



EMPLOYMENT TRIBUNALS

Claimant:
Ms I Sihra

v

Respondent:
Sera Neon Ltd

Heard at: London (Central) (via CVP)

On: 4 May 2023

Before: Employment Judge Fredericks-Bowyer

Appearances

For the claimant: In Person
For the respondent: Mr J Waters (Solicitor)

JUDGMENT

The claimant's claim for wages in the form of commission is struck out as a result of the conduct of the claimant in pursuing the claim, which included not complying with Tribunal Orders, and which rendered a fair hearing impossible at this full merits hearing.

REASONS

Introduction

1. I struck out this claim following the respondent's application at the outset of the full merits hearing. My ex tempore decision was interrupted at Mr Water's end by a technical issue and, given that a costs application was intimated, the respondent then asked for these reasons.
2. The claimant represented herself at the hearing. The respondent was represented by Mr Waters, a solicitor. I did not hear any sworn evidence during the hearing. The claimant had not provided any witness evidence to be heard at the hearing. The

respondent had presented witness statements those witnesses were available to give evidence. My decision to strike out the claim rendered their participation unnecessary.

3. I had access to a bundle of documents which ran to 78 pages. I had access to an e-mail exchange from 6 February 2023 where the claimant clarified her claim. I was also shown the e-mail exchanges in the lead up to the hearing, which culminated in the respondent putting the claimant on notice of the strike out application which I heard, and the claimant's response to it.

The claim

4. The claim form (pages 1 to 12) was issued on 3 March 2022. The claim ticked boxes indicating that she was bringing claims for (1) unfair dismissal, and (2) 'other payments'. The narrative within the claim form indicated that the claimant was unhappy with how she was treated as a parent of a young child, but the claim form does not overtly make a claim for any form of discrimination. The respondent resisted the whole of the claim and applied for it to be struck out because the claimant did not have two years' service for the unfair dismissal complaint and because no other part of the claim had any reasonable prospect of success.
5. A two day full merits hearing was listed for 10 and 11 August 2022.
6. On 26 April 2022, Regional Employment Judge Wade ordered the claimant to clarify her claim because it was not clear to the Tribunal what the claim was about (pages 25 and 26). On the same date, the claimant was issued with a strike out warning in respect of her unfair dismissal complaint (page 27). The claimant did not respond to this correspondence and so her unfair dismissal claim was struck out by Employment Judge Elliot on 9 June 2022 (page 28).
7. On the same date, Judge Elliot directed that a letter (page 29) be sent to the parties to make clear that the claim is not presently accepted as a discrimination claim. The operative part of the letter says –

"This is not a discrimination claim. The claimant would need to make an application to amend and identify what sort of discrimination is relied upon... The hearing time is reduced to 1 day, 10 August 2022."

8. The hearing did not proceed in August 2022. The claimant was unable to attend. There was then a delay to the proceedings until this hearing was listed. By letter dated 20 January 2023, the Tribunal made orders for preparation for the hearing which included ordering witness statements be filed ahead of this hearing.
9. Those orders also required the claimant to set out in writing what her money claim was by 3 February 2023. She failed to comply with that order on time, but advised on 6 February 2023 that her claim is for:-

"This dispute is now over the unpaid commission for the work I completed and won business for Sera Neon by signing Herriot Watt university."

As per my contract, warm leads should be 5 percent and this was a warm lead that I got over the line with much more potential opportunities. This deal alone brought Sera Leon between £130-160k if not more as the client was wanting to move quickly, hence resources were increased constantly to meet requirements.

All I am looking for is what I'm fairly owed, my commission as per the contract."

10. By the time of the hearing, the claimant's claim was very narrow compared to that originally intimated. The whole claim was about the operation of the clauses in the claimant's contract relating to commission.

11. The claimant's contract was shown to me at pages 30 to 43. The relevant clauses for the dispute are clause 12 and clause 14 (pages 31 to 32) (my underline for emphasis):-

"12 – Remuneration paid to the Employee for the services rendered by the Employee as required by this Agreement (the "Remuneration") will consist of a salary of £30,000 (pounds) per year plus a discretionary commission according to the following formula:

...

5% of net profits from all business generated via the warm leads shared with the Employee by Sera Neon....

...

14 – The Employee understands and agrees that any additional remuneration paid to the Employee in the form of bonuses, commission or other similar incentive remuneration will rest at the sole discretion of the Employer and that the Employee will not earn or accrue any right to incentive remuneration by reason of the Employee's employment."

12. When I explored the claimant's claim with her, she accepted that the respondent was contractually entitled to withhold any commission which may have been otherwise payable by use of its reserved 'discretion'. She said that she understood what the contract says and means, but that she now felt that the situation was unfair and so she wanted the Tribunal to order commission is paid. The claimant had not prepared any argument and had no evidence to indicate that the decision was made in an unreasonable, irrational or discriminatory manner. That allegation was not pleaded in her claim either.

13. During that preliminary conversation, I formed the view that the claimant was asking me to make a decision which would be contrary to the agreed terms of the contract without any argument or evidence as to why it would be lawful for me to do so. Consequently, I was concerned that the claim had no reasonable prospect of success even if evidence was heard during the course of the full merits hearing.

The claimant's conduct

14. The claim was not well pleaded and it is apparent that there was some confusion or lack of clarity about what the claimant was claiming. This is not unusual and the Tribunal is used to dealing with such occurrences. There is no criticism of the claimant for the way her claim was pleaded initially.
15. As is usual when dealing with such occurrences, the claimant was ordered to clarify her claims and to give reasons why she should be able to bring an unfair dismissal claim without the two years' service normally required. She did not comply with the Regional Employment Judge's order to clarify her claims. Her unfair dismissal complaint, which the respondent had been required to respond to, was consequently struck out.
16. The Tribunal issued new directions on 20 January 2023. This ordered the claimant to set out the amount she was claiming, how that is calculated, and also income received since the employment ended. The deadline for doing so was 3 February 2023. The claimant did not comply with that order and only provided part of the required information to the respondent, when chased, on 6 February 2023.
17. The directions also ordered the parties to disclose relevant documents and produce witness statements in advance of the hearing. The claimant did not comply with the order to provide a witness statement. The wording of the order was that *"everybody who is going to be a witness, including the claimant, needs a witness statement..."*. Mr Waters e-mailed the claimant about the lack of her witness evidence on 24 April 2023 and 26 April 2023. He sent the claimant the respondent's witnesses' statements on 27 April 2023. He chased again on 3 May 2023, the day before this hearing.
18. The claimant responded on 3 May 2023 to say that she had been unwell and could provide evidence of being unwell. She said that she did not have a witness statement. She also said she had a voice recording which she could share which contradicted the witness statements. To this end, the claimant confirmed that she had not disclosed relevant documents as she had been ordered to do. An audio recording is defined as a document for the purposes of disclosure.
19. I asked the claimant about her illness during the hearing. The claimant told me that she had been ill with the flu and had spoken to her GP about the flu. She admitted that she had not been so unwell that she was in hospital. She admitted that she had been able to communicate by e-mail throughout the period. The claimant had not provided any evidence of her illness to the Tribunal or to the respondent. She did not bring any to the hearing, either.
20. I am satisfied that the claimant's flu was not of the sort which would excuse a party from complying with Tribunal orders over a period of some four months. The claimant described a minor illness, albeit I accept that she may have been off her feet at home for a few days.

Strike out application

21. Mr Waters e-mailed the claimant on the morning the day before the hearing (3 May 2023). That e-mail says:-

“Despite several chasing e-mails (24 and 26 April 2023), we have not received your witness statement or, indeed, any communication from you.

You were provided with our witness statement on 27 April.

In the circumstances, it is not possible for us to properly prepare for the hearing. We will therefore be asking for your claim to be struck out”

22. The claimant then sent her response which said that she was ill, did not have a statement, but did have a voice recording. She then said, in a later e-mail, that she would want the hearing to go ahead on the following day.
23. At the outset of the hearing, after I had clarified with the claimant what her claim is (with reference to the contract), and the claimant had confirmed that she had no witness statement, Mr Waters made his application to strike out the claim. He submitted that the claim had a long and protracted history, in part due to the claimant not properly responding to correspondence and more significantly due to her consistently failing to comply with case management orders. He submitted that the claimant sought to rely on un-evidenced illnesses which led to delay, and that the respondent was unable to benefit from a fair hearing where the claimant had not provided a witness statement, had seen the respondent’s evidence, and had proposed to ambush the respondent with a previously unknown recording.
24. Mr Waters also drew my attention to the principles outlined in the the now well-known case of *Emuemukoro v Chroma Vigilant (Scotland) and Higgins UKEAT/14/20/JOJ*, noting that this was the final hearing and the claimant’s failure to provide witness evidence and full disclosure had made a fair hearing in the listed window impossible. He argued that it was proportionate in the circumstances to strike out the claim.
25. The claimant did not particularly resist the application. She repeated again that she felt the fair course of action would be for me to find in her favour with her claim. She did not have any reason for her failure to comply with orders other than her recent illness. She suggested that a postponement would allow her to remedy any deficiencies, now that she appreciated how important a witness statement was to her pursuing her claim.

Law relevant to strike out

26. *Rule 37 Employment Tribunal Rules of Procedure* says:-

“37(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—

- (a) that it is scandalous or vexatious or has no reasonable prospect of success;*
- (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or 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;

(d) that it has not been actively pursued;

(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 struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.”

27. There is discretion when considering whether to strike out on any of these grounds. The word is ‘may’. Whenever the Tribunal is considering exercising a power, it must keep in mind the overriding objective found at Rule 2. This requires the Tribunal to deal with cases fairly and justly in the circumstances, which involves balancing the interests of the parties in the circumstances and also includes -

“(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility;

(d) avoiding delay, so far as compatible with proper consideration of the issues;
and

(e) saving expense.”

28. Failure to comply with order relating to witness statements, and the resultant impossibility of holding a fair hearing, was considered by the Employment Tribunal in the Emuemukoro decision referred to me by Mr Waters above. In that case, Mr Justice Choudhary upheld a Tribunal’s decision to strike out a response on the first day of a trial because no respondent witness statements had been produced. Rule 37(1)(e) should be taken to refer to a fair hearing being impossible *within the trial window* when that is the point at which the analysis is undertaken. In the words of Choudhary J (paragraph 28):-

“It was a highly relevant factor, as confirmed by the Court of Appeal in Blockbuster, that the strike out application was being considered on the first day of the hearing. The Parties were agreed that a fair trial was not possible in that hearing window. In other words, there were no options, such as giving the Respondent more time within the trial window to produce its witness statements or prepare a bundle of documents, other than an adjournment. If adjournment would result in unacceptable prejudice (a conclusion that is not challenged by the Respondent), then that leaves only strike out.”

Strike out – discussion and conclusion

29. The claimant has failed to comply with orders, as identified above, and has given no reasonable explanation for doing so. The failure to comply with the orders set by the Tribunal on 20 January 2023 has had a significant impact on the ability to hold a fair final merits hearing in this window. In particular, the failure to provide a witness statements has, on any view, rendered a fair trial in this window impossible. This is a significant adverse finding, and not one that I came to lightly.
30. In terms of the lack of a witness statement, I did consider whether the claimant could swear to any facts pleaded in her claim form. This was a document well known to the respondent, and to which the respondent had already responded and provided evidence. The problem here, in this case, is that the claim form does not deal with the factual detail of what is now the only remaining part of the claim. All the claim form asserts is that she was not paid the commission because the respondent said it is 'discretionary'. Frankly, the claimant has never set down in writing, anywhere, why it is she says that the respondent should pay her 5% commission – a commission which she herself accepts is contractually discretionary. The respondent has not had the opportunity to consider any evidence that the claimant might say for the first time on the witness stand. That would not be fair.
31. In my view, the claimant's conduct has also been unreasonable in bringing the parties to the position they were at the outset of the hearing. It is not reasonable conduct of litigation to ignore or fail to address orders, to seek to rely on undisclosed evidence, to not present a witness statement, to not respond to the opponent in the lead up to the hearing, and to then try to explain away conduct with reliance on a short term illness which is not, as admitted, particularly serious either.
32. I have identified that there exist grounds upon which to strike out the claimant's claims, specifically those found at Rule 37(1), (b), (c) and (e). I consider that the claimant had the opportunity to respond to the respondent notifying her of the intention to make an application on 3 May 2023, because she did respond to that correspondence. She also had the opportunity to respond to the application in the hearing, where she was given every opportunity to address the grounds of the application. I was therefore able to strike out the claim in the hearing.
33. In my judgment, the situation is almost identical to that of Emuemukoro, the only material difference being that this is a simple claim listed for one day, whereas that was a multi-day claim of some complexity. The principles to be applied are the same. The claimant did not present a witness statement or comply with orders designed to ensure a fair hearing at the final hearing. A fair hearing was therefore impossible. There was no further hearing listed. The question is how to address that. This is the second part of the strike out analysis.
34. Is it proportionate or appropriate to strike out the claim? I should consider the overriding objective, take into account that there should be an expectation that the matter concluded today, and then consider whether any lesser sanction would be appropriate. I decided not to pass any sanction whilst listing the claim for another final hearing, and decided to strike out the claim instead.

35. I came to that decision for three reasons:-

35.1. First, the claimant has shown a significant propensity to ignore Tribunal orders generally. It is not a case where the claimant has made a mistake on one occasion which meant the hearing had to be abandoned. The claimant has consistently failed to comply, even after her unfair dismissal complaint was struck out for her failure to provide more information. I consider it extremely unlikely that the claimant would comply with future directions for a new hearing. It would not be in accordance with the overriding objective, or *Emuemukoro*, for me to require the respondent to go to further time and cost defending the claim after having come to that conclusion.

35.2. Second, the claimant appears to me to have been deceptive in aspects of conducting the claim. She says she has a recording which dis-proves the respondent's evidence, but she has decided not to mention that until the day before the hearing. I do not consider it remotely likely that the claimant was unaware of her disclosure obligations. She is an intelligent person who had a professional role. The obligations are clear, and she has the responsibility to comply with them when advancing her case. Similarly, as outlined above, the claimant has sought to rely on an illness for not complying on time with directions between the dates of 20 January 2023 and 4 May 2023. That illness is flu and, on the claimant's own explanation, that illness did not render her unable to take part in litigation. It certainly did not render her unable to send an e-mail to warn the respondent that she would not be able to comply with Tribunal orders. In my judgment, the claimant's illness is an excuse which she has seized upon to try to explain her conduct.

35.3. Third, the claimant's claim is seriously weak and I consider that it had no prospects of succeeding based on her intended arguments at the outset of the hearing. The claimant agrees that she entered into the contractual arrangements outlined above. She agrees that that contract expressed the respondent has the discretion, exercised solely, to not pay commission where the claimant converts a warm lead. She simply thinks, now, that that is unfair and it should be paid. There is no intended legal argument other than that simple opinion. I could not reverse the contractual provision on that basis, even if all of the evidence had been heard. I make clear at this point that the claim is not struck out on prospects but, clearly, the likelihood of the claimant succeeding at another hearing if this one were postponed is something I should take into account. If, as here, the claimant has essentially no likelihood of succeeding, then it is not in accordance with the overriding objective to decide to let the claim continue when there are already good reasons for not doing so. The respondent would be severely prejudiced by having to return on another day to defend a claim that is so obviously bound to fail.

36. Any course of action which meant the claim continued would, in my judgment on these circumstances, be an error because of the resultant prejudice on the respondent and because of the need to preserve the Tribunal's resources to properly run and arguable claims. Consequently, the claim is struck out.

Costs

37. At the end of the hearing, Mr Waters intimated that the respondent would wish to apply for costs as a result of the matters which led to the claim being struck out.
38. Such an application should be made in writing, marked for my attention, with an indication whether a hearing is required for the application to be determined.

Employment Judge Fredericks-Bowyer

Dated: 18 June 2023

Sent to the parties on:

31/07/2023

For the Tribunal Office: