



EMPLOYMENT TRIBUNALS

Claimant

Miss M Puar

v

Respondent

Duncan Lewis Solicitors Ltd

PRELIMINARY HEARING

Heard at: Watford

On: 9 February 2018

Before: Employment Judge Bedeau

Appearances:

For the Claimant: In person
For the Respondent: Mr O Isaacs, Counsel

REASONS

JUDGMENT having been sent to the parties on 7 March 2018 and the parties having requested written reasons in accordance with rule 62(3) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, reasons are hereby given below:

1. The claimant applied for the strike out order issued on 18 August 2017, to be set aside and that she be allowed to pursue her claims to a final hearing. The application was opposed by the respondent.

The issues

2. The issues I have to consider are:
 - 2.1 what was or were the reasons for the claimant's failure to comply with the tribunal's order and or Unless Order?
 - 2.2 The seriousness of the default?
 - 2.3 The prejudice to the other party; and

2.4 whether a fair trial is still possible?

The evidence

3. I heard evidence from the claimant. No oral evidence was given on behalf of the respondent. In addition, the parties adduced a joint bundle of documents.
4. The presented a very detailed witness statement, essentially focussing on the merits of her case. She was cross-examined by Mr Isaacs, counsel on behalf of the respondent. Questions were also put to her by me. In the main I accepted the chronology set out in Mr Isaacs' skeleton argument.

Findings of fact

5. The respondent is a firm of solicitors with its main office in Harrow. It also has an office in Stuart Street, Luton.
6. The claimant commenced employment with the respondent on 3 August 16, as a caseworker on a probationary contract for the first six months and was based at the Luton office.
7. On the 8 December 2016, her employment was terminated, according to the respondent, on grounds of performance.
8. On 2 March 2017, she presented her claim form alleging that she had been unfairly and wrongfully dismissed and had been discriminated against because of race and religion or belief. In the response presented to the tribunal on the 2017, the respondent denies the claims and asserts that the claimant failed to reach the standards required of her during her probationary period, consequently, her employment was terminated. In addition, her claims were inadequately pleaded.
9. On 16 March 2017, the case was listed for a preliminary hearing, in private, to consider the claims, issues and to give case management orders. The claimant was duly notified by the tribunal of the hearing as notice of it was sent to her address. At all material times her email address was manjeet.puar.advocate@gmail.com.
10. On 31 May 2017, she emailed the tribunal stating that she was due to start employment on the 1 June 2017 working in Cambridgeshire and asked the tribunal whether it was possible for the hearing to be put back to the afternoon or re-listed, to allow her to be inducted in her new job in the morning. She stated that it had taken her six months to find employment following her dismissal and apologised for any inconvenience caused. Her application was copied to the respondent.

11. The respondent objected, and the application was refused by Employment Judge Small on the same day. The parties were informed that the hearing would go ahead as listed. The tribunal wrote to the claimant using her gmail account. The claimant said that she only became aware to the decision on 1 June 2017.
12. At the hearing on 1 June, EJ Skehan ordered that the case be re-listed for a further preliminary hearing on 21 August 2017 with a time estimate of 3 hours; the claimant to provide further information in respect of her claims within 14 days from receipt of the order; and that the respondent's costs application for the aborted hearing be considered on 21 August.
13. A copy of the case management orders was sent to the parties on 5 July 2017. The claimant said that she did not receive it until 18 August 2017.
14. On 4 August 2017, on notice to the claimant, the respondent applied for the claims to be struck out for non-compliance with the orders, alternatively, and Unless Order. On 14 August an Unless Order was issued and sent to the parties. A further copy of the case management orders of 1 June 2017, was sent to the parties by the tribunal. The Unless Order required the claimant to comply with the case management orders by 17 August 2017 or the claims would be struck out without further order. There was no compliance because the claimant asserted that she was not aware of the order. On 18 August 2017, the parties were informed by the tribunal that the claims were struck out for non-compliance with the Unless Order.
15. The claimant completed the legal practice course and stated that she was aware of where to search for legal information. She communicated using her gmail email account. By 31 May 2017, she was chasing the respondent for references as she had registered with a firm of recruitment consultants in January 2017. She had a telephone interview with the consultants and was told that she was due to start her new job on 1 June 2017 but said to them that she was not available to start on that day. She was, however, told that her induction would be in the morning on 1 June. She did not ask whether her induction could be on 2 June. She wrote to the tribunal on 31 May requesting that the hearing be put back to the afternoon. It was only on 1 June she was told by the tribunal that her request had been refused.
16. On 3 July 2017, she called the tribunal but did not ask for a copy of the case management orders. From 28 July to 18 August 2017, she said that she did not log into her email account because she was working, and her mobile phone had "crashed". She replaced it with another one, but it was not a smart phone. She acquired a new smart phone in September 2017 but did not set up her email accounts on it.
17. When she logged into her email account on 18 August 2017, she read the case management orders, the Unless Order and the Strike Out Order.
18. She said with her new job, having to move address and in the process, being busy packing up her belongings, compounded by the problems with her

computer and mobile phone, she was unaware of the orders issued. She did not comply with the order to provide further information because her focus of attention was on seeking relief from sanction, that is, to get the strike order set aside. She also said that she suffers from short term memory loss.

Submissions

19. I considered the submissions by Mr Isaacs and the claimant. I do not propose to repeat their submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

The law

20. Under rule 38(2),

“A party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations.”

21. The factors I have to take into account are: the reasons for the default; the seriousness of the default; the prejudice to the other party; and whether a fair trial remains possible, Thind v Salvesen Logistics Ltd UKEAT0487/09, Hylton v Royal Mail Group Ltd UKEAT0369/14.

Conclusion

22. Dealing with those matters in turn, the reason for the default was that the claimant said that she did not receive the Unless Order, the Strike Out Order and Case Management Orders until 18 August 2017. In relation to whether she received these documents in the post, she said that she moving to a new address and was in the process of packing up her possessions for the move. I did not consider these as good reasons for the default and do entertain a degree of scepticism as she told me that both means of communicating information from the tribunal to her failed, namely email account postal address. She studied law and should be familiar with litigation. It was up to her to prosecute her case before a tribunal and that means complying with the orders made. If that was the only factor I would have no hesitation in rejecting her application.
23. I also have to consider the seriousness of the default. She did not comply with the case management order that she should serve further information clarifying her claims. She told me, and I was prepared to accept her account that she was focusing on this hearing to set aside the Strike Out Order and did not believe she had to comply with the Case Management Orders made on 1 June 2017 by Employment Judge Skehan which were promulgated to the parties on 5 July 2017.
24. The prejudice to the respondent. I accept that the respondent does not have the full picture of the claimant's claims and how she put her case against it, but it engaged in a detailed internal process in addressing the claimant's performance and conduct; the decision to terminate her probation; and the appeal process.

There are documents documenting the steps taken which are likely to act as aide memoirs to any potential witnesses it may call. There is the inevitable delay in having to wait for the final hearing. Although I do accept that the respondent will suffer some prejudice, I am of the view that the prejudice can be overcome.

25. Were I to reject the claimant's application the reality is that she will not have any recourse against the respondent in relation to her claims.
26. Is a fair trial possible? Mr Isaacs takes a neutral position in respect of this. I have come to the conclusion that a fair trial is possible. The claimant can give her account of events, although I am told, which is acknowledged, that she suffers from short-term memory loss. She has, however, provided a very detailed witness statement in support of her case and according to Mr Isaacs she has added to that which may involve, in due course, an application to amend.
27. Balancing as I do, all those factors, I have and I must say, quite candidly and with some reluctance, fall on the side of the claimant. I will set aside the judgment and allow the claimant to proceed with her claims against the respondent.

Employment Judge Bedeau

11 October 2018.....

Sent to the parties on:

19 October 2018.....

For the Tribunal:

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