EMPLOYMENT TRIBUNALS

Claimant: Mrs R Ley

Respondent: London Borough of Sutton

Heard at: **London South (Croydon)** **On: 16 May 2018**

Before: **Employment Judge John Crosfill**

Representation

Claimant: No appearance or representation

Respondent: In Person

JUDGMENT

1. The Claimant's claims are struck out in their entirety pursuant to rule 37(1)(d) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

REASONS

1. The Claimant was dismissed by the Respondent. On 12 November 2015 she presented an ET1 to the Tribunal. Since then there have been 5 preliminary hearings either in person or on the telephone in order to clarify the claims and make arrangements for a final hearing (that number does not include 2 hearings adjourned in advance to accommodate the Claimant's ill-health). The Claimant failed to attend the last of those hearings on 1 August 2017 and notified the tribunal that she would not do so just 45 minutes before the hearing. At that hearing Regional Judge Hilderbrand ordered that the claim be stayed until the Claimant provided medical evidence directed at her failure to attend and additionally on the prognosis of her being able to effectively prosecute and conduct these proceedings. When the Claimant failed to take any steps to do so the Respondent, by a letter dated 26 January 2018 applied to strike out the claim on the basis that (1) the Claimant had failed to comply with orders of the tribunal, (2) that the Claimant had failed to prosecute her claim, and (3) that a fair trial was no longer possible. It was that application that was before me.

2. At 2:00pm (the time given in the Notice of Hearing "NOH") the Claimant had not attended. I asked the clerk to make all possible enquiries and she was able to speak to the Claimant on the mobile telephone number on the file. The Claimant said that she did not know that there was a hearing. She said that she had changed her e-mail address from the one to which the notice of hearing was sent. She claimed that she had provided that address to the Tribunal orally at some time in December. She said that she was attending a funeral and would not be coming to the hearing. I then asked the clerk to bring the Respondent's representatives into the Tribunal room. I relayed what I had been told to Ms Winstone and her instructing solicitor who had attended.

3. The Tribunal's file disclosed that the Claimant had asked for a copy of REJ Hilderbrand's order by e-mail (using the address used for service of the NOH) on 30 October 2017. Her e-mail does not suggest that she has not previously received a copy of that order but that she could no longer locate an electronic copy. The content of the e-mail shows that she was aware of the need to provide medical evidence. The tribunal file shows that a copy of the order had been sent previously on 9 August 2017. A further copy was sent to her by the Tribunal on 16 November 2017. The Respondent's solicitor told me that having been copied in to the Claimant's e-mail she had sent a copy of the order in response. The Claimant was clearly using the e-mail address provided for service until as late as 30 October 2017.

4. There is no record on the Tribunal file of any contact with the Claimant by telephone or otherwise after 30 October 2017 and in particular no documentary evidence that the Claimant had notified the Tribunal or the Respondent that she had changed her e-mail address. The Respondent's solicitor was able to examine her file and she was able to tell me that other than the 30 October 2017 e-mail she had heard nothing from the Claimant.

<u>Service of the application/NOH</u>

5. Rule 86 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (hereafter references to a rule are references to those rules of procedure) provides for the delivery of documents to a party (by the tribunal or another party). That rule provides that a document may be delivered by sending electronic communication (rule 86(1)(c)). Where a party has given a postal address and an address for electronic communication documents may be delivered to either unless the party has indicated otherwise <u>in writing</u> that a particular address should not be used (Rule 86(3)).

6. Rule 90 provides for the date upon which a document should be taken to have been received. In the case of electronic documents they are deemed to have been received on the day they were sent <u>unless the contrary is shown</u>.

7. I am entirely satisfied that the Claimant has taken no proper steps to tell either the Tribunal or the Respondent that her e-mail address, in use throughout these proceedings, should no longer be used. As such I am satisfied that the Claimant was properly served (in accordance with the rules) with both the Respondent's

application and with the notice of hearing. There is no satisfactory evidence that they were not received by the Claimant and I proceed on that basis. I make an alternative finding below on the assumption that they were not received.

Should I proceed in the Claimant's absence?

8. Rule 47 provides where a party fails to attend a hearing or be represented a tribunal may dismiss the claim or proceed with the hearing in the absence of the party having taken into account all of the information available and having made enquiries as to the reason for any absence.

9. I did not consider it appropriate simply to dismiss the hearing on the basis that the Claimant had attended. I do consider that, assuming in the Claimant's favour, she had not received the Respondent's application and the NOH, the responsibility for that state of affairs is entirely the Claimant's. She has not taken the reasonable step of notifying the Respondent or Tribunal of her change of address. Nevertheless, I consider that simply dismissing the claim because of that default alone would be disproportionate. That, as my conclusions show, is not the case if the entire conduct of the claim is reviewed, but that is what I am invited to do in the Respondent's application.

10. I consider that in the circumstances of this case it is not in accordance with the overriding objective to adjourn the Respondent's application and that I should proceed in the absence of the Claimant. I reach that decision on the basis that I am not satisfied that the NOH was not received by the Claimant but even if I am wrong about that the NOH was properly served and any failure to receive it is another default by the Claimant in her dealings with the Tribunal. The procedural history of this case is described below. Progress has been glacial. After 2 years and 6 months it remains hard to see what claims the Claimant wishes to progress other than a straightforward claim for unfair dismissal which she has resisted having heard separately). The Claim had been stayed for over 9 months in anticipation of the Claimant explaining a previous failure to attend a hearing. Whatever her reasons for that failure there has been no attempt by her to comply with the terms upon which the stay would be lifted. When I have regard to the cost to the Respondent and the fact that some matters referred to by the Claimant go back to 2013 I consider that the interests of justice come down firmly in favour of proceeding in absence.

Merits of the application

11. Rule 37(1) sets out the circumstances when a tribunal may strike out a claim or response. If, and only if, the tribunal are satisfied that the applicant has established that the circumstances exist then the tribunal has a discretion whether or not to strike out the claim or response - ***Hasan v Tesco Stores Ltd*** **UKEAT/0098/16**. A claim may be struck out where it has not been actively pursued (see Rule 37(1)(d)). As that was the major plank of the Respondent's application I decided to deal with that part of the application first. The Respondent had prepared a chronology. I had read the file in advance of the hearing and I accept that the chronology and descriptions of events is accurate.

Rather than repeat that chronology I attach it as a schedule to this judgment.

12. It is clear from the chronology (and the ET1 and file) that the Claimant failed to set out her case with sufficient particularity at the outset. The Respondent's repeated complaints in that regard were accepted by my colleagues and were in my view entirely justified. It is also quite clear to me that to this day the Claimant has failed to clarify her case. In April 2017 the Respondent prepared a clear and helpful request for further particulars. The Claimant's response was entirely inadequate.

13. It is also clear from the chronology that the Claimant has repeatedly breached the orders of the tribunal. In August 2016 she was ordered by EJ Freer to comply with Orders of EJ Spencer, having failed to do so. On 29 November 2016 REJ Hilderbrand made an unless order requiring her to take certain steps. The Claimant failed to do so. It appears that (indulgently) a retrospective extension of time was granted. Ms Winstone flirted with the suggestion that that could be of no effect but recognised that it was likely to be thought of as a reconsideration.

14. The Claimant was invited to consent to having her dismissal based claims determined first. A hearing had been listed for that purpose but was vacated. The Claimant has actively resisted that entirely sensible case management suggestion.

15. On 1 August 2017 a preliminary hearing was held conducted by REJ Hildebrand. 45 minutes before the hearing was due to commence the Claimant sent an e-mail saying that she was not well enough to drive to the hearing. The hearing was ineffective. An order was made staying the claim until such time as the Claimant provided medical evidence for her failure to attend and importantly evidence that she would be able to manage the proceedings. That latter order was apparently made in the light of a number of other hearings which had to be adjourned and deadlines extended to cater for the Claimant's ill-health together with concerns expressed by the Respondent that they were being deprived of their right to a fair trial.

16. I am satisfied that that order was served upon the Claimant. The Claimant's e-mail of 30 October 2017 suggests that she would be attending an appointment with her consultant. The implication was that she would soon be in a position to provide the evidence requested and would seek to lift the stay on the proceedings. In fact the Claimant has done nothing whatsoever to supply the medical evidence nor has she taken any other step in the proceedings in the 9 months since REJ Hildebrand made his order.

17. I have regard to the following legal principles:

    17.1. The tribunal's power to strike out a case under rule 31(1)(d) should be exercised in accordance with the principles under the Civil Procedure Rules 1998 and in particular in accordance with the guidance in ***Birkett v***

James **1978 AC 297 HL -** see ***Evans v Commissioner of Police for the Metropolis*** **1993 ICR 151 CA**.

17.2. ***Birkett v James*** suggests that a case may be struck out in two circumstances:

17.2.1. Where there has been delay which is intentional or contumelious (disrespectful to the court) or

17.2.2. Where there has been inordinate and inexcusable delay giving a substantial risk that a fair hearing may not be possible OR which is likely to cause serious prejudice to the respondent

17.3. ***Rolls Royce plc v. Riddle*** **[2008] IRLR 873** makes it clear that ***Birkett v James*** identifies two separate circumstances when a claim might be struck out. Where there has been delay caused by intentional or disrespectful conduct a claim might be struck out even where a fair trial might be possible. Lady Smith described the two situations as follows:

> *"These principles appear to have been identified because of there being justifiable cause for concern about two problems of which a failure to actively pursue a claim may be indicative. The first is that it is quite wrong for a claimant, notwithstanding that he has, by instituting a claim, started a process which he should realise affects the employment tribunal and the use of its resources, and affects the respondent, to fail to take reasonable steps to progress his claim in a manner that shows he has disrespect or contempt for the tribunal and/or its procedures. In that event a question plainly arises as to whether, given such conduct, it is just to allow the claimant to continue to have access to the tribunal for his claim. That is a distinct and different matter from the second problem which is that if a claimant has failed to actively pursue his claim to an inordinate and inexcusable extent so as to give rise to a risk of real prejudice to the respondent if the claim were to carry on, then a question arises as to whether or not there can still be fair trial and if there is doubt about that whether the claim should then be prevented from going any further."*

17.4. Prejudice to a respondent is not inherent in any delay but must be demonstrated ***Evans v Commissioner of Police***

17.5. That said, prejudice may be established on the basis of delay as was recognised by Hofmann LJ in ***Evans v Commissioner of Police*** *"I accept that in the ordinary case the nature of the prejudice will usually be obvious. It may be, as has been said in the cases, that it is necessary to investigate the facts before memories have faded, not to allow hurt feelings to fester and to provide as summary a remedy as possible"*.

17.6. In deciding whether or not to strike out a claim it is essential to have regard to all of the material circumstances including the fact that striking out the claim is a draconian step of last resort ***Rolls Royce plc v. Riddle*** . The public interest in discrimination claims being fully ventilated is also a material factor ***Evans v Commissioner of Police*** per Steyn LJ (as was) para 12.

18. I would readily accept that many litigants struggle with articulating their claims. Equally many litigants are reluctant to shoehorn their grievances into the constraints of the statutes which confer jurisdiction on the tribunal lest some issue about which they feel strongly is lost. Only in an unusual case could the delay caused by grappling with these problems be described as intentional or disrespectful of the tribunal process. I consider the fact that the Claimant failed to provide a full response to the Respondent's clear and straightforward request for further information does evidence an unwillingness rather than an inability to clarify the claims in this case. The fact that that request was made in April 2017 18 months after the claim started provides additional evidence for that conclusion.

19. On a number of occasions the Claimant has failed to comply with the orders of the tribunal and on one occasion breach the terms of an unless order. The Claimant held a responsible position as a Senior Commissioning Officer when working for the Respondent. It is inconceivable that she did not understand that she was required to take steps to comply with those orders. Again I consider that that provides evidence that the Claimant was unwilling, rather than unable, to follow the directions of the tribunal. Such conduct is inherently disrespectful.

20. The matter which is by far of greatest significance is the Claimant's conduct since 1 August 2017 which has caused 9 months of delay. I am prepared to accept that it is possible that the Claimant's ill health is what caused her to be unable to attend the hearing of 1 August 2017. However, she would have been aware that her failure to attend that hearing would have caused inconvenience both to the Respondent and to the Tribunal (and it turn its other users). The Order of 1 August 2017 required the Claimant to provide medical evidence to support her explanation for her absence and to explain how she would be able to cope with the proceedings. The Claimant would have understood that until she did so no steps would be taken in the proceedings. It is clear from the Claimant's e-mail of 30 October 2017 that she understood that she was required to provide medical evidence. That e-mail also refers to the Claimant taking a holiday and from that I infer that her health was not such that it prevented her from complying with the order.

21. The Claimant has done absolutely nothing to progress her case since 30 October 2017 (even assuming generously that that e-mail was progress). 6 months have gone past without any contact from the Claimant. The narrative of the order of 1 August 2017 makes it clear that the Respondent was protesting about the effect of the delay. I find that the only explanation for the Claimant's failure to promptly deal with this matter is that the Claimant has decided not to take the steps necessary to comply with the requirements of the Tribunal to have the stay lifted. I catagorise that conduct as deliberate and it is disrespectful to the Tribunal, the Respondent, the individuals publicly accused by her of

discrimination and the other users of the Tribunal.

22. The Respondent says, and I accept, that the Claimant's former line manager, a person who she blames for much of her treatment, has left the Respondent's employment and they have no contact details for him. I do not consider this an insurmountable difficulty but it is indicative of the difficulties that arise where claims are needlessly delayed. It is a factor to which I have regard.

23. I take into account the fact that striking out the Claimant's claim may deprive her of a remedy for unlawful conduct. I understand that I am taking a draconian step in striking out the claims. I fully understand the public interest in having discrimination claims heard. However, none of those matters is sufficient to outweigh what I find to be intentional and disrespectful conduct by the Claimant in failing to properly engage with the tribunal process up to 1 August 2017 and thereafter simply ignoring the proceedings, further derailed by her non-attendance at a hearing, and the need to take steps to get them back on track.

24. I therefore decide the application on the basis that the delay in the proceedings was intentional and disrespectful. This claim has already used a significant amount of the tribunal's resources. The Tribunal file is in two folders is 6 inches thick and showing distinct signs of age. The orders and matters outstanding barely differ from those made at the very first preliminary hearing in early 2016. The case is still nowhere near ready for a trial. The fault for this lies almost entirely at the Claimant's feet. Taking into account all of the matters I have referred to, the chronology and documents on the tribunal file and even making all due allowances for the health difficulties the Claimant faces I have come to the conclusion that the balance comes down firmly in favour of striking out the claims.

25. Given this conclusion I will not deal with the alternative basis upon which the Respondent put its application.

Employment Judge John Crosfill
Date: 15 May 2018

IN THE EMPLOYMENT TRIBUNAL LONDON SOUTH CASE NO. 2303059/2015

B E T W E E N:

MRS ROSEMARY LEY

Claimant

-and-

LONDON BOROUGH OF SUTTON

Respondent

CASE

CHRONOLOGY

November 2013 Paul Feven becomes C's Line Manager

January 2015 Reorganisation to merge Adult and Children's Directorates of Social Services - consultation commences.

4th March 2015 Claimant brings Dignity at Work ("DAW") complaint against her line manager, following notification of ring fence arrangements in the reorganisation

9th April 2015 Claimant attends interview for new post, is not appointed.

21st May 2015 Claimant is written to with redundancy arrangements.

2nd June 2015 Claimant says she will not appeal redundancy notice

29th June 2015 Claimant submits grievance

9th September 2015 DAW outcome (not upheld)

24th September 20915 Claimant appeals outcome of DAW

30th June 2015 Claimant's effective date of termination

12th November 2015 ET1 Lodged

23rd November 2015 Grievance outcome with report from external investigator

26th February 2016 Claimant appeals outcome

29th February 2016 Appeal against DAW outcome (not upheld)

1st March 2016 Closed Preliminary Hearing (PH) and CMO (EJ Spencer) making orders for C to comply with by 4th April 2016 (medical evidence, details of discrimination claims, list of issues and schedule of loss).

26th April 2016 Claimant submits 'Particulars of Claim', list of issues, schedule of loss and DWP PIP award letters. She also sends copies of grievance letters and correspondence with R.

9th May 2016 Claimant says she is too unwell to attend further telephone PH tomorrow. It is postponed (with the agreement of R). Claimant is asked to provide a medical certificate.

3rd August 2016 Telephone PH before EJ Freer. C is ordered to comply with the Order (pars 3&4) of EJ Spencer made on 1st March, by the 2nd September 2016. An in person PH is set for 19th September 2016.

19th September 2016 PH before EJ Hildebrand. Hearing date is set down (3 days) to hear complaint about redundancy, for the 10 – 12 May 2017. Claimant is ordered to provide medical records by 2nd October 2016, and indicate whether she agrees to the split hearing.

16th November 2016 R writes to the tribunal to apply for an Unless Order in the light of the Claimant failing to comply with the Order of EJ Hildebrand.

29th November 2016 Claimant is Ordered that Unless she complies with pars 2 & 3 of the 19th September Order, her claim will stand struck out without further Order at 4.30pm on the 8th December 2016

8th December 2016 (Time: 17.49) Claimant asks for more time to fulfil the Order on the basis of ill health.

9th December 2016 R objects, stating that the Claimant has left it too late to apply for more time and that her claim should stand struck out.

19th December 2016 EJ Hildebrand orders that the Claimant's application for more time is granted. She now has until 31st January 2017 to submit her medical records.

23rd March 2017 Claimant says that she cannot attend the PH set for the 30th March 2017 because she is unwell and in hospital. R does not object. The Hearing is postponed.

10th April 2017 Telephone hearing before EJ Balogan. Orders the Claimant to obtain and present a report from her GP relating to the individual and cumulative effect of her conditions by 8th May 2017. R is ordered to provide requests for further particulars and C is order to reply by 8th May 2017. Claimant indicates that she rejects the proposal for a split hearing, but no decision taken until the claim is clarified.

27th April 2017 R submits requests for further particulars of claim (C responds with further particulars of claim which the Respondent says are still inadequate for it to understand her claim).

28th April 2017 R concedes that C is disabled by reason of her rheumatoid

arthritis from aprox. 2007 and as a result of fibromyalgia from September 2012.

16th June 2017 Claimant agrees to a split hearing but only on the basis that the historical complaints against her line manager are heard first.

1st August 2017 PH before REJ Hildebrand. 45 minutes before the hearing the Claimant emails the Tribunal to say that she cannot attend as she is not well enough to drive. The Claim is stayed pending the Claimant submitting medical evidence relating to the Claimant's medical condition, its affect on her ability to attend hearings and on her capacity to manage the litigation.

26th January 2018 R applies to strike out the Claimant's claim on the basis of failure to adhere to tribunal orders and failure to prosecute her claim. Nothing has been heard from the Claimant since the 1st August Hearing (which she did not attend). In the alternative, it requests a further Unless Order. The Tribunal reminds the Respondent that the case is stayed.

14th April 2018 Notice of PH is issued, for the 16th May 2018.