EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss Thalia Vosper	v	DPD Group UK Limited

Heard at: Norwich (by CVP) **On:** 28 March 2022

Before: Employment Judge M Warren

Appearances:
For the Claimant: In person
For the Respondent: Mr Bownes, Solicitor

JUDGMENT having been given orally and in writing, signed on 28 March 2022, but not promulgated as at the time these written reasons were signed and such written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. Miss Vosper was employed by the Respondent as a Counter Manager. Her employment began on 29 November 2017. She was dismissed on 11 January 2021. After ACAS Early Conciliation between 17 March 2021 and 17 April 2021, she issued these proceedings claiming unfair dismissal on 21 May 2021.

2. It is relevant to note that on the Claim Form, Miss Vosper does not name a legal representative as acting on her behalf and at no point in these proceedings has there been a named representative acting for Miss Vosper.

3. After the proceedings were issued and a defence filed by the Respondent, a Notice of Hearing was sent out to the parties on 11 September 2021. That Notice of Hearing appears to be correctly addressed to Miss Vosper, at the address she gave on her Claim Form. It is the address she gave to ACAS as appears on the ACAS certificate. There is no suggestion that it is an incorrect address. The Notice of Hearing was received by the Respondent's Solicitors through the post. Miss Vosper says that she did not receive it.

4. The Notice of Hearing gave the usual Case Management Orders, the hearing was scheduled for today, 28 March 2022. The Case Management Orders required Miss Vosper to produce a Schedule of Loss by 25 October 2021, for disclosure to take place by 8 November 2021, for the Bundle to be agreed by 22 November 2021 and for Witness Statements to be exchanged on 6 December 2021.

5. On 15 November 2021, the Respondent's Solicitors wrote to Miss Vosper by email, the email address is the correct address for Miss Vosper as indeed are all the emails that I refer to below. In this first email, the solicitors reminded Miss Vosper of the tribunal's Case Management Orders and chased her for her Schedule of Loss. She did not reply.

6. On 26 November 2021, the Respondent's solicitors emailed Miss Vosper again to chase for the Schedule of Loss and for disclosure of documents.

7. On 29 November 2021, the Respondent's Solicitors emailed the Tribunal to say that the Claimant had not complied with the Case Management Orders, that they had not heard from her at all and that they therefore sought a Strike Out pursuant to Rule 37. That email to the Tribunal was copied to Miss Vosper. She says she did not receive it.

8. On 10 December 2021, the Respondent's solicitor wrote again to the Tribunal, copied to the Claimant. They stated that they had heard nothing further from the Claimant and chased for their Strike Out Application to be dealt with. Miss Vosper says she did not receive that correspondence.

9. On 24 December 2021, a strike out warning was issued to Miss Vosper on the instructions of the Regional Employment Judge, REJ Foxwell. The letter was addressed to Miss Vosper at her correct postal address. It refers to her not having complied with the Tribunal's Orders of 11 September 2021 and states that REJ Foxwell is contemplating striking her claim out either because of her non-compliance with that order or because the case is not being actively pursued. She was required to reply by 14 January 2022.

10. The Respondent's solicitors received the strike out warning through the post and having heard nothing further, emailed the Tribunal on 21 January 2022, copied to the Claimant, a formal application for strike out by way of reference to REJ Foxwell's warning.

11. Whilst Miss Vosper said she did not receive the letter from REJ Foxwell of 24 December 2021, she says that she did receive the email from the Respondent's solicitors of 21 January 2022. She says that caused her to telephone the Tribunal, as a result of which the Tribunal staff emailed to her a copy of the Notice of Hearing of 11 September 2021. In response to that, on 24 January 2022, Miss Vosper emailed the Tribunal, (not copying in the Respondent's Solicitors) stating that this was the first time she had seen the order of 11 September 2021. She asked for more time to collate the required information.

12. Miss Vosper's email was referred to Employment Judge Tynan, who gave instructions for a letter to be written to the her; that letter was written on 24

February 2022, again correctly addressed to her at her home address. In that letter, Employment Judge Tynan asked,

> *"The Notice of Hearing was sent to the Claimant at her address given to ACAS and in her Claim Form. Why does she say that she first saw it over four months later? Has she been away from home or did she not open her post?"*

The letter calls for a response within seven days.

13. It looks as if that letter was emailed to Miss Vosper by the Tribunal staff and so she wrote on 24 February 2022 to the Tribunal, (this time she did copy in the Respondents) to ask:

> *"Was it sent to my email address or residential address? I have checked back through all my emails and I hadn't received anything until receiving a notice to close the case".*

Again, she asked for more time.

14. On 14 March 2022, the Respondent's Solicitors wrote to the Tribunal copying in Miss Vosper, chasing the Tribunal for a response to its strike out application, making it clear that it has prepared the case ready for hearing, in that there is a Bundle and there are Witness Statements.

15. Miss Vosper's correspondence of 24 February 2022 was referred to Employment Judge Ord, who caused a letter to be written on 21 March 2022. Employment Judge Ord stated that Miss Vosper had not answered the question posed by Employment Judge Tynan and he himself posed the question,

> *"What steps have been taken to prepare for this case since 24 January 2022?"*

A response was called for by 27 March 2022, (which actually was yesterday, a Sunday). No response has been received.

16. This morning, I checked with Miss Vosper about whether or not she had received this letter. To begin with she said she had not, then she agreed she had and acknowledged that she had not replied to it.

17. A direction was given by the Regional Employment Judge that these matters should be dealt with at the outset of today's hearing.

18. When we logged in at 10 o'clock ready to start the hearing, Mr Bownes for the Respondent was present, but Miss Vosper was not. I adjourned, asking the clerk to call Miss Vosper, which I am told that she did. Miss Vosper explained to the clerk that her solicitor was ill, she wanted representation and therefore wanted time to arrange for representation and time to prepare. Miss Vosper acknowledged that she had received the joining instructions for this CVP Hearing last Friday. She told me that those joining instructions had gone into her junk email as indeed had, she said, all the other email correspondence that I have referred to, with the

exception of the email of 21 January 2022.

19. Miss Vosper has been able to provide us this morning with a copy of an email from an HR Consultant, Mr Holt of Holt HR Consulting, dated 10 March 2022, it reads as follows,

> *"Sorry – I've been out of action since the start of February. Had a health scare and have been in hospital. Long story short – ending up with a pace maker(!). Anyway, I am currently on* "restricted duties" *so I can't undertake anything new at the moment… I can certainly ask around my network to see if there is anyone with capacity to assist, if you want me to?"*

That was in response to an email from Miss Vosper of 10 March 2022 chasing for a response to an earlier email.

20. One further fact to record before I move on, is that a postponement of today would likely mean that the hearing of Miss Vosper's unfair dismissal claim could not be convened until November of this year at the earliest.

21. We have from the Respondent, two Witness Statements, (from the Dismissing Officer, Ms Peterson and an Appeal Officer, Mr Luff,) and a fully paginated and indexed bundle of documents.

22. Mr Bownes has made an Application for the claim to be struck out. We adjourned for 15 minutes to allow Miss Vosper to collect her thoughts and to respond to that Application.

The Law

23. Rule 37 of the tribunal's rules of procedure provides that,

> *"(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—*
> *…*
> *(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;…"*

It is on those three grounds that Mr Bownes makes his Application.

24. On an application to strike out at this stage, the leading authority is Blockbuster Entertainment Ltd v James [2006] IRLR 630 CA. Sedley LJ said in that case, (at paragraph 5):

> *"This power [that is this power to strike-out], as the employment tribunal reminded itself, is a draconian power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the*

proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response."

25. In Chambers-Mills v Allied Bakeries [2008] UKEAT 0165/08 Burton J clarified that these 2 cardinal conditions are alternatives. If either is established, the Tribunal must then consider whether the draconian remedy of a strike out is a proportionate response.

26. In exercising discretion, a Tribunal should have regard to the overriding objective. Rule 2 sets out the Overriding Objective as follows:

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.

27. In Blockbuster Sedley LJ approved the guidance from Richardson J in Weir Valves & Controls (UK) Ltd v Armitage [2003] UKEAT/0296/03 (paragraph 17) :

"But it does not follow that a striking out order or other sanction should always be the result of disobedience to an order. The guiding consideration is the overriding objective. This requires justice to be done between the parties. The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience"

28. In exercising discretion, one must also balance the relative prejudice to the parties.

Conclusions

29. I regret to say that the suggestion that Miss Vosper had not seen any of the correspondence until that one email of 21 January 2021, does not seem to me to be a credible assertion and I do not believe her.

30. Miss Vosper's initial position with me this morning was that she had not received any email correspondence, only later to concede she had received it, into her junk email in box. She was not honest with me.

31. That Miss Vosper did not change her email settings after 21 January 2021 when on her own case, (which I do not believe) she recognised from receipt of the 21 January email, that earlier emails from the Tribunal and the Respondent's Solicitors had been going into her junk email, is frankly astonishing and plainly, in my view, unreasonable conduct. It ill behoves her to complain time and time again after each piece of correspondence after 21 January was put to her, *"I didn't receive it, it went into my junk email"* when from that date, she knew that important correspondence from the tribunal and the Respondent's solicitors would be going into her junk email box.

32. In any event, knowing that correspondence was going into her junk email after that date and not checking her junk email herself is unreasonable conduct, if indeed it is the case that she did not. Frankly I do not find it credible that she did not either change her settings or check her junk email, once she realised correspondence from the tribunal and solicitors was going into her junk email.

33. During the course of the hearing, Miss Vosper made a suggestion that the Respondent's solicitors may not in fact have sent the various emails that I recited. That is an unfounded allegation. The email correspondence to the Tribunal to which I referred had been printed out by the Tribunal staff for my benefit and clearly shows that the correspondence had been copied to Miss Vosper.

34. Miss Vosper has not provided a particularly clear answer to Employment Judge Tynan's direction, although she gave a form of response and I do not criticise her over heavily for that. However, I do not believe that Miss Vosper did not receive the strike out warning from the Regional Employment Judge. She did not respond to it. Miss Vosper agreed on being pressed by me, but to begin with she denied it, that she had received the letter with Employment Judge Ord's directions and she did not respond to it.

35. The fact of the matter is that Miss Vosper has done nothing to prepare this case for the hearing which was scheduled to take place today. She has known since January 2022 on her own case, that the case was going ahead today and that there were matters that needed to be done. She is intelligent, articulate and literate. She was acting in person in accordance with the tribunal records and there is no reason why she could not have

started the required preparation. I acknowledge that it looks as if from that date she was probably trying to contact Mr Holt, but she has known since 10 March that he was not going to be able to act for her and no steps appear to have been taken by her to seek alternative representation.

36. Miss Vosper herself stated today that she has deliberately not been replying to the Respondent's Solicitor's correspondence, saying that it was the tribunal that needed to know about her circumstances, not the Respondent's solicitors. This is conduct which is not in accordance with the overriding objective; it is not helpful and it is unreasonable conduct.

37. I find it not credible that Miss Vosper issued these proceedings in May 2021 yet had heard nothing and had done nothing to find out what might be going on, until she received the strike out warning of January 2022, some seven months later. All she had done, was attempt to contact ACAS, who of course, have nothing to do with the Employment Tribunal process.

38. This morning too, I have to say, Miss Vosper's conduct has in my view been unreasonable. She knew that today's hearing was scheduled to start at 10 o'clock and she did not turn up. She had the information on how to join. In my view she was probably hoping to get away with an adjournment if she did not appear.

39. Therefore today, an Employment Judge and an Employment Tribunal room and a Cloud Video Hearing Room have been made available to hear her case. Those resources have been wasted, in that it has not been possible to hear that case. The Employment Tribunal Service is under huge strain at the moment because of the Covid crisis and if I were to grant a postponement, that would mean use of one further day of the Tribunal's valuable resources. Having regard to the Tribunal's resources is part of the consideration of the overriding objective.

40. In my view, Miss Vosper's conduct of these proceedings has been unreasonable, it has been vexatious; she has been attempting to frustrate the Respondents, she has deliberately not complied with Case Management Orders, she has not complied with the Regional Employment Judge's strike out warning, she ignored EJ Ord's correspondence, she has not been actively pursuing the case in any way whatsoever and in my view, she has deliberately and persistently disregarded the Tribunal's procedural steps. The fact that she has been unrepresented, (and that the Respondent is represented) is no excuse; she was aware of what was required of her and she chose not to comply and she chose to ignore correspondence. She has chosen not to cooperate with the Respondent's solicitors and the tribunal.

41. In the absence of disclosure and a witness statement from Miss Vosper, it would not be possible to proceed with a fair hearing today. Although Miss Vosper was dismissed in January 2021, some of the allegations relevant to the case date back to February and March 2020. Inevitably, further delay to November 2022 at the earliest means, if I were to postpone the hearing, it would be two and a half years since some of the events in question, which will impact on the cogency of evidence, rendering a fair hearing not possible.

42. Striking out will prejudice the Claimant as she will lose her right to argue her case, but this is a situation of her making and the prejudice is ameliorated by the fact that she has had the opportunity to present her case, but instead has abused the system. By not striking out, the Respondent would be prejudiced by, if I were to proceed today, not knowing what the Claimant was going to say and if were to postpone, by loss of cogency of evidence with the passage of time and the additional expense of a further hearing.

43. Weighing these matters in the balance, I am of the view that in this instance, it is proportionate to strike out the claim.

Employment Judge M Warren

Date: 5 April 2022

Judgment sent to the parties on

10 April 2022

For the Tribunal office