EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Miss A McQuilkin		**London Probation Service**

Heard at: London South Employment Tribunal **On:** 6 November 2020

Before: Employment Judge Hyams-Parish

Representation:
For the Claimant: Did not attend
For the Respondent: Ms G Hirsch (Counsel)

JUDGMENT

The Judgment made by Employment Judge Martin pursuant to Rule 21 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, sent to the parties on 13 April 2019, is set aside.

REASONS

Claim

1. By a claim form presented to the Tribunal on 17 August 2014 the Claimant brings claims of disability discrimination.

2. In the absence of any response received by the Respondent to the claim, a Judgment pursuant to Rule 21 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Tribunal Rules") was entered by Employment Judge Martin and sent out to the parties on 13 April

2019.

3. The Respondent seeks a reconsideration of the above Judgment and asks that it be set aside so that it is able to defend the claim.

Background

4. The Claimant was, according to her claim form, employed by the London Probation Trust from 13 October 2003 to 20 December 2013.

5. She presented her claim form in the Employment Tribunal on 17 August 2014. At that point, Tribunal fees were in place. It appears that she did not apply for a fee exemption, despite the fact that she was unemployed at the date of presenting her claim.

6. In October 2017, the Claimant issued further proceedings at London East Employment Tribunal against the National Probation Service, allegedly arising out of the same employment and its termination in 2013. I have not made any determination whether it is in fact the same claim as that lodged at this Employment Tribunal. That claim is referred to here as the London East case. A response to that claim was filed by the Respondent.

7. On 24 November 2017, HMCTS wrote to the Claimant following the Supreme Court Judgment in the Unison case regarding Tribunal fees, to ask the Claimant if she wished to have her claim considered for reinstatement. That letter gave the Claimant a three-month deadline to respond, i.e. by 23 February 2017. I am informed by Ms Hirsch that the Claimant did not respond by the deadline.

8. A preliminary hearing in the London East case was held on 5 January 2018. During that hearing the Claimant did mention that she had issued another claim previously but not that the HMCTS had written to her asking whether she would like to reinstate her claim.

9. Three days after the above preliminary hearing in London East, the Claimant was sent a form and letter asking again whether she wished to reinstate the claim issued in 2014. The signed page of the form that I have seen shows that the Claimant did not sign that form until 11 June 2018, and did not send it until 12 June 2018, over three months after the deadline. She makes no mention of the London East claim.

10. The Claimant did not inform the Respondent of the developments at paragraph 9 above. Therefore, it proceeded with a lengthy and complex preliminary hearing against multiple parties of which the Respondent was one. Had they known of the current claim, Ms Hirsch says that the Respondent may well have applied for a stay in the London East case.

11. On 29 June 2018, a notice of claim in the current case was sent to the

London Probation Trust.

12. On 24 July 2018, a judgment was sent to the parties in the London East case striking out the claims in their entirety.

13. On 3 September 2018, this Employment Tribunal wrote to the Claimant to clarify which successor organisation was the correct Respondent for her current claim, given that she had named a Respondent, London Probation Trust, that no longer existed.

14. The Claimant appealed against the London East judgment to the Employment Appeal Tribunal, which included an allegation of bias against Employment Judge Pritchard. This appeal subsequently failed.

15. On 20 December 2018, it appears that this Employment Tribunal sent the National Probation Service a substituted service of claim letter stating that "a claim as been made against the Respondent". It is not, however, clear whether that letter was ever received by the Respondent. Ms Hirsch informs me that the Respondent has no record of having received it.

16. A Rule 21 judgment was sent to the parties on 13 April 2019 but did not come to the Respondent's attention until 2 May 2019. The judgment came as a surprise to the Respondent given that they had already successfully defended the London East case.

17. The Respondent contacted the Tribunal and was sent a copy of the claim form on 22 May 2019. It sent a detailed application to set aside the judgment, together with a draft response, on 28 May 2019.

Law

18. Rule 70 of the Tribunal Rules provides that a Tribunal may reconsider a judgment where it is necessary in the interests of justice to do so. In considering whether to set aside a Rule 21 judgment, a Tribunal will take into account a number of factors, such as the Respondent's explanation as to their failure to present a response within the applicable time limits, the merits of any response, and the balance of prejudice between the parties.

Preliminary matters

19. Following the application by the Respondent to reconsider the Rule 21 judgment, this matter was listed before Employment Judge Martin on 14 May 2020. Employment Judge Martin listed today's hearing to consider (i) whether the Rule 21 Judgment should be set aside (ii) and if it was set aside, whether to strike out the claim on the grounds that the claim has already been determined by Employment Judge Pritchard at London East Employment Tribunal.

20. The Respondent was ordered to send to the Claimant its submissions in relation to both matters at paragraph 19 above by 11 June 2020. The Claimant was ordered to provide any reply by 9 October 2020. The Claimant was in attendance at the above hearing.

21. The Claimant did not appear at today's hearing. On 8 October 2020, she wrote to the Tribunal by email stating that she was experiencing poor mental health and other health issues. She referred to being subjected to a sustained campaign of harassment on social media. She said that she had been unable to prepare her case. Whilst she had spoken to the Disability Law Service, who she said had agreed to represent her, the representative was not available to attend today. Looking through the file, there is no correspondence from the Disability Law Service suggesting that they are now representing the Claimant.

22. Attached to her email on 8 October 2020 was an email from the Claimant's GP saying:

> ***I can confirm that the above patient has a diagnosis of Schizophrenia and takes regular medication for this. She is currently reporting mental health concerns and is worried that she will not be able to prepare and be ready for the upcoming Employment Tribunal hearing on November 6th 2020.***

23. Prior to today's hearing, the clerk telephoned the Claimant to ask her whether she would be attending and asked her whether she had submitted any reply to the Respondent's application. She referred to the email and the letter from the doctor referred to above.

24. I asked Ms Hirsch how she was inviting me to proceed today. She said she was inviting me to proceed in the Claimant's absence on the reconsideration issue. She said that the Claimant had been given ample opportunity to respond. There was no indication when the Claimant would be in a position to attend and it was reasonable for the Respondent to expect progress in their case. She said it was unlikely that the Claimant could add much more by way of response, given that much of this rested on the Respondent's reasons for the delay. She said that it was in accordance with the overriding objective, in particular to avoid further delay and saving expense, to proceed on that point. She accepted that consideration would need to be given to postponing the application to strike out but invited me to make an unless order if I chose to postpone.

25. In reaching my decision on this issue, I considered the medical evidence supplied by the Claimant. It was very brief and did not state that the Claimant could not attend today or that she could not provide the response to the Respondent's application as requested by Employment Judge Martin. The letter simply stated that the Claimant was worried that she would not be able to attend. Finally, the letter gave no indication when the Claimant

would be in a position to attend or provide the information ordered. I concluded that it was in the interests of the overriding objective to proceed in the Claimant's absence on the reconsideration application only. I was concerned about the age of this case and the further delay that would follow. I concluded that the Respondent should receive a determination on this application.

26. I decided not to proceed with the strike out application in the circumstances but to provide the Claimant with a further opportunity to provide the necessary information requested. I was also conscious that I did not have before me today, a copy of the London East claim form. I concluded that an unless order was appropriate. **This is annexed to this judgment**.

Reconsideration application

27. I consider this case to be rather exceptional. The Claimant having left the Respondent's employment in 2013, and having already defended a claim in London East, it was not expecting a further claim to be lodged by the Claimant. During the period between the termination of the Claimant's employment and the reinstatement of the claim form, the name of the Respondent had changed. I accept the Respondent's evidence that they checked their records to ascertain whether a claim form had been received from the Claimant in 2018 and they did not receive it. It is not a case where the Respondent has sat on a claim form and done nothing about it. Had they received it, they would have responded.

28. I am further persuaded by the merits of the response and consider that there is a reasonable chance that this claim is the same as the London East case. I cannot be certain of that but I have looked at a detailed judgment by Employment Judge Pritchard in which he refers to the London East claim and the facts that support it. If that is right and the claims are the same, the res judicata principle would prevent the Claimant from pursuing the claim at this Tribunal and consideration would need to be given whether the Tribunal has jurisdiction to hear it. It is clearly in the interests of justice to allow the claim to be defended so that the above res judicata point can be resolved. I have considered the balance of prejudice and concluded that there is greater prejudice to the Respondent in not allowing them to defend the claim.

29. For the above reasons, I have concluded that the Rule 21 judgment should be set aside.

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Employment Judge Hyams-Parish
06 November 2020

UNLESS ORDER

Rule 38 of the Employment Tribunals Rules of Procedure 2013

Having heard representations by Counsel for the Respondent at a hearing on 6 November 2020, at which the Claimant did not attend, Employment Judge Hyams-Parish ORDERS that:

Unless by **4pm on 5 February 2021** the Claimant complies with either orders at (a) or (b) below, **all of the claims under the above case number shall stand as dismissed without further order**.

(a) The Claimant shall write to the Respondent and the Tribunal clearly setting out how her current claim is different to the one that was struck out by Employment Judge Pritchard at London East Employment Tribunal (Claim Number 3201082/2017);

(b) If due to her mental health, the Claimant is unable to comply with (a) she must, by the same date, provide to the Respondent and the Tribunal a letter from her GP or other treating practitioner, confirming that due to her mental health she is unable to comply, the reasons which support the above conclusion, and a clear indication when it would be anticipated that the Claimant will be in a position to comply.

Should there be compliance with either (a) or (b) above, the parties will be required to attend an open preliminary hearing on **18 February 2021 at 10am** to consider whether the claim should be struck out on any of the following grounds provided by Rule 37 of the Employment Tribunal Rules, namely:

- that the claim is scandalous or vexatious or has no reasonable prospect of success (because the Tribunal has no jurisdiction to hear it as the claim has already been determined by London East Employment Tribunal)

- that the manner in which the proceedings have been conducted by or on behalf of the Claimant (as the case may be) has been scandalous, unreasonable or vexatious;

- for non-compliance with any of these Rules or with an order of the Tribunal;

- that the claim has not been actively pursued; or

- that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim.