THE EMPLOYMENT TRIBUNALS

Claimant: **B**

Respondent: **C**

Heard at: **North Shields**

On: **25 September 2018**

Before: **Employment Judge Beever (sitting alone)**

Representation:

Claimant: **No attendance**

Respondent: **in person, accompanied by his wife**

JUDGMENT

The claimant's claim is struck out in its entirety

REASONS

1. The matter was listed before me as a Public Preliminary Hearing following paragraph 2 of the Case Management Order of EJ Garnon on 19 July 2018 and sent to the parties on 10 August 2018. Paragraph 2 provided that:

   "there will be a public preliminary hearing with a time estimate of four hours before an Employment Judge sitting alone on the first available date after 3 September 2018 to consider:
   (a) whether the claim or part of it should be struck out

(b) whether it is just and equitable to consider the claim notwithstanding it has been brought more than three months after the date of the acts complained of
(c) to the extent that claim or part of it is allowed, to make case management orders to bring it to trial"

2. A Notice of Hearing dated 10 August 2018 stating that the hearing will be heard by an Employment Judge at North Shields on Tuesday 25 September 2018 was sent to the parties by email on 10 August 2018 (12.56hrs).

3. When the case was called on for hearing at 10.00am, the claimant had not attended and the respondent was present accompanied by his wife.

Proceeding in the absence of the claimant

4. I waited until 10.15am to see if the claimant arrived late. I then caused a tribunal clerk to make contact with the claimant. The clerk was able to contact the claimant by a mobile telephone number at 10.20am. The claimant said that she was not aware of the hearing today. When asked, the claimant said that he had in fact chosen to be contacted by post. The claimant informed the tribunal clerk that she told tribunal that her emails "weren't really working" and that she needed correspondence by post. She did not recall when she had informed the tribunal of that. The claimant said that she was unable to attend at any time today. She was asked to provide some email confirmation.

5. By email at 10.39hrs, the claimant stated, "I was unaware of court date and have been informed about this just half an hour ago. I have also advised the office to contact me by mail as never receive emails"

6. I caused the case to be called on at 11.10am. The respondent told me that the claimant had told the tribunal by telephone last time that she was not aware of the previous hearing. That is a reference to the hearing in front of EJ Garnon on 19 July 2018.The respondent made representations today that he wanted the tribunal to continue with the case today. He asked the tribunal to consider striking out the claim as per EJ Garnon's notice. He said that this was the second time that the claimant has simply not turned up, had not been truthful about the reasons, and the delay and lack of progress was having a significant psychological effect on him and his wife. He said that there had been no progress in the case since he had put in his ET3 in June and prior to the last hearing. He said that the matters now go back several years and even now he does not understand how the claim is being put. He did inform me of the nature of the two incidents which led to two criminal charges being brought and for which he pleaded guilty.

7. The first question I needed to address was whether it was appropriate to continue with the Preliminary Hearing despite the absence of the claimant. Rule 47 of the Employment Tribunal Rules 2013 gives a tribunal power to proceed with the hearing in the absence of a party. Rule 47 provides:

"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"

8. I considered first the claimant's reasons for her absence. The tribunal's enquiry of the claimant elicited the response that she was not aware of the hearing date and that she had also advised the office to contact her by mail as she never receives emails.

9. The tribunal took account of the following features:

9.1. The claimant's ET1 form dated 30 April 2018 elected correspondence by email and her email address was set out in full
9.2. The ET1 form was initially rejected and the claimant was advised of this by email on 1 May 2018 (13.02hrs) with the subject heading citing the case details and the claimant promptly responded to the email on the same day (at 16.59hrs) identifying the proper respondent's name. her email contained the same subject heading together with the prefix "Re:" which is indicative of a reply to an email received
9.3. EJ Garnon made some case directions regarding the identity of the respondent and a need for the claimant to amend her claim. This was sent to the claimant by email dated 3 May 2018 (15.51hrs). The claimant received the email and she, again promptly, responded with information about the respondent
9.4. The initial acceptance process was convoluted, as described further by EJ Garnon in his Notes of 19 July 2018. He did however accept the claim in full and the claimant was informed of this by email on 24 May 2018 (11.14h). The email attachments included "7.7 doc" which was a Notice of Preliminary Hearing Case Management to take place at North Shields on 19 July 2018. The email address was the same; there was no "bounce back" or "undeliverable" response. I am satisfied it came to the attention of the claimant
9.5. Service on the respondent proved complicated but the upshot was that EJ Garnon directed the "Re-sending of Claim" and stated "to the Claimant" that the Preliminary Hearing on 19 July 2018 is not postponed. This is sent to the claimant to the same email on 5 July (14.03hrs). The email address was the same; there was no "bounce back" or "undeliverable" response
9.6. On 16 July 2018 (15.45hrs) the claimant was sent by email a copy of the ET3 response. The claimant replied to this on 18 July (21.16hrs). In her email she asked, "can you please confirm if a date has been set for the hearing?" The tribunal by email on 19 July (11.07hr) informed the claimant that, "the final hearing will be set when you and the respondent attend the preliminary case management hearing at 2pm today". The claimant's reply by email (13.34hrs), is that, "I haven't received anything about the hearing so can be postpone [sic] as I can't make it. I don't want to see him"
9.7. EJ Garnon dealt with the hearing on 19 July 2018. It is important to note that the claimant did not attend that hearing and a telephone conversation with a

tribunal clerk on the morning elicited that, "she could not attend as she was at work" (see Paragraph 12 of EJ Garnon's Note).

9.8. EJ Garnon signed the detailed Note on 20 July 2018. For administrative reasons, the Note was not sent to the parties until 10 August 2018. It was by email (11.37hrs), enclosing EJ Garnon's Case management order, the anonymisation order and the restricted reporting order. On the same date, a Notice of Hearing stating that EJ Garnon's Order would be dealt with at North Shields on 25 September 2018 was sent. This was attached to an email sent to the parties on 10 August 2018 (12.56hrs).

9.9. Crucially, the claimant received the email timed at 12.56hrs. This is evident because she replied (Re:) on 13 August 2018 (15.59hrs). that email needs to be considered in detail:

9.10. Part of that email from the claimant appeared to address the reasons for a late claim. She also stated that she was not able to comply by 10 August with EJ Garnon's Order for Further information as she had only just received an email on 13 August. She stated that she could not face the respondent in person due to the nature of his previous actions, and requested to see the judge alone. These features indicate that the claimant was fully aware of both the Order of EJ Garnon and by implication also the Notice of Hearing for 25 September 2018

9.11. EJ Garnon directed an extension of time to 24 August for the claimant's Further Information and required the claimant to comply fully and stated, "it may be possible to conduct a preliminary hearing by telephone conference but this will not be considered until the claimant complies with the Order". By email dated 14 August 2018 (14.44hrs), EJ Garnon's further order was sent to the parties.

9.12. The claimant has not responded.

9.13. The claimant has not followed up her earlier emails;

9.14. The next contact with the claimant was in relation to the telephone conversation with a member of tribunal staff today, as described above.

10. I also had regard to the tribunal file. The claimant chose to receive correspondence by email. She has consistently responded to emails sent by the tribunal staff. There is no suggestion of any "bounce back" of emails, and on no occasion was the wrong email used.

11. There is nothing on the tribunal file to indicate that the claimant would prefer to correspond by mail or that there was any difficulty with email correspondence, and I would have expected to see that if, as the claimant has stated, she had advised tribunal staff that she wanted correspondence by mail. The suggestion that the claimant, "never receive emails" is patently not accurate because there are numerous email exchanges where the claimant is replying to emails sent to her (at the email address that she identified).

12. I do not accept her statement that she "never receive emails" and I see no basis for accepting her assertion that tribunal staff were advised by the claimant to correspond by mail.

13. I also find that the claimant was informed of today's hearing by email. She had specifically replied to an email received on 13 August 2016 (12.56hrs),

which email contained the details of today's hearing. I find that the claimant was aware of today's hearing

14. I also note that the claimant's email of today's date (10.39hrs) does not make seek a postponement or take any other step in the proceedings or indicate an intention to do so.

15. I find that the claimant had failed to attend the last hearing and would as a result have been on notice of the importance of taking part in the proceedings. The events of this morning amount to a repetition of the events of the previous hearing. The claimant does evidently receive emails and does respond to them. I take account of the fact that the claimant specifically asked if she could avoid a hearing when she would be face to face with the respondent but EJ Garnon dealt with that specifically by requiring her first to comply with the Order for Further Information. The claimant at no stage has followed up on that matter including making any attempt to provide Further Information.

16. I find that the Claimant has chosen not to respond further to the order of EJ Garnon, which was sent to her by email on 14 August 2018 (14.44hrs) and I also find that she has chosen not to attend today's hearing. She has not requested a postponement.

17. In the light of my power to proceed in the absence of a party, and having regard to Rule 47 and also to the overriding objective set out in Rule 2 in particular with a need to avoid delay and to provide both parties with a reasonable opportunity to participate, I conclude that it is appropriate to deal with the Preliminary Hearing in the absence of the claimant.

The Public Preliminary Hearing Issues

18. EJ Garnon made an order for Further Information (see Paragraph 1) in terms that the claimant is to provide to the respondent and to the tribunal in writing full particulars of her claim having regard to paragraph 21 of EJ Garnon's Note, which identified a requirement to set out: (a) What was said or done to her? (b) Where did it happen? (c) When (approximates are better than none) (d) Who else, if anyone, was there, (d) What effect it had on her both at the time and since? EJ Garnon extended time to 24 August 2018 for compliance after taking into account the claimant's email of 13 August 2018 (15.59hrs).

19. Part of EJ Garnon's Note reads as follows:

"25. Having reflected carefully my view is that the starting point for any progress in this case must be for the claimant to set out the facts which she is going to allege in these proceedings. At a PuPH a tribunal may decide any preliminary issue even if that issue, resolved in favour of the respondent, would lead to dismissal of the whole claim. It is rare I order such a hearing solely on a time limit point under the EqA
26. In this instance, in order to save time in the future, I have decided to list a PuPH. Depending on the claimant's reply, it may be any question of striking

out the claim will not be necessary.it may be in the interests of both parties to reach agreement as to whether it is just and equitable for the case to be heard here rather than elsewhere"

20. EJ Garnon directed that the PuPH should consider: (a) whether the claim or part of it should be struck out, (b) whether it is just and equitable to consider the claim notwithstanding it has been brought more than three months after the date of the acts complained of, (c) to the extent that claim or part of it is allowed, to make case management orders to bring it to trial.

21. Rule 37 provides

" (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.

22. As to Rule 37 (2) above, I am satisfied that the terms of EJ Garnon's Order and the Note which was sent to the parties and I find was received by the claimant amount to giving the claimant a reasonable opportunity to make representations so as to meet the condition applied by the requirement of Rule 37(2).

23. In considering the question of whether to strike out the claimant's case I have also had regard to the overriding objective in Rule 2 of the 2013 Rules which provides:

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, in so far as practicable –

(a) ensuring the parties are on an equal footing

(b) dealing with a case in ways which are in proportionate to the complexity or importance of the issues
(c) avoiding unnecessary formality and seeking flexibility in the proceedings
(d) avoiding delay, so far as compatible with proper consideration of the issues
(e) saving expense

24. Dealing with cases justly is not confined to the case in question. The proper administration of justice was not to be disrupted by parties' failure to comply with orders or other forms of unreasonable behaviour. In addition, I record and note that all litigants are entitled to reasonable opportunity for a fair and public hearing within a reasonable time. In Riley v The Crown Prosecution Service [2013] IRLR 966 the Court of Appeal emphasised that that is an entitlement of both parties to litigation. It is also an entitlement of other litigants not to be compelled to wait for justice more than a reasonable time. In Riley, the claimant in that case was not deliberately in breach of orders.

25. Tribunal administration is burdened with the obligation of providing litigants with hearings within a reasonable time. Problems are manifold when caused to Employment Tribunals and more importantly other litigants when parties, through failure to comply with orders which are made to help them present their claims in an arguable fashion, fail to comply with those orders, or act in other respects unreasonably.

26. Rule 2 requires a tribunal to have regard to all relevant factors and I consider that includes the extent of any non-compliance or unreasonable behaviour, what disruption, unfairness or prejudice has been caused, whether a fair hearing would still be possible, and whether striking out or some lesser remedy would be an appropriate response. See Weirs Valves v Armitage [2004] ICR 371. Thus, I take into account a key question which is whether a striking out order is a proportionate response. See Blockbuster Entertainment v James [2006] IRLR 630. Such considerations will apply equally to non-compliance as to proceedings which may have been conducted unreasonably.

27. I have had regard to the authority of Birkett v James [1978] AC 297 which holds that a tribunal can strike out a case where there has been delay that is intentional or contumelious (disrespectful or abusive to the court) or there has been inordinate and inexcusable delay, which gives rise to a substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the respondent.

28. The facts of this case go back to 2015 when the claimant was employed by the respondent. In her ET1, the claimant complains of discrimination on the grounds of sexual orientation. This is not immediately apparent from the details in her claim form. In her form, the claimant has recounted some detail and she has recited that she had been left traumatised after five months of harassment. The claim form was fundamentally lacking in detail and in

consequence it was necessary to establish what facts the claimant was alleging in order to identify what legal claims the claimant was advancing and to permit the respondent to know what case was being made against him.

29. The claimant's employment with the respondent had ended in June 2016. At about that time, the respondent was arrested. The respondent informed EJ Garnon that he had appeared before the Crown Court on two charges of sexual assault in which the claimant was the victim. Having heard from the respondent, EJ Garnon concluded that those charges were isolated events and did not include the more serious allegations which the claimant appeared to be making in these proceedings.

30. The ET1 was issued on 30 April 2018, a period nearly two years after the end of her employment. The claimant said in her email to the tribunal dated 13 August 2018 that the reason for the late claim was that she was awaiting the outcome of the criminal case. In June 2018, the respondent filed an ET3 in which he denied the claim and contended that the claim was out of time.

31. Reflecting on what the respondent had told EJ Garnon and repeated to me about the criminal charges, it became evident that save for those 2 incidents which no doubt were part of the criminal investigation, any future factual investigation into what may or may not have happened in the workplace was now the subject of recollections from in excess of 2 years previously and which may or may not have no possibility of corroboration.

32. The claimant received notice on 24 May 2018 of the Preliminary Hearing listed for 19 July 2018 which was the first opportunity for the parties to progress the claim. I find that the claimant was notified of the hearing date, but chose to disregard that notification and to take no steps to deal with or to prepare for the 19 July Preliminary Hearing. When the tribunal clerk contacted her, she stated that she was unable to attend the hearing but that was wholly avoidable and she had the opportunity to contact the tribunal prior to the hearing.

33. In the event therefore the hearing on 19 July 2018 proved ineffective because EJ Garnon was not in a position to clarify the case and to identify the issues and progress the matter to a hearing. He made an Order for Further Information which would not have been necessary had the claimant attended or participated as the clarification could have been sought and obtained at the hearing. However, given the circumstances in which the claimant appeared to have chosen not to attend, EJ Garnon informed the claimant in his Order that the tribunal would at the next hearing consider whether to strike out the claim.

34. I find that the claimant was aware of the Order of EJ Garnon. She knew that she was required to provide Further Information and indeed EJ Garnon had established in plain English exactly what was required of the claimant. The claimant acknowledged that she was required to provide further information at least by implication in her email of 13 August 2018 in which she said that she "could not reply in the timescale of 1oth August as only received email

today [13 August 2018].” EJ Garnon extended time, but the Claimant did not comply. She did not respond.

35. Further, she knew that she was at risk of a strike out of her claim: that too is spelt out in plain English by EJ Garnon. I am fully satisfied that the claimant received the Notice of Hearing for the hearing on 25 September 2018. This was known to her from 10 August 2018 in circumstances set out above. The claimant took no steps to comply with EJ Garnon’s Order thereafter or take any other step in the proceedings: this was as I have said despite the fact that the Claimant was aware from the Note of EJ Garnon that the tribunal on 25 September 2018 might consider whether a strike out of her claim was appropriate.

36. The claimant failed to attend the hearing on 25 September 2018. When the tribunal clerk spoke to the claimant by telephone on 25 September 2018, the claimant gave an inaccurate and wholly unsatisfactory explanation for her absence and non-participation in the proceedings and the claimant did not give any indication that she would progress the case. She did not ask for an adjournment.

37. The claimant’s conduct has meant that the progress of the case would now be further delayed considerably. The respondent asked me to take account of the fact that the delay in proceedings has had a significant psychological effect on him and that it is unfair that he cannot progress the claim against him. The criminal proceedings have now been concluded for some months now and it was unfair on the respondent, he contended, that this case is not progressing.

38. He urged on me that it a trial would not be fair. The claimant appears to be relying on extensive and serious allegations of harassment over a significant time period which continue to remain unparticularised and ostensibly significantly beyond what the respondent had faced at the Crown Court which, in his words and consistent with what he told EJ Garnon, related to two individual incidents for which his sentence was of the lowest order. The respondent urged on me that he cannot be expected to know what these allegations might be and believes that the considerable time that has passed since the claimant left her employment (in June 2016) and the overall time since any incidents may have occurred makes it difficult to see how he could provide an effective defence.

39. In the light of these circumstances, I turn to my conclusions.

40. Dealing with the time-point first, the question of whether a tribunal should entertain a claim which is out of time arises from s.120 EqA which EJ Garnon set out in greater detail. A tribunal has a wide discretion to consider a late claim if it is just to do so and may take into account anything it considers relevant. Useful guidance is set out in British Coal Corporation v Keeble [1997] IRLR 336.

41. I take into account that the claimant provided a reason in her email on 13 August 2018 that she had waited until the conclusion of the criminal case. I do not know whether the claimant was aware of her rights at an earlier stage and if so when.

42. It seems highly likely that the claim is out of time given that the employment relationship came to an end in June 2016 and the ET1 was issued almost 2 years later. However, I am not in a position to reach an informed conclusion on whether it would (or would not) be just and equitable to allow an extension of time for the claim to proceed. I conclude that it is possible that the claimant would be able to satisfy the obligation on her to establish that it would be "just and equitable" for the claim to proceed.

43. I have concluded that I should not reach any decision on the time-point. Further, it would be inappropriate to consider any strike-out of the claim on that basis given my finding that it is possible that the claimant would be able to satisfy the obligation on her to establish that it would be "just and equitable" for the claim to proceed. As a result, the issue of whether the tribunal has jurisdiction to hear the complaint falls to be dealt with, if appropriate, at a later stage in the proceedings and will, if appropriate, need to be the subject of subsequent case management.

44. Turning to the question of strike out, I have given this anxious consideration. I remind myself that strike out is a matter of last resort and I take into account the obligation to look to see whether a lesser outcome would be a proportionate response in the circumstances.

45. The claimant did not attend the Preliminary Hearing on 19 July 2018 despite the fact that she had received notification. I have not accepted that she was unaware of the hearing. Next, the claimant did not comply with EJ Garnon's Order. More significantly, the claimant did not attend a second time, this time at the Preliminary Hearing today on 25 September 2018, despite the events that had occurred on 19 July 2018 and that she would have been on notice that she needed to progress her own case. I do not accept that the claimant did not know. I find that the claimant knew from her emails that the case needed to be progressed and she chose not to take part in today's hearing. She did so despite knowing that part of the purpose of today's hearing was to see whether she had provided proper particulars of the claim and if not for consideration of whether her claim should be struck out. I find that her explanation regarding emails and correspondence by mail was false and that she knew of the hearing.

46. I have no doubt that her conduct passes the threshold of "unreasonable" behaviour for the purpose of Reg 37(1). I find that given the repetition of her behaviour in non-attendance and the apparent explanations she has given, which I have not accepted, and in addition, a failure to provide the further information requested by EJ Garnon the claim has not been actively pursued for the purpose of Reg 37(d).

47. I have asked myself whether a fair trial is no longer possible. I have no doubt that there is a substantial risk that a fair trial is no longer possible. The claimant has demonstrated her unwillingness to provide the respondent with any sufficient detail for him to be expected to answer and this is so despite the opportunity to attend both EJ Garnon's hearing and today's hearing. Already at the point of the issue of the proceedings in April 2018, the lapse of time made it difficult to see how complaints (yet to be fully or properly set out) might be dealt with. What compounds the position here and drives me to the conclusion that there is a substantial risk that a fair trial may no longer be possible is the subsequent delay and its further impact on recollections of witnesses and their inevitably fading memories and the claimant's apparent unwillingness to provide the respondent with any sufficient detail.

48. I have asked myself whether a strike out is a proportionate response or in other words whether a lesser outcome would be a proportionate means of addressing the situation. The claimant on my findings chose not to attend on 19 July; she was on notice of the prospect of a strike out of her claim, but she did not respond. She chose not to attend today; she provided what I have found to be an untrue explanation. She has demonstrated an unwillingness to pursue the claim or to provide the respondent with a sufficient explanation of her case so that he could answer it. A further adjournment might appear to be a simple solution, but such a solution fails not only properly to account for the delay arising, not just to the respondent but its impact on other court users but also the likelihood that the claimant would continue not to respond and to cause yet further delay.

49. Bearing in mind throughout that strike out is an exceptional measure, I am nevertheless satisfied that it is appropriate in this case. I take into account that the claimant is a litigant in person and it might be said she not understand what is required of her. In the present case, it seems to me that EJ Garnon went to great lengths to explain matters in plain terms at the hearing on 19 July 2018 to ensure that parties were on an equal footing and understood what was expected and what would happen otherwise.

50. Pursuant to my powers under Rule 37, and by reference to Rule 37 (d), that the claim has not been actively pursued and/or Rule 37(b), the unreasonable conduct of the claimant, I strike out the claimant's case in its entirety.

51. In the light of that decision, no further case management direction is appropriate.

EMPLOYMENT JUDGE BEEVER

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON

1 October 2018

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JUDGMENT SENT TO THE PARTIES ON

3 October 2018

AND ENTERED IN THE REGISTER

G Palmer

FOR THE TRIBUNAL