the
30 parties confirming what has occurred.

(2) A party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the

interests of justice to do so. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations.

(3) Where a response is dismissed under this rule, the effect shall be as if no response had been presented, as set out in rule 21.”

19. ***Wentworth-Wood v Maritime Transport Ltd UKEAT/0316/15*** 10

summarised the law in relation to such orders.

Discussion

20. I did not make an immediate decision on the competing arguments as I wished to take time to reflect on them. Having done so I have concluded that there is a great deal in the submissions for the claimants, and I am concerned at the breaches by the respondent, but that the circumstances are such, for the reasons that I shall come to, that it is not in accordance with the overriding objective to strike out the responses.

21. Firstly I consider that although the claimants were slightly late in sending the recast pleadings and Schedules of Loss that was an error, and that it did not materially prejudice the respondent. They were sent to him shortly after 11am, and he saw them at 2.45pm on the day after compliance was due.

22. Secondly I do not accept the argument for the respondent that the recast pleadings are insufficient. Whilst they may not be perfect they provide I consider at the least adequate notice of the claims made against him and the basis for that. They repeat, in my judgment, the essential parts of the claims made against him as earlier pled. Whilst the context for those claims has changed by the settlement against the other three respondents, the claims against him are to all intents and purposes the same. When asked to point to any aspect that was not, the respondent was unable to do so.

23. Thirdly I did not consider that there had been any breach of the Order in relation to details of the settlement and that adequate information on that was provided in the Schedules of Loss.

24. Fourthly although the respondent raised the issue of competency of 5 proceeding against him alone following the settlement he was not able to make any further argument beyond that assertion, and for the reasons outlined in the Note dated 13 July 2021 it appears to me that it is not incompetent to do so. Whilst the respondent pointed out that he was not an employee of the former first respondent and argued that that 10 distinguished his case from those authorities I do not consider that as a matter of principle his role, as an agent giving advice, makes any difference. The issue is whether his acts in that role fall within section 110 of the Equality Act 2010 or not.

25. What did cause me greater concern was the position with regard to the 15 Bundle of Documents. The Orders made required the claimants to provide that by 13 July 2021. They did not do so, nor did they at that time apply to the Tribunal for a variation of that Order. The Bundle of Documents was not sent to the respondent until 9 August 2021, at a time when he was abroad.

20 26. The reasons for that were explained by Ms Jiggins for the claimants. Firstly it appeared to them that many important documents that fell within the terms of paragraph 9 of the Orders referred to above had not been produced by the respondent (who at that time represented both the first respondent, and acted for himself as the then second respondent). 25 Documents had been produced by the respondent on 8 June 2021 in a series of emails. Some were copies, without a complete record of timings or the email trail involved for example, as referenced above. They were concerned that many expected documents were not provided.

27. Their concern at the omission of documentation was entirely 30 understandable. It is very hard indeed to understand why the respondent would not produce documentation he had in his possession, such as notes of meetings he held or reports given to the employers instructing him,

amongst many others. He said in argument that he had given all that he had, including such notes, but he was unable to say when he had done so precisely or where they could be found, and I consider that the claimants are very likely indeed to be correct in saying that he had not done so as 5 they were so keen to see what those notes said. Ms Jiggins also said that she had looked through the respondent's emails a number of times and not found what she had referred to as missing. It is also not a complete compliance

with the order to copy and paste from emails, rather than provide a full copy for example, and that supports the view that not all 10 documents that fell within the order were provided.

28. Secondly, the respondent had not provided any other documents as being those he would find on in his defence to the claims made. All that he had produced were documents purportedly to answer the terms of paragraph 9 of the said Orders. They were not necessarily a comprehensive list of all 15 relevant documents to the position he took. It would be expected, normally, that the respondent would provide additional documentation in relation to the claims made, beyond those falling within the Orders at paragraph 9. That he did not do so is at best highly surprising, but generally supports the claimants' position on outstanding documentation.

20 29. It was to a large extent understandable why the claimants would leave finalisation of the Bundle until after the respondent had addressed those two issues. He has not to date done so. It is also similarly to a large extent understandable that they did not do so in the period between 13 July and 19 July 2021 when the respondent went on holiday as he did not raise with 25 them the Bundle. I was also informed that he did not reply to emails from them in relation to the documentation they sought. It is also true that the respondent has challenged the claimants in the past for sending him emails when he was on holiday.

30. But the claimants did not write to the Tribunal in relation to this, and seek 30 a variation of the Order. The respondent was not on holiday on 13 July 2021 as he did not leave until 19 July 2021. His being on holiday is not therefore a reason for not providing any Bundle on that earlier date of 13 July 2021.

31. As matters stand therefore the claimants are in breach of the terms of that Order, although that breach was in the circumstances I have described, and was remedied on 9 August 2021. That is I consider a factor that I must weigh in the balance when seeking to address the applications before me. 5 Even although the respondent appears to me to be materially in breach himself in, from what I understand to be the position from the analysis above, not providing all documents falling within paragraph 9 (and at the very least he was not able to inform me of the detail of his alleged compliance with that order in the hearing), in the absence of any

10 application for a variation of the Order what I consider that the claimants ought to have done is to have prepared the Bundle that they did later prepare on 9 August 2021 but to have done so on 13 July 2021, provided that and explained that it was so provided subject to resolving the issues of the documentation they considered to be omitted from it as not yet 15 provided by the respondents (at that stage there were four respondents, although the orders in paragraph 9 were made against the first and second respondents only). That would have complied with the terms of the order.

32. Whilst the respondent referred to legal advice he said that he had received the detail of that was not provided, and the respondent appeared for
20 himself rather than through a solicitor. If the advice was as the respondent said it was, I consider that it was wrong. The respondent ought to have complied with the order as to a witness statement. If he had not had time to finalise it by referencing page numbers in what is a large bundle he could (and in my view should) have provided it in draft subject to that detail
25 being added later. The witness statement is his explanation of what happened in the processes involving the two claimants and his role in that either as the person undertaking actions or as someone giving advice to the employer. As an HR Consultant, someone representing parties before the Tribunal, he was, or at least should have been, aware of the 30 importance of preparing that witness statement. One would ordinarily expect work on it to have started as soon as the Orders to do so were made, at the latest. I am concerned that the respondent said that he has not even started that process, and his comments on how difficult he has found the Tribunal claims against him to be. He has been advised in earlier
hearings to seek legal advice, and could have done so well before July 2021.

33. This all means that in my judgment both parties are in breach of orders, but the respondent has the primary share of the fault for the fact that
5 witness statements are not exchanged as had been ordered, and that the Bundle of Documents appears to be incomplete in that a number of material documents are not yet within it. I was informed by Ms Jiggins that all bar two of the documents had been provided by the respondent or earlier seen by him, such that although there were about

1,250 pages in the Bundle they ought to have been familiar to him. She argued forcefully

that the stage had been reached where the strike out of the respondent's response was in accordance with the overriding objective.

34. I consider however that the claimants (or their representative) are not entirely without fault. For the reasons set out above the Bundle of 15 Documents even in a form considered to be incomplete ought to have been provided within the terms of the Order, or an application to vary that order made. Neither was done. Whilst the level of fault is low given the circumstances it is a factor that I require to weigh up in the exercise of my discretion.

20 35. The respondent has contributed substantially to the difficulties he has in providing a witness statement by the position outlined above in relation to the documentation in the Bundle. If he has any document falling within the terms of paragraph 9 of the said Orders he must provide them immediately to the claimants. The Order has been granted, and a failure to comply with 25 it may be treated as a serious issue. He will be able to see what is in that Bundle, and if he believes that he sent other documents to the claimants' representative on or around 8 June 2021 that are not there he can refer to that in email correspondence to her as soon as he is able to.

36. It is nevertheless accurate to state that, when abroad, the respondent has 30 received a large Bundle of Documents in a short time-frame to prepare a witness statement, outside that provided for in the Orders, even if firstly he had seen earlier all but two of the documents in that Bundle and

secondly that he was not acting at all prudently in not commencing drafting of that document well beforehand. He has sought legal advice but is doing so in Chicago, with a six hour time differential. He does not return to the UK until 23 August 2021.

5 **Conclusion**

37. I considered without difficulty that it was not in accordance with the overriding objective to grant the respondent's application for strike out. Whilst the claimants did not comply with the terms of the Orders as to the Bundle the reasons for doing so are as above, and largely are I consider
10 the fault of the respondent himself. The delay of a few hours at worst to comply with the 13 July 2021 orders was an error, and not one that caused material prejudice to the respondent. I do not consider that the other criticisms the respondent makes of the claimants' compliance with orders is well founded.

15 38. I considered that it was not in accordance with the overriding objective to grant the claimants' applications for strike out, although I did so with a substantial degree of hesitation given that the primary fault for the present position lies I have concluded with the respondent and the level of fault on the part of the claimants is low. The respondent was in breach of the order
20 for the witness statement but I concluded that it was not proportionate to strike out his response given the claimants' own breach of the order for the Bundle however understandable it was for them to do as they did given the circumstances. A strike out of the response is a draconian remedy, as set out in the case law referred to in the earlier Judgments. Where a claim 25 is defended unreasonably an award of expenses may be sought under
Rules 70-74. That is a further factor I considered relevant. I do not say that an order for expenses if sought would be granted, but it is a matter that may arise after the Final Hearing is concluded. It is I consider still possible

for a fair hearing of the claims to take place, despite the delays that have taken place, and that is a further (and important) factor to weigh in the balance.

39. I concluded in all the circumstances that the appropriate course of action was not simply to refuse the strike out application made by the claimants, but to grant an unless order under Rule 38, as set out above. I considered that doing so was in accordance with the interests of justice given the
5 circumstances set out above and in particular what the respondent said about matters, his failure to even start drafting the witness statement, and what I consider is most likely to be outstanding documentation he has yet to produce.

40. I was not prepared to allow the respondent more than the time set out in
10 the Judgment in light of the arrangements made for the Final Hearing referred to in submission, in particular the fact that the claimants who have mental health issues will need time to give detailed instructions to their representative on the witness statement if produced, and then for the representative to prepare for cross examination of the respondent and
15 give notice of that.

41. The respondent will require to make arrangements to comply with the unless order if he wishes to maintain a defence to the merits of the claims made. He referred to other matters but he has not been giving this claim the attention that it requires, and any difficulty he has is of his own making.
20 He has approximately seven days from his return to the UK (and 12 days from the date of this Note) to do so, or in effect five working days from his return to the UK as 30 August 2021 is a Monday, and that is in keeping with his argument that he could have prepared a witness statement before going on holiday on 19 July 2021 had the Bundle been provided to him on
25 13 July 2021. It is necessary to balance his request for more time with the arguments for the claimants of prejudice to them by delay.

42. He may need to consider either seeking immediate legal advice to assist him in doing so, or make other arrangements for other pressures on his time if he considers that that may affect his ability to do so. If the unless order is not complied with within the terms set out the full terms of Rule 38 apply and his defence to the claims will be restricted to the issue of remedy, although the claimants still have an onus of proof and will require to discharge that if they are to succeed on the merits of those claims. That

is all, I consider, in accordance with the overriding objective given the circumstances of the case as I have outlined above.

43. In coming to my decision on these matters I did not consider it material whether or not the respondent had insurance for the claims against him, 5 or whether or not he may have any claim against those advising him as

Ms Jiggins argued for, both of which the parties referred to in submission. Even if the advice was wrong, that does not mean that it was negligent, and even if it was negligent the losses flowing from that are not simple to identify. I noted that the claimants have mental health issues which may 10 be exacerbated by delays, and that the respondent has referred to his having mental health difficulties. It appeared to me that the interests of justice included moving to the Final Hearing if the witness statement is provided as required by the unless order, and to do that with as little delay as was practicable.

- 15 44. Ms Jiggins in her email to the Tribunal on the morning of the hearing referred to practical difficulties caused by any late production of the witness statement. She sought the variation of the earlier orders by revoking the arrangements in respect of the respondent.

45. I considered that that was not in accordance with the overriding objective 20 and did not grant her application but I considered that further time should be made available to Ms Jiggins for preparation of questions for cross-examination given the

circumstances. I have therefore varied the time for notice of questions to be sent to the respondent in light of that. The claimants will give their evidence first. If the unless order is complied with ²⁵ the respondent will cross examine them, and the Tribunal may have its own questions. There may be re-examination. It is not envisaged that the evidence of the respondent will be heard until at the very earliest the second day of the Hearing, and he will therefore have at least a measure of notice of the questions before his evidence on the merits is heard. That lesser notice of questions than originally provided for is the result of his own fault in my judgment, and balances the circumstances of the claimants against his own. The date for his giving advance notice of questions is, for the avoidance of doubt, not affected by this Judgment.

46. The claimants also argued for a strike out on the basis of no reasonable prospects of success for the respondent given the absence of documentation as referred to above but prior notice of that had not been given, separately I did not consider that it followed from the absence of 5 documentation that the response had no reasonable prospects of success, and in any event I did not consider it to be in accordance with the interests of justice to grant that application. The claimants have the onus of proof in establishing their claims under the 2010 Act so far as laid against the respondent. The absence of documents does not of itself 10 necessarily do so.

47. The claimants in addition referred to seeking an order for production of the legal advice to the respondent on the basis that legal privilege had been waived. I was not satisfied from what was said either that it had been waived or that if it had that the waiver was as wide as permitted such an 15 order to be granted. In any event that application was made during the course of the hearing.

48. It appeared to me to be appropriate and in the interests of justice to allow the respondent to have time to consider that and take advice on that matter, including from those who gave him that advice. If therefore the 20 claimants do wish to pursue that matter they may make an application for an order, intimate that to the respondent, and if opposed a further hearing can be fixed to determine that.

25

30

Employment Judge:	A Kemp
Date of Judgment:	18 August 2021
Date sent to parties:	18 August 2021