



EMPLOYMENT TRIBUNALS

Claimant: Miss N Mirabdolhagh Hezaveh

Respondent: Headmasters Salons Ltd

Heard via Cloud Video Platform (London Central) On: 13 September 2021

Before: Employment Judge Davidson

Representation

Claimant: did not attend

Respondent: Ms C Gurevitz, HR Consultant

JUDGMENT FOLLOWING A PRELIMINARY HEARING

The claimant's claim is struck out pursuant to Rule 37 on the grounds of her repeated failure to comply with case management orders and the tribunal considers that it is no longer possible to have a fair hearing.

The hearing dates on 12, 13, 14, 15 and 18 October 2021 are therefore vacated.

REASONS

Background

1. The claimant worked for the respondent from 24 January (alternatively from 11 February) 2019 to 28 May 2019 as a Salon Trainee Manager.
2. On 21 August 2019 she filed a claim in the employment tribunal alleging direct discrimination and/or harassment related to race and/or religion and/or sexual orientation and victimisation. She also claimed arrears of wages.
3. The respondent disputed the claims. At the time the response was lodged on 12 November 2019, the respondent was represented by Xact Group Ltd.
4. On 8 July 2020, there was a telephone preliminary hearing before EJ Clark. The case was listed for 4 days from 15-18 February 2021. At that hearing the claimant was represented by Miss Iqbal, lay representative, and the respondent was

represented by Ms K McManus of Xact Group Ltd. A List of Issues was drafted with a number of elements requiring further details from the claimant. Various case management orders were made at the hearing including orders for disclosure of documents and exchange of witness statements.

5. By an Order dated 30 September 2020, EJ Clark suspended the orders made on 8 July 2020 pending a further case management hearing to be held on 21 October 2020.
6. At this hearing, also before EJ Clark, the hearing dates in February 2021 were vacated to be re-listed after 1 September 2021. (The hearing was subsequently listed to start on 12 October 2021.) During the hearing, the claims were clarified and the issues were set out in the order of 21 October. EJ Clark went on to make case management orders. These included an order for a schedule of loss by 12 January 2021, disclosure of documents on or before 12 January 2021 and exchange of witness statements by 26 February 2021.
7. On 17 November 2021, there was a case management hearing in respect of a Judicial Mediation hearing. This required a schedule of loss to be prepared and the preparation of a limited bundle of documents which was to be sent to the tribunal by 7 December 2020.
8. By January 2021, the contract between Xact Group Ltd and the respondent had come to an end and the respondent had instructed Ms C Gurevitz of AvloHR Ltd to represent it. Ms Gurevitz obtained the documents from her clients which were in their possession. She was unable to get hold of the previous representatives for documents as Xact Group was taken over and many of the people who had worked there, including Ms McManus, moved on.
9. The respondent sent its list and documents by 'We transfer' on 12 January 2021. In response, Miss Iqbal stated that she had made disclosure to the previous representatives but that she would go through the respondent's disclosure and would be in touch. The respondent had sight of the index of the bundle for the judicial mediation, which appears to have been wider in scope than that ordered by EJ Clark, and this comprised 27 documents. Of these 27 documents, Ms Gurevitz believes there are approximately 15 she has not seen, most of these being Whastapp messages. She asked Miss Iqbal to forward to her the relevant emails from her Sent Items mailbox that had been sent to Ms McManus. Miss Iqbal confirmed that she would send whatever was missing.
10. In January 2021, both the claimant (who was expecting twins) and Miss Iqbal were unwell. Miss Iqbal requested an extension of time to comply with the orders.
11. The claimant's twins were born on 13 February 2021. Ms Gurevitz asked if Miss Iqbal required more time to comply with the order but she did not respond.
12. On 13 March 2021, Ms Gurevitz emailed Miss Iqbal to follow up. Miss Iqbal said she was ready to exchange two witness statements but one was not ready as the witness was abroad. She did not respond to queries about the documents.
13. On 8 April 2021 the respondent applied for a strike out on the basis of non-compliance with orders. The claimant maintained that she had provided the documents to the previous representatives and asked for an extension of time until 12 April for exchange of witness statements but did not comply with that deadline.
14. The respondent repeated the strike out request by email dated 19 May 2021. Miss Iqbal replied with the schedule of loss, the index of the JM bundle and confirmation

that the claimant's twins had been delivered on 13 February.

15. In June 2012 Miss Iqbal said that the claimant, the twins and she were all unwell. On 30 June she requested an extension of time to comply with the orders to 31 July. The respondent did not object but asked for the medical evidence relied on by the claimant.
16. The claimant did not comply with the 31 July deadline.
17. On 13 August 2021, EJ Grewal directed that there would be a preliminary hearing to consider the respondent's strike out application. She went on to say that if the claimant wishes to rely on any medical reasons for not complying with the orders, she should produce medical evidence to support that.
18. On 23 August, Miss Iqbal said she was going through the documents and requested an extension to 30 September for compliance. The respondent considers that this is too close to the hearing on 12 October 2021 and prejudices the ability to have a fair trial.
19. On 25 August 2021, Employment Judge Wade wrote to the parties referencing the difficulties being experienced by the claimant but pointing out that the case must be progressed in the interests of justice as the claim had started in August 2019. She repeated that if the claimant has any medical reasons why she cannot comply with the orders, she must produce medical evidence to support that. She confirmed that the hearing would go ahead on 13 September.

Today's hearing

20. This hearing was listed for today to consider the respondent's strike out application. In correspondence, the claimant objected to the strike out and said that her emails and telephone calls on the subject had not been responded to. She made further representations confirming she thought the case is ready for hearing although one of her witnesses had not yet provided a statement. She also maintained that the claimant's documents had been provided to the previous representatives of the respondent and the current representative. Ms Gurevitz states she has still not received the claimant's documents.
21. Shortly before the hearing was due to start, the tribunal received an email from Miss Iqbal purporting not to have known about the hearing and saying the claimant had not had notice of the hearing. She also referred to a 5 day listing from 1 September which had not taken place, which had caused stress to the claimant. She repeated that she had provided documents to the respondent's former and current representatives. She did not attend the hearing.
22. The claimant did not provide any medical evidence for failing to attend today's hearing.
23. I consider that the claimant was given a reasonable opportunity to make representations either in writing or by attending this hearing. I have taken into account any representations made in writing.

The respondent's application

24. The respondent made the application for a strike out on the grounds of the claimant's failure to comply with orders. The respondent also relied on the claimant's failure actively to pursue the claim and that her conduct (or that of her representative) has been unreasonable. These matters, taken together, make it

no longer possible to have a fair hearing.

25. The respondent relied on the following submissions:

- a. The claimant has still not provided the missing Whatsapp documents despite Ms Gurevitz informing her in January 2021 that she did not have these and was unable to contact anyone at Xact Group Ltd to ask for them.
- b. Only one witness statement has been provided (Frederick). The claimant's own witness statement has not been exchanged despite Miss Iqbal saying in March that it was ready to be exchanged.
- c. If the claimant complies with the orders on 30 September, as she is proposing, there cannot be a fair hearing on 12 October as the case is complex and seven days is not enough time to prepare after receiving disclosure and witness statements.
- d. If the orders are not complied with until 30 September, the hearing will have to be postponed and that will prejudice the fairness of the hearing as events by then will be three years old.
- e. The respondent has no confidence that the claimant would comply with a further deadline as she has failed to meet deadlines in the past without providing satisfactory explanations.
- f. The claimant has not provided anything since 19 May 2021.
- g. The claimant is only reactive and has done nothing to pursue her claim actively. When she misses deadlines, she does not provide an explanation and simply waits until the respondent follows up.
- h. The respondent is being put to expense just in chasing the claimant up.
- i. Miss Iqbal repeatedly claims to have complied with orders when she has failed to do so.

26. The respondent does not believe that an Unless Order is appropriate because the claimant will simply maintain that she has complied, when this is not the case. She has herself suggested a number of deadlines for compliance, none of which she has kept to.

The Law

27. Rule 37 provides that the tribunal may strike out all or part of a claim on the grounds that the proceedings have been conducted by or on behalf of a party in an unreasonable manner, that a party has failed to comply with the Rules or an order of the tribunal, that the claim is not being actively pursued or if the tribunal considers that it is no longer possible to have a fair hearing.

Decision

28. It was unfortunate that Miss Iqbal did not attend the hearing. It is clear from earlier correspondence that she was aware it was taking place, albeit she did not agree that there was a need for a strike out hearing. She failed to provide any evidence to support her reasons for non-attendance, nor did she make an application for a postponement.

29. In the absence of the claimant and her representative, I have had regard to representations made in correspondence which I have seen in the documents before me today.

30. The claimant appears to be under the impression that there was a five day hearing starting on 1 September which has not taken place. I assume that this is a misunderstanding of EJ Clark's order stating that the case would be re-listed 'over 5 days after 1 September 2021'. This does not mean 5 days starting on 1

September 2021. The claimant's comments regarding the failure of that hearing to take place are therefore misconceived.

31. In the light of the pending hearing date, I concluded that the matter had to be dealt with today. I therefore went ahead without the benefit of Miss Iqbal's input.
32. Looking at the history of this case since January 2021, there is a pattern which appears to repeat itself. The respondent is asking for documents which appear on an Index created by Miss Iqbal which they do not have. Miss Iqbal maintains that these were provided to the previous representatives but has, on several occasions, agreed to provide them. Every deadline that passes is met with a request for an extension, together with an assertion that the documents have been supplied. The reasons for requiring more time are usually medical but no medical evidence has been provided at any stage to support the claimant's position.
33. Miss Iqbal has failed to explain why the relatively simple task of finding the Sent Items mails to Ms McManus and forwarding these to Ms Gurevitz cannot be done. If she did not send them to Ms McManus in this way, she has failed to explain this. If she is unsure of what documents are being requested, she can ask for clarification. However, she has not engaged in this process at all.
34. I note that REJ Wade commented "As EJ Grewall said in her direction of 13 August, if the claimant has any medical reasons why she cannot comply with the orders, she must produce medical evidence to support that." No medical evidence has been produced throughout the case other than a letter to confirm that the claimant delivered twins in February 2021.
35. I have taken into account the magnitude of default and note that the failure to comply is repeated, without evidenced explanation. The claimant seeks to rely on a significant number of Whatsapp messages but her representative has repeatedly failed to provide copies of these, promising to do so while at the same time asserting that she has complied with the obligation. This puts the respondent in an unfair situation. The claimant's representative has indicated that there will be three witness statements but has only produced one (Frederick) and has provided an explanation in respect of another (that the individual is abroad). No statement has been received in respect of the claimant despite this apparently being ready in March. There is also no explanation why the statement of the witness abroad cannot have been finalised in the months since it was first raised in March 2021 as being problematic.
36. The claimant and her representative have been on notice since 8 April 2021 that the respondent was pursuing a strike out application on the grounds of non-compliance with the orders for disclosure and exchange of witness statements. The application was repeated in May 2021 and the notice of this hearing was sent in August 2021, followed by correspondence about the hearing.
37. I appreciate that striking a claim out is a draconian step but there has been no reasoned explanation or evidenced explanation from the claimant or her representative for the repeated failures. The hearing date is a month away and the respondent is not in a position to finalise its preparation. The claimant asserts that she is ready for a hearing but has not disclosed her witness statement or agreed the contents of the bundle of documents. She has failed to attend today's hearing.
38. In all these circumstances, I find that the respondent is sufficiently prejudiced by the claimant's failure to comply with orders as to render the hearing unfair.

39. I therefore conclude that the claimant's claim should be struck out under Rule 37 on the basis that she has failed to comply with tribunal orders and this has compromised the ability to hold a fair hearing.

Employment Judge Davidson

Date 14 September 2021

JUDGMENT SENT TO THE PARTIES ON
15/09/2021.

FOR EMPLOYMENT TRIBUNALS

Notes

Public access to employment tribunal decisions: Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

CVP hearing

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was CVP video. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.