EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss Manjeet Puar	**v**	Duncan Lewis Solicitors Limited

PRELIMINARY HEARING REMITTED BY THE EMPLOYMENT APPEAL TRIBUNAL

Heard at: Watford **On**: 16 January 2020

Before: Employment Judge Bedeau

Appearances

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

JUDGMENT

The strike out order is set aside as a fair trial is still possible.

REASONS

1. At the preliminary hearing on 9 February 2018, one of the issues I had to hear and determine was the claimant's application to set aside the strike-out order issued on 18 August 2017. After hearing evidence and submissions, I set aside the order, judgment was sent to the parties on 7 March 2018. Following a request by the respondent, written reasons were sent to the parties on 19 October 2018.

2. The respondent successfully appealed my judgment before Mr Justice Poole on 19 November 2019 and the case was remitted to me to consider the claimant's application afresh, but I should not take into account the claimant's amended particulars served on 22 February 2018, paragraph 47.

Evidence

3. I heard evidence from the claimant. Unlike at the previous hearing, the respondent produced a bundle of documents comprising of 176 pages. References will be made to the documents as numbered in the bundle.

Findings of fact

4. The respondent is a firm of solicitors. It employs approximately 500 people and 200 consultants across 14 offices in the United Kingdom. Its main office is in Harrow.

5. The claimant commenced her employment with the respondent on 3 August 2016, as a caseworker and was the subject of a six months' probationary period. She worked at the respondent's Luton office. Her employment was terminated on 8 December 2016 within the probationary period, for reasons to do with her performance and conduct.

6. In her claim form, presented to the tribunal on 2 March 2017, she claims wrongful dismissal, discrimination because of race, religion or belief, and unfair dismissal. At a preliminary hearing held on 1 June 2017, before Employment Judge Skehan, although the claimant was not present, she acknowledged, in writing, that the tribunal did not have jurisdiction to hear and determine her unfair dismissal claim as she did not have two years, qualifying period of service. Accordingly, that claim was dismissed upon withdrawal.

7. Although the claimant told me that she has lodged an appeal against the EAT judgment in the Court of Appeal, no date has been fixed to hear her case. She initially asked for this hearing to be adjourned pending the outcome of her appeal, however, as this case is already nearly three years old, she was content for it to proceed and to give evidence.

8. She has six years' experience in civil and five years in family litigation. She told me that she also worked for five years in criminal law, and knows where to look for legal information and advice. In her claim form she stated that her e-mail address is manjeetpuar.advocate@gmail.com. She accepted in cross-examination, that she could access her g-mail account using a web browser.

9. As already stated, the case was listed for a preliminary hearing in private on 1 June 2017. On 31 May 2017, the claimant e-mailed the tribunal using her g-mail account stating the following:

> "Dear clerks to the tribunal
>
> I have been offered a new role working in Cambridgeshire. I made them aware at interview stage and yesterday that I am not available on 1 June 2017. They have however, just telephoned me to tell me that I must start the role tomorrow as the inductions are taking place tomorrow and Friday.

> I have asked that I be allowed to attend part of the induction and leave at 1pm to attend Watford at 2pm. However, the drive will be from Huntingdon to Watford and I am not sure if I will be able to attend the hearing on time. I am waiting for the employers to contact me to confirm that I can attend part of the day for the induction. I therefore request the tribunal either push the hearing back to 3pm or list it for another day.
>
> It has taken me nearly six months to secure employment after dismissal, I do not want to risk losing this job. I would be very grateful if the court would assist me on this point.
>
> I apologise for any inconvenience caused to the tribunal and the respondent.
>
> I have copied the respondent into this e-mail and will address them in a separate e-mail. I am grateful to the tribunal to hear my application at this hearing. I have documents to file with the court which I will do so today." (page 95 of the bundle)

10. She emailed the tribunal again at 17.34 that evening stating that she would be starting her induction in her new job at 9.30am the following day. Further, as a litigant in person she would need legal representation. (page 96)

11. She said in evidence that her new job had already been delayed by a week and she was told by the recruitment agency, Venn Group, on 31 May 2017, that if she did not attend her induction due to take place on 1 June 2017, she would lose the position. She did not, however, tell the agency that she had an Employment Tribunal hearing on 1 June. She was sent an itinerary for her first day, 1 June 2017, from 9am to 5pm. (page 97)

12. She said that the Department for Work and Pensions would have penalised her if she did not take up the post. When I looked at the DWP documents sent to her in relation to Universal Credit, it states:

> "If without good reason, I am not available as described, my Universal Credit payments will be cut by £10.40 per day for up to 91 days."

13. She could have informed DWP of her Employment Tribunal hearing on 1 June 2017 at 2pm, to avoid a cut in her Universal Credit payment. In my view, attending an Employment Tribunal or a Court hearing provides a "good reason" for not attending work on a particular day.

14. She repeated her request for a postponement of the hearing as she was due to her start her new job. The respondent's representatives objected to the application on three bases, namely the notice of hearing was sent on 16 March 2017, enough time for the claimant to make the necessary alternative arrangements; counsel's fees had already been incurred; and the claimant had not given a sufficient reason why she would be unable to attend the hearing. (page 99)

15. At 11:43 on 1 June 2017, the tribunal informed the parties, by email, that the hearing would go ahead on that day in the afternoon at 2pm. The tribunal communicated with the claimant via her g-mail account. (page 100)

16. The claimant told me that she was aware that she had correspondence from the Employment Tribunal in relation to her postponement application. She said in her witness statement, paragraph 14, that she had called the tribunal at least 30 times in the morning of the hearing stating that she was unable to attend but had been informed that the Judge had ordered all parties to attend. She later checked her e-mails and sent a screen shot to the tribunal, evidencing the times she called.

17. The e-mail from the tribunal on 1 June at 11:43, in the morning, clearly stated that the hearing would proceed. The claimant said that she did not believe that at the time there was anything wrong with her g-mail account.

18. The hearing went ahead as listed on 1 June at 2pm before Employment Judge Skehan. The claimant did not attend, nor was she represented. Mr Isaacs, of counsel, attended. As already stated, it became apparent during the hearing that the claimant was not bringing an unfair dismissal claim and it was dismissed upon her withdrawal. The Judge set out the respondent's understanding of the claimant's claims being wrongful dismissal; race and religious discrimination, the claimant alleged that she was treated less favourably because she is a Sikh, and a possible victimisation claim.

19. The claimant was ordered, within 14 days from receipt of the order, to provide to the respondent and to the tribunal, an amended document setting out particulars of each and every claim; the date of the allegation; what was said or done or the gist of what was said or done; who was present; identifying where that claim is contained in the original claim form; and to specify the nature of each allegation, ie direct discrimination on the grounds of race, direct discrimination on the grounds of religion or victimisation.

20. The respondent was given leave to amend its response 14 days following receipt of the claimant's further information. The hearing was relisted for 21 August 2017, with a time estimate of half a day and the claimant was ordered to notify the tribunal and the respondent if she was unable to attend the hearing.

21. At the hearing the respondent stated its intention to pursue an application for costs against the claimant because of her non-attendance and that it should be considered at the re-listed hearing. It was ordered to provide a schedule of its costs within 14 days from the date of receipt of the case management orders. (page 41 to 43)

22. On 13 June 2017, Mr Dominic Coyle, legal advisor on behalf of the respondent, wrote to the tribunal and copied in the claimant. He stated:

> "We write further to the preliminary hearing held on 1 June 2017 and the order of the tribunal to provide details of the respondent's costs thrown away. We can inform the tribunal that the respondent's costs thrown away for attendance at the hearing are in the sum of £750 only, representing counsel's fees. We have attached counsel's fee note for his attendance.
>
> We have copied the claimant into this e-mail." (page 102)

23. The claimant acknowledged that she had seen Mr Coyle's e-mail. She e-mailed the tribunal on 25 June 2017, stating that she had not received a copy of EJ Skehan's orders.

24. The claimant said in evidence that during this time, in late June and following, she had limited access to her e-mails and that her mobile phone had crashed. She could access her g-mail account through her laptop, and had use of another phone. She did not tell the tribunal, at the time, that she could be contacted in other ways.

25. On 5 July 2017, the tribunal sent out to the parties, the case management orders made by EJ Skehan. In the claimant's case, it was sent to her g-mail account, but she said that she could not remember receiving orders, either by post or by e-mail.

26. On 28 July 2017, she e-mailed Mr Coyle about some interaction she had with a member of staff against whom she alleged bullying. The e-mail was sent on her g-mail account. (pages 105 to 106)

27. She told me that by 5 July 2017, she knew there had been orders made by EJ Skehan but not the content. In her e-mail dated 28 July 2017, to Mr Coyle, she did not ask him about the Judge's orders. She said that Mr Coyle did not inform her about the outcome of the hearing or about the orders. She would normally leave home at about 6:30 in the morning and it was not until September 2017 when she got a new mobile phone and did not set up her g-mail account on it. By then her case had been struck out.

28. She admitted that she did not make any further attempts to find out more about the Judge's orders because she had been unemployed for six months and was more interested in retaining her new job. Between 25 June to 18 August 2017, she could not remember whether she had accessed her g-mail account after 28 July 2017.

29. On 4 August 2017, Mr Coyle e-mailed the tribunal and copied in the claimant with reference to the case management orders, in particular, that the claimant should provide to the tribunal and to the respondent, an amended document setting out details of every claim she wished to pursue, by not later than 19 July 2017. He confirmed that he had not receive correspondence from her relating to her claims as amended. He asserted that she failed to comply with the tribunal's orders; was not actively pursuing her claim; and that her conduct amounted to unreasonable behaviour. Accordingly, her claims be struck out.

Alternatively, an unless order be issued for the provision of the further information within a further seven days or her claims be struck-out. (107)

30. The claimant said that she could not recall receiving Mr Coyle's e-mail. She acknowledged that the tribunal had sent her case management summary and orders, but she did not receive them, nor did she receive the tribunal's later e-mail attaching the orders dated 14 August 2017. (108 to 110)

31. On 14 August 2017, Employment Judge Manley issued an unless order in the following terms:

> "The claimant is to comply with tribunal orders sent to the parties on 5 July 2017 (copy enclosed) by 17 August 2017 or the claim will be struck-out without further order" (45)

32. It was sent by e-mail as an attachment by the tribunal on 14 August 2017 at 13:37. The sender of the documents stated that he had omitted the document in the original e-mail and apologised for the confusion caused. (44)

33. On 18 August 2017 at 11.33, the tribunal e-mailed Mr Coyle and the claimant using her g-mail account, a document entitled, "Confirmation of dismissal of claim". This stated:

> "Further to the unless order sent to the parties on 14 August 2017, which was not complied with by 17 August 2017, the claim has been dismissed under rule 38.
>
> The hearing listed on 21 August 2017 has been cancelled". (Pages 47 to 48)

34. On 18 August 2017, at 12:08, the claimant wrote to the tribunal following her receipt of the letter dismissing her claims. She stated that she had not received case management orders following the hearing on 1 June 2017 and had written to the tribunal on 25 June 2017 asking that the orders be forwarded to her, but they were not, and the respondent did not inform her about the orders. She stated that on 3 July 2017, she called the tribunal 13 times to find out what was happening but did not get through until 4:50pm and was neither told that the matter had gone part heard nor about the orders made. The information she was given was that the hearing was adjourned until 21 August 2017 and the respondent's cost application. She stated that she had only seen the respondent's strike-out application and the unless order on 18 August 2017. She asked that the strike out order be set aside. She maintained that she was not aware of the orders made by EJ Skehan. (page 111)

35. Later, on 18 August 2017, at 15.54, she emailed the tribunal copying Mr Coyle, stating:

> "Please see the attached document to be placed before the Tribunal Judge.

> Kindly please again note that I am unavailable on 22nd August 2017, 01st September 2017 and will be moving to new accommodation in September/October 2017. I have a valid claim with merits against the respondent.
>
> As I have stated in previous correspondence I have limited internet and can confirm I have not received the court orders by email or post. I will try to log in as often as I can. I ask the tribunal Judge to consider my accessibility to the internet pending and during the move. Please also note that once I have moved I will have to make arrangements for post to be delivered to me too.
>
> I look forward to hearing from the Tribunal as a matter of urgency." (113)

36. The attachment was her application to set aside the dismissal and for an extension of time to comply with the orders of 1 June 2017 in which she stated that the hearing went ahead in her absence despite requests for an adjournment. She had written to the tribunal on 25 June 2017, stating that she had not received the case management orders for the hearing on 1 June. The respondent's solicitors failed to bring the case management orders to her attention at the time when she was in correspondence with them. She made 15 calls to the tribunal about the orders on 3 July 2017 but was only able to speak to a clerk at 4.45pm who told her that the orders have not yet been typed, that the preliminary hearing had been adjourned and that costs would be considered at that hearing. She stated that she had started a new temporary role as a Child Care Paralegal within a very busy department and that it was not possible for her to call the tribunal every day. In preparing for the adjourned hearing, she logged on to her emails to discover the Confirmation of dismissal of claim dated 18 August 2017 and the respondent's application for an unless order dated 4 August 2017, which was, she asserted, ambiguous as it did not provide her with a compliance date which meant that should could respond at "her earliest convenience." She asked that the dismissal be set aside as she was unable to attend the hearing on 1 June 2017 and that she be given time to comply with the orders. She objected to the respondent's costs application. (114-116)

37. She said she had stopped taking medication and that the effects of not doing so was the reason for not reading her e-mails. She resumed on or after 21 January 2018.

38. She wrote in paragraphs 22 and 23 of her witness statement, the following:

> "22. Due to the treatment I had endured, I was left battered and bruised. I am currently suffering from short-term memory loss, I become confused and cannot always absorb the information before me when reading or listening. I am suffering with headaches too from the stress and the ordeal. I find myself staring into space and when at work I find my mind drifting off and thinking about everything that has happened to me.
>
> 23. I do not know the long-term implications of the memory loss and confusion. My GP prescribed me medication, the medication would make me drowsy and sleepy."

39. She did not produce any evidence of the medication she was taking at the relevant time, although she said she might have photocopies of her prescriptions.

40. On the same day, 18 August 2017, at 14:31, Mr Coyle wrote to the tribunal, copying in the claimant, as the claimant had copied in him in her e-mail, to confirm that both parties received a copy of the tribunal's orders on 5 July 2017. He also confirmed that the respondent's application for an unless order was copied to the claimant on 4 August 2017 and that she was copied in the tribunal's unless order on 14 August 2017. On that basis, the respondent could see no reason why she had not been in receipt of any of the correspondence. It was its contention that she was fully aware of the correspondence and had been given a reasonable time in which she should comply with the tribunal's orders. Her conduct was evidence that she was not actively pursuing her claim. In addition, her conduct in failing to comply with the tribunal's orders amounted to unreasonable behaviour. For those reasons, the respondent objected to any application to reconsider the tribunal's dismissal of the claims. (page 112)

41. Following on from his e-mail, again on the same day, at 15:54, the claimant e-mailed the tribunal and copied in Mr Coyle. She wrote, amongst other things, the following:

> "As I have stated in previous correspondence, I have limited access to the internet and can confirm I have not received the court orders by e-mail or post. I will try to log-in as often as I can. I asked the tribunal Judge to consider my accessibility to the internet pending and during the move. Please note that once I have moved, I will have to make arrangements for post to be delivered to me too.
>
> I look forward to hearing from the tribunal as a matter of urgency." (113)

42. She said in evidence that she had received the unless order by post and that since 18 August 2017, she did not change the means by which she communicated, and others communicated with her. She had taken the Thursday and Friday prior to the re-listed preliminary hearing on 21 August, in order to prepare for it. She said that it was possible that on 17 August she had accessed her g-mail account but did not see the e-mail and attachment from the tribunal dated 14 August 2017 at 13:37, the reason being that she was more focussed on preparing for the adjourned hearing.

Submissions

43. Mr Isaacs, counsel on behalf of the respondent, submitted rule 86 of the tribunal's rules, states when service of documents by the tribunal is deemed to have been received. The claimant had told the tribunal that the mode of communication was to be by e-mail. Rule 90 provides for deemed service. If an e-mail is delivered it is taken as having been received unless on the contrary is proved by the claimant. The burden is on the claimant to prove that she had not received the electronic or postal

communication from the tribunal. In this context, she had no difficulty communicating up to 1 June 2017. She used her g-mail account. She had difficulty in relation to documents being accessed by her mobile phone. However, had continuing access to her g-mail account through her web browser, her laptop and computer.

44. She did not attend the hearing on 1 June 2017 and was aware that case management orders were issued because she called the tribunal to find out and was told that orders were made and would be sent out once typed.

45. By 25 June 2017, she did not receive the orders and wrote to the tribunal.

46. Case management orders were sent to her correct e-mail address on 5 July 2017. The respondent had received the communication from the tribunal on that date. There was no evidence adduced to show that was having problems accessing her e-mails via her g-mail account. She had accessed her g-mail account on 28 July 2017. She either did not bother to read her e-mails prior to 28 July 2017, or had read them but ignored them.

47. It was “fantastical” for her to suggest that she would not have been aware of the orders. This would indicate that she was either negligent in not looking or, having read it, ignored it.

48. The respondent copied in her on 4 August 2017 in connection with its strike-out and unless order application. On 14 August 2017, the Employment Tribunal re-sent the unless order to her.

49. She took Thursday 17 and Friday 18 August to prepare her case for the hearing on 21 August. The 17 August 2018 was within the time for compliance with the unless order she had received. Even if she did not access her g-mail account, she was sent the order by post.

50. She had not discharged a burden place on her to show that she did not receive case management orders in respect of the hearing on 1 June 2017, or the unless order.

51. Mr Isaacs relied on the case of Thind v Hylton.

52. In relation to the factors to be considered, the claimant had not shown a good reason for failing to comply with the unless order. She had been negligent in failing, or deliberately failed, to check her e-mail account.

53. In relation to the seriousness, he relied on the case of Oak Cash. He asserted the claimant’s breach was serious because it was important for her to clarify her case of the preliminary hearing because failure to do so would cause delay and increase costs which would affect the course of the hearing. The failure to comply even with unless order highlights the seriousness of the breach. The Employment Tribunal must not be quick to grant relief in such circumstances.

54. In relation to prejudice, Mr Isaac submitted that the claims are historic. The allegations involved comments unlikely to be supported by

documentary evidence. The claimant stated that she suffers from short-term memory loss and there remains the question as to whether what she says about her treatment is true. The respondent has incurred costs in dealing with the case against it and she appears to have accepted that her case has not been adequately particularised. The issues are not clear, and the parties are no further forward with this litigation since May 2017.

55. In relation to whether or not a fair trial is possible, the claimant's failure to particularise her claims makes a fair trial impossible and Mr Isaac relied on the case of Hylton, an inadequately particularised claim means that a fair trial is impossible. He then looked at the claims as pleaded, identifying inadequate particularisation, jurisdiction of issues and new claims. He submitted that the document presented by the claimant was not in compliance with the tribunal's order. He asked that the respondent's strike-out application dated 8 March 2018 in relation to the claimant's inadequate particularisation for the claim be granted. (pages 142 to 143)

56. **The claimant stated that she did not receive the orders. If she had, she would have responded. There was a bounce bank for e-mails. She sent her written statement but it bounced back due to the size on 25 January 2018. In her set-aside application she stated that she was starting a new job, had arranged to start on 1 June 2017 which corresponded with the tribunal and she wanted a postponement. If she had failed to turn up for work she was going to be sanctioned by being deprived 90 days benefit by the Department for Work and Pensions. She was not aware that the hearing had gone ahead and received the orders on 18 August 2017. She referred to the case of Abraham v RBS, in relation to setting aside orders of the tribunal. Her claims had been struck out before she had received the case management orders.**

57. As regards the case of Hylton, she submitted that the process was not penal and the facilitated application for a strike-out order was not valid as she did not understand it as when she received the orders on 18 August 2017 she responded. She made repeated phone calls to the tribunal on the day of the hearing. She says she had move from her Luton address.

58. She referred to the case of Neary submitting that setting aside a strike-out order must be in the interest of justice. She had discriminated by a number of individuals at the time she was working for the respondent and was dismissed because as an Indian Sikh she had been racially discriminated against by those who were Pakistani Muslim. Her claims of victimisation, race, religious discrimination are in her form. The respondent is aware of the circumstances of her treatment as they were discussed during her appeal.

59. In relation to prejudice, she submitted that she was not given the opportunity to defend herself internally while she was working for the respondent at a probation meeting and appeal meeting. She should be allowed to put her case forward. She had been discriminated against and

was not aware of the Employment Tribunal procedures or she would have clarified her case had she been able to attend the hearing on 1 June 2017.

60. As regards the seriousness of the breach, she submitted that she either set aside the strike-out order as soon as she became aware of it. She should be allowed to proceed with her claims against the respondent based on her treatment. She has a right to a fair trial and to cross-examine the respondent's witnesses. She could not understand how the respondent has been prejudiced. She reiterated when she received the orders from the tribunal. In relation to the respondent's strike-out order, she referred to the response I gave on 4 April 2018, which she took as a rejection of the respondent's application. She submitted that the application had already been determined by me, referred to the case of Henderson v Henderson and also Johnson v Gorewood & Co 1[2002] 2 AC1, as it was an abuse of process to resurrect an issue that had already been determined. She also referred to the case of Ladd v Marshall.

61. Mr Isaac's, in response, stated that the respondent has lost the opportunity of a hearing within a reasonable time and that the claimant was the author of her own misfortune. She still has contractual claims she can bring to County Court. In her further information, she has raised new allegations without an application to amend and therefore they should be struck out. The existing allegations within in her claim form could proceed if she overcomes the respondent's objections to setting aside the strike-out order.

The Law

62. Rule 3.9, relief from sanctions in the Civil Procedures Rules 1998, states the following:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice, direction or court order, the court will consider all the circumstances of the case, so far as to enable it to deal justly with the application, including the need –
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> (a) For litigation to be conducted efficiently and at proportionate costs; and
> (b) To enforce … with rules, practice directions and orders."

63. Rule 38 of the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013, schedule 1 provides, in respect of unless orders:

> "(1) An order may specify that if it is not complied with by the date specified, the claim or response, or part of it, shall be dismissed without further order. If a claim or response, or part of it, is dismissed on this basis the tribunal shall give written notice to the parties confirming what has occurred.
>
> (2) A party whose claim or response is being dismissed, in whole or 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 satisfied on the basis that it is in the interest 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.
(3) Where a response is dismissed under this rule, the facts shall be as if no response had been presented, as set out in rule 21."

64. The tribunal's strike-out powers are in rule 37, this provides:

"37 – striking out
(1) At any stage of the proceedings, either on its own initiative or on the application of a party, the tribunal may strike out all, or part of a claim or response on any of the following grounds –

(a) That is scandalous or vexatious or has no reasonable prospect of success;
(b) That the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be), has been scandalous, unreasonable or vexatious;
(c) For non-compliance with any of these rules, or 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 response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing, or if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response has been presented, as set out in rule 21 above."

65. In the case of Thind v Salversen Logistics Limited [2010] UK EAT/0487/09, Underhill P as he then was, applied the judgment in the case of Governing Body of St Albans Girls School and another v Neary [2009] EWCA CIV 1190. His Lordship held that there was no obligation on the tribunal to proceed by reference to CPR 3.9. In his judgment he stated the following:

"the law as it now stands is much more straight forward. The tribunal must decide whether it is right, in the interest of justice, and the overriding objective, to grant relief to the party in default, notwithstanding the breach of the unless order. That involves a broad assessment of what is in the interest of justice, and the factors which may be material to that assessment will vary considerably according to the circumstances of the case and cannot be nearly categorised. They will generally include, but not be limited to, the reason for the default, and in particular, whether it is deliberate; the seriousness of the default; the prejudice to the other parties; and whether a fair trial remains possible. The fact that an unless order has been made, which of course puts the party in question squarely on notice of the importance of complying with the order and the consequences if he does not do so, will always be an important consideration. Unless orders are an important part of the tribunal's procedural armoury (albeit one not to be used lightly), and they must be taken very seriously; their effectiveness will be undermined if tribunals are too ready to set them aside. But that is nevertheless, no more than one consideration. No one factor is necessarily determinative of the course which the tribunal should take. Each case will depend on its own facts."

66. In the case of Oak Cash & Carry Limited v British Gas Trading Limited, Oakcash appeared against the refusal of relief and sanction, as its defence had been struck-out for non-compliance with court orders, pursuant to Civil Procedure Rule 3.9. One of the issues for the Court of Appeal to determine was whether or not, in assessing the seriousness of non-compliance with an unless order, the court should have regard to the original breach which gave rise to the unless order. Lord Justice Jackson gave the leading judgment he held:

> "Paragraph 37 ….. at stage 1, the court must ignore X's historic breaches and assess the breach in respect of which X is seeking relief.
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> 38 …. An unless order, however, does not stand on its own. The court usually only makes an unless order against a party which is already in breach. The unless order gives that party additional time for compliance with the original obligation and specifies an automatic sanction in default of compliance. It is not possible to look at an unless order in isolation. A party who fails to comply with an unless order is normally in breach of an original order or rule as well as the unless order.
>
> 38 In order to assess the seriousness and significance of a breach of an unless order, it is necessary also to look at the underlying breach. The court must look at what X failed to do in the first place, when assessing X's failure to take advantage of the second chance which he was given.
>
> 40. In my view, the phrase "the very breach", in paragraph 27 of Denton, when applied to an unless order, means this: the failure to carry out the obligation which was (a) imposed by the original order or rule and (b) extended by the unless order.
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> 41. The very fact that X failed to comply with an unless order (as opposed to an 'ordinary' order) is undoubtedly a pointer towards seriousness and significance. This is for two reasons. First, X is in breach of two successive obligations to do the same thing. Secondly, the court has underlined the importance of doing that thing by specifying an automatic sanction in default (in this case the draconian sanction of strike-out)".

67. In the Oak Cash and Carry Ltd, case the Court of Appeal concluded that Oak Cash's breach was significant and serious.

68. In the case of Denton v TH White Limited [2014], EWCA CIV 906, in that case by a majority, the master of the roles and Vos LJ, held by "the assessment of the seriousness or significance of the breach should not, initially at least, involve a consideration of other unrelated failures that may have occurred in the past. At the first stage, the court should concentrate on an assessment of the seriousness and significance of the very breach in respect of which relief and sanctions is sought. We accept that the court may wish to take into account, as one of the relevant circumstances of the case, the defaulters previous conduct in the litigation (for example, if the breach is the latest in a series of failures to comply with orders concerning, say, the service of witness statements). We consider that this is better done at the third stage, rather than as part of the assessment of seriousness or significance of the breach.

69. In the case of Opara v Partnesrhips in Care Ltd UKEAT/0368/09, ……at the EAT, held,

> "When a Tribunal is considering whether to grant relief against a sanction, the main focus will be on the default itself –
>
> (1) the magnitude of the default;
> (2) the explanation for the default;
> (3) the consequences of the default for the parties and the proceedings;
> (4) the consequences of imposing the sanction on the parties and the proceedings; and
> (5) the promptness of the application to remedy the default.
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> These are the principal factors the Tribunal will have in mind when it considers the interests of the administration of justice, and above all whether it is unjust and disproportionate to impose the sanction."

70. In the case of Hylton v Royal Mail Group [2015] UK EAT/0369/14, in considering rule 38 (2) Employment Tribunal's Rules of Procedure, Langstaff P held:

> "21. The purpose of case management orders is in general to secure, where that remains possible, that there should be a fair hearing of the allegations made by one party against the other. Where accusations have been made on a very generalised basis, as here, clarity of the accusation is needed. The respondent is entitled to know what acts it is being accused of and the tribunal cannot adjudicate properly unless that is the case. Unless and until this done, it is difficult, if not impossible, to have a fair trial. As observed in Johnson v Oldham, parties are entitled to know the case against them.
>
> 22. It must usually be the case that, where a claim has been struck-out because of a failure to provide such information, but by the time of an application for relief, the information has been supplied, the court will grant relief. The purpose of orders would have been achieved. Again, as observed in Johnson, the approach should be facilitative rather than penal. That cannot, however, apply where there has been no compliance, even at the stage of seeking relief from the order which was made. Orders are made to be observed. As was said by Underhill J (as he was) in the case of Thind v Salversen Logistics Limited…. every case turns on its own facts, and it should not be thought to be usual that relief will be granted from the effect of an unless order ….."

71. On the delivery of document to the parties, rule 86 TR 13 provides:

> "86. Delivery to parties:
>
> (1) Documents may be delivered to a party (whether by the tribunal or by another party) –
> (a) By post;
> (b) By direct delivery to that party's address; (including delivery by a courier or messenger service);
> (c) By electronic communication; or
> (d) By being handed personally to that party, if an individual and if no representative has been named in the claim form, or response; or to any individual representative named in the claim form or response; or, on the

> occasion of a hearing, to any person identified by the party as representing that party at that hearing".

72. Rule 90 deals with the date of delivery and states:

"90. Date of delivery

Where a document has been delivered in accordance with rule 85 or 86, it shall, unless the contrary is proved, be taken to have been received by the addressee –

(a) If sent by post, on the day on which it would be delivered in the ordinary course of post;
(b) If sent by means of electronic communication on the day of transmission;
(c) If delivered directly or personally on the day of delivery."

73. I have also taken account of rule 38(2) Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, as amended.

Conclusion

74. I have come to the conclusion that the claimant was negligent in failing to enquire of the tribunal's orders sent to her on 5 July 2017.

75. I am persuaded that a fair trial is still possible notwithstanding the age of the allegations. There appears to be a considerable amount of documentation in this case, notwithstanding the statement that the claimant made. Despite suffering from short term memory loss, throughout this hearing she was able to go back in time, give an account of her experienced while she was working for the respondent.

76. Having taken into account these matters, I have come to the conclusion that the order should be set aside and the claimant be given the opportunity to put a case before a full tribunal.

77. In relation to the claimant's reasons for not complying, the case management orders and/or the unless order, being that she had not received them, I do not accept. Rule 90 ETR provides for a seat of electronic communication on the day sent. It is possible for a party to be in ignorance of electronic communication being sent by the tribunal if they do not have the means to read the information. In this case, however, I was satisfied that the claimant communicated with the tribunal and with the respondent's representatives via her g-mail account up to 1 June 2017 and according to her from 18 August 2017. In between those dates, I find that she failed to read important correspondence following her non-attendance at the hearing on 1 June 2017. She also said that she was more focussed on her new job but that does not provide a good reason for failing to read important correspondence. She was negligent in opening and in not reading her e-mails and post from the tribunal.

78. I accept that the breach of the unless order was serious and … from the tribunal's order for further information by 18 July 2017. This led the respondents to take an application on whether to strike-out the claims or

an unless order be issued, on 4 August 2017 which the claimant ought to have known about had she at the time read her e-mails. She is someone with experience in civil litigation and must know that there are likely to be orders issued by a court or tribunal following a hearing. As a result of her conduct, the tribunal dismissed the claims against the respondent.

79. In my view, as I am not possessed of much more detailed evidence than at the earlier preliminary hearing in February 2018, I have come to the conclusion that the claimant serious and significantly breached the terms of the unless order in negligently failing to check her e-mails and post from the respondents from the tribunal.

80. As regards prejudice, I accept that the respondent has lost the opportunity of the hearing taking place within a reasonable time period; that the claims are historic; and is prejudiced by the delay; and it has incurred significant costs.

81. On the other hand, the claimant has made serious allegations against the respondent's employees. She followed the internal processes which have been documented. The respondent knows of the claimant's case and the claimant presented her claim form to the tribunal and it was in the position to respond in great detail. It was not told who have left the respondent since the presentation of the claim form, and who may give relevant evidence. Although the claimant stated she suffers from short term memory loss, it had not impacted on the way in which she gave her evidence before me. She was able to explain her conduct, not only during her employment but in relation to the events leading up to and after her claims were dismissed by the tribunal. Her short term memory loss, will have, in my view, limited impact on the cogency of her evidence. She was able to give detailed answers in response to Mr Isaacs questions and in response to my questions.

82. Is a fair trial possible? The respondents say that the claimant's failure to adequately particularise her claims makes a fair trial impossible. I brought to counsels' attention what I recorded in my notes at the last hearing in February 20108. What he said to me in answer to what I believe questions I put to him in relation to this issue, was "cannot say whether a fair trial is possible". I have considered that reply significant and concluded that the respondent's position on this particular issue was "neutral".

83. In the EAT judgment, paragraph 42, my conclusion that the respondent's position on a fair trial as being "neutral" described as a "mischaracterisation". Neither party asked for my notes to be produced at the Employment Appeal Tribunal. Had that been done it would have disclosed my note on respondent's submissions on this particular issue.

84. I accept that counsel's written submissions in February 2018 would not have had a particular note as it followed and inter-change I had with him at the time.

85. I am not persuaded that a fair trial is impossible. The claimant has a clear recollection of events while she worked for the respondent. Her claim form is quite detailed in terms of her wrongful dismissal, race and religious discrimination claims. She identifies her alleged perpetrators and deals with her termination and her appeal against dismissal. The respondent's response addresses the factual allegations, explains reasons for the claimant's dismissal and the conduct of the appeal. Under a separate heading "further allegations" it challenges the claimant's case against named individuals.

86. Balancing as I do, all of the above factors, not one of which has determinative of the outcome. I have taken into account prejudice and fair trial as well as the seriousness of the default but on balance have come to the conclusion that there is greater prejudice to the claimant if the dismissal is not set aside. Furthermore, a fair trial is possible in this case. I will therefore set aside the dismissal.

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Employment Judge Bedeau

Date: …06/03/2020

Sent to the parties on: ...06/03/2020

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For the Tribunal Office