EMPLOYMENT TRIBUNALS

Claimant: Mrs P Darroux

Respondent: Sunridge Housing Association

JUDGMENT

1. The claimant's claims are all struck out.

2. The full hearing listed for **3-7 February 2020** is cancelled.

3. By a separate Case Management Order, which should be read with this Judgment, the respondent's application for costs has been listed to be heard on **Monday 3 February 2020** at **10 am** at the Watford Employment Tribunal.

REASONS

The immediate reason

4. The immediate, material reason for strike out is that the claimant has failed to comply with case management orders made on 17 July 2019. She has failed to show cause why her claims should not be struck out. The claims are no longer capable of fair trial.

5. In order to render what I have called 'the immediate reason' understandable, it seems to me right in the interests of justice to set out the path by which I have reached the above conclusions. Where page numbers are given below, they refer to the bundle available at the hearing in July 2019.

The background history

6. The tribunal has heard no evidence and made no findings of fact. It appears from the documents that the following is an uncontentious historical summary. The claimant had been employed by the respondent as Home Manager of a residential home for about 12 years. She was dismissed on 1 April 2014. The stated reasons for dismissal related to performance of certain management duties. On 4 July she presented claims of unfair dismissal and race discrimination.

7. According to the respondent, after the claimant's dismissal, continuing enquiries revealed financial discrepancies. In due course, the respondent reported those discrepancies to the police, after which the claimant was charged with theft. She was tried at Wood Green Crown Court in 2016 and convicted. The broad allegation was that the claimant had completed inflated claims for payment for overtime and other elements of pay, which had been processed by the respondent's payroll provider, and paid from the respondent's funds into the claimant's bank account over a period of years. The claimant pleaded not guilty, and maintains strongly her innocence of the charges and of any wrong doing.

8. The claimant was sentenced to sixteen months imprisonment. She appealed against her conviction, and in due course, her appeal was allowed by the Court of Appeal, and the conviction quashed. The bundle at the July 2019 hearing contained a transcript of the judgment of the Court of Appeal (Case 2016/03297/B1, 151-164).

9. The Court of Appeal wrote that it quashed the claimant's conviction with little enthusiasm. It recorded that the jury had found her to be dishonest. Paragraphs 39, 65 and 69 of the judgment indicate that her conviction was quashed because she was charged, tried and convicted of the wrong offence in law.

10. The Employment Tribunal proceedings were presented on 4 July 2014, and stayed pending the conclusion of all the criminal proceedings, and the imprisonment of the claimant. Preliminary hearings were listed on 23 April 2018 and 10 August 2018, neither of which the claimant attended. On the second date, Judge Manley listed a further preliminary hearing for 21 September.

Hearing in September 2018

11. There was then a case management hearing on 21 September 2018, before Employment Judge Bedeau (24-30). The claimant and Mr Brotherton were present. His case management order was sent to the parties on 17 October 2018. He listed the hearing for the five days starting Monday 15 July 2019. As appeared later, his order did not in fact specify that the hearing would start on the first of the five days, and did not set a full case management timetable.

12. Between October 2018 and the start of the July 2019 hearing, the tribunal received a modest amount of correspondence from the parties. The claimant sent the tribunal three statements dated 9 November 2018. Mr Brotherton, of Croners, on behalf of the respondent, wrote to the tribunal to state that he had difficulties serving the bundle because he did not have the claimant's new home address. He notified the tribunal in due course that he had served the bundle by e-mail. He also wrote to state that the claimant had declined to exchange witness statements.

Hearing in July 2019

13. The tribunal convened to hear the case on Monday 15 July 2019. The claimant did not attend. We read the bundle and statements and dealt with case management. It was quickly apparent that the respondent had not given full disclosure and we identified a number of documents which were referred to in the

respondent's witness statements, notably Board minutes and emails, of which disclosure was plainly relevant but had not been given.

14. The respondent had, on that day, not served its witness statements, because it had been unable to agree a mutual process of exchange. I asked it to do so unilaterally (which is often the best course if only side is represented). Mr Hoyle of Croners said that he did so the same (Monday) afternoon by email.

15. It is the usual practice for tribunal staff to contact parties on the last working day before a hearing to remind them of the hearing. The tribunal file showed that a member of the tribunal's listing staff had spoken to the claimant on the previous Friday (12 July) and the claimant had confirmed her attendance. We asked a clerk to telephone the claimant on her mobile on the Monday morning but the clerk could not get through. Although the tribunal was entitled to start the full hearing at 2pm, it seemed to us as a matter of fairness best to adjourn to the following morning. The tribunal e-mailed the claimant to tell her that that had happened and that the hearing would start at 10am the next day, even in her absence. The email was sent to the address which the claimant later confirmed was correct.

16. The tribunal was ready and entitled to start the hearing at 10 am the next morning, Tuesday 16 July. The claimant did not attend. Mr Hoyle arrived with documents to make up the shortcomings in disclosure which had been identified the previous day. A further case management matter arose, and at about 10:40 am we adjourned for 30 minutes, with a view to starting evidence after that.

17. I suggested to Mr Hoyle that he should make one last effort to telephone the claimant before the 11:10 am start. Mr Hoyle reported after 11.10 am that he had spoken to the claimant, who was adamant the hearing was due to start the following Friday, which was the fifth day of the listed five. Mr Hoyle said that he was then contacted by telephone by a Mr Leachman, who had said that he represented the claimant, and asserted that he had it "in black and white" that the claimant had been told not to attend until Friday. Mr Hoyle volunteered that he had googled Mr Leachman and had found that he (or someone of the same name) had been convicted some years before of unlicensed representation in the immigration tribunal. (That assertion did not assist us, and we did not, the following day, ask Mr Leachman if that was indeed the same person: it is recorded here for the sake of completeness only).

18. After some discussion, the tribunal conducted two case management hearings by telephone with the claimant. The judge telephoned her on her mobile number (the same one on the ET1) and put the tribunal room phone on loud speaker.

19. The claimant informed the tribunal that her e-mail account had been out of order the previous day and had just been repaired, so she could not have received either of the tribunal's e-mail of Monday afternoon, or the witness statements sent by Mr Hoyle at about the same time. The claimant said that she could not reach the tribunal with Mr Leachman that afternoon.

20. We therefore adjourned until 10 am on the third listed morning, Wednesday 17 July, repeating to the claimant that the tribunal would start in her absence if she

was not there. She was advised to arrive early, and was told that the tribunal waiting rooms were open from 9 am. Those instructions were confirmed by e-mail from the tribunal the same afternoon.

21. The claimant arrived at 10:20 am on the third day. She was accompanied by Mr Leachman, who represented her. Although he used legal terminology, Mr Leachman was plainly inexperienced in Employment Tribunal practice, law and procedure. A number of matters arose.

22. The claimant's explanation for not having attended was that she had read paragraph 1 of the case management summary of Judge Bedeau as stating that the hearing might start on any day between July 15 and 19. While we agree that the order did not say in terms that the hearing would start on 15 July, it did say that this was a five day case, and it did not say that it could start on any of the listed days.

23. The claimant insisted that she had been telephoned on Friday 12 July by a member of tribunal staff and told not to attend until 19 July. It was explained to her that listing staff routinely telephone parties the day before their hearing is due to start, to confirm attendance and record on the file that they have done so. That was the case with this file. Furthermore, there was no evidence on the file of a judicial decision to change the listed start date. Applying the tribunal's knowledge and experience of its own systems and procedures it was unlikely in the extreme that a member of staff would telephone the claimant on 12 July to tell her to attend on 19 July. Mr Leachman said that Judge Bedeau's order said plainly that the hearing could start on any day of the listed five days. It did not.

24. The tribunal noted the sudden default in the claimant's e-mail account. That is a frequent regrettable occurrence in the preparation for litigation.

25. The claimant agreed that she had not prepared a witness statement. Judge Bedeau's order had omitted to set a time table or direction for service of witness statements. That was plainly an oversight. Croners might at any time after 17 October have asked the tribunal to remedy it, but had not done so. That placed us in difficulty; the claimant could not be faulted for failing to comply with a procedural step which she had not been ordered to comply with.

26. The claimant insisted that she did not have a copy of the bundle; that she had not been sent a hard copy; and that if she had been sent one by e-mail she had not received it. There was no evidence in the tribunal of delivery by either method of the bundle; and we would regard it as imprudent to deliver a 200 page bundle by e-mail to a claimant in person.

27. Likewise, the claimant said that she had not received the respondent's witness statements until handed them that morning. She accepted that she had received Mr Hoyles' e-mails, but without attachments.

28. Mr Hoyle suggested that the claimant could take the afternoon of 17 July to read the statements and bundle, and start the following morning.

29. There was one further case management difficulty. Judge Bedeau's order had listed the 12 acts of racial discrimination alleged by the claimant to him at the

hearing in September 2018. The claimant had not given any evidence about any of them in any of her statements dated 9 November 2018. She agreed that she had not. She said that she had thought that it was not necessary to do so, because she understood that Mr Brotherton, on behalf of the respondent, had told Judge Bedeau that the respondent agreed that it had discriminated against her in each of those 12 respects, so it was not necessary for her to give evidence about them, only to give evidence about unfair dismissal.

30. There was absolutely nothing in the order of Judge Bedeau which would have given the claimant the slightest reason to believe that that was what had happened. On the other hand, it was not impossible that that was what she genuinely believed. If that were the case, taken with all the other matters, it was evident that her level of understanding and her ability to master the paperwork of this case were very limited indeed, a matter which, in accordance with the overriding objective, we had to take into account. In that context, Mr Hoyle asked the tribunal to ask the claimant if she had any reading or learning difficulty. While that seemed a strange question to put to a former manager of many years' service, the judge asked the claimant if she wanted to say anything in reply and she did not.

Adjournment

31. It seemed to us that the tribunal had been taken at length through the process which had led up to the hearing on 15-17 July. There was a risk of engaging in a trial of satellite procedural issues. The reality of the matter by the late morning of 17 July was that it did not seem to us possible to conduct a fair hearing in the circumstances and we adjourned part-heard to the first available date for a five day hearing, which was the following February.

32. We were anxious to ensure that all parties left the room with all procedural steps dealt with, so that there could be a guarantee that the hearing in February 2020 would be effective. We discussed with the parties such further case management as was required and I signed an order on those matters the same afternoon. It was sent out by email at 12.51 on 21 July.

33. I also offered brief guidance to the claimant and Mr Leachman about aspects of the case. One was that they might benefit from observing a tribunal hearing. One was to tell Mr Leachman that the tribunal operated within the framework of its 2013 rules, not CPR. I told the claimant that the tribunal would not and could not deal with what she saw as her right to compensation for the process of wrongful trial and conviction.

34. Finally, I explained to the claimant that Polkey principles might be relevant in this case in at least two respects. The first was that the period of compensation might be limited to that period which would have led up to her dismissal for alleged financial irregularities, had she still been employed when those came to light. The second was that as the over-arching principle of compensation is such sum as is "just and equitable" the tribunal might take the view that the sum mentioned by the Court of Appeal of £49,000.00 which the claimant was alleged to have misappropriated, might well be set off before any award of compensation for unfair dismissal was made.

Subsequent events

35. The July order listed a telephone hearing to take place on 5 November, so that I could receive an update on compliance with the July orders, and on the state of preparation. Due to administrative errors, notice of the call-in details was not sent to the parties until 12.10 on 4 November, and then technical difficulties prevented the hearing from taking place.

36. On 5 November, on my instruction, a short letter was sent to the parties to ask about primarily the state of case preparation. That crossed with a letter of 5 November from Mr Hoyle of Croners, which said that the respondent had complied with the July orders, but the claimant had not, and applied for strike out. By email of 8 November Mr Hoyle repeated these points.

37. A letter dated 8 November was also received from the claimant, although its style and content appeared to be those of Mr Leachman. It did not answer any of the questions in the tribunal's letter of 5 November. It said nothing about either side's compliance with the July orders. It asserted at some length that the conduct of the hearing in July had been in violation of the claimant's rights. It referred to, among others, the Bill of Rights 1689 and the Tonnage and Poundage Act 1640. It was difficult to understand. It was of no assistance.

Show cause procedure

38. On 13 November the tribunal invited the claimant to show cause why the claim should not be struck out due to non-compliance with the orders of July, and failure to pursue the claim. It set a timetable for the parties' responses, and said that I would deal with the correspondence after my return from annual leave on 3 December.

39. On 20 November the claimant sent the tribunal a one-page witness statement, to which she attached three items of correspondence. The statement said, for the first time, that the claimant had not received the Order of 17 July. The tribunal's file shows that it was sent to the claimant by email at 12.51 on 21 July.

40. The claimant said that she attached what she called a witness statement from the Care Quality Commission. In fact, she attached correspondence of August and September 2019 which she had had with CQC under the provisions of the Freedom of Information Act, in which she inquired about events of 2013 and 2014.

41. The claimant wrote that she had been 'instructed to revisit the report made by Judge Manley' which she would complete before 'the submission deadline of 3 January 2020.' I do not know what this refers to. Judge Manley last heard this case in August 2018. I have extended no deadlines to 3 January 2020.

42. The claimant said nothing in response to paragraphs 3.3, 3.5, or 3.6 of the July Orders, which directed her to serve evidence about racial discrimination and remedy.

43. On 21 November Mr Hoyle of Croner repeated his request for strike out, and repeated that the respondent applied for costs.

Discussion

44. Rule 37 of the tribunal's rules provides, so far as material,

> 'At any stage of the proceedings, either of its own initiative or on the application of a party, a tribunal may strike out all or part of a claim … for non-compliance with .. an order of the Tribunal; (d) that it has not been actively pursued; (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim .. (or the part to be struck out).'

45. In the exercise of its discretion, the tribunal must have regard to the over riding objective, including the requirement, so far as practicable, to put the parties on an equal footing.

46. The claimant was present, as she concedes, with a representative, when Orders were made on 17 July 2019. On the same day she confirmed that her email address was accurately held by the tribunal records. The Orders were sent to that account on 21 July. The tribunal's letter to the parties of 5 November started, 'Have you complied with the Orders of 17 July (sent to you on 21 July)?' The claimant's long letter of 8 November did not answer or challenge this question. I find that the claimant had knowledge of the tribunal's orders at the hearing on 17 July, and access to a written copy on 21 July. She has not complied. She has failed to give any reason for her non-compliance. She has failed to show cause why her claim should not be struck out.

47. The failure to comply with paragraph 3.3 of the July Order is particularly serious, because in the absence of the claimant's evidence on race discrimination, the respondent does not know what it has to answer, save a series of bare assertions. Given in particular that the material events took place before April 2014, it is impossible to see how those claims can be the subject of a fair trial.

48. I have given anxious consideration to whether to permit the claim for unfair dismissal to proceed. The July orders made provision for the claimant's evidence on unfair dismissal to stand. Her default on unfair dismissal is limited to remedy. I have considered whether to proceed by striking out the claim of race discrimination only; and by limiting the claim of unfair dismissal at the first stage to liability only, at which the claimant would be limited to her evidence of 9 November 2018.

49. On balance, I have decided not to take this course, and to strike out the claim of unfair dismissal as well. I do not accept that I would do justice to the respondent by exercising the tribunal's case management powers in a way which would have the result that the tribunal in effect worked around the claimant's non-compliance with its orders. Preparation of a schedule of loss is an essential element of a claim of unfair dismissal. The claimant has had a very long time to do so. She has had access to an adviser and to the internet. She has failed to do so, and has failed to address the issue or show cause in correspondence. The claim for unfair dismissal is struck out.

Next step

50. A separate case management order has the effect of reducing the time allocated to this case to one day, at which, if it is pursued, the respondent's application for an order for costs will be decided.

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Employment Judge R Lewis

Date:…5/12/19……

Sent to the parties on:

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For the Tribunal:

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