



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs S Buck

v

Plain Jane Limited

OPEN PRELIMINARY HEARING

HELD AT: London Central ON: 11 May 2023

BEFORE: Employment Judge Brown (Sitting alone)

Representation:

For Claimant: Mr B Henry, Counsel

For Respondents: Mr D Charity, Consultant

JUDGMENT

The Judgment of the Tribunal is that:

1. The unless order dated 18 November 2022 and the consequent strike out are set aside.
2. UNLESS the Claimant provides her witness statement to the Respondent, in the form in which it existed on 18 November 2022, either by providing the password to the Respondent, or by sending the text of the witness statement, by 4pm on 12 May 2023, her claim shall be struck out.
3. The claim is listed for a Final Hearing for 5 days, starting on 12 June 2023, before a Full Tribunal, in person.

REASONS

1. This hearing was listed to decide:
 - a. The Claimant's application to set aside a strike out order made by the Tribunal on 21 November 2022 and the Respondent's reply dated 14 December 2022.
2. I read the application and reply and other documents the parties asked me to read from a joint bundle prepared for this hearing.

3. Both parties made submissions.

The Background

4. The relevant background to this hearing included the following.

5. By a claim form presented on 2 April 2020 the Claimant presented complaints against the Respondent of unfair dismissal, pregnancy and maternity discrimination, sex discrimination and holiday pay. The Respondent presented its ET3 response on 4 October 2020.

6. On 21 October that year there was a Case Management Preliminary Hearing. The case was listed for a 5 day final hearing commencing on 19 October 2021. Witness statements were ordered to be exchanged in February 2021.

7. In or around January 2021 the Claimant's former representative, Mr E Buck, of SHR International Group Limited, came on record as the Claimant's representative. Mr Buck is a family friend of the Claimant and was not acting for profit. The Respondent was not aware of this.

8. Witness statements were not exchanged in February 2021. There was a disagreement between the parties about whether the Claimant should provide further particulars of her claim.

9. The Claimant made an application to postpone the final hearing on 7 October 2021, on the grounds of a GP report dated 5 October 2021 saying that the Claimant was not fit to attend the hearing and was without a representative who was sick and had required surgery. The Tribunal granted the postponement and asked the parties to provide their dates of availability for a relisted hearing by 14 October 2021.

10. On 11 and 13 October 2021, the Claimant and Mr E Buck both emailed the Tribunal with her relevant dates.

11. On 29 April 2022 the Tribunal issued the Claimant with a strike out warning, on the basis that her claims were not being actively pursued, because the Claimant had failed to provide her dates of availability.

12. On 5 May 2022, however, the Claimant's representative Mr E Buck objected to the strike out on the basis that the Claimant had complied with the order to provide her dates. As a result, on 9 May 2022, the Tribunal wrote to the parties, apologising to the Claimant and asking the parties for further dates to avoid.

13. Between 10 May and 12 May 2022 the parties exchanged correspondence with the Tribunal, providing further dates of availability and addressing case management. On 11 May 2022 the Claimant's representative asked that the Respondent send a hard copy bundle to him by 20 May 2022 and proposed exchanging witness statements on 27 May 2022.

14. The Respondent replied, saying it had provided an electronic bundle, that the Claimant's representative had not provided an address to which a hard copy should be sent and that the Claimant had agreed, but then failed, to provide further particulars of her claim. The Claimant's representative replied further, asking to agree a date for witness statement exchange.

15. On 11 May 2022 the Tribunal sent the parties a Notice of Hearing for a 5 day final hearing starting on 22 November 2022. The Notice of Hearing was addressed to Mr E Buck.

16. On 15 November 2022 at 10:29 the Tribunal emailed the Claimant, her former representative and the Respondent's representative, saying "Dear parties, Employment Judge Adkin is considering making an UNLESS order. The Claimant may make any representations by 5pm on 16 November 2022. I am requesting that the Claimant personally as well as her representative is copied in, as I am not confident that her representative is receiving or responding to communication about this case".

17. On 16 November 2022 the Claimant wrote to the Tribunal saying, "Further to the email received yesterday regarding this case. May I please urgently request a copy of all recent correspondence that has been sent to myself or my representative? I am not aware if any progression with this case. Has a date been set for the trial? Please advise on the current status."

18. On 18 November 2022, the Tribunal wrote to the parties: at 09:20 saying 'Dear parties, The respondent has made an application for an unless order. The claimant has been given until 5pm on the 16th November 2022 to make any representations. The Tribunal had received none. Please see unless order attached".

19. The enclosed unless order stated: "On the application of the respondent and having considered any representations made by the parties Employment Judge Adkin ORDERS that- Unless by 9.00am on the 21st November 2022 the Claimant has provided to the Respondent and Tribunal by email her witness statement, the claim will stand dismissed without further order. The Judge's reasons for making this Order are the Claimant has failed to exchange witness statement in compliance with a Tribunal order dated 21 October 2020 and failed to respond to reasonable communication from the Respondent in order to facilitate the exchange of witness statement in time for a 10 day hearing listed on 22 November 2022."

20. The Claimant provided her witness statement to the Tribunal and the Respondent at 09.04 on 21 November 2022, but in password protected form.

21. On the same day, at 09.36, the Claimant emailed the Tribunal further, saying that the Unless order had been a surprise and had been the first time she had been told of the Final Hearing date. She said she had complied with the unless order by providing a password protected version of her witness statement, since she had not received a witness statement from the Respondent and no arrangements had been made for exchange. She said that she had been disadvantaged by the way that the case had been managed and that she had not received, either: a notice of hearing from the tribunal; a hard copy of the agreed bundle from the respondent despite

requests; the respondent's witness statement; or, confirmation of the dates and location of the hearing, despite having asked the tribunal for this the previous week.

22. At 12.02 that day the Tribunal wrote to the Claimant saying that Employment Judge Adkin had confirmed that the Claimant's claim had been struck out and the hearing listed to commence on 22 November 2022 had been vacated.

23. The Respondent opposed the Claimant's application to set aside the unless order. It pointed out that Mr Buck, the Claimant representative, had been copied into the Respondent's letter to the Tribunal on 12 May 2022 at 07:21 saying, "Thank you for the Notice of Hearing dated 11th May 2022.." . The Respondent said that it had written to Mr E Buck on 24 October 2022 and 3 November 2022, regarding exchange of witness statements, and had received no response from him. The Respondent said that it would not be in the interests of justice for the strike out to be set aside: the matter had been subject to profound and unreasonable delay due to the Claimant and / or her representative Mr E Buck. By the time the matter would be relisted, more than 4 years would have passed since the beginning of the period covered by the parties' evidence. It said that, if Mr E Buck's organisation, SHR International Group Ltd, did not see fit to keep the Claimant notified of case progression, then it has been negligent in its handling of this matter and was liable to her.

24. At today's hearing, I saw a contemporaneous text exchange between the Claimant and Mr E Buck on 25 October 2022, when Mr Buck told the Claimant that he couldn't find anything relating to dates and said "so maybe we don't have anything yet", to which the Claimant replied, "I don't have anything either" – and asked Mr Buck what was the best way to find out. I saw another contemporaneous text exchange between the Claimant and Mr Buck on 15 November 2022, when she asked him whether he had received any information about the case from the Tribunal, but to which he did not reply.

25. Having heard evidence from the Claimant at today's hearing, I was satisfied that the Claimant was not aware that the hearing had been listed to start on 22 November 2022. I was satisfied that her representative, Mr Buck, had been sent a Notice of Hearing on 11 May 2022 by email from the Tribunal, and had also seen a letter from the Respondent referring to that Notice of Hearing. However, he was at fault in not notifying her of the hearing date.

26. I was also satisfied that the Respondent had written to Mr Buck in October and November 2022, proposing exchange of witness statements, but had not heard anything from him.

27. I accepted the Claimant's evidence that Mr Buck stopped communicating with her from late October 2022. It appeared that EJ Adkin had been concerned, at that time, that Mr Buck was not responding to correspondence, or passing it to the Claimant.

28. The Claimant had not exchanged her witness statement with the Respondent at any time, despite being ordered to do so, initially, by a date in February 2021.

29. When the Claimant did provide her witness statement to the Respondent and the Tribunal, she did so protecting it by password. She told me, and I accepted, that she did so because she believed it was necessary to protect her position when she believed that the Respondent had not provided its witness statement.

30. The statement was provided 4 minutes beyond the deadline, when the Claimant had proposed to exchange her witness statement on 27 May 2023. She accepted in evidence that she had a statement ready for exchange. It ought to have been possible, in my view, for her to provide her statement by the time required in the unless order.

31. I accepted her evidence that, having received the unless order on Friday 18 November 2023 she had tried to seek legal advice regarding the unless order and her duty to exchange witness statements when she had not received a statement from the Respondent and more generally. She was only able to obtain some advice at 08.50 on 21 November, just before the expiry of the time limit on the unless order. She attempted to send the statement on time, but IT issues meant that it was provided slightly beyond the time specified.

32. The Claimant has still not provided her witness statement. The claim was struck out so no further steps have been taken in it. The Claimant told me that she would provide the password to the witness statement today, if the claim was reinstated.

33. I was told that, otherwise, the case is ready for hearing.

Law

34. A party notified by the tribunal of the dismissal of a claim or response for breach of an unless order under *r 38(1) ET Rules of Procedure 2013* may apply under *r 38(2)* to have the order set aside on the grounds that it is in the interests of justice.

35. In *Governing Body of St Albans Girls' School v Neary* [2009] EWCA Civ 1190, [2010] IRLR 124, Smith LJ (with whom Ward and Sedley LJJ agreed) held, at [49]–[52], that a tribunal considering relief from sanctions is not constrained by any particular checklist of factors, but must consider all the factors relevant to the interests of justice and avoid considering irrelevant ones. Nonetheless, Smith LJ said at [60] that, '[i]t is well established that a party guilty of deliberate and persistent failure to comply with a court order should expect no mercy'

36. In *Thind v Salvesen Logistics Ltd* UKEAT/0487/09, [2010] All ER (D) 05 (Sep).., Underhill J stated (at [14]): "The tribunal must decide whether it is right, in the interests of justice and the overriding objective, to grant relief to the party in default notwithstanding the breach of the unless order. That involves a broad assessment of what is in the interests of justice, and the factors which may be material to that assessment will vary considerably according to the circumstances of the case and cannot be neatly categorised. They will generally include, but may not be limited to, the reason for the default, and in particular whether it is deliberate; the seriousness of the default; the prejudice to the other party; and whether a fair trial remains possible. The fact that an unless order has been made, which of course puts the

party in question squarely on notice of the importance of complying with the order and the consequences if he does not do so, will always be an important consideration. Unless orders are an important part of the tribunal's procedural armoury (albeit one not to be used lightly) and they must be taken very seriously; their effectiveness will be undermined if tribunals are too ready to set them aside. But that is nevertheless no more than one consideration. No one factor is necessarily determinative of the course which the tribunal should take. Each case will depend on its own facts.”

Discussion

37. In considering the seriousness of the default in this case, I accepted that the Claimant had not personally known of the date of the hearing, nor of the Respondent's attempts, in October and November 2022, to agree a date for exchange of witness statements.

38. The unless order was made, on 18 November 2022, less than 1 working day before the date for compliance with the unless order, requiring her to provide a witness statement by 9.00 on 21 November 2022.

39. The Claimant did not have representation at the time, because her previous representative had stopped communicating with her. She sought legal advice very promptly, but was only able to obtain any advice about 10 minutes before the deadline for compliance with the order.

40. The Claimant reasonably wanted reassurance about the requirement for her to provide a witness statement, when she believed that the Respondent had not provided its own witness statement.

41. She sent a witness statement, password protected, very shortly after the deadline in the unless order.

42. I considered that the Claimant's default was substantial because she did not, in fact, provide a witness statement given that it was password protected and not readable.

43. However, I considered that she had acted promptly and in good faith and had made an attempt to comply with the order.

44. Her previous representative was not acting for profit and was not a professional representative in the sense that that is normally understood. That was relevant to the seriousness of the default.

45. With regard to the unless order itself, therefore, on all the facts, the Claimant was not seriously at fault in her failure to comply with it.

46. More generally, there had been delays in the conduct of the case, but it appeared that these were not entirely due to the Claimant.

47. There was a year's delay in the claim being listed for hearing initially, no doubt due to the covid pandemic.

48. Some of the correspondence between the Claimant and the Respondent indicated a difficult and somewhat uncooperative approach on both sides.

49. I was not satisfied that this was a case in which the Claimant was guilty of deliberate and persistent failure to comply with a court order. Nor, indeed, was her representative's failure to inform of the Claimant of the hearing date deliberate. It appeared from his text exchange that he genuinely believed he had not been informed of the hearing date.

50. Regarding prejudice to the Respondent, it has now prepared for 2 hearings and has been put to time and expense in doing so. That is a substantial factor weighing against relief from sanction.

51. Furthermore, the case is now very old. There is obvious risk to a fair hearing by the effect of delay on memories.

52. Unless orders should not be set aside lightly.

53. However, the case is ready and can be listed for hearing.

54. I have not been told that there is any specific prejudice to the Respondent in defending the claim. The Respondent was aware of the claim at an early stage, soon after the events in question. It prepared its statements some time ago.

55. It appears to me that a fair hearing is still possible.

56. The lists are such that the claim can be listed for hearing on any date from 22 May to end of July 2023.

57. I take into account that the sanction of strike out is draconian and denies the Claimant a hearing on the merits.

58. On all the facts, given that a fair hearing is still possible, that the claim is ready for trial and the Claimant was not guilty of repeated nor deliberate default in respect of orders, I conclude that it is in the interests of justice to set aside the unless order.

59. However, to protect the Respondent from further delay, I order that, unless the Claimant provides her witness statement to the Respondent, in the form in which it existed on 18 November 2022, either by providing the password to the Respondent, or by sending the text of the witness statement, **by 4pm on 12 May 2023**, her claim will again be struck out.

60. Having given judgment, the parties agreed that the claim could be listed for hearing for 5 days from 12 June 2023.

Employment Judge Brown

Dated:11 May 2023.....

Judgment and Reasons sent to the parties on:

.11/05/2023

For the Tribunal Office