EMPLOYMENT TRIBUNALS

Claimant: Ms Sarah Garrod

Respondent: Riverstone Management Limited

Heard at: London South by MS Teams **On:** 25 March 2022

Before: Employment Judge Jones QC

Appearances:

For the claimant: In person.
For the respondent: Mr Deshpal Panesar, Queen's Counsel

JUDGMENT

1. The application to strike out the response fails.

2. No order as to costs.

REASONS

Introduction

1. This is the second judgment that I have given in this case. Like my judgment of 24 April 2022, it arises from a preliminary hearing that was conducted over three days: on 24 and 25 February and 25 March 2022. That hearing followed from an earlier three-day hearing before Employment Judge Harrington which took place on 28 May and 3 and 5 August 2021. Across those six days the Tribunal has been asked to consider a strike out applications, specific disclosure and costs issues. Whilst there was ultimately some agreement on specific disclosure issues once principles were established, the other matters have been hard fought. The final hearing is to be heard over 10 days. Discounting non-effective hearings, judgment writing time, reconsideration applications and interlocutory appeals, this case will (if not

compromised) have occupied 16 days of Tribunal time by the end of the final hearing. Each party has complained about the position and, unsurprisingly, each party blames the other.

2. This judgment deals with the Claimant's application to strike out the Respondent's notice of appearance and with the Respondent's costs application. Submissions in respect of this application were made on 25 March 2022. The hearing was conducted remotely. The Claimant represented herself and the Respondent was represented by Mr Panesar QC.

3. The core of the Claimant's submissions is set out in her skeleton argument. That document incorporates certain correspondence by reference and she supplemented it with oral submissions. Mr Panesar QC also put in a skeleton argument to which he spoke at the hearing.

Strike Out: The Grounds

4. The Claimant invokes **Rule 37(1)** of the **Tribunal Rules**. She says that the Response should be struck out on the following grounds:

   (1) The response has no reasonable prospects of success;

   (2) The proceedings have been conducted in an unreasonable manner; and

   (3) The Respondent has failed to comply with a Tribunal order.

   I deal with each ground in turn.

Strike Out: The Law

5. The power to strike out a response is conferred by **Rule 37** of the **Tribunal Rules**. **Rule 37(1)** provides, so far as is presently relevant, as follows:

> "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 any 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 struck out)."

6. There has been significant appellate guidance on the circumstances in which this draconian step may be taken. The principal guidance may be summarised as follows:

   (1) Discrimination claims (and responses to them) are fact-sensitive and although they are not immune to strike out applications (**ABN Amro Management Services Ltd v Hogben** UKEAT/0266/09) they should only be struck out in the clearest cases

(**Anyanwu v South Bank Students' Union** [2001] UKHL 14, [2001] IRLR 305). That fact sensitivity places a particular importance on the hearing of evidence;

(2) The power to strike out is a "draconic" one which is not to be too readily exercised (**James v Blockbuster Entertainment Ltd** [2006] EWCA Civ 684, [2006] IRLR 407) and, as with any tribunal power, the power to strike out has to be exercised in accordance with reason, relevance, principle and justice (**Williams v Real Care Agency Ltd** UKEATS/51/11, [2012] ICR D27);

(3) In cases where the ground relied upon is no reasonable prospect of success:

(a) The statutory test means what it says. It is not sufficient to show that a claim or defence is unlikely, or even very unlikely to succeed, there must be *no reasonable prospects* of it succeeding (**Balls v Downham Market High School & College** [2011] IRLR 217, EAT and contrast the lower threshold in respect of deposit orders at **Rule 39** where "little reasonable prospect of success" is the threshold test);

(b) In deciding whether the high threshold is met, the case of the party responding to the application must ordinarily be taken at its highest (**Mechkarov v Citibank NA** UKEAT/41/16, [2016] ICR 1121). The Tribunal does not conduct a mini-trial (**ED&F Man Liquid Products v Patel** [2003] EWCA Civ 472); in consequence

(c) Only exceptionally will it be appropriate to strike out a claim where the central facts are in dispute (**Ezsias v North Glamorgan NHS Trust** [2007] EWCA Civ 330, [2007] ICR 1126). Such an exception might arise where one party's factual case is unsustainable because it is, for instance, inexplicably inconsistent with contemporaneous documents;

(4) In cases where the ground relied upon is failure to comply with rules or orders

(a) A party that does not observe an order is at the mercy of the tribunal (**Harris v Academies Enterprise Trust** UKEAT/0102/14 [2015] ICR 617) but the need to exercise the power to strike out in a reasoned and proportionate way is no less significant here (**Bennett v Southwark LBC** [2002] EWCA Civ 223, [2002] IRLR 407);

(b) The **Presidential Guidance on General Case Management** (2018) provides at Para 12:

> "In exercising these [strike out] powers the Tribunal follows the overriding objective in seeking to deal with cases justly and expeditiously and in proportion to the matters in dispute. In some cases parties apply for strike out of their opponent at every perceived breach of the rules. This is not a satisfactory method of managing a case. Such applications are rarely successful. The outcome is often further orders by the Tribunal to ensure the case is ready for hearing";

(c) The guiding principle is he overriding objective. The tribunal should consider all the circumstances including:

(i) the magnitude of the default;

(ii) whether the default is the responsibility of the solicitor or party (although it is not easily open to a party to disown the actions of their representatives (**Harmony Healthcare v Drewery** UKEAT/866/00, [2000] All ER (D) 1302);

(iii) what disruption, unfairness or prejudice has been caused; and

(iv) whether a fair trial is still possible. (**Weir Valves & Controls (UK) Ltd v Armitage** [2004] ICR 371, EAT);

(5) In cases where the ground relied upon is scandalous, unreasaonble or vexatious conduct of the proceedings:

(a) Where a strike out is sought on the basis that a party has conducted proceedings unreasonably the two "cardinal conditions" for the exercise of the "draconic" power are that "the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made fair trial impossible (**James** above). In a case not involving deliberate disobedience or failure to perform an order of the court, whether a fair trial is still possible is a crucial factor in relation to a discretion to strike out the whole of a case. (**De Keyser Ltd v Wilson** UKEAT/1438/00 [2001] IRLR 324)[1].

Strike Out: Does the Response have a reasonable prospect of success?

Reasonable Prospects: Were there shortfalls in the company secretarial function?

7. Excluding remedy, the parties have identified 35 issues for determination by the Tribunal at the Final Hearing. Some of the issues potentially lead to more than one head of liability. Whilst there are a number of very specific complaints – for instance the Claimant complains that no "return to work lunch" was arranged for her – there is an index issue which may be summarised as follows:

(1) The Claimant was employed as Company Secretary;

(2) She took a period of maternity leave;

(3) Someone was hired to discharge her duties during her leave period;

(4) However, it was intimated to her before the leave started that if the Respondent was pleased with the work done by the new employee, they would be kept on when the Claimant returned and that is what then happened.

8. The Respondent's case is that the Claimant returned to the same job; Company Secretary. The Respondent says that they had come to the conclusion that they needed additional company secretarial resource and it was for that reason that the person who provided maternity cover was kept on. At paragraph 17 of their ET3 they say the following:

> "In addition the Respondent's company secretarial function had been under-resourced for some time, and there were longstanding shortfalls in the provision of

[1] It seems to me that it is always likely to be a relevant, even if not necessarily crucial or determinative factor in all cases, since it goes to the proportionality of the strike out.

> company secretarial duties originating long before the Claimant's maternity leave (or intimation of the same) that required the recruitment of an additional company secretary. Those shortfalls included the persistent late provision of (centrally important) board minutes, and late provision of board papers to enable board members time to assimilate them. To address the same, in addition to the Claimant's role, Jane Badejoko, the person who provided cover during the Claimant's maternity leave, was retained after the Claimant returned. The need for an additional company secretary was entirely borne out on the Claimant's return by the amelioration in those shortfalls and the additional workload of the Respondent after Ms Badejoko's recruitment."

9. The Respondent therefore both denies what I will call the index detriment, i.e. not allowing the Claimant to return to her job and denies that there was any causal connection between her leave and the retention of Ms Badejoko as an additional company secretary.

10. Understandably, the Claimant reads paragraph 17 of the ET3 as personally critical of her performance. The Respondent says it is not a question of personal performance but of want of resource.

11. It is the causation issue that is the focus of the Claimant's submissions on prospects. She accepts that there is an issue of fact that is in dispute between the parties. That issue is determining the real reason for retaining Ms Badejoko. There is also plainly (and relatedly) a dispute as to whether any "longstanding shortfalls in the provision of company secretarial duties" in fact existed. The Claimant says that there is no disclosed documentary evidence which corroborates the existence of any shortfalls. Further, she says, such evidence as has been disclosed points in the opposite direction. I was shown a 2017/18 Board Effectiveness Review completed by a Mr Luke Tanzer. It is a questionnaire designed to assist the Board of RiverStone Insurance (UK) Limited - a group company - make a self-assessment of its effectiveness. The questionnaire asked Mr Tanzer to rate a number of aspects of the Board's operations on a scale of 1 – 10. Mr Tanzer appears to have given the maximum score on every occasion and never to have added any concerns or suggestions for improvement in the box provided. It is possible of course that the Board was indeed operating at 100% efficiency. It is also possible that Mr Tanzer did not do a careful job of completing the questionnaire. Either way, it was an opportunity to identify any significant shortfall in company secretarial duties and none is identified. Company Secretarial is scored at 10. I was shown a second document: a Board Effectiveness Review Report for the same company. It is dated 20 April 2018 and collates a number of questionnaires. The collated score for company secretarial is "9.6 (very effective)". The Claimant also points to a "board minutes schedule" which suggests that she was able to produce board minutes on time without needing additional resource. Looking at the schedule, there are a number of entries which indicate that initial drafts of minutes where not being produced within one month of the relevant meeting. Since I have heard no evidence about the schedule or the significance of the fact that initial drafts were often not being produced within in a month, it is impossible for me to place any weight on this document. Perhaps it helps the Claimant, perhaps it helps the Respondent, but it will take evidence to make that clear.

12. Having referred me to these documents, the Claimant's argument (as I understood it) is, in essence, as follows:

(1) There is no evidence of the alleged shortfalls and such evidence as exists points in the other direction;

(2) The Respondent therefore has no reasonable prospect of establishing that any shortfalls existed;

(3) It follows that the Respondent has no reasonable prospect of establishing that the real reason for retaining Ms Badejoko was to meet shortfalls in company secretarial performance;

(4) The Tribunal is bound, therefore, to reject the Respondent's argument on causation and find instead that the reason for retaining Ms Badejoko was the Claimant's maternity leave;

(5) The Tribunal is equally bound to go on to find that the Claimant was not permitted to return to her job; and

(6) The response should be struck out.

13. There are a number of problems with the Claimant's argument. The first is that the index issue is, as I have already indicated, not the only one. Indeed, I will come in a moment to consider a second line of argument that addresses the question of how the Respondent dealt with the Claimant's grievance. If I were inclined to accept the Claimant's argument on the index issue, therefore, that would not, it seems to me, be a reason to strike out the Respondent's entire response.

14. The second problem is that I do not think that point (5) follows from point (4). The question whether the addition of another company secretary meant that the Claimant did not return to her job is a question of fact and logically prior to any issue of causation, which is to say that if the Tribunal concludes that the Claimant did return to her job, the question of causation is irrelevant. There is insufficient material before me to allow me to conclude that the Respondent has no reasonable prospect of establishing that the Claimant resumption of company secretarial duties was a return to her job.

15. Finally, I am not persuaded that points (2) and (3) are made out. The Claimant accepts that the relevant question of fact is in dispute. She cites **Ezsias** to the effect that "it would only be in an exceptional case that that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success". She says, however, that this is an exceptional case. She relies on a dictum of Kay LJ to the effect that there may be such an exceptional case where "the facts sought to be established are inexplicably inconsistent with the undisputed contemporaneous documentation".

16. Although I would not go so far as to say that it would never be appropriate to do so, I do not think that it can be said in this particular case that an absence of disclosed documentary evidence in support of the Respondent's case on this particular issues makes it the kind of exceptional situation that Lord Justice Kay had in mind. Absence of evidence is not, to coin a phrase, evidence of absence. Concerns can and do go unrecorded in businesses. The Tribunal will need to hear oral evidence in order to assess the genuineness of the Respondent's case.

17. There is, however, an inconsistency with the board effectiveness reviews. Mr Panesar contends that it is not an inexplicable inconsistency. He says it will be dealt with in the witness statements and that the Claimant will be able to cross-examine the witnesses. Ultimately this

is an issue which turns on what was in the minds of those who took the decision to retain Ms Badejoko. Bearing in mind the frequently repeated appellate guidance that discrimination cases are fact-sensitive and the importance of the tribunal forming their own assessment of witnesses, I do not consider it would be appropriate to strike out the response on this issue before those who took the decision have had an opportunity to give evidence.

Reasonable Prospects: Was there "unambiguous victimisation"?

18. Turning to a different point, the Claimant argues that she has an unanswerable case on victimisation and that the response on that issue should be struck out. She says that the Respondent cannot suggest that it undertook a fair grievance and appeal process when its "first course of action" was to try to terminate the Claimant's employment "for having performed a protected act". The written submissions suggest that are, in reality, two distinct arguments about the grievance process which have been run together. The first is that the grievance and disciplinary process was defective and incontestably so. I address that argument in the next section of the judgment below. However, there is another argument, namely that the grievance and appeal processes were not merely defective but a sham because the Respondent had already resolved to terminate her employment in retaliation for her having raised a grievance rather than resolve her concerns and that it tried to ensure her termination before the grievance investigation had even begun.

19. The argument that "trying to terminate" the Claimant's employment demonstrated that there was an act of victimisation faces two immediate difficulties. The first difficulty would appear to be that no victimisation claim is made on the face of the ET1. It was not identified as a claim by EJ Nash when conducting the preliminary hearing on 30 June 2020. An application to amend the claim was accepted that day to add another claim - constructive dismissal – but not a victimisation claim. Nor is it referred to in the list of issues prepared for the purposes of that hearing (the "List of Issues"). No application to amend appears to have been made at the hearing before EJ Reed on 8 January 2021. The first reference I can find to a claim of victimisation is in the Claimant's letter of 17 May 2021 which sets out her application for a strike out. The Claimant told me that the point about "unambiguous victimisation" was before EJ Harrington but, it would seem, it was deployed as an argument against the meeting being cloaked in without prejudice privilege rather than being identified as a head of claim. The alleged victimisation was said to amount to "unambiguous impropriety". There was no formal application, so far as I can see, for victimisation to be added as a complaint in the proceedings. Similarly, there was no application for amendment before me.

20. The second difficulty is that the alleged attempt to terminate her employment appears to be a reference to what she says Mr Sherrard said to her at the meeting in November 2019. That conversation is the one that the EJ Harrington determined was held on a without prejudice basis.

21. In the circumstances, it is by no means clear to me that there is a live claim of victimisation (because it has not been pleaded) or, if the Tribunal has previously been seized of the issue, that the claim can now be pursued given EJ Harrington's determination that the relevant conversation is privileged.

22. The Respondent did not take a point about whether a victimisation claim was pleaded. The line taken in their written submissions was that that exploring the possibility of a without prejudice resolution was not a detriment. In oral submissions Mr Panesar focused on the

second difficulty identified above – that EJ Harrington had determined that the meeting was covered by without prejudice privilege and, by implication, that there was no unambiguous impropriety.

23. Even assuming that:

(1) There is a live claim of victimisation; and

(2) It is still maintainable in the light of EJ Harrington's decision;

I consider that the Respondent's point on detriment has a reasonable prospect of success. That is not, of course, to say that it will succeed or that it is more likely than not to do so, simply that it cannot be said that it has no reasonable prospect.

Reasonable Prospect: Did the Respondent conduct a fair grievance and appeal process?

24. The Claimant has raised complaints about the grievance and appeal process. The claim itself lists a number of criticisms of the grievance and appeal process but does not link them to any particular head of liability. The List of Issues makes reference to "the Respondent's alleged failure to adequately address C's concerns through the grievance process" but in the context of it being an omission which is relied upon as amounting (whether on its own or taken together with other matters) as amounting to a fundamental breach of contract. There is no indication that the alleged defects are relied upon as individual instances of discrimination.

25. In her written submissions, the Claimant concentrates on three principal complaints:

(1) The investigation took over a third of a year to complete;

(2) The investigation failed to uphold any of the allegations; and

(3) The investigation only sought an account of the November meeting from Mr Sherrard rather than asking for an account from the Claimant and her husband.

Relying on **Hewage v Gampian Health Board** [2012] UKSC 37, the Claimant says that it is open to the Tribunal to infer from these alleged deficiencies that she has been the victim of acts of discrimination. I reiterate that, so far as I can tell from the pleadings and the List of Issues, defects in the grievance procedure are not being run as instances of discrimination so it is not immediately apparent to me what the significance of **Hewage** is to the present strike out application.

26. Turning to the principal complaints, none of them strike me as so obviously amounting to defects that the Respondent should be debarred from arguing that it performed investigations that were consistent with their implied contractual duty to resolve grievances promptly and properly (**W A Goold (Pearmak) Ltd v McConnell** [1995] IRLR 516). How long an investigation may take will depend on a variety of factors including the number of allegations raised, the number of witnesses that needed to be spoken to and their availability, etc. Similarly, the range and number of those spoken to will normally be a matter for the investigator. Whether an employer has failed improperly to uphold grievances will depend on what their investigation revealed and whether they approached the exercise in good faith. All these are matters that have to be looked at in their appropriate factual context and that, in turn requires evidence. That evidence has yet to be heard. This ground does not come close to establishing that the Respondent has no reasonable prospects of prevailing on the issue.

Reasonable Prospects: Conclusion

27. For the reasons set out above, I am not prepared to strike out the response, or any part of it, on the grounds that the Respondent does not have reasonable prospects of success.

Strike Out: Has the Respondent conducted the proceedings in an unreasonable manner and/or have they failed to comply with a Tribunal order?

28. The Claimant's submissions, quite understandably, do not distinguish between conduct which goes to these two grounds. I intend therefore, to consider the conduct in the round and then to determine whether either of the two grounds is made out.

29. In order to conclude that the response (or any part of it) should be struck out on the basis of unreasonable conduct, I would have to be satisfied either that a fair trial is no longer possible (which is not contended for) or that the Respondent's conduct has involved deliberate and persistent disregard of the required procedural steps (**Blockbuster Entertainment Ltd v James** [2006] IRLR 630 EWCA).

30. In order to conclude that the response should be struck out on the basis that the Respondent has failed to comply with tribunal order I would need to consider the factors identified at Paragraph 6(4)(c) above. I have had these test in mind when approaching the conduct relied upon by the Claimant.

31. The conduct relied upon is as follows:

    (1) In breach of EJ Nash's order of 30 June 2020, the Respondent included irrelevant documents and multiple copies of documents in the bundle prepared for the preliminary hearing before me;

    (2) The same bundle included certain social media posts and led to the Respondent inappropriately raising questions of libel in employment tribunal proceedings;

    (3) The same bundle was submitted on three occasions, growing each time, without the Claimant being given a chance to comment or object;

    (4) The Respondent provided disclosure of certain documents only on 25 February 2021, on which date the bundle for the hearing before EJ Harrington was due to be submitted. The disclosure included documents that the Claimant considers irrelevant; omitted documents that she considers were relevant (and in respect of which I have since granted specific disclosure); was at times improperly redacted; and which included some documents that had become co-mingled;

    (5) The Respondent submitted a bundle on 25 February 2021 which omitted the Claimant's documents requiring her to submit them herself;

    (6) The Respondent only provided their skeleton in support of their costs application on the morning of the day that it was originally due to be heard;

    (7) A witness statement from Mr Sherrard was provided only on 17 February 2022 when the hearing was on 24 and 25 February 2022.

I have omitted reference to grounds (principally set out at Para 62 of the Claimant's skeleton) which have been overtaken by the decision made in relation to the without prejudice issue.

Breach of Order/Unreasonable Conduct: The Preliminary Hearing Bundle

32. I take the first three points together as they all relate to the preliminary hearing bundle.

33. The Claimant says that the Respondent breached EJ Nash's order of 30 June 2020 by including certain irrelevant documents and multiple copies of others. Direction 8.1 of EJ Nash's order makes provision for a bundle and, indeed, directs that it should contain only relevant documents and that (unless there is some good reason to do so) only one copy of any such document should be included. However, the order does not relate to the preliminary hearing bundle, it relates to the bundle for the final hearing.

34. Directions for the preliminary hearing were made by EJ Reed. At Paragraph 9 of his order of 20 January 2021, he directs:

> "The parties are directed to agree a bundle of documents for use at that hearing by 8 February. In the absence of agreement, separate bundles may be submitted."

Even if the Claimant's criticisms of the preliminary hearing bundle are well-founded, therefore, there can be no question of it having amounted to a breach of EJ Nash's order (since it did not apply to the preliminary hearing bundle), or, for that matter, of EJ Reed's order (since it did not make the same provision in respect of relevance and non-repetition). The strike out application would have, therefore, to be advanced on the basis of unreasonable conduct of the litigation.

35. There cannot be many employment judges who have not at some point felt the temptation to strike out a party's case at the sight of a bundle which contains many irrelevant or repeated documents. However, having worked through the helpful analysis set out at Appendix 1 to the Claimant's written submissions, I am not persuaded that any criticisms that may be made of the preliminary hearing bundle reach a degree of seriousness that would begin to make strike out a proportionate response. Most of the documents that the Claimant considers irrelevant I think a party could reasonably see as being appropriate to include within the bundle including, for example, the ET1 and ET3, to which she takes specific objection. There are 10 documents that are included more than once. Two are included three times. I do not consider that to be very significant, still less so significant that the Respondent should be struck out. I am not persuaded that it resulted in any disruption, unfairness or prejudice and, in any event, the preliminary hearing was conducted fairly.

36. Turning to the inclusion of the social media posts, they were included in support of the Respondent's costs application. It was suggested that they demonstrated that rather than accepting that she had made improper reference to a without prejudice meeting in her pleading (as EJ Harrington found she had), the Claimant was engaged in an "ongoing campaign to publicise the without prejudice matters" including through social media posts. The Respondent was, I consider, entitled to pursue the point, albeit that I was not ultimately persuaded to found an order for costs on it. Contrary to the Claimant's assertion, the Respondent was not trying to persuade the Tribunal to determine defamation issues.

37. Since the hearing was conducted remotely, an electronic bundle was used. It was, in my view, appropriate, to resubmit the bundle if pages were to be added. That approach is more convenient for the tribunal than having to work from a number of different PDFs. The Claimant

dos not appear to complain that she did not receive copies of the updated bundles. Instead, she complains that she was not "invited to do the same". If the Claimant had documents that she wanted the tribunal to consider, she did not need to be invited by the Respondent to add them to the bundle. That was a matter that she would be expected to pursue herself. She also complains that she was not given the opportunity to object. However, since she was free to object if she had wished to so, again, it is not clear what the ground of complaint is. In any event, the submission of updated versions of the bundle would not, in my view, amount to conduct of the kind that would make striking out of the response appropriate.

Breach of Order/Unreasonable Conduct: Disclosure

38. The principal complaints about disclosure given on 25 February 2021 are that it contained irrelevant material; and that it was incomplete.

39. An order for disclosure by list was originally made by EJ Nash on 30 June 2020. It provided for mutual exchange of lists on 21 September 2020. The Respondent says that they provided the list on that date. The Claimant asked for copies of all of the documents on the list and suggested that there were documents missing. The Respondent asked for clarification as to what the Claimant thought had been omitted. Ultimately there was an application for specific disclosure made by the Claimant on 2 November 2020. A further application for specific disclosure was made by the Claimant on 7 February 2021 (it is incorrectly dated as 2020). The second application was focused on documents needed for the determination of the without prejudice issue at a preliminary hearing which was, at that point fixed for 1 March 2021 (the "WP Hearing").

40. At a preliminary hearing on 8 January 2021, EJ Reed suspended the directions which were aimed at ensuring that the matter was ready for final hearing. They were unable to consider the Claimant's application for specific disclosure in respect of the WP Hearing as they did not have the application before them. Since the Respondent had indicated that they were proposing to provide some documents voluntarily, they were directed to tell the Claimant by 15 February 2021[2] which documents they were *not* willing to disclose. The parties were further directed to agree a bundle by 8 February 2021 and to send it (or, failing agreement, separate bundles) to the Tribunal by 25 February 2021. The Respondent wrote to the Tribunal on 8 February 2021 (a week ahead of the deadline) identifying the documents that it objected to disclosing.

41. On 15 February 2021, the Respondent wrote to the Claimant enclosing their response to the Claimant's 7 February 2021 disclosure application; a witness statement from Mr Sherrard and an index for the bundle for the WP Hearing. On the same day, the Claimant sent the Respondent a copy of her witness statement and told the Respondent that her husband's witness statement would be delayed by one day (in fact it was sent two days later).

42. On 17 February 2021, the Claimant was sent a link to the draft WP Hearing bundle. This seems to have taken the Claimant by surprise. She replied to say that she had been expecting to receive a copy on 25 February 2021. On 21 February 2021 the Claimant sent documents that she wanted included in the bundle. On 25 February 2021, the Respondent replied saying that

[2] The case management summary appears to have recorded the date, in error, as 15 January 2021 and the Respondent wrote on 21 January 2021 asking for the date to be corrected.

since they had been unable to agree the bundle, she should send her documents directly to the Tribunal. The email from the Respondent also contained an amended version of Mr Sherrard's statement for the WP Hearing and a further statement from him. Finally, the email attached the "Respondent's Core Bundle". By a further email, the Respondent sent a link to a One Drive directory which contained the documents that it was willing to disclose. The Claimant's response was: "All received, thank you".

43. On 26 February 2021, the Tribunal wrote to the parties postponing the hearing. It was ultimately re-listed for 28 May 2021.

44. As I understand the Claimant's submission, it is the email of 25 February 2021 forwarding the link to the directory of disclosed documents that is at issue. The first complaint is that not all the documents were relevant. The essential problem is that the parties disagree as to what is and is not relevant. The Claimant complains, for instance, that documents were included which concerned a colleague – a Ms Wilding. Mr Panesar QC said that the material had been included because they will want, at final hearing, to show that other maternity leave returners have flourished which, he suggested, would tend to disprove the allegation that the Respondent had mistreated the Claimant as a result of her taking leave. Without commenting on the weight that the Tribunal might eventually give such material, it does not seem to me to be unreasonable to have disclosed the material. Still less is it the sort of conduct that could justify a strike out. The Claimant suggested that it was a deliberate "psychological tactic". In my judgement, it was not.

45. The Claimant further complains that certain documents had become co-mingled. Having looked at the sample documents that the Claimant refers to in her written submissions, it is by no means clear to me that there has been any co-mingling. However, if there has been, the appropriate response is to seek clarification in correspondence with the Respondent. That course of action would have the merit of being consistent with the overriding objective. Absent a deliberate and persistent disregard for the requirements of disclosure, it is not a matter for a strike out. I do not accept that there was any such conduct on the part of the Respondent.

46. As to incomplete disclosure, again, this is a matter where the parties appear reasonably to have disagreed as to what it was or was not appropriate to disclose. The matter was ultimately resolved at the hearing before me. The Claimant did not persist in every request, nor did I direct disclosure in respect of every request that she maintained. The Respondent did not resist every request. For the most part the parties were able to agree a position in respect of every outstanding request. This, again, is manner of dealing with hotly contested disclosure issues that is consistent with the overriding objective. Again, with the final hearing some months away, there was no real question of prejudice. In my view the disputes were genuine and there is no basis for concluding that the Respondent conducted itself in a manner which would justify a strike out.

Breach of Order/Unreasonable Conduct: Failure to Agree a Bundle for use at the WP Hearing.

47. I have set out above the orders and chronology of developments relating to the production of the bundle for the WP Hearing and do not repeat them here. What this allegation comes down to is that the Claimant says she had been led to believe that she would provide her documents and that an agreed bundle would be provided to the Tribunal. At the last moment, the Respondent said that the bundle was not agreed and that she should provide her documents

directly to the Tribunal. The Claimant thought the bundle could be agreed; the Respondent did not. The directions made specific provision for the provision of separate bundles in the event that the parties could not agree the contents.

48. The sum total of the inconvenience caused to the Claimant was that she had to send her papers by email to the Tribunal and to the Respondent rather than to the Respondent alone. Her response to being invited to do so is set out in her email of 25 February 2021 timed at 10:17:

> "OK. Just to forewarn you I will attach this email to my updated bundle which I'll produce now in acrobat and send right away"

It is scarcely consistent with the Claimant believing that she had been put to any great difficulty or that she was at any risk at all of prejudice. Indeed, in her oral submissions to me the position that she took is that, had circumstances been different, she *might* have found it difficult to comply. But even that is difficult to understand. If she had the documents ready to email to the Respondent, she necessarily had them ready to email to the Tribunal.

49. It would undoubtedly have been better if the contents of the bundle could have been agreed. That is, after all, what the directions were seeking to achieve. But since agreement was not ultimately reached, separate bundles were what had been provided for. There is no question, therefore of a breach of EJ Reed's order nor, I consider can the Respondent be said to have conducted themselves in a manner that would justify a strike out.

Breach of Order/Unreasonable Conduct: Was the skeleton argument for the costs application provided late?

50. The Claimant says that the Costs skeleton was submitted on the morning of 16 December 2021, which was the date set for it to be decided. According to **Tribunal Rules, r 42** any written submissions should have been sent in 7 days before the hearing. This complaint appears to be based upon a misreading of **Rule 42** which provides:

> "The Tribunal shall consider any written representations from a party, including a party who does not propose to attend the hearing, if they are delivered to the Tribunal and to all other parties not less than 7 days before the hearing."

The rule compels a Tribunal to consider any written representations received not less than 7 days before the hearing. If the written representations are received thereafter it would be a matter within the discretion of the Tribunal whether or not to consider them. The rule does not compel the party to submit written representations by a particular date, nor does it preclude the Tribunal from considering them if they do not.

51. The hearing did not go ahead on 16 December 2021. It was eventually heard by me on 24 and 25 February 2022. As it transpired, therefore, the Claimant had the skeleton argument some 2 months before the relevant hearing.

52. Since there was no direction for skeleton arguments, it would have been open to the Respondent simply to attend and make oral arguments. The provision of an argument at that late stage gave structure to the oral submissions which would be an aid to understanding for the Tribunal and Claimant alike. I take the point. I do not think that providing a skeleton on the day of a hearing is a matter that justifies strike out. I would, however, make the following

observation; litigants in person will often find being presented with a skeleton at the last moment a source of considerable stress rather than as a way of helping them understand the arguments. That will be aggravated where the skeleton contains law with which they may be unfamiliar and/or if they are impaired in some way (perhaps because they do not have English as a first language or where, as here, they have poor mental health). This is a matter that the Respondent should bear in mind for any future hearings. The Claimant has made it clear that she feels ambushed, so it would be wise for Respondent to send any skeleton to the Claimant well in advance of any hearing.

Breach of Order/Unreasonable Conduct: Was Mr Sherrard's statement provided late?

53. The Claimant complains that:

(1) Mr Sherrard provided a witness statement without there being permission to do so;

(2) It was only provided on 17 February 2021, which did afford the Claimant an opportunity to prepare a witness statement in response; and

(3) He had done the same on 1 January 2021 resulting in a wasted hearing before EJ Reed on 8 January 2021.

54. Having considered EJ Reed's case management summary, the felt that it was "clear that evidence [would] have to be heard on the matter". They do not seem to have had any in principle objection to the Respondent producing a witness statement. It is difficult to see how any employment judge could have, given that the question whether the November 2019 meeting attracted without prejudice privilege turned at least in part on contested issues of fact. Nor does the summary suggest that "late" production of a witness statement had resulted in a wasted hearing. What the judge actually says is:

> "The respondent had also produced a short bundle for the purposes of the hearing but I was informed that the claimant had produced a rather longer one and I did not have it in front of me. It apparently includes documents that I would have to see, not least the order giving rise to this hearing and the grievance submitted to the respondent by the claimant in advance of the meeting, which the respondent says evidences a dispute. It was simply impossible to determine the issue at this hearing."

It appears, therefore, that the reason the hearing was not effective was that the judge did not have a copy of the Claimant's bundle of documents.

55. EJ Reed made a specific direction in respect of witness statements for the WP Hearing; they had to be exchanged by 15 February 2021[3]. The correspondence included in the bundle makes it clear that the Respondent served Mr Sherrard's statement (and a supplemental statement) on 15 February 2021. The Claimant sent her own statement but only sent her husband's statement on 17 February. On the face of it therefore, the Respondent complied with EJ Reed's direction and the Claimant did not. If serving a witness statement on 17 February 2021 were grounds for a strike out, it would justify striking out the claim. In the circumstances, this complaint does not provide grounds for a strike out of the response or any part of it.

[3] Again, the EJ's order says, in error, that it was to occur on 15 January 2021.

Conclusion

56. I have considered the principal individual bases upon which the Claimant seeks to strike out the response above. None of them justify a strike out of the response or any part of it. I have also asked myself whether, looking at all of these grounds in the round, they add up to a sound basis for a strike out. I have concluded that they do not. Nor, having reviewed the Claimant's correspondence and written submissions do I consider that there is any other basis for striking out the response.

Costs

57. The preliminary hearing went part heard. A month past between the first two days and the resumed hearing. At the end of the first hearing, I explained to the Claimant how high a hurdle a strike out application has to clear. It was agreed that the Claimant would reflect on whether or not she wanted to pursue her application. She decided that she did. The Respondent's position is that having had a specific opportunity to consider whether she pursued the application and given that a number of the grounds were very weak, I should consider making an award of costs in the event that I dismissed the application on the basis that the Claimant had acted unreasonably in persisting.

58. I agree that a number of the grounds were extremely weak. However, on a very narrow balance I have concluded that it was not unreasonable for the Claimant to persist in her application. I have to take into account that the Claimant is representing herself (**AQ Ltd v Holden** [2012] IRLR 648 EAT) and I also take into account the apparently uncontested fact that she has been in poor mental health. I think it was reasonable for her to pursue her application in respect of the index issue. She is right that the Respondent did not draw the Tribunal's attention to any documentary evidence that pointed on its face to serious shortfalls in company secretarial function. She is also right that the board effectiveness review material points, on its face, in the opposite direction. Although the Respondent says that that apparent inconsistency will be explained, Mr Panesar QC did not spell that explanation out in any substantive detail. Put another way, if I were stood in the Claimant's shoes, I can well imagine that I would think the case on perhaps the most important issue was open and shut. If it was reasonable to pursue that ground, a hearing was inevitable and although many other issues had to be considered, I do not think that they would justify an award of costs in this case. I repeat, however, that the balance was a very narrow one. I observe in conclusion that if the Claimant believes strongly in the substantive merits of her case by far her best strategy would be to ensure that a final hearing is effective at the earliest possible date. Intense and protracted interlocutory battles are not serving the interests of either party and certainly are not serving the interests of justice.

Employment Judge Jones QC

19 May 2022