# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs L McManamin

**Respondent:** 1. Impact Education Multi Academy Trust
2. Phillip Hannah
3. Rachel Adams

**HELD AT:** Leeds **ON:** 29 November 2022

**BEFORE:** Employment Judge D N Jones

**REPRESENTATION:**

**Claimant:** Ms A Hart, counsel
**Respondent:** Mr D Flood, counsel

**JUDGMENT** having been sent to the parties on 30 November 2022 and written reasons having been requested by the respondents dated 14 December 2022 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

1. This is an application to strike out the claims. Strike-out of a claim or part of a claim are governed by Rule 37 and the ground upon which it is advanced that this is a case which should be struck out is that the manner in which the proceedings have been conducted by or on behalf of the claimant has been unreasonable, and that the claimant has not complied with orders of the Tribunal. The guiding principle is set out in the case of **Weir Valves v Armitage [2004] ICR 371** in which His Honour Judge Richardson said "The guiding consideration is the overriding objective. This requires justice to be done between the parties. The court should consider all the

circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and still whether a fair hearing is still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience."

2. The history of this case insofar as it is relevant to that issue is as follows. The claim was issued on 24 December 2021. The respondent applied for those claims which pre-dated 7 June 2021 to be struck out on 21 February 2022. On 2 March 2022 the claimant's current representative took over the conduct of the file. There had been three other representatives prior to that time. She is represented by her union who have in-house solicitors.

3. On 9 March 2022 the case was listed for a preliminary hearing on 28 June to consider the respondents' applications. The claimant failed to provide written representations and a witness statement in accordance with the notice of hearing seven days before the hearing but these were produced only the night before and the skeleton argument prepared by counsel first notified the respondent that it was alleging a reason for the delay was because of incorrect legal advice on the morning of the hearing on 28 June. Employment Judge Lancaster did not strike out the case but made orders that a succinct List of Issues and Schedule of Loss should be served and filed by 26 July 2022. He remarked upon the lengthy nature of the claim and the need for it to be clarified. No such clarification was given in the List of Issues by the due date and on 27 July 2022 the respondents' representative wrote requesting the List of Issues. It received no response. On 1 August 2022 the respondents' representative again sought clarification to which it received no response. On 8 August 2022 the respondent applied for a strike-out of the claim or an unless order and on 11 August 2022 the respondent again wrote requesting for a response.

4. The first time the claimant responded to say that the claimant was on holiday and hoped to provide information the following week, Employment Judge Brain having ordered her comments by 18 August 2022. On 19 August 2022 the respondent notified the Tribunal that there had still not been compliance with the order and the claimant requested an extension to 2 September 2022 which was granted in respect of providing the List of Issues and Schedule of Loss. Even that order was not complied with. By 12 September 2022 the claimant was provided with a strike-out warning to explain why the claim should not be struck out, to reply by 19 September 2022. On that date the claimant responded by her representative to state that the representative had been busy and it would be disproportionate to strike out and requested a further extension until 26 September. Further and Better Particulars were provided on 23 September 2022. That was not a List of Issues. On 26 September a further Amended Particulars was provided but still not a List of Issues. On 27 September the respondent notified the Tribunal there was a continuing breach. On 28 and 29 of September a Statement of Expectations and Schedule of Loss was submitted. On 3 August the respondent e-mailed the claimant a request that she comply with the order and supply a List of Issues. There was no response. On 18 November, eight working days before the preliminary hearing, a List of Issues was provided. That was the third iteration, the earlier two being further particulars.

5. That is the history of the non-compliance. It is self-evident that it is a failure to comply with many orders of the Tribunal. It is, in my judgment, unreasonable conduct of the proceedings. Having read the statements of the claimant and her representative, Ms Macey, I am satisfied that that is attributable to the acts of the representative and not the claimant, a matter to which His Honour Judge Richardson indicated, in **Weir Valves v Armitage,** I should identifiy.

6. I have considered whether this serious failure to comply with orders was deliberate or inadvertent. As I indicated to Ms Hart in submissions, there comes a point at which one has to question the assertion of a representative that they are simply too busy to the point at which what might have been inadvertence tips into wilful disregard or at least reckless disregard. I have limited information at this time on which to draw such an inference.

7. I have considered the statement of Ms Macey. The Union has been significantly understaffed. She has been coping with a workload outside her region in the form of the claimant's case. I am prepared to accept that the workload has contributed to these unacceptable defaults of the Tribunal's process. That of course is no assistance to the respondents, and particularly their representative, to whom I express my sympathy, who has diligently written to the representative of the claimant attempting to achieve compliance so that her client can proceed with the defence to the claim. I find no criticism can properly be made of the representative of the respondent and any suggestion in the statement of Ms Macey to that effect is rejected.

8. So, I am satisfied in respect of the magnitude of the default that it is significant but not wilful. The effect of it is that there has been a four month delay in a case which involves allegations going back two years. If the claimant was bringing claims which simply pre-dated the claim form by three months that would obviously not be as significant in terms of the impact on the case as one which spans back two years. I have that in mind as well. I am satisfied the default has caused some disruption in that only now will the case be able to be addressed and responded to instead of four months earlier. That is a hardship for the respondent.

9. In summary the threshold to strike out the claim is established because of unreasonable conduct on the part of the representative of the claimant and unacceptable failure to comply with Tribunal orders.

10. I then have to consider proportionality. In **Blockbuster Entertainment v James [2006] IRLR 630,** the Court of Appeal reminds tribunals that will include asking whether a lesser measure to address the default would be appropriate, particularly focussing on whether a fair trial is still possible in spite of the default and whether striking out the claim is disproportionate. As Lord Justice Sedgley remarked, the first object of any system of justice is to get triable cases tried.

11. I reach the conclusion that it has not yet reached the stage where I can say that a fair trial is not possible. Perhaps fortuitously for the claimant, this case is heard in a region in which the case at a final hearing can be heard within months not years and so that four-month delay may not be as disadvantageous as it might otherwise have been because the longer a case awaits a hearing the greater is the prejudice to the parties, all the parties, because of the effect of delay on the memories of the witnesses and the possible loss of witnesses themselves. I recognise in that respect that, as His

Honour Judge Tayler indicated in **Cox v Adecco [2021] UKEAT 0039/19/01**, that although it is open to a party to say that there is a general effect on delay a party relying upon that is better placed to identify the particular issues which are affected by the delay or any witnesses who may no longer be available. The respondents assert that some witnesses will have left although I have no further particularisation of that.

12. Of course if there were to be further default, I cannot bind another judge, but I imagine the Tribunal would take that very seriously in the light of what I have already said. The reassurance that a lesser remedy may be appropriate in respect of further disobedience begins to wane. I anticipate that an unless order would be quite likely if any order is now not complied with.

13. Bearing in mind all of those factors, on the issue of proportionality I have reached the conclusion that a fair trial is still possible with tight case management. I do not consider it would be proportionate to mark the disobedience by striking out the claim, although I leave open the issue as to whether or not any application may arise from that. I do not deal with an application of a consequential cost to the respondent of these delays because I am not seised with sufficient information, but I do make that point that it is for the parties to consider their positions in the light of my current findings.

Employment Judge D N Jones

Date 16 January 2023

REASONS SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE