



EMPLOYMENT TRIBUNALS

Claimant: Ms D Nyanganyi

Respondent: MG Trading Castlefield Limited

Heard at: Manchester **On:** 9 and 10 March 2017

Before: Employment Judge Porter

Representation

Claimant: In person

Respondent: Mr M Gabbie, managing director

JUDGMENT having been sent to the parties on 10 March 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

- 1 Written reasons are provided pursuant to the written requests of the claimant (received on 7 April 2017) and respondent (received on 23 March 2017).

Background

- 2 The claim was presented on 20 September 2016.
- 3 The claim form indicated an intention to pursue claims of:

- 3.1 discrimination on the grounds of race;
 - 3.2 discrimination on the grounds of religion or belief;
 - 3.3 unfair dismissal;
 - 3.4 breach of contract -- failure to pay notice pay;
 - 3.5 unlawful deduction from wages;
 - 3.6 outstanding holiday pay.
- 4 The ET1 contains a document headed "Brief Details of claim" which includes:
- 4.1 an acknowledgement that the claimant had received a letter informing her that she had been suspended from work, with direct quotations from that letter of suspension;
 - 4.2 direct quotations from the dismissal letter;
- 5 On 5 October 2016 the claimant advised the tribunal that she was no longer residing at the address provided in the claim form. She asked that all further correspondence be sent to her e-mail address. The request was agreed. The tribunal file was therefore noted that all correspondence with the claimant should be by e-mail only.
- 6 A Response was entered, indicating an intention to defend the claims.
- 7 On 29 November 2016 a preliminary hearing was held before Regional Employment Judge Robertson. The purpose of the hearing was to identify the issues and to make case management orders. The claimant was in attendance in person. The respondent is not legally represented and at the preliminary hearing was represented by Mr Gabbie, Managing Director.
- 8 Case Management Orders were made at the preliminary hearing and a copy sent to the parties on 2 December 2016. Orders included the following:
13. The claimant shall file with the Tribunal and serve on the respondent by 13 December 2016 Further Particulars of her complaints of unpaid wages, breach of contract and unpaid holiday pay, setting out in each respect how much she claims and precisely how the amounts claimed are calculated.

14. If the claimant pursues her complaints of unlawful race discrimination and/or religion and belief discrimination, she shall file with the Tribunal and serve on the respondent by 21 December 2016 Further Particulars of the complaints, setting out in short, numbered paragraphs what treatment she alleges amounted to unlawful race and/or religion and belief discrimination, including what happened, when, where, what words were used and the grounds on which she contends the treatment amounted to unlawful race and/or religion and belief discrimination.

15. If the claimant seeks leave to amend her claim to include a complaint of unlawful sex discrimination, she shall file with the Tribunal and serve on the respondent also by 21 December 2016 full particulars of the complaints, setting out in short, numbered paragraphs what treatment she alleges amounted to unlawful sex discrimination, including what happened, when, where, what words were used and the grounds on which she contends the treatment amounted to unlawful sex discrimination.

16. If the claimant does not pursue her complaints of unlawful race and/or religion or belief discrimination, or her application to amend the claim to include a complaint of unlawful sex discrimination, which require her under the terms of these Case Management Orders to supply Further Particulars of the complaints, she shall write to the Tribunal by 21 December 2016 to withdraw such complaints or to confirm that she does not pursue her application for leave to amend her claim.

19. If the claimant does not pursue such complaints, so that the case will concern only her complaints of unfair dismissal, unauthorised deductions from wages, breach of contract and unpaid holiday pay, it will be listed for a two day hearing in the Manchester Employment Tribunal before any Employment Judge sitting alone when standard Case Management Orders will be issued in writing by the Tribunal.

9 By e-mail dated 2 December 2016 the claimant indicated that she did not wish to pursue her claims of unlawful discrimination on the grounds of race religious belief and sex. She provided a spreadsheet indicating:

9.1 Various dates over a 2 year period from 30 September 2014 upon which the claimant alleges that there has been an underpayment of wages;

9.2 The amount allegedly deducted on each date, totalling £31,948.90;

9.3 An allegation of non-payment of a bonus in the sum of £6,000.00.

No details were provided as to how the bonus was calculated. The claimant did not provide particulars of her claim for outstanding holiday pay.

- 10 By Judgment dated 9 December 2016, sent to the parties on 15 December 2016, the complaints of discrimination were dismissed on withdrawal.
- 11 The remaining claims, as identified by REJ Robertson at the earlier preliminary hearing, were listed for hearing and a notice of hearing sent to the parties on 8 December 2016.
- 12 In accordance with the Case Management Orders of REJ Robertson, further Case Management Orders were sent to the parties by letter dated 15 December 2016, setting out the timetable for compliance with the orders as follows:

By no later than	The following shall be done
13 January 2017	Parties to complete disclosure of documents
27 January 2017	Respondent to produce joint bundle of documents
9 February 2017	Parties to complete exchange of witness statements

- 13 Correspondence was received from the claimant relating to compliance with the orders for disclosure of documents.
- 14 By letter dated 21 December 2016 the claimant was advised as follows:
- Regional Employment Judge Robertson responds to your shorter letter of 16 December 2016 that documents and witness evidence must be disclosed or served in accordance with the Tribunal's Case Management Orders dated 15 December 2016. You will not be permitted to produce documents or witness evidence at the hearing which have not been disclosed or served accordingly.
- 15 By e-mails dated 13 January 2017, sent to the claimant and copied to the tribunal, the respondent stated that, in compliance with the order for disclosure, it attached to the e-mails copies of documents. The emails concluded:
- Please could you provide by e-mail to this address copies of any additional documents on which you wish to rely by way of disclosure by no later than Friday 13th January, in accordance with the Case Management Directions of the Tribunal. Following receipt of your documents, we will then prepare a joint bundle of documents used to the tribunal hearing.
- 16 By e-mails dated 14 January 2017, addressed to the tribunal and others, under the subject heading "By allowing new evidence it is not only false it is spectacularly false and you know it!", the claimant acknowledged receipt of the defendants e-mails and attached documents, indicating that, in her view, the documents provided by the respondent included "existing evidence and new evidence".

- 17 By e-mail dated 17 January 2017 the claimant wrote to the tribunal indicating that the respondent had failed to disclose certain relevant documents and had invented others.
- 18 By letter dated 18 January 2017 the tribunal notified the parties of the following orders made by EJ Franey:
1. By 4pm on Friday 27 January 2017 each party must have supplied to the other a copy of every document in its possession relating to the case.
 2. By 4pm on Friday, 3 February 2017 the respondent must have provided to the claimant an indexed and page -- numbered bundle containing all these documents.
 3. By 4pm on Friday, 17 February 2017 each party must have supplied to the other a written witness statement (typed in numbered paragraphs) from each person -- including the claimant and Mr Gabbie -- who will give evidence. The statements must set out in date order the facts about which the witness wishes to tell the tribunal.
 4. The respondent must bring three copies of his statements and a bundle of documents to the hearing. The claimant must bring three copies of her witness statements.
 5. Any concerns about the authenticity of any documents disclosed should be included in witness statements and will be addressed at the final hearing. If any relevant documents exist and have not been disclosed an application should be made in writing for an order for disclosure.
- 19 The tribunal was copied into correspondence between the parties about;
- 19.1 continued allegations by the claimant that the respondent had failed to disclose relevant documents;
 - 19.2 the respondent's requests for attachments to e-mails from the claimant to be photocopied and sent to them as they were unable to read the attachments
- 20 By letter dated 1 February 2017 the parties were advised as follows:
- “Employment Judge Slater acknowledges your e-mails dated 20, 23 and 24 January 2017. She notes that the order of Employment Judge Franey was to supply to the other party a copy of every document in its possession relating to the case by 27 January 2017. The e-mails were written before this deadline. If a party considers that relevant documents exist and have not been supplied by that deadline, the party should write to the other party initially, identifying the specific document(s) and asking for it to be disclosed. If the document is not provided, and the party is not satisfied with any explanation given as to why it was not provided, the party should apply to the tribunal for an Order, enclosing copies of

the correspondence and explaining why they think the document exists and its relevance to the issues to be determined by the tribunal.

Documents must be supplied in a form which can be read by the recipient. It appears that the respondent is unable to read some documents sent as attachments to e-mails by the claimant. The claimant should, therefore, send the respondent hard copies of these documents by post."

21 By e-mail dated 31 January 2017, copied to the tribunal and others, the claimant rejected the respondent's request for a current address to which to send the document bundle.

22 By e-mail dated 3 February 2017, copied to the claimant, the respondent advised the tribunal as follows:

"With regard to the indexed page bundle due to be delivered to the claimant by 4 pm today unfortunately I can't obtain an address for the claimant or send by e-mail (which was my intention) because of the number of pages, I can however deliver a bundle to the tribunal by hand for the claimant to collect or alternatively another collection point. Please advise what action you would like me to take."

23 By letter dated 16 February 2017 the tribunal advised the claimant as follows:

"Employment Judge Tom Ryan notes the claimant's request for documents and that the respondent is ready to deliver a bundle to the claimant.

In order to progress the case it is necessary for the claimant to be in possession and consider the documents that are in the bundle. If she will not provide an address for their delivery it seems that the only alternative is for her to collect them from the respondent and the employment tribunal. The claimant is required to inform the tribunal and respondent in writing and by 23 February 2017 how she proposes the documents should be delivered to her."

24 By e-mail dated 16 February 2017 the claimant advised the tribunal that she could only be reached by e-mail and that she could not go to the respondent's premises as she was "flooded with fear when she left at the defendant's premises"

25 The parties continued to copy the tribunal with correspondence relating to the delivery of a bundle and exchange of witness statements.

26 The claimant continued to refuse to provide an address for the delivery of a bundle, refused to agree a collection point for the bundle. Instead she indicated that the respondent should persist with its attempts to forward the bundle by e-mail and made suggestions for the attachments to be sent, for example, by zip file. By e-mail dated 21 February 2017 the respondent informed the claimant that whereas they had attempted to

compress the file into a zipped folder it was still too large to send by e-mail.

27 On 17 February 2017 the respondent sent to the claimant various e-mails reminding her of the duty to exchange witness statements and suggesting that they may be sent by e-mail to each other simultaneously.

28 By e-mail dated 20 February 2017, copied to the tribunal, the respondent sent to the claimant a copy of Michael Gabbie's witness statement, adding:

"We await the claimant's statement which should not be changed or in any way amended in light of the claimant having read Mr Gabbie's statement."

29 By letter dated 23 February 2017 the claimant was advised as follows:

"Employment Judge Porter has directed that the claimant must provide an address for service of the bundle upon her. It need not be her own personal address but could be of a friend or relative. Continued debate re delivery of bundles by e-mail risks the right to a fair hearing."

30 Further correspondence was received from the parties indicating that neither party was satisfied that full disclosure had taken place.

31 By letter dated 1 March 2017 the parties were advised by the tribunal that any outstanding issues relating to the bundle and disclosure of documents would be considered at the outset of the hearing.

31 By e-mail dated 2 March 2017 the claimant sent to the tribunal her comments upon Mr Gabbie's witness statement.

32 By e-mail dated 2 March 2017, copied to the tribunal, the respondent advised the claimant:

"As yet we have not received an address or locations so that we can deliver the bundle, I am quite happy to send it to any destination of your choice, please let me know."

There is no record on file of a response to that email by the claimant.

The Hearing

Day 1

33 At the outset of the hearing it was noted that:

- 33.1 the respondent had provided copies of the bundle which it had attempted to send to the claimant by email;
 - 33.2 the claimant did not have a copy of that bundle until the morning of the hearing, as she had not provided an address for service or collection;
 - 33.3 the claimant had not prepared a witness statement, had not served a copy of any such statement upon the respondent prior to the hearing.
- 34 References to page numbers in these Reasons are references to the page numbers in the Bundle prepared by the respondent.
- 35 The Bundle included copies of the following documents:
- 35.1 An index containing the dates, description and page number of each document in the bundle;
 - 35.2 An email dated 15 August 2016 (page 126) from Mr Gabbie to the claimant informing her that she was suspended from duty and the reasons for the suspension;
 - 35.3 An email from the claimant's solicitors dated 22 August 2016 advising the respondent that they had been instructed in relation to the recent suspension and disciplinary action and advised the respondent that the solicitor would be accompanying the claimant at the disciplinary hearing;
 - 35.4 Minutes of a disciplinary hearing held on 23 August 2016, indicating that the claimant was represented by her solicitor at that hearing;
 - 35.5 An email dated 25 August 2016 ("the dismissal letter") from Mr Gabbie to the claimant advising her of his decision to dismiss her summarily on the grounds of gross misconduct and the reasons for his decision. The claimant was advised of her right of appeal;
 - 35.6 A letter from the claimant to Mr Gabbie (page 139), raising a formal grievance about the termination of her employment. In that letter the claimant:
 - 35.6.1 acknowledges receipt of letters from the respondent including letters dated 15 August and 22 August;

- 35.6.2 acknowledged receipt of a letter informing her of her suspension from work;
 - 35.6.3 quoted from the dismissal letter;
 - 35.7 An email from the respondent to the claimant (page 153) advising her that her grievance (which was treated as an appeal against dismissal) would be considered at a hearing on 12 September 2016;
 - 35.8 An email from the respondent to the claimant (page 183) dated 23 September 2016 (“the appeal outcome letter”) advising her that her appeal against dismissal had been unsuccessful and setting out the reasons for the decision;
 - 35.9 An email from the claimant to Mr Gabbie (page 186) acknowledging and responding to the appeal outcome letter.
- 36 Employment Judge Porter asked the claimant why she had not prepared a witness statement. The claimant asserted that she was unable to prepare her witness statement because:
- 36.1 she did not have a copy of the bundle of documents;
 - 36.2 certain documents had not been disclosed, namely:
 - 36.2.1 her contract of employment;
 - 36.2.2 the alleged agreement that she take a reduction in salary;
 - 36.2.3 her suspension letter;
 - 36.2.4 correspondence relating to her dismissal;
 - 36.2.5 correspondence relating to her appeal against dismissal;
 - 36.2.6 all emails written by her during the course of her employment
- 37 Employment Judge Porter explained that she would consider the parties’ submissions as to whether those documents had been disclosed to the claimant and, if not, whether an order for disclosure of those specific documents should be made, and the claimant given the opportunity to respond to them, before proceeding any further.

- 38 As neither party was legally represented Employment Judge Porter explained that:
- 38.1 she had read the correspondence file and was aware that there were allegations from both parties relating to non-disclosure of relevant documents;
 - 38.2 the duty to disclose documents related to the disclosure of all documents in the power possession or control of a party which were relevant to the issues to be determined by the tribunal;
 - 38.3 there was no duty to disclose a document which did not exist;
 - 38.4 If there was a dispute as to the existence or veracity of a document then such dispute would be considered by the tribunal and determined after hearing all the evidence.
- 39 Employment Judge Porter proceeded to hear submissions from both parties, giving both parties the opportunity to comment on each of the documents requested by the claimant. It was noted as follows.
- 40 **Contract of employment.** The claimant asserts that the respondent failed to disclose her contract of employment. The respondent denies that it provided the claimant with a contract of employment, but asserts that the claimant had herself disclosed 2 pages of a contract, which have been included at page 189 of the bundle. The respondent denies providing the claimant with that contract which, it says, is a document created by the claimant for the purpose of these proceedings. The claimant replied that the respondent has failed to include the full contract in the bundle because it is 6 pages long and she has her own copy of that Contract.
- 41 In light of the claimant's admission that she had a copy of this contract of employment, the veracity of which was in dispute, Employment Judge Porter sought clarification from the claimant as to whether she was seeking disclosure of a different contract of employment or how she said her ability to prepare a witness statement was adversely affected by the respondent's alleged failure to disclose the document. The claimant confirmed that the contract she sought was the six page document that she had in her possession. No other contract of employment was identified by her.
- 42 EJ Porter therefore ordered that:
- 42.1 no order for disclosure was necessary;

- 42.2 the claimant had a copy of the relevant document;
- 42.3 there was a conflict of evidence as to the validity and source of the document which would be decided after hearing all the evidence.
- 43 **Written Agreement re reduction in salary.** The respondent asserts that there was a verbal agreement for the reduction in hours worked by the claimant and a corresponding decrease in salary. The respondent asserts that there was no written agreement. The claimant asserts that she did not agree to the reduction in hours – they were unilaterally imposed.
- 44 EJ Porter noted that:-
- 44.1 neither party asserted that such a document existed;
- 44.2 An order for disclosure could not therefore be made;
- 44.3 there is a conflict of evidence between the parties relating to the reason for the reduction in salary and whether the claimant agreed to the reduction;
- 44.4 That conflict of evidence can only be determined after hearing all the evidence.
- 45 It was after hearing submissions on this second document that the claimant read out a pre-prepared application for the employment judge to recuse herself. The employment judge agreed to consider that application immediately.

Application for the employment judge to recuse herself

- 46 The claimant asserted that:
- 46.1 the employment judge had shown bias to the respondent;
- 46.2 the employment judge had made findings of fact in favour of the respondent, had for example, accepted the respondent's evidence that she had agreed to part-time working and a reduction in wages;
- 46.3 a fair hearing was no longer possible

The Law

- 47 In *Ansar v Lloyds TSB Bank plc [2007] IRLR 211*, the Court of Appeal approved the following summary of the principles :

"1. The test to be applied as stated by Lord Hope in **Porter v Magill [2002] AC 357**, at paragraph 103 and recited by Pill LJ in **Lodwick v London Borough of Southwark** at paragraph 18 in determining bias is: whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

2. If an objection of bias is made, it will be the duty of the chairman to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance...

3. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour: ..

4. It is the duty of a judicial officer to hear and determine the cases allocated to him or her by their head of jurisdiction. Subject to certain limited exceptions, a judge should not accede to an unfounded disqualification application: *Clenae Pty Ltd v Australia & New Zealand Banking Group Ltd [1991] VSCA 35* recited in *Locabail* at paragraph 24.

...

6. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without something more found a sustainable objection: *Locabail* at paragraph 25.

.....

8. Courts and tribunals need to have broad backs, especially in a time when some litigants and their representatives are well aware that to provoke actual or ostensible bias against themselves can achieve what an application for adjournment (or stay) cannot: Sedley LJ in *Bennett* at paragraph 19.

9. There should be no underestimation of the value, both in the formal English judicial system as well as in the more informal employment tribunal hearings, of the dialogue which frequently takes place between the judge or tribunal and a party or representative. No doubt should be cast on the right of the tribunal, as master of its own procedure, to seek to control prolixity and irrelevancies: Peter Gibson J in *Peter Simper & Co Ltd v Cooke [1986] IRLR 19*, EAT at paragraph 17.

10. In any case where there is real ground for doubt, that doubt should be resolved in favour of recusal: *Locabail* at paragraph 25."

Decision on application for recusal

- 48 Employment Judge Porter refused the application on the grounds that:
- 48.1 The judge had considered the each parties' submissions, as explained, to ascertain whether there had been a failure to disclose each of the requested documents and, if so, whether Orders should be made for disclosure;
 - 48.2 The judge had pointed out conflicts of evidence which would be determined later, after hearing all the evidence;
 - 48.3 The judge had only considered two documents. The claimant accepted that she had a copy of the contract of employment, asserted that there had been no agreement for the reduction in salary;
 - 48.4 The claimant was not prejudiced in any way by the findings to date;
 - 48.5 The judge had not, as asserted, made any findings of fact in favour of the respondent, had not, for example, accepted the respondent's evidence that the claimant had agreed to part-time working and a reduction in wages;
 - 48.6 The claimant admitted that she had pre-prepared the application, in advance of the hearing;
 - 48.7 The fair-minded and informed observer, having considered the facts, would conclude that there was no real possibility that the tribunal was biased.
 - 48.8 There is no real ground for doubt in this case;
 - 48.9 There was no merit in the claimant's assertion that the employment judge was biased in favour of the respondent.
- 44 After announcing her decision the employment judge noted that, from the outset of the hearing, the claimant had engaged in unreasonable behaviour, had refused to listen to either the judge or Mr Garrie, had talked over both the judge and Mr Garrie while they were trying to speak, had continually interrupted the judge in mid – sentence. The employment judge gave the claimant 5 minutes to calm herself and to consider her conduct. The judge explained that, after the short break, the judge would continue to hear further submissions in relation to the remaining documents requested by the claimant.

- 49 After the short break the claimant tried to reopen her application for specific disclosure of the written Agreement re reduction in salary, repeating loudly the same submissions and the same allegations of bias against the employment judge.
- 50 The employment judge confirmed her previous comments, that neither party asserted that such a document existed. Whether there was a verbal agreement would be determined after hearing the evidence. Employment Judge Porter invited the claimant to continue with her application for disclosure of the remaining documents.

Continued application for specific disclosure of documents

- 51 **Letter of suspension.** The claimant asserts that she never received a copy of that document, either in August 2016 or since. The respondent asserts that the letter of 15 August 2016 was sent to the claimant on or about that date, and a copy appears at page 126 of the bundle.
- 52 **Dismissal letter.** The claimant asserts that she never received a letter confirming dismissal, either in August 2016 or since, that she was informed of the dismissal at a hearing; it was not confirmed by email. The respondent asserts that:
- 52.1 the dismissal letter was sent by email and by whats app message in August 2016 and a copy is included at page 135/136 of the bundle;
- 52.2 the claimant appealed the decision to dismiss and in her appeal letter (which appears at page 139 of the bundle) acknowledges receipt of the suspension and dismissal letters;
- 53 **Appeal letter.** The claimant asserts that she never received a letter confirming the outcome of the appeal. The respondent asserts that:
- 53.1 the claimant was notified of the appeal outcome by email (pages 183-185 of the bundle);
- 53.2 it got a solicitor's letter, and an email from the claimant in response (page 186) which clearly shows that the claimant had received the appeal outcome;

The claimant replied that her solicitor's response was to a telephone call not a letter.

- 54 **Emails sent by the claimant in the performance of her duties between 2014 and 2016.** The claimant at first asserted that these documents are relevant because she did work for the respondent between 2014 and 2016, the respondent denies it, and the claimant needs the emails to prove it. The respondent asserted that it accepts that the claimant was employed by the company between 2014 and 2016, and that they have never denied this fact. In response, the claimant asserted that there was a dispute as to nature of her job in this period: she worked as an overseas co-ordinator researcher whereas the respondent asserts that she was a personal assistant. The respondent asserts that it accepts that the claimant's function was an overseas co-ordinator researcher, that she may, at times, have been described as a personal assistant, but there was no dispute as to her job function.
- 55 E J Porter noted that these e-mails had not been disclosed. However, the request for disclosure of all email correspondence to and from the claimant for the period 2014 and 2016 was refused because:
- 55.1 the claimant had failed to establish the relevance of such documents, in light of the respondent's concession that the claimant was employed throughout that period in the job function of overseas co-ordinator researcher;
- 55.2 the request was disproportionate. The request for every email on whatever topic in such a long period of time would potentially involve extensive documentation of little, if any, relevance to the issues in dispute.
- 56 E J Porter also noted it was not clear why the failure of the respondent to disclose these emails prevented the claimant from preparing her witness statement on any relevant issue relating to the performance of her duties in this period.
- 57 EJ Porter noted that :-
- 57.1 the documents sought by the claimant, as set out at paragraphs 51,52 and 53 above, are in the bundle;
- 57.2 there is an apparent conflict as to whether such documents, the suspension letter, dismissal letter and appeal outcome letter are valid documents, whether they were prepared and sent to the claimant on the dates noted in the document;
- 57.3 there was also a conflict as to whether these documents had been disclosed to the claimant by the respondent during the course of the proceedings, prior to the preparation of the bundle.

- 58 EJ Porter therefore ordered that she would hear further submissions from both parties as to whether copies of these documents had been sent to the claimant in compliance with the respondent's duty to disclose relevant documents. This was relevant in deciding whether the claimant had, as asserted by her, been unable to comply with the Order for exchange of witness statements because the respondent had failed to disclose these documents in advance of the hearing.
- 59 The respondent requested more time to consider this point. EJ Porter suggested that there be a short break to give both parties the opportunity to prepare, and for the claimant to consider the bundle of documents provided this morning to identify which of the documents she had not seen before.
- 60 Throughout this discussion the claimant refused to listen to what was being said by either the respondent's representative or by the employment judge. She continually interrupted, shouting loudly, making repeated allegations of lies and fabrication of evidence, and refused to stop talking when asked by the judge so that the claimant and the respondent could hear and understand what the judge was saying.
- 61 EJ Porter informed the claimant that she was leaving the room because she was not prepared to continue to sit while the claimant acted in this way, while the claimant ranted, making repeated serious accusations, without giving either the judge or the respondent's representative the opportunity to deal with her concerns in a professional manner. The claimant denied ranting. EJ Porter repeated that she would take a short break for the reasons previously indicated. EJ Porter, directing her comments to the claimant, who continued to shout accusations as EJ Porter spoke, asked the claimant to spend the break looking at the bundle of documents to confirm which documents she has not seen before. The claimant said she did not need to do that because she had not seen any of them. EJ Porter pointed out that the claimant must follow this instruction, because to fail to do so was unreasonable conduct. EJ Porter noted that there was, on the claimant's own admission, part of a document in the bundle, namely part of the Contract of Employment, which the claimant had identified as an incomplete document because she had a copy of the entire 6 page document. There may be other documents in the bundle which the claimant has seen before and she must be given time to consider that bundle. The claimant asserted that EJ Porter did not understand her but accepted everything the respondent said. EJ Porter noted the claimant's criticism, which she did not accept, but pointed out that the judge must continue to try to explain what is happening, what is needed from the claimant

- 62 After a short break EJ Porter started to hear submissions from the respondent about allegations by the claimant that it had failed to disclose relevant documents. Reference was made to the claimant's request for specific disclosure in her email dated 2 February 2017, which appeared at page 104 of the bundle. The respondent made a number of assertions including the following:
- 62.1 The respondent had disclosed documents by attachments to email dated 13 January 2017, which described the attachments as A1, A3, A4, A6, A7 A8 A9, A10. Those documents had been included in the bundle and could be identified as the numbered pages included reference to appropriate attachment (A1 etc);
 - 62.2 Some of the requested documents (the claimant's contract, the transcript she had prepared, her appeal letter, exchanges of emails between them) were the claimant's own documents and they did not understand why they needed to send copies of those to the claimant as she had provided the originals;
 - 62.3 They had sent the suspension letter, invitation to the disciplinary hearing, dismissal letter and appeal outcome letter to the claimant at the time and correspondence from the claimant and/or her solicitor clearly showed that she had received them. They did not think they needed to send further copies as part of the disclosure exercise but they had been included in the bundle;
 - 62.4 Some of the documents did not exist, for example, the letter to the police and alleged exchanges of what's app messages;
 - 62.5 the claimant was not prevented from writing her witness statement. If she had cooperated with the sending of the bundle she would have seen all the documents;
 - 62.6 It did not understand the claimant's case
- 63 The claimant was given the opportunity to respond. During these submissions:
- 63.1 The claimant asserted that the respondents were lying, that the respondent had sent a letter to the police and it should be in the bundle;
 - 63.2 The claimant asserted that the respondent had failed to disclose satisfactory documentary evidence to prove that she was guilty of gross misconduct, the reason given for dismissal;

- 63.3 the claimant started to explain the contents and relevance of the transcript of a conversation between her and Mr Gabbie, which she acknowledged was a document prepared by her and sent by her to the respondent.
- 64 EJ Porter noted that:
- 64.1 the respondent denied sending any such letter to the police. This was a conflict of evidence which would be considered during the hearing;
- 64.2 the respondent asserted that it had disclosed all the documents relied upon in reaching its decision to dismiss. The alleged failure of the respondent to provide documentary evidence in support of its allegation of gross misconduct would be considered during the evidence;
- 64.3 The failure to disclose and/or include in the bundle, any relevant documents could be raised with the respondent's witnesses;
- 64.4 the relevance of the transcript prepared by the claimant was not in issue at this stage. The issue was whether the claimant had sight of the various documents during the disclosure process and whether her ability to prepare her witness statement was affected by the respondent's failure to disclose any document. The claimant accepted that this was her own document.
- 65 During the latter exchange the claimant refused to listen, talking over the judge as she spoke, shouting allegations of bias against EJ Porter, against REJ Robertson at the previous hearing, and against the tribunal clerks who, the claimant alleged, had also failed to produce the transcript.
- 66 At this stage EJ Porter concluded that it was appropriate to consider a proposal that the claim be struck out, in light of:
- 66.1 the claimant's failure to comply with an Order of the tribunal to provide a copy of her witness statement;
- 66.2 the claimant's unreasonable conduct;
- 66.3 the respondent's assertion that it did not know the case it had to answer

- 67 EJ Porter tried to explain this proposal while the claimant shouted over the judge's comments and refused to be quiet.
- 68 EJ Porter gave the claimant the opportunity to consider her response to this proposal to strike out her claim over the lunch break and urged her to take legal advice, if she was able to do so. The claimant was advised that ACAS may be able to give her advice.

Proposal to strike out the claim

- 69 After the lunch break the claimant repeated her application that the judge recuse herself. EJ Porter stated that she had already made a determination on that application, the claimant was merely repeating the same points, and the application remained without merit and was refused.
- 70 EJ Porter heard the claimant's comments on the proposal to strike out. The claimant made a number of assertions including:
- 70.1 the respondent had failed to disclose relevant documents;
 - 70.2 the respondent had failed to provide her with a copy of the bundle;
 - 70.3 as a result she had been unable to prepare her witness statement
- 71 Having heard those submissions, EJ Porter explained that, in considering such a strike out, she must consider whether a fair hearing was still possible. EJ Porter asked the claimant for her comments on the possibility of a fair hearing.
- 72 The claimant replied that there could not be a fair hearing because she had not prepared a witness statement. However, having now received a copy of the bundle, she could prepare her witness statement overnight. The respondent had no objection to the claimant's proposal.
- 73 EJ Porter started to respond to this, explaining that the claimant must act in a reasonable manner the next day. The claimant interrupted the judge, shouting, repeating allegations of bias, denying that she was unreasonable. Despite repeated requests the claimant refused to stop talking over the judge, refused to listen.
- 74 EJ Porter indicated that she would retire to give the claimant ten minutes to consider whether she was prepared to listen to what the judge was about to say.
- 75 On her return EJ Porter ordered that, in light of the respondent's agreement to the claimant's proposal:

- 75.1 the claim would not be struck out;
- 75.2 The claimant was ordered to prepare her witness statement overnight, and provide a copy to the respondent by email by 9 am the next day, and a paper copy by 9.30 am;
- 75.3 The tribunal would start hearing the evidence at 10 am the next day.
- 76 The claimant once more started shouting. Despite repeated requests the claimant refused to be quiet, refused to stop talking. EJ Porter explained that the claimant must comply with her requests to be quiet because it was the judge's job to conduct the proceedings, to ensure a fair hearing for both parties.
- 77 The claimant replied that:
- 77.1 EJ Porter could not tell her to be quiet, could not tell her what to do;
- 77.2 the claimant could run the case as she wished;
- 77.3 it was the judge's job to hold a fair hearing, not to put statements in the respondent's mouth, not to agree with everything they said.
- 78 During this time the claimant continued to make repeated applications for EJ Porter to recuse herself, making the same allegations of bias.
- 79 EJ Porter told the claimant that this was an abuse of process, to refuse to listen to the judge, refuse to keep quiet while being spoken to. EJ Porter stated that she was minded to strike out the claim for abuse of process. However, EJ Porter would give the claimant one last chance to consider her conduct and to conduct herself the next day in a reasonable fashion.
- 80 E J Porter again refused to recuse herself, because:
- 80.1 EJ Porter had been conversing with the parties and making orders having considered the submissions and the documentary evidence;
- 80.2 the fair-minded and informed observer, having considered the facts, would still conclude that there was no real possibility that the tribunal was biased.
- 81 EJ Porter confirmed her decision on this point indicating:

- 81.1 the claimant's allegations of bias acquired no more credence just because she kept repeating them;
 - 81.2 The claimant could not dictate that the case be transferred to a different judge;
 - 81.3 The case would proceed before EJ Porter the next day.
- 82 The claimant sent 2 emails to the tribunal on 9 March 2017:
- 82.1 at 15:11, making reference to EJ Porter's comment about the claimant's wish for the case to be transferred to a different judge and stating that she could not find a copy of the respondent's letter written to the police in the bundle;
 - 82.2 at 20:52, describing the bundle as a "shallow bundle" and asserting that documents were missing including:
 - 82.2.1 her complete Contract of Employment;
 - 82.2.2 a copy of the respondent's letter written to the police;
 - 82.2.3 transcripts of recordings created by the claimant.

Day 2

- 83 On the second day the claimant stated that she had not prepared the witness statement. When asked for a reason the claimant asserted that she had been unable to prepare her witness statement overnight because:
- :
- 83.1 documents were omitted from the bundle, namely:
 - 83.1.1 a letter from respondent to the police, the document as discussed the day before as set out at paragraphs 62-64 above;
 - 83.1.2 the emails, to show she had been working for the respondent between 2014 and 2016, as discussed the day before as set out at paragraphs 54 and 55 above;
 - 83.1.3 any emails relevant to the allegation of misconduct , as discussed the day before as set out at paragraphs 64.2 above;
 - 83.2 the document at page 199 of the bundle – her own document - had been edited.

- 84 EJ Porter asked the claimant why she had not written her witness statement when:
- 84.1 the claimant had proposed writing the witness statement overnight, when she was aware of the contents of the bundle and the absence of these documents from the bundle; and
- 84.2 the allegedly edited document was her own document and therefore she had the original.
- 85 The claimant responded that she could not prepare her witness statement because she did not have access to the internet after the hearing, on the night of 9 March 2017.
- 86 EJ Porter asked the claimant how she had sent the emails to the tribunals at 15.31 and 20.52 on 9 March 2017 if she did not have access to the internet.
- 87 The claimant replied that she only had access re a friend's mobile phone.
- 88 EJ Porter asked the claimant, if she had problems preparing a witness statement electronically why she had not simply written it down.
- 89 The claimant asserted that she had started to write a witness statement on her telephone but stopped because of the state of the bundle.
- 90 Throughout this exchange the claimant interrupted when the employment judge was talking. The employment judge asked the claimant three times to be quiet while she spoke. Three times the claimant refused, talking over the judge in an extremely loud voice as the judge was speaking to her and asking her to be quiet. The claimant refused to be quiet.

The Law

- 91 Rule 37 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides that a tribunal may, either on its own initiative or on the application of a party, strike out all or part of a claim on the following grounds :-
- 91.1 non-compliance with any of the Rules or with an order of the tribunal;

- 91.2 the tribunal considers that it is no longer possible to have a fair hearing in respect of the claim;
- 91.3 the manner in which the proceedings have been conducted has been scandalous, unreasonable or vexatious.
- 92 Before striking out a claim for unreasonable conduct the tribunal must be satisfied that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible. In either case, the striking out must be a proportionate response. **Blockbuster Entertainment Ltd v James 2006 IRLR 630 CA.**
- 93 In considering whether a claim should be struck out on the grounds of scandalous, unreasonable or vexatious conduct a tribunal must take into account whether a fair trial is still possible. **De Keyser Ltd v Wilson 2001 IRLR 324 EAT.**

Decision

- 94 In reaching the decision to strike out the claim the employment judge considered all the circumstances including the following.
- 95 The claimant has failed to comply with the Order of the tribunal to send to the respondent a witness statement in advance of the final hearing. EJ Porter has considered the claimant's explanation for this failure and notes in particular as follows:
- 95.1 the respondent disclosed various documents to the claimant by sending to her copies of the documents by way of attachments to e-mails (see paragraphs 15 and 62.1 above);
- 95.2 correspondence on file shows that the claimant received copies of those documents (see paragraph 16 above);
- 95.3 the respondent failed to disclose, as part of the formal disclosure process, copies of the suspension letter, invitation to the disciplinary hearing, dismissal letter and appeal outcome;
- 95.4 documentary evidence clearly shows that the claimant had received copies of those documents at the time they were sent and had retained copies which she has used in preparing her appeal against dismissal and her claim to the tribunal (see paragraphs 4, 35.6, and 35.9 above);

- 95.5 the respondent had failed to disclose, as part of the formal disclosure process, copies of the documents created by the claimant;
- 95.6 the claimant had copies: they were her own documents;
- 95.7 the respondent had prepared a bundle of documents, including the suspension letter, invitation to the disciplinary hearing, dismissal letter and appeal outcome, and copies of the documents which the claimant had sent them;
- 95.8 the respondent had made several attempts to provide a copy of that bundle to the claimant;
- 95.9 the claimant refused to co-operate with suggestions as to alternative means of getting a copy of that bundle;
- 95.10 the tribunal in correspondence had emphasised the importance of the claimant taking steps to secure a copy of the bundle in advance of the hearing;
- 95.11 the claimant had prepared a written response to the respondent's witness statement;

In all the circumstances the tribunal finds that the claimant's ability to prepare a witness statement was not prejudiced by the respondent's failure to formally disclose copies of documents which the claimant already had in her possession. In any event, any prejudice to the claimant would have been remedied if she had followed the instruction of the tribunal, had complied with the overriding objective, had made arrangements for service of the bundle upon her. The claimant has failed to provide a satisfactory explanation for her failure to provide a witness statement in advance of the final hearing.

- 96 The tribunal, prior to the hearing, advised the claimant of the importance of preparing and serving a witness statement in accordance with the terms of the Orders (see paragraph 14 above).
- 97 The claimant has failed to comply with the order of the tribunal to provide a witness statement on the second day of the hearing. The claimant has failed to provide a satisfactory explanation for her failure to do so. In reaching this conclusion EJ Porter notes in particular that:
 - 97.1 the claimant had proposed that she could now prepare her written statement, having had a copy of the bundle;

- 97.2 the claimant gave conflicting explanations as to why she had not complied with the Order;
- 97.3 the claimant once again asserted that the respondent had failed to disclose documents;
- 97.4 this assertion had been considered on the first day of the hearing when it had been made clear that the documents sought by the claimant either:
- 97.4.1 were not relevant;
 - 97.4.2 did not exist;
 - 97.4.3 may not exist. There was a conflict of evidence on that which could only be determined after hearing the evidence;
 - 97.4.4 were documents which, the claimant asserted, were needed to prove that she was guilty of gross misconduct as alleged. The absence of such documents would be discussed during the giving of evidence and the tribunal invited to make the appropriate decision taking into account the absence of documentary evidence;
- 97.5 the claimant asserted that she had been unable to prepare the witness statement because she had no internet access. That is inconsistent with her sending emails to the tribunal on the night of the first day of the hearing. In any event, an internet connection is not necessary for the purpose of preparing a witness statement.
- 98 The right to a fair hearing is prejudiced by the claimant's failure to provide a witness statement, as ordered. The claimant has failed to set out her evidence in relation to each of her claims.
- 99 The claimant has acted in an unreasonable manner from the commencement of the hearing.
- 100 The claimant is now acting in a scandalous manner. It is an abuse of process for the claimant to refuse to comply with the orders of the judge, to refuse to listen, to refuse to cooperate in the proceedings.

- 101 The claimant has been given an opportunity to reflect on her behaviour and has been advised of the consequences of her continuing to act in this wholly unacceptable manner.
- 102 A fair hearing is no longer possible because:
- 102.1 the respondent does not know the case it has to answer;
 - 102.2 the claimant refuses to accept the orders made during the hearing;
 - 102.3 the claimant makes repeated applications for disclosure of documents when the application has been considered;
 - 102.4 the claimant makes repeated applications for the employment tribunal judge to recuse herself, when the application has been made and refused;
 - 102.5 it is difficult, if not impossible, to conduct this hearing in a fair manner when the claimant shouts throughout, refuses to be quiet, refuses to listen to what is being said by the judge and the respondent's representative. The employment judge has to shout above the noises made by the claimant to enable the judge's comments to be heard by the respondent and the observers. It is not clear how much the respondent can actually hear of the judge's comments. It is difficult for the judge to be sure that she can hear correctly what is being said by the respondent's representative, who is not legally trained and whose ability to present the respondent's case is significantly hampered by the claimant's persistent interruptions;
 - 102.6 the respondent's right to a fair hearing is prejudiced by the claimant's conduct
- 103 EJ Porter asked the claimant to be quiet to enable the judge to state her decision. The claimant refused to be quiet, continuing to shout allegations of bias, and unfair treatment at the hands of EJ Porter who, the claimant alleged, should have recused herself when originally asked.
- 104 EJ Porter therefore announced, while the claimant continued shouting, that the claim was struck out because:

- 104.1 in light the claimant's failure to provide a witness statement, she had failed to comply with the orders of the tribunal;
- 104.2 the claimant's continued conduct that day was an abuse of process ;
- 104.3 a fair hearing was no longer possible.

105 EJ Porter noted that:

- 105.1 she was providing summary reasons only as the claimant continued to shout and it was not appropriate for the Judge to continue shouting over her with full reasons;
- 105.2 a copy of the judgement would be sent to the parties;
- 105.3 the judgment would contain details of how to obtain full reasons and the avenue for an appeal of the decision

Employment Judge Porter
Date: 21 April 2017

SENT TO THE PARTIES ON
27 April 2017

FOR THE TRIBUNAL