EMPLOYMENT TRIBUNALS

Claimant: **Ornelia Hamolli**

Respondents: **Meister Real Estate Ltd**

RECORD OF A PRELIMINARY HEARING

Heard at: Reading (by CVP) **On: 14 March 2024**

Before: Employment Judge Reindorf KC

Representation

For the Claimant: Mr S Mahouzi (Trainee Solicitor)

For the Respondent: Mr J Tramboo (Counsel)

RESERVED JUDGMENT

1. The Respondent's application for the Claimant's claim of disability discrimination to be struck out for non-compliance with an order of the Tribunal is refused.

REASONS

Introduction

2. The Claimant was employed by the Respondent as a Junior Estate Agent from 6 September 2021 until her dismissal with effect from 16 September 2022.

3. In an ET1 lodged on 25 November 2022 the Claimant complained of unfair dismissal, sex discrimination and disability discrimination. The disability upon which she relies is Tinea Versicolor / Pityriasis Versicolor, a skin condition.

4. Following a strike warning sent to the Claimant by the Tribunal on 19 December 2022 the unfair dismissal claim was struck out on 3 April 2023 on the basis that the Claimant did not have two years' qualifying service.

5. In its ET3 dated 23 January 2023 the Respondent argued that the Claimant had been dismissed for poor performance and that the claims were frivolous and vexatious.

6. A Preliminary Hearing for case management took place on 12 July 2023 before EJ Palmer, at which the Claimant appeared in person. EJ Palmer listed a Preliminary Hearing in public on 10 January 2024 to determine whether the Claimant was at the relevant times a disabled person for the purposes of s.6 of the Equality Act 2010 and to conduct case management.

7. EJ Palmer made case management orders in preparation for the Preliminary Hearing in public. These included an order for the Claimant to send the Respondent, by 27 September 2023:

    7.1. copies of parts of her GP and other medical records;

    7.2. anything she had in writing which would help show that she had the relevant disability or the effect which the disability had on her, such as a letter from a doctor; and

    7.3. any other evidence relevant to whether she had the disability at that time (paragraph 4.1 of the Case Management Orders ("CMOs")).

8. EJ Palmer's CMOs were sent to the parties on 7 November 2023.

9. On 27 September 2023 the Claimant sent to the Respondent a disability impact statement and a GP's letter (the latter was not originally included in the bundle, but was produced during the hearing by the Claimant). On 9 January 2024 she sent her GP records. On 11 March 2024 she sent two reports by medical experts: one from a consultant dermatologist, Mr Wright, dated 9 February 2024 and one from her treating consultant psychiatrist, Dr Spadaro, dated 5 March 2024.

10. On 15 December 2023 the Claimant instructed her present solicitors to act for her in this litigation.

11. The Preliminary Hearing on 10 January 2024 was postponed to 14 March 2024 of the Tribunal's own motion.

The Hearing

12. The hearing was conducted remotely by video (CVP). The Claimant provided a bundle consisting of 160 pages. The bundle was not agreed by the Respondent, on the basis that it contained a chronology, a case summary, a list of issues and the two expert reports, none of which were agreed. Mr

Mahouzi for the Claimant also provided a skeleton argument with exhibits. Some further documents were provided separately by the Claimant.

13. During the hearing Mr Tramboo applied for the Claimant's expert reports to be excluded from the evidence on the basis that they had been served in breach of the CMOs. I dismissed this application for the reasons given in the separate Case Management Orders of today's date. Of my own motion I postponed the hearing of the disability point. In my Case Management Orders I have also made directions for the Respondent to adduce its own expert medical evidence and for both parties to provide Further Particulars.

The Respondent's application to strike out the disability discrimination claim

14. Mr Tramboo pursued an application to strike out the disability discrimination claim. Initially he argued both (1) that the Claimant had failed to comply with EJ Palmer's CMOs and (2) that the Claimant's case on whether she had been a disabled person at the relevant times was scandalous and vexatious. He later restricted his application to the first limb on the basis that the second limb was premature and could only properly be determined once the substantive disability point had been decided.

15. I heard submissions from Mr Tramboo on the application. Mr Mahouzi then indicated that he wished to call the Claimant to give evidence as to her compliance with EJ Palmer's CMOs. Mr Tramboo objected to the Claimant giving evidence when she had already heard his submissions. Whilst the situation was unsatisfactory, I was content to allow the Claimant to give evidence on the basis that in weighing her evidence I could take into account the fact that she had already heard Mr Tramboo's application. In any event, I did not consider it to be particularly prejudicial to the Respondents for the Claimant to have heard Mr Tramboo's submissions, since in many cases he would have been required to put his application in writing in advance of the hearing in any event.

16. Up to this point the Claimant had attended the hearing by telephone. When called to give evidence, she initially stated that her mobile phone was faulty and she could not appear by video. I decided that I was not content to hear her evidence by telephone since credibility was in issue. The Claimant then appeared by video, although she did not explain how this had become possible. She gave evidence in chief and was subjected to cross-examination. I then heard from Mr Mahouzi and again from Mr Tramboo in submissions.

<u>Findings of fact</u>

17. The Claimant attended the Preliminary Hearing of 12 July 2023 in person. She understood the orders made by the judge, and retained a record or recollection of them which was sufficient to enable her to follow them even though she did not receive EJ Palmer's CMOs until after the date for compliance with the orders at paragraphs 4.1 and 5.1. She also conducted

research on the internet about the sort of evidence required to prove disability for the purposes of the EqA.

18. The Claimant worked hard to produce her disability impact statement, which she sent to the Respondent on time on 27 September 2023. She also attempted to obtain medical information from her GP. The only document she received from the GP practice before 27 September 2023 was the one which she sent to the Respondent on that date. She was not satisfied that this was sufficient, because she understood that EJ Palmer had ordered her to provide more information than it contained. The Claimant told me that when she sent this document to the Respondent, she stated in the covering email that further documentation would follow. The covering email was not in the bundle but since the Claimant was not challenged on this assertion in cross-examination I accept its veracity.

19. The Claimant continued to ask her GP practice for more evidence after 27 September 2023. By way of example, on 27 October 2023 she sent them a message setting out in detail the test for disability, which she had found on a template on the internet. I find that she was not attempting to prompt any particular answers from the GP when she sent this message; she was merely setting out the test for disability so that the GP could understand what was required. The Claimant did not receive timely responses from her GP Practice.

20. The Claimant instructed her current solicitors in December 2015. They advised her to obtain expert medical evidence. On that basis she instructed Mr Wright and Dr Spadaro to produce reports.

21. When the Claimant received her medical records in early January she sent them to the Respondent.

22. The Claimant received Mr Wright's report at some point in February 2024 and Dr Spadaro's report in early March 2024. On 11 March 2024 her solicitors included them in the bundle for the present hearing.

<u>The law on strike-out and deposit orders</u>

23. An employment judge or Tribunal has power, at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on the following grounds (amongst others):

    23.1. that it is scandalous or vexatious or has no reasonable prospect of success (Rule 37(1)(a) of the ET Rules); or

    23.2. for non-compliance with any of the Rules or with an order of the Tribunal (Rule 37(1)(c)).

24. By Rule 6 a failure to comply with any Rules or any order of the Tribunal 'does not of itself render void the proceedings or any step taken in the proceedings' and:

''In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; (d) awarding costs in accordance with rules 74 to 84'.'

25. A strike out on the no reasonable prospects basis will only be appropriate in rare circumstances (*Tayside Public Transport Co Ltd v Reilly* [2012] IRLR 755) such as where there is "realistically only one outcome" (*Hawkins v Atex Group Ltd* [2012] ICR 1315 at §25 per Underhill J) or "it is instantly demonstrable that the central facts in the claim are untrue" (*Tayside*) or the facts sought to be established are "totally and inexplicably inconsistent with the undisputed contemporaneous documentation" (*Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126 CA at §29 per Maurice Kay LJ).

26. The Tribunal should not conduct a mini-trial to establish core disputed facts that are "not susceptible to determination otherwise than by hearing and evaluating the evidence" (*Ezsias*). It must take the Claimant's case at its highest.

27. Discrimination claims in particular should only be struck out "in the clearest cases" (*Mechkarov v Citibank NA* [2016] ICR 1121 at §14. See also *Anyanwu v South Bank Students' Union* [2001] IRLR 305 HL at §24 per Lord Steyn and at §37 per Lord Hope; *Chandhok v Tirkey* [2015] IRLR 195 EAT at §§19-20 per Langstaff J) in which the applicant "can clearly cross the high threshold of showing that there are no reasonable prospects of success" (*QDOS Consulting Ltd v Swanson* UKEAT/0495/11 (12 April 2012, unreported)). Where core issues of fact will turn "to any extent" on oral evidence, they should not be decided without it (*Mechkarov* at §14). Nor should they be struck out if there is a "a prospect which is more than fanciful" that the Respondent will fail to shift the reverse burden of proof (*A v B* [2010] EWCA Civ 1378 at §61).

28. When determining the proportionality of the response to non-compliance, the Tribunal is required to make a structured examination in order to see whether there is 'a less drastic means to the end for which the strike-out power exists', such as unless orders and costs orders (*Blockbuster Entertainment Ltd v James* [2006] EWCA Civ 684, [2006] IRLR 630).

29. Applications for strike out for every perceived breach of the rules of procedure or Tribunal orders are to be deprecated and such applications are rarely successful. It is disproportionate to strike out for a one-off minor breach.

30. The guiding consideration, when deciding whether to strike out for non-compliance with an order, is the overriding objective (*Weir Valves and Controls (UK) Ltd v Armitage* [2004] ICR 371). This requires the judge or Tribunal to consider all the circumstances, including 'the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is possible'.

31. If at a Preliminary Hearing the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may order the party putting forward the allegation or argument to pay a deposit of an amount not exceeding £1000 as a condition of continuing to advance the allegation or argument (Rule 39(1)). However, before making an order, the Tribunal must make reasonable enquiries into the ability of the party to pay the deposit and have regard to any such information when deciding the amount of the deposit (r 39(2)).

32. Although deposit orders are subject to a lower threshold than strike-outs, the Tribunal must also decline to make a deposit order in a discrimination case unless there is an extremely clear basis for doubting the likelihood of the party being able to establish the facts essential to the claim (See *Sharma v New College Nottingham* UKEAT/0287/11 (1 December 2011, unreported); *Van Rensburg v Royal Borough of Kingston-upon-Thames* UKEAT/0095/07, [2007] All ER (D) 187 (Nov)).

The parties' submissions

33. The basis of Mr Tramboo's application was that the Claimant's GP records and expert reports were served late (in breach of paragraph 4.1 of EJ Palmer's CMOs) and the Claimant had not served Further Particulars (in breach of paragraph 5.1 of EJ Palmer's CMOs).

34. Mr Mahouzi's position was that the Claimant had complied with EJ Palmer's CMOs.

Conclusions

35. It is clear to me that the Claimant substantially complied with paragraphs 4.1 and 5.1 of EJ Palmer's Order, in that she sent to the Respondent on the due date a disability impact statement and such medical evidence as she had been able to obtain. In her covering email she explained that she would send further medical evidence. On 9 January 2024 she sent her medical records. The Respondent was not prejudiced by the lateness of those records, which it received in good time to consider and take instructions on in advance of the present hearing (the 10 January 2024 hearing having been vacated by the Tribunal).

36. The substance of the Respondent's complaint is that the Claimant thereafter sent further medical evidence in the form of two expert reports which she had adduced without seeking permission, and that she disclosed them too late for the Respondent to be able meaningfully to rebut them. This was plainly capable of prejudicing the Respondent. However, this default by the Claimant does not, in my view, reach the threshold of persistent disregard of Tribunal orders for striking out for non-compliance. Moreover it appears that the fault may lie with the Claimant's solicitors rather than with her.

37. Furthermore in light of the late disclosure of these reports I had decided to postpone the hearing and had made directions for the Respondent to adduce its own expert evidence. Insofar as disruption and expense have been or will be caused to the Respondent, it is at liberty to make an application for costs

or wasted costs in due course. I consider that this approach is a considerably less drastic means by which to achieve fairness between the parties and that it will result in a fair trial of the issue. I take into account that only one postponement of this Preliminary Hearing has previously occurred, and that was of the Tribunal's own motion, and the final hearing has not yet been listed. Thus there is adequate time for the matter to regularised and for the parties to be put on an equal footing before any substantive point is determined.

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Employment Judge Reindorf KC

Date 15 March 2024

Sent to the parties on:

27 March 2024

For the Tribunal: