Case Number: 3305236/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss J Wilson	v	Ministry of Justice

PRELIMINARY HEARING

Heard at: **Watford** **On: 14 October 2020**

Before: **Employment Judge R Lewis (sitting alone)**

Appearances:

For the Claimant: **In person**
For the Respondents: **Ms L Robinson, Counsel**

RESERVED JUDGMENT

1. The claimant's application under Rule 38(2) is allowed, and dismissal of this claim is set aside.

2. Case management orders for the re-instated hearing are made in a separate order.

REASONS

1. This was the regrettably delayed hearing of the claimant's application of 27 June 2019 for reconsideration of an unless order of 30 May 2019, and of a decision communicated by letter of 27 June 2019 that the claim had been struck out for breach of the unless order.

2. I was most grateful to Ms Robinson for the documents which were of real assistance today: a written submission with appendices; a disclosure schedule; and a procedural chronology. I also had in PDF form a provisional trial bundle (about 336 pages). It was not clear which documents the claimant had with her. The parties referred to other bundles, to which I did not have access.

3. I proceeded relatively informally. I addressed what I saw as the points in the claimant's claim; something of the history which had led to strike out; but I focused primarily on what might happen if I were to reinstate the claim.

4. The tribunal has experience of the problems faced by litigants in person. In general terms, many face the difficulty of achieving equality of arms with a represented, substantial opponent. They find themselves on generally unfamiliar territory, using strange vocabulary, and having to follow unfamiliar rules and concepts. To many litigants, the informality of the tribunal is itself a difficulty, because it may present as an absence of structure or discipline. Cases often focus on certificated episodes of stress or anxiety, which may be made worse by the tribunal experience.

5. At this short hearing, the claimant showed signs of all of these, to which I add another particular difficulty. The claimant's understanding of law and procedure falls far short of what is necessary to enable her to do justice to herself. She has proceeded without professional advice, and with unshakeable faith that her own understanding is correct, when it plainly is not. I set out these points, not to criticise or distress the claimant, but because they were part of my consideration of the matters before me.

The current issue

6. The only claim which is currently before the tribunal is for unfair dismissal. The respondent says that the reason for dismissal was related to conduct. I became concerned during this hearing that the claimant has not understood what that involves, and I therefore summarised the steps in this case. The claimant said that she had not understood that to be the framework and I hope it is helpful that I record that the steps are the following. The questions for the tribunal which comes to hear this claim of unfair dismissal will be the following. I include questions which are agreed for the sake of completeness.

    6.1 Was the claimant an employee of the respondent? This is agreed.

    6.2 Did she at the time of dismissal have two years service? This is agreed.

    6.3 Was she dismissed within the legal meaning of a dismissal? This is agreed.

    6.4 Did she enter into early conciliation and present her claim to the tribunal in time? These are agreed.

    6.5 The tribunal must then decide what was the reason for the claimant's dismissal. In law this means the factual considerations which were in the mind of the person who made the decision to dismiss, Miss Lee. The reason given by Miss Lee, and relied on by the respondent now, is the claimant's failure to disclose that she had been involved in court proceedings and in a police matter. I took some time on this point with the claimant. I understand her to say three things:

6.5.1 First, she agrees that the above is indeed the reason for dismissal which has been put forward by Miss Lee and the respondent;

6.5.2 Secondly, that she does not agree that that was in fact the real or actual reason for her dismissal; and

6.5.3 Thirdly, that she did not, at this hearing (or at any time before) put forward her formulation of what she says was the real or actual reason for her dismissal, if it was not the reason given by Miss Lee.

6.6 If the tribunal accepts that the stated reason was the actual reason, was that a potentially fair reason? Conduct is one of the potentially fair reasons for dismissal set out in s.98(2) Employment Rights Act 1996 ("ERA").

6.7 Have the requirements of fairness been met? The burden of proof is neutral. The tribunal must be satisfied that the respondent genuinely believed that the claimant had committed the misconduct for which she was dismissed; that it formed the belief on reasonable evidence, and following a reasonable investigation. A reasonable investigation does not need to enquire into every potential point, but should be an investigation which was within the range of reasonable responses to the task of investigating.

6.8 Fairness requires a fair procedure to have been followed. The tribunal will look to see if the claimant had access to the evidence against her, was given enough fair notification of meetings, had the right to have someone with her at meetings, the opportunity to give her side of the story, and had a right of appeal. The tribunal may consider the arrangements made for a claimant with a long stress-related absence before a dismissal meeting.

6.9 Was dismissal within the range of reasonable responses? The question is not, would the tribunal have made the decision to dismiss, but was dismissal a decision which in all the circumstances was reasonably available to the decision maker.

6.10 If the dismissal was unfair, did the claimant in any way bring the dismissal on herself? If so, the tribunal must state a percentage by which she did so, and reduce any compensation payable by the same percentage. In certain cases, the percentage may go up to 100%, which means that an unfairly dismissed employee may receive no compensation.

6.11 If the procedure followed was not fair, would a fair procedure have made a difference to the outcome of the disciplinary procedure? This is known as the Polkey question, and the tribunal must look into what might have happened, but did not.

6.12 If the dismissal was unfair, to which remedy is the claimant entitled? An unfairly dismissed claimant has the right to ask to be re-employed by the respondent, or to be awarded money compensation.

7. The claimant told me that she understood that she must prove that her dismissal was unfair. That is wrong. It is for the respondent to prove each of the above steps except for (a) 6.7 above, for which the burden of proof is neutral; and (b) at the 6.12 stage, it is for the claimant to prove her entitlement to remedy. The fairness of a dismissal is assessed at the time when the dismissal took place. The assessment will depend to a great extent on the information held by the dismissing officer at the time of the dismissal. The date of dismissal in this case was 23 December 2015, and the tribunal may not be greatly assisted by information which came to light afterwards.

Procedural history

8. I was not assisted by the detail of the procedural history which I was asked to consider.

9. The most recent case management hearing had taken place on 19 October 2018, and Judge Warren's order was sent to the parties on 30 November. It was significant that the claimant said that such was her state of anxiety at the time, she did not open the letter containing the order until 8 January 2019.

10. It seemed that there were at least two important points in that order which the claimant misunderstood. (There may have been others). She said that at paragraphs 27 and 28 of his judgment, Judge Warren misrepresented what the claimant had said in reply to the application for a deposit order.

11. I have explained to the claimant, and I record, that the summary at paragraph 28 is not a finding based on hearing evidence. It is not binding on the parties. It is not the claimant's pleaded case. As paragraph 27 states, it is Judge Warren's attempt to distill a seemingly discursive explanation. When she gives evidence, the claimant is free to depart from what he wrote.

12. At paragraph 4 of his case management order Judge Warren, using template wording, wrote that written statements must "be cross referenced to the bundle". I understood the claimant to have interpreted this to mean that the points she wanted to make about unfair dismissal (which she wrongly thought she had to prove) must always be supported by a relevant document or documents. As a result she feared that if she said something in her evidence which was not supported by a document, it could not be heard.

13. I record that I explained to the claimant that her understanding is wrong. Where a witness refers to a document in the bundle, it is a helpful working tool that the written statement identifies the page number that is being referred to. Where witness evidence does not refer to a document in the bundle, that need does not arise. That is all there is to it.

14. Judge Warren's case management order was a straightforward order of the type made in courts and tribunals every day to bring claims to a fair trial. The claimant nevertheless became entangled with compliance in the first half of 2019. Her problems seemed, as she explained them, to be almost entirely the product of her own misunderstanding. Her belief that she could not produce evidence, or

challenge Judge Warren's summary, as she felt obliged to, led her to understand wrongly that she needed more documents to do so, and that she should make no attempt at compliance until that had happened.

15. She therefore became entangled in correspondence with the respondent about documents. As she had nearly 30 years' service at time of dismissal, the respondent had substantial documents about her, but had also disposed of items which were more than about six years old, in accordance with usual practice. The claimant understood, wrongly, that the tribunal would conduct a much more wide-reaching enquiry than it in fact does, for example into consideration of records going back many years before her dismissal. She became convinced that all of these avenues had to be exhausted before she could agree a bundle or prepare a witness statement. She also followed the route of subject access request. That produced more documents than had been disclosed in these proceedings by the respondent. That is inevitable. Subject access requests are indiscriminate, where tribunal disclosure is selective and focused. That is why subject access requests invariably generate more documents than the disclosure exercise, or than the tribunal needs.

16. It was frequently difficult during this hearing to persuade the claimant to join me in discussing how this case would go forward if reinstated, rather than reliving her past disputes. Ms Robinson, who has been briefed in this matter since its beginning, and who described her approach as sympathetic and pragmatic (I entirely agree that both words are well used) stressed that there was no reason to believe that if the claim were reinstated, the claimant would conduct the litigation with the focus, analysis and discipline which have been lacking.

Disclosure

17. Ms Robinson told me that early in this litigation, predicting a dispute about disclosure, she advised the respondent to give full disclosure of all personnel records. That was astute, pragmatic advice. She said that these items run to some 700 pages, of which a trial bundle of about 340 pages is agreed. She told me that the claimant has never given disclosure.

18. Ms Robinson had produced a disclosure schedule which was enormously useful. She set out in three columns, (1) documents requested by the claimant; (2) whether the document had already been disclosed; and (3) the answer to the question, if not disclosed, does the document exist? The only document which had been requested, not disclosed, and which the respondent agreed existed, was its own standard grievance procedures.

19. I asked the claimant, more than once, so that I could be quite sure of her answer, the following question*: "Is there any document which you have asked for, which the respondent has agreed that it has, but which it has refused to disclose."* I am confident in recording that the claimant's consistent answer was "No".

20. I have explained to the claimant that no order for disclosure can be made for documents which do not exist. In her closing submission, the claimant volunteered that while she felt there were more documents, and while she felt that she might ask for more documents, she will abide by an order made by the

tribunal not to ask for further disclosure. That was a thoughtful and pragmatic suggestion, which I take up below, and in the accompanying case management order.

Legal framework

21. I noted the recent discussion by the EAT in Uwhubetine and another v NHS Commissioning Board England and others UK EAT/0264/18/JOJ, and in particular, the discussion at paragraphs 41-49, which I set out below:

> "41 I turn to the arguments before me today and my decision. As to the law, Rule 38 of the Employment Tribunals Rules of Procedure 2013 provides: "Unless orders 38.—(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 has been dismissed, in whole or in 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 set aside on the basis that it is in the interests 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 effect shall be as if no response had been presented, as set out in Rule 21."
>
> 42 A number of propositions emerge from the authorities, in particular Royal Bank of Scotland v Abraham UKEAT/0305/09; Marcan Shipping (London) Limited v Kefalas [2007] EWCA Civ 463; Johnson v Oldham Metropolitan Borough Council UKEAT/0095/13; and Wentworth-Wood and Others v Maritime Transport Limited UKEAT/0316/15.
>
> 43 I can summarise these points as follows. Firstly, there are potentially three distinct decision points for a Tribunal under Rule 38. Firstly, there is the making of an Unless Order. Secondly, there is the determination of whether an Unless Order has been complied with, and hence whether the relevant claim or response or part thereof has been automatically dismissed by operation of the Unless Order. Thirdly, the determination of an application, if there be one, to set aside the Order on the basis that it is in the interests of justice to do so. These are distinct decision points to be approached on distinct bases, in respect of which, if any such decision is to be challenged, a separate appeal is required and time would run from the date of the relevant decision.
>
> 44 Where a Tribunal is determining whether there has been compliance with an Unless Order and hence whether to give written notice as to whether the relevant pleading has been dismissed by the Order taking effect, the Tribunal is not concerned at that point with revisiting the terms of the Order: whether it should have been made, or whether it should have been made in those terms. Nor is it concerned at that point with the question of whether, if there has been non-compliance with the Order, there should be some relief from sanctions.
>
> 45 The starting point for the Tribunal engaged in that task is to consider the terms of the Order itself and whether what has happened complies with the Order or not. This may call for careful construction of the terms of the Order, both as to what the Order required and as to the scope of the Order in terms of the consequences of non-compliance, particularly in cases where there are multiple claims or multiple parties. If there is an ambiguity the approach should be

> UKEAT/0264/18/JOJ -16- A B C D E F G H facilitative rather than punitive, and any ambiguity should be resolved in favour of the party who was required to comply. However, what the Tribunal cannot do is redraft the Order or construe it to have a meaning that it will not bear, though its words should of course be construed in context.
>
> 46 Next, the test to be applied is as to whether there has been material non-compliance, that being a qualitative rather than a quantitative test. In a case where the Order required some further Particulars to be given, the benchmark is whether the Particulars have sufficiently enabled the other party or parties to know the case that they must meet. However, the Tribunal is not concerned with the legal or factual merits of the case advanced, but merely with whether sufficient Particulars have been given to meet that test.
>
> 47 Finally, the Rules do not require any particular formalities to be observed in relation to the process for determining whether there has been non-compliance with an Unless Order, leading, if non-compliance be found, to a written notice confirming that the relevant pleading has been dismissed in accordance with it. This is something that can potentially be done by a Judge on paper without a hearing, although a Judge may decide to invite written submissions and/or to convene a hearing, before making that determination. The obligation on the Tribunal, whichever route it goes, is to comply with the overriding objective.
>
> 48 To those points, which emerge from the foregoing authorities, I add the following. Firstly, the Rule does not actually impose an obligation on the Tribunal to issue a written notice if it considers that an Unless Order has been complied with. However, if it is alleged that it has not then this must lead to a determination of whether the Order has been complied with and has taken effect, or not. UKEAT/0264/18/JOJ -17- A B C D E F G H
>
> 49 Further, if the conclusion is that the Order has not been complied with, and has taken effect, although that will have occurred automatically, there is an obligation on the Tribunal to issue a written notice to the parties confirming what has occurred. That is both because that is what Rule 38(1) says and because it is the issuing of such a written notice that triggers the right of a party to make an application under Rule 38(2) to have the Order set aside on the basis that it is in the interests of justice to do so. That is why such an application is treated, as the authorities confirm, as an application for relief from sanctions, as opposed to a freestanding challenge to the original Order having been made in the first place."

22. I respectfully adopt the rigour of the EAT's analysis, and have approached today's hearing as a third step hearing, ie an application for relief from sanctions. I note that when I come to consider the overall circumstances, the division between the three stages indicated by the EAT becomes blurred. When considering what is serious and significant, and the overall circumstances, it seems to me that while I make my decision on the material before me today, and in accordance with the principles applicable to relief from sanctions, I am bound to give some consideration to the employment and litigation history.

23. As this an application for relief from sanctions, the tribunal should have regard to the approach of the civil courts and the guidance in Denton v White [2014] EWCA Civ 906.

24. The claimant remains in default of the tribunal's October order for disclosure. The reasons are in short, the muddle of misunderstanding set out above. The default is serious and significant, particularly in relation to the witness statement.

25. The claimant was dismissed after nearly 30 years' service for a matter which (it was agreed today) only came to the respondent's attention because the claimant volunteered it. I accept that there is a dispute as to when she volunteered the information, and how and why. I am duty bound to give effect to the "equality of arms" provision of the overriding objective, particularly in a case where there is undisputed evidence of stress related illness, and where I find, as I now do, that the claimant's misunderstanding of many aspects of law and procedure has let her down badly.

26. It seems to me that what has happened is that during the first half of 2019 the claimant became convinced that she had to prove all the elements in her case; in particular in order to demonstrate that Judge Warren's precis was wrong or incomplete; and that she thought that by repeatedly asking for documents from the respondent, something might be found to which she had to refer in her witness evidence. She also thought that she could not advance a case which was not cross-referenced to a document at every point.

27. Ms Robinson told me that the respondent's witness statements had been completed. She expressed concern that reinstatement would lead to trial possibly up to six years after dismissal. She told me that Ms Lee, the dismissing officer, has retired from service, and may not wish to attend, particularly if the public health situation has not improved by the time of hearing. She expressed concern that a fair trial had become impossible.

28. I fully accept that Ms Lee may not be able to add in oral evidence in 2021 to what was written in 2015. However, the Civil Service is a paper heavy employer, and I can see no objection to her giving evidence in 2021 which is reliant on 2015 documentation. I am therefore relatively untroubled by Ms Robinson's submission that the passage of time generally renders fair trial impossible. The trial will focus on the paperwork from the time, and the tribunal is unlikely to expect detailed recollection from a witness giving evidence many years after the event. I add that the respondent has the right to apply for a witness order, but it is commonplace now for witnesses to give evidence by video link. Certainly, that would be acceptable in principle.

29. I am much more troubled by Ms Robinson's submission that if the claim is reinstated, the claimant will conduct it in future in exactly the same way which caused problems in the past. The claimant's responses gave a number of indications at this hearing that that might happen, and I could see that the claimant's assurances about the future conduct of the claim might have been given opportunistically in order to secure reinstatement. It is trite to say that past behaviour is a good predictor of future behaviour.

30. I accept that the respondent has found the claimant a demanding opponent, but I must bear in mind, as a reminder that there is a boundary between being a difficult opponent, and behaving so unreasonably as to lose one's right to be

heard, the observation of Sedley LJ in Blockbuster Entertainment Limited v James [2006] IRLR 630:

> "The courts and tribunals of this country are open to the difficult as well as to the compliant, so long as they do not conduct their case unreasonably."

31. In concluding on balance that it is right to allow the claimant's application, set aside the strike out and unless order, and re-formulate a case management order, I repeat and stress in the next paragraph one overarching comment which I made a number of times in different ways during this hearing.

32. I am reinstating the claim on the footing that the claimant will move forward in accordance with the order made separately, and will not try to return to the disputes, mistakes and misunderstandings which led to strike out in 2019. If she does, she is at risk of the claim being struck out. I have made specific provision for this eventuality in the accompanying Case Management Order.

_____

Employment Judge R Lewis

28 October 2020

Sent to the parties on:

…….

For the Tribunal:

……..