



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mx E Lad

v

Cavendish Learning Limited

Heard at: Huntingdon (by CVP)

On: 16 August 2023

Before: Employment Judge M Ord

Appearances

For the Claimant:

Ms J May, Solicitor

Ms G Parkin, Court Appointed Intermediary

For the Respondent:

Ms E Evans-Jarvis, Solicitor

RESERVED JUDGMENT STRIKING OUT the RESPONSE

1. The Response is Struck Out pursuant to Rule 37 Of the Employment Tribunal Rules of procedure 2013, because;-
2. The manner in which the proceedings have been conducted by or on behalf of the Respondent has been unreasonable - Rule 37(1)(B).
3. The Respondent has not complied with the Orders of the Employment Tribunal - Rule 37 (1) (c).
4. It has, as a result, not been possible to have a fair Hearing in respect of this claim which was listed for 15 days commencing 15 August 2023 Rule 37 (1) (e).
5. The Respondent is entitled to participate in the Hearing in relation to Remedy.

REASONS

Background

1. The Claimant was employed by the Respondent for a short period of time from 28 August 2020 until her dismissal on 17 December 2020, as a Food Technology Teacher.
2. Early Conciliation began on 15 January 2021 and ended on 8 March 2021.
3. On 7 April 2021, the Claimant presented her claim to the Employment Tribunal bringing the following complaints:
 - 3.1. Breach of contract;
 - 3.2. Breach of the Working Time Regulations 1998 in relation to daily rest breaks (Regulation 10);
 - 3.3. Disability discrimination under s.15 (discrimination because of something arising from disability), §.20 and 21 (failure to make reasonable adjustments) and s.26 (harassment) of the Equality Act 2010 (“EqA”);
 - 3.4. Direct discrimination contrary to s.13 and harassment contrary to s.26 EqA 2010 on the ground of gender reassignment;
 - 3.5. Victimisation contrary to s.27 EqA 2010;
 - 3.6. Automatically unfair dismissal contrary to s.103 of the Employment Rights Act 1996 (“ERA”) (dismissal for making protected disclosures) and / or s.104 ERA 1996 (dismissal for asserting a statutory right); and
 - 3.7. Detriment for making protected disclosures contrary to s.47 ERA 1996.
4. The Respondent’s Response was presented on 3 June 2021. All claims were denied and the Respondent expressed a need for further information.
5. A Preliminary Hearing was held before me by telephone on 31 January 2022. Ms May attended for the Claimant as she has done throughout. At that stage the Respondent was represented by Mr Malloy, a Litigation Consultant. Whilst the identity of the individual who has had conduct of this matter on behalf of the Respondent has altered from time to time, the Respondent has been represented by Peninsula Business Services throughout.

6. At the Hearing on 31 January 2022 the Claimant's breach of contract claim was dismissed on withdrawal. It remained in dispute as to whether the Claimant was at the relevant time a disabled person (the Claimant relying on Autism, ADHD and Complex Post Traumatic Stress Disorder).
7. Whilst considerable steps were taken to identify the issues for the Tribunal to determine at that Preliminary Hearing, a further Preliminary Hearing was listed for 16 May 2022 to be conducted in person to establish a complete list of complaints and issues to be considered at the Final Hearing. Directions for disclosure of medical information and an Impact Statement were given and the Final Hearing was listed for 9 – 13 January 2023, with Case Management Orders for preparation for that Hearing being given effectively by consent.
8. The written record of the Hearing with Case Management Orders was sent to the parties on 23 February 2022. Neither party has advised the Tribunal that what was set out in the Case Management Summary is either inaccurate or incomplete, as they were invited to do by Section 9 of the Orders.
9. Key dates from those Orders were as follows:
 - 9.1. 21 February 2022 – the Claimant to provide further and better particulars of the claim under s.15 EqA 2010;
 - 9.2. 21 February 2022 – the Respondent to confirm whether it accepted that the Claimant carried out all or any (and if so, which) of the alleged protected acts she relied upon for her victimisation claim and if it was said that any of the accepted acts did not amount to a protected act under s.27(2) EqA 2010 which part or parts of the definition accepted act failed in the Respondent's view to meet;
 - 9.3. 14 March 2022 – the Claimant to provide further and better particulars of the reasonable adjustments claim and copies of Medical Notes and Records, together with an Impact Statement;
 - 9.4. 28 March 2022 – the Respondent to confirm whether it accepted that the Claimant was at the material times disabled within the meaning of s.6 EqA 2010 and if not, which part or parts of the definition within that Section it was said the Claimant had failed to meet on the basis of the evidence provided;
 - 9.5. 18 March 2022 – the parties to exchange lists of documents and copy documents;
 - 9.6. 15 April 2022 – the Respondent to provide a Draft Index for the Final Hearing Bundle;

- 9.7. 13 May 2022 – by this date the parties were to agree the contents of the Final Hearing Bundle and the Respondent was to provide a hard paper copy and a soft electronic copy to the Claimant; and
- 9.8. 24 June 2022 – exchange of Witness Statements.
10. At the next Preliminary Hearing on 16 May 2022 (although this was not confirmed to the Tribunal before the Hearing) the Claimant confirmed that the Respondent had not provided to the Claimant a Draft Index for the Bundle of documents.
11. The Hearing on 16 May 2022 had been listed to be heard “In Person”. At the request of the parties it was converted to a Hearing by use of the Tribunal’s Cloud Video Platform (CVP) which I had agreed to because I was told that all claims and issues had been agreed and clarified. That was not, in fact, the case.
12. Mr Malloy again represented the Respondent at this Hearing.
13. It was apparent at the Hearing that the List of Issues was not agreed and that there was a prospect (which did not materialise) of the Respondent seeking a further (public) Preliminary Hearing. Further, it became apparent that the previous listing period would be inadequate as the Respondent now intended to call seven witnesses and the Claimant could not, because of her condition or conditions, conduct or participate effectively a hearing on consecutive days. The length of the Hearing was extended to eight sitting days with the Tribunal setting aside 15 days for the conduct of the Final Hearing.
14. A number of adjustments were required by the Claimant and the Orders set out the arrangements which the Tribunal would make for the Final Hearing.
15. Adjustments to the previously issued Case Management Orders were made so that:
 - 15.1. The Final Hearing was vacated from 9 – 13 January 2023 and re-listed for 14 August to 1 September 2023;
 - 15.2. The Respondent was to send a Draft Index for the Final Bundle by 18 May 2022;
 - 15.3. The Final Hearing Bundle was to be agreed between the parties and a copies sent to the Claimant by 17 June 2022; and
 - 15.4. Witness Statements were to be exchanged on 29 July 2022.

16. On 18 May 2022, an Index for the Bundle was sent to the Claimant.
17. No Final Bundle was sent by the Respondent and the Claimant's Solicitors took this up with the Respondent on 28 July and 11 August 2022.
18. On 12 August 2022, Mr E McFarlane told the Claimant that he now had conduct of the case and that Mr Malloy was no longer representing the Respondent. He asked for a two week extension to the date for exchange of Witness Statements.
19. On 19 August 2022, a Bundle of documents purporting to be the Final Hearing Bundle was sent to the Claimant, but it was, I have been told by the Claimant (and this has not been disputed), incomplete. The Claimant's Medical Notes and Records had not been included and Ms May advised Mr McFarlane of this on 24 August 2022.
20. Ms May received no response whatsoever to her communication and she pursued the matter on 2 November 2022, 6 December 2022, 23 February 2023 and 19 April 2023.
21. Without a complete Final Bundle the Claimant's Witness Statement could not be completed.
22. At the Hearing on 16 May 2022, I had listed a further Preliminary Hearing to be held on a date to be fixed approximately three months before the Final Hearing to ensure all interlocutory matters had been completed and all Orders complied with. That Hearing was listed for 15 May 2023.
23. By the Hearing on 15 May 2023, Ms Parkin had been appointed by the Court as an Intermediary. Ms May again attended the Hearing for the Claimant, Ms Parkin was in attendance and a Mr A Williams (Legal Advisor) attended for the Respondent.
24. The Claimant confirmed that no Final Bundle had been provided and Witness Statements had not been exchanged.
25. Mr Williams was unable to explain the delay in the provision of the Final Bundle, nor could he explain why the Claimant's Solicitor's promptings in November and December 2022 and again in February and April 2023 had elicited no response. He said he did not have the day to day conduct of the Hearing. He told the Tribunal (who had not been previously advised of this) that the day to day conduct of the case was now in the hands of Mr McFarlane and he told the Tribunal that had been the case since August 2022.
26. After giving the Claimant an opportunity to give instructions to her Solicitor, Ms May on behalf of the Claimant confirmed that provided the Final Hearing Bundle was provided promptly and provided Witness Statements could be exchanged far enough in advance of the Final Hearing to enable

the Claimant to properly consider the same and give instructions, the listed Hearing could still proceed.

27. The Claimant's conditions mean that she is unable to assimilate information, process the same and give instructions as promptly as would otherwise be the case. The late provision of information or changes to previously agreed arrangements would prejudice her position.
28. Further, Ms Parkin as Court Appointed Intermediary had produced a Report which made a number of recommendations for adjustments for the Final Hearing which the Respondent did not raise any objection to and which were approved by me.
29. I recorded at paragraph 18 of the Case Management Summary, for the Hearing on 16 May 2023, as follows:

"In relation to the delays in preparation of this case, I considered whether in the circumstances, it was appropriate to either Strike Out the Response in whole or in part, or to make an Order barring or restricting the Respondent's participation in the proceedings. Given the Claimant's willingness to proceed provided sufficient time was afforded ahead of the currently listed Final Hearing (bearing in mind that any postponement and re-listing would take the Final Hearing into the end of 2024, possibly early 2025) I was not minded to make any such Order. Rather, I have made an appropriate Unless Order and have given the Respondent's Representatives the opportunity to explain their delay / default and explain why any costs incurred by the Claimant as a result should not be the subject of an Order in accordance with Rules 74 – 84 of the Employment Tribunal Rules of Procedure."

30. Accordingly, I made an Unless Order for the Respondent to provide one hard copy and one soft copy of the agreed Final Hearing Bundle by 10am 19 May 2023 in default of which the Response would be struck out.
31. I recorded that the Respondent had failed to comply with the Case Management Orders of 16 May 2022, which were made at the previous Preliminary Hearing in the face of a failure to comply with the Orders made on 31 January 2022, that the provision of a Final Bundle and the exchange of Witness Statements was almost one year late, whilst the Respondent had not provided any excuse or reason why this was so. Given that the Claimant was naturally reluctant to lose a long listed Hearing, particularly in circumstances where any postponement would result in a further very lengthy delay to the Hearing, I was satisfied that the matter was best and properly dealt with by the making of an Unless Order.
32. I also Ordered the exchange of Witness Statements to take place by not later than 4pm 2 June 2023 and Ordered that no extension to that date could be agreed between the parties without the consent of the Tribunal.
33. I Ordered that by 22 May 2023 Mr McFarlane was to write to the Tribunal, with a copy to the Claimant explaining the causes of the delay in dealing with the Case Management Orders made on 16 May 2022, in particular the cause of delay since 1 September 2022 and to show cause why any

costs incurred by the Claimant as a result of the Respondent's default in complying with the Case Management Orders should not be paid by the Respondent, to be assessed if not agreed, (the issue of such costs to be considered as part of the Final Hearing).

34. On 5 June 2023, Ms May wrote to the Tribunal (copied to Mr McFarlane) regarding the exchange of Witness Statements which had been Ordered to take place by 2 June 2023. The Claimant's Solicitor erroneously referred to this as an Unless Order.
35. Attached to that email were the following:
 - 35.1. Email of 31 May 2023 from the Claimant's Solicitors confirming that they were ready to exchange Witness Statements, advising that Ms May was absent on holiday on 4 June 2023 and asking the Respondent to contact her colleague Bridget Giltinane;
 - 35.2. Email from Ms Giltinane of 2 June 2023 asking the Respondent's Representative for confirmation that Witness Statements could be exchanged;
 - 35.3. On 15 June 2023, Ms May confirmed that Witness Statements had not been exchanged, that uncertainty was causing the Claimant further anxiety which would triggered Autistic meltdowns and asking for the Tribunal's assistance;
 - 35.4. On the same day, 15 June 2023 at 5.39pm, Ms Evans-Jarvis wrote to the Tribunal asking for a variation to the Tribunal's Orders. She confirmed that the Unless Order had been complied with and sought an extension of time for exchange of Witness Statements (the Claimant's Solicitors had not agreed to any extension and the previous Order made it clear that no extension could be agreed between the parties without reference to the Tribunal). Ms Evans-Jarvis stated that she had taken over the full conduct of the matter and that a full investigation was being undertaken as to why Case Management Orders had not been complied with "*over what is an unacceptable period*". She had been in charge of the matter since 11 June 2023. She said that she had been,

"Looking to address any and all outstanding issues, what is so far clear is it is not due to any failings of the Respondent. Certainly in the most recent history unforeseeable circumstances have led to the non-compliance of the Witness Statement exchange on 2 June 2023."

She referred to the fact that the Claimant's Representative had been communicating with the individuals concerned rather than the "*official contact email*" which was stated on the ET3 form being Legal@peninsula-uk.com . It is noted that at that stage the Respondent's Representative was Ruari Smith. Ms Evans-Jarvis

did not explain what the “*unforeseen circumstances*” were, nor did she explain why sending emails directly to the person with day to day conduct of the matter would cause any difficulty, indeed, stating only that it was “*imperative*” that the “*@legalservices*” correspondence address should be used as a ‘cc’ address (although she did not explain why).

36. The reply from the Claimant’s Solicitor was to seek an Order Striking Out the Respondent’s Response. It was stated that the Respondent had shown a “*complete disregard for the authority of the Tribunal*”.
37. In the light of the correspondence I listed a further Preliminary Hearing on 11 July 2023 and (no information from McFarlane having been received as far as I was aware) Ordered his attendance at that Hearing which was listed for 11 July 2023.
38. The Hearing on 11 July 2023 was conducted by telephone. Ms May again represented the Claimant, Ms Parkin was in attendance as Intermediary and Ms Evans-Jarvis represented the Respondent.
39. For the reasons set out in the Orders made that day (which are précised below) the Final Hearing was postponed from its 15 day listing commencing 14 August 2023 and a Public Preliminary Hearing was to be held on 16 August 2023 to determine whether the Response should be Struck Out on the basis that the conduct of the Respondent has been unreasonable, there had been non-compliance with the Orders of the Tribunal and it was no longer possible to have a fair Hearing in respect of the claim listed to commence on 14 August 2023 and for 15 days in that trial window, and finally because the Response had not been actively pursued.
40. At the Hearing on 11 July 2023 I recorded the Orders made on 15 May 2023 being for a copy of the agreed Final Bundle by 19 May 2023 (an Unless Order) and an Order to exchange Witness Statements on 2 June 2023 (with no extension to be granted without the consent of the Tribunal).
41. The Respondent had sent a Bundle to the Claimant on 18 May 2023, but then on 30 June and 3 July 2023 had given further disclosure. Witness Statements had not been exchanged but the Claimant had been ready to exchange on 2 June 2023 and the Respondent had not. Yet further documents were disclosed on 6 July 2023.
42. The Claimant’s difficulties because of their mental health condition had been explained to me by Ms Parkin:
 - 42.1. She needs time to first assimilate the need to carry out preparation;
 - 42.2. Process the information which was provided; and
 - 42.3. Give instructions.

43. When I asked Ms Parkin what the prospect was of the Claimant being able to give instructions to their Solicitor and deal with outstanding preparation for the Hearing so it could proceed on 14 August 2023, she replied, “zero”.
44. On the basis that the Claimant had no prospect, according to the independent Court Appointed Intermediary, of being able to participate fully and in a fair Hearing by 14 August 2023, I was bound to postpone the Final Hearing. As recorded in the Record of the 11 July 2023 Preliminary Hearing, I did so with great reluctance because the matter required, for the benefit of all parties, to be resolved.
45. Given the delay and the impact this had had upon the Claimant’s ability to bring her case to a conclusion and the failure to comply with Tribunal Orders, I determined that a further Hearing should take place which was the listing which came before me today.
46. I referred both parties to the Employment Appeal Tribunal decision in Emuemukoro v Croma Vigilant (Scotland) Limited and Ors. UKEAT/0014/20/JOJ.

Today’s Hearing

47. Before me today were:
 - 47.1. A Statement from Ms Parkin the Intermediary;
 - 47.2. A Statement from Ms Joanne May, Solicitor for the Claimant;
 - 47.3. A Statement from Mr Ed McFarlane (with track changes from a draft);
 - 47.4. A Statement from Ms Evans-Jarvis, Solicitor for the Respondent;
 - 47.5. Written submissions from the Claimant;
 - 47.6. A timeline provided by the Claimant;
 - 47.7. A copy of the Employment Appeal Tribunal’s decision in Emuemukoro;
 - 47.8. A copy of the Employment Appeal Tribunal’s decision in Weir Valves & Controls (UK) Limited v JB Armitage EAT/0296/03MA;
 - 47.9. Reference was made to a Bundle of documents;
48. Both parties made oral submissions and at the end of the Hearing, in the light of the expectation that each side would seek written reasons for the decision today, this Judgment was reserved.

49. The essential points from the written submissions were as follows:

49.1. Georgina Parkin – Court Appointed Intermediary:

- i. That the Claimant's conditions had been exacerbated by uncertainty introduced at the end of May 2023 from which, in Ms Parkin's opinion, the Claimant would need a lengthy period of time to recover so that they can understand and engage in the process which may take as long as a year;
- ii. Uncertainty and delays in Court proceedings have exacerbated the challenges which the Claimant faces which impact on the ability to process events and possibilities outside of the expected and the known;
- iii. The delays disrupt the Claimant's established routines leaving heightened discomfort and anxiety, whereas routine and predictability are key to the Claimant's strategies in managing their conditions;

49.2. Joanne May – Solicitor for the Claimant:

- i. Ms May recited the history of delays as she saw them, in particular,
 - a. Delay in providing the draft Index to the Bundle which was sent on 18 May 2022 and approved by her the following day;
 - b. In relation to the paginated joint Bundle which should have been received by 17 June 2022 and which she pursued on 30 June 2022, 25 July 2022, following which on 26 July 2022 Mr McFarlane replied to say that he was working on producing the Bundle as soon as possible;
 - c. On 11 August 2022, chasing the Bundle again (a reply of the following day from Mr McFarlane asking for a two week extension for exchange of Statements); and
 - d. The Bundle finally being received on 19 August 2022.
- ii. Ms May recited that the Medical Notes and disability information had not been included in the Bundle and drew this to Mr McFarlane's attention on 24 August 2022. In the absence of any response she sent chasing emails on 2 November and 6 December 2022.

- iii. Mr McFarlane's reply of 7 December 2022 said that he was working on the finalised Bundle and finalising his client's statements.
- iv. On 15 December 2022, Ms May asked Mr McFarlane to add the Medical Notes to the end of the Bundle so existing pagination was not affected, but received no response so chased again on 23 February 2023 and again on 19 April 2023.
- v. On 24 May 2023, Mr McFarlane told Ms May that he had returned from a period of annual leave and would be looking into the question of the Bundle as a matter of urgency.
- vi. After the Preliminary Hearing on 15 May 2023, Mr McFarlane sent Ms May an updated Bundle of documents, but the page numbers had changed. A soft copy of the Bundle was received on 18 May 2023 but no hard copy was provided.
- vii. On 31 May 2023, Ms May confirmed that the Claimant was ready to exchange Witness Statements on 2 June 2023. Her colleague emailed Mr McFarlane on that day to exchange statements, but neither received a response. Ms May emailed the Employment Tribunal on 5 June 2023 and again on 15 June 2023. The copy sent to Mr McFarlane received an 'out of office' email.
- viii. On 15 June 2023, Ms May received a telephone call from Ms Evans-Jarvis to say that she had been handed the case on 11 June 2023 and asked for an extension of time for Witness Statements. Ms May pointed out that this would be prejudicial to the Claimant and contrary to the Order which I had made on 15 May 2023.
- ix. On 30 June 2023, 64 further pages of disclosure (not indexed or paginated) was sent by Ms Evans-Jarvis to Ms May. At 5.32pm that same day, by which time Ms May was away from the office, Ms Evans-Jarvis asked her to "*please confirm if you intend to exchange witness statements today, i.e. now*".
- x. Ms May indicated that the Claimant would need to read and consider the additional disclosure and provide instructions to update their statement. On 3 July 2023, a further 62 pages of disclosure was made by the Respondent and a supplemental paginated and indexed Bundle was forwarded on 6 July 2023.

- 49.3. It was against that background that Ms May attended the Case Management Hearing on 11 July 2023, where Orders were made as set out above.
- 49.4. Ed McFarlane – for the Respondent
- i. Mr McFarlane’s Statement indicated that he had received conduct of the case on 13 July 2022. According to the handover he received disclosure had been completed.
 - ii. He began work on Bundle preparation in early August 2022 and completed a draft Bundle on 18 August 2022.
 - iii. The email from the Claimant’s Solicitor of 24 August 2022 pointing out that Medical Notes had not been included in the Bundle was not responded to. Mr McFarlane referred to the fact that he was attending a two day Hearing on 23 and 24 August in reading, had a two day Hearing in East London and a three day Preliminary Hearing in September 2022, had a week’s leave from 17 – 21 October 2022 and accepted he also missed a follow up email on 2 November 2022. He referred to having a five day case being heard in London South from 14 – 18 November “*which significantly impacted on [his] time and ... was allocated ... at short notice*”.
 - iv. Mr McFarlane said that he had other matters that impacted on his ability to prepare cases, including being asked to cover for a departed colleague which required attendance at a Preliminary Hearing on 8 November 2022 and a four day Hearing on 28 November – 1 December 2022.
 - v. A further email from the Claimant’s Solicitor on 6 December 2023 coincided with Mr McFarlane being in a Hearing in Cardiff.
 - vi. Mr McFarlane missed the email of 23 February asking about exchange of Witness Statements and said that from January onwards he had had an extremely heavy workload with a three day Hearing 4 – 6 January, two Preliminary Hearings on 16 and 17 January, a three day Hearing on 1 – 3 February and a Preliminary Hearing on 7 February, a three day Hearing and a multi-party case which was vacated before the Hearing and a five day disability claim which was heard on 6 – 10 March 2023 and a three day Hearing on 13 – 15 March which was settled before the Hearing. He had a three day Hearing 3 – 5 April 2023 and was on annual leave from 14 – 21 April 2023. He was again on annual leave from 27 April to 2 May 2023. On 16 – 19 May 2023 a four day Hearing in Glasgow which was reduced to one day.

- vii. Mr McFarlane said that he had raised concerns with Managers over his workload, as a result of which the Preliminary in this case was allocated to a colleague, after which this case was passed to Ms Evans-Jarvis.
 - viii. Mr McFarlane described it as “*most unfortunate*” that case preparation had been affected, but it was not deliberate, it was as a result of the pressure of work and circumstances that were beyond his control.
- 49.5. Ms Evans-Jarvis – for the Respondent said,
- i. She took over conduct of the matter because the Respondent had raised concerns. According to her Statement, she had a discussion with Mr McFarlane on 2 June 2023 with a view to a handover being provided on 5 July 2023.
 - ii. In fact she says the file was handed over to her on Sunday 11 June 2023.
 - iii. On reviewing the handover, Ms Evans-Jarvis stated that “*witness statements had not been addressed*” and that due to Hearing commitments she could not take instructions until 15 June 2023, so that she sought to vary the date for exchange (which had been fixed at 2 June 2023 with, as per my Orders of 15 May 2023, could not be extended without the consent of the Tribunal. The Respondent made an Application to extend time in reply to which the Claimant made an Application to Strike Out.
 - iv. According to, Ms Evans-Jarvis she had a meeting via Teams with the Respondent and the witnesses to finalise Witness Statements ready for exchange on 30 June 2023, at which point it became apparent that the Respondents witnesses had not seen the Bundle and its content which was rectified that day.
 - v. Further disclosure was sent by Ms Evans-Jarvis on 30 June 2023 and she says that the Respondent had been ready to exchange Witness Statements since 30 June 2023. It was on that day that a paginated supplemental Bundle was sent in two parts to the Claimant’s Solicitors.
 - vi. On 11 July 2023, further disclosure took place when the Respondent disclosed for the first time minutes of the Claimant’s Grievance Hearing.

- vii. On 4 August 2023 (the date by which the Bundle for today's Hearing was to have been agreed) Ms Evans-Jarvis sent to the Claimant's Solicitor the proposed Bundle for agreement and said that she was waiting for a response from Mr McFarlane regarding any emails he may have sent and asked Ms May to check whether she had received anything from Mr McFarlane. In her Statement she refers to the Bundle being created and sent to the Claimant "as Ordered" on 4 August 2023, but that it was not agreed until 7 August 2023 (the next working day).

The Law

50. Under Rule 37 of the Employment Tribunals Rules of Procedure 2013 at any stage of the proceedings, either on its own initiative or on the Application of a party, the 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 had no reasonable prospects of success;
 - b. That the manner in which the proceedings had 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;
 - d. That it has not been actively pursued; and
 - 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).
51. In the case of Emuemukoro v Croma Vigilant (Scotland) Limited and Ors. UAEAT/0014/20/JOJ, the Employment Appeal Tribunal held that it was not an error of Law in order for the power to strike out to be triggered for a fair trial not to be possible at all; it is enough for the power to be exercisable that, as a result of a party's conduct, the fair trial was not possible within the trial window.
52. In the case of Weir Valves and Controls (UK) Limited v JB Armitage EAT/0296/03MA, the Employment Appeal Tribunal confirmed that when considering strike out for non-compliance with an Order under Rule 37(1)(c) a Tribunal must have regard to the overriding objective in Rule 2 to deal with cases fairly and justly, which requires consideration of 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.

Submissions for the Claimant

53. Ms May provided written submissions to which she added, briefly, orally.
54. Ms May pointed out that in Emuemukoro, the Strike Out power was referred to as draconian and the cardinal conditions for the exercise of the power are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. In the event that either of those conditions are met it becomes necessary to consider whether striking out is a proportionate response.
55. In relation to non-compliance with the Orders, Ms May recited
 - 55.1. The failure to provide the draft Index to the Bundle by 13 May 2022, as originally Ordered;
 - 55.2. The failure to provide a paginated joint Bundle by 17 June 2022, which was indeed not provided until an Unless Order was made on 15 May 2023 for one soft copy and one hard copy to be provided by 19 May 2023, with a date for exchange of Witness Statements of 2 June 2023 which could not be extended between the parties without the consent of the Tribunal;
 - 55.3. Further, the Claimant was ready to exchange Witness Statements on 31 May 2023, but no response was received until on 15 June 2023 the Respondent's representatives said that they were not ready to exchange and requested an extension to 30 June 2023, on which date further disclosure took place by the Respondent;
 - 55.4. Ms Evans-Jarvis on behalf of the Respondent said that she was ready to exchange Witness Statements on 30 June 2023, but a paginated Bundle of further documents was not provided until 6 July 2023. So that even if the Respondent was aware of the pagination numbers, etc., the Claimant was not;
 - 55.5. That at the Hearing on 11 July 2023, (the fourth Preliminary Hearing of this case) the Court Intermediary confirmed that the prospect of the Claimant being able to deal with this case in the current window was "zero" so that the Hearing (listed for 8 days over a 15 day period beginning 14 August 2023) was vacated;
 - 55.6. Ms May submitted that the two most significant prejudicial delays were related to the exchange of Witness Statements. She stated that 2 June 2023 was the very last day that the Claimant believed would give them an opportunity to read the Statements, digest them

and provide instructions so that a long standing Hearing date, due to the failure to exchange Witness Statements, was lost. She also referred to the production of 82 pages of documents on 30 June 2023 and a further 82 pages later on the same day as being extremely prejudicial to the Claimant who has been unable to read through them, provide instructions and update her Statement due to disabilities which are exacerbated by the last minute production of evidence;

- 55.7. As regards whose responsibility the default is, Ms May pointed out that the file had been handled by no fewer than five people within the Respondent's Representatives, referred to a lack of communication between the various individuals which was highlighted in my Case Management Orders of 11 July 2023 and stated that the Claimant should not be prejudiced by these actions;
- 55.8. She pointed out, however, that no information has been given about the involvement of the Respondent and the failure to comply with the Orders of the Tribunal and that throughout the entire process, no Representative of the Respondent has attended any of the four Preliminary Hearings that had taken place;
- 55.9. Ms May referred to Phipps v Priory Education Services Limited [2023] EWCA Civ. 652, a Court of Appeal case which stated that an Employment Tribunal was wrong in failing to grant an Application to reconsider the Strike Out of her claim which had been caused by her Representative's default. In that case a Strike Out had occurred entirely because of improper conduct of the Representative and the Claimant was not implicated in the misconduct;
- 55.10. Although I am required as set out in Weir Valves to inquire whether the default was the responsibility of the party or their Representative, no information has been provided either by the party or the Representative to enable that inquiry;
- 55.11. Ms May submitted that there was unfairness and prejudice caused to the Claimant in that they have lost a long standing trial window which makes a fair trial no longer possible in that window due to their disabilities and that there would be substantial delay in the re-listing of a further Hearing. She described the Respondents approach to compliance with the Orders of the Tribunal as displaying scant regard to those Orders and submitted that there should be finality of litigation as a matter of public interest. The Hearing that took place at least four years after the termination of short employment would not be, in her view, proportionate or in accordance with the overriding objective;

- 55.12. Insofar as the question of whether the Response has been actively pursued, Ms May referred to what she described as inordinate and inexcusable delay on the part of the Respondent;
- 55.13. Insofar as the question of a fair Hearing was possible, the case was listed for an eight day Hearing (over 15 days) to commence on 14 August 2023 and had been so listed since 16 May 2022;
- 55.14. The Intermediary stated at the Hearing on 11 July 2023, that there was no (“zero”) prospect of the Claimant being able to give instructions to their Solicitors and be able to deal with outstanding preparation for the Hearing so it could proceed on 14 August 2023;
- 55.15. The late disclosure of documents on which the Claimant’s instructions are required will also require amendment to the Claimant’s Statement. Ms May referred to Ms Parkin’s Statement referring to the Claimant having a much higher than usual frequency and intensity of “meltdowns” and her stating that

“the impact of this is particularly evidence in my Client’s ability to read, process and understand the large volume of new documents and statements produced recently by other parties. My Client is not able to do this at present, due to the deterioration of their condition caused by the recent uncertainties and changes”

and submitted that the loss of the Hearing has caused unacceptable prejudice to the Claimant.

- 55.16. An additional submission was that the Unless Order made on 15 May 2023, that:

“Unless the Respondent provides to the Claimant one hard and one soft copy of the agreed Final Bundle by 10am on Friday 19 May 2023, the Respondent’s Response will be Struck Out”,

had not been complied with because the Bundle submitted did not include the later disclosure which should have been disclosed far earlier in the proceedings, so that the Bundle provided could not be described as the “Final Bundle”;

- 55.17. Finally, Ms May again referred to the Statement of Ms Parkin and her comment that,

“There has been an exponential impact on [the Claimant’s] ability to function in everyday life and in particular, to engage with the case. Mx Lad will require a lengthy period of time to recover from this disruption and “reset” so that they can understand and engage as they were at the end of May. They need time to re-establish their

focus. This resetting process may take as long as a year, during which time Mx Lad will continue to suffer.”

Submissions for the Respondent

56. It was accepted on behalf of the Respondent that there had been delays and failure to comply with Orders, but it was stated that this did not amount to unreasonable conduct and I was reminded that Strike Out was a draconian action.
57. There was no evidence, on the Respondent's submission, of the Claimant suffering financial hardship and that as all schools are regulated by Ofsted a finding of discrimination against any school would be harmful to its reputation.
58. As an alternative to Strike Out, the Respondent suggested holding a Dispute Resolution Meeting, in accordance with the Tribunal President's most recent direction, and that it would be more proportionate to list the case for such a Hearing.
59. On inquiry, the Respondent had not at any stage suggested Mediation (Judicial or otherwise) as a means of resolving this case prior to today, nor made any proposals in resolution of the dispute. The claimant, through their solicitor, expressed doubt as to the genuineness of this proposal against that background.
60. It was accepted that a fair Hearing was not possible within the timescales previously set out, but that a fair trial would still be possible at some later date.
61. It was accepted that one of the newly produced documents was the Interview Pack from the Claimant's Interview for employment in August 2020, which had not been disclosed until 30 June 2023. No cogent explanation was provided for that delay.
62. Ms Evans-Jarvis stated that it would be unfair and unjust for the Claimant to obtain a windfall because of failings of the Respondent's Representatives; that an alternative remedy would be in costs and that further delay would not be relevant to the Claimant's employment. Ms Evans-Jarvis accepted that there had been no negotiation discussion or attempt to resolve this case by the Respondent since its commencement and in reply, Ms May pointed out that the Respondent itself did not appear to be engaged in the matter at all bearing in mind their non-attendance at any stage of the process including today (and there has been no evidence from the respondent itself submitted for today)

Conclusions

63. There have been consistent and significant failures on the part of the Respondent to deal with this case in accordance with the Orders of the Employment Tribunal. In the absence of any information from the Respondent, or their Representative, as to whether this has been caused by the Representatives themselves, the Respondent itself, or a combination of the two, the inquiry which I would otherwise have been able to make into the cause of delay has not been possible.
64. There has clearly been a failure to comply with the Orders for disclosure. The original Order for disclosure was made at a Preliminary Hearing on 31 January 2022 and required each party to send to the other a list of all documents in their possession, custody, power or control which are relevant to the issues between them, together with copies, by not later than 18 March 2022.
65. A failure to disclose obviously relevant documents such as the Interview Pack relating to the Claimant's interview for employment in mid-2020 or documents relating to the claimant's grievance until the end of June 2023, has not been explained.
66. Witness Statements were originally to be exchanged in this case (Order also made on 31 January 2022) on 24 June 2022. Subsequent Orders were made and not complied with and the Claimant was hampered in their final preparation by the late and piecemeal disclosure of documents by the Respondent. The Claimant was ready to exchange Witness Statements in accordance with the most recent (and non-extendable) Order for exchange made on 15 May 2023, to take place on 2 June 2023. The Respondent was not and it is not clear why. Of course, because there was subsequent later disclosure of documents the Claimant's Statement would need to be amended once they had the opportunity to read, consider, assimilate and give instructions on, the late disclosed documents.
67. Ms Evans-Jarvis was honest enough to accept that the Respondent had been in breach of the Orders, but said that this was not deliberate.
68. Some reason for delay has been given in Mr McFarlane's Statement. That praise in aid the fact that he was overworked and engaged in other cases. If it is the case that the Respondent's Representatives are insufficiently staffed to properly manage and handle, in accordance with the Orders of the Tribunal, cases on which it has received instructions, then it is within its own gift to solve that problem. It can hire further staff, it can instruct external Counsel, or it can decline instructions on the basis that it is unable to manage the case properly. None of those things were done, rather other cases were managed, handled and heard and this case was left to one side. That is unacceptable and the Claimant has suffered the consequence by losing her opportunity for final resolution of this case through the Final Hearing due to begin on 14 August 2023. I find that that

amounts to a deliberate decision. This case was left while others were actioned.

69. For the same reasons it cannot be said that the Response has been actively pursued. Disclosure has been piecemeal over a year beyond the date originally Ordered. Preparation of a Hearing Bundle did not take place. Witness Statements were not prepared. The result has been an unnecessarily large number of Preliminary Hearings, the making of an Unless Order and ultimately the loss of a Final Hearing. It is not clear what activity the Respondent relies on to indicate their efforts to comply with the Orders of the Tribunal.
70. All of this also amounts to unreasonable conduct of the proceedings. Orders of the Tribunal are not made as a guideline or as a starting point from which parties can subsequently choose to extend the process. They are made to be complied with. The Respondent has taken what I can only describe as a careless or cavalier approach to the management of this case.
71. The cumulative effect of all of this was capable of being overcome when the matter came before me on 15 May 2023. On that day an Unless Order was made for the provision of the Final Hearing Bundle, which I was told was ready. An Order was made for exchange of Witness Statements on a date which could not be extended without the consent of the Tribunal, and provided those Orders were complied with the Claimant was, on the basis of their instructions and the opinion of the Court Appointed Intermediary, able to proceed with the Final Hearing commencing 14 August 2023.
72. The Orders were not, however, complied with to the extent that the Respondent was not ready to exchange Witness Statements on 19 May 2023 and the bundle sent was clearly not complete as subsequent disclosure confirmed. Subsequently, and some days after the time for exchange had passed, the Respondent sought an extension from the Claimant (contrary to the Orders of 15 May 2023) and on the same day engaged in further disclosure of relevant documents.
73. On that basis, by the time the matter came before me on 11 July 2023, there was no prospect of the Claimant being able to assimilate the further documents, process the information and give instructions to enable the matter to proceed on 14 August 2023.
74. A fair trial of the case beginning 14 August 2023 was not possible. I reached that conclusion guided by the Court Intermediary whose role was to assist the Court and facilitate communication between the parties and others in the process and provide partial recommendations to the Court about specific communication needs and outline the steps to achieve them. She was clear and exact in her comments at the Hearing on 11 July 2023 that the prospect of the Claimant being able to give instructions to their Solicitors and deal with outstanding preparation for the Hearing so that it could proceed on 14 August 2023, was “zero”.

75. Accordingly,
- 75.1. The manner in which the proceedings have been conducted on behalf of the Respondent has been unreasonable;
 - 75.2. There has been repeated non-compliance with the Orders of the Employment Tribunal by the Respondent;
 - 75.3. It has no longer been possible to have a fair Hearing in respect of the claim listed to commence on 14 August 2023 for 15 days; and
 - 75.4. The Response has not been actively pursued.
76. I am reminded that the question of fair trial is not “ever” but as per Emuemukoro, it is sufficient to engage the provisions of Rule 37(1) (e) for a fair trial not to be possible within the trial window.
77. The non-compliance with Tribunal Orders has caused disruption, unfairness, and prejudice to the Claimant. Their disabilities make it impossible for them to assimilate and give instructions on documents or other information as rapidly as would be the case for non-disabled persons.
78. As Ms Parkin has pointed out, the delay and disruption has caused the Claimant further distress and has exacerbated their conditions. They have lost the certainty of a Hearing commencing 14 August 2023 and are faced with further periods of uncertainty and difficulty. That is unfair and it is prejudicial.
79. A fair trial has not been possible in the trial window and for reasons already given, I cannot determine whether the default in compliance was the responsibility of the party or their Representative and if both, to what degree one or the other has been at fault.
80. I must therefore consider whether Strike Out is the appropriate sanction, or whether some lesser remedy would be an appropriate response.
81. I am satisfied that in this case striking out the Response is the appropriate sanction.
82. The impact of the delay and disruption caused by the Respondent’s default has a substantial and has caused material impact on the Claimant’s wellbeing. According to Ms Parkin, it may be a year or more before the Claimant is able to deal with the matter properly. She has suffered increased “*meltowns*”.
83. The suggestion that a Dispute Resolution Appointment could be fixed, rather than striking out the Response, is, whilst creative, made late in the day and in the face of a situation where the Respondent has made no

effort whatsoever to resolve the dispute in any way since its commencement. The Claimant's Solicitor was concerned that this was not a genuine effort at resolution and I share the concern bearing in mind the history of the matter to date. It is, it seems to me, a last ditch attempt to avoid the consequences of the Respondent's default and the loss of the Final Hearing.

84. This is not a case where an award of costs would be an appropriate means of resolving the issue because the prejudice and impact which the Claimant has suffered is not one which is remediable in costs. There has been an impact on their wellbeing, they are suffering further and continued delay and costs are not an appropriate remedy for that.
85. When the matter came before me on 11 July 2023, it was not possible to remedy the deficiencies in preparation in the time available and bearing in mind Ms Evans-Jarvis' acceptance that there had been delay in compliance with Tribunal Orders and in part non-compliance, I find that the reason why the Hearing could not take place as listed was entirely due to the failure of the Respondent to comply with Case Management Orders.
86. Notwithstanding the fact that the power to Strike Out is a draconian one which should be used cautiously and with restraint, I am satisfied that in the interests of justice it is necessary to Strike Out the Response in this case.
87. The alternatives are unattractive and in the light of the conduct of the matter by the Respondent, inadequate.
88. A Dispute Resolution Appointment, can take place notwithstanding this Judgment. The Respondent has been at liberty to commence negotiations with the Claimant throughout the conduct of the case.
89. The re-listing of the case based on the existing time estimate could not be effective until, at the earliest, mid-2025 and that assumes that the Claimant will be in a position to give necessary instructions in accordance with the timescale suggested by Ms Parkin. That delay of itself would amount to unacceptable prejudice to the Claimant whose employment ended in 2020.
90. I do not consider that the Claimant has done anything to cause or contribute to the procedural delays. It is entirely due to the conduct of the Respondent and / or the Respondent's Representatives.
91. I appreciate, of course, that this Judgment will mean that the Respondent will lose the chance to contest the claim on its merits, but the fault for that lies with either or both of the Respondent and its Representative. It lies not with the Claimant and the Claimant should not suffer further prejudice and delay.

92. For those reasons the Response is Struck Out. The Respondent will be at liberty to make representations and adduce evidence on the issue of Remedy and separate directions have been made.

Employment Judge M Ord

7 September 2023

Sent to the parties on:
21 September 2023

For the Tribunal Office.