



EMPLOYMENT TRIBUNALS

Claimant: X

Respondent: Y

HELD AT: Manchester **ON:** 21 March 2017

BEFORE: Employment Judge Holmes
Mrs C Linney
Ms J A Beards

REPRESENTATION:

Claimant: Not in attendance
Respondent: Mr C Taft, Counsel

JUDGMENT ON PRELIMINARY HEARING

It is the judgment of the Tribunal that the hearing of the preliminary issue in this matter to determine whether the claimant's claims should be struck out is adjourned to be determined in Chambers on **12 June 2017**. The parties are not to attend.

CASE MANAGEMENT ORDERS

It is the order of the Tribunal that:

1. By **10 April 2017** the claimant do reply in writing to the Tribunal's questions set out below:

Questions for the claimant to which she is requested to reply, where possible, by either "yes" or "no" –

- a) Does the claimant intend to attend (or be represented, if not appearing in person) at the resumed final hearing of her claims?
- b) If so, and the claimant is unwilling to continue to answer oral questions from the Tribunal, is she willing to answer, within a reasonable timescale, written questions posed by the Tribunal in respect of her evidence?

- c) If the claimant is willing to attend the resumed hearing, does she wish to re – examine herself, i.e. to give clarification of her evidence thus far , as previously explained to her ?
 - d) If not , is the claimant content to waive her right to re-examine herself, , so that the totality of her evidence will be her cross examination , and her answers to the Tribunal’s oral and written questions?
 - e) If the claimant intends to attend the resumed hearing, is it her intention to cross examine the respondent’s witnesses?
 - f) If not, does the claimant forgo her right to cross examine the respondent’s witnesses?
 - g) If not, how does she propose that the evidence of the respondent’s witnesses is challenged, and her case put to then?
 - h) Is the claimant content to remain present during the remainder of the hearing and to note the evidence given by the respondent’s witnesses, and the closing submissions made by Mr Taft , so as to enable her to make her own final submissions at the conclusion of the hearing?
 - i) If not, how does she propose the remainder of the hearing is conducted?
 - j) How else, if not by the means set out above, does the claimant propose that the Tribunal proceeds with the rest of the hearing of her claims?
2. The respondent shall, by **5 May 2017**, provide to the Tribunal, and copy to the claimant, any further written submissions in relation to the proposal to strike out the claimant’s claims in the light of the claimant’s responses to the Tribunal’s questions.
3. The Tribunal will reconvene in chambers on **12 June 2017** to consider further the proposal to strike out the claimant’s claims in the light of the further written representations so received.

REASONS

1. The Tribunal this morning has re- convened to hear by way of a preliminary hearing whether the claimant's claims in this matter should be struck out pursuant to rule 37(1)(e) on the basis that a fair hearing is no longer possible.
2. The events giving rise to this hearing go back to the hearing that was conducted by the Tribunal on 12-15 December 2016 , when the hearing of the claims commenced before the Tribunal, and the claimant gave evidence. However, in the course of that evidence, and whilst she was in fact answering questions from the Tribunal, the claimant became upset, and her behaviour in the Tribunal was such as gave concerns as to her wellbeing. The events in that hearing are set out in the Tribunal’s judgment sent to the parties on 4 January 2017. Consequently that hearing was adjourned, and the Tribunal directed that the claimant, who suffers from

paranoid schizophrenia, confirm in writing to the Tribunal that she was fit, and willing, without condition to resume giving her evidence to answer questions from the Tribunal, and thereafter re-examining herself so that her claims could thereafter proceed to a conclusion.

3. Following that order the claimant did indeed write to the Tribunal on 12 January 2017, a letter in which she said the following:

"I confirm that I, X is fit, however unwilling to resume giving evidence and answer questions from the Tribunal."

4. Having received that letter and finding it somewhat ambiguous the Tribunal; wrote to the claimant on 20 January 2017 seeking clarification of what exactly it was that the claimant was saying ,because having said on the one hand that she was fit to attend a hearing, she then went on to say that she was unwilling to resume giving her evidence. The Tribunal accordingly sought clarification of her response.

5. That came in a letter dated 26 January 2017, in which the claimant said:

"As stated on the letter to Manchester Employment Tribunal's letter dated 12/01/2017 my response remains the same",

and she enclosed a further copy of her previous letter.

6. In those circumstances, the Tribunal wrote again to the claimant on 7 February 2017 informing the claimant that as she was saying that she was unwilling rather than unfit to attend the resumed hearing, the Tribunal was now considering whether to strike out her claim pursuant to rule 37(1)(e) of the 2013 Rules of Procedure, on the grounds it was no longer possible to have a fair hearing in respect of the claim. That letter set out the reasons for the Tribunal considering making such an order, but giving the claimant an opportunity to respond to that proposal and in particular as to whether she wished to attend a preliminary hearing to determine that issue.

7. The claimant replied by a further letter on 9 February 2017 in which she said:

"I want to object to the proposal, seek a hearing of the issue alone and not to resume the full hearing immediately after the issue is determined which I attend in person."

8. That was a reference to the Tribunal's letter which indicated that the proposal for a strike out would be considered, but that the full hearing, if that application was not granted, would not then resume immediately.

9. That letter too was somewhat ambiguous in the Tribunal's view, so the Tribunal communicated further with the claimant, and this hearing was listed. The Tribunal's letter of 1 March 2017 set out this hearing date and the length of hearing. The letter invited the claimant to confirm whether she wished to attend, or make written representations.

10. The claimant's next communication to the Tribunal was on 13 March 2017 in which she said this:

“As stated the letter to Manchester Employment Tribunals dated 12 January and confirmation on 26/01/2017”

and she repeated what she said in that letter, that she was unwilling to resume giving evidence although she was fit.

she then carried on to say,

“Therefore will not attend the listed preliminary hearing on 21/03/ 2017 at 10.00am”

11. The Tribunal having received that letter wrote further to the claimant on 15 March 2017, noting that she was not going to attend the preliminary hearing but asking if she had any written comments to make as to why the claim should not be struck out on the grounds that a fair hearing was not possible, and she was invited to send her comments to the Tribunal as soon as possible, and at the latest by 20 March 2017, which was of course yesterday.

12. The Tribunal today, however, received in the post a letter from the claimant dated 17 March 2017, which was of course Friday, in which she says this:

“A fair hearing is not possible therefore the claim should not be struck out. I receive your letter on 16/03/2017 stating to respond to you by 20/03/2017 which allows me only 1 day to prepare and write a statement to you as 18/03/2017 and 19/03/2017 is weekend where it is non postal days.

You have never taken my Disability into consideration, I am always pushing myself to prepare and write my statement to you before your deadline allowing me no time to rest, taking away my human rights and giving me no justice.”

13. That was, as I say, received by the Tribunal this morning. The respondent has attended and is represented again by Mr Taft, who has appeared for the respondent throughout these proceedings, and he was given a copy of that letter for his perusal not having had, obviously, the chance to see it before the hearing.

14. The Tribunal having received that letter, whilst it is not an application for a postponement as such, did note that the claimant was appearing to complain that she had had insufficient time to make written representations in relation to the proposal to strike out her claim. The Tribunal raised, therefore, with Mr Taft how it should proceed in these circumstances.

15. Mr Taft for the respondent had previously been instructed to pursue the application that the claim be struck out today, and in the absence of any counter instructions that was his primary position.

16. The Tribunal, however, was concerned, particularly bearing in mind its duty to make reasonable adjustments for the claimant's disability, which, of course is her condition of paranoid schizophrenia, that to proceed when she was claiming that she had had insufficient time to make written representations in relation to the proposal to strike out her claim was a matter of some concern, and may amount to a failure to make reasonable adjustments for her disability. As Mr Taft in his candid submissions

has acknowledged, striking out a claim, of course, is a draconian and extreme measure, and one that the Tribunal will only take in the most extreme circumstances. In these circumstances to do so without giving the claimant a final opportunity to make written representations as to why such an order should not be made is one the Tribunal is loathe to contemplate if there is an alternative.

17. The Tribunal therefore raised with Mr Taft the possibility of not making a decision today, but giving the claimant a final opportunity to make written representations in relation to this issue. Further, it seemed to the Tribunal that it may be beneficial for both parties to consider other alternatives, and to clarify precisely what the claimant's position is.

18. From the quotations made from the correspondence received from the claimant, the Tribunal's impression was that, whilst she was saying that she would not re-attend a hearing, and go back into the witness box to answer questions from the Tribunal, and to complete her re-examination, the claimant was not saying, in terms, that she would not attend a resumed hearing. That raises the possibility, the Tribunal considers, of her attending a resumed hearing but not giving any further evidence, or certainly any further oral evidence, but the claimant still participating particularly by cross examining the respondent's witnesses who, of course, will be the next witnesses.

19. The Tribunal therefore considers it an avenue worth exploring to see if the claimant is in fact saying what the Tribunal understands her to be saying, and whether, on that basis, she is prepared to attend a resumed hearing to continue with cross examination, indeed, commence cross examination, of the respondent's witnesses.

20. In terms of her own evidence, the Tribunal considers it worth exploring with her whether she is prepared to complete the remaining questioning from the Tribunal by answering written questions from the Tribunal. Further, in terms of re-examination, which the claimant had had explained to her, and indeed did indicate in the course of the previous hearing she would prepare for herself, as to whether, if she felt unable to complete that, she would give up her right to re-examine herself. If she accepts those limitations and is prepared to deal with written questions from the Tribunal in her own evidence, that may (and the Tribunal puts it no higher) be a way in which the hearing could be resumed, and she could then proceed to cross examine the respondent's witnesses when they gave evidence.

21. The respondent, of course, has not at this stage had an opportunity to consider that as an alternative way of dealing with this issue, and much of course depends upon what the claimant herself says.

22. Consequently, the Tribunal has decided that it will not determine this application today, and with sympathy for the respondent's position, and the understandable desire to reach a conclusion of this case which is at risk of being prolonged, and becoming unwieldy, and indeed impossible to conclude unless resumed soon, the Tribunal will not decide the issue today, but proposes instead to write to the claimant and ask her some very specific questions to clarify once and for all what her position is in relation to how the claim can be dealt with going forward. Once those questions have been answered, the respondent will have the opportunity to look at the answers and to make its own submissions in relation to whether in the

light of those answers, the contention is pursued that there can no longer be a fair hearing. Much of course depends on what answers the claimant gives, and it may well be that certain answers will dictate that there will be an obvious conclusion to this issue.

23. The claimant should also be clear that, even if she is able to answer all the questions from the Tribunal as to how she is willing to proceed in the affirmative, and is able to resume the hearing in some form, that that may not be sufficient. The respondent may still take the view, and the Tribunal may agree, that that is not sufficient, and that a fair hearing is indeed still not possible. But the time at which that should be determined, it seems to us, is when the claimant's position has been further clarified, and she has had the time that she says she needs to respond to this application, and further that the respondent then has the final opportunity to comment upon her responses. The Tribunal can then consider the issue in the light of all that information.

24. So, for those reasons the Tribunal is going to adjourn this matter. It will issue directions to the claimant, and the respondent as to the timescale for the further submissions to be received. It will then reconvene in chambers and will seek to make a decision on the application. If that is not possible and a further hearing is needed the parties will be notified, but it is hoped that the responses received from both the claimant and the respondent, in writing, will enable the Tribunal to make a final decision as to the future conduct of this claim.

25. As previously, the claimant is urged to seek advice, legal or non - legal, and assistance from her health care professionals, support workers, or family or friends in her dealings with these claims.

Employment Judge Holmes

Dated: 23 March 2017

JUDGMENT, REASONS AND ORDERS
SENT TO THE PARTIES ON

29 March 2017

FOR THE TRIBUNAL OFFICE