EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms A. Stretch	**V**	**Sparring Partners t/a Gym Box**

Heard at: London Central (by video) **On**: 24 November 2021

Before: Employment Judge P Klimov (sitting alone)

Representation

For the Claimant: Ms J. Warren (non-practising barrister)

For both Respondent: Mr Z. Malik (solicitor)

JUDGMENT having been sent to the parties on 26 November 2021 and written reasons having been requested by the claimant on 8 December 2021, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Issues

1. By a claim form dated 28 February 2020 the claimant has brought complaints of direct race discrimination, harassment on the grounds of race and victimisation. The respondent resists all the claims.

2. When accepting the claimant's claim, the tribunal issues the standard directions/orders, which were sent to the parties together with the ET2 form.

3. On 29 June 2020 there was a case management preliminary hearing, at which EJ Khan made various case management orders and listed the case for a final hearing over 5 days on 10 – 16 November 2020.

4. Pursuant to EJ Khan's orders the claimant was required, *inter alia*, to send to the respondent:

    a. by 6 July 2020 further particulars in relation to her allegations, as it was set out in the Orders, and

b. by 8 July 2020 copies of her documents, and a list of documents from the respondent's list of documents she wished to be included in the trial bundle.

5. The parties were ordered to exchange witness statements by 4 September 2020.

6. On 7 July 2020 the claimant sent to the respondent her list of documents, schedule of loss and further and better particulars. The respondent took the view that the claimant's further and better particulars did not provide adequate information about the allegations, pursuant to the orders made by EJ Khan.

7. There were then various email exchanges between the claimant's and the respondent's representatives, in which the respondent's representatives argued that the claimant's list of documents contained many, if not all, of the documents, which were already on the respondent's list, when the claimant was ordered to provide copies of her documents, which were not on the respondent's list.

8. The claimant's representative argued that the redacted copies of some of the respondent's documents should be disclosed unredacted and sought disclosure of further documents.

9. This led to a delay in the preparation of the trial bundle. The claimant finally submitted her documents on 23 September 2020, together with a request for specific disclosure.

10. In response to the claimant's request, the respondent's representatives pointed out that many documents sought by a way of specific disclosures had already been disclosed to the claimant.

11. There were further email exchanges about the relevance of the documents requested by the claimant. On 25 September 2020 the respondent's representatives sent to the claimant's representative a link to an updated bundle of documents.

12. The exchanges concerning the adequacy of the claimant's further and better particulars and the completeness of the disclosure provided by the respondent continued through October 2020, including the claimant making an application to the tribunal for an order for specific disclosure, which the respondent resisted. It appears the claimant's application has not been dealt with.

13. On 3 November 2020 the respondent sent the claimant a link to an updated trial bundle and sought the claimant's confirmation that she was ready to exchange witness statements. The claimant's representative did not reply.

14. On 4 November 2020 the respondent made an application for a witness order and an application to postpone the final hearing because one of its key witnesses was thought to be abroad. The claimant resisted the postponement application. She, however, did not confirm that she was ready to exchange witness statements. REJ Wade granted the respondent's application for a witness order, but left the final hearing as listed, to start on 10 November 2020.

15. On 5 November 2020, in the afternoon, the respondent's representatives again sought the claimant's confirmation that she was ready to exchange witness

statements. The claimant's representative replied saying that she was not ready because she needed to check the claimant's witness statements against the final bundle. She said that she would be ready to exchange in the morning. She did not write to the respondent's representatives the following morning.

16. On Friday, 6 November 2020 at 11:41am, the respondent's representatives applied to the tribunal for an unless order, seeking the claimant's claim to be struck out unless she exchanged witness statements by 3pm on the same day, 6 November 2020.

17. REJ Wade refused the application. However, she ordered that the final hearing be postponed because it was "*already too late for the respondent to prepare for the hearing without the claimant's witness statements*". Instead, REJ Wade ordered an open preliminary hearing to determine whether the claimant's claim should be struck out because of her conduct and breach of the case management orders. The order was emailed to the parties on 6 November 2020 at 15:22.

18. On 6 November 2020 at 15:21 the claimant's representative emailed the claimant's witness statements to the respondent's representatives, apologising for the delay, which she said was caused by a recent bereavement.

19. This open preliminary hearing was to decide whether the claimant's claim should be struck out. The respondent also made a costs order application under Rule 76 and Rule 80 of the ET Rules. Both matters were considered and decided upon at the hearing.

20. For this open preliminary hearing the respondent submitted a skeleton argument by Mr Malik and a bundle of 99 pages. The claimant submitted her bundle of 49 pages. Ms Warren appeared for the claimant and Mr Malik - for the respondent. No witnesses were called by either party. However, I was referred to various documents in the bundles during the parties' submissions and arguments.

The Law

Striking out Claim

21. Rule 37 of the Employment Tribunals Rules of Procedure 2013 ("ET Rules) provides:

> *(1) 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 part of a claim or response on any of the following grounds—*
>
> *(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;*
>
> *(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 to be struck out).*

22. For a tribunal to strike out for unreasonable conduct, it must be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible; and in either case, the striking out must be a proportionate response (see *Blockbuster Entertainment Ltd v James 2006 IRLR 630, CA*).

23. In *Bolch v Chipman 2004 IRLR 140, EAT*, the EAT set out the steps that a tribunal must ordinarily take when determining whether to make a strike-out order:

    - before making a striking-out order, an employment judge must find that a party or his or her representative has behaved scandalously, unreasonably or vexatiously when conducting the proceedings
    - once such a finding has been made, the just must consider, in accordance with, whether a fair trial is still possible, as, save in exceptional circumstances, a striking-out order is not regarded simply as a punishment. If a fair trial is still possible, the case should be permitted to proceed.
    - even if a fair trial is unachievable, the tribunal will need to consider the appropriate remedy in the circumstances. It may be appropriate to impose a lesser penalty, for example, by making a costs or preparation order against the party concerned rather than striking out his or her claim or response.

24. In *Emuemukoro v Croma Vigilant (Scotland) Ltd and ors EAT 0014/20* the EAT held that where a party's unreasonable conduct had resulted in a fair trial not being possible within that window, the power to strike-out was triggered. Whether the power should be exercised would depend on whether it was proportionate to do so. The proposition that the power could only be triggered where a fair trial was rendered impossible in an absolute sense would not take account of all the factors relevant to a fair trial.

25. In deciding whether to strike out a party's case for non-compliance with an order under Rule 37(1)(c), a tribunal will have regard to the overriding objective set out in Rule 2 of the ET Rules of seeking to deal with cases fairly and justly. This requires a tribunal to consider all relevant factors, including:

    - the magnitude of the non-compliance
    - whether the default was the responsibility of the party or his or her representative
    - what disruption, unfairness or prejudice has been caused
    - whether a fair hearing would still be possible, and
    - whether striking out or some lesser remedy would be an appropriate response to the disobedience — (see *Weir Valves and Controls (UK) Ltd v Armitage 2004 ICR 371, EAT*).

26. Whenever a tribunal is considering a strike-out on the ground of non-compliance with prior orders pursuant to rule 37(1)(c), it must consider whether such an order is a proportionate response to the noncompliance.

A Costs Order

27. Rule 76 of ET Rules provides:

76 (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

28. The following key propositions relevant to costs orders may be derived from the case law:

29. There is a two-stage exercise to making a costs order. The first question is whether a paying party has acted unreasonably or has in some other way invoked the jurisdiction to make a costs order. The second question is whether the discretion should be exercised to make an order. Only if the tribunal decides to exercise its discretion to make an award of costs the question of the amount to be awarded comes to be considered (Haydar v Pennine Acute NHS Trust UKEAT/0141/17).

30. While the threshold tests for making a costs order are the same whether or not a party is represented, in the application of the tests it is appropriate to take account of whether a litigant is professionally represented or not. Litigants in person should not be judged by the standards of a professional representative (AQ Ltd v Holden [2012] IRLR 648).

31. For term "vexation" shall have the meaning given by by Lord Bingham LCJ in AG v Barker [2000] 1 FLR 759:
"*[T]he hallmark of a vexatious proceeding is … that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be , its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.*" (Scott v Russell 2013 EWCA Civ 1432, CA)

32. 'Unreasonable' has its ordinary English meaning and is not to be interpreted as if it means something similar to 'vexatious' (Dyer v Secretary of State for Employment EAT 183/83).

33. In determining whether to make a costs order for unreasonable conduct, a tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct — (McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA)

34. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant. However, the tribunal must look at the entire matter in all its circumstances. Yerrakalva v Barnley MBC [2012] ICR 420 Mummery LJ gave the following guidance on the correct approach:

"*41. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment Tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances*".

Wasted cost

35. Rule 80 of the ET Rules states:

> *(1)A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs—*
> *(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or*
> *(b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.*
> *Costs so incurred are described as "wasted costs".*
> *(2) "Representative" means a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit.*
> *(3) A wasted costs order may be made in favour of a party whether or not that party is legally represented and may also be made in favour of a representative's own client. A wasted costs order may not be made against a representative where that representative is representing a party in his or her capacity as an employee of that party.*

36. In *Ridehalgh v Horsefield 1994 3 All ER 848, CA* the Court of Appeal examined the meaning of 'improper', 'unreasonable' and 'negligent' — subsequently approved by the House of Lords in *Medcalf v Mardell and ors 2002 3 All ER 721, HL* — as follows:

- 'improper' covers, but is not confined to, conduct that would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty,
- 'unreasonable' describes conduct that is vexatious, designed to harass the other side rather than advance the resolution of the case,
- 'negligent' should be understood in a non-technical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.

37. In *Ratcliffe Duce and Gammer v Binns (t/a Parc Ferme) EAT 0100/08* the EAT observed that the Court of Appeal in *Ridehalgh*, had advocated a three-stage test for courts (and, by extension, employment tribunals) to adopt in respect of wasted costs orders:

    - first, has the legal representative acted improperly, unreasonably, or negligently?
    - secondly, if so, did such conduct cause the applicant to incur unnecessary costs?
    - thirdly, if so, is it in the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

38. The Court of Appeal in *Ridehalgh* emphasised that even where a court — and, by extension, an employment tribunal — is satisfied that the first two stages of the test are satisfied (i.e. conduct and causation) it must nevertheless consider again whether to exercise the discretion to make the order and to what extent. It still has a discretion at stage 3 to dismiss an application for wasted costs where it considers it appropriate to do so.

Submissions and Conclusions

39. In its skeleton and oral submissions and arguments, the respondent submitted that the claimant's claim should struck out because:

    i. The claimant was in default of the standard tribunal orders issued with the ET2 form, and also in breach of the orders made by EJ Khan at the case management hearing on 29 June 2020 .
    ii. The claimant was late by 77 days in disclosing her documents, which delayed the production of the trial bundle.
    iii. The claimant disclosed her documents in a "piecemeal fashion", which caused disruption and unnecessary costs.
    iv. The claimant failed to properly engage with documents and unreasonably repeatedly sought disclosure of documents, which had been disclosed by the respondent.
    v. The claimant delayed the exchange of witness statements, which caused the respondent to apply for an unless order and resulted in the hearing being postponed by the tribunal.
    vi. The claimant failed to provide proper further and better particulars.
    vii. General lack of cooperation by the claimant in breach of the overriding objective under Rule 2 of the ET Rules.

40. The respondent argued that the above was unreasonable conduct by the claimant and/or her representative, Ms J. Warren.

41. Further, the respondent submitted, the claimant was in breach of the tribunal case management orders, and even if the claimant could establish that the breach was not intentional, the delay was excessive and created a situation where the hearing could not proceed within the allocated window.

42. Therefore, due to the claimant's breaches of the case management orders a fair hearing within the allocated window was not possible. In the circumstances, the respondent argued, it would be proportionate to strike out the claimant's claim because a new hearing date was likely to be at least some 18 months after the original date, and such delay would affect reliability and accuracy of witness testimony, thus endangering the fairness of the hearing.

43. Finally, the respondent submitted that the above unreasonable conduct and breaches of the case management orders by the claimant had resulted in wasted costs for the respondent in the amount of £2,397. The respondent applied to the tribunal for a costs order for that amount under Rule 76(1)(a) and 76 (2) against the claimant or under Rule 80 against her representative.

44. With respect to the latter, the respondent argued that the claimant's failures, which were the grounds for the strike out application, also meant that the claimant's representative did not act with the competency reasonably expected of ordinary members of the profession.

45. Ms Warren gave oral submissions to the tribunal, arguing that the tribunal should not strike out the claim or make a costs award because:

    a. Both parties were in breach of the case management orders and there were delays on both sides,
    b. The claimant's breaches were not deliberate,
    c. She had some technical difficulties with sending documents via email,
    d. The respondent did not disclose all the relevant documents, and that caused a delay in finalising the trial bundle.
    e. The bundle prepared by the respondent did not have all the relevant documents, which prompted her to seek an order for specific disclosure, which was a reasonable step to take in the circumstances.
    f. Her father was seriously ill and passed away on 5 October 2020. Her emotional state was such that it was very difficult for her to concentrate on preparing the case for the hearing. She did not write to the tribunal to explain that because at that time it was not something at the forefront of her mind.
    g. She, however, had done her best in the circumstance, and had prepared and sent witness statements on 6 November 2020.
    h. In any event, the hearing could not have gone ahead because of the second lockdown in November 2020.

46. Having considered the parties' submissions and the relevant documents in the bundles, I decided that the manner in which the proceedings had been conducted by the claimant's representative, Ms J Warren, was unreasonable in the following respects:

    a. She was significantly late in disclosing the claimant's documents. The manner, in which the documents had been disclosed to the respondent, was not reasonable and not in accordance with the case management orders. Her explanation that she had technical difficulties with her email, does not explain the delay or the piecemeal fashion in which the documents had been disclosed.

b. She did not engage properly with the documents disclosed by the respondent, repeatedly asking for copies of the documents which had been disclosed. It appears she did not properly review the respondent's bundle before applying to the tribunal for specific disclosure.
c. Her repeated requests for further documents lacked specificity to enable the respondent to properly address those.
d. She delayed the exchange of witness statements and failed to respond in a timely manner to the respondent's emails on the subject. Given the proximity of the start date of the final hearing (just one working day), her failure to exchange documents on the morning of 6 November, as she had promised in her email of 5 November, prompted the respondent to apply for an unless order, which in turn resulted in the hearing being postponed by the tribunal.
e. These failures were also breaches of the case management orders,
f. Her overall conduct of the proceedings was not in accordance to the overriding objective under Rule 2 of the ET Rules.

47. Ms Warren told me that she was a non-practicing barrister. She provides her services under the name of Warren Employment Advice Solutions ("WEAS").

48. Taking into account her personal circumstances, I nevertheless find that her conduct fell below the standard reasonably expected of a member of the barristers' profession, even if not practicing as a barrister. As Ms Warren will be aware, the Bar conduct rules, including requiring her to observe the duty to the court in the administration of justice, and to act in the best interest of her client, still apply to her.

49. If Ms Warren felt that her personal circumstances prevented her from continuing to represent her client with all due attention and diligence required, she should have come off the record. She, however, continued to act for the claimant, but in a way that ultimately forced the respondent to seek an unless order, which unfortunately resulted in the postponement of the hearing.

50. For these reasons, I find that the relevant provisions under the Rules 37(b) and (c), 78(1)(a) and 78(2) and 80(1) were engaged.

51. However, applying the test in *Weir Valves and Controls (UK) Ltd v Armitage,* I find that, in the circumstances, striking out the claimant's claim will be disproportionate and unjust.

52. Although there was a substantial delay by the claimant disclosing her documents, Ms Warren sent the claimant's documents on 23 September. There was still sufficient time before the final hearing to prepare the bundle, and indeed, even with some further wrangling between the parties on its content and the outstanding specific disclosure application by the claimant, the bundle was ready on 3 November.

53. While concluding that Ms Warren should have engaged more diligently in the preparation of the bundle, I find that there was a genuine dispute as to

whether the respondent had disclosed all relevant documents and whether the documents disclosed in a redacted form should have been disclosed unredacted.

54. Finally, although Ms Warren's inertia about the exchange of witness statements, (which I find puzzling given the imminency of the start of the hearing), was the underlying cause of the respondent's seeking an unless order, which in turn resulted in REJ Wade postponing the hearing, Ms Warren did send the claimant's witness statements before (albeit just a minute before) the tribunal order postponing the hearing.

55. I do not accept Ms Warren's submission that the hearing could not have gone ahead because of the second lockdown. Tribunal hearings continued through the second lockdown. In any event, the hearing could have been converted to a video hearing, as indeed Ms Warren asked the tribunal to do on 19 October 2020, to which request the respondent did not raise any objections.

56. However, I find that the magnitude of non-compliance was not such that, absent the tribunal's decision on its own initiative to postpone the hearing, a fair hearing would not have been possible within the allocated window. It appears the respondent's representatives were content to proceed with the hearing, starting on Tuesday, provided they received the claimant's witness statements by 3pm on Friday. They have received the statements at 3.21pm.

57. I also find that the ordered postponement did not create a serious prejudice to the respondent or an undue risk to the fairness of the future hearing. Taking into account the parties' availabilities, it was possible to re-list the hearing for July 2022. It appears all essential preparatory steps have been completed and the case is ready for the hearing. If necessary, the tribunal can re-issue a witness order with respect to the respondent's key witness.

58. I also note that at that time the respondent's representatives did not appear to think that the delay would be prejudicial or make a fair hearing impossible. In fact, on 9 November 2020 they wrote to the tribunal asking to vacate this preliminary hearing.

59. Looking at the entire picture, I find that striking out the claimant's claim will be wholly disproportionate and an unjust punishment to the claimant for failings of her representative. This will not be in the interests of justice.

60. Having found that Ms Warren acted unreasonably within the meaning of Rule 76(1)(a) and was also negligent within the meaning of Rule 80(1)(a), the next step is to consider whether a costs order or a wasted costs order should be made.

61. Considering the nature, gravity and effect of the conduct and looking at the matter in the round, for the reasons I declined to strike out the claimant's claim, I also find that it is not be in the interests of justices to make a costs order under Rule 76(1)(a) or 76 (2) against the claimant.

62. At the end of the hearing, I asked Ms Warren about her financial circumstances. She told me that her monthly income was £300, she had no savings, and no professional negligence insurance. She also told me that she did not have a permanent job and did not get paid for her services.

63. I reviewed items of the wasted costs sought by the respondent. These are: (i) Counsel's fee (£1,020) for the postponed hearing, (ii) costs for preparation and attendance of this Open Preliminary Hearing (£816 and £510 respectively) and (iii) costs (0.5 hour) for time taken to write two emails to Ms Warren on 3 and 5 November regarding exchange of witness statements (£51).

64. I decided not to make a wasted costs award against Ms Warren, largely because, in my view, making such an award would be punishing her for the tribunal's decision to postpone the hearing, taken on its own initiative. Although her negligent (within the meaning of Rule 80) conduct set in motion a chain of events, which ultimately resulted in the postponement, in my judgement, the nexus between the two is not sufficiently strong for me to exercise my discretion and make a wasted costs order against her.

65. This open preliminary hearing was also ordered by the tribunal to decide whether the claimant's claim should be struck out, which the respondent, at least on 9 November 2020, thought was unnecessary. Therefore, the respondent's costs in preparing and attending this hearing is at best consequential to Ms Warren's negligent conduct.

66. With respect to the costs for emailing Ms Warren about the exchange of witness statements, Ms Warren, albeit with some delay, did reply to the respondent's representatives enclosing the claimant's witness statements and apologising for the delay, which she explained by her recent bereavement.

67. Further, between the respondent's original invitation to exchange witness statements made by an email on 3 November and the follow-up email on 5 November, to which she replied sufficiently promptly, there was an application on 4 November by the respondent's representatives to postpone the final hearing because of its key witness's availability, which would have put into question the need to exchange witness statements until the postponement application had been dealt with by the tribunal. In the circumstances, I decided that it would be unjust to order Ms Warren to pay the respondent's costs incurred in writing these two emails.

68. For these reasons I declined to make a costs order under Rule 76 or a wasted costs order under Rule 80.

69. The final hearing has been re-listed for 25-29 July 2022. I trust the parties will now be able to proceed with any remaining preparations for the final hearing in a cooperative manner and in accordance with the overriding objective.

Employment Judge P Klimov
London Central Region

Dated : 24 December 2021

Sent to the parties on:

26/12/2021

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For the Tribunals Office

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