



THE EMPLOYMENT TRIBUNALS

Claimant: Mrs J Wolloms

Respondents: CI Accountancy Limited (1)
Mr G Killmister (2)
Mr L Hare (3)

Heard at: Newcastle Hearing Centre (by telephone) **On:** 14 July 2020

Before: Employment Judge Morris

Representation:

Claimant: Ms A Besnard, Solicitor
Respondents: Mr M Howson, Consultant

JUDGMENT

The judgment of the Employment Tribunal is that the claimant's application that the respondents' response should be struck out in its entirety is refused.

REASONS

The application

1. The claimant's application was made in reliance upon the grounds contained in Rules 37(1)(b), (c) and (d) of the Employment Tribunals Rules of Procedure 2013 ("the Rules"); albeit focussing principally upon the first two of those subparagraphs.
2. In making the application Ms Besnard pointed to the respondents' failure to comply with certain of the Orders that had been made by the Employment Tribunal at a Private Preliminary Hearing on 19 July 2019, being primarily that a final bundle of documents was to have been agreed and produced by the respondents by 24 April 2020, and witness statements were to have been exchanged by 22 May 2020. Instead, she said that she had had to be proactive and had contacted the respondents' representative on 16 April 2020 regarding the draft bundle in relation to which the index produced by Mr Howson on 21 April had been inadequate. By

way of example, it did not include the report of the independent chair of the appeal hearing attended by the claimant at which, she said, it had been concluded that none of the allegations made against the claimant amounted to gross misconduct or misconduct justifying her dismissal. Ms Besnard had drawn these omissions to the attention of Mr Howson on 22 April making the point that the majority of the missing documents undermined the respondents' defence. For ease, she had suggested that he used the claimant's list of documents as a starting point for the bundle index. The representatives had then agreed that the bundle would be produced by Mr Howson by 1 May 2020. Not having heard further from Mr Howson, however, Ms Besnard contacted him again on 5 May and in his response of 7 May 2020 he explained that his clients had not provided him with copies of all the documents contained in the claimant's list. He suggested that Ms Besnard should send him the relevant documents. As the missing documents were all either in the respondents' possession or under their control, she did not consider it reasonable to expect her client to incur these costs and therefore suggested, on 11 May, that Mr Howson should obtain the documents from his clients. She had not heard further from him.

3. As such, Ms Besnard had made her strike-out application to the Tribunal on 17 June 2020. Two days later Mr Howson had produced a bundle but it was essentially the previous bundle and did not contain all the documents required to address the issue. She had accordingly written to Mr Howson on 26 June but heard nothing in response.
4. Witness statements were due to be exchanged on 22 May 2020. Ms Besnard wrote to Mr Howson on 21 May to say that she was in a position to exchange statements (subject only to receipt of the bundle of documents to insert page numbers) and asked for confirmation that the respondents were likewise placed. No response was received.
5. In concluding her application, Ms Besnard suggested that the respondents were delaying deliberately so as to require her client (who is privately funding this litigation herself) to pay unnecessary costs, discourage her from proceeding, deny her access to justice and avoid responsibility for their actions in the past.

The response

6. For his part, Mr Howson explained the difficulties he faced in producing a bundle of documents in what he called "quite unprecedented times" with his office having been shut since March until it opened during the week commencing 15 June 2020. Furthermore, all printing and copying businesses have been shut. As a consequence, it had been impossible to produce copies of the bundle, which is said to comprise 644 pages.
7. Mr Howson's principal point was that matters could be simply advanced if Ms Besnard were to send him the documents she considered were missing from the bundle, as he had requested, rather than simply producing a list of documents and commenting that those that were missing were already in the respondents' possession or control. If he had those documents he would include them in the bundle.

8. As to witness statements Mr Howson confirmed that they were drafted and could be finalised in approximately one hour following agreement as to content of the bundle.

Consideration and decision

9. I had some sympathy with the claimant's position as, on the face of it, it did appear that it could be said that the respondents had conducted the proceedings in an unreasonable manner, not complied with Orders of the Tribunal and, possibly, not actively pursue their response. Further, that the respondents' representatives might have failed in their duty as set out in Rule 2 of the Rules, "to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal". Consequences had included that the case was not ready for hearing as it should have been had the Orders been complied and the claimant might have been put to unnecessary costs; albeit I do not make any formal finding on that on the basis of the scant information that I have received.
10. Although having a degree of sympathy with the claimant, as was commented during a telephone Preliminary Hearing held on 28 November 2019 (which had been arranged to discuss whether to list a public preliminary hearing of a previous application by the claimant to strike out the respondents' response), an application to strike out a response is draconian in nature, the general position being that cases should be tried on their merit.
11. More particularly, in considering this application I have to have regard to the overriding objective contained in Rule 2 referred to above of seeking to deal with cases fairly and justly. In the context of this application I am therefore required to consider all relevant factors including the following: the magnitude of the non-compliance; whether any default was the responsibility of the respondents or their representatives; what disruption, unfairness or prejudice has been caused to the claimant; whether a fair hearing would still be possible (see: De Keyser Ltd v Wilson [2001] IRLR 324); whether striking out the response or some lesser remedy (such as cost penalties) would be an appropriate step to address the issues in respect of which the claimant complains or whether, in fact, a strike-out is the only proportionate and fair course to take: (see: Weirs Valves and Controls (UK) Ltd v Armitage [2004] ICR 371 and Blockbuster Entertainment Ltd v James [2006] IRLR 630).
12. Although I reserved my decision in relation to the strike-out application I took the opportunity to explore with the representatives steps that might be taken if my decision was to refuse the application. In the course of that discussion the representatives agreed certain steps that each of them would take if the claimant's application were not to be successful. I have set out those agreed steps in Case Management Orders contained in a separate document. I am confident that if the representatives take those steps and comply with their duty referred to above to assist the Tribunal to further the overriding objective and, in particular, to co-operate with each other and with the Tribunal, matters should be capable of being resolved enabling this case to come before a Tribunal for hearing in due course.

13. In those circumstances, notwithstanding the matters relied upon by Ms Besnard, I am satisfied that a fair hearing should still be possible and, therefore, that to strike out the response at this stage would be disproportionate. As such I consider it inappropriate to take the draconian step of striking out the respondents' response (or any part of it) and therefore refuse the claimant's application.

EMPLOYMENT JUDGE MORRIS

**JUDGMENT SIGNED BY EMPLOYMENT JUDGE
ON 15 July 2020**

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