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THE EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr L Kwendakwape

**v Chelsea and Westminster NHS
Foundation Trust**

Heard at: London Central

On: 29 December 2017

Before: Employment Judge Glennie

Representation:

Claimant: Neither Present nor Represented

Respondents: Mr M Greaves, Counsel

JUDGMENT

The judgment of the Tribunal is as follows:

1. Pursuant to Rule 47 of the Rules of Procedure 2013 the Tribunal proceeded with the hearing in the absence of the Claimant.
2. The Claimant's application for relief against the sanction of the claim being struck out and/or for reconsideration of the judgment dated 20 June 2017 striking out his claim is dismissed.
3. The Tribunal being satisfied pursuant to Rule 76(1)(a) of the Rules of Procedure 2013 that the Claimant has acted unreasonably in the way in which he has conducted the proceedings, the Claimant is ordered to pay to the Respondent costs assessed at £1,750 in respect of this application.

REASONS

- 1 By his claim to the Tribunal the Claimant, Mr Kwendakwape, made complaints of unfair dismissal and race discrimination. Those claims were disputed by the Respondent, the Chelsea and Westminster NHS Foundation Trust.
- 2 At a Preliminary Hearing held on 15 March 2017, Employment Judge Grewal made case management orders including an order for the exchange of witness statements on or before 31 May 2017. The full merits hearing was listed to take place on 21 June 2017.
- 3 On 6 June 2017 (and all dates that follow are in 2017), the Respondents applied for an unless order requiring the provision of the Claimant's witness statement by 4 pm on 9 June. At 11.33 on 9 June the Claimant sent an email to the Tribunal, copied to the Respondent's solicitor, asking for "about 3 more working days to send the rest of the witness statements", saying that he had been busy submitting his dissertation assignment essays and preparing for his final exams. The email stated that the Claimant had attached some of the statements: the attachments were documents such as an appraisal and emails, but did not include a witness statement from any individual.
- 4 The Respondent's application was referred to Employment Judge Grewal, on whose instructions a letter was sent by the Tribunal to the Claimant by email on 12 June (at 11.29am) stating that if the Claimant did not exchange witness statements by 4pm that day the Tribunal would consider striking out his claim.
- 5 The Respondent sent an email on 13 June stating that the Claimant had not provided the witness statement on the 12th, but instead had sent by email at 15.54 and 16.20 various documents that had already been included in the Tribunal bundle. The Respondent's solicitors stated that nonetheless the Respondent had provided its witness statements to the Claimant by email on the morning of 13 June and that the Respondent applied for the claim to be struck out.
- 6 The file was referred to Regional Employment Judge Potter on whose instruction a letter was sent to the Claimant by email at 12.25 on 15 June stating that Judge Potter was considering striking out the claim because of failure to comply with the Tribunal's order to provide witness statements by 12 June, and failing actively to pursue the claim. The letter continued that if the Claimant wished to object to this proposal he should give his reasons in writing or request a hearing at which he could make his objections by 20 June.

7 REJ Potter gave a judgment striking out the claim for the reasons indicated in the warning letter of 15 June on 20 June. At the same time the hearing listed to commence on the following day 21 June was vacated. The judgment was emailed to the Claimant at 16.52 on 20 June. The Tribunal's file shows that at 15.39 on the same day, the Claimant had attempted to send a copy of his witness statement as an attachment to an email. It is apparent from his subsequent email of 21 June that he had spoken to a member of the Tribunal's administrative staff who told him that it had not proved possible to open the attachment to the email of 20 June. The Claimant said he did not realise that and that he was sending the attachment again.

8 Then on 22 June the Claimant sent an email to the Tribunal, copied to the Respondent, apologising for not complying with the order to provide witness statements by 12 June, saying "this was due to my commitment of my final exams of June". The Claimant said that he wished to object to the proposal to strike out his claim and requested a hearing. The document continued with his witness statement.

9 The file was again referred to REJ Potter who caused a letter to be sent to the Claimant on 10 July 2017 in the following terms:-

"You responded to the Tribunal's strike out warning on 22 June 2017, 2 days after the deadline for such a response. The claim had already been struck out and the hearing vacated. If you apply for relief from the sanction of strike out please provide to the Tribunal and the Respondent by 24 July 2017 details of why you say the strike out judgment should be revoked."

10 The Claimant replied on 22 July, stating that he asked for the judgment to be set aside on the basis that he had complied with the Tribunal's order to provide the witness statement by 12 June 2017. In this connection he relied on an acknowledgment from the Tribunal at 15.42 on 20 June, which would appear to be in fact an acknowledgement of his email at 15.39 on that date.

11 REJ Potter caused further enquiries to be made with the Tribunal's office and was informed that the attachment to the Claimant's email at 15.39 on 20 June could not be opened. On Judge Potter's further instructions an email was sent to the Respondent's solicitor on 7 August 2017 in the following terms:-

"Please confirm whether you received a readable copy of the Claimant's statement on 12/06/17 (as indicated below).

"Please also indicate what if any comments you received from the Claimant in response to the strike out warning. The Tribunal received a series of emails on 20 and 21 June saying they attached a witness statement but we were not able to open any of these. The first readable copy the Tribunal received was on 22/06/17. The first time the Tribunal received an objection to the strike out and a request for a hearing was at 15.57pm on 21/06/17."

- 12 There was attached to that email a copy of the Claimant's email of 22 July in which he asserted that he had complied with the order to provide the witness statement by 12 June.
- 13 The Respondent's solicitor replied on 8 August stating they had not received any witness statement from the Claimant on 12 June 2017, let alone a readable version, but instead attachments which were documents that had already been included in the bundle, and that the first correspondence that they had received from the Claimant following the strike out warning of 15 June was a copy of his email to the Tribunal of 20 June 2017 timed at 15.39. The Respondent's solicitor stated that the attachment to that email was corrupted, although they had ultimately managed to open the document.
- 14 REJ Potter then directed that the matter be listed for a hearing to decide the Claimant's application for relief from the sanction of striking out, and on 2 November the parties were notified that the hearing would be listed on 22 November. On 9 November the Claimant sent an email to the Tribunal stating that he had had to travel to Zambia due to his mother being critically ill in hospital and stating that, while he could not predict how long he would be away, he had provisionally booked a return ticket for 27 November. The Tribunal understood this to be a request for a postponement of the hearing set for the 22nd and asked for the Respondent's comments. The Respondent did not object to the request but asked for the Tribunal to give consideration to whether it would be possible to hold the hearing via a video link, in the alternative asking that the hearing should be listed as quickly as possible on the Claimant's return to the UK given the delays since the original trial date. Following this on 14 November 2017 the parties were notified by email that the hearing would be postponed to 5 December at 2pm.
- 15 At 09.32 on 4 December, the Claimant sent an email to the Tribunal copied to the Respondent's solicitor in the following terms:-
- "Further to your email dated 9th November 2017, I wished to inform the court that I am still in Zambia; my critically ill mother passed on the day I was in flight out to Zambia on 9th November 2017. We put my mother to rest on 13th November 2017, since I am the oldest in my family I had to extend my stay to deal with family issues. I have provisionally booked my return ticket for 6th December 2017."
- 16 The Respondent sent an email also on 4 December which included the following:-
- "Once again, given the Claimant's personal circumstances, the Respondent has no objection to a further postponement. However it would ask that this hearing is listed as quickly as possible on his return to the UK later this week. The Respondent would also add, that whilst it has not objected to his application on this occasion, it is not prepared to agree to any further postponement. Whilst it has every sympathy for the Claimant's loss, the

position remains that this matter has been ongoing for a very considerable amount of time. The Claimant issued his ET1 on 27 December 2016, his employment.....having terminated on 19 September 2016. The full liability hearing was originally supposed to take place in June 2017, one of the Respondent's witnesses no longer works for the Respondent and another is due to leave their employment and relocate abroad in February 2018. The Respondent submits that there is therefore a risk of real prejudice being caused to the Respondent if this matter is not listed for a hearing without further delay."

17 Following this, the parties were notified by email on 4 December 2017 that the hearing would be postponed to a date to be fixed, and then by an email on 6 December were notified that the hearing would take place on 29 December at 10am.

18 On 26 December (a bank holiday on which the Tribunal's offices were closed) the Claimant sent an email to the Tribunal, copied to the Respondent's solicitor, in the following terms:-

"Further to your email dated 4 December 2017, with sincere regret wish to inform the court that I am still in Zambia. I did not travel as early scheduled; 9th December 2017. The reason is that on 25th November 2017 I had a accidental fall which left a cut on my right sheen [sic] I needed 6 stitches to cover it, the time I was meant to fly out back to England, the wound and leg has since gotten infected enabling me too ill to travel. I regret the inconvenience caused, I will advise the esteemed court on the day I will travel back to England.

I would kindly request the court to please, yet again, reschedule the court date."

There was attached to the email an image which appeared to show a laceration to a leg.

19 The Respondent replied on 27 December by email objecting to the application for a postponement. The Respondent's solicitor made essentially the same points as made in the previous email about the lapse of time and the Respondent's witnesses. The Respondent's solicitor made the further point that the Respondent had incurred wasted costs in respect of each postponed Preliminary Hearing, since on each occasion that the PH had been postponed and relisted, previously instructed counsel had been unavailable and new counsel had to be instructed. The solicitor continued that the Respondent had instructed counsel for the current Preliminary Hearing and that a third postponement would be costly and prejudicial to the Respondent which was spending public funds in defending the claim. The Respondent's solicitor suggested that the Tribunal consider directing the Preliminary Hearing take place by telephone, which would avoid the difficulty with the Claimant being unable to travel.

- 20 On 28 December at 11.58, a letter was sent by email to the parties on the instruction of Employment Judge Wade, stating that the request to postpone the hearing had been refused on the grounds that the Respondent objected and the matter could not be allowed to drag on since the claims were struck out on 20 June 2017. The letter stated that the case remained listed for hearing on 29 December and that the hearing would be conducted by telephone and continued:

“The Employment Judge will telephone the parties so please provide the Tribunal the name of the contact person and the number you wish to be used on the day by return.

“Alternatively, the Claimant should confirm that he no longer wishes to pursue this application.”

- 21 I took judicial notice of the fact that Zambia is 2 hours ahead of London in point of time and so an email sent from London timed at 11.58 would be received in Zambia at 13.58 on the same day.
- 22 The Respondent provided a telephone number for counsel. No telephone number was received from the Claimant. Although I was aware that the Claimant was almost certainly in Zambia and not in the UK, I telephoned the mobile phone number on the file for the Claimant. That number was not recognised. There was then some delay in being put through to the Respondent’s counsel, but at 10.25 I made contact and the hearing began.
- 23 I decided that I should proceed with the hearing in the Claimant’s absence for the following reasons:-
- 23.1 Given that communication between the Tribunal and the parties was being undertaken by email, there had been sufficient time for the Claimant to notify the Tribunal of a phone number on which he could be reached in Zambia.
- 23.2 Not proceeding would effectively have negated Employment Judge Wade’s decision to refuse the application for a postponement.
- 23.3 As can be seen from the chronology set out above, the Claimant’s application for a postponement of the hearing on 29 December had been made at a very late stage and a time when it was difficult for the Tribunal and the Respondent to deal effectively with that application. The Claimant knew that he had not returned to the UK as planned on 9 December and it was not apparent to me why he had not made an application more promptly after that date. Even if he had been hoping to be able to return at some point between then and the Christmas holidays, and assuming in his favour that he did not know that the Tribunal’s office was closed on 27 December as well as the 25th and 26th, he should in my judgment have applied at

the latest shortly before the Christmas break to enable his application to be dealt with effectively.

- 23.4 As previously rehearsed in correspondence and as found by Employment Judge Wade, there had been considerable delay since the intended hearing of the case and the events with which it was concerned.
- 23.5 The Respondents had again instructed counsel for this hearing and there would be wasted costs if it were not able to proceed.
- 24 The Claimant was of course not present to make his application, but I considered the material available to me from him. I took guidance on the principles to be applied from the Court of Appeal authority of **Denton v TH White Limited [2014] EWCA Civ 906**. The Tribunal should consider: (1) the seriousness and significance of the breach; (2) why it occurred, and whether there was good reason for it; and all the circumstances of the case.
- 25 I found the breach to be serious and significant. The original date for exchange of witness statements pursuant to the Tribunal's orders was 31 May. The Claimant was already in breach when the Respondent applied for an unless order on 6 June, and had not remedied that by the time the unless order was communicated to him on 12 June. A party's failure to provide his witness statement when ordered jeopardises the whole trial process: it is very difficult for a fair trial to take place if one party fails to provide his statement in time for the other party to consider it and prepare properly for the hearing.
- 26 The Claimant has not, in my judgment, given a good reason for the breach. His statement in his email of 22 June that his non-compliance with the order was "due to my commitment of my final exams of June" did not, in the event, tell the Tribunal a great deal. The Claimant did not say when in June his exams took place, or explain why he had not drawn these to Employment Judge Grewal's attention at the Preliminary Hearing on 15 March, when account could have been taken of them in fixing the full merits hearing and the timetable for the case management orders. In the absence of his having done so, it seemed to me that the Claimant had decided to give priority to his academic work over preparing for the hearing in accordance with the Tribunal's orders.
- 27 I found that, if anything, the weakness of the Claimant's explanation was compounded by the assertion in his email of 22 July that he had complied with the order to provide the witness statement by 12 June and his linking of the Tribunal's acknowledgement of 20 June to this. It was not the case that he had complied with the order, and his attempt to say that he had seemed to me to suggest a lack of conviction about the explanation that he had previously given.

- 28 So far as the other circumstances of the case are concerned, the Claimant failed to respond to REJ Potter's warning letter within the time specified, replying 2 days after the deadline. His default in providing his witness statement had caused the trial to be vacated at a very late stage.
- 29 Against all of this, I took into account the fact that refusing to revoke the order striking out the claim would plainly mean that the Claimant's case would never be heard, which would be prejudicial to him. I concluded that this did not outweigh the other factors that I have described above, and that I should refuse his application.
- 30 Mr Greaves made an application for costs on the basis of the Claimant's unreasonable conduct in relation to the application. I am satisfied that there had been unreasonable conduct in that the Claimant had made the application for reconsideration of the strike out judgment or for relief from the sanction of striking out, but had then failed to attend the hearing in the circumstances that I have outlined above. I did not consider that there had been unreasonable conduct in relation to the earlier postponements, but that there had been unreasonable conduct in the Claimant's late application to postpone the present hearing and his failure to attend it by telephone. I therefore found that Rule 76 (1) (a) of the Rules of Procedure 2013 applied in that there had been unreasonable conduct of the proceedings by the Claimant.
- 31 It does not automatically follow from such a finding that a costs order is made. The Tribunal has a discretion whether to make such an order or not. I considered that in the circumstances that I have outlined above, a costs order was appropriate.
- 32 Rule 84 of the Rules of Procedure 2013 provides that in deciding whether to make a costs order and if so in what amount the Tribunal may have regard to the paying party's ability to pay. In the circumstances I had no information as to the Claimant's ability to pay, but I concluded that given the history that I have outlined above, and the Claimant's failure to attend the hearing, whatever the position about his ability to pay a costs order should be made.
- 33 Mr Greaves relied on a costs schedule dated 20 November 2017 that had been prepared for the hearing intended to take place on 5 December. That claimed a total sum for preparation for the application and attendance at the hearing of £2,273.20. That figure included an estimated sum of £429 for attending the hearing at an hourly rate of £143. The hearing did not in the event last 3 hours and I therefore considered that that should be reduced to £143 which would give a sub total of £1,987.20. I further reduced this to £1,750 as representing that the amount that I considered to be an overall reasonable figure to order the Claimant to pay in the circumstances.
- 34 The hearing ended at about 10.45am. At 11am an email was received by the Tribunal from the Claimant giving a telephone number on which he could

be contacted in Zambia. That was followed by another email at 11.16 in which the Claimant said this: "Please I need the court to put into consideration that although I am willing to proceed by telephone because the judge has ordered this I feel that the balance of the law is being unfavourable to me as I have not had the opportunity to arrange for a defence lawyer for today's hearing in light of my circumstances I also do not have access to my files of evidence available to me" and the Zambian telephone number was again given.

- 35 As the hearing had already concluded and I had given my judgment before this email was received, and since it was received one hour after the time at which the hearing was due to start, I did not attempt to contact the Claimant on that number.
- 36 Although there has not been a request for written reasons, in the light of the history of the matter and the events of 29 December, I have decided that these reasons should accompany the judgment.

Employment Judge Glennie on 5 February 2018