

**IN THE INDUSTRIAL TRIBUNAL**

**Claim No Ind Tri 4/2012**

**BETWEEN**

**AMANDA LEEMING**

**-and-**

**STAN JAMES (GIBRALTAR) LIMITED**

**DECISION**

1. This is the Tribunal's decision following an Application by the Respondent that the Complainant's Originating Application for unfair dismissal be struck out. The Application is unopposed and the Complainant has not participated in the proceedings since they were revived in January 2015.

**Background**

2. The Complainant's claim is set out in her IT1 form dated 20 January 2012. The Complainant was employed as a Graphic Design Manager on 22 January 2008. She was dismissed for gross misconduct on 7 December 2011 in relation to her behaviour and attitude as Team Manager. The Complainant claims that the dismissal was unfair on the following grounds "Being forced to accept unreasonable changes to conditions of employment and remuneration without agreement; failure on the Company's part to follow correct and fair procedures; general harassment from Line Manager and refusal on the company's part to enter into mediation.
3. The Respondent's position is that following an investigation and gathering of evidence from other members of staff, the Complainant was invited to a disciplinary hearing, and following dismissal was offered the right of appeal, which the Complainant did not exercise. The Respondent also relies on the fact that the Complainant was offered a junior role as Graphic Designer with training, and that

the Complainant's failure to accept the same was a failure to reasonably mitigate her losses.

#### Chronology

4. The Complainant filed her IT 1 on 20 January 2012. The Respondent filed its IT 3 form on 3 February 2012 and sought an extension of time for filing further grounds. On 29 February 2012, the Respondent filed its full Grounds of Resistance. The Complainant was represented by a Mr Michael Ford, and the Respondent by an English solicitor, Nicholas Saville, now of Wedlake Bell.
  
5. A Chairman was appointed on 23 March 2012. The first directions hearing was set down on 8 January 2013. The Respondent requested an adjournment to 28 January 2013 and for a telephone hearing to be arranged. There then followed an exchange of correspondence between the Tribunal and the Respondent's representative regarding the standing of English solicitors and counsel appearing before the Industrial Tribunal. The Respondent's representative was advised by the Chairman that only Gibraltar lawyers could appear. In my view this is incorrect given that parties can be represented by "any" person according to the Industrial Tribunal Rules. As a result of this, the directions hearing was adjourned to 26 February 2013, and then vacated for the Chairman to consider further the question of representation. The last record of contact by the Complainant's representative is 19 December 2012 by email to the Tribunal secretary.
  
6. There was then a period of complete inactivity in the Tribunal, and it was not until 21 January 2015 that I was appointed as Chairperson in place of Mr Lombard. An attempt was made to notify the Complainant by telephone on 23 January 2015, but the secretary recorded that there was "No reply". The Tribunal notified the parties of the fact that the claim had been revived by email and post on 29 January 2015.
  
7. A Preliminary Hearing was set down on 17 February 2015 and the Tribunal notified the parties by email on 9 February 2015. No response was received. There were no appearances on 17 February 2015, and I adjourned the matter to 2 March 2015 as I was concerned the parties might not have had sufficient notice. The parties

were notified on 19 February 2015 of the adjournment and further date for a hearing.

8. On 2 March 2015, there was no appearance by the Complainant, and the Respondent, who did not attend either on the basis that this would incur significant costs, submitted proposals that an order for directions be made. I approved this Order, and am advised by the Tribunal secretary that this was sent to both parties on 6 March 2015. The Order provided for further and better particulars to be filed by the Complainant. There has been no compliance with the Order.
9. On 20 May 2015, the Tribunal secretary was able to obtain an alternative email address for the Complainant, and an attempt was made to contact her on this address by the Tribunal. No response was received.
10. Another directions hearing was set down for 20 July 2015. The Tribunal sent out notices on 22 June by email. The Respondent's representative advised on 23 June 2015 that he would not appear, and requested that the claim be struck out. I indicated to the Tribunal secretary that if the Respondent wished to seek strike out of the Complaint, it should make a formal application for strike out pursuant to Rule 17(2) of the Industrial Tribunal Rules. I also requested that the hearing be vacated as it was set down too soon to allow the Respondent to properly serve the Complainant, and that an alternative date in September should be identified.

#### Strike out application

11. On 9 September 2015, the Respondent applied by letter for a strike out of the complaint on the basis of the Complainant's failure to engage with the proceedings.
12. A hearing was set down on 21 September 2015. Notice of the hearing had been given to the parties by the Tribunal by email on 25 August 2016. Neither party appeared. I was not satisfied that the Complainant was on proper notice of the hearing given that she had not been notified of the strike out application itself. I therefore adjourned the hearing. In particular, the application, dated 9 September 2015 had been sent to the Complainant by post from England. I was not satisfied

this would have reached the Complainant before the hearing on 21 September 2015. Secondly, only one of the Complainant's email addresses was used; there was no evidence before me that any attempt had been made to contact the Complainant by telephone.

13. Although I acknowledge that it is the Complainant's responsibility to pursue the claim, I considered that part of the significant delay in the case was due to the fact that there was no Chairperson appointed, and indeed matters before the Tribunal did not progress for several years. Further, the complete change in Tribunal staff and contact details could also potentially have made it harder for the Complainant to make enquiries. I therefore adjourned for a further 2 months to allow the Respondent time to serve the strike out application on the Complainant. I also directed that a witness statement should be submitted confirming service of the application by registered post on the Complainant's address and her representative's address; service by email on all three available addresses and whether any confirmation of receipt or indeed failure to delivery messages were available, that at least 2 attempts be made to contact the Complainant by telephone on the numbers provided on 2 separate dates. I directed the Respondent to the guidance in the case of *Ind Tri 3/2012 Ruiz v Gibdock*. The Tribunal was also asked to give notice of the hearing and pending strike out to the Complainant by giving notice by post and email and by making one further attempt to contact the Complainant on the numbers available. This message was circulated by the Tribunal on 2 October 2015 to all parties by email.
  
14. A hearing was scheduled for 21 January 2016. On 17 November 2015 (by email) and on 20 November 2015 (by registered post) the Tribunal notified the parties of the hearing, although regrettably the letters sent stated the hearing was a preliminary hearing rather than the hearing of the strike out application. However, in any event, neither letter was delivered; the letter to Mr Ford was returned as he was unknown at the address 18d, Calle Las Petunias, Alcaidesa, Spain and the letter to Ms Leeming was returned undelivered. The Tribunal also attempted to contact Mr Ford by telephone on 0034 956797183 on 13 October and 17 November 2015 and the number appeared to be disconnected on both occasions.

15. The Tribunal used an incorrect email address for the Complainant, and on 17 November 2015, the Respondent's solicitors notified the Tribunal secretary of the same.
  
16. According to the Witness Statement of Mr Nicholas Paul Saville dated 23 December 2015, (received on 9 February 2016) the following attempts were made to contact the Complainant:
  - a) A letter was sent dated 13 November 2015 by International signed for post to the Complainant at the Complainant's address on file, namely Las Colinas 14, Princesa Kristina, Manilva, 29692 Spain. The letter enclosed the Respondent's application to strike out the claim.
  - b) A copy of that letter was sent by International Signed for Post to the Complainant's representative's address on the tribunal's file to Mr Michael Ford, at 18d Calle La Petunias, Mirador de Faro, Alcaidesa Spain 11315.
  - c) A copy of the letter was also sent by email to the three addresses on file.
  - d) The Complainant was telephoned by Mr Saville on the numbers provided on two separate days; on 12 November 2015 both numbers were invalid; the same happened on 13 November 2015 when the numbers were inactive on three attempts with each number.
  
17. Unfortunately the letter sent by the Respondent's lawyers did not in fact notify the Complainant of the hearing, (which was only set down on 21 January 2016 a week after the letter of 13 November) but it advised that should the Complainant wish to make representations, she should do so by writing to the Tribunal at any time before the next hearing. Contact details were provided and the letter stated that the Tribunal would notify the Complainant of a hearing date in due course (which was done by the Tribunal's letter of 20 November). In any event, on 14 and 20 January 2016, the Respondent confirmed that the letters by post to both Ms Leeming and Mr Ford respectively had not been delivered.
  
17. The 21 January 2016 hearing was then adjourned on 19 January 2016 by email to the parties as a result of the Secretary's illness. Although I did request that this proceed with alternative arrangements as I was concerned that after the

Respondent's efforts to notify the Complainant it was not appropriate to vacate the hearing, I was advised that it was impossible for the hearing to go ahead.

18. As a result, the hearing was rescheduled for 4 March 2016. The Tribunal notified the Respondent and the Complainant on 19 February 2016 of the re-scheduled hearing by email. An attempt was also made by the Tribunal to contact the Complainant by telephone on 9 February 2016.
19. On 4 March 2016 at 12.30, another hearing took place, and again there were no appearances by either party.

#### The law

20. I agree with the decision in *Ruiz v Gibdock Limited* that the Tribunal has power to strike out a claim if it would be just and fair to do so. The application was brought under Rule 17(2), which is subject to Rule 16(3) that "the Tribunal may, if it thinks fit, before granting an application under rule 10 or rule 17 require the party making the application to give notice of it to the other party or parties. The notice shall given particulars of the application and indicate the address to which and the time within which any objection to the application shall be made being an address and time specified for the purposes of the application by the tribunal".
21. Although I note that there have been some errors made in sending out notifications about hearings and the application, I am satisfied that all reasonable steps to notify the Complainant of the revived proceedings and strike out application have been taken and that it is has proved impossible to make contact with the Complainant or her representative.
22. In particular, I base this finding on the Witness Statement of Nicholas Saville and the repeated attempts to contact the Complainant's representative by telephone, as well as the fact that registered letters sent by the Tribunal and the Respondent's solicitors have been returned undelivered. It would appear that neither the address nor the telephone contact details provided by the Complainant are valid now, and there has been no attempt by the Complainant or her representative to provide updated details. Attempts have also been made repeatedly to notify the

Complainant by email, using not only the email provided on the Originating Application but a further address obtained by the Tribunal secretary through her own enquiries. It is now 4 and a half years since the Complainant first filed her application, and no steps have been taken by the Complainant since then to progress her Originating Application. There is no evidence before me that the emails have been undelivered, and although it would be preferable to have confirmation that these had been delivered, and that the Complainant is on notice, I consider that sufficient time has now passed to mean that it is just and fair to strike out the claim.

- 23 The Respondent has also sought an order for costs under Rule 15 of the Industrial Tribunal Rules and in September 2015 considered its costs to be £14,051.67. No further submissions have been made as to the basis on which costs should be awarded.
- 24 I am not minded to make an order for costs. The provision to which the Respondent points is Rule 15(1) where it is stated that subject to sub-rules (2) and (3) the Tribunal shall not normally award costs but that "where in its opinion a party to any proceedings ...has acted frivolously or vexatiously, the Tribunal may make an order that that party shall pay to another party either a specified sum in respect of the costs incurred by that other party or in default of agreement the taxed amount of those costs."
25. The Respondent suggests that the Complainant has acted frivolously or vexatiously in ignoring correspondence from the Respondent and the Tribunal. I consider Rule 15(1) sets out a very limited provision, and do not believe this implies a wide power to award costs when striking out on the grounds of non-prosecution, and I concur with the judgment in *Mohammed Reduan v Bahia Caterers Limited Ind 22/2009*.
26. The Complaint is therefore struck out, with no order as to costs.

Michele Walsh  
Chairperson  
4 August 2016