Case Number: 1806788/2021

EMPLOYMENT TRIBUNALS

Claimant	**Respondents**
Ms L McManamin	1. Impact Education Multi Academy Trust 2. Phillip Hannah 3. Rachel Adams

Heard at: **Leeds** **On: 21 February 2024**
Before: **Employment Judge Davies**

Appearances
For the Claimant: **Mr Harris (counsel)**
For the Respondent: **Ms R Blythe (solicitor)**

JUDGMENT

1. The Claimant has failed to comply with Tribunal orders and the conduct of the proceedings by the Claimant or on her behalf as been unreasonable. A fair hearing is no longer possible and her claims are struck out in full.

JUDGMENT having been given orally to the parties on 21 February 2024 and written reasons having been requested by the Claimant at the hearing in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This was a preliminary hearing in public to decide whether the claim should be struck out because the Claimant has failed to comply with Tribunal orders and/or because the conduct of the proceedings by the Claimant or on her behalf has been unreasonable.

2. The Claimant was represented at the hearing by Mr Harris (counsel). Mr Harris is not the legal representative with conduct of the file, he is simply counsel instructed to attend this hearing. The Respondent was represented by Ms Blythe (solicitor). I was provided with a file of relevant documents. Ms McManamin had provided a witness statement for today's hearing and I read it, together with her previous witness statements and attached documents. Ms McManamin gave brief oral evidence.

Procedural history and factual background

3. This judgment should be read in conjunction with the judgment and written reasons of Employment Judge Jones, following a preliminary hearing on 29 November 2022. On that occasion, EJ Jones narrowly decided not to strike out the claims for non-compliance with Tribunal orders. He warned the Claimant that, while another judge could not be bound by his comments, the Tribunal was likely to take very seriously any further failure to comply with Tribunal orders, and that the reassurance that a lesser remedy than striking out might be appropriate in respect of further disobedience would begin to wane.

4. Having concluded that the claim should not be struck out, EJ Jones listed the final hearing to take place over 15 days in June and July 2023. He made case management orders, including orders for the parties to provide an agreed list of issues, for the disclosure of documents and agreement of a hearing file by the end of March 2023 and the exchange of witness statements by 10 May 2023.

5. The parties remained unable to agree the list of issues, and requested a further preliminary hearing at which that could be addressed. This took place on 22 May 2023. By that time, the Claimant had also made a request for specific disclosure and the Respondent applied for disclosure of the Claimant's mitigation documents as none had been disclosed to date. EJ Maidment conducted the preliminary hearing. He dealt with issues relating to privilege and other matters and made some orders for specific disclosure by the Respondent. He then ordered the Respondent to provide the Claimant with a draft of the hearing file for the final hearing. The Claimant was ordered to provide comments on that file, including which items could be removed because they were irrelevant, and to make any request for specific disclosure by 14 July 2023.

6. EJ Maidment listed a further preliminary hearing on 28 July 2023 and postponed the final hearing to December 2023, because the parties were not ready for it to take place in June 2023.

7. EJ Deeley conducted the preliminary hearing on 28 July 2023. She moved the final hearing from December 2023 to February 2024 at the Respondent's request because of the availability of its witnesses. She made further case management orders, including an order requiring the Claimant to provide mitigation documents by 25 September 2023; an order for both parties to send each other a list of documents contained within the lengthy draft hearing file that could be removed; and an order for witness statements to be exchanged by 20 November 2023. That order was expressly not an order for simultaneous exchange, but was an order for each party to provide its statements by the due date. The Claimant made an application for specific disclosure during the preliminary hearing on 28 July 2023 and EJ Deeley listed the 19 documents or categories of documents sought.

8. The Respondent responded in due course to the Claimant's application for specific disclosure. It pointed out that 15 of the 19 documents requested were in the Claimant's possession or had already been disclosed and were in the draft hearing file already.

9. On 30 October 2023, the Respondent made a further application for the claim to be struck out, on the basis that the Claimant had not complied with the orders to provide mitigation documents, to seek to agree which documents could be removed from the draft hearing file, and to confirm that disclosure was complete.

10. On 5 November 2023 the Claimant's legal representative emailed the Tribunal to say that disclosure would be completed by 10 November 2023. On 27 November 2023 EJ Cox therefore refused the Respondent's strike out application. She was of the view that this would not be proportionate, given the assurance that the documents were to be provided by 10 November 2023 and related to mitigation only. She said that the parties must cooperate to agree a manageable hearing file.

11. In fact, the Claimant's representative had not provided any further disclosure by 10 November 2023. The Respondent's representatives made repeated attempts to contact him, including by leaving voicemails, sending emails and even attempting to contact his supervisor. Eventually on 24 January 2024 the Claimant's representative made contact with the Respondent's. Apart from the very brief email to the Tribunal on 5 November 2023 (which was not in fact complied with), that was the only communication from the Claimant's representative for almost four months. In the 24 January 2024 email, the Claimant's representative said that the Claimant had disclosed all relevant mitigation documents prior to 28 July 2023. He said that he had "not been instructed to seek the removal of any documents from the existing file" and he said that they were currently working on witness statements. The Respondent's representative then requested specific disclosure of evidence relating to two roles for which it *knew* the Claimant had applied in around May 2020. She asked for confirmation that the Claimant's representative had actually read the draft file, drawing attention by way of example to pages that needed removing and pages that were duplicates. She also asked when the Claimant's representative proposed exchanging witness statements.

12. The Respondent had applied for an unless order on 15 January 2024. That application had not been dealt with by the Tribunal by 26 January 2024, when the Respondent's representative applied for a postponement of the hearing that was due to start on 19 February 2024. At that stage, she was due to go on annual leave for two weeks, after which it was half-term, so it had become impossible for the file and statements to be finalised and exchanged and the parties to be ready for the hearing.

13. Employment Judge Wade declined to postpone and re-list the hearing. Instead, she ordered that one of the days be used to decide whether the claims should be struck out.

14. The Claimant's representative disclosed further mitigation documents on 31 January 2024.

15. That is the procedural history that brings the matter before me today.

16. I have read with care the Claimant's witness statement, in which she explains that her own preparations have been hampered by illness among family members and by a bereavement. She also explains that her email was hacked in August 2023 and that for a few weeks she did not have email access. She explains that she

thought she had disclosed all relevant mitigation documents, and promptly disclosed others when she realised they were potentially relevant and when she managed to find copies of them on her mother's computer. I accept at face value her evidence about these matters. She also says that her solicitor told her in November 2023 that the date for exchanging witness statements would have to be pushed back. This was not a conscious decision by her not to comply with a Tribunal order and she did not realise it might lead to a further strike out hearing. Correspondence from the Claimant's legal representative referring to pressure of work and backlog makes clear that failures to respond to correspondence and to address the case management orders were primarily the responsibility of the Claimant's representative, not her own responsibility.

17. Mr Harris tells me that the Claimant would be in a position to provide her witness statement within seven days if so ordered. He tells me that the Claimant's union acknowledges that it might have to pay some reasonable costs in relation to the recent delays. Were this case to be re-listed, it would be autumn 2024 before it could be heard.

18. I also note:
    18.1 The Respondent did not send its witness statements to the Claimant by the due date or at all. That was, strictly, in breach of EJ Deeley's order. Statements were taken some time ago.
    18.2 Two witnesses for the Respondent, who are the alleged perpetrators in relation to an early allegation, no longer work for the Respondent and left under a cloud. They would be likely to be hostile witnesses.

Legal principles

19. The legal principles are uncontroversial. Under Rule 37 of the Employment Tribunal Rules of Procedure 2013, the Tribunal can strike out all or part of a claim, among other reasons for non-compliance with a Tribunal order or where the conduct of the claim by or on behalf of the Claimant has been unreasonable.

20. In deciding whether to strike out a party's case for non-compliance with a Tribunal order, the Tribunal must have regard to the overriding objective of seeking to deal with cases fairly and justly. The Tribunal must consider 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: see *Weir Valves and Controls (UK) Ltd v Armitage* [2004] ICR 371, EAT.

21. For a Tribunal to strike out for unreasonable conduct, it must be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps or that it has made a fair trial impossible: see *Blockbuster Entertainment Ltd v James* [2006] IRLR 630, CA.

22. In both cases – non-compliance with Tribunal orders and unreasonable conduct - the Tribunal must not strike out the claim unless it is also satisfied striking out is proportionate. That involves consideration of whether there is some step short of

striking out the claim that will achieve the desired result. The first object of any system of justice is to get triable cases tried: see *Blockbuster*.

23. In *Harris v Academies Enterprise Trust* [2015] ICR 617, while rejecting the submission that the strict approach that is taken to striking out under the Civil Procedure Rules should be taken in the Employment Tribunals, the EAT nonetheless held that justice is not simply a question of the court reaching a decision that may be fair as between the parties in sense of fairly resolving the issues; it also involves delivering justice within a reasonable time. Indeed, that is guaranteed by Article 6 of the European Convention on Human Rights and Fundamental Freedoms. Overall justice also means that each case should be dealt with in a way that ensures that other cases are not deprived of their own fair share of the resources of the court. The EAT also observed that one relevant factor may be that a failure to comply with Tribunal orders over a period of time, repeatedly, may give rise to a view that if further indulgence is granted, the same will simply happen again.

Conclusions

24. Applying those principles, I have reached the following conclusions. First, there has been a failure by the Claimant or her representative to comply with Tribunal orders and there has been unreasonable conduct by the Claimant's legal representative. On her behalf, Mr Harris, sensibly, does not seek to avoid that.

25. The non-compliance with Tribunal orders involves non-disclosure of mitigation documents, failure to comply with orders designed to reduce the Tribunal hearing file to a manageable and proportionate size, and failure to provide a witness statement. I accept Mr Harris's submission that it is important to look properly at these matters in context. The hearing could have gone ahead in the absence of mitigation documents – that would have prejudiced the Claimant not the Respondent – and could have been based on the unwieldy draft hearing file that has been prepared. The Respondent could have (and perhaps should have) unilaterally disclosed its witness statements. In principle, a hearing could potentially have taken place if it had done so.

26. However, the more fundamental difficulty is the total failure of the Claimant's representative to communicate with the Respondent's representative for a period of months in the run up to a fifteen-day Tribunal hearing. That meant that the parties were unable to co-operate to ensure that they were prepared for the hearing and it was this that led, inevitably, to the hearing being postponed again. This conduct was wholly unreasonable.

27. The question is therefore whether a fair hearing is still possible and, if not, whether striking out the claim is proportionate. I must consider whether some lesser step could be taken instead.

28. It is necessary to balance all the relevant factors in deciding whether a fair hearing is possible and whether striking out is proportionate. In doing so I take into account that the Claimant makes serious and weighty allegations. There are, of course, two versions of events, but the allegations clearly cannot be dismissed as hopeless or trivial. I also take into account the impact of these events on the

Claimant as set out in her witness statement. It is also necessary to take into account that much if not all of the responsibility lies with the Claimant's legal representative, not her. It is evident that this arises from pressure of work and lack of people to do it. There are, of course, steps the Claimant can take in respect of failures by her legal representatives. Nonetheless, these matters weigh in the Claimant's favour.

29. On the other hand – if the case is postponed and re-listed in the autumn, the claim will be heard almost three years after the claim was presented and four years after many of the events about which complaint is made. I am not persuaded by the Respondent's submission that prejudice would arise because of the two identified witnesses who have "left under a cloud." It seems to me that the Respondent would have faced those issues in any event if the hearing had gone ahead this week. But it is quite clear that in general terms memories will fade, and a further six to eight months' delay will be significant. That is so even if there are documents from the time and witness statements have been taken. Witnesses will be cross-examined and called on to remember events, and inferences may be drawn if they cannot provide answers and explanations.

30. I also take into account what the EAT said in *Harris*. A fair hearing involves delivering justice within a reasonable time. Here, one corporate Respondent and two named individual Respondents have now been facing very serious allegations for a number of years. Twice a fifteen-day hearing has been in their calendars and then moved at relatively short notice. If the hearing is moved to the autumn, that would leave these allegations unresolved for another six to eight months. That is in the context of a 3-month primary time limit.

31. I have concluded that overall a fair hearing is no longer possible. The delay is too great; the impact on recollections will be significant; and putting this matter off again for many months is inimical to the concept of fairly resolving the disputes between parties within a reasonable time.

32. I have considered very carefully whether there is something less than striking out that could be done instead. Mr Harris, in his very careful and persuasive submissions, suggests that there is a step short of striking out these claims that could be taken: make the provision of the Claimant's witness statement subject to an unless order. He submits that either she will provide it and the hearing can go ahead on the new date, or she will not and the claim will be struck out. I have thought very carefully about this, but balancing all the relevant factors and in the context of the history of these proceedings, I am not persuaded that this step would enable a fair hearing to take place. It does not overcome the difficulty that this hearing will now be delayed until later this year. Furthermore, I do take into account that in this case compliance has been promised in the past and not delivered. The Claimant narrowly escaped having her claim struck out more than a year ago and what has followed. on any view, entails further shortcomings in compliance, failure properly to engage and, ultimately, a period of total failure to communicate or co-operate. Disclosure was promised in November, which led EJ Cox to reject a strike-out application at that stage, and then nothing further was done or said for more than two months. The email from the Claimant's representative dated 24 January 2024 still has all the hallmarks of failure to engage properly with the detail of this matter. It, like the specific disclosure

application made last July, gives the clear impression that nobody has still properly read or engaged with the claim and documents.

33. Bearing in mind the overriding objective and the need to do justice to both sides, for all these reasons I have concluded that a fair hearing is not possible and that it is proportionate and necessary to strike out these claims for non-compliance with orders and unreasonable conduct.

34. I conclude by saying that in his able submissions Mr Harris said everything that could be said on the Claimant's behalf. I also note that this judgment is not intended as personal criticism of the Claimant's legal representative. I have not been provided with detailed information about the circumstances, but it is clear that the context is, as I have said, one of overwork and lack of resource. Unfortunately, the consequence is that it is no longer possible to have a fair hearing of these claims.

Employment Judge Davies

Date: 6 March 2024

Sent to the parties on:

Date: 11th March 2024

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For the Tribunal:

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