EMPLOYMENT TRIBUNALS

Claimant: **Miss A Bovell**

Respondent: **Reading Borough Council**

Heard at: **Reading Employment Tribunal**

On: **4 August 2022**

Before: Employment Judge Eeley
Ms C Bailey
Mr M Fulton-McCallister

Representation
Claimant: In person
Respondent: Mr A Rhodes, counsel

JUDGMENT on the claimant's strike out application having been sent to the parties on 15th August 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant presented a written document to the Tribunal which was received by this Tribunal the day before the resumed hearing today (4 August 2022), although the claimant indicates that she had in fact presented it to the Tribunal back in July. In any event, it is a document entitled *"Urgent re application to strike out the respondent defence and or the ET to substitutes an alternative order restrict in the Respondent from continuing participation in the ongoing hearing".* The Tribunal took time to read and digest the contents of that document and to hear further submissions from the claimant and the respondent's counsel, Mr Rhodes, before adjourning to make a decision.

2. The basis of the claimant's application can be summarised. Firstly, there is a complaint that the witness who is currently part heard in cross examination, Ms Sarah Gee, should not be being permitted to give evidence via video link as opposed to in person. The claimant refers to what occurred at the hearing on the last occasion. The claimant indicates that the respondent has failed to provide the medical evidence which justifies the

need for Ms Gee to attend by CVP rather than in person at the Tribunal. The claimant also makes representations about the fairness of the way that Sarah Gee is being treated as compared to how Sarah Gee herself treated the claimant during the course of the relevant employment relationship. The claimant raises an issue about witness statements and whether there has been a manipulation of the witness evidence before the Tribunal. The claimant raises an issue about the reliability and credibility of Ms Gee's witness evidence and matters were raised tangentially, regarding witness orders and the previous proceedings prior to the Employment Appeal Tribunal judgment which resulted in the remission of the proceedings to this fresh Tribunal.

3. In addition, in oral submissions, the claimant took us to the fact that there had been two documents added to the bundle on the last occasion: pages 183(a) and (b) which had been provided to the Tribunal in documentary form and inserted in the paperwork on the last occasion. However, the claimant says that she had not been provided with (or had since misplaced) the documents and had requested a further copy this morning from Mr Rhodes. She had obtained that documentation and that issue itself was resolved. However, in the course of that exchange Ms Bovell interpreted the explanation given to her by Mr Rhodes as indicating that there might be further documentation which was missing from the bundle or which she had not been provided with, thereby indicating that a fair trial was no longer possible.

4. So, I am going to address each of the themes in the application and give our findings and conclusions in relation to each of them.

5. Firstly, the issue of Sarah Gee's attendance via CVP. It was in fact addressed on the last occasion. The brief chronology is that a witness order for Sarah Gee's attendance was granted (on the papers) the week prior to the Tribunal hearing following an application made by the respondent. It was copied to the claimant so that she was aware that Ms Gee was being called as a witness. Some time later, but also before the hearing commenced, the respondent asked for permission for Ms Gee to attend and give evidence via CVP on health grounds. A combination of factors were relied on including that the witness suffers from IBS, that the witness has since retired from employment with the respondent and has moved some considerable distance away (to the Gower Peninsula in South Wales.) The indication given was that requiring the witness to travel an extended period of time by public transport, something in the region of a four hour journey, would adversely affect her health, would be stressful and would exacerbate her medical condition. There might also be practical issues about undertaking the journey in those circumstances (ready access to toilet facilities etc).

6. That was the basis on which a CVP link was requested. The Tribunal heard those representations on the last occasion and we gave the claimant the opportunity to make any representations that she wished in relation to that. The outcome, we decided, was that the proportionate and fair way forward, in order to ensure that all relevant witnesses were heard from and their evidence properly considered, was to allow CVP evidence from Sarah Gee but with the proviso that the respondent had to provide some form of

medical evidence to substantiate the assertion that, medically, the witness needed to attend via CVP rather than in person. That was the basis of the Tribunal's original decision. Unfortunately, the Tribunal did not set a deadline for provision of that medical evidence. That medical evidence has yet to be provided to this Tribunal. The explanation that has been given to us today is that efforts were made in fact made to obtain the medical evidence. Ms Gee has, quite understandably, transferred from the GP practice that she had prior to her move to Wales to a GP practice which is local to her current place of residence. In doing so she, of course, has needed to transfer her medical records from one GP practice to another. She made a request to her former GP practice for the evidence which she needed to send to the Tribunal. The former GP practice informed her that they could not assist because she was no longer a patient of the practice. They redirected her to her new GP practice. The new GP practice said that once the records came to them they would provide the documentation. The problem, as at the date of this decision, is that although the medical records have transferred to the new GP, the practice has not acted upon the earlier assurances and has not provided the medical evidence to the witness. Thus she has been unable to provide the evidence to the Tribunal. So, it appears that there is a valid explanation as to why that documentation is not here. However, the claimant has a legitimate grievance insofar as the evidence has not been provided as directed. The Tribunal will need to resolve that in due course so that the Tribunal is fully appraised of the legitimacy, or otherwise, of the application for evidence to be given by CVP. I will park that issue for a moment but that is the situation in relation to that aspect of the claimant's application.

7. The claimant made a further reference to issues with Sarah Gee's witness statement and made the assertion that there had been some manipulation of the documentation. She suggested that there had been a change from an old witness statement to a new one and an attempt to mislead the Tribunal in some way. Upon a review of the notes from the last hearing it became apparent that this issue too had been resolved at the last hearing. At the beginning of her cross examination the claimant suggested to Ms Gee that there were two different witness statements and that this was problematic. At this point the Tribunal allowed the parties to exit the hearing room and discuss the issue. This happened on two separate occasions. As a result of those discussions we were told that, in fact, the two witness statements were identical save that the 'new' witness statement had been updated (at paragraph 1 which dealt with employment status) to reflect the fact that the witness had retired since the inception of proceedings. To avoid any allegations of dishonest or inappropriate behaviour the solution proposed (and adopted) was that the respondent would rely on the initial, 'old' version of the witness statement but brief supplemental questions in Chief would be used to give the witness opportunity to update and clarify her current employment status. This was designed to remove any suspicion that the evidence had been changed or manipulated in other ways and to reassure the claimant that all parties were working from the same witness statement. It was thought that this would ensure that the evidence put before the Tribunal was proper, accurate and up-to-date and the claimant was not disadvantaged by being required to check the contents of a further 'new' witness statement but was still free to put whatever questions she needed to in cross examination. That matter was therefore resolved at the last hearing

and nothing has happened with it in the intervening period since the last hearing which means that we have to revisit it. That matter has been dealt with and nothing has changed.

8. The claimant also makes various submissions about the reliability and credibility of Sarah Gee's witness evidence and, as I have already indicated to her, those are matters which she is entitled to raise either as part of cross examination or, latterly, in her closing submissions to the Tribunal. She is entitled to put those issues before the Tribunal (for example, any discrepancies in the evidence) and ask us to assess the credibility of the witness and the reliability of her evidence based on that. The Tribunal may well draw inferences and conclusions which are adverse to the respondent's witness. However, that is a matter for consideration at the conclusion of the hearing. It is not a ground on which to strike out the respondent's defence part way through the final liability hearing in the case. The normal process in the Tribunal is that evidence is heard and weighed, submissions are made about it and a decision is reached by the Tribunal following a consideration of all relevant matters. Nothing which has arisen so far in this case means that the Tribunal is required to depart from this procedure and strike out the defence part way through the hearing.

9. The claimant has also raised the issue of whether the Tribunal should grant her applications for witness orders. The Tribunal has made it clear to the claimant that we have not refused any application by her for a witness order. The issue was identified as still outstanding at the last hearing. Part of the agenda for today's hearing was to deal with any outstanding applications for witness orders. The problem we encountered on the last occasion was that the claimant did not have an address on which we could serve any witness orders that we made. There was a practical and fundamental difficulty in making a witness order. The indication we gave to the claimant was that she could and should obtain those contact details and renew her application for the witness order and that if she was able to present that to us in writing by today we would consider it further at this hearing and would consider whether to make the witness order. The Tribunal raised the issue with the claimant this morning and it became apparent that matters had not progressed in the intervening period since the last hearing. She was still not able to present us with a proper address for service of witness orders. Consequently, the Tribunal is still unable to take matters further. It is not that we have refused or decided the application for a witness order. Rather, we cannot deal with it in the way that the claimant would wish given that lack of necessary information. This was explained to Ms Bovell at the hearing and she appeared to accept and understand the reason why we cannot take that matter any further. Equally, we have indicated that this really was the last opportunity for her to make those applications given that any witness order needs to be issued and served in sufficient time for the resumed hearing in November. Today's hearing is the last occasion on which all the parties and the Tribunal will be convened together to consider any applications prior to the November hearing dates.

10. The Tribunal also dealt with the documentation issue that the claimant raised. After some discussion it appeared that further copies of pages 183(a) and (b) had been presented to the claimant this morning. She now

has them. This was accompanied by an explanation, the gist of which was to try to explain/understand why or how they had been omitted from the bundle in the first place. The suggestion was that the poor quality/cheap paper used by the respondent in its photocopying of the bundles may well have resulted in pages not going through the photocopier properly or being 'chewed up' by the photocopier. In any event, the claimant was asked to confirm whether she was aware of any further specific documents which were missing from her bundle. She could not do so. She was asked to confirm whether she had gone through the index to her copy of the bundle to verify whether all the relevant pages were in fact in that bundle. We made reference to the fact that certain pages had obviously been inserted at a later stage hence they were numbered with lower case letters: (a), (b), (c), (d), (e) etc. They would be, it seems to us, the most likely candidates for 'missing pages' given that they were not in the initial pagination. She has not carried out that exercise and a brief examination of the Tribunal's copy of the bundle indicates that those pages are present and correct. It appears that it was only pages 183(a) and (b) which were initially missing from everybody's copy of the bundle.

11. The claimant is asking us to draw an adverse inference from that experience and to conclude that the respondent is improperly withholding documentation from the bundle in some way. Drawing all the threads of that argument together I should also say that the claimant makes reference in her document to proceedings before the EAT decision in this litigation. She draws a comparison between the treatment of the claimant and the treatment of the respondent. The claimant asserts that in the past history of this litigation she had her claims struck out for failing to provide medical evidence as to why she had not attended the Tribunal and indeed, that medical evidence that she provided was ignored. As a result she felt that it was unfair to let the respondent 'get away with' failing to provide the medical evidence to back up the request for a CVP link and a hybrid hearing. She pointed to the difference in treatment and indicated that that was discriminatory and rendered continued proceedings here unfair.

12. She also referred to the previous decisions about disclosure made by my judicial colleagues prior to this point in the litigation. However, I did indicate to her (as I think I did on the last occasion), that those decisions have 'been and gone.' They are not generally to be reopened unless there is an application for a reconsideration of said decision by the claimant. In those circumstances it would be the original decisionmaker who would carry out the reconsideration, not this Tribunal. The claimant has made no such reconsideration application. Nor is there any appeal against those decisions. Nor can it be said that there has been a material change in circumstances such that the decisions should be taken again based on the circumstances as they now stand. I have been told of no further developments which make it fair and just (and not an abuse of process) to reopen a decision that was previously made by a colleague judge. None of these circumstances mean that we could or should reopen those previous decisions, albeit that I take on board the complex and convoluted procedural history of these proceedings prior to this Tribunal panel becoming involved in them.

13. So, as I say, drawing all of that together, we have to consider whether or not any of the grounds for a strike out in Rule 37 of the Employment Tribunal

Rules of Procedure are made out in this case. Are there grounds to strike out within the rules and, if so, should we exercise our discretion to strike out the defence in this case at this stage?

14. None of the points made by the claimant in her application go to the substantive merits of the defence to the claim. Rule 37(1)(a) does not arise for consideration.

15. Rule 37(1)(b) requires us to consider whether the manner in which the respondent (or its representative) has conducted proceedings has been scandalous, unreasonable or vexatious. We do not accept that this limb of the test is made out. In broad terms we do not accept that there is evidence of scandalous, unreasonable or vexatious behaviour on the part of the respondent in the ways outlined by the claimant. We have heard the explanations, we have just recited them for the record and we are satisfied that unreasonable, vexatious behaviour has not been established. Even if such behaviour had been established it would not automatically be the case that a strike out would follow. The discretion needs to be exercised in proper manner. The decision has to be proportionate and we need to give full consideration as to whether a fair trial is still possible even following unreasonable behaviour. For a tribunal to strike out for unreasonable conduct we must be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible. In any event the striking out must be a proportionate response. We are not satisfied that this test is met.

16. To the extent that the medical evidence to demonstrate the need for witness evidence by CVP has not been provided, there had been a failure to comply with a Tribunal's order (rule 37(1)(c)). However, it does not automatically follow that the correct remedy is to strike out the response. We must consider the provisions of the overriding objective in rule 2. We need to consider the magnitude of the non-compliance, whether it was the fault of the party or of its representative, what disruption, unfairness or prejudice has been caused, whether a fair hearing would still be possible and whether some lesser remedy would be an appropriate response to the non-compliance. The Tribunal's response to the breach must be proportionate and fair in all the circumstances. It must give due considerations to the reasons for the breach. We must consider whether a fair trial is still possible. Given our comments above, we still consider that a fair trial is possible in this case. Striking out the response to the claimant would not be an appropriate approach or solution. Strike out would be wholly disproportionate. The Tribunal has to ensure a fair hearing. Discounting the evidence of a significant key witness for various procedural reasons is not a way to ensure a fair hearing. Nor is preventing the respondent from properly pursuing its defence to the claim. We need to ensure that there is a fair hearing and that we hear all the relevant evidence from all of the relevant witnesses and that both sides have a fair opportunity to cross examine the witness and to put their case. That can be done via CVP where necessary for a particular witness. We can hear submissions about the quality of the evidence and any inferences that we should draw at the conclusion of the hearing. It is not a good reason to strike out the defence part way through a trial. A less draconian approach can and should be taken in the circumstances.

17. Furthermore, Ms Gee points out that she did make efforts to get the medical evidence and it is not in her gift to force the GP to comply with her requests. It would therefore be disproportionate to disable the respondent from defending the claim for reasons which are not wholly within its own control or within the control of its witness.

18. Furthermore, the claimant is concerned about the fact that she has had to attend in person and give evidence in person and one of the witnesses has not. However, we reminded her that that is at least partially because of the concerns and the difficulties experienced by a previously constituted Tribunal back in November 2021 in which I was the judge. The case was due to be heard by CVP. I made case management orders and drafted a hearing summary in relation to the November 2021 hearing indicating the technical difficulties that were encountered. In summary, we attempted to start the CVP hearing but the claimant could not establish a reliable connection to the internet and to the hearing. It was therefore necessary for her to attend in person to be able to be heard, seen and to be able to make representations and give evidence. That was necessary in order to facilitate a fair hearing for the claimant. We have not had the same concerns or difficulties with Sarah Gee's CVP evidence. The Tribunal can give due consideration to the fact that her evidence is given remotely when considering the strengths and weaknesses of the evidence. The proportionate way to deal with this is (as it was on the last occasion) to ensure that there are good grounds for Sarah Gee's failure to attend in person. We requested that medical evidence and it has not been provided. To that extent the claimant does have a legitimate complaint but the proportionate way to meet that complaint is to make a further order regarding the medical evidence rather than to strike out the whole of the response. We have issued that order in a separate document and therefore do not repeat the contents of that order within these reasons.

19. In light of our comments above, we do not need to address rule 37(1)(e) further. Nor does rule 37(1)(d) arise for consideration in the circumstances of this litigation (whether the response has been actively pursued.)

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Employment Judge Eeley

Date: 20 October 2022.

Reasons sent to the parties on:

21 October 2022

For the Tribunal Office