EMPLOYMENT TRIBUNALS

Claimant: Mr A Domanski

Respondent: Phinia Delphi UK Ltd.

Heard at: Bristol **On:** 4 March 2024

Before: Employment Judge Livesey

Appearances:
For the Claimants: Did not attend
For the Respondent: Mr Dando, solicitor

JUDGMENT

The Claimant had conducted proceedings in a manner which scandalous, unreasonable and/or vexatious within the meaning of rule 37 (1)(b) and his claim was struck out.

REASONS

Relevant background

1. The Claimant had issued his claim on 25 November 2022. The complaints were of unfair dismissal and discrimination on the grounds of disability.

2. When the Response was accepted on 7 February, the Claimant was asked to provide an impact statement and any medical evidence in support of his disability by 20 April. He failed to comply with that direction and a further order was made on 5 May for compliance within a further week. In the meantime, the Respondent

applied to have the discrimination claim struck out as a result of his non-compliance.

3. The Tribunal's email of 5 May did prompt a response from the Claimant the following day; a short email in which he reasserted his disability (a heart condition) but neither medical evidence nor an impact statement were enclosed.

4. On 12 May, a document written in Polish was supplied. The Claimant further asserted (again without an impact statement or medical evidence that could be understood) that he was disabled;

"My disabilitys base are on mainly heart problems and uneven hips problems."

5. The Tribunal responded on 26 May;

"*The Judge notes that this is still an early stage of proceedings. A telephone Case Management Hearing has yet to take place. Nevertheless, the emails of 6 May and 12 May do not assist. The attachment is in Polish. The directions of 9 February 2023 were straightforward and they need to be complied with. If they are not complied with by the date of the hearing on 25 July, there is a real risk that a judge will accede to the Respondent's request and strike out the disability discrimination complaints."*

6. It was not until 11 July that the Claimant supplied a translation of the document which had been provided on 12 May. It purported to be a 'Certificate of Degree of Disability' and, whilst some limitations were specified ("*incapable of undertaking permanent work*"), the nature of the Claimant's condition was not specified, nor was any prognosis given. The author stated that the assessment had been based upon an analysis of medical documents, which were not supplied.

7. Over a week later, on 19 July, the Claimant supplied a letter dated 10 January 2019 from a Dr Dickson, an Occupational Health Physician. The letter described the Claimant's '*history of heart problems'* without specifying precisely what they were.

8. Employment Judge Midgley then conducted a Case Management Preliminary Hearing on 25 July. The case was listed for a further preliminary hearing on 27 October at which the issue of disability was to have been determined. A final hearing for three days was also listed to take place on 4, 5 and 6 March 2024. Case management directions were issued by consent for the preliminary hearing only the and the issues were discussed, agreed and recorded in the Case Summary. The Respondent withdrew its application to strike out (paragraph 8 of the Order).

9. On 15 August, the Respondent admitted disability and asked for the Preliminary Hearing to be vacated. Directions leading up to the final hearing were proposed. Employment Judge Self agreed that an open Preliminary Hearing was no longer

necessary, but a further Case Management Preliminary Hearing was eventually listed in its place to take place on 2 February 2024.

10. Employment Judge Midgley issued directions leading up to the final hearing which had been requested by the Respondent, the Claimant having not disputed them.

11. Amongst those directions was a provision for the hearing bundle index to have been agreed by 27 November. On 18 December, the Respondent indicated that the bundle had been shared with the Claimant on 22 November. No objection had been received and so a final version had been sent on the 28th. It therefore considered that the final hearing bundle was complete.

12. On 2 January 2024, the Claimant applied for a "*motion to dismiss the documentation as evidence in the case. As we see most of documents posted by BorgWarner as "evidence" is far away from reality and facts.*"

13. On 30 January, the Claimant applied to postpone the hearing. He wished to consult with his representative and "*demonstrate that the* [Respondent's] *witnesses are biased towards the case*". He also stated that he was due to have been outside the UK and "*it may be a problem with signal during the hearing*".

14. The Respondent objected to the postponement application and it was refused by a judge on 31 January. The Claimant was reminded that Polish interpreters had been booked for the hearings on 2 February and 4-6 March and that he had had 97 days in which to arrange representation and seek legal advice. He was told to make sure that he was in the UK for the final hearing.

15. The Claimant failed to attend the further case management hearing on 2 February before Employment Judge Bax. Extensive efforts were made to contact him (see paragraph 45 of the Case Summary). He was required to provide an explanation for his non-attendance by 12 February. Other than a change in the date for exchange of witness statements (to 16 February), no other directions were altered and the March listing was confirmed.

16. It was clear then that doubts were expressed about the Claimant's desire to actively pursue his claim, but the Judge issued no sanction at that stage, other than dismissing his 'motion' of 2 January (see paragraph 12 above and paragraphs 54 - 56 of the Case Summary).

17. On 5 February, the Claimant wrote to explain his non-attendance on 5 February; he attributed it to his "*health condition*", without providing any detail and/or medical evidence. He also said that part of the reason was the fact that the witnesses currently lived in Poland although, again, it was not clear why that fact had prevented *him* from attending the Case Management hearing.

18. On 15 February, the Claimant supplied a witness statement on behalf of Marta Iwanus dated 23 October 2023. The detail of the statement will be examined below, but its service upon the Respondent brought about its application of 20 February to strike the claim out on the basis that it was falsified. In all other respects, it said, it was ready for the final hearing. When it pointed out to him that he had failed to file a witness statement of his own, he responded and stated that

one was not necessary and that he stood by everything that he had testified to in the correspondence (his email of 21 February).

19. No witness statement has ever been filed by the Claimant himself. Judge Midgley's original directions included the following paragraph;

> "*The Claimant and the Respondent must prepare witness statements for use at the hearing. Everybody who is going to be a witness at the hearing, including the Claimant, needs a witness statement.*"

20. On 23 February 2023, the Regional Employment Judge wrote out in the following terms;

> "*In accordance with the case management orders, the claimant is required to produce a witness statement for himself. If he fails to do so, he will have no evidence on which to base his claim.*
>
> *Further, the claimant is to respond straight away to the respondent's assertion that the statement he provided from Ms Iwanus is false. Failure to do so may mean that his claim is struck out.*"

21. That was where the trail went cold. There was no reply to the Respondent's application to strike the claim out, nor to the Regional Employment Judge's email of 23 February, either in relation to Ms Iwanus' statement or his own. The Regional Employment Judge therefore converted the first day of the final hearing into a Preliminary Hearing in order to determine the Respondent's application.

22. On Friday 1 March at 9.57 pm, the Claimant wrote to say that he was working abroad and would not have been back in the country until 26 March "*as I reported before*", presumably preferring to his email of 30 January (paragraph 13 above). A few minutes later, he sent a further email in which he said that the Respondent was accusing him of "*false evidence without any basis or evidence*" (see, further, below).

Principles

23. The Respondent asserted that the Claimant had conducted proceedings scandalously, unreasonably and/or vexatiously (rule 37 (1)(b)).

24. Striking out a case as a result of the behaviour of a party was undoubtedly a drastic sanction and it must have been proportionate to the offence (*Bennett-v-Southwark LBC* [2002] IRLR 407 and *Bolch-v-Chipman* [2004] IRLR 140). Even if unreasonable conduct had been demonstrated, a judge still had to consider whether striking out the claim would have been a proportionate sanction and, in a case where a fair trial was still possible, that would rarely have been the case (*Arriva London-v-Maseya* UKEAT/0096/16/JOJ).

25. Where a party's unreasonable conduct had resulted in a fair trial no longer being possible, however, the power to strike a claim out under rule 37 (1)(b) was clearly triggered (*Emueukoro-v-Cromo Vigilant (Scotland) Ltd* [2022] ICR 327), but even in such a case, the Tribunal still had whether the nuclear option of a strike out was

appropriate rather than, perhaps, some lesser sanction. It did not follow the claim *had* to be struck out. A tribunal was always left with a discretion (the use of the word '*may*' at the start of rule 37) which had to be exercised in accordance with the overriding objective and the interests of justice.

Discussion and conclusion

26. In the statement from Ms Iwanus which was served by the Claimant, she claimed to have been his supervisor during his time with the Respondent and alleged that she had been '*forced to leave*' her job for having tried to help him during the disciplinary process which resulted in his dismissal. She claimed that, in previous testimony given by her, she had been '*manipulated by an offer of promotion in exchange for putting* [the Claimant] *in a situation that threatened his position*'.

27. The Respondent indicated that it had been in regular contact with Ms Iwanus even though she no longer worked for it. She had been providing information to it "*to assist it in responding to the Claimant claims.*" When it had received her statement from the Claimant, it contacted her again. Not only did she say that she had not been in touch with the Claimant since she had left the Respondent's employment, but also that she had not written, or even seen, the statement which he had filed. She said that her signature must have been forged. An email exchange with Ms Iwanus was provided which corroborated the submissions.

28. The Respondent argued that the Claimant's conduct in relation to Ms Iwanus' statement was scandalous and that it was a deliberate attempt to mislead the Tribunal, which amounted to contempt.

29. The Claimant's failure to attend what would have been the first day of his trial was unreasonable conduct in light of the history of the case; the hearing had been listed since 25 July. The Claimant had only applied for a postponement on 30 January and, when that he was refused, he failed to attend the 2 February hearing, attributing his absence to his 'health condition' without giving any further detail. He was, perhaps, fortunate to have avoided sanction then.

30. His absence today led to two irresistible conclusions; first, that he had little regard for the Tribunal process. Having had his trial listed for over 7 months and having had a postponement application refused, he had nevertheless chosen not to attend. Secondly, that the Respondent's account in respect of Ms Iwanus' statement was to have been accepted in the absence of any cogent explanation from the Claimant as to why it might have been wrong and/or inaccurate.

31. That second conclusion led to the inescapable finding that the Claimant's conduct had indeed been scandalous and an attempt to mislead. The threshold test of rule 37 (1) (b) was met.

32. They were not, however, the Claimant's only failings in the case;

- He had failed to comply with the directions of 7 February or 5 May in relation to the provision of an impact statement and medical evidence;
- He failed to provide any disclosure, either a list or copy documents;

- He had failed to comment upon and/or challenge the contents of the hearing bundle, until after it had been supplied and agreement had been deemed;
- He had failed to properly explain the 'health condition' which had allegedly prevented him from attending on 2 February;
- He had failed to file a witness statement for himself, despite clear directions in relation to the requirement;
- He had failed to respond to the Regional Employment Judge's direction of 23 February *at all.*

33. Was a fair trial still possible? The Respondent's argument that the Tribunal could no longer accept the veracity of anything that the Claimant told it, was compelling. He had demonstrated a wilful disregard for the Tribunal's authority and his conduct had revealed a lack of integrity. A fair trial was no longer possible.

34. In the circumstances, it was reasonable to strike the case out. The Claimant had wasted the time of the Respondent and the Tribunal. He had been given his opportunity of his complaints, which he had spurned. His conduct thus far suggested that further compliance was a distinct possibility if the case was allowed to proceed.

Employment Judge Livesey
4 March 2024

Judgment sent to the parties on:
18th March 2024

For the Tribunal Office: