RM

EMPLOYMENT TRIBUNALS

Claimant: **Ms L Ojelade**

Respondent: **Genesis Housing Association Limited**

Heard at: **East London Hearing Centre**

On: **12 April 2018**

Before: **Employment Judge Barrowclough (sitting alone)**

Representation

Claimant: Neither present nor represented

Respondent: Mr. T Goodwin (Solicitor)

JUDGMENT having been sent to the parties on 16 April 2018 and reasons having been requested by the Employment Appeal Tribunal in the Order sealed on 13 November 2018.

REASONS

1. This is the hearing of the Respondent's applications to strike out the whole of the Claimant's claim, alternatively to make deposit orders in relation to all the various complaints advanced therein, and for a costs order.

2. The case was listed to be heard at 10.00am but, due to other business before the Tribunal, was not called on for hearing until 12.25 pm. In the interim and at my request, numerous attempts were made by the Tribunal's staff to contact the Claimant, who was not in attendance or represented, at the telephone number provided in her ET1, and also on a different number which she had apparently given to Mr. Goodwin, the Respondent's solicitor who appeared on their behalf at this hearing. All such attempts were unsuccessful, and in addition Mr. Goodwin told me that he had emailed the Claimant on the previous day, 11 April, to remind her of the hearing. Accordingly, the hearing of the Respondent's applications proceeded in the Claimant's absence. Mr. Goodwin had helpfully prepared and handed up a skeleton argument (Exhibit R-1), a bundle of relevant documents and correspondence (R-2), and a separate skeleton in relation to his potential costs application (R-3).

3. The background to the Respondent's applications is far from straightforward, and is set out in Mr. Goodwin's skeleton and in his firm's letter to the Tribunal of 20 February 2018; and I summarise it as follows.

4. It is accepted that the Claimant was employed by the Respondent from 6 February 2008 until 22 August 2014, when she was dismissed, the Respondent's given reason being ill-health capability, the Claimant having been on continuous sickness absence from 5 February 2013 until the date of her dismissal. On 23 July 2014, almost exactly one month before she was dismissed, the Claimant had presented a claim to the Tribunal, numbered 3200971/2014. That claim included complaints for disability discrimination, a redundancy payment, arrears of pay, and holiday and notice pay; but not for unfair dismissal. The Respondent resisted all those complaints, its ET3 being presented on 29 September 2014. A preliminary hearing, at which the Respondent was seeking a deposit order and case management orders were to be made, was held before Employment Judge Prichard on 10 November 2014, and the resulting order is at pages 28 to 30 in R-2. In summary, the learned judge postponed consideration of all aspects of the Claimant's claim, on the basis that, with the exception of the disability discrimination allegations, the Claimant's complaints had been presented before the Claimant had been dismissed, and were therefore *'legally invalid'*, as he termed it. Judge Prichard went on to assist the Claimant by exploring the apparent scope of her disability discrimination allegations, which related to the Claimant's back and knee, and the potential complaints arising of a failure to make adjustments and/or disability related discrimination. He also clearly set out the relevant time limits for any fresh claim which the Claimant might be minded to bring, including a complaint of unfair dismissal as well as the existing claims for pay, if desired. In particular, the Claimant was told of the requirement to initiate ACAS early conciliation before presenting any such further claim, the deadline for doing so being 21 November 2014, three months after her dismissal.

5. The Claimant duly presented a second claim to the Tribunal on 16 November 2014 under number 3200010/2015. That claim included all the complaints previously advanced by the Claimant, as well as an allegation of unfair dismissal. Once again, the Respondent contested the whole of the Claimant's claim, the ET3 Response to this second claim being lodged on 6 February 2015. On 7 May thereafter the Respondent applied for the claim to be struck out because the Claimant had failed to comply with the Early Conciliation procedure. That application came before Employment Judge Ferris at an open preliminary hearing on 15 May 2015, when the Claimant accepted during the course of her evidence that the Early Conciliation certificate quoted and relied upon in her second claim was that obtained in relation to her first claim, and that she had not contacted ACAS or obtained a separate certificate in relation to her then current claim. Accordingly, and as set out in the learned judge's judgment and reasons at pages 47 to 54 of R-2, the Claimant's second claim (number 3200010/15) was deemed to be invalid due to the Claimant's failure to comply with the early conciliation rules, the Tribunal having no jurisdiction to consider any of the complaints therein contained. Additionally, the complaints in the Claimant's first claim (number 3200971/14) for a redundancy payment, notice pay, holiday pay and arrears of pay were struck out by EJ Ferris, who determined that they had no reasonable prospect of success, having considered the possible merits of those complaints in,

and for the reasons set out at, paragraphs 5 to 8 of his judgment. In the result, the Claimant's only remaining or surviving complaints were her allegations of disability discrimination, which were identified as being disability related discrimination and a failure to make adjustments, and the learned judge went on to clarify the issues for determination at the final hearing.

6. However, on 26 October 2015, the parties agreed a COT3 settlement of all the Claimant's claims against the Respondent, including those in claims nos. 3200971/2014 and 3200010/2015, arising out of or in connection with her employment or its termination. The full terms of the settlement are set out at pages 59/60 of R-2, and, following the appropriate notification by ACAS, Regional Employment Judge Taylor issued judgments dismissing both claims on settlement on 3 November 2015. Finally, the Respondent asserts (in their solicitors' letter to the Tribunal of 20 February 2018) that the monies payable to the Claimant by reason of the COT3 settlement in the sum of £11,200 were duly paid to her in December 2015; and a copy of the cheque dated 3 December 2015 which was sent to the Claimant is at page 67A1 of R-2.

7. About two years later, the Claimant presented her current claim to the Tribunal on 5 December 2017. By her claim, the Claimant seeks to re-instate the complaints previously advanced in claim number 3200971/2014 (disability discrimination, a redundancy payment, salary arrears and holiday and notice pay) only. As can be seen from the Tribunal form completed by the Claimant on 5 December 2017 seeking reinstatement of her earlier claim (pages 68/69 in R-2), the Claimant ticked or completed the box in the form indicating that her earlier claim had been either rejected, dismissed or closed because of a *'failure to present a valid fee / help with fees application'.* Whilst it is true that, at the time both the Claimant's earlier claims were presented, the Employment Tribunal fees regime was in place, there is nothing to suggest that there was in fact any failure by the Claimant to comply with it, at least from the documentation I have seen; or that any such failure on the Claimant's behalf to pay any fee due played any part in the dismissal of either claim.

8. The Respondent's address for service provided by the Claimant in her ET1 was no.2a, Claughton Road, London E13 9PN. As the Respondent's solicitors pointed out in their letter to the Tribunal of 20 February 2018, that is an office which the Respondent has not used since 2015, and was not the office address provided for the Respondent, or the address for service given, in either of the Respondent's ET3 responses to the Claimant's earlier claims. As a result, the Respondent did not become aware of the existence of the Claimant's current claim until the afternoon of 19 February 2018, when they received a letter from the Tribunal advising them of a preliminary hearing on 22 February at 2pm. The Respondent's solicitors wrote to the Tribunal on both 19 and 20 February, setting out the history as summarised above, and asking for the hearing fixed for 22 February to be vacated, and for the case to be re-listed for a further preliminary hearing, at which the Respondent would seek (a) an extension of time within which to file an ET3 in response to the Claimant's claim, and (b) to strike out the Claimant's claim under rule 37(1) of the Employment Tribunal Regulations 2013, or for an order that the Claimant's attempt to re-instate her earlier claim be rejected. On 21 February Employment Judge Foxwell agreed to the requested postponement, directed that the Respondent was not required to file an ET3 pending the preliminary hearing

on 12 April 2018, at which those matters would be heard and determined; and a notice of hearing was sent to the parties.

9. At the hearing before me, Mr. Goodwin on behalf of the Respondent requested that the strike out application be heard first, since if it succeeded there would be no need to consider the application for an extension of time for presentation of an ET3 by the Respondent. I accepted that suggestion.

10. The application to strike out the claim was put forward under both rule 37(1) (a) and (b): that the claim was both scandalous or vexatious or had no reasonable prospect of success, and that the manner in which the claim had been conducted by the Claimant had been scandalous, unreasonable or vexatious. The Claimant's current claim was nothing more than a repetition of (or attempt to reinstate) the complaints in the Claimant's first claim number 3200971/2014. Accordingly, and in relation to rule 37(1)(a), Mr. Goodwin submitted that the doctrine of *res judicata* applied in these circumstances, both in relation to those complaints which were originally struck out by EJ Ferris on 15 May 2015, and the remaining complaints of disability discrimination, which were subsequently dismissed on withdrawal on 3 November 2015. The complaints struck out on 15 May 2015 had been judicially determined as having no reasonable prospect of success for the reasons set out in the judgment then handed down, and therefore cause of action estoppel applied, and they could not be resurrected to be re-litigated. As to the complaints dismissed upon withdrawal, the Court of Appeal had confirmed in **Barber v Staffordshire County Council [1996] All ER 748**, a copy of which judgment was helpfully provided, that dismissal upon withdrawal by a party constitutes a judicial decision for the purposes of *res judicata.* Secondly, rule 52 of the 2013 regulations provides that where a claim is withdrawn, it shall be dismissed unless the Claimant reserves his or her rights, or the Tribunal does not consider it to be in the interests of justice to do so – neither of which exceptions apply in this case.

11. With respect to the manner in which the Claimant's current claim had been conducted and the provisions of rule 37(1)(b), Mr. Goodwin submitted that the claim had been brought and presented under a wholly false or fraudulent pretext. The Claimant had stated in her application to re-instate her earlier claim that the reason it was dismissed or closed was because of a failure to pay an applicable fee, or which related to *'help with fees application'*, as could be seen at page 68 of R-2. That was simply untrue, in that it was clear beyond argument that the complaints in the Claimant's first claim, which were repeated in her current claim, had either been struck out following a preliminary hearing, or dismissed upon withdrawal by the Claimant following a COT3 settlement. Since the Claimant must have known the true position full well, her conduct in bringing and pursuing her current claim self-evidently must have been both vexatious and unreasonable.

12. Mr. Goodwin therefore submitted that the Claimant's claim should be struck out under both rule 37(1)(a) and (1)(b). The Claimant had had ample opportunity to put forward representations and/or reasons why the strike out application should not be granted, in written submissions and/or at the hearing itself, since she had been made aware of the preliminary hearing and the matters to then be determined in the Tribunal's notice of hearing of 21 February 2018; but had failed to pursue either alternative. In fact, Mr. Goodwin said, nothing had been heard by his firm from the Claimant since the matter had resurfaced in February 2018.

13. Put shortly, I accept Mr. Goodwin's submissions. In my judgment, the history of the Claimant's earlier claims and of their disposal is abundantly clear from the documentation in R-2 to which I have referred above, and the simple fact must be that the Claimant is attempting by this claim to resurrect complaints which have, as she must know, already been determined and concluded as having no reasonable prospect of success, or in relation to which she has already reached a settlement with the Respondent and received agreed compensation in the sum of £11,200. The inescapable inference from this attempt to have 'two bites at the cherry' is that the Claimant by so doing has been acting disingenuously, if not dishonestly, in putting forward a palpably false reason for the determination of at least one of her earlier claims: and no evidence or material has been produced by the Claimant to rebut or gainsay that inference. Accordingly, I strike out the Claimant's claim under both rule 37(1)(a) and 37(1)(b). For the sake of completeness, I record that Mr. Goodwin also put forward submissions in relation to the Claimant's claim being out of time, and to strike out any attempt to repeat the complaints contained in the Claimant's second claim (no. 3200010/2015). In the light of my judgment, there is no need to adjudicate the former; whilst the latter issue was not in fact before the Tribunal for determination. Finally, in these circumstances no consideration of the application to extend time for presentation of the Respondent's ET3 is required.

14. **A brief ex tempore judgment having been delivered at the hearing, Mr Goodwin raised the Respondent's application for costs, made and copied to the Claimant on 20th February 2018, pursuant to rule 75(1)(a)….** of the 2013 regulations, on the basis that, as the Tribunal had found, the Claimant had acted vexatiously or unreasonably in bringing and pursuing her current claim (rule 76(1)(a)), and that her claim had no reasonable prospect of success (rule 76(1)(b)). Mr. Goodwin's firm had written to the Claimant on a 'without prejudice save as to costs' basis on 15 March 2018, and a copy of that letter is at pages 86/87 of R-2. In that letter, the manifest difficulties that faced the Claimant's claim – essentially, the same matters relied upon by the Respondent in this hearing - were clearly set out, the Claimant was invited to withdraw her claim, and told that, if she agreed to do so, the Respondent would not seek to recover costs from her. The Claimant was also warned that if she did not withdraw, a costs order would be sought at the forthcoming preliminary hearing, and that the amount of costs incurred might then have risen to £10,000. Finally, the Claimant was informed of a number of free legal advice centres in her local area where she might be able to obtain advice on her position, and given a period of two weeks from the date of the letter within which to consider her position and withdraw her claim without penalty. Mr. Goodwin told me, and I have no reason to doubt, that no response to that letter was ever received from the Claimant. He submitted that the Claimant, by apparently ignoring what he suggested was a generous offer from the Respondent, had once more acted unreasonably, and that further significant and unnecessary costs had thereby been incurred.

15. The Respondent had indicated by their solicitors' letter to the Tribunal of 20 February 2018, which had been copied to the Claimant, that costs as at that date amounted to £2,673, inclusive of VAT and disbursements, and a costs schedule had been annexed. By the time of the letter to the Claimant of 15 March 2018, costs had apparently risen to about £5,000. Finally, an updated costs schedule to

the date of the hearing, totaling £6,957 inclusive, was at pages 89/90 of R-2. It was submitted that such a figure was reasonable and proportionate, and that no good reason had been shown why such costs should not be paid by the Claimant.

16. In my judgment, and for the reasons already given in paragraph 13 above, the Claimant was indeed acting vexatiously and unreasonably in bringing this claim or seeking to re-instate her earlier claim, neither of which had any reasonable prospect of success; and also in then pursuing it, or at least in not responding to and accepting the offer contained in the Respondent's solicitors' letter of 15 March 2018, and further unnecessary costs have thereby been incurred. It seems to me to be fair and appropriate that the Claimant should be ordered to pay the Respondent's costs, particularly in the light of the commendably clear and reasonable terms of the costs warning letter. As to the amount of such costs order, and whilst I bear in mind that I have not heard from the Claimant, the time spent and sums claimed, as set out in their two costs schedules, by the Respondent's solicitors seem to me to be reasonable and appropriate. If the Claimant had wished to dispute the amount or basis upon which the Respondent's costs were calculated and claimed, that would have been clear to her from the costs schedule annexed to the Respondent's solicitors' letter of 20 February 2018, and she could also have done so in response to the costs letter dated 15 March 2018, nearly one month before this hearing. However, the Claimant has chosen not to do so. Finally, it is I think relevant that the Claimant has already received compensation from the Respondent in relation to the loss of her employment with them in the not inconsiderable sum of £11,200. In all the circumstances, I order the Claimant to pay the Respondent's costs in the sum of £6,957.

Employment Judge Barrowclough

25 April 2019