Case Number: 1606572/2010

EMPLOYMENT TRIBUNALS

Claimant: **Ms A Clarke**

Respondent: **Abertawe Bro Morganwg University Health Board**

Heard at: Cardiff (remotely by CVP) **On:** 17th March 2022

Before: **Employment Judge R F Powell**

Appearances

For the Claimant: Did not attend and was not represented

For the Respondent: Mr. J Allsop, Counsel

Judgement

The Claimant's application for a reconsideration hearing is struck out and her claim dismissed under Rule 38(1)(e) of the Employment Tribunal Rules Of Procedure 2013

Reasons

Introduction

The Application

1. By an application dated 24th January 2022 the Respondent applied for an order to strike out the claim of Ms Clarke ("the Claimant"). It asserted that the Claimant had not taken any steps to progress her claim since January 2020; a period of two years and two months prior to this hearing.

2. Accordingly, its application was made under rule 37(1)(d) of the Employment Tribunal Constitution & Rules of Procedure Regulations 2013.

The Claimant's participation in this hearing

3. Rule 37(2) states that a claim or response may not be struck out unless the party in question as been given a reasonable opportunity to make representations, either in writing, or at a hearing.

4. The Respondent's application was sent by email and copied to the Claimant. So far as the Employment Tribunal, and the Respondent, are aware the Claimant did not reply.

5. Notice of this hearing was sent out on 8th Feb 2022 by email and post to the Claimant and by email to Respondent. The email account to which this notice was sent is the same account by which the Respondent and the Tribunal have previously communicated with the Claimant.

6. The Hearing commenced at 10 o'clock but the Claimant was not present. The hearing was adjourned to allow the Employment Tribunal time to telephone, and email, the Claimant to enquire whether she was aware, and intended, to attend this CVP hearing.

7. I am informed by the Employment Tribunal staff that two telephone numbers were tried, one which did not appear to be active, the other was not answered.

8. I heard the Respondent's submissions in the absence of the Claimant. I decided not to give judgment orally; in part because it would allow the Claimant a greater opportunity to respond to the Employment Tribunal's communication before I concluded my deliberations.

9. At the time of writing this judgment, during the late afternoon of the 17th March 2022, the Employment Tribunal had not received any communication from the Claimant.

10. By reason of the above, I am satisfied that the Claimant has been given a reasonable opportunity to attend this hearing, or had she so wished, to make written representations.

The Relevant background to this application

11. In April 2009, the Claimant was working as a nurse. Whilst working with the Respondent she expressed concern about the treatment received by a patient who subsequently died. Her concerns were raised with the doctor concerned. She complained to him about the treatment the patient had received.

12. The Claimant reported the matter to the coroner on 17 April 2009 and was not invited to work any further shifts thereafter.

13. In October 2009, the Respondent banned her from undertaking further work at the Respondent's hospital and the Claimant brought a whistleblowing complaint.

14. The case had a difficult progression prior to the Liability Hearing held in April and July 2012 before myself, Mr Fryer and Mr Hamilton. We dismissed her claims.

15. The Claimant applied for a review of that Decision on the basis that there was new evidence not previously before the Tribunal and that there had been a serious irregularity.

16. . The Review Hearing went ahead in February 2013 and by a Reserved Judgment sent to the parties on 4 June 2013, her application was unsuccessful.

17. The Claimant did not appeal the liability judgment but she did appeal the reconsideration decision. Initially permission to appeal was refused by the Employment Appeal Tribunal ("EAT").

18. The Claimant appealed to the Court of Appeal against that refusal to grant permission and in March 2015, Elias LJ considered that the Claimant's appeal did raise arguable points in law and granted permission to appeal.

19. On 10 May 2017, before Soole J , the Claimant's appeal was upheld. He concluded that the absence of the extended review application from the Tribunal's consideration constituted a "serious procedural irregularity" (paragraph 34). The matter was remitted to us to be considered afresh.

20. The reconsideration of the review application was then listed to be heard on 25 September 2017.

21. However, it proved impossible for a variety of reasons to proceed with the hearing on that date, and instead a Preliminary Hearing took place for directions in respect of the remitted Review Hearing.

22. We decided to list the matter for five days commencing on or after 1 February 2018. It was agreed that there were seven issues to be determined at the remitted hearing.

23. An order was made, by consent, dealing with listing issues and other procedural matters. As to the documentary evidence, the Tribunal ordered as follows:

24. “3. No later than 4:00 pm 23rd October 2017 each party shall send to the other copies of all contemporaneous records of the evidence and submission[s] made during … the Liability Hearing. The copies shall be in the original format created during the hearing.”

25. On 4th October 2017 the Claimant requested that the Tribunal provide, from memory, a summary of its material recollections, so that these were clear before the parties provided their respective notes.

26. The Tribunal refused that application on 19 December 2017. In doing so it said as follows:

27. “ The Claimant’s concern over the breadth of the issues to be considered at the Reconsideration is a matter which will be addressed after the Claimant has complied with the order as set out in paragraph 2. The original date having passed without compliance; the order is varied to require compliance by Wednesday 4th January 2018. … Those terms of the order were agreed by counsel for the parties and both elements of the Claimant’s application did not disclose a material change of circumstances or raise an argument which was not considered at the September 2017 Preliminary Hearing. As the parties agreed to provide their respective contemporaneous notes by the 23 October 2017 it is proportionate and in accordance with the interests of justice that they comply with that order before addressing whether there is any need for additional information from the tribunal. Similarly, both counsel agreed to the method of clarification of the issues set out in paragraph 2 of the order.”

28. In subsequent correspondence, the Claimant explained that there had been a material change in circumstances; that change being the Tribunal’s description of what it would do once it had received the parties’ notes of evidence.

29. By a letter dated 15 February 2018, the Tribunal rejected the Claimant’s contention that there had been a material change of circumstances.

30. The Claimant lodged a further appeal to the EAT which was dismissed on the 23rd January 2019.

31. The passage of time between the Reconsideration hearing judgment of 2013 and January 2019 was largely a period of very limited progress of the case in the Employment Tribunal whilst the decisions of the EAT and Court of Appeal were awaited.

32. From January 24th 2019 the parties were still bound to comply with the 2017 orders.

33. There was no apparent progress in respect of the parties' provision of copies of their respective notes and a further iteration of the 2017 order was made requiring exchange by the 28th June 2019.

34. I am informed that the Respondent was ready to exchange its notes on the 28th June 2019 but the Claimant did not do so. In any event, by June none of the orders had been adequately complied with nearly two years after they were made.

35. A further dispute arose between the parties following the Claimant's statement that she perceived the 25th September 2017 order had required the disclosure of any privileged statements which may have been part of the parties' notes of the 2012 liability hearing.

36. On my personal recollection, and on considering the terms of the September 2017 order, it was evident that my direction was limited to the record of the evidence of the witnesses and the parties' submissions on liability.

37. This was repeated to the parties in correspondence from the ET dated 25th November 2019.

38. Mr Allsop stated that the Claimant had made a request for a hard copy of the Respondent's draft bundle and that was sent to her and later she made a further request that a duplicate should be provided to her legal advisors. But, upon request for the address of those advisors, none was provided.

39. Subsequent efforts by the Respondent to agree directions in November 2019 met with no success.

40. The Respondent avers its efforts to agree a revised timetable in January 2020 did not receive a response from the Claimant.

41. The Respondent asserts that it has received no communication from the Claimant for two years.

42. That period included the Covid related "lock downs" of 2020, but, as all directions should have been progressed considerably earlier than March 2020, and there is no information from the Claimant before me to explain why she had not acted to progress matters, I do not find that was a relevant consideration.

43. On 10th January 2022 the Employment Tribunal wrote to the parties requesting the them to indicate the current state of preparation for the Reconsideration Hearing.

44. The Respondent replied on the 24th January 2022.

45. The Claimant did not respond.

46. The Respondent's email of the 24th January 2022 asserted that:

    a. the Claimant had not responded to its correspondence,
    b. nor complied with the outstanding orders and;
    c. The Claimant had not taken any steps to progress the case since January 2020; a period of two years and two months prior to this hearing.

47. The same correspondence applied for an order to strike out the claim or, in the alternative, the imposition of a deposit order.

The Parties' submissions

48. The Claimant, as of 17. 30 on the 17th March 2022, has not made any submission.

49. Mr Allsop, on behalf of the Respondent contended as follows:

50. That Following the dicta in Evans & Another v Commissioner of Police of the Metropolis 1993 ICR 151 the Employment Tribunal should follow the approach of the House of Lords in Birkett v James 1978 and cited a more recent example of the correct approach from the case of Khan v London Borough of Brent EAT 002/18 DA wherein Her Honour Judge Tucker referred to Rolls Royce plc v Riddle [2008] IRLR 873, and, in particular at paragraphs 18 to 20 of the report. At paragraph 20 Lady Smith sets out as follows:

    "20. … it is quite wrong for a Claimant, notwithstanding that he has, by instituting a claim, started a process which he should realise affects the employment tribunal and the use of its resources, and affects the Respondent, to fail to take reasonable steps to progress his claim in a manner that shows he has disrespect or contempt for the tribunal and/or its procedures. In that event a question plainly arises as to whether, given such conduct, it is just to allow the Claimant to continue to have access to the tribunal for his claim."

51. The Respondent argued both limbs of the *Birkett v James* guidance:

    a. That there had been delay which was intentional or disrespectful to the court, or

    b. There had been inordinate and inexcusable delay, which gave rise to a substantial risk that a fair reconsideration hearing is now impossible, or which is likely to cause serious prejudice to the Respondent.

52. Mr Allsop argued that since the 28th June 2019 the Claimant had not made any effort to agree the notes of evidence or any other aspect of the 2017 directions.

53. He noted the case was unusual because the judgment on liability, dismissing the claim had not been subject to appeal but the character of the reconsideration application required detailed analysis of the evidence and an invitation to the Employment Tribunal to make fresh, and alternative findings of fact to those made in 2012.

54. He submitted that any dispute between the parties in respect of their notes of the 2012 hearing would fall to be considered, and determined , by reference to the recollection of the Employment Tribunal; a task which was probably impossible to achieve with any acceptable degree of reliability ten years after the evidence had been given[1].

55. Further, if the reconsideration application was allowed that would itself involve either a tribunal panel rehearing the case; hearing evidence from witnesses whose recollection of the events which occurred in 2009 would be adversely affected by the passage of time or, as the Claimant sought, the current panel making fresh findings; again, based on its recollection of the evidence given ten years ago.

56. With respect to the Claimant's conduct, the Respondent argued that since she had failed to disclose her notes on the 28th June 2019, she had not taken any action to progress the case towards a reconsideration hearing.

57. Equally, on the Respondent's case, the Claimant had not communicated with the Respondent or the Employment Tribunal for two years.

Discussion and conclusions

58. In the absence of any contrary statement of fact or any submission by the Claimant I accept the Respondent's account of its interaction with the Claimant.

59. Whilst I am aware of the whole history of this case I have concluded that the specific events up to and including the outcome of the 2019 EAT hearing are immaterial to this application. However, the number of years which have passed since the alleged conduct in 2009 maybe a material consideration.

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[1] As the five day reconsideration hearing has not been listed it is highly unlikely that it can be listed before July of 2022.

60. I find that there was slow progress up to the 28th June 2019 and some modest inter-parties' communication up to November 2019. I also find that the Claimant does not appear to have made any positive step to produce her copy of the notes of the liability hearing and has provided no explanation for her delay since her September 2019 suggestion that privileged material should be disclosed.

61. On the information before me her last active step occurred in November 2019. That is a period of no less than 26 months of inaction. As noted above, the Claimant has offered no explanation for that period. Most recently the Claimant did not reply to the Employment Tribunal's request for an update on progress in January 2022 and she has neither acknowledged or responded to the Notice of Hearing or the Respondent's application of the 24th January 2022.

62. In my judgment, in the absence of any explanation, the failure to comply with the Employment Tribunal's directions for such a length of time is more likely than not to be a conscious and intentional act.

63. I also find that the period of no less than 26 months is an inordinate and, in the absence of any explanation, an inexcusable delay.

Is there a substantial risk that a fair hearing would not be possible or there would be serious prejudice to the other party?

64. I have directed myself in light of the authorities of Abegaze v Shrewsbury College of Arts & Technology 2010 IRLR 238 CA and Riley v Crown Prosecution Service 2013 IRLR 966.

65. The sanction of striking out a claim is a draconian limitation on the right to a fair trial within a reasonable time. In this case the Claimant has had a trial on liability in 2012. Since 2013 the case has concerned the merits of her application for reconsideration. That application is however one which asks the tribunal to revoke the liability judgment, make fresh findings of fact in some respects and to reverse its decision on the merits of her claim.

66. The loss of my own notes and annotated bundle for the 2012 liability hearing necessitated the provision of the parties' contemporaneous notes. Both parties consented to the production of their notes to enable the Employment Tribunal to conduct a fair reconsideration hearing

67. Without those notes to assist the panel's recollection of the oral evidence, largely given in April 2012 there is a very substantial risk that a fair reconsideration hearing could not take place.

68. It would, in my judgment be far more difficult still for another Employment Tribunal panel to do so.

69. I take into account Mr Allsop's submission on the difficulty the respondent's witnesses now have to recall events. In my judgment it highly unlikely that, if the liability judgment were revoked and a new hearing was ordered, the witnesses to events which took place in 2009 (several of those incidents being verbal exchanges without contemporaneous records), would not have a reasonable prospect of being able to provide reliable evidence at such a hearing which would not be listed before 2023; some fourteen years after the disputed verbal exchanges in question.

70. I therefore find that, if the Reconsideration hearing cannot take place before the original Employment Tribunal, with the benefit of the said contemporaneous notes of evidence, a fair hearing is very unlikely to be possible.

71. I have concluded that it is highly unlikely a fair re- hearing will be possible.

Sanction

72. I have considered whether there is a less draconian path which balances the Claimant's intentional default with the overriding objective of the Employment Tribunal.

73. In my judgment, the only realistic path which has a prospect of a fair hearing is the current reconsideration hearing which takes place with the benefit of the parties' notes; so that the panel who heard the witnesses in 2012 can be assisted to have the best recollection of the evidence possible when considering the merits of the reconsideration application.

74. I have accepted, in the absence of any submission from the Claimant, the Respondent's assertion that the Claimant has not complied with the order even when she was in a position to do so in June 2019. In my judgment,, but for her non-compliance, the reconsideration hearing would have taken place in late 2019 or early 2020.

75. I must also take into account the future prospect of the claimant complying with the outstanding case management orders of 2017. In my experience some parties, faced with the prospect of the dismissal of their case, express a willingness to act promptly, to comply without further order or otherwise assist the Employment Tribunal to deal with their claim in a timely fashion. The Claimant's silence is significant in this respect.

76. I have considered whether the imposition of an unless order would be a proportionate approach. To be proportionate such an order must have a sufficient likelihood of persuading the Claimant to comply with the Employment Tribunal's instruction; to make such an order in circumstances which lead me to conclude the Claimant would not comply in any event would not be sincere or reasonable.

77. So far as I am able, on the information provided to me by the parties, I can find no basis to conclude that the imposition of a rule 58 unless order would be an effective catalyst to co-operation by the Claimant.

78. The Claimant was on notice of the respondent's application of the 24th January 2022 and has not responded to that application in the following six weeks. The Claimant was on notice of this hearing dated the 8th February and did not acknowledge that notice. The Claimant has not attended this hearing. The Claimant has not explained her absence. The Claimant has not responded to the Tribunal's email sent shortly after the hearing was set to commence.

79. The Claimant has gained considerable experience of tribunal procedure over the last thirteen years and has, in the more recent years, had access to very capable legal advice. She is a litigant in person with considerable experience and sufficient understanding to appreciate the importance, and effect, of the Respondent's application.

80. In my judgment, if a party does not respond, in any form, to an application to strike out their claim, nor to the notice of a hearing to strike out their claim, nor take any steps to oppose the application at the hearing, there is no sufficient basis to have any reasonable confidence that an unless order would provoke a change in that party's conduct of their litigation. That is particularly so in the context of the preceding two years of inaction.

81. In my judgment there is no lesser sanction which has any prospect of causing the Claimant to alter the course of her persistent failure. Accordingly, the dismissal of her case is a sanction which is proportionate and in accordance with the overriding objective of the Employment Tribunal.

82. For the above reasons the application to strike out the claimant's application for reconsideration is granted.

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Employment Judge **R F Powell**

Dated: 18th March 2022

ORDER SENT TO THE PARTIES ON 22 March 2022

FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS

Mr N Roche