EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr E Ukwu	v	**Ultra Electronics Holding plc & others**

PRELIMINARY HEARING

Heard at: **Watford** **On:** **3 October 2017**

Before: **Employment Judge George**

Appearances:

For the Claimant: **Not present**
For the Respondents: **Mr Thomas Gillie, Counsel**

JUDGMENT

1. The Respondents' applications for an order that the claim be struck out on the grounds of unreasonable conduct on the part of the claimant and/or for non-compliance with an order of the Tribunal and/or because it is no longer possible to have a fair hearing are dismissed.

2. The full merits hearing of this claim, due to be heard for 7 days commencing on 9 October 2017, is postponed. The hearing has been relisted to be heard at **Watford Employment Tribunal, Radius House, 51 Clarendon Road, Watford, Hertfordshire WD17 1HU** to start at 10am or so soon thereafter as possible on **20 to 24, 28 and 29 August 2018**.

3. The parties are to write to the tribunal within **seven days of the date on which the Order is sent to them** to indicate whether they wish to apply for an earlier final hearing at other hearing venues in the region, namely Cambridge, Bury St Edmunds or Norwich.

4. The claimant's application for the order for sequential witness statements to be varied so as to provide, instead, for mutual exchange of witness statements is dismissed. A separate order concerning the provision of the claimant's witness statement accompanies this order.

5. The claim has been listed for a telephone preliminary hearing before Employment Judge George on **10 November 2018 at 2 pm with a time estimate of 2 hours**. At that hearing, the parties are to present suggestions as to how an agreed list of issues can be prepared in this case.

6. The respondents' application for the claimant to pay the costs of and occasioned by the postponement of the final hearing from 9 October 2017 is adjourned to be determined at the final hearing of the claim unless an application to restore it is made before then.

7. Case management orders follow the reasons for these decisions.

REASONS

1. There are number of applications before me today at this urgent preliminary hearing that was listed by me as a result of the following correspondence to the tribunal:

    a. The claimant's letter of 30 August 2017;
    b. The letter from Clarion solicitors, on behalf of the Equiniti dated 7 September 2017;
    c. The letter from EEF dated 12 September 2017, and
    d. The email from the claimant dated 12 September 2017 timed at 17:31.

2. It is entirely regrettable that the written Order, setting out the orders which were made orally on 23 June 2017, was not sent to the parties until 18 August 2017 because of pressure of work at the tribunal. This does appear to have, in the words of Ms Warren, created the possibility for disagreement between the parties about what was expected of them in the interim even though they had their own notes of the orders and the claimant had been given dispensation to record the hearing in order that he need not take notes.

3. It was apparent from the above correspondence that case management orders which were designed to enable the respondents and the tribunal to have necessary particulars about the claims had not been complied with. They should have been complied with notwithstanding the fact that the parties had not yet received the written order. By the time the situation came to my attention, the trial bundle had been prepared but witness statements had not yet been disclosed and the final hearing was due to start in less than two weeks. The tenor of the correspondence made clear that the parties were not achieving the cooperation necessary to ensure that the claims are ready to be tried and it was unclear whether the trial would be able to proceed on 9 October 2017 as listed. Mindful that, were it to be postponed, a new hearing date was unlikely to be found in Watford Employment Tribunal under the Summer of 2018, I listed the claims for a preliminary hearing to seek to resolve outstanding issues and see whether it was possible for the trial to proceed.

4. The Notice of Hearing was sent to the parties on 29 September 2017 together with the written reasons for certain case management orders which had been requested by the claimant on 30 August 2017. This notice indicated that the issues to be decided today were

    a. the claimant's application that an Order for sequential exchange of witness statements, made by me on 23 June 2017, should be varied so as to provide for mutual exchange of witness statements;
    b. the claimant's application for directions for him to prepare a chronology and cast list;
    c. the respondent's application that the claim be struck out under Rule 37(1)(b) and or (c) of the Rules of Procedure;
    d. the respondent's alternative application that the final hearing of the claim be postponed; and
    e. the claimant's application for orders for specific discovery.

5. In the meantime, on 2 October 2017, the claimant made an application of his own to postpone the final hearing which is listed for 9 October 2017 for seven days on grounds of his ill health. At the same time he applied for today's preliminary hearing to be postponed, also on the grounds of his ill health. He provided a medical certificate which is in the form of the proforma Statement of Fitness for Work for Social Security Purposes indicating that on 2 October 2017 a Dr Daly from St John's Hill Surgery diagnosed him to be suffering from anxiety, depression, shoulder and arm pain. Dr Daly certified the claimant to be unfit for work and commented that he was unable to attend the employment tribunal "due to not being well enough due to the above issues". The certificate certified that that would be the case for 21 days but that the doctor would not need to assess the claimant's fitness for work again at the end of the period.

6. Prior to this application, the claimant had applied to postpone the preliminary hearing of 3 October on the basis that he had to attend work. This was refused. Unfortunately, the claimant's contract to provide the services of a company secretary was then terminated and, on 2 October, he emailed the tribunal to say that he was now able to attend the preliminary hearing listed for 3 October. This was very quickly withdrawn and replaced with the application of 2 October 2017 for a postponement both of the full merits hearing and of the preliminary hearing on grounds of ill health.

7. REJ Byrne determined the application to postpone the preliminary hearing of 3 October and rejected it. The claimant did not attend but wrote to express his disappointment and dissatisfaction with the decision to reject his application to postpone today's hearing.

8. I first considered whether I should continue with the preliminary hearing in the claimant's absence or postpone it because of it. I took into account the fit note provided by the claimant but also the emails which he sent on 2 October, the first of which stated that he was going to attend on 3 October. In my view, there is a great deal of difference between being too unwell to conduct your own representation during a 7 day full merits hearing against counsel when multiple

allegations of detriment on grounds of protected disclosures are to be determined and being too unwell to attend a preliminary hearing which was, essentially, listed to decide whether the trial could go ahead and how it should be case managed. In my view there was nothing in the fit note from Dr Daly, when set against the claimant's own email indicating that he would be able to attend, which provided evidence that he was unable through ill health to be able to participate in the second type of hearing. The interests of justice were in favour of judicial intervention in the case management of the claims rather than in permitting further drift.

Strike out application

9. I had available to me for the purposes of the preliminary hearing a 2 volume bundle of documents, a statement of Deborah Warren of Clarion solicitors, on behalf of the Equiniti Respondents but with whose observations the Ultra Respondents wished to be associated and written submissions on behalf of both Respondents by Mr Gillie.

10. In those written submissions, Mr Gillie set out in detail arguments which I shall paraphrase here but which I took into account in full. He referred to a number of authorities specifically on the question of the right to a fair trial pointing out that, both in the law of the European Convention on Human Rights and under domestic law a fair trial incorporates concepts such as avoiding delay, equality of arms between the parties, an adversarial trial where both parties had knowledge of and the opportunity to comment on the observations filed and evidence adduced by the other. I note, in particular, the comments of Mr Justice Langstaff in Chandok v Tirkey UKEAT/0190/14 at paragraph 18;

> "In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues."

11. These comments seem to me to be particularly applicable to this case in a way to which I shall return later.

12. It is argued on behalf of the Respondents that I should strike out the claims first, because it is no longer possible to have a fair hearing and secondly because the manner in which the proceedings have been conducted by the claimant mean that it is appropriate to exercise the powers under Rule 37(b) or (c) of the Employment Tribunals Rules of Procedure 2013. The points made in respect of these two lines of argument overlapped to some extent.

13. The Respondents' argument is that 2 years have passed since the incidents, 19 months since the claim was launched and the Respondents still do not know the claim that they have to meet in sufficient detail to enable them to prepare

their evidence in response. Mr Gillie pointed out that the claimant is a qualified lawyer who states that he is a member of the Nigerian Bar and should therefore be fully aware of the framework of procedural rules surrounding litigation. It was argued that, although a litigant in person, the claimant has experience and skills which litigants in person typically lack. The Respondents are prejudiced by having to defend a vague claim which, after 2 years, they are no closer to understanding than they were at the beginning. Individuals are included as respondents and it was, it was submitted, even more important where named individuals are facing individual liability that they should know the allegations against them. The reason, it was said on behalf of the Respondents, that it was not possible to have a fair trial was that the employment tribunal had already used such weapons as were available to it in the form of unless orders and deposit orders and they had not worked. Mr Gillie took me to correspondence which he said indicated that the claimant had explicitly set out that he does not agree with case management orders made and would be appealing them. He had, argued Mr Gillie, made clear his intention to ignore the tribunal's case management orders.

14. I do have concerns about the way that this litigation is heading and about a number of matters that impinge on whether a fair trial is possible. The first is the length of time that has elapsed since the incidents in question. We are already two years on from the fairly short period of the claimant's contract and memories do fade with time. Secondly I am told, and am not surprised to hear, that a number of the employees who are witnesses to the relevant events have left the respondents' employment and this inevitably makes it more difficult for them to obtain evidence from them and for the necessary preparatory work to be done. On the other hand, I am not given any specific evidence that particular individuals can no longer be traced and this argument is little more than the general observation that, after two years, it is likely to be harder for the individuals concerned to recall events.

15. The most significant matter is that there have been three preliminary hearings in this case where the tribunal has made attempts to encourage the claimant to focus his mind on the core strength of his claim and to explain how it is put forward so that the respondents should be able to understand the case that they have to meet. I accept that this is necessary so that the parties are on equal footing. These attempts by the tribunal have, regrettably, not yet been successful.

16. To take an example that I referred to during the course of this hearing, detriment no. 24 is an allegation that on 11 September 2015 there was ongoing spreading of malicious falsehoods regarding the claimant's purported unsatisfactory performance and conduct. That allegation is made against 12 individuals and despite it being dated 11 September it is said to be ongoing. That is not sufficient for the respondents to know how to approach the individuals concerned to seek their instructions and their account of what they did.

17. Not only that, but an employment judge faced with deciding whether that allegation of detriment is made out against one or more of those 12 individuals would have the greatest of difficulty in doing so. He or she would not know what it is alleged was said by whom and why it was said to be on grounds of a protected disclosure.

18. I take into account that it is sometimes the case that, in the context of the case as a whole, an allegation which at first sight appears difficult to understand is in fact less so. However, this is an example of the phrasing of an allegation which caused me to accept the Respondents' submissions at the preliminary hearing in June 2017 that the claim was insufficiently clear for them to know the case against all of the individuals who are being sued.

19. I am conscious that whistle blowing cases frequently involve strong emotions. As in the case of allegations of discrimination, it is important that individuals who consider themselves to have suffered a detriment, sometimes of a kind which adversely affects their career prospects for years, have a full and fair opportunity to bring their claim to an impartial tribunal and obtain redress. There is a public interest in such claims being heard and I should not lightly strike out allegations, particularly where a fair trial is still possible.

20. I am also mindful that the circumstances of the delay on the part of the employment tribunal in sending out the written order made on 23 June 2017 contributed to the potential for dispute. My assessment is that essentially, for good and for bad, matters are no further on than they were in June 2017 when the matter was last before me (with the exception of the trial bundle having been prepared), but essentially it is as possible as it was at that stage for there to be a fair trial. Furthermore, the claimant has complied with two unless orders which have been made so far: one in relation to disclosure and one in relation to further and better particulars. This suggests to me that this is a sanction available to me to which the claimant does respond.

21. This brings me on to arguments based upon the claimant's conduct. I have taken into account Ms Warren's statement and the various documents that I have been taken to that concern the way in which the proceedings have been conducted.

22. It is fair to say that there has been lengthy correspondence from all parties to the tribunal and between each other. This is not the best way for parties to obtain the best out of the tribunal. Shorter letters which make the most important points and which ask for orders which the employment tribunal can make are more likely to be responded to quickly than those which make lengthy complaints about the other parties' conduct. Furthermore, where one party has made an application, a quick but focused response from the other parties avoids the delay of the tribunal waiting for comments before actioning a particular request. These are general points I make about the correspondence from all parties.

23. However, having read the correspondence myself I am driven to say that, the claimant's correspondence shows a tendency for him to indulge in heights of oratory which can fairly be described as inflammatory. He has made some serious accusations about the conduct of those representing the Respondents which he does not follow up with evidence. He is saying that his fellow professionals have deliberately misled and lied to the employment tribunal when what it appears they have actually done is merely put their respective parties' cases, those being cases with which he does not agree.

24. One particular exchange of correspondence that drew my eye was a letter from Ms Warren of Clarion Solicitors to the other parties, written on 24 August 2017. She had identified the risks to the trial date by the delay that had regrettably occurred with the tribunal sending its order out and the consequent non-compliance with case management orders, in particular by the claimant, and she wrote to the parties suggesting an alternative timetable. Quite properly, she did not copy this to tribunal, presumably hoping that their common interest in getting the claims to the point of trial would cause the other parties to view her suggestion as, in the main, constructive.

25. The claimant rebuffed that suggestion expressing his surprise that she thought it appropriate for him to comply with an Order that had not been sent to him and for which reasons had not been provided. He had, in point of fact, received the Order by that stage but said that he had not yet opened it because he only actioned his post once a week. Had he opened the order before responding then he would have realised that her alternative timetable was a practical suggestion to try to get things back on track.

26. It is important that, moving forward, all parties, focus on what the claims are and preparations for trial because that is what the employment tribunal will focus on. It is not appropriate at this stage for any party to rake over every step in the conduct of the litigation. To do so risks hampering the prompt preparation of the case for trial and is unnecessarily costly. Again, while I direct that comment at both parties, unfortunately, based upon the correspondence I have seen, it appears that the claimant tends to focus on fighting the interlocutory steps in the proceedings and he thereby risks losing sight of the main objective which is a trial of his claims which is fair to both parties.

27. Having said that, the strike-out power is not to be exercised as a punitive measure and I do not conclude that the claimant has been acting from any improper motive. I therefore do not think that matters have reached the point where it is appropriate to strike out for the way in which the proceedings have been conducted. My conclusion is that the balance of prejudice is clearly in favour of refusing the application to strike out at this stage. However, I remind the claimant of the comments which I made in paragraph 4 of my reasons sent out to the parties on 18 August 2017.

28. There is a necessary element of co-operation that seems to have been lacking so far in this case. This co-operation is not assisted by the claimant alleging the

respondents of wilful and deliberate attempts to mislead the tribunal but neither is it assisted by repeat applications to strike out the claim. The claimant's response to Ms Warren's letter of 24 August 2017 is an example of the hostility shown by the claimant to a sensible suggestion that has made it difficult for the parties to progress preparation without the intervention of the tribunal.

Postponement

29. Regrettably the hearing will have to be postponed. There are two reasons why I reach that view. First, the claimant has produced medical evidence that he is unfit to conduct his own representation for the next three weeks. The claimant's correspondence suggests that part of the causes of his anxiety are the fact of these proceedings and it is always a matter of judgment as to whether it is better for proceedings to go ahead and that source of anxiety to be removed or for the party to have the opportunity to be fit enough to represent themselves and in this case I think that the balance comes down on the side of the latter.

30. However, in any event the parties were not ready for hearing. There had not been compliance with the Orders for witness statements that had been made on 23 June 2017. These should have been complied with even though no written order had been sent out by the tribunal. I do not repeat what I have already said about the correspondence in the interim.

31. The final hearing in this matter is to be re-listed on **20-24, 28 & 29 August 2018**. The parties are to write in to the tribunal within seven days of the date on which the Order is sent to them to indicate whether they wish to apply for an earlier final hearing at the other hearing venues, namely Cambridge, Bury St Edmunds or Norwich.

The claimant's application to vary the order for sequential witness statements/respondents' application for an unless order

32. The claimant has applied to vary the Order that I made on 23 June 2017 for sequential exchange of witness statements. I sent out written reasons for the making of that Order. They were sent on 29 September 2017 although they do not bear that date. The reasons for which I made the Order in the first place seem to me to still apply. I do not see that anything has changed in the meantime that means that I should vary that Order. I give an example of why I am persuaded that the claims are still not sufficiently clear in paragraph 16 above.

33. There have already been three different documents which provide further and better particulars. Sequential witness statements would require the claimant to set out the facts upon which he relies as against every individual who is said to have subjected him to a detriment and then it would be possible for the respondents to respond to it. In the alternative I considered whether I should view the claimant's application as an application to reconsider the Order that I made but for the same reasons I do not think that that application has any reasonable prospects of success.

34. In reaching that conclusion, I do take into account the written submissions made by the claimant to the effect that he would be at a substantial disadvantage if he is required to set out his evidence before the respondents do so. He asserts, if I understand his point correctly, that because the respondents have taken a joint position in their response to his claim it can be inferred that they will collude in the preparation of their witness statements. This is not a reasonable inference to make. Furthermore, as explained in the passage from Chandok v Tirkey which I cited at paragraph 10 above, even in our adversarial system, fairness means that each party should know the case they have to meet. In my judgment, sequential witness statements are, in the circumstances of this case, a more practical way to achieve that than a further order for particularisation.

35. One risk of particularisation is that the party who gives the particulars seeks by doing so to expand rather than particularise their claim. An example is where the claimant in this case gave particulars (in response to the unless order sent out on 29 September 2017) which specified that he wished to make allegations against more individuals than were mentioned in his original schedule of detriments. This is not the purpose of particularisation and nor is it the purpose of witness statements. The claimant's complaints are already found in a variety of sources (see paragraph 5 of the order sent to the parties on 18 August 2017). This will make it difficult for the employment judge conducting the final hearing to identify and decide the issues. For that reason, at the telephone preliminary hearing which I direct should happen in just over four weeks' time, the parties are to present suggestions as to how an agreed list of issues can be prepared in this case.

36. The respondents ask that an unless order is made, requiring the claimant to serve his witness statement within 7 days. I agree that it is appropriate to order the claimant to comply with paragraph 5 of the order sent out to the parties on 18 August 2017 and to attach an Unless Order to that part of the order. Full reasons for making the Unless Order are contained with the separate order which accompanies this one. Taking into account the medical evidence provided by the claimant, I have concluded that he should have four weeks from the date on which this order is sent out in which to complete his statement.

37. The case will then be listed for telephone preliminary hearing before me on **10 November 2017** at **2pm** with a time estimate of two hours in order that progress towards trial readiness can be assessed and further case management orders made, including for the respondents' witness statements.

Applications for discovery

38. In relation to the claimant's application for discovery made on 12 September 2017, no order is made on this application at present. The respondents have indicated that to the extent that relevant documents falling within the ten categories listed by the claimant exist and are in their control, they have disclosed them and that they will disclose any further relevant documents that

come to their attention as they do so in compliance with their ongoing obligation to disclose relevant documents.

39. I therefore make no order upon the claimant's application. If the claimant wishes to make an application for specific disclosure, he needs to set out with particularity the identity of the document that he wishes to have disclosed, why it is relevant and why he believes it to be in the control of the first or second respondents. Any applications for specific disclosure by any of the parties should be made within 14 days of the date on which this Order is sent to them so that consideration can be given to whether it is practicable for them to be determined at the telephone preliminary hearing currently listed for 10 November 2017 within its present time estimate.

Costs

40. The respondents have made applications for the claimants to pay their costs. The Equinity respondents are limiting their application to the costs of attending this preliminary hearing, namely the solicitor's cost of liaising with the employment tribunal and their clients for this hearing and counsel's fees for today. The Ultra respondents are a membership organisation. They are applying for the counsel's costs of attending today and also the brief fee incurred in relation to next week's final hearing which has now been postponed.

41. The application is made alternatively on the basis of rule 76(1) and/or (2) of the Employment Tribunals Rules of Procedure 2013: namely unreasonable conduct and where a hearing has been postponed.

42. I am conscious that Rule 77 says that the party against whom a costs order is sought, which is the claimant in this instance, must have had a reasonable opportunity to respond to the application. The second respondents warned the claimant on 2 October 2017 that they would be making an application for costs if the trial was to be postponed on the basis that the cause of it would be the claimant's failure to comply with the order to serve his witness statement. The first respondents warned the claimant on 25 August 2017 that if there was any further delay in the proceedings beyond that point, (namely once the written tribunal order had been received by the parties), their client would make an application to the tribunal for costs or for the claim to be struck out. The respondents made applications for the final hearing to postponed on the basis of insufficient time to prepare as a result of the claimant's failure to serve his witness statement on 7 and 12 September 2017.

43. I consider first whether the claimant has been guilty of unreasonable conduct in relation to failing to comply with paragraph 5 of the Order made on 23 June 2017 but sent to the parties on 18 August 2017. On the one hand he was present in the tribunal. He heard the Order that was made and he had a recording of it from which to refresh his memory. He is legally qualified and should therefore be aware of the importance of complying with Orders in order to ensure that litigation is run smoothly.

44. However, cutting through the heightened expression sometimes used in the claimant's correspondence, his perspective appears to be that this was a case management order that he did not agree with and in respect of which he indicated his desire to appeal. He asked for written reasons but, unfortunately, also asked for a number of other orders. Whether it was for that reason or for some other reason I do not know but, despite the fact that I was the only person who could provide those reasons and the request was made in time, I was not informed of his request for written reasons until 26 September 2017. Those written reasons were provided on 29 September 2017.

45. It is not for me to make the claimant's case for him. I bear in mind that he is not present and has filed with this tribunal medical evidence which he relies on as showing the reason why he is not present today. In those circumstances I am not satisfied that he has had a reasonable opportunity to respond to this application for costs. I therefore think it would be wrong for me to make a determination, in the absence of the claimant's explanation, about whether he was guilty of unreasonable conduct at this time.

46. Nor, given the dual reasons for the postponement, do I find that there is a basis for making a Costs Order in relation to Rule 76(2) at this present time. I initially considered refusing the application for costs. However I have reconsidered that and have decided to adjourn the respondents' application for the claimant to pay the costs of and occasioned by the postponement of the final hearing from 9 October 2017 to be determined at the final hearing unless an application to restore it is made before then. They have incurred costs because of the postponement and have made a case that the claimant should bear some of those costs which the claimant should have the opportunity to respond to before it is determined.

47. The claimant should understand that although the tribunal exercises its power to award costs sparingly it does have that power which can be exercised, including on grounds that a party has failed to comply with one of its orders. Parties have to understand that there are consequences of failing to comply with orders when the other parties to the litigation are inconvenienced and put to expense as a consequence.

48. I made the following case management orders by consent. Insofar as they are not made by consent, reasons were given at the time and are not now recorded.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The claimant has leave to file and serve a cast list and neutral chronology setting out the dates of key events. These documents are

to be served on the other parties **within four weeks of the date on which this order is sent to the parties**.

2. Any applications for specific discovery to be made by any party to the claim should be made **within 14 days of the date on which this order is sent to the parties** and should identify the particular documents in respect of which an order for discovery is sought, why they are relevant to the issues and why they are believed to be in the control of the party against whom the order is sought.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The tribunal may also make a further order (an "unless order") providing that unless it 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 or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

_____

Employment Judge George

Date: 5 October 2017 …….

Sent to the parties on:

……

For the Tribunal:

……..