



EMPLOYMENT TRIBUNALS

Claimant

Respondents

Ms Forzana Khanom

v

Mishcon de Reya LLP

Heard at: London Central (in private, by video)

On: 27 February 2024

Before: Employment Judge **P Klimov** (sitting alone)

Representation:

For the Claimant: Not present or represented

For the Respondent: **Ms T O'Halloran**, counsel

JUDGMENT

The claimant's claim is dismissed for non-attendance (Rule 47 in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013).

REASONS

Background

1. The claimant presented her claim on 30 November 2022.
2. There was a case management hearing on 7 August 2023 before Employment Judge Joffe. The Judge gave the usual case management orders and listed the claim for a final hearing over 4 days, starting on 27 February 2024.
3. The claimant failed to comply with the orders made by EJ Joffe ("**the EJ Joffe Orders**"). In particular, she failed to provide medical evidence of the alleged disability by 18 September 2023, and to disclose documents by 6 November 2023 ("**the Original Disclosure Order**"), despite being repeatedly chased by the respondent.

4. On 24 November 2023, the respondent applied for an unless order and an order to vary the dates for compliance with some EJ Joffe Orders, including to vary the disclosure date to 15 December 2023.
5. On 1 December 2023, the Tribunal wrote to the parties asking the claimant to comment on the respondent's application by 4pm on 5 December 2023 ("**the December Order**") and granting the respondent's application to move the disclosure date to 15 December 2023 ("**the Delayed Disclosure Order**"). The claimant did not comply with the December Order.
6. On 5 December 2023 at 7pm, the respondent renewed its unless order application of 24 November 2023.
7. On 13 December 2023, EJ Woodhead made an order in the following terms ("**the EJ Woodhead First Order**"):

If by **4pm on 15 December 2023** the Claimant has:

- i) has failed to comply with the Delayed Disclosure Order; and
- ii) has failed to provide adequate explanation:
 - a. for not complying with:
 - 1.the Original Disclosure Order; and
 - 2.the December Order; and
 - 3.the Delayed Disclosure Order; and
 - b. as to why their claim should not be struck out under Rule 37;

then the Tribunal will consider striking out the Claimant's claim under Rule 37 of the Employment Tribunal Rules of Procedure contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 No. 1237 (as amended).

8. The claimant failed to comply with the EJ Woodhead First Order.
9. On 21 December 2023, the respondent applied to have the claimant's claim struck out for failure to comply with the Tribunal's orders.
10. On 11 January 2024, EJ Woodhead made an order in the following terms ("**the EJ Woodhead Second Order**"):

By email, before **4pm on Monday 15 January 2024**, the Claimant in correspondence to the Tribunal (which she must also copy to the Respondent) must:

- a. explain why they have failed to comply with the Delayed Disclosure Order; and
- b. explain why they have failed to provide adequate explanation for not complying with:
 - i. the Original Disclosure Order; and
 - ii. the December Order; and
 - iii. the Delayed Disclosure Order; and
- c. explain why they have failed to respond to the Tribunal's correspondence of 13 December 2023; and
- d. explain whether in their view the hearing listed for 27, 28 and 29 February 2024 and 1 March 2024 can proceed on those dates and, if so, how the CMO's might need to be varied as regards:
 - i. exchange of documents (paragraph 14 of the CMO's); and
 - ii. agreement of a file of documents (paragraphs 16 and 17 of the CMO's); and

- iii. preparation and exchange of witness statements (paragraph 25 of the CMO's); and
- e. explain why their claim should not be struck out under Rule 37 (c) and, in doing so, set out any response to the points made by the Respondent in their email of 21 December 2023 at 16:09.

The Claimant must provide any necessary evidence (such as medical evidence) supporting her explanations as directed above. In accordance with the Rules, the Claimant must copy the Respondent on all correspondence sent to the Tribunal.

11. On 15 January 2024, the claimant wrote to the Tribunal giving her reasons for non-compliance with the orders. She partly blamed her former solicitors (who had come off record on 6 December 2023), partly her ill health (side effects of medication), and partly technical problems with her laptop. Having carefully considered the claimant's reasons for non-compliance, I find them wholly unpersuasive and insufficient to excuse the claimant's repeated and continued failure to abide by the Tribunal orders.
12. Notably, in her email of 15 January 2024, the claimant said that she was "*willing to comply*", was in the process of seeking legal representation, and "*wish[ed] to proceed with the hearing*".
13. On 15 January 2024, the respondent wrote to the Tribunal, responding to the claimant's representations and restating its application for a strike out order. The respondent also stated its view that the case was not ready for the final hearing commencing on 27 February 2024, and it was not possible to make it ready, considering the state of its preparedness and the claimant's total failure to engage in the process.
14. On 26 January 2024, EJ Lewis order that a further preliminary hearing be fixed "*to discuss case preparation, whether the February hearing dates are still practical, and any adjustments which the claimant may need for case preparation including the hearing*".
15. There were further email exchanges between the parties and the Tribunal between 26 January and 19 February 2024, ultimately resulting in REJ Freer deciding on 23 February 2024 to vacate the final hearing and convert the first day of the hearing (27 February 2024) to a 3-hour case management preliminary hearing (by video) to review the current position together with how the case will progress, including whether the respondent's strike out application should be listed or unless orders made.
16. The claimant did not respond to the REJ Freer's Order. She did not apply to have the preliminary hearing on 27 February 2024 postponed.
17. On 26 February 2024, at 4:23pm, the Tribunal emailed the parties instructions on how to join the preliminary hearing by video.

The hearing

18. On 27 February 2024, at 9:35am, the claimant emailed the Tribunal saying that she would not be able to join the hearing because she was at the airport about to board a flight to go on a family trip abroad for her birthday. She said

that she had given instructions to her former representatives that she would not be available the entire week of 26 February 2024.

19. On my instructions, the clerk emailed the claimant with the following message:

“Employment Judge Klimov has instructed me to inform you that you are expected to join the hearing today. If you do not join the hearing at 10am, your claim is likely to be dismissed and you may be ordered to pay the Respondent’s costs.”

20. The following auto-reply message came back from the claimant’s email address:

“Please note that I currently have very limited access to emails and not at all during weekdays. If your query is urgent, please contact me by phone (preferably by text during office hours). Thank you.”

21. I asked the clerk to telephone the claimant, but Tribunal did not have her number, because the claimant had not given her telephone number in her ET1 form or in other communications with the Tribunal. I asked the clerk to check with the respondent if it had the claimant’s mobile phone number. The clerk was not able to obtain it from the respondent either.

22. The respondent joined the hearing. The claimant did not join the hearing.

23. I waited until 10:20am before starting the hearing. The claimant did not join the hearing.

24. I asked Ms O’Halloran to make representations on behalf of the respondent. Ms O’Halloran had prepared a helpful skeleton argument for the hearing, which I had read in advance. However, considering the claimant’s non-attendance at the hearing, I asked her to make further oral submissions.

25. Ms O’Halloran said that it was hardly surprising that the claimant had failed to attend the hearing, considering how she had been pursuing the matter all along. Ms O’Halloran said that the claimant had not been actively pursuing her claim. She took me through the procedural history of this case, highlighting repeated and unexplained failures by the claimant to comply with the Tribunal’s orders and generally engage in the process. Ms O’Halloran said that the claimant’s failures showed a complete disrespect towards the respondent and the Tribunal. She said that, considering the fact that the claimant was an apprentice-solicitor, and as such would be aware of the importance to conduct herself appropriately and with due courtesy toward her opponent and the Tribunal, the claimant’s conduct was particularly striking.

26. Ms O’Halloran reiterated that it was not just a one-off non-compliance, but a persistent and continuing failure, which caused the respondent to incur substantial and unnecessary costs in chasing the claimant and making various applications to the Tribunal. She emphasised that the claimant’s conduct took a wholly disproportionate amount of the Tribunal’s time and resources in managing the case.

27. Ms O’Halloran also drew my attention to the fact that the claimant had been warned more than once, both by the respondent and the Tribunal that her

claim was at risk of being struck out for non-compliance with the orders and for failure to actively pursue it.

28. Finally, Ms O'Halloran drew my attention to paragraphs 5 and 6 of her skeleton, where she had set out the relevant case law on the issue of unreasonable conduct of proceedings, and in particular the pronouncement of Lady Smith in *Rolls Royce plc v Riddle* [2008] IRLR 873, EAT, that it is quite wrong for a claimant "*to fail to take reasonable steps to progress his claim in a manner that shows he has disrespect or contempt for the tribunal and/or its procedures*" (para 20). Although striking out a claim is the most serious of outcomes for a claimant, she [Lady Smith] commented that "*it is important to avoid reading the warnings in the authorities regarding its severity as indicative of it never being appropriate to use it*" (para 35). In that case, her Ladyship, on appeal, struck out the claimant's unfair dismissal claim because of "*a persistent disregard for the tribunal, its procedures, and the respondents' interests*", making a strike out of the claim *'inevitable'*.
29. Ms O'Halloran concluded her submissions by saying that the claimant's behaviour squarely fell within what Lady Smith had described as "*a persistent disregard for the tribunal, its procedures, and the respondents' interests*", and therefore her claim ought to be struck out and a costs order (in the amount to be determined at a later date) be made against the claimant.
30. In the alternative, if I were not minded to strike out the claim at this hearing, Ms O'Halloran asked me to list a preliminary hearing in public to determine the respondent's strike out application.

Analysis and Conclusion

31. If it were a preliminary hearing in public, I would have had no hesitation in striking out the claimant's claim under Rule 37(1)(a), (c) or (d) of the Employment Tribunals Rules of Procedure 2013 ("**the ET Rules**").
32. Having carefully reviewed the matter (including all the claimant's correspondence), I find that this case is a prime example of when the Tribunal not only can but should exercise its strike out powers. In fact, in my view, not striking out the claimant's claim on these facts would be a perverse decision.
33. The claimant showed a complete and utter disregard to the Tribunal's process. She caused the respondent to incur substantial and unnecessary costs, and all that due to her failure to engage with her own claim. She took a wholly disproportionate time from the limited Tribunal's resources, with at least six Employment Judges having to deal with her case at various stages. At the same time, she barely exerted any effort herself to progress her case. Due to the claimant's unreasonable conduct and complete disregard of the Tribunal's orders, the case is no further forward than where it was in August 2023.
34. Furthermore, her persistent failures and the lack of engagement with the case meant that the final hearing had to be vacated on a short notice, which in turn means that this vacant slot might not be filled with other pending cases. The

result of that is not only unnecessary and wasted costs and time for the respondent and the Tribunal, but a knock-on effect on other applicants, who have to wait longer for their cases to be heard.

35. The claimant is an apprentice-solicitor. It appears she aspires to join this profession. Therefore, she who would (or at any rate – should) be aware of the importance to follow due legal process, and how she should conduct herself towards her opponent and the Tribunal. Her conduct of this case demonstrates the opposite of what could be expected of someone in her position.
36. Unfortunately, because this hearing had been listed as a case management hearing (in private), it was not open for me to strike out the claim under Rule 37(1)(a), (c) or (d) of the ET Rules at the hearing.
37. I decided that it would be disproportionate and a further wasting of the Tribunal's time and resources to list another preliminary hearing (in public) to determine the strike out application.
38. However, it was open for me to consider whether the claimant's claim should be dismissed under Rule 47¹ of the ET Rules. Accordingly, I turned my mind to that question.
39. First, I considered whether the hearing should proceed in the claimant's absence and decided against that. In the claimant's absence it was not possible to progress the case any further. The claimant was in serious and on-going default of numerous Tribunal's orders, and it appeared to me that she was not willing to properly engage in the process despite her assurances to the contrary and her feeble excuses for the current failures. In the circumstances, giving further case management directions would have only meant putting the respondent at further unnecessary expense and introducing more delay in the process. I had no good reasons to believe that the claimant would comply with any such orders.
40. I was satisfied that every reasonable attempt had been made to make the claimant to join the hearing. The claimant was warned of the likely consequences of her not attending the hearings. The claimant was given sufficient extra time to join the hearing. She made no attempts to do so.
41. Therefore, considering:
 - a. the claimant's persistent, long-lasting and egregious disregard of the Tribunal's orders and her failure to engage with the process, thus showing a complete and utter disrespect to the respondent and the Tribunal, bordering on contempt;

¹ **47. Non-attendance**

If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence.

- b. her feeble and frankly scarcely credible explanations as to the reasons for not engaging with the process and failing to comply with the Tribunal orders;
- c. her failure to attend the hearing today, when she knew full well (at least from 9 August 2023) of the date of this hearing, and from 23 February 2024 that the hearing was going ahead;
- d. that no stage did she apply to postpone the hearing, but on the contrary, in her email of 15 January 2024 assured the Tribunal that she was “*willing to comply*” and wished “*the hearing to proceed*”;
- e. the reason that she was not attending the hearing was that she was going on a long-planned family holiday, which reason in the circumstances I found to be completely unsatisfactory;
- f. the impossibility to proceed with the hearing or to progress the case any further without the claimant’s attendance and engagement; and
- g. my conclusion that it would be disproportionate and contrary to the overriding objective to list a further hearing, or to issue new case management orders, which I had no confidence the claimant would comply with

I decided that it would be in accordance with the overriding objective to exercise my powers under Rule 47 of the ET Rules and dismiss the claimant’s claim for non-attendance of the hearing.

42. Ms O’Halloran indicated that the respondent would be seeking a costs order against the claimant. I said that a costs order application could be made in the usual way pursuant to Rule 77 of the ET Rules, and if made should be marked for my attention.

Employment Judge P Klimov

27 February 2024

Sent to the parties on:

11 March 2024

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For the Tribunals Office

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