IN THE LONDON SOUTH

EMPLOYMENT TRIBUNAL

CASE NUMBERS: 2318353/2010N

2330171/2010/N

2300254/2011B

BETWEEN:

Ms A A Vaughan

Claimant

-and-

Careers Enterprise LTD and Others

Respondent

PRE-HEARING REVIEW

Written Submissions for Ms AA Vaughan

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1. I am employed by Lewisham Council. I was TUPE'd in from Careers Enterprise Limited on 1 April 2011. Careers Enterprise Limited failed to inform me that I had been selected by the Council for transfer. I actually found out that I had been TUPE'd on 1 April 2011. This constitutes a failure to consult under TUPE. This is particularly detrimental to me as a disabled employee. I am one of only 5 staff out of 35 who have selected by the Council to be transferred, the rest of my former colleagues are now unemployed. Careers Enterprise Limited was responsible for delivering the Connexions contract in Lewisham. Lewisham Council decided not to re-new its contract with Careers Enterprise Limited and the Connexions

service closed on 18 March 2011. I began working for the Connexions service in March 2004, under London East Connexions Partnership. Prospects took over the contract for the Connexions service in 2006. VT Group PLC's subsidiary, Careers Enterprise Ltd (VT Enterprise) took over the Connexions contract in the first week of August 2008. Babcock International Group PLC took over the VT Group PLC on July 8th 2010 and their subsidiary, Careers Enterprise Limited (BabcockEnterprise) took over the Connexions contract on this date.

2. In addition to the existing issues that had previously been identified for determination, the Tribunal has stated that it will consider the following issues at the PHR/CMD, (please note that as I am unsure whether all the issues will be dealt with at the PHR, they have all been covered in my submissions) :

    a) Should the ET strike out my claims on the grounds of, unreasonable and vexatious behaviour?

    b) Whether or not the Tribunal should make a cost order against me on the grounds that in bringing and/or conducting proceedings, I have acted vexatiously, abusively, disruptively or otherwise unreasonably?

    c) Should the ET grant my amendment application for claim number 2300254/2011?

d) Should claim number 2300254/2011 be consolidated with claim numbers 2318353/2010 and 2330171/2010

Issues

3. The tribunal will have to decide the following issues:

Striking out my claims

4. Should the ET strike out my claims out on the grounds of, unreasonable and vexatious behaviour?

Making a Cost Order

5. Whether or not the Tribunal should make a cost order against me on the grounds that in bringing and/or conducting proceedings, I have acted vexatiously, abusively, disruptively or otherwise unreasonably?

Amendment Application

6. Should the ET grant my amendment application for claim number 2300254/2011?

Consolidation

7. Should claim number 2300254/2011 be consolidated with claim numbers 2318353/2010 and 2330171/2010

Submissions

Should the ET strike out my claims out on the grounds of, unreasonable and vexatious behaviour?

8. Where a Tribunal is dealing with an application to strike out under rule 18(7)(c) it is first necessary to determine whether the party responding to such an application is guilty of conduct amounting to a deliberate and persistent disregard of the required procedural steps and/or orders of the Tribunal. If so, whether, secondly, a fair trial is possible.

9. The tribunal must decide whether it is right, in the interests of justice and the overriding objective, to grant this request to the party in default, notwithstanding their breach of the two orders dated 14 October 2010 and 10 November 2010 and numerous other procedural abuses. That involves a broad assessment of what is in the interests of justice, and the factors which may be material to that assessment will vary considerably according to the circumstances of the case and cannot be neatly categorised. They will generally include, but may not be limited to, the reason for the default, and in particular whether it is deliberate; the seriousness of the default; the prejudice to the other party; and whether a fair trial remains possible.

10. The fact that the two orders have been breached, even though both parties were squarely on notice of the importance of complying with the order and the consequences if he does not do so, will always be an important consideration. Orders are an important part of the tribunal's procedural armoury (albeit one not to be used lightly), and they must be taken very seriously; their effectiveness will be undermined if tribunals are too ready to set them aside.

11. If the respondents request is granted this would be extremely prejudicial to me and I believe that I would be put at an enormous disadvantage. The Tribunal will need to weigh up all relevant factors, including the respondent's explanation for their non-compliance, the reason for their long delay in making the cost order and strike out applications and requesting that the third claim be covered at the PHR/CMD, the merits of the defence and the possibility of prejudice to me as an unrepresented and disabled claimant. The respondent's applications were made long after the date for compliance had expired (with regards to both orders) and the applications are also in breach of the two orders dated 14 October and 10 November 2010. The idea is that the parties should be able to approach the hearing on an equal footing, without being faced with 'surprise evidence', an inadequate time to prepare and with an appropriate length of time allocated for case management.

12. The respondents numerous complaints relating to claim number 2300254/2011B are also irrelevant, as the striking out of this claim or response did not form part of the issues to be considered at the PHR and the Tribunal. When I pointed this out to the Tribunal in my letters dated 15 and 16 March 2011, the respondent's then unconvincingly tried to claim that this was an oversight on their part, in their

letter to the Tribunal dated 16 March 2011. The respondent's explanation relates to a period of approximately five months, since the notice of the PHR was sent to both parties, and three months since I lodged the third claim. This was an oversight that lasted five months. The respondent party failed to explain adequately, their failure to make the request during the five month period. It does not seem to me that mere oversight by solicitors and over a period of five months was sufficient reason for or explanation of failure to comply with the Tribunal Order dated 10 November 2010.

13. To my mind this interpretation of rule 13(2) accords with its natural meaning and furthers the overriding objective set out in reg 3 of the 2004 Regulations. It is part of the duty of employment tribunals to ensure, so far as practicable, that a case is dealt with expeditiously and fairly: reg 3(2). This duty cannot be performed without a power to impose sanctions which take effect upon non-compliance. With regards to meeting a deadline ordered by the Tribunal for supplying information pertaining to striking out claims, the sanction cannot be avoided by simply making the statement 'we do not propose to apply for any of the claimant's claims to be struck out *at this stage*', the power in rule 13(2) would be deprived of its usefulness and would be an encouragement to further interlocutory skirmishing rather than progress in litigation.

14. Under rule 13(1)(b), if a party does not comply with an order made under the rules an Employment Judge or Tribunal may make an order to strike out the whole or part of the claim, or, as the case may be the response. rule 13(2) provides: **"An order may also provide that unless the order is complied with, the claim or, as the case may be, the response shall be struck out on the**

date of non-compliance without further consideration of the proceedings or the need to give notice under rule 19 or hold a pre-hearing review or Hearing."

Whether or not the Tribunal should make a cost order against me on the grounds that in bringing and/or conducting proceedings, I have acted vexatiously, abusively, disruptively or otherwise unreasonably?

15. The respondent party's allegations are unfounded and therefore a cost order should not be granted. In this case, it's quite clear that Respondent party (Careers Enterprise Ltd, Babcock Education and Skills Limited and others) and/or those acting by or on behalf of the Respondent party (Paris Smith Solicitors), are the ones who have deliberately and persistently disregarded the required procedural steps and not I.

16. The respondent's sole explanation given for non-compliance with the Tribunal order dated 10 November 2010, and in relation to their extremely late strike out application was that they had made the following statement in their letter dated 30 November 2010; '*we do not propose to apply for any of the claimant's claims to be struck out at this stage*'. They then formally requested that claim number 2300254/2011B also be covered at the PHR/CMD, despite the fact that the CMD agendas, PHR witness statements, PHR written submissions, PHR evidence and Tribunal CMD orders/directions and Notice of Pre-Hearing Reviews only dealt

with claim numbers 2318353/2010 and 2330171/201, a schedule of claims has only been ordered and produced for claim numbers 2318353/2010 and 2330171/201, the tribunal had yet to decide whether or not claim number 2300254/2011 should even be consolidated with claim numbers 2318353/2010 and 2330171/201 and whether or not an amendment for claim number 2300254/2011 should be granted.

Should the ET grant my amendment application for claim number 2300254/2011?

17. The tribunal has the power under rule 10 (q) of the procedure rules to permit amendment of a claim or response. I acknowledge that the closer we get to the hearing, the harder it will be to amend my claim. Having said this, a tribunal claim can be amended at any time; I just need the tribunal's permission. (ET Regs 2004 sch 1 rr10 (2) (q) 11 (1). The Respondents are trying to prevent me from even being able to seek permission, which is unreasonable and unjust.

18. 'In deciding whether to allow an amendment, the ET must take account of all the circumstances and balance the hardship and injustice of refusing the amendment against that of allowing it. '(Selkent Bus Co. Ltd v Moore [1996] IRLR 661, EAT. Transport and General Workers Union v Safeway Stores Ltd UK EAT/0092/07). Any further amendments I may make should not be treated as new claims. 'Where the amendment is to add new facts and grounds, the ET must decide if the new claim is in time and, if not, whether the amendment should be allowed. If the claim arises out of the same facts as the original claim but simply adds factual details or attaches a new legal label, the ET should very readily allow the

amendment even outside the time limit.' (Selkent Bus Co. Ltd v Moore [1996] IRLR 661, EAT. Transport and General Workers Union v Safeway Stores Ltd UK EAT/0092/07). 'It is always a matter for the tribunals' discretion.' (Selkent Bus Co. Ltd v Moore [1996] IRLR 661, EAT. Transport and General Workers Union v Safeway Stores Ltd UK EAT/0092/07). Other factors would be why the new claim was not originally included, how late in the day the amendment is now sought; whether the Respondent would be surprised by the new allegation or prejudiced by its late addition and, as already mentioned, the balance of hardship to each party.

Should claim number 2300254/2011 be consolidated with claim numbers 2318353/2010 and 2330171/2010?

19. The consolidation of all three claims would be prejudicial to me and result in the scope of my claims being narrowed in order to save time. It is clear from the proceeding so far that the respondent party is still trying to narrow the scope of my two claims, so in light of this fact, I don't see how it would be fair to add on another claim. This would also exacerbate my experience of injustice rather than help to resolve it. In addition to this the Tribunal has also previously advised me to whittle down my claims on two occasions, (which I have done). I believe that it is just and equitable for the tribunal to allow me to continue with the claims set out in my schedule dated 17 January 2011 and not limit the scope of my claims any further, (as this may lead to inadequate justice).

20. It is important for the tribunal to note that my claims started out as two separate claims, the first being lodged at the tribunal in April 2010 and the second being

lodged in July 2010. It was I, and not the Respondent party, who requested that my two cases be consolidated. I did this to try to save the tribunal time and money. It now feels like I am being penalized for this, instead of having this acknowledged and being treated fairly.

21. I am also mindful of the fact that the EAT has said that that an ET should be careful not to overstep the line between legitimate case management and over-simplifying my case by striking out proper claims to save time. There is tension between what expedition requires and what fairness requires. In the end, 'Justice should be preferred to expedition'. (Senyonjo v Trident Safeguards Ltd UKEAT/0316/04. See also EAT's comments in Sodexho v Gibbons [2005] IRLR 836, eat. Article 6 (The right to a fair hearing) and article 14 (non-discrimination) of the European Convention on Human Rights should also be taken into account.

Conclusion

22. In line with my original strike out application, and my automatic strike out application dated 15 March 2011, I would ask that the Tribunal grants this application and strikes out the response without further consideration of the proceedings or the need to give notice under rule 19 or hold a pre-hearing review or hearing. It is submitted that this approach would be in accordance with the overriding objective to deal with the proceedings efficiently, fairly, justly and in accordance with the overriding objective. This is particularly the case given the respondents previous failure to comply with the Order dated 14 October 2010, their abuse of process and persistent failure to follow procedural steps.

23. I refer the Tribunal to the principles propounded by Sedley LJ in Blockbuster v James [2006] IRLR 630 (Court of Appeal). In summary, where a Tribunal is dealing with an application to strike out under rule 18(7)(c) it is first necessary to determine whether the party responding to such an application is guilty of conduct amounting to a deliberate and persistent disregard of the required procedural steps and/or orders of the Tribunal. If so, whether, secondly, a fair trial is possible.

24. There is an important interest in employment tribunals enforcing compliance, and it may well be just in such a case for a response to be struck out even though a fair trial would remain possible. The case of *Blockbuster Entertainment Ltd v James* [2006] IRLR 630 did not concern an unless order; and the facts of *Governing Body of St Albans Girls' School & Another v* Neary [2010] IRLR 124 illustrate that a claim may be struck out even though a hearing is still possible – see in particular paragraphs 63 and 64 of the judgment. This principle should also therefore be applicable to responses as well. As stipulated in *Blockbuster Entertainment Ltd v James* [2006] IRLR 630: power to strike out an issue: 5. This power, as the employment tribunal reminded itself, is a Draconic power, not to be readily exercised. It comes into being if a party has been conducting its side of the proceedings unreasonably. For this reason I also believe that the respondent should be prevented from participating in both the liability and remedies hearing.

Ms Ayodele Adele Vaughan

Date: 6 April 2011