



EMPLOYMENT TRIBUNALS

Claimant: Mrs Mihaela Vasiliu

Respondent: Barclays Services Ltd

Heard at: East London Hearing Centre

On: 25, 26, 30, 31 July 2019, 2 August 2019 and
7 October 2019

Before: Employment Judge Burgher

Members: Ms L Conwell-Tillotson
Mrs BK Saund

Appearances

For the Claimant: No attendance

For the Respondent: Mr J Susskind, Counsel

JUDGMENT

1. **The Claimant's claims are struck out under rule 37 of the 2013 Employment Tribunal rules on the basis of non compliance with Tribunal orders and unreasonable conduct.**

REASONS

1. At the start of the resumed hearing on 7 October 2019 the Respondent made an application to strike out the Claimant's claims pursuant to rule 37 and 47 of the 2013 ET rules.

2. Rule 37 of the ET Rules states:

37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) 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, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above

3. Rule 47 of the ET rules states:

Non-attendance

47. 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.

4. The Claimant sent an email to the Tribunal on 4 October requesting the hearing to be delayed for reasonable time, at least two months, after mid-December. This application was refused by Tribunal letter dated 4 October 2019 and it was made clear to the parties that the hearing would proceed as planned.

5. The relevant procedural background is as follows:

6. The full merits hearing for the case was listed to take place over 10 days between 25 July 2019 and 7 August 2019.

7. The Tribunal heard evidence from the Claimant and the 26, 30, and 31 July 2019. We heard evidence from three of the Respondent's witnesses namely Andrew Stalker, Jane Bell and Philip Caldwell on 31 July 2019.

8. On 1 August 2019 the Claimant requested an indefinite postponement of the hearing. She stated that she fell seriously ill and was taken directly to hospital on 31 July 2019. The Tribunal required further medical evidence to assess the application and the Claimant was required to attend the hearing on 2 August 2019, which was the fifth day of the full merits hearing.

9. On 2 August 2019, the Claimant attended the Tribunal and renewed her application for a postponement. Following discussion this was granted and specific orders regarding medical evidence and adjustments were made. The orders were explained to the parties on 2 August 2019 and confirmed in writing and sent to the parties on 8 August 2019.

10. Paragraph 9 of the directions required the Claimant to provide medical evidence by 2 September 2019 supporting the basis for the postponement.

11. Paragraph 10 of the directions specified that if the medical evidence is not provided is inadequate the Respondent is entitled make any applications it deems appropriate in respect of the progression of case. The case was ordered to reconvene between 7 – 11 October 2019.

12. Paragraph 12 of the directions required the Claimant to provide the Tribunal with any requirements for reasonable adjustments for the reconvened hearing by 16 September 2019.

13. Paragraph 13 of the directions specified that if the Claimant is unable to attend the resumed hearing date the Tribunal have will have regard to the overriding objective and would consider continuing the hearing the Claimant's absence pursuant to rule 47 of the 2013 ET rules.

14. Paragraph 14.3 of the directions specified that if the order is not complied with the Tribunal may take such action as it considers just may including striking out the claim or response.

15. The Claimant sent an email to the Tribunal dated 30 August 2019 stating:

The doctor being on the summer season holiday leave, I may not be able to submit the completed translated questionnaire on September 2, but as soon as possible with the above constraints.

16. The Claimant did not provide any medical evidence to the Tribunal or the Respondent. The Respondent wrote to the Claimant reminding her of the obligation to provide medical evidence by letter dated 4 September 2019. The Claimant did not respond.

17. Consequently, the Respondent applied by letter dated 12 September 2019 to strike out the Claimant's claims because it not being actively pursued and the Claimant has not complied with the Tribunal order. The Respondent also stated that by applying for an indefinite postponement without adequate or proper supporting evidence, then failing to provide the evidence in the generous time provided was scandalous unreasonable and/or vexatious and is an abuse of the Tribunal's process.

18. The Tribunal notified the parties by letter dated 24 September 2019 that the Respondent's application for strike out would be considered at the start of the reconvened hearing. The parties were informed that the Claimant's lack of correspondence and communication, contrary to the Tribunal orders may be

considered and the Claimant was invited to make any representations. No representations were received from the Claimant in this regard.

19. The Claimant sent an email dated 4 October 2019 applying for a further postponement, for at least two months, and a recusal of the Tribunal Judge. No medical reason was advanced for the postponement. That application was considered and responded to by Tribunal on 4 October 2019 refusing the postponement and the recusal request. The parties were informed that the hearing would proceed as planned.

Submissions

20. The hearing reconvened on 7 October 2019. The Claimant was not in attendance. Mr Susskind renewed the Respondent's application to strike out. He reiterated the matters raised the Respondent's letter dated 12 September 2019. He referred the Tribunal to the cases of Rolls-Royce Plc v Riddle UKEATS/0044/07 and Blockbuster Entertainment v James [2006] EWCA Civ 684.

21. In the case of Rolls-Royce Plc the Honorable Lady Smith stated at paragraph 19 that the predecessor to rule 37 is not drafted to fetter the discretion of the however, it will be important for the Tribunal to take account of the whole facts and circumstances including the fact that strike out is the most serious of sanctions. That being so, it is usually considered appropriate to take account of the principles laid down by the High Court in England prior to the introduction of the current CPR. There are two considerations, the first of which is where there has been intentional and contumelious default by the Claimant and the second is whether has been inordinate and inexcusable delay,

22. Mr Susskind advanced his submissions on the basis that the Claimant has demonstrated intentional and contumelious default. In particular, he submitted that the Claimant:

22.1 Was aware that she had to provide medical evidence not done so;

22.2 Had failed to provide an explanation as to why medical evidence not been provided;

22.3 Had not responded to the Respondent's application dated 12 September for strike out;

22.4 Was aware that the Respondent was applying for strike out made no representations;

22.5 Had not attended Tribunal hearing on 7 October 2019 without good reason,

23. Mr Susskind also referred as the case of Blockbuster Entertainment Ltd, at paragraphs 18 to 21. In this case Sedley LJ stated that the first objective any system of justice is to get triable case tried and in deciding this the Tribunal needs to have in mind the timing the application and the reasons why the application is made. It was stated that it takes something very unusual to justify striking out on procedural grounds

a claim that has arrived at the point of trial. It may be disproportionate to strike out the claim on an application will be made on the morning of the hearing. Striking out must be a proportionate measure.

24. Mr Susskind took no issue as to whether the Respondent was prejudiced in proceeding or whether it could receive a fair trial. When addressing the question of proceeding in the Claimant's absence he stated that it would not be proportionate to do so.

25. Mr Susskind submitted that it would not be proportionate continue the case given that the Claimant has not indicated when she would be able to actually attend. He stated that the Respondent has another five witnesses and will be put to further inordinate expense to attend for the next 3 days to continue give evidence, answering in some cases vague allegations, and drafting submissions on the issues when the Claimant herself has chosen not to attend.

26. Mr Susskind also submitted that Tribunal time should be considered, in particular, by continuing the claim in this case would be sanctioning unreasonable conduct in circumstances where the Claimant did not intend to comply with Tribunal orders and attend to prosecute her claim. Paragraph 20 of the Rolls Royce Plc was referred to in this regard.

Conclusions

27. Had the Claimant provided the relevant medical evidence to substantiate the initial postponement from 2 August 2019 the Tribunal would have been likely to have considered whether to postpone further or to continue with the hearing in the Claimant's absence pursuant to rule 47 of the 2013 Tribunal rules. However no medical evidence was provided.

28. When considering the submissions and the law and having been taken through the default by the Claimant, the extent of her allegations, some of which had an unclear basis, and the fact that were still five of Respondent's witnesses to consider, we concluded that it was not proportionate to continue the hearing in the Claimant's absence. The Tribunal considered that it would be artificial and unattractive to seek to make factual findings in respect of allegations in favour or against numerous witnesses in respect of whom the Claimant cannot challenge due to her decision not to attend.

29. Further, the Tribunal is confident that the hearing would have proceeded and concluded in August 2019 if the postponement application on medical grounds was not made and granted at that time. Medical evidence to justify that postponement was essential. This was ordered and the Claimant has failed to provide the medical evidence in breach of such Tribunal order. We also consider that her failure to provide this amounts to unreasonable and contumelious conduct.

30. In these circumstances we take the unusual step of striking out the Claimant's complaint on the basis of non-compliance with the Tribunal orders and her unreasonable conduct pursuant to rule 37(1)(b) and (c) of the 2013 Tribunal rules.

Employment Judge Burgher
Dated: 8 October 2019