EMPLOYMENT TRIBUNALS

Claimant: Ms P Linden

Respondent: Grayson Engineering Systems

PRELIMINARY HEARING

Heard at: Midlands (West) (in private; by telephone) **On:** 16 July 2020

Before: Employment Judge Camp

Appearances
For the claimant: in person
For the respondent: Mr D Cooper, solicitor

ORDERS

Confirmation of dismissal of the claim

1. On 13 March 2020, Employment Judge Harding made the following order, pursuant to rule 38 of the Rules of Procedure: "*Unless the Claimant sends to the Respondent a copy of her witness statement by 4:00 pm on the 12th April 2020, her claim will stand dismissed without further order.*" The claimant did not send a copy of her witness statement to the respondent by that time on that date, or at all. Her claim has therefore been dismissed.

Writing to the Tribunal

2. Whenever they write to the Tribunal, the claimant and the respondent must copy their correspondence to each other.

Useful information

3. All judgments and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions*
shortly after a copy has been sent to the claimants and respondents.

4. There is information about Employment Tribunal procedures, including case management and preparation, compensation for injury to feelings, and pension loss, here:
https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions/

5. The Employment Tribunals Rules of Procedure are here:
https://www.gov.uk/government/publications/employment-tribunal-procedure-rules

6. You can appeal to the Employment Appeal Tribunal if you think a legal mistake was made in an Employment Tribunal decision. There is more information here:
https://www.gov.uk/appeal-employment-appeal-tribunal

REASONS

7. By way of background to this equal pay, sex discrimination and victimisation claim, see the written record of the preliminary hearing dealt with by Employment Judge Lloyd on 31 May 2019.

8. One of Judge Lloyd's orders was for exchange of witness statements by 27 November 2019. He also included in his write-up of the hearing, expressly for the claimant's benefit, the internet addresses of various useful bits of guidance, including the Presidential Guidance on general case management, which, in his words, includes guidance on "*preparing and exchanging witness statements*".

9. From at the latest 19 December 2019 onwards, the respondent's solicitor was emailing the claimant asking for her witness statements so that he could exchange the respondent's with her. On 6 January 2020, she emailed him to say that she was "*awaiting statements from witnesses and will forward to you once received*". On 8 January 2020, she emailed him to say that he should "*submit your pack, I have previously submitted a witness statement to the court along with bank statements*". (Pausing there, I note that the claimant has never submitted any witness statements to the Tribunal, and that she was ordered to exchange witness statements with the respondent, not submit them to the Tribunal). It was not clear what she was referring to and the respondent's solicitor, not unreasonably, thought she must be referring to her schedule of loss. He replied the same day explaining that a schedule of loss was not the same as a witness statement, attaching a link to the Presidential Guidance, and referring her specifically to the pages of it that relate to witness statements.

10. On 16 January 2020, the respondent's solicitor sent a chasing email and the claimant replied stating, "*I submitted to court an statement from my witness which I believe you were offered a copy of*" [*sic*].

11. On 21 January 2020, the respondent's solicitor again emailed the claimant about her statements, and enclosed a copy of the respondent's statement. His email included this: "*if you do not serve a statement in your own name prior to the trial in compliance with the Rules and Presidential Guidance by reference to form and content, it will be open to the tribunal to debar you from giving evidence and to my clients' Counsel to invite the tribunal to do so.*"

12. On 24 February 2020, the respondent emailed the Tribunal (copying-in the claimant in accordance with rule 92) applying for an unless order in relation to witness statements. That email again referred to the claimant not having, "*served a statement in her own name*".

13. By this stage, the final hearing was imminent, it being due to take place on 16 to 19 March 2020. On 11 March 2020, the claimant applied for a postponement, citing medical reasons. On Friday, 13 March 2020, the Tribunal wrote to her at Employment Judge Flood's direction asking her to provide, urgently, medical evidence to support the postponement application and any comments on the respondent's application for an unless order. Later the same day, after a further email from the respondent, Employment Judge Harding postponed the final hearing, directed that the claimant still needed to provide the medical evidence that Judge Flood had ordered her to provide, and made the unless order set out in paragraph 1 above. I note that that order referred to her needing to provide the respondent with a copy of "*her witness statement*". I also note that the hearing was not postponed because of the COVID-19 situation – hearings were postponed from 19/20 March 2020.

14. The claimant emailed the Tribunal (not copying the respondent in, in breach of rule 92) on 20 March 2020 with pictures of her medication (Sertaline and Propanolol). She explained that she could not get written evidence from her GP due to the COVID-19 situation. Although it was not the reason her claim was dismissed, I should perhaps mention that that evidence was not adequate. Having a diagnosis of, and being on medication for, depression and anxiety is a cause for sympathy and understanding, but is not, in and of itself, a good reason for having a trial postponed. However, I accept that the claimant may well have been unable to get better evidence at that stage, given the pandemic, albeit that 'lock-down' was not until 23 March 2020.

15. The claimant appears not to have responded to the unless order at all. She is suggesting that she thought all she had to send was the statement from her witness, and that she had already sent this. I am afraid that does not make very much sense. She is an intelligent and capable HR professional. Putting to one side the fact that she had been referred to the Presidential Guidance several times (which, had she read it, would have put her straight), and had been told by the respondent's solicitor that she needed to produce a statement "*in* [her] *own name*" at least twice, if she thought she had already done everything she had to do: what did she think the Tribunal was ordering her to do?; why didn't she write to the Tribunal saying that she thought she had already complied with the order and did not understand what she was being ordered to do?

16. In addition, how did the claimant think the trial was going to work without a statement from her? I asked her during this hearing whether she thought that she could just turn up at the trial and give unlimited oral evidence without any prior warning to the respondent or the Tribunal of what she was going to say. She answered "no", but did not explain what she had envisaged was going to happen, if not that.

17. Moreover, what she calls a "*statement from my witness*" appears not to be a statement at all.

17.1 On 15 April 2020, the respondent's solicitor emailed the Tribunal seeking confirmation that the claim had been dismissed for breach of Judge Harding's unless order. His email included this: "*In view of the fact that 12 April was in fact Easter Sunday, we would have been content to take no point upon non-compliance if the statement had been served by 14 April (yesterday). However, no statement has been served, nor indeed has any medical evidence been provided, and there has been no communication of any nature from the Claimant in the meantime.*"

17.2 The following day, the claimant wrote to the Tribunal and the respondent's solicitors. Her email included this: "*I have copied the wording from the email received as a statement, this was provided to the courts on the preliminary hearing, I was given until 24th April to provide a statement. // I do not feel that the provision of a voluntary statement in support of my claim should be a reason why the company are seeking to have this case dismissed. // I submitted the statement to court in support of my claim and not as evidence.*" She appears to be referring to something that she sent to the Tribunal in 2019, before Judge Lloyd's order for exchange of witness statements was even made.

17.3 In her email, she then sets out what I assume is "*the wording from the email received as a statement*" she referred to, which, in its totality, reads as follows: "*My name is Duncan Lockey and I worked at Graysons Thermal Systems from Feb 2018 till Aug 2018 at Head of Production whilst working there I had 3 direct reports Shawn Bailie (aluminium manager) Chris Kelly (OE build manager) and Ryan Hassan (fab Manager) I reported into Stuart Graysons. Regards Duncan Lockey*" [sic]. That is not a statement, but a short email note.

17.4 I am not aware of anything else the claimant has provided to the respondent or the Tribunal that even she is suggesting is a witness statement.

18. In those circumstances, she failed to comply with Judge Harding's unless order and her claim was automatically dismissed immediately after 4 pm on 12 April 2020. (The fact that it was Easter Sunday did not prevent her from complying with it, since she could have emailed any statement to the respondent's solicitor as easily on that day as on any other – and, indeed, had had nearly a month in which to do so when the deadline expired). The Tribunal should therefore have sent the claimant confirmation that this had happened, in accordance with the second sentence of rule 38(1). Unfortunately, the Tribunal did not do this.

19. The respondent's email of 15 April 2020 asking for confirmation that the claim had been struck out was referred to an Employment Judge, but the fact that the claim had been struck out appears to have been overlooked. The Judge just had this telephone preliminary hearing listed.

20. When I received the Tribunal papers in preparation for this hearing – the afternoon of the day before the day of the hearing – I considered sending the parties confirmation that the claim had been dismissed and inviting the claimant to apply to have the order set aside under rule 38(2), with a view to dealing with that application at this hearing. I decided against this mainly for two reasons.

20.1 I was not dealing with this hearing from the Tribunal offices and did not have the whole Tribunal file with me. It was possible that I had not seen something which meant that the claim had not been dismissed pursuant to Judge Harding's unless order. (By the time of the hearing, which started at 2 pm, I had made sure that a copy of the whole file, from April 2020 onwards, had been sent to me).

20.2 The claimant evidently did not realise that the unless order had taken effect and that her claim had been dismissed. Someone whose claim or response has been dismissed for not complying with an unless order has 14 days of the date the notice telling them their claim has been dismissed was sent to apply to have the order set aside. I thought it would be unfair to the claimant to expect her to put together her application, and gather her evidence to support it, in less than 24 hours.

21. As things stand, then, the claimant does not have a claim before the Tribunal because her claim was dismissed in April. It is up to the claimant what to do next. She could do nothing, and just let her claim go; she could make an application under rule 38(2), which may or may not be successful. (If she thinks I have made a legal mistake, she could also appeal to the Employment Appeal Tribunal – see paragraph 6 above). I do not advise her to do anything except to take expert legal advice, if she can find a suitable adviser.

22. It is, though, appropriate for me to repeat a few things I said during the hearing.

23. First, if the claimant wants to apply to have the order set aside under rule 38(2), she must make sure that she obeys the Rules – in particular rules 38(2) and 92 – when she does so.

24. Secondly, any application she makes is unlikely to be successful if she does not comply with the unless order – i.e. if she does not prepare and then send to the respondent a statement from herself, preferably typed rather than handwritten, with page numbers and paragraph numbers, setting out, usually in date order, everything that she wants to tell the Tribunal about what happened during and in relation to her employment with the respondent that is relevant to her claim. There is more information about witness statements here, in Guidance Note 3, from page 10:
https://www.judiciary.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20180122.pdf

25. Thirdly, as part of any application to have the order set aside under rule 38(2), she will also need to provide a detailed explanation of why she did not comply both with the original order for exchange of witness statements and with the unless order, and of what her thought process was at each stage. The commentary I provided above, in paragraphs 8 to 17, about what happened may help her when she is thinking about what she needs put in that detailed explanation.

26. Fourthly, if she does make such an application, I am afraid I can give her no guarantees that it will be successful whatever she does.

27. Finally, I note that the respondent has yet to decide whether or not to make a costs application against the claimant. Any application for costs will need to be made within the 28 day time limit in rule 77.

Employment Judge Camp

16 July 2020