



EMPLOYMENT TRIBUNALS

Claimant: Ms A Lawton

Respondents: 1) Dynamic Medical Logistics Ltd
2) Mr A Edwards

JUDGMENT

1. The respondent's application to strike out the claimant's claims in their entirety under Rule 37(1)(b) and (e) of the Employment Tribunal Rules of Procedure 2013 is refused.
2. The respondent's application for costs in relation to the postponement of the full hearing of this claim from 6 December 2021 under Rule 76 of the Employment Tribunal Rules of Procedure 2013 is refused.

EXTENDED REASONS

3. The respondent's applications were made on the morning of the full hearing of this claim (which was subsequently postponed and converted into a preliminary hearing) in front of the Tribunal panel (consisting of Employment Judge Deeley, Mr Roberts and Mrs Hill). Please refer to the separate Preliminary Hearing summary for further details.
4. We provided oral reasons for our decision during the hearing, but have provided extended reasons for the benefit of the Tribunal panel at the full hearing of this claim.
5. On the morning of the full hearing, the Tribunal asked both parties if they had a copy of the hearing file. The claimant said that she had not received the hearing file. The Tribunal discussed matters with the parties and it became apparent that:
 - 5.1. Mr Malik (on behalf of the respondent) sent the hearing file to the claimant by special delivery;
 - 5.2. Royal Mail provided a signed receipt for the hearing file with the initials 'Idx', but this was not the claimant's signature;

- 5.3. the claimant did not receive the hearing file at that time;
- 5.4. Mr Malik exchanged correspondence with Ms Choudry (an adviser from the Citizen's Advice Bureau) relating to this claim in May and June 2021. Mr Malik mentioned in his email to Ms Choudry regarding the claimant's non-compliance with case management orders that "*The completed bundle was posted to the Claimant on 4 May 2021*". He also emailed Ms Choudry stating that "*I can see the bundle was signed for by 'A Lawton', so that was successfully delivered on 5 May*". Ms Choudry did not respond to that email. Instead Mr Malik and Ms Choudry exchanged further emails regarding the arrangements for exchange of witness statements and other matters. The claimant was not copied into these emails;
- 5.5. the claimant had recently undergone an operation for spinal fusion on 19 April 2021 and was recovering from that operation. The claimant said that she had suffered from post-operative depression and that was why Ms Choudry was liaising with the respondent on her behalf;
- 5.6. Ms Choudry and the claimant discussed a 'bundle' of documents, but the claimant thought that Ms Choudry was referring to a separate file containing the respondent's witness statements (which the respondent sent to the claimant or on around 21 May 2021 and which she did receive);
- 5.7. Mr Malik and the claimant exchanged more recent emails which referred to a 'bundle', however the claimant again believed that this related to the respondent's witness statements.

Respondents' strike out application

6. The Tribunal must consider a number of factors in relation to a strike out application. We noted that:
 - 6.1. the power of strike out may be exercised if (amongst other things):
 - 6.1.1. the manner in which a party has been conducting proceedings is scandalous, unreasonable or vexatious (Rule 37(1)(b));
 - 6.1.2. the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim (Rule 37(1)(3));
 - 6.2. the Court of Appeal in *Blockbuster Entertainment v James* [2006] IRLR 630 held that the 'unreasonable conduct' must be either:
 - 6.2.1. take the form of deliberate and persistent disregard of required procedural steps; or
 - 6.2.2. be such that it has made a fair trial impossible;

- 6.3. the Court of Appeal also noted that strike out is a draconian sanction and the Tribunal must consider whether other sanctions or case management directions would be proportionate.
7. We decided that it is not appropriate to strike out claimant's claims. The key reasons for our decision are:
- 7.1. we concluded that the claimant's conduct was not unreasonable. The claimant did not receive the hearing file and mistakenly believed that references by Ms Choudry and by Mr Malik to a 'bundle' were to the respondents' witness statements that she received later in May 2021;
- 7.2. a fair hearing is still possible in this claim. We noted that the Tribunal had capacity to arrange a full hearing of this claim from January 2022 onwards, although we noted that a hearing was unlikely to be listed until late February 2022 because of the need for a further copy of the hearing file and the time required to comply with orders relating to additional disclosure and supplemental statements. (In the event, the hearing was re-arranged for five days commencing on 28 February 2022). In addition, there was no suggestion by any party that they would suffer significant prejudice (eg due to witness availability for a postponed hearing);
- 7.3. the respondent referred the Tribunal to the EAT's recent decision in the case of *Emuemukoro v Croma Vigilant (Scotland) Ltd and others* (UKEAT/0014/20). The EAT in this case held that in order for the power to strike out to be triggered because a fair trial was not possible, it is enough that a fair trial was not possible within the trial window because of the party's conduct. However, we concluded that the facts of that case were significantly different to those of this claim because:
- 7.3.1. that case involved a failure by the respondent's representatives (Peninsula Business Services) to prepare both the hearing file and any witness statements for the respondent;
- 7.3.2. the Tribunal Judge noted that the full hearing would be delayed from around November 2019 to late summer 2020.

Respondents' costs application

8. The Tribunal may make a costs order under Rule 71(1)(a) where a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in the way that proceedings have been conducted.
9. We noted that the respondents would have had to prepare for today's hearing in any event and that the additional costs that they had been put to related to today's additional hearing day.

10. We concluded that the claimant's conduct was not 'unreasonable' given the circumstances set out above. The claimant did not receive the hearing file and mistakenly believed that references by Ms Choudry and by Mr Malik to a 'bundle' were to the respondents' witness statements that she received later in May 2021.
11. We therefore refused the respondents' costs application.

Employment Judge Deeley

6 December 2021

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