THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr H Echikwa	**v**	**Knightsbridge RMC**

Heard at: London Central **On**: 20 July 2021

Before: Employment Judge Glennie

Representation:
Claimant: Ms K Benjamin (Lawyer)
Respondent: Ms E Grace (Counsel)

REASONS

1. On 20 July 2021 I heard and determined the Respondent's application to strike out the claim, deciding that it should be struck out. I gave my judgment and reasons orally. The Claimant has subsequently asked for written reasons.

2. There was an agreed bundle of documents, and page numbers in these reasons refer to that bundle.

3. The hearing was conducted wholly remotely, by CVP. There were some initial issues with this on the Claimant's side. At about 10.44pm on 19 July and 8.53am on 20 July (both UK time) the Tribunal received emails from Ms Benjamin, who was in the USA, stating that she was unable to log in to the hearing. (She would not have been able to do so, as there was no one in attendance in the virtual hearing room at those times). In the second of these emails she asked for an adjournment of a few days. The Claimant himself logged on to the hearing shortly before the start time of 10.00, but had lost his connection by the time the Tribunal convened at 10.00.

4. I adjourned until 11.00 with a view to giving time for these problems to be addressed. The Claimant returned using his mobile phone, but there were again problems with the connection. Ms Benjamin sent an email at about

11.33 saying that she had been trying to log on to the hearing since about 3.00 UK time, without success, and asking whether a telephone link could be arranged. Such a link was arranged, but in the event at around 12.30 the Claimant and Ms Benjamin were both able to join via CVP and the hearing proceeded.

5. The complaints were originally of race discrimination; unfair dismissal; breach of contract (wrongful dismissal) and failure to pay holiday pay. The hearing was listed to commence today (i.e. 20 July 2021), with a time estimate of 3 days. Race discrimination was no longer in issue as at the first day of the hearing, which was listed before a judge alone by video (CVP). Neither party objected to the latter.

6. Employment Judge Burns made case management orders (pages 52.7 – 52.9) at a preliminary hearing on 9 July 2021. The orders were sent to the parties on the day that they were made. Order (8) provided as follows:

   By 5pm on 16/7/2021 the parties shall exchange by email witness statements of the evidence of any witnesses (including the Claimant) they intend calling at the trial. No additional witness evidence will be allowed at the final hearing without the Tribunal's permission. The written statements must: be type in double line spacing; have numbered paragraphs; set out the relevant events in chronological order, with dates; contain all the evidence which the witness is called to give including evidence about the Claimant's financial losses and any attempts to mitigate; contain only evidence relevant to issues in the case; not be excessively long; and be cross-referenced to the documents in the bundle (including references to the page numbers of those documents).

7. Order (12) referred to rule 6 and to the Tribunal's power to take steps including striking out the claim or response, in the event of non-compliance with any order of the Tribunal.

8. On 16 July at 15.45 the Respondent's solicitor, Mr Dos Santos, sent an email to the Claimant at page 541 asking him to confirm that he would be in a position to exchange witness statements at 4:30 that afternoon. The Claimant wrote in reply "Yes I am. There are no outstanding issues left". Mr Dos Santos wrote again at 16.38 on the same day, at page 540, confirming readiness to exchange statements and proposing that this should be done by email. He wrote again at 17.17 (also page 540) expressing disappointment at not having received the Claimant's statement and proposing an exchange at 6pm.

9. At 17.35 on 16 July Ms Benjamin sent an email on the Claimant's behalf to Mr Dos Santos in the following terms:

   "This is Kate Benjamin, I represent the Claimant Mr Echikwa.

   "Could you please stop harassing Mr Echikwa with your emails.

"All Mitigation Documents were sent on the date the Preliminary Hearing Judge specified which was Monday 12 July 2021……

"You should have informed us and provided your email to let us know that all documents should be forwarded to you.

"Therefore, get the Mitigation Documents from Knightsbridge, and cease from harassing Mr Echikwa and direct all questions to me from now on."

10. Hereafter, the times shown on the emails in the bundle become somewhat confusing, as Ms Benjamin was located in the USA and some copies are shown with US times, others with British times. However, Mr Dos Santos replied at pages 547-548 stating that the mitigation documents sent on 13 July had been included in the bundle, and that the question of witness statements was a separate matter. He referred to the relevant order and wrote:

"We have confirmed that we are ready to exchange witness statements, but we have not received Mr Echikwa's statement, nor have we received confirmation that he has prepared a witness statement.

"Please confirm whether or not Mr Echikwa has prepared a witness statement. If he has, and in view of the time, please confirm that you will be in a position to exchange witness statements at 10am on Monday 19 July 2021."

11. Ms Benjamin replied at pages 546-547 saying that she and/or the Claimant had had difficulty accessing the bundle, which had been sent via Mimecast, and writing the following about witness statements:

"Claimant's witness statements were all included in the Mitigation documents……

"Please check the documents and you will find them."

12. Ms Raja of the Respondent's solicitors wrote at page 545 stating that the Claimant's witness statement was not included with the mitigation documents and repeating the request for an exchange at 10am on 19 July. She also said that the bundle would be sent in smaller parts by PDF on the Monday morning. Ms Benjamin replied at pages 544-545 expressing surprise at hearing that the Respondents had not found the witness statements in the bundle, saying that this should have been drawn to her attention on 16 July, and stating that she was re-forwarding them. She also stated, as was the case, that the Respondent's statements had not been received, and asked for them as soon as possible.

13. Ms Benjamin then sent to Ms Raja 3 emails from individuals (not including the Claimant) which had previously been disclosed and which were in the bundle. At 08.43 on 19 July Ms Raja, at page 543, asked for the Claimant's witness statement by 10am and said that failing this, an application to strike

out the claim would be made. She also asked whether the three individuals would be attending the hearing to give evidence. Mr Echikwu replied at 09.45, also at page 543, stating that two of these "will be available to provide witness statements on the Wednesday 21 July 2021."

14. The remaining correspondence was not in the bundle due to its recent generation. Ms Benjamin wrote again to Ms Raja stating that the witness statements had been prepared electronically because of the pandemic.

15. At 13.19 on 19 July Ms Benjamin sent an email to the Tribunal applying for an order striking out the response, or part of it, on the grounds that the Respondent had not supplied an indexed bundle in PDF form, and had not exchanged witness statements. At 16.23 on the same day Mr Dos Santos sent an email to the Tribunal asserting, in summary, that the trial bundle had been provided and that the reason why the Respondent had not exchanged witness statements was that the Claimant had never indicated readiness to provide his statement. He set out much of the history of the correspondence and applied for an order striking out the claim.

16. Rule 37(1) provides that all or part of a claim or response may be struck out on grounds which include non-compliance with an order of the Tribunal, and unreasonable conduct of the proceedings by or on behalf of a party. It is important to note that the rule does not state that an order striking out a claim or response shall be made if the threshold condition is fulfilled: there is a discretion to be exercised.

17. I found that the Respondent had not failed to comply with the Tribunal's order. The bundle was supplied to the Claimant: when he said that he was unable to access it, or was having difficulty accessing it, the Respondent's solicitor sent it again in a different format. The Respondent was ready to go ahead with exchange of witness statements, and did not provide its statements because the Claimant was not ready to provide his. The reason why the exchange of statements ordered by Judge Burns did not occur was that the Claimant was not ready. That cannot, in my judgment, mean that the Respondent was in breach of the order.

18. Even if it could be said that, in some technical way, the Respondent was in breach of either order, I would not make an order striking out the response as a matter of exercise of the discretion. The hearing could have proceeded today if the Claimant had been ready.

19. I also found that the Claimant was in breach of the order to exchange witness statements. He has apparently never been ready to do so (although he said he was on 16 July) and still is not in a position to do so on the first day of the hearing.

20. The explanation advanced by Ms Benjamin for the failure to provide the Claimant's witness statement was, initially at least, somewhat confusing. Ms Benjamin said that she had thought that Judge Burns' order referred to all the witness statements the Claimant had in his possession, including all

the documents such as the schedule of loss. I was not sure what she meant by this.

21. Subsequently, Ms Benjamin gave the following, clearer, explanation. "I thought the Claimant had made his witness statement in his application to the Court. I thought that when one makes an application to the Court one includes the witness statement with the application".

22. I understood this as meaning that Ms Benjamin and, presumably, the Claimant, believed that the contents of the claim form amounted to the Claimant's witness statement. Ms Benjamin's reference to making an application to the Court seemed to me to reflect the procedure often applicable in the civil courts when a party makes an interlocutory application.

23. I am not bound to accept this explanation at face value, and two matters lead me not to do so.

    23.1 I find this explanation unbelievable in the face of the clear terms of the order made by Judge Burns. The order expressly stated that the Claimant should exchange a witness statement on the due date. It would not have said that if he had already provided his witness statement in the claim form. Furthermore, the order made provisions about the form of the statement. The relevant part of the claim form obviously did not comply with these: it was not typed with double spacing (although that in itself is not the most important point); it did not have numbered paragraphs; it did not contain any evidence about financial losses or attempts to mitigate; and it was not cross-referenced to the agreed bundle.

    23.2 When the Respondent raised the question of the Claimant's own witness statement, this explanation was not advanced on his behalf. It was not said that the Claimant believed that the contents of his claim form stood as his witness statement. Instead, documents intended to stand as statements from other witnesses were re-sent. The fact that these did not include a statement from the Claimant himself was not addressed.

24. In the event, therefore, I do not believe the explanation that has been given. In addition to finding that there has been a failure to comply with the Tribunal's order, I find that there has been unreasonable conduct by or on behalf of the Claimant within the meaning of rule 37, in failing to exchange his witness statement under circumstances which means that the full hearing has not been able to proceed, and in advancing an explanation for this which I find to be untrue.

25. I therefore find that in these two respects the conditions for striking out the claim under rule 37 have been fulfilled. As I have already observed, the fact that this is so does not mean that the Tribunal must strike out the claim.

There is a discretion to be exercised. in considering the exercise of this discretion I have taken the following factors into account:

25.1 There will clearly be prejudice to the Claimant if I strike out the claim, because he will no longer be able to proceed with it.

25.2 The situation is, however, of the Claimant's, or his representative's, own making.

25.3 The requirements for provision of a witness statement, and for the form of it, are important. The claim form sets out the claim that a claimant is making: the witness statement provides the evidence that he wishes to give. If a party does not provide a witness statement, the other party is effectively unable to prepare for the hearing.

25.4 In some circumstances, a claimant might say that he wishes to rely on the contents of the claim form as his witness statement. That might, or might not, be an acceptable way of proceeding (for example, the lack of cross-referencing to the bundle could substantially impede the Tribunal in a case such as the present where the bundle contains over 600 pages); but the Claimant did not even say that this was what he was proposing.

25.5 The date for the full merits hearing has been lost. Enquiries of the Tribunal's listing office indicate that it might be possible for the hearing to be re-listed in October, but that March 2022 is more likely.

25.6 Postponing and re-listing the hearing would cause prejudice to the Respondent, who has incurred the costs of this hearing and who will have to arrange for the attendance of its witnesses on a revised date.

25.7 As I have found, the Claimant has not given a frank explanation to the Tribunal of his default.

26. I therefore find that, as a matter of discretion, I should strike out the claim.

27. Ms Grace also sought to rely on the connection difficulties described by Ms Benjamin as amounting to unreasonable conduct. Given the conclusions I have set out above, it was not necessary for me to make any finding about this point.

Employment Judge Glennie

Dated: …19 October 2021…..……..

Reasons sent to the parties on:

19/10/2021.

For the Tribunal Office