



EMPLOYMENT TRIBUNALS

Claimant: Ms C Israel

Respondent: Capita Customer Management Limited

AT A HEARING

Heard at: Leeds **On:** 21st, 22nd, 23rd and 24th November 2022

Before: Employment Judge Lancaster
Members: BR Hodgkinson
GM Fleming

Representation

For the claimant: In person (attending via CVP - Cloud Video Platform)
For the respondent: Mr A Johnston, counsel

JUDGMENT dated 24th November 2022 having been sent to the parties and the Claimant's email timed at 12.54 pm on 24th November 2022 having been treated as a request for written reasons in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided as a record of the oral decision already given.

REASONS

The Application

1. The Respondent has applied for a strike out of the claim under rule 37 (1) (b) of the Employment Tribunals Rules of Procedure 2013, on the grounds that the manner in which the proceedings have been conducted on behalf of the Claimant has been vexatious or unreasonable, or under (e) that it is no longer possible to have a fair hearing.
2. This basis of the application was first indicated in summary form at about 12 o'clock on day 3, Wednesday 23rd November 2022. Mr Johnston made it clear that if the Claimant changed her position with regard to being cross-examined on the bundle of documents, he would withdraw the application. The case was then adjourned for

Case: 1800771/2021

reflection on both sides, and resumed at 12.40 pm when the application was again made by way of reasoned oral submissions. The case was then further adjourned from 12.50 pm to 2.20pm, to include lunchtime, after which the Claimant's submissions in response were heard. In addition the Claimant relies upon an email to the tribunal timed at 12.35 pm in which she asserts that the continuation of the hearing is an abuse of process, and repeats her claim of a lack of judicial impartiality. The Tribunal then began considering its decision at 2.40pm, calling the Parties back at 3.40 pm to deal with additional questions, and then reserving judgment overnight for further deliberations.

The facts

3. The Claimant's evidence had commenced at 10.30 am on the morning of Day 3.
4. Initially she answered some questions in cross-examination about pre-employment checks in which she was taken to relevant documents within the hearing file. However, following a short adjournment at about 11.35am, when she began to be questioned on the outcome letter in respect of her first grievance, she refused to read the document. She stated that she would not be "ordered" by Mr Johnston to refer to a bundle which was incomplete.
5. The Claimant has confirmed that she will not now engage with the consideration of any documents within the tribunal process so long as the bundle is that which has been prepared by the Respondent. In response to specific questions from the Tribunal in the course of its deliberations, she stated that not only would she continue to refuse to look at documents in the bundle, but that she would also not answer questions based upon extracts from such documents if they were read out to her. This refusal to engage with documents in the bundle was confirmed to extend not only to further questions in cross-examination, but also to any questions which the Tribunal panel may have in due course.

The background

6. It is worth our reciting briefly the chronology of the issues concerning preparation of the bundle, and which has led to the Claimant taking her present stance.
7. Following two preliminary hearings on 29th June 2021 and on 22nd September 2021, where the potential issues in the claim had been clarified, the case was set down for a public preliminary hearing on 31st January 2022 to consider the extent to which leave to amend was needed, whether such leave should be granted and whether any part of the claim should be struck out as having no reasonable prospect of success.
8. Prior to that public preliminary hearing Case Management Orders (CMOs) had been made by Employment Judge Morgan KC, which included a direction that the Respondent should be responsible for preparing the bundle of documents for that preliminary hearing.
9. On 18th January 2022 the Claimant wrote to the Respondent, copying in the Tribunal, complaining that the preliminary hearing bundles were "subjective and selective – incomplete and confusing to portray me the Victim wrongly. Totally unethical". In her subsequent skeleton argument for the preliminary hearing,

Case: 1800771/2021

dated 29th January 2022, the Claimant referred to this letter of 18th January as if it were a strike out application. In fact Employment Judge Davies had addressed this correspondence on 20th January 2022, and expressly told the Claimant that this was a copy of correspondence with the Respondent, that it did not contain any application to the Tribunal, and that accordingly no action would be taken.

10. In any event, the preliminary hearing was able to go ahead and any previous dispute about documentation was no longer relevant.
11. Employment Judge Jones, who conducted the preliminary hearing by CVP on 31st January 2022, then reserved his decision both on any substantive judgment and in respect of further CMOs. He did not then, in fact, conclude his decision making until 23rd February 2022 and the Judgment and the Case Management Order were both sent out on or shortly after 4th March 2022.
12. In the meantime the Claimant had submitted further documents to the Tribunal and to the Respondent, for the attention of Employment Judge Jones. These were necessarily, however, relevant still only to the preliminary issues and not to the issues for final hearing. That is because until Employment Judge Jones had handed down his decisions, the extent of the claims and issues that were actually to go forward to a final hearing had not yet been ascertained.
13. In the event a substantial portion of the potential complaints were either disallowed or struck out, including the entirety of the claim against the then Second Respondent DWP. Both the case management decisions and the Judgment of Employment Judge Jones are subject to a pending appeal to the Employment Appeal Tribunal (EAT), where there has still as yet been no decision on the merits of the Claimant's application .
14. In accordance with Employment Judge Jones' directions the Respondent on 9th March 2022 produced a list of the remaining issues. Those are still the only issues that would have fallen to be determined at this hearing.
15. In respect of the claims and issues that were proceeding, the case management order was that the parties send each other a list of relevant documents by 14th April 2022, that copies should then be requested by 21st April and sent by 28th April 2022. The Respondent was then tasked with preparing a file of those documents by 6th May 2022.
16. On 22nd March 2022, Employment Judge Maidment, whilst extending the time for the submission of the Claimant's Schedule of Loss, had reminded her that regardless of any appeal she must continue to comply with the directions in the claims which were going forward to a final hearing. On 6th April 2022 the Respondent's application to postpone the hearing listed for July 2022 was granted, and the new notice of hearing for 21st November 2022 was subsequently sent on 29th April 2022. The case management timetable was, however, not varied.
17. The Respondent sent the Claimant a list of its relevant documents on the due date, 14th April 2022. She did not send the Respondent her list. Instead, she drafted a document, also on 14th April 2022, listing a number of applications, including one for a strike out for "repeated failures to follow Case Management Orders by respondents".

Case: 1800771/2021

This appears to be on the basis that the Claimant objected to the list that the Respondent had supplied in compliance with the Order for disclosure of documents, because it did not also include some, unidentified, documents which she had submitted at the preliminary hearing stage.

18. This application was not , however, sent to the Leeds Employment Tribunal, even if that was the Claimant's intention, but only to the EAT.
19. From 14th April 2022 onwards the parties engaged in private correspondence regarding disclosure. This led to the Respondent, on 9th May 2022 applying for an Unless Order or for a strike out of the claim on the basis that the Claimant had not complied with the directions regarding disclosure. The inter-party email correspondence was then attached to that application. It is clear reading those documents that the tone of the Respondent' solicitor, Mr Heyes, was moderate and reasonable throughout. In contrast the attitude of the Claimant was uncooperative and her language intemperate.
20. Notwithstanding that she correctly identified the apparent failure on the part of the Claimant to meet her obligations under the orders, Employment Judge Cox, on 18th May 2022, refused that application by the Respondent. She also observed that if the Claimant still did not supply her own list of other documents the Respondent could complete the bundles based upon their own disclosure only.
21. Also on 18th May 2022 the Claimant sent to the Leeds Employment Tribunal a copy of her 14th April submission to the EAT, wanting to know why it had not been responded to.
22. Employment Judge Maidment dealt with that on 24th May 2022, when he informed the Claimant that no strike out application had in fact been made to the Leeds Employment Tribunal , and that he could not comment on her correspondence with the EAT
23. The Claimant replied on 24th May 2022, inaccurately asserting that she had had applied for a strike out every time that the Respondent failed to produce a fair, objective and complete bundle, and questioning why the Tribunal had not responded to these purported strike out applications.
24. She also in that email did, however make a separate, albeit misconceived, application for a strike out on wholly unconnected grounds. I refused that strike out application on 9th June 2022. At the same time I specifically reiterated Judge Maidment's observation that there had never in fact been any application actually addressed to the Tribunal for a strike out in relation to alleged non-compliance with CMOs. I also expressly stated in that letter that if any dispute remained unresolved as between the parties in respect of either non-inclusion of documents in the bundle, or non-disclosure of specific documents, an application would need to be made to the Tribunal in order for the issue to be determined.
25. The Claimant wrote again to the tribunal on 9th June 2022 specifically applying for interim relief, preparation time orders and witness orders, and asking for an extension of time in which to submit her witness statement. She also again asserted that she had already submitted applications for strike out for non-

Case: 1800771/2021

compliance with CMOs. Employment Judge Cox, on 10th June 2022, granted the extension of time but refused the applications for interim relief or witness orders. The costs application was not specifically addressed but was in any event clearly premature. Judge Cox also treated the reference to a strike out as if it were in fact an application, and stated that it was refused as she was not satisfied that there were grounds for making such an order.

26. Since my directions on 9th June 2022 the Claimant has never supplied to the Tribunal any list of specific documents which she says ought to be added to the hearing bundle. She has not even identified any categories of documents which she claims have been omitted. She has not applied for any orders in respect of any contentious further inclusion of her supplied documents.
27. At the telephone preliminary hearing before myself on 18th October 2022 the Claimant applied for specific disclosure of one item, which I refused with written reasons given. No application was made in respect of any additions to the bundle. It was, in fact expressly noted that the bundles had been produced solely by the Respondent, following Judge Cox's observation so 18th May, and that these would, therefore, be the files that were used at the final hearing. What is in those bundles is, of course, material and admissible evidence in the case, and is cross-referenced within the Respondent's witnesses' statements. It still remained open for the Claimant to produce any additional relevant documents and apply for them too to be admitted. She has not done this.
28. On 15th November 2022, 6 days before the hearing was due to start the Claimant applied for a strike out, in part on the basis of alleged continued failure to comply with CMOs so resulting – as she expressed it - in wrong, inaccurate and incomplete information being put before the Employment Tribunal.
29. That application was dealt with on the first day of the hearing, and was unanimously dismissed. The Claimant clearly does not accept that decision and has repeatedly attempted to renew her arguments.
30. At the end of Day 1 the Claimant applied that I recuse myself, and that application was dealt with and refused on Day 2. Because that recusal application was based in large part upon the conduct of the strike out application on Day 1, the Claimant was given a further opportunity to identify any occasion when she had in fact made a specific and relevant strike out application directly to the Tribunal in connection with the bundles in respect of final hearing issues, no such application being evident on the tribunal file. She was unable to do so. Therefore, I also concluded that there were no grounds upon which we should review or reconsider our decision to refuse the strike out application. The lay members of the Tribunal have confirmed in the hearing that they also agree with that assessment.
31. Although the Claimant has firmly persuaded herself that her position as to the inadequacy of the bundles is right, against that chronology it is not an objectively reasonable stance.

Conclusion

32. The unreasonable conduct of proceedings, we do not need to go so far as to say it is vexatious although it is in part an attempt to undermine the decision to refuse a strike-out, lies however not so much in the unreasonableness of the Claimant's previous stance on the bundles, as in the way that has now manifested itself in the conduct of the hearing.
33. A fair hearing requires consideration of fairness to both sides. By refusing to engage with any questioning on the contemporaneous documents the Claimant is denying the Respondent the proper opportunity to put its case to her and to challenge her evidence. That is manifestly unfair to the Respondent. It is not simply a case of the Claimant subjecting herself to a disadvantage by declining to address relevant evidential issues, it also has an adverse effect upon the way the Respondent's case can be presented. The Tribunal itself is also prevented from carrying out a proper evaluation of the whole of the evidence in the case.
34. Even where we have identified clearly unreasonable conduct, we must, applying the principles in Blockbuster v James [2006] IRLR 630, consider whether a strike-out, which is a draconian course of action, is proportionate. We unfortunately have to conclude, in the light of her expressly stated unwillingness to cooperate with any possible alternative suggestions, that there is no way of mitigating the Claimant's intransigent stance so that a hearing might nonetheless continue. We consider that in these circumstances it is simply no longer possible to have a fair hearing.
35. We have also considered a possible adjournment. However, this tribunal is ready and able to hear the case, an adjournment is not appropriate and would not alter the position

EMPLOYMENT JU DGE LANCASTER

DATE 7th December 2022