EMPLOYMENT TRIBUNALS

Claimant: Miss C Logan

Respondent: Innovation First International (UK) Limited

Heard at: Manchester (by CVP) **On:** 20 June 2022

Before: Employment Judge Phil Allen
Ms K Fulton
Mr P Dobson

REPRESENTATION:

Claimant: Mr M Hamer (the claimant's partner)
Respondent: Mr J Searle (counsel)

JUDGMENT (STRIKE OUT APPLICATION)

The unanimous judgment of the Tribunal is that the response should not be struck out.

REASONS

Introduction

1. The claimant was employed by the respondent from 6 June 2014 until 10 September 2020 as an Accounts Administrator and/or (later in the employment) as Finance. The claimant was dismissed with notice on 28 July 2020. The claimant alleges that: she was unfairly dismissed; she was unlawfully directly discriminated against because of sex and/or pregnancy; she was unlawfully harassed related to sex and/or pregnancy; she was unlawfully victimised; and/or unauthorised deductions were made from her wages. The respondent denies all of the claimant's claims and contends that she was fairly dismissed by reason of redundancy.

Issues determined in this Judgment

2. This is a case in which preliminary hearings (case management) were conducted, on 22 January 2021; 5 August 2021; and 28 January 2022. The preparation of the case for hearing has been contentious and difficult.

3. The case was listed to be heard over five days, 20-24 June 2022. On the first day of the final hearing the claimant made an application for the response to be

struck out. The basis for that application was the respondent's conduct of the proceedings.

4. The issue determined in this Judgment was the claimant's application, which was considered as having been made under Rule 37(1)(b) of the Employment Tribunal rules of procedure.

Procedure

5. The claimant was represented by her partner, Mr Hamer, at the hearing (albeit that on occasion the claimant also spoke for herself). As Mr Hamer emphasised, he was neither qualified nor did he have any experience of Tribunal proceedings. The respondent at the hearing was represented by Mr Searle, counsel.

6. The hearing was conducted by CVP remote video technology, although the arrangements which were put in place on 20 June were not standard. The final hearing had been listed to be conducted in-person, that is with the parties attending at Manchester Employment Tribunal to conduct the hearing (albeit the respondent had confirmed that one witness would be giving evidence from the USA by videolink). On Thursday 16 June 2022 a letter was sent to the parties by the Tribunal which explained that in view of the likely travel difficulties caused by industrial action scheduled for the week of the Tribunal hearing, Regional Employment Judge Franey had directed that the hearing be converted to be a hearing heard remotely by CVP (that is the system the Tribunal uses for remote video hearings). That letter was sent by email to the email addresses which the Tribunal had for the parties, but unfortunately the email was not received by the claimant or her representative. The CVP details were subsequently provided to the parties, but the claimant and her representative assumed that those details were being provided because of the need for one of the respondent's witnesses to give evidence remotely. The claimant and her husband attended at the Tribunal building for the first day of the hearing. In order to ensure that the hearing could commence as arranged, but with the parties being in a comparable position (and to avoid one party being physically present in a room with some of the panel and the other not), arrangements were made for the hearing to proceed with the claimant and her representative accommodated in a Tribunal room using a screen, albeit in a different room to the Employment Judge and one of the members who were also present in the Tribunal building. The respondent's representative and the respondent's observers attended remotely by CVP.

7. Prior to the hearing the claimant had previously applied for the hearing to be postponed, but that application had been refused.

8. On the first day of the hearing the claimant's representative raised the unfairness which he perceived had arisen from the preparation of the case for hearing. That led to him initially making two applications: an application for the response to be struck out as a result of the respondent's conduct of proceedings; and an application for the hearing to be postponed (the latter having been raised as a potential application based upon a change in circumstances by the Tribunal). After a discussion about the position in the claim and the documents available to the Tribunal, the claimant's representative asked to be given some time to prepare to make the application. The claimant initially sought half an hour to prepare. After an adjournment between 11.52 and 12.07 the Tribunal agreed to the claimant being

given the time sought and, indeed, gave the claimant until 2pm to prepare for the submissions (the hearing breaking at 12.15 approximately).

9. On the recommencement of the hearing at 2.07 pm, the claimant's representative asked for the rest of the day to prepare his submissions on the strike out and postponement applications. The respondent's counsel had provided a document upon which he wished to rely in responding to the submissions during the adjournment, a copy of which was handed to the claimant's representative just before the hearing re-commenced. The respondent's counsel opposed the application to be given the rest of the day to prepare, highlighting the risk that the case would not be heard in the time available. After an adjournment to consider the further application, (at 2.25 pm) the Tribunal granted the claimant's representative a further half an hour to prepare his submissions on the applications he was making, but it was emphasised that the Tribunal wished to reach a decision on the applications during the first day of hearing.

10. At 2.55 pm the claimant's representative made his submissions. He commenced the submissions by explaining that the claimant did not want to pursue a postponement application as this would have a huge prejudice for the claimant and she did not wish to drag the proceedings out. The application to strike out was made and explained. The respondent's representative was then given the opportunity to make submissions (as the respondent opposed the application). During the respondent's representative's submissions the claimant's representative wished to interrupt and was told he could not do so. At the end of the respondent's submissions the claimant's representative was given an opportunity to respond, which he did. The Tribunal believed that his response had been completed and therefore the hearing was disconnected/adjourned in order to enable the Tribunal to reach a decision.

11. After an adjournment between 3.35 pm and 3.55 pm the hearing reconvened and the parties were informed of the outcome to the strike out application. The reasons were also briefly explained to the parties. The claimant and her representative expressed their dissatisfaction with the decision and asked about the possibility of appeal. This document records the Tribunal's Judgment and reasons in the application made (the reasons having been provided in writing in any event in the light of what was said by the claimant and her representative).

12. Following the decision, the Tribunal adjourned to read the witness statements and relevant documents in the proceedings. On the afternoon of the second day of the hearing the claimant made an application to postpone. The respondent's position initially was that it was neutral in respect of the application. The Tribunal considered the parties' positions and proposed the alternative of the case being adjourned part-heard and recommencing to be heard (with the same panel) over five days on 27 February to 3 March 2023. The parties (ultimately) agreed to that approach and the hearing did not continue on 22-24 June as had been proposed. Amongst other things, the postponement allowed time for the claimant to prepare for cross-examination of the respondent's witnesses and allowed time for the respondent to provide the statement of law which it had previously been ordered to provide, so that it could be considered by the claimant ahead of the hearing. One reason why the postponement was sought was to enable the claimant to obtain legal representation

if she chooses to do so, and the adjournment provided time for her to do so (if that is what she chooses to do).

The facts relevant to the application

13. There was a dispute between the parties about the preparation of the case for hearing and, in particular, who was at fault for the lack of preparedness of the parties. The claimant's representative in the strongest terms laid the blame with the respondent's solicitor and asserted that the respondent had not complied with any of the orders made throughout the preparation for hearing on the dates required. The respondent's representative apportioned the blame to the claimant and her representative and provided a document to the Tribunal which set out the respondent's view of the steps taken.

14. The Tribunal focused in reaching its decision upon the later steps required for preparation for hearing. Whilst the claimant's representative made references to things such as the later preparation of bundles for previous preliminary hearings by the respondent, the Tribunal considered the steps prior to the final hearing as being the ones which were important for the decision being made.

15. Detailed case management orders had been made after each of the preliminary hearings. A series of steps were ordered by Employment Judge Housego following the hearing on 5 August 2021 which should have resulted in an agreed bundle being prepared by the end of January 2022 and witness statements sent to the other party by the end of February 2022. Revised case management orders were made by Employment Judge Butler after the hearing on 28 January 2022. Time to compete the agreed bundle was extended to 4 March 2022. Time for witness statement exchange was extended to 19 April 2022. Both parties were to write to the Tribunal to explain that the case was ready for hearing by 17 May 2022. Given that the claimant was not legally represented, the respondent was to send the claimant a document setting out any legal argument it was seeking to rely on by 13 June 2022.

16. A letter had been sent by the Tribunal on 8 June 2022 which emphasised that the parties must ensure that witness statements had been prepared and were available for the hearing. The parties were told that if they had not done so, they were to send each other the witness statements upon which they intended to rely as soon as possible. The letter went on to say "*if they are exchanging statements, they should be exchanged on a date and time which the claimant's representative reasonably identifies*". The claimant's representative emphasised that the statement was addressed using the word "*if*" and therefore was not a requirement.

17. The most contentious issue between the parties was the preparation of the bundle. For the final hearing the respondent presented a 794 page bundle. It asserted that included not only the documents for the bundle required, but also a respondent's supplementary bundle, a claimant's supplementary bundle, and additional documents. The claimant wished to rely upon a bundle which she had prepared, which was provided electronically and contained between 667 and 690 pages. Prior to the application being determined it had not been possible to undertake a detailed comparison of the two bundles, but it was clear that there was a significant degree of overlap between the two bundles.

18. The claimant's position was that she had only been provided with the respondent's bundle on (or about) 16 June. The claimant and her representative had not had the opportunity to look at it or see the extent to which the bundles duplicated as they had been preparing her witness statements over the weekend prior to the hearing (having been working in the previous week) and her statements referred to pages in the claimant's bundle.

19. The respondent's position was (in summary) that it had disclosed documents on 22 October and 29 November 2021, with the claimant having provided her disclosure documents on 14 December 2021. There had subsequently been issues about further disclosure sought, and the respondent said it had complied with orders which required provision by 11 February 2022. A 594 page paginated bundle had been sent to the claimant by recorded delivery on 8 April 2022 and returned (undelivered) on 29 April. On 31 May and 5 June a further bundle (amended after exchanges between the parties) was emailed to the claimant. On 10 June the bundle was updated and sent to the claimant by email; that bundle also having been collected by the claimant's representative on 16 June. The claimant did not agree with the respondent's account.

20. A list of issues had not been agreed as it should have been. A list had been prepared by Employment Judge Housego and appended to the case management order following the hearing on 5 August 2021. Both parties attended the final hearing with a list of issues, agreement having proved impossible.

21. Following the Tribunal's letter of 8 June, the claimant's representative had not identified a date and time for exchange of witness statements, save that he believed he had suggested exchanging during the weekend immediately prior to the hearing (a time when he would not be working) but that had been rejected by the respondent's solicitor because it was not during his working time. The respondent had sent its witness statements to the claimant by email on 15 June 2022. Copies of the statements had also been collected at the same time as the bundle on 16 June. The claimant's witness statements were provided to the respondent by email shortly after midnight on the morning of the first day of hearing. The respondent's representative had not had the opportunity to consider the claimant's statements (at least in any detail) prior to the start of the hearing. The claimant's representative said he had not had the chance to prepare for cross-examination of the respondent's witnesses.

22. The claimant had informed the Tribunal that the parties were not ready for hearing on 17 May. The respondent had not contacted the Tribunal at that time.

23. The respondent had not provided the document setting out the legal arguments upoon which it relied. The claimant's representative particularly emphasised how difficult it made it for him to prepare for the hearing without it. The respondent's explanation relied upon the lack of an agreed list of issues, the absence of witness statements to enable it to be prepared, and that this was contended to be a fact case and not a legally complex case.

24. At the time of the application to strike out neither party was seeking a postponement of the hearing, albeit the respondent's representative emphasised that postponement could be considered by the Tribunal when considering the strike out

application (it applying as an issue when it was considered whether strike out was a proportionate approach).

The Law

25. The application was considered as one which had been made under rule 37(1)(b) of the Employment Tribunal rules of procedure. That provides that the Tribunal may strike out a response on the grounds that the manner in which the proceedings have been conducted by or on behalf of the respondent has been scandalous, unreasonable or vexatious. In practice the claimant's representative's submissions arose from a contention of unreasonable conduct rather than scandalous or vexatious conduct.

26. The claimant's representative referred to the Equal Treatment Bench Book. The Tribunal reviewed the relevant chapter in the Equal Treatment Bench Book about litigants in person, to which the claimant's representative had referred, albeit the Tribunal was familiar with claims conducted by unrepresented claims and the issues which can arise, as it is common in the Tribunal for parties (and claimants in particular) to be unrepresented.

27. The respondent's representative placed reliance upon the case of **Blockbuster v James [2006] IRLR 630**. He asserted that there were four questions for the Tribunal: has there been scandalous, unreasonable or vexatious conduct of the proceedings; if so, was a fair trial no longer possible; was strike out a proportionate response to the conduct on question; and if the response was struck out, what part could the party play in the proceedings going forward. The claimant's representative was critical of law being referred to without him being previously notified and emphasised the difficulty which a claimant without legal representation had in responding to such points.

28. The Tribunal in reaching its decision the Tribunal needed to determine: whether the manner in which the respondent had conducted proceedings was unreasonable (as, in practice, the claimant's arguments were focussed upon it being unreasonable); if so, was a fair hearing no longer possible; and, if so, was striking out the response proportionate or were there alternative options available. In order for a claim to be struck out the claimant needed to persuade the Tribunal that non-compliance was deliberate and persistent, or had the effect that a fair hearing was impossible. The Tribunal needed to consider all the circumstances, including the magnitude of any default, and what disruption, unfairness or prejudice had been caused.

Conclusions

29. The parties had fundamentally different positions regarding the orders and non-compliance. The Tribunal particularly focused upon what the position had been in the period immediately before the final hearing, as that was the important part of the claim for the application being made, it did not focus upon non-compliance with steps such as the preparation of bundles for previous preliminary hearings.

30. It was clear that disclosure had been contentious and, at times, acrimonious. The position as asserted by the parties has already been addressed.

31. The parties had been required to agree a list of issues. The parties had not agreed a list. The lists of issues were similar in their content, when the detail of what was contained in them was reviewed (albeit they differed in order and terminology).

32. At the preliminary hearing on 28 January 2022, the Tribunal had extended time for witness statements to be exchanged to 19 April 2022. Neither party had sent the other witness statements on that date. The Tribunal's order of June 2022 made clear that the parties should send each other their witness statements as soon as possible, and explained that if exchange was required then the claimant's representative was to identify the time and date for exchange. The respondent sent its witness statements to the claimant on 15 June 2022. The claimant and her representative said they had not read the statements as they had been at work during the week and then had been preparing the claimant's own statements. The claimant's witness statements were sent to the claimant shortly after midnight on the morning of the final hearing.

33. The Tribunal carefully considered the issues and the submissions which it had heard. It reviewed the relevant chapter in the Equal Treatment Bench Book about litigants in person.

34. The Tribunal did not find that the respondent's conduct of the proceedings had been unreasonable. It was clear that directions had not been complied with on the dates ordered. There was a degree of fault by both parties when the lack of preparedness for the hearing itself was considered. The respondent had been late in providing its witness statements, but it had provided its witness statements before the claimant had done so. However, the conduct of the respondent could not be correctly described as unreasonable when the document prepared by the respondent and the steps undertaken were taken into account. The conduct was not deliberate or a persistent failure to comply with the later directions; issues in dispute with the bundle had delayed the other steps being undertaken.

35. Even if the respondent had acted unreasonably, the Tribunal believed that a fair hearing remained possible. The Tribunal had been provided with witness statements from the relevant witnesses. It would and could consider the documents referred to in those statements from the bundle to which they referred. It appeared to be the case that the majority of the documents in the respondent's bundle were documents which the claimant would have seen and had been provided with some time earlier, even if not with the numbering and the order included in the current respondent's bundle.

36. In any event, the Tribunal did not find striking out the response to be proportionate when any matters regarding conduct of the proceedings were considered. The claimant was pursuing serious and important claims, including of discrimination on grounds of sex and pregnancy. Those issues needed to be determined on their merits. Considering the claimant's representative's concerns about the fact that he had not received the statement of the law from the respondent, the Tribunal considered that the issue could be addressed in other ways rather than strike out, such as hearing submissions on a later date after such a document had been provided. Dismissal of the response in its entirety would not be a proportionate approach.

Employment Judge Phil Allen

23 June 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

11 July 2022

FOR THE TRIBUNAL OFFICE

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