



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Williams

**Respondent:** Conwy County Borough Council

**Heard at:** Cardiff, by video

**On:** 14 September 2023

**Before:** Employment Judge S Jenkins

## Representation

Claimant: Mr D Walton (Solicitor)

Respondent: Ms A Niaz-Dickinson (Counsel)

The decision on the Claimant's strike-out application having been sent to the parties on 15 September 2023, and written reasons having been requested, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, on 28 September 2023, the following reasons are provided:

# REASONS

## Background

1. The preliminary hearing was to consider the application made by the Claimant's representative, in an email of 5 July 2023, to strike out the Respondent's response pursuant to rule 37(1) of the Employment Tribunals Rules of Procedure. The focus of the application was on Rule 37(1)(b), that the manner in which the proceedings had been conducted by or on behalf of the Respondent had been scandalous, unreasonable or vexatious; and on Rule 37(1)(c), due to non-compliance with orders of the Employment Tribunal. The application also referenced arguments made under Rules 37(1)(d) and (e), but the primary ground was Rule 37(1)(b).
2. The conduct and non-compliance complained of related to asserted failures by the Respondent to comply with orders of Judge McLeese, issued at a preliminary hearing on 19 January 2023. Those were that the Claimant's representative would provide comments on a draft List of Issues by 2 February 2023, and then that the List of issues was to be agreed by 16 February 2023. Implicit within that was that the Respondent would indicate its agreement to the Claimant's comments or would provide its further comments and amendments prior to 16 February 2023.
3. The Claimant's representative provided his comments on the List of Issues on 2 February 2023 as required. However, no further communication on

the matter was provided by the Respondent, despite several reminders, until, in fact, 6 September 2023, i.e. a little over a week before this preliminary hearing. Even then, the Respondent's then representative, rather than simply providing comments on the Claimant's representative's comments, appeared to have undertaken a redraft of the List of Issues, albeit that the core terms of the Claimant's comments appeared to remain.

4. Whilst not referenced in the Claimant's representative's email of 5 July 2023, the Claimant's representative, during this preliminary hearing, also referred to asserted deficiencies by the Respondent in relation to disclosure. In that regard, Judge McLeese had directed that the Claimant was to inform the Respondent of any required outstanding disclosure by 2 February 2023, which was done. The Judge then directed that the parties were to agree an index to the hearing bundle by 23 February 2023, with a copy of the bundle being provided to the Claimant by the Respondent by 9 March 2023. Whilst not specified by Judge McLeese, implicit within that timetable was the disclosure of any requested additional documents by the Respondent.
5. Whilst not within the implied time period, the Respondent sent an email to the Claimant's representative on 4 May 2023, which the Claimant's representative did not appear to have received, containing the additional disclosure, spanning some 1,500 pages, on top of the original bundle of some 3000 pages.
6. There was a dispute between the parties as to the subsequent responsibility for disclosure deficiencies. The Claimant's representative contended that representations were made in emails that the disclosure had not been received. The Respondent's representative contended that the Claimant's representative did not, at any stage, ask for documents to be re-sent. In the event, they were, in fact, re-sent the day before this preliminary hearing, i.e. on 13 September 2023.
7. All that was in the context of the final merits hearing in this case being scheduled to take place over two weeks from 2 October 2023, it having been postponed at the parties' request in September 2022.

## **Law**

8. The relevant legal principles governing strike-out applications were set out in the Respondent's representative's skeleton argument, and were broadly accepted by the Claimant's representative.
9. Particular guidance on the approach a Tribunal should take in relation to strike-out applications was provided by the Court of Appeal in James –v- Blockbuster Entertainment Ltd [2006] EWCA Civ 684, and by the Employment Appeal Tribunal in Bolch v Chipman [2004] IRLR 140.
10. The former case, noted that, "*The two cardinal conditions for [the strike-out power's] exercise 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 either case, the Court noted that striking out must be a proportionate response.

11. In the latter case, it was noted that three points are required to be decided by a Tribunal in relation to a strike out application:

*"(1) There must be a conclusion by the Tribunal not simply that a party has behaved unreasonably, but that the proceedings have been conducted by or on his behalf unreasonably."*

*"(2) Assuming there be a finding that the proceedings have been conducted scandalously, unreasonably or vexatiously, that is not the final question so far as leading onto an order that the Notice of Appearance must be struck out."*

*"(3) Once there has been a conclusion, if there has been, that the proceedings have been conducted in breach..., and that a fair trial is not possible, there still remains the question as to what remedy the tribunal considers appropriate, which is proportionate to its conclusion. It is also possible, of course, that there can be a remedy, even in the absence of a conclusion that a fair trial is no longer possible, which amounts to some kind of punishment, but which, if it does not drive the defendant from the judgement seat... may still be an appropriate penalty to impose, provided that it does not lead to a debarring from the case in its entirety, but some lesser penalty."*

## **Conclusions**

12. My focus was on the application as made, i.e. considering the failures arising in the relation to the List of Issues and not the broader points made in relation to disclosure at this hearing, of which the Respondent had not had any prior notice.
13. Taking into consideration the guidance provided by the James and Bolch cases, I concluded that the Respondent had been guilty of unreasonable conduct in relation to the List of Issues. Problems appeared to have arisen due to the sheer number of locum solicitors having been involved in the case over the last year or so, which led me to conclude that it was not possible to say that there had been deliberate disregard of the directions. However, I was satisfied that disregard had been persistent. It covered a period in excess of six months, during which several reminders were provided by the Claimant's representative, and indeed, several promises were made by various representatives of the Respondent that the comments on the List of Issues would be provided.
14. In terms however of the impact of that failure on the fairness of the forthcoming trial, I did not consider that the Respondent's failures in relation to the List of Issues made a fair trial impossible. The substance of the List of Issues had been broadly known to both parties since at least February 2021, and the Respondent's representative's revisions, whilst not being helpful in terms of the ability of the Claimant's representative to follow the changes made, broadly echoed the previous draft. The late provision of the Respondent's comments should not, in my view, have impacted on the Claimant's ability to have prepared his witness statement in advance of the final hearing.
15. The issues arising from the disclosure, where, in essence, in excess of

**Case No: 1601152/2020**

1,000 pages of material needed to be absorbed within a two-week period, may potentially have had a greater impact on the ability of the forthcoming hearing to proceed, but that was a matter for case management. It would not be fair to strike out the Response on that basis, even if I concluded that the Respondent was at fault, on which I formed no view, when it had not been the basis of the Claimant's strike out application.

16. In conclusion, a fair, albeit re-scheduled, hearing remains possible and it would not be proportionate to strike out the response. The Claimant's strike-out application was therefore refused.

---

Employment Judge S Jenkins

Date: 18 October 2023

REASONS SENT TO THE PARTIES ON 19 October 2023

FOR THE TRIBUNAL OFFICE Mr N Roche