



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs E Stamp

**Respondent:** OHM Clothing Ltd

**Heard at:** Bristol (via VHS)      **On:** 6<sup>th</sup> December 2021

**Before:** Employment Judge P Cadney

**Representation:**

Claimant: In Person

Respondent: Mr E Bourke

## PRELIMINARY HEARING JUDGMENT

The judgment of the tribunal is that:-

- i) The respondents application that the claim be struck out is dismissed;
- ii) The respondent's application that the claimant be ordered to pay a deposit as a condition of being permitted to pursue the claim is dismissed;
- iii) The respondent's application for costs is dismissed;
- iv) The case will be re-listed for hearing on 13<sup>th</sup> /14<sup>th</sup> June 2022.
- v) Directions for the hearing of claims are set out below.

### Reasons

1. By a claim form dated 7<sup>th</sup> October 2020 the claimant brings claims of unfair dismissal arising out her dismissal for redundancy; and breach of contract (unpaid notice pay). The claims appear simple and straightforward. The claimant contends that her dismissal was unfair in that the respondent wrongly and unfairly took into account the fact that she had received a final written warning in her selection for

redundancy and/or that the decision was pre-determined; and/or the scoring was unfair and/or that the respondent should have selected using LIFO (last in first out). She alleges she is still owed two weeks' notice pay. The respondent denies that the disciplinary warning formed any part of the scoring or selection and contends that the scoring and selection process were fair.

2. Ordinarily that would have resulted standard directions being issued; the case listed for two day hearing; and heard within a reasonable timeframe. In fact there have been difficulties with compliance with the directions resulting in two previous case management hearings prior to this, the third preliminary hearing before the case may finally be heard nearly a year after the original listing. In order to set the current applications in context it is necessary to set out some of the history of the claim although I will do so as briefly as possible.
3. The claimant's claim was lodged on 7<sup>th</sup> October 2020 relating to her dismissal on 30<sup>th</sup> June 2020. On 24<sup>th</sup> November 2020 the Grounds of Resistance were received and on 29<sup>th</sup> January 2021 the tribunal sent a Notice of hearing listing the claim for hearing on 5<sup>th</sup>/ 6<sup>th</sup> August 2021 and giving standard case management directions. The respondent sought a postponement of the original hearing dates as Mr Bourke was not available and the claimant made an application for specific disclosure. As a result the case was listed for a TPH on 14<sup>th</sup> May 2021.
4. At that hearing EJ Gray re-listed the case for hearing on 6<sup>th</sup> /7<sup>th</sup> December 2021 and gave a revised timetable of disclosure (19<sup>th</sup> July 2021); agreement as to the bundle (27<sup>th</sup> September 2021); and exchange of witness statements (11<sup>th</sup> October 2021).
5. On 15<sup>th</sup> July 2021 the respondent wrote seeking orders in relation the Schedule of Loss; disclosure of mitigation documents; and orders as to the bundle as its view was that the claimant was seeking to include irrelevant material. There was then an exchange of correspondence which resulted in the case being listed for a further TPH before EJ Halliday on 16<sup>th</sup> September 2021.
6. On 16<sup>th</sup> September 2021 EJ Halliday gave a further revised timetable; Counter Schedule of Loss (23<sup>rd</sup> September); disclosure (30<sup>th</sup> September); bundle (21<sup>st</sup> October); witness statements (13<sup>th</sup> November).
7. On 6<sup>th</sup> October Mr Bourke supplied the Counter Schedule which had been delayed for ill health reasons it is not necessary to set out in this decision. On 12<sup>th</sup> October the claimant complained that she had not received the respondent's list of documents (although there is no specific order in respect of this). On the same day Mr Bourke wrote indicating he was not able at that point to deal with the existing case management orders. On 26<sup>th</sup> October the respondent wrote complaining that the claimant had only complied with the disclosure

order on 10<sup>th</sup> October 2021 supplying some 100 documents and had then sent a further list of some 48 documents on 17<sup>th</sup> October. It contended that this put the claimant in breach of EJ Halliday's order and meant that agreeing the bundle by 21<sup>st</sup> October had not been possible. As a result they sought an order striking out the claim for non-compliance and its costs of dealing with the two separate disclosure lists which is put at some 20 hours and a total sum of £3,000. He also requested that if the strike out application failed that the hearing be postponed for ill health reasons. On 26<sup>th</sup> November 2021 EJ Bax converted the hearing on 6<sup>th</sup> December to a Preliminary Hearing to determine :

- i) The respondent's strike out application;
  - ii) The respondent's costs application;
  - iii) Any further case management orders.
8. Strike Out Application – The application is for the claim to be struck out for non-compliance with the tribunal orders, specifically EJ Halliday's disclosure order of 16<sup>th</sup> September 2021, pursuant to rule 37(1)(c). Documents which should have been sent on 30<sup>th</sup> September 2021 were not sent until 17<sup>th</sup> October 2021 with the wrong documents having been sent on 10<sup>th</sup> October 2021. The respondent points to the fact that neither in correspondence nor in her submissions has the claimant given any explanation or reason for her failure to do so and ever applied for any extension to the time limit at the point that it must have been apparent that she would not be able to comply with the order.
9. The claimant submits that a strike out is inappropriate for a number of reasons. Firstly although she was late in disclosing the documents she wanted in the bundle there are only forty eight documents and it would still have been possible to have agreed the bundle and exchanged witness statements in time for the final hearing but for Mr Bourke's illness; which had led him to seek an adjournment of the hearing in any event. If the claim would have been adjourned anyway her late compliance with the order has not in fact caused any delay to the proceedings. Moreover the respondent was also late in complying with EJ Halliday's order in relation to a Counter Schedule of Loss; and it is remarkable that they should seek to strike out her claim for late compliance with an order when they are guilty of precisely the same thing.
10. In deciding whether to strike out a party's case for non-compliance with an order under rule 37(1)(c), a tribunal has to consider the overriding objective of dealing with cases fairly and justly. This requires the tribunal to consider all relevant factors, including:
- i) the seriousness of the non-compliance;

- ii) whether the default was the responsibility of the party or his or her representative;
  - iii) what disruption, unfairness or prejudice has been caused; whether a fair hearing would still be possible, and
  - iv) whether striking out or some lesser remedy would be an appropriate response to the disobedience;
  - v) most significantly the tribunal has to consider whether a strike out order would be a proportionate response.
11. The first and most obvious point to make is that some ten months after the original directions were sent and following two TPHs and three sets of case management directions the parties have not got as far as completing disclosure in a simple claim of unfair selection for redundancy. Had it not actually happened, this would be an almost unbelievable state of affairs. All that is required is for any document either party wishes to refer to, to be put in the bundle. If either party thinks a document is irrelevant it can say so and the tribunal will consider the point at the final hearing. Secondly it is not at all clear that the claimant is responsible for all the delays which have led to this point and for the respondent to seek to rely on one failure by the claimant to comply with the case management orders as a basis for striking out the whole claim appears, to put it generously, ambitious and ungenerously somewhat opportunistic.
12. In my judgment a strike out order would be obviously disproportionate to a relatively short delay in the disclosure of documents which ordinarily would not have delayed the final hearing; and where the respondent had already indicated it could not comply with the case management directions hearing; and had made an application to postpone the hearing if the claim was not struck out. Given those circumstances and given that in my view a fair hearing is clearly still possible; a strike out order is not appropriate.

### Deposit Order

13. The respondent seeks a deposit order on two bases. Firstly that in the event that I'm not persuaded that the claimant's failure to comply with case managements directions should result in the case being stuck out, that her failure to comply with them should result in the making of a deposit. The second is that the claims have little reasonable prospect of success.
14. These applications can be dealt with briefly. The first is not in my reason a proper basis for making a deposit order; either I am persuaded that the claim should be struck out for non-compliance or

I am not. As I am not (for the reasons given above) it follows that I am not persuaded that I should make a deposit order on this ground.

15. In respect of the second it is not possible in my judgement to determine at this stage that the claim has little prospect of success and it follows that a deposit order is not appropriate at this stage and the claim will have to be heard on the merits.

### Costs

16. The application for costs is also based on the claimant's failure to comply with the case management orders. The respondent's representative alleges he spent twenty hours examining the original list of some 100 documents and the subsequent corrected list of 48 documents. In terms of the costs wasted in any event it would only be time spent on the original list and to the extent that it didn't involve work on the 48 documents as the work on those documents would have had to have been carried out in any event. This automatically in my view reduces the amount of time to ten hours, but as the 48 documents were as I understand it part of the list of 100 it is difficult to see how it could have required much time to consider documents that had already been considered.
17. The first question is whether this crosses the threshold for an order for costs in r76. The respondent submits that it does as the claimant has in her email accepted that sending the wrong list has caused the respondent and the tribunal to waste time, which is by definition unreasonable conduct. The difficulty is in my judgment that on any analysis this was simply an error on the claimant's part. Looked at overall I am not persuaded that I should exercise my discretion to order the claimant to pay costs as a result of a simple error.

### Directions

18. Hearing - As set out above the case will be re-listed for hearing in Bristol at the location and address given in EJ Gray's order of 14th May 2021 on **13<sup>th</sup> /14<sup>th</sup> June 2022**.
19. Disclosure – The date for compliance with EJ Halliday's order (paragraph 10) is varied to **31<sup>st</sup> January 2022**.
20. Bundle – The date for compliance with EJ Halliday's order (paragraph 11) is varied to **28<sup>th</sup> February 2022**
21. Witness Statement – The date for compliance with EJ Halliday's order (paragraph 11) is varied to **30<sup>th</sup> March 2022**.

Employment Judge P Cadney  
Dated: 22 December 2021

Judgment sent to parties: 13 January 2021

FOR THE TRIBUNAL OFFICE