Case No. 1601475/2021
1601484/2021
1600869/2022

EMPLOYMENT TRIBUNALS

Claimant: **C (1)**
D (2)

Respondent: **R1**
R2
R3
R4
R5

HELD AT/BY: Wrexham by CVP **on:** 11th October 2023

BEFORE: Employment Judge T. Vincent Ryan

REPRESENTATION:

Claimants: Mr C Howells, Counsel (with Ms E Quenby, Employment Law Consultant)
Respondents: Mr. P. Collins, Senior Litigation Consultant

JUDGMENT having been sent to the parties on 12 October 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. **The Issues** – In a situation where the final hearing is listed to take place over 8 days commencing 1st November 2023, on the basis of the Claimants' application that the Respondents' responses should be struck out for non-compliance with Orders made by the Tribunal, because the responses have not been actively pursued, and that a fair hearing was no longer possible the issues arising for determination today are:

    1.1. Whether there has been non-compliance with an Order of the Tribunal by the Respondents;

1.2. Whether the responses have not been actively pursued;

1.3. Whether I consider that it is no longer possible to have a fair hearing in respect of the responses

1.4. Whether striking out all or some of the Respondents' responses would be in the interests of justice, and in accordance with the overriding objective of the Tribunal.

2. The Facts: I heard sworn evidence from the Claimants' solicitor, Ms E Quenby (based on and including her written statement dated 10 October 2023); I heard from the Respondents' Litigation Consultant, Mr P Collins, and found the following facts (which were substantively agreed by both parties):

2.1. I asked Mr Collins whether he accepted the veracity and accuracy of Ms Quenby's factual statements (as opposed to her comments and opinions on how and why he had acted, or omitted to act, as set out in the factual parts of her statement). He agreed that the witness statement was factually accurate. Leaving aside her said comments and opinions, which I find she held sincerely, I find that the whole statement is a statement of fact. Further leaving to one side matters between Ms Quenby and her clients which he cannot be expected to know first-hand, I confirm that Mr Collins, for the Respondents, accepts the accuracy and veracity of the following specific paragraphs concerning steps required, taken and not taken namely:

2.1.1. Paras 4-14
2.1.2. Paras 16-25
2.1.3. Paras 31 – 50
2.1.4. Paras 52
2.1.5. Paras 56-58

2.2. Mr Howells prepared "Claimants' Submissions" dated 10 October 2023. I asked Mr Collins whether the Respondents accepted the factual accuracy of the chronology at paragraph 1 headed "Procedural history". He did. I confirm that history as facts found.

2.3. I note Mr Collins' statement that he "could not take issue with the facts" set out in the said statement and submission, and as such he had no questions in cross examination of Ms Quenby. The Claimants' evidence on this preliminary issue, that of Ms Quenby, and factual submission was uncontested.

2.4. I accept as fact Mr Collins' statements:

2.4.1. That his clients wished to pursue their responses to the claims;

2.4.2. That he believed he “frankly had a lot of work to deal with” (although no details were given, there was a reference to his attending at other Tribunal hearings);

2.4.3. That he believed that while there had been “some compliance” with case Orders, he knew there had not been full compliance;

2.4.4. That he was simultaneously dealing with “a number of cases and this one has slipped”.

2.4.5. That “the buck is with” him.

2.4.6. That he was embarrassed.

2.5. I note that the matters stated in paragraph 2.4 comprise the extent of the Respondents’ explanation for the current state of affairs (as detailed in Ms Quenby’s statement and Mr Howells’ submissions).

2.6. Furthermore, I find, by Mr Collins concession, that the Respondents had yet to do the following (and Mr Collins put forward a proposed timetable to achieve it) namely (and in each case having taken instructions from one or more of his five clients as appropriate, and working around the preparation he needed to undertake in preparing witness statements for another case, his diary otherwise now being “blocked”):

2.6.1. He needed to “find” and check outstanding disclosable documents;

2.6.2. He needed to find and re-read and then send to the Claimants (hopefully today) transcripts of various meetings. He wanted to re-read them but did not feel he needed further instructions (but please see 2.6.5 below). Mr Collins suggested that this could be done by him by 4 p.m. today (although he planned initially to complete the outstanding witness statements in a different case);

2.6.3. Update the substantive chronology;

2.6.4. Update the draft List of Issues;

2.6.5. Remind himself of what preliminary issues he had intended raising and then, subject to instructions, prepare a hearing bundle, a supplementary bundle of documents, in respect of any such issues (albeit he admitted being confused by this today). I note that Mr Howells reminded Mr Collins that the Respondents had indicated they challenged the admissibility of transcripts/recordings that they held;

2.6.6. Agree the Index to the main hearing bundle, and therefore contents of the hearing bundle. He suggested this be done by 13 October 2023.

2.6.7. Provide an indexed and paginated hearing bundle to the Claimants. He suggested this be done by 20 October 2023.

2.6.8. The Respondents, potentially all five of them, needed to update their witness statements given the passage of time and the events in the meantime since initial drafts were prepared for the abortive hearing last March. The initial drafts were then approved, but none had been signed. He suggested that witness statements be exchanged by 25 October 2023.

2.7. In summary I find:

2.7.1. The claim having been issued on 7 September 2021, the final hearing listed to be held 6 – 15 March 2023 was postponed because of the Respondent's failure to comply fully with Cases Management Orders made on 27 July 2022 and 2 February 2023. The matter was not ready for a fair and just hearing to be held in March 2023.

2.7.2. Further Case Management Orders were made on 15 June 2023 with a view to a final hearing, which was then listed to commence on 1 November 2023 (14 working days from today). As at today the Respondents have still failed to comply with the said Orders and the case remains unprepared and not ready for the final hearing. There has been no substantive progress in preparation since last March's postponement. Nothing has been done to date that would allow for full preparation by the Claimants who are still awaiting important disclosure, not least in respect of recorded meetings.

2.7.3. Whereas the Claimants' representatives suspect that the Respondents' serial failures to comply with Orders and to pursue their responses actively, specifically to make disclosure, is deliberate and tactical I am unable (on the evidence before me) to conclude that this is the case; it may be.

2.7.4. The Claimants have been prejudiced in preparing for any final hearing. Evidence has been withheld from them to date. They have yet to receive potentially important transcripts and recordings of various meetings, full disclosure otherwise, and therefore a working hearing bundle. They have been unable to finalise their own witness statements, and have not seen the Respondents' statements. Their representatives have been put to the time spent, and the Claimants to the cost incurred, in chasing the Respondents for progress, in making applications and in additional correspondence with the Tribunal, and in attending additional preliminary hearings. Their representatives are concerned at the potential for an "ambush" by late steps taken by the Respondents and, at least that they (the Claimants) may be put in the invidious position of having to ask for a further postponement of the final hearing even if the Respondents were able to comply with Mr Collins' proposed timetable mentioned above.

2.7.5. There are contested allegations of words said and actions taken by the parties in relation to events that took place two years ago, and longer. I take notice, as opposed to finding in fact, that if either party required a postponement of the November hearing it is unlikely that the matter could be re-listed before early Spring next year; there would be a likely delay of somewhere in the region of a further 6 months with the distinct possibility that the re-re-listed hearing might be on or about the first anniversary of the first listing, some 2 ½ years after the events in question.

2.7.6. The situation so summarised is the responsibility of the Respondents and/or their representatives.

3. The Law

3.1. Rule 2 ETs (Constitution and Rules of Procedure) Regulations 2013 sets out the overriding objective of the Tribunal, stated to be to deal with cases fairly and justly, including by reference to listed criteria. The Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising, any power given to it by the Rules. The parties and their representatives are required to assist the Tribunal to further the overriding objective and in particular they are required to co-operate generally with each other and with the Tribunal.

3.2. Rule 37 provides that at any stage of the proceedings, either of its own motion or on the application of a party, a Tribunal may strike out all or part of a claim or response on any one of a number of listed grounds, including for non-compliance with any of the Rules or with an Order of the Tribunal, or because the claim or response has not been actively pursued, or that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the parts to be struck out). 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 at a hearing if requested. Where responses struck out the effect shall be as if no response has been presented.

3.3. I accept the appropriate citation of authorities by Mr Howells in his written submissions. Mr Collins did not take issue with these legal submissions. I took into account the cases referred to by Mr Howells in reaching my decision. In the circumstances, especially that I allowed Mr Collins additional time in an adjournment to consider the Claimants' Submissions, and the authorities are explained, I will not set out case summaries here. I refer to Mr Howells' written submission.

4. Application of Law to Facts

4.1. the Respondents not only failed to comply with case management orders made at two preliminary hearings prior to the abortive hearing of 1 March 2023 but their non-compliance led directly to the postponement of that

hearing. Further Case Management orders were made with a view to hearing these claims in two weeks' time. The Respondents failed to comply with those orders. Save to apply for this hearing the Respondents appear to have done nothing in relation to this claim, or at least nothing by way of substantive and necessary preparation, since March 2023. This failure is despite the efforts of the Claimant's representative to engage, to cooperate, and to make progress in the hope that there could be an effective hearing commencing on 1 November 2023. The Respondents effectively thwarted the Claimant's best efforts.

4.2. As at today the parties are not in a position to guarantee readiness for an effective hearing on 1 November 2023. This is a direct result of the Respondents' inactivity in relation to the case and their serial non-compliance with case management orders.

4.3. Based upon the history of this matter to date and the manner in which Mr Collins presented his proposed revised timetable today, I have no confidence that the Respondents will take the necessary steps to put the Claimants in a position whereby there could be an effective hearing in two weeks' time. I suspect that even if Mr Collins achieved the objectives he was prepared to set himself, compliance would be so late that in fairness to the Claimants they would require more time and would be obliged to request postponement of the final hearing.

4.4. I accept the point made by Mr Howells that even if the responses are struck out the Claimants will not necessarily receive a "windfall". They are making claims of unlawful discrimination. This is not a claim suited for a "default" judgment such as under Rule 21. The Claimants must still prove facts to the satisfaction of a judge that could lead to a finding of unlawful discrimination. Striking out the responses does not mean that they are effectively home and dried. In fact the Claimants submit that a strike out at this stage would not negate the need for a multi-day hearing. Furthermore, the Respondents will not necessarily be precluded from being heard in relation to remedy, if the Claimants succeed.

4.5. I said in the oral judgment that I did not wish to compound Mr Collins' evident embarrassment, and he was quick today to acknowledge his fault. We all make mistakes and we all wish we had done something that we had not done or that we had done something sooner than we did them. That is just a matter of human frailty. Accepting such frailty is not however the point of the exercise today.

4.6. I must consider the overriding objective of the Tribunal; the interests of justice must prevail. This entails, in cases such as this, compliance with strict duties of disclosure and with preparatory orders. It is not just a case of a tick box exercise getting things done but also doing them thoroughly and in a timely fashion so that a case is properly prepared for a final hearing. We do not just consider the provision of material, the building blocks of a claim and

response respectively, but the timely provision of all relevant and necessary material in such a way as it allows the respective parties to build their cases in readiness for a hearing which would otherwise be ineffective. There may be a hearing but it must be effective in that the Tribunal is able to deal fairly and justly with the case.

4.7. Ms Quenby's witness statement and Mr Howells submissions are damning indictments of the Respondents and their representative. Their factual bases were accepted by Mr Collins; in fairness to him I did not ask him to comment on the judgemental opinions expressed. It is however hard to avoid the conclusion that there is fault here.

4.8. There has already been one abortive listing. The Claimants have been put to considerable expense and, we are told, emotional stress, by the actions of the Respondents and their representative, or should I say their inactivity. The quality of the evidence in a case that is fact sensitive, cannot be improved by the delay when we are already some two years post the events in question with the very real prospect of a further postponement if the responses are not struck out.

4.9. Mr Collins has proposed an aspirational timetable to keep the matter on track. I accepted his assurances last February that he would take the necessary steps to make the March hearing effective. Once again there was fault on the part of either the Respondents or their representative, or both, in that they failed to follow through on the assurances given to me at the February preliminary hearing. Mr Collins did not persuade me today that he would be able to meet his aspirational timetable. I also consider that in the unlikely event he did so, disclosure or the like would be so late that the Claimants would not be ready by the 1 November 2023. Mr Collins is representing five respondents. There are two individual claimants. Both sides intend calling additional witnesses such that there may be as many as 10 witnesses in all. Without full disclosure, including of the transcripts that are in issue, neither party could confirm to me exactly who they would be relying upon to give witness statements. The additional witnesses, as yet unnamed to me, may for all I know have had little involvement with the case since the events of some two years ago. Their memories may have faded.

4.10. I considered whether or not to make an Unless Order, requiring action or leaving the Respondents to face the immediate consequences of non-compliance. These can be effective in ensuring action. On the other hand they can just give rise to satellite litigation and dispute as to whether or not there has been compliance. Any such order would be with a view to securing commencement of the final hearing on 1 November 2023 I did not feel that at this short notice it would be appropriate for all the reasons stated above (the unlikelihood of compliance but if there was compliance likelihood that it would necessitate a postponement application by the claimants, and in any event the risk of dispute as to whether or not there has been compliance).

4.11. I considered whether I should just postpone the hearing set to start on 1 November 2023. I concluded that this was unconscionable. The final hearing was postponed some seven months ago for the same reasons and in the same situation we are in today. That is unfair to the Claimants. Once again I have no real confidence that even if additional time was granted, the Respondents would comply with orders satisfactorily. I say this is despite Mr Collins' protestations; he failed to give me what I considered to be reassurance. The additional cost, delay, and likely detrimental effect on the quality of evidence are also factors that I took into account in deciding not to just order postponement of the hearing, and issuing a new timetable..

4.12. I considered therefore the balance of prejudice to the parties depending on whether I took any of the potential courses of action outlined above.

4.13. The respondent has had ample opportunity, over and again, to prepare its defence and to cooperate with the Tribunal and with the Claimants to ensure that the overriding objective is met. They have failed. I was not given a satisfactory explanation for the serial failure. If it came down to Mr Collins being busy for the last several months then the Respondents ought to have acted appropriately to appoint another representative or instruct him to delegate responsibility for this case. Responsibility, fault, lies fairly and squarely with the Respondents and Mr Collins.

4.14. The Claimants have been deprived of an opportunity for timely, comprehensive, preparation. Whether the Respondents' failures were deliberate or not, the Tribunal should not be complicit in any sense in what may be an even unintended or inadvertent ambush, a situation where the Claimants would be bounced into a proposed timetable and imminent final hearing. As I have repeatedly stated, I think the likelihood is they would be obliged to request a further postponement. If there was no postponement then inevitably their late preparation would be rushed and sub-optimal, certainly not what Ms Quenby and Mr Howells intended. It would not be the preparation that was anticipated at the number of preliminary hearings, being the required preparation for a hearing of the issues as serious as these.

4.15. Given the timescale to date it is apparent that the Respondents have not been actively pursuing their responses. They are in serial breach of orders. Their inactivity and omissions have prejudiced a fair hearing. I conclude that a fair hearing is not possible in November of this year. As the final hearing is pushed back in the calendar further from the events in question the quality of evidence is detrimentally affected to the extent that I consider there will not be a fair hearing on liability if the Respondents are allowed further time and opportunity to contest liability.

4.16. Striking out the responses would leave a situation where there still needs to be a liability hearing. The Claimants still need to satisfy the Tribunal that they have proven facts which could lead to a finding of unlawful

discrimination. If there is a finding of unlawful discrimination the Respondents may well be allowed to re-enter the fray with regard to remedy, and therefore they are not severely prejudiced. They have chosen not to pursue their responses with regard to liability. They may yet choose to take part in remedy proceedings, if there are any.

4.17. The balance of prejudice is severely against the Claimants if the Respondents are allowed to pursue their responses at the final hearing either in November or in 2024.

4.18. The interests of justice will be best served by my striking out the responses, allowing the Claimants to proceed to a final hearing on liability, leaving open the possibility of the Respondents being heard on remedy (if remedy is even appropriate).

4.19. Ms Quenby has commented on what she considers to be the Respondents', or Mr Collins', disrespect shown to the Tribunal. I have limited my consideration to the interests of justice. That said, it is right to say that orders are made with a view to the overriding objective of the Tribunal, and yet in this case they have been blatantly disregarded.

Employment Judge T V Ryan

Date: 27.10.23

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

[TVR]