

IN THE INDUSTRIAL TRIBUNAL

CASE NOS.: IND TRI 17/2016,

18/2016 & 19/2016

BETWEEN:

RENUKA KUKANESEN

Complainant

-v-

DAISY SERVICES LIMITED

Respondent

Monday, the 8th day of May 2017

Before Ms Gabrielle O'Hagan, Chairperson

UPON THE APPLICATION of the Respondent dated 19 April 2017,

AND UPON HEARING Susan Innes and Leah Carnegie of the Respondent,

AND the Complainant not appearing,

IT IS ORDERED THAT:

Case Nos. Ind Tri 17/2016, Ind Tri 18/2016 and Ind Tri 19/2016 be struck out, with Reasons in writing reserved, such Order being effective from the date of delivery by the Tribunal to the parties of the Reasons in writing.

Gabrielle O'Hagan

CHAIRPERSON

IN THE INDUSTRIAL TRIBUNAL

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-AND-

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REASONS

Reasons made further to the Order of the Tribunal made on 8 May 2017 that Complaints Case Nos. 17/2016, 18/2016 and 19/2016 be struck out.

History

1. The Respondent is a subsidiary of an online gambling company. The Complainant, Ms Kukanesen, was employed by the Respondent as a General Counsel from July or November 2014 (her employment commencement date is in dispute) until 29 or 31 March 2016 (her employment termination date is also in dispute).
2. Throughout the proceedings, the Complainant represented herself and the Respondent was represented by Susan Innes (Senior Legal Counsel) and Leah Carnegie (VP HR).
3. On 23 June 2016, the Complainant made 3 Originating Applications to the Industrial Tribunal, each dated 23 June 2016:
 - (i) Ind Tri 17/2016: for unfair dismissal - "*Section 64(2)(a) of the Employment Act; or in the alternative, section 64(2)(c); and/or section 59 of the Employment Act*";
 - (ii) Ind Tri 18/2016: for sex discrimination - "*violation of sections 52A(1), 52B(1), 52C Employment Act*"; and
 - (iii) Ind Tri 19/2016: for bullying at work - "*sections: 6(1) and 6(2) of the Employment (Bullying at Work) Act 2014*".

4. In the unfair dismissal Originating Application (Ind Tri 17/2016), the Complainant responded to the question as to what in her opinion was the principal reason for dismissal by stating:-

"As set out in section 64(2)(c) [stet]; or alternatively, section 64(2)(c) of the Employment Act; and/or section 59 of the Employment Act."

In respect of the sex discrimination and bullying at work Originating Applications (Ind Tri 18 & 19/2016), she responded to the question as follows:-

"Termination without due notice under section 64(2)(a) of the Employment Act; or alternatively, termination by the employee in circumstances in which he is so entitled by reason of employer's conduct under Section 64(2)(c) of the Employment Act; and for Section 59 of the Employment Act."

5. The Respondent filed 3 full Notices of Appearances dated 6 July 2015 denying each complaint and in each case requiring the Complainant to provide further particulars of each and every allegation made in her Originating Applications..
6. The complaints were listed for Preliminary Hearing on 31 August 2016, by emailed notice from the Tribunal to the parties dated 12 July 2016. On 5 August 2016, the Complainant emailed the Tribunal stating that she would not be available on 31 August 2016 and requesting the services of the Director of Employment as a conciliation officer. She followed this up with a further email to the Tribunal dated 8 August 2016 and email correspondence followed, culminating in the Preliminary Hearing listed for 31 August 2016 being adjourned and a meeting between the parties and the conciliation officer being arranged for 14 September 2016.
7. The Complainant failed to attend the meeting with the conciliation officer and failed to advise either the conciliation officer, the Tribunal or the Respondent that she would not be attending. The Respondent's Head of HR and its legal adviser did attend the meeting. The Respondent expressed its dissatisfaction at the resultant waste of time and costs by letter to the Tribunal and requested that the Complainant confirm whether she intended to proceed with her complaints and, if so, to provide better particulars of the same, absent which: *"we ask the Tribunal to put the Claimant on notice that it is our intention to seek to have these claims struck out on the basis that they are without merit, have no reasonable prospects of success and are vexatious"*.
8. The complaints were then listed for Preliminary Hearing on 11 October 2016. Both parties attended. The Complainant made no reference to her non-attendance at the meeting with the conciliation officer on 14 September 2016.
9. On 14 September 2016, I made an Order: consolidating the 3 complaints; requiring the Complainant to file and serve full particulars of the grounds on which she relied and facts and contentions relevant thereto by 16 November 2016; and giving leave to the Respondent to file and serve responses by 7 December 2016. A further Preliminary Hearing was listed for 14 December 2016.

10. The Complainant filed "Particulars of Claim" dated 16 November 2016 in respect of the consolidated complaints and the Respondent filed on 7 December 2016 an "Amended & Consolidated Notice of Appearance" dated 6 December 2016.

11. Following a time change by the Tribunal for the Preliminary Hearing listed for 14 December 2016, the Respondent notified of its unavailability and eventually the Preliminary Hearing was re-scheduled for 17 January 2017. Both parties attended and I made a case management Order, including:

- (i) standard disclosure be effected by the parties by 16 February 2017; the Complainant's disclosure to include a schedule of loss;
- (ii) the parties to exchange lists of witnesses by 16 March 2017; and
- (iii) a preliminary hearing be listed for 30 March 2017..

I also directed the Complainant to draft, settle with the Respondent and send in to the Tribunal the Order for my approval, as is customary.

12. By email to the Tribunal dated 20 February 2017 copied to the Complainant, the Respondent notified that:

- (i) It had not received the draft Order from the Complainant; and
- (ii) It had not received disclosure from the Complainant (the Respondent attached its own List of Documents to the email).

13. At the Preliminary Hearing on 30 March 2017, the Respondent attended, but the Complainant failed to attend. She had not advised either the Tribunal or the Respondent that she would not be attending. The Secretary to the Tribunal advised that she had also sent a reminder to the Complainant about the Hearing by email. No applications having been made by either party prior to the 30 March 2017 Preliminary Hearing and given the Complainant's unexplained failure to attend, I made no Order and adjourned until 8 May 2017.

14. By email dated 19 April 2017, the Respondent made an Application that the Complainant's complaints be struck out, under Rule 16(1) of the Industrial Tribunal Rules, on the grounds that they had not been actively pursued, for want of prosecution and/or for repeated failures to comply with an Order of the Tribunal. The Respondent provided a copy of its service letter to the Complainant (sent by email and by registered post), which included details of the adjourned Preliminary Hearing.

15. At the adjourned Preliminary Hearing on 8 May 2017, the Respondent attended, but again the Complainant failed to attend. Again, she had not advised either the Tribunal or the Respondent that she would not be attending.

16. The Respondent advised that it had sent copies of its Application and cover letter to the Complainant by registered post to 3 different postal addresses obtained for the Complainant at various times and also by email (although no "read" receipt to the email had been received). It had also tried to contact the Complainant by "WhatsApp" and

Skype, but the Complainant had not accepted the attempted contact. The Respondent put into evidence copies of the certificates of posting and the sent email. The Secretary to the Tribunal advised that she had also sent reminders to the Complainant about the Hearing by email on 3, 6 and 25 April 2017 and those emails had not been returned. The Secretary had also tried to telephone the Complainant on those days, but her telephone was apparently switched off.

17. I was and am therefore satisfied that the Complainant was on full notice of the adjourned date and time for the Preliminary Hearing and of the Respondent's Application. I therefore heard the Application in the Complainant's absence.
18. In addition to the contents of its email Application dated 19 April 2016, the Respondent reminded me that the Complainant is a qualified lawyer and submitted that she should therefore understand the consequences of not attending Hearings and not complying with Tribunal Orders, particularly given that the complaints which are the subject of the proceedings were commenced by the Complainant. The Respondent confirmed that it had served its list of witnesses by 16 March 2017, as per the 17 January 2017 Order.
19. At the conclusion of the Hearing, on due consideration of all of the facts and submissions before me, I made an Order that the Complainant's Complaints nos. 17/2016, 18/2016 and 19/2016 be struck out, with Reasons in writing reserved. These are my Reasons.

The law

20. Rule 16(1) of the Industrial Tribunal Rules provides that: "*Subject to the provisions of these rules, the tribunal may regulate its own procedure*". This has been held to include power to strike out a claim if it would be just and fair to do so (Ruiz-v-Gibdock Limited (Ind Tri 3/2012) dated 10 June 2015) and also power to exclude a party who has failed to comply with the Tribunal's orders from further participation in the proceedings (Barwil Agencies Limited-v-Salmon (1997-98 Gib LR)). In Barwil, it was held:- "*By r.16(1), the Tribunal may regulate its own procedure. That must include sanctions similar to those of the Supreme Court to hold a party out of its process if that party proves himself unworthy of access to it. ... It should be remembered that it is only where there is a real risk that justice cannot be done that a party should be excluded from the proceedings.*"
21. Applications are brought under Rule 17(2): "*a party may at any time apply to the tribunal for directions on any matter arising in connection with the proceedings*".
22. Under Rule 16(3):- "*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 give 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.*"

Findings

23. I am satisfied that the Complainant was expressly on notice of the Preliminary Hearing on 30 March 2017, since it was listed in the Order made at the Preliminary Hearing on 17 January 2017, which the Complainant had attended.
24. I am also satisfied that the Complainant was properly notified of the adjourned date and time for the Preliminary Hearing on 7 May 2017 and of the Respondent's strike out Application, including as required by Rule 16(3) of the Industrial Tribunal Rules, given that the Respondent sent its Application and cover letter to the Complainant by registered post to 3 different postal addresses and also by email; and also that the Tribunal had sent 3 reminders to the Complainant by email. I also note that if the Complainant were not aware of the adjournment of the 30 March 2017 Hearing, one would have expected her to contact the Tribunal for further information, which she did not do.
25. The Complainant has taken no steps in these proceedings since her appearance at the Preliminary Hearing on 17 January 2017. She has not complied with the 17 January 2017 Order that she give standard disclosure (including a schedule of loss) by 16 February 2017, nor that she serve a list of witnesses by 16 March 2017. In addition, she has not taken any steps to finalise the 17 January 2017 Order. Further, the Complainant did not attend the Preliminary Hearing, as set down in the 17 January 2017 Order, on 30 March 2017, nor the adjourned the Preliminary Hearing on 8 May 2017. She at no stage advised the Tribunal or the Respondent that she was not intending to attend a Hearing, nor has she since provided any explanation for the same, or indeed made any contact at all with the Respondent or the Tribunal. Crucially, she has not opposed the Respondent's Application that her complaints be struck out, nor taken any steps in respect of that Application. This course of conduct or rather course of inaction on the Complainant's part leads me unavoidably to the finding that the Complainant is not actively pursuing her complaints. It is therefore only just and fair that her complaints be struck out.
26. By way of addendum, although I am conscious of the fact that the Complainant is a litigant in person, I did not consider it incumbent upon me to take any special measures during the proceedings before me. This is because the Complainant is a qualified lawyer and as such must be assumed to understand at least the nature and consequences of making and pursuing legal claims and proceedings and the importance of complying with Orders made in such proceedings and of attending hearings.

Conclusion

In all the circumstances, I therefore Ordered on 7 May 2017 that the Complainant's Originating Applications Case Nos. 17/2016, 18/2016 and 19/2016 be struck out on the basis that they had not been actively pursued and for want of prosecution.

Gabrielle O'Hagan

Gabrielle O'Hagan, Chairperson
17 May 2017