Case Number: 3347294/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms J Benjamin	v	The Markfield Project

Heard at: Watford **On**: 10 April 2018

Before: Employment Judge Hyams, sitting alone

Appearances:

For the Claimant: In person, and not represented

For the Respondent: Ms Sarah Miller, who is a director of the respondent

JUDGMENT

It is in the interests of justice that the claim be reinstated. The Unless Order of Employment Judge Manley of 23 January 2017 is revoked.

REASONS

1 The claimant's claims were struck out following the issuing of an "unless order" dated 23 January 2017 by Employment Judge Manley ("the unless order"). The hearing before me of 10 April 2018 was a much-delayed hearing to consider whether that order should be revoked, under rule 70 of the Employment Tribunals Rules of Procedure 2013.

The factual background to the hearing before me of 10 April 2018

2 The background to the unless order was that when the claim was made on 23 November 2016, while the claimant ticked the box on the ET1 form for "disability" discrimination, she did not say what her disability was. Her claim was not fully pleaded, either. Two directions to the claimant were given by Employment Judge Lewis on 30 December 2016. One of them was to "state, in writing to the Tribunal, the disability on which her claim of disability discrimination is based".

3 The claimant did not respond to that direction. On 20 January 2017, Ms Miller wrote to the tribunal, asking whether any response had been received by the tribunal to that direction. As a result, on 23 January 2017, the unless order was made. It was in these terms:

> "On the Tribunal's own initiative and having considered any representations made by the parties, Employment Judge Manley ORDERS that-
>
> **Unless by the 30 January 2017** the claimant responds to the Employment Tribunal's letter of 30 December 2016, the claim will stand dismissed without further order."

4 When the claim form was sent to the respondent by the tribunal, the tribunal listed a closed preliminary hearing to take place on 3 February 2017. On 1 February 2017, the tribunal sent the claimant by email at 11.16 a letter headed "Confirmation of dismissal of claim", which was in these terms:

> "Further to the Unless Order sent to the Claimant on 23 January 2017 which was not complied with by the Claimant, the complaints of Unfair Dismissal, Disability Discrimination and Race Discrimination has been dismissed under Rule 38.
>
> The hearing listed on 3 February 2017 has been cancelled".

5 That prompted an email from the claimant at 12.16 on the same day, i.e. an hour later, in the following terms (all spellings in the following, and all other, quotations, are as in the originals):

> Dear Sir/Madame
>
> Since I have been unemployed I have accumulated rent arrears and the landlord presented me with a repossession order. As a result of I tried enthusiastically to resolve the matter. Which became very difficult and tiring as the local authority was unhelpful to begin with. As a result I became sick the emotionally strain grow to be overpowering. This had an impact on me psychically as well and I was unable to function.

> I was due to attend court on the 2nd February 2017 for the repossession however the Local Authority made a decision to award the backdated payment to my account therefore I was able to pay some of the monies owed to my account. On the 31st January 2017 the Landlord decided to withdraw the repossession order.
> As a result of the above events mentioned it would have been very difficult to then submitted the documents and attend the tribunal for this matter as I would not have been able to comply to the court demands. Firstly, this was due to my psychical and emotional well being and the additional health problems that I have been experiencing recently. Secondly the fact that I have a disability I am unable to deal with both emotionally demanding cases alongside each other. For example I would have needed time to prepare paper work seek legal advice and ensure that I had the right support if needed once I had attended court.
> In addition I am asking the courts to make reasonable adjustments that I will be able to receive sufficient support before the court hearing and during the court case."

6 On 6 February 2017, the claimant sent a further email in which she used the heading "Reconsider for case to be reinstated". She enclosed with that email an email which showed that the landlord of her home had indeed withdrawn the application for the possession of her home on 31 January 2017. On the following day, 7 February 2017, the claimant sent to the tribunal a handwritten letter with the same heading, "Reconsider for case to be reinstated", enclosing a report of a Dr S Moody of 21 April 2003 which was to the effect that the claimant was dyslexic.

7 Employment Judge Manley then, on 24 February 2017, directed the sending of a letter asking the respondent whether it agreed that the claim should now be reinstated. Ms Miller responded on behalf of the respondent, and opposed the reinstatement of the claim on the basis that the claimant had not, to the respondent's knowledge, "given a reason as to why she could not have supplied [the information that her disability was dyslexia] by the deadline set".

8 A hearing was then directed to consider the claimant's application for the reinstatement of her claim. That hearing was directed to take place on 12 July 2017. On 10 July 2017, that hearing was postponed by Employment Judge Manley at the claimant's request to enable her to prepare for the hearing and to learn about the outcome of her application for help with the fees payable at that time for the issuing of the claim.

9 The hearing of the claimant's application for reconsideration was then listed to be heard on 10 November 2017. Shortly before then, the claimant instructed a Mr Wayne Lewis, of "Access Lawyers". On 6 November 2017, he sought an adjournment of the hearing, but Employment Judge Manley refused to adjourn the hearing again. However, there was no judge available to hear the claimant's application on that date, and it was again postponed, this time by order of

Regional Employment Judge Byrne made on 9 November 2017. The hearing was then listed to take place on 1 March 2018. Mr Lewis attended that hearing, but the claimant did not. She said that Mr Lewis had said that she need not attend the hearing, but there were emails in the tribunal's file which suggested that that was not the reason why she did not attend: on 28 February 2018, at 12:11, Mr Lewis enclosed a draft witness statement for the claimant, dealing with the merits of the case, but not the reasons why she had not complied with Employment Judge Lewis' order of 30 December 2016 and the unless order of 23 January 2017. That witness statement was unsigned and was dated "00 February 2018". A document described by Mr Lewis as "my draft particulars of claim" was also enclosed with that email. In the email, Mr Lewis wrote:

> "I have decided not to attend as my client as her representative because she has failed to co-operate with me and I have not been able to complete her particulars of claim as she does not give me answers. Also I have another issue with her to be resolved. She is a nice lady and seems to know what is going on but I suspect the pressure of going to the Tribunal has got to her.
>
> She has a habit of disappearing for long times in between her instructions and frankly I am frustrated with these long delays.
>
> We have telephone her constantly and occasionally she response to say her phone is playing up. The last time we had contract with her was on Monday to say she wanted to talk to me but I was unavailable at the time. We have been calling her ever since but no response and she gave us another telephone number [which he stated]. In my view she will need help to deal with the tribunal as explained in her medical report before the tribunal."

10 At 13:54, however, Mr Lewis wrote this, in a further email to the tribunal:

> "Update, just spoke to the Claimant and she cannot now attend as her employers will not let her take any more time off as she has been off sick for too often. In the circumstances I will now attend."

11 Mr Lewis did then attend the hearing on the next day, 1 March 2018, without the claimant accompanying him. Employment Judge Bedeau heard the application advanced by Mr Lewis. Mr Lewis put before Employment Judge Bedeau (but did not give to Ms Miller, who was present for the respondent) copies of two witness statements, both of which were signed by the claimant and dated 28 February 2018. The longer one was a corrected version of the draft witness statement sent to the tribunal by Mr Lewis on the previous day. The shorter one was about the reasons why the claimant did not comply with the order of 30 December 2016 and the unless order of 23 January 2017. The shorter witness statement contained this paragraph (numbered 9)):

> "I spoke with Mr Lewis today and was surprise that he was complaining about me. It is true that I have not been able to see him much because I was sick at home a lot. I also had trouble with my mobile telephone as the screen was broken and, in the end, I had to buy a new sim card."

12 Employment Judge Bedeau adjourned the hearing to 10 April 2018 and made the following orders:

12.1 "The claimant must attend the hearing and failure to do so without good cause will result in her application to either vary or revoke the order dismissing her claim made on 1 February 2017, being dismissed."

12.2 "The claimant shall serve a witness statement on the respondent setting out the reasons why it is in the interests of justice to either vary or revoke the order dismissing her claim, by not later [than] **4pm 29 March 2018**."

12.3 "The claimant shall serve her application to amend her claims on the respondent with a copy sent to the tribunal by not later than **4pm 29 March 2018**."

12.4 "Any documents to be relied upon by the claimant must be included in a bundle served on the respondent by not later than **4pm 29 March 2018**."

13 That order was sent to Mr Lewis on 16 March 2018. In fact, he had on 13 March 2018 sent an email to the tribunal in these terms:

> "I write to inform the tribunal that I have withdrawn from this case and ask that you update your records accordingly."

14 The tribunal clerk who had sent the order to Mr Lewis then evidently saw that email in the tribunal's possession and sent the order to the claimant by email.

15 On 5 April 2018, Ms Miller wrote to the tribunal to say that the respondent had received no further correspondence from the claimant or her representative since the hearing of 1 March 2018: "neither an application to amend her claim nor a witness statement". A member of the tribunal's staff then scanned the hard copies of the two witness statements put before it by Mr Lewis on 1 March 2018 and sent them to Ms Miller by email.

16 The claimant attended the hearing before me on 10 April 2018 with no further documents. I heard oral evidence from her.

The claimant's evidence given at the hearing of 10 April 2018

17 The claimant's only explanation for the failure by her simply to send a one-line email before 30 January 2017, stating that the disability on which she relied was her dyslexia, was that she was too stressed to do so because of the

possession proceedings which she was defending, coupled with the facts that (1) she had difficulty because her short-term working memory was poor (that being one of the features of her abilities which, taken together with her relative strengths in other areas, led to the diagnosis of dyslexia) and (2) the more stressed she became, the less able she was to deal with the written word. She said too that she was very low during the period when her home was threatened by the possession proceedings.

18 When I asked her why she did not even try to comply with the orders made by Employment Judge Bedeau on 1 March 2018 and sent to her on 16 March 2018, the claimant initially said that she did not receive them and could not read them on her mobile telephone because it was not working. When I put to her the fact that, contrary to what she implied in paragraph 9 of her shorter witness statement (which I have set out in paragraph 11 above), the fact that a mobile telephone's screen was broken had nothing to do with the need to replace the SIM card, she accepted that. After some further probing, she accepted that the screen on her mobile telephone (the telephone is an iPhone 6 Plus, so it has a large screen, on which it was possible with relative ease to read documents) was working on 16 March 2018 and subsequently, and that there was no technical or physical reason why she could not look at her emails and see the orders of Employment Judge Bedeau. Her explanation for her failure to do so was then changed to the fact that she was suffering from high blood pressure and was dizzy as a result. She showed me two sickness certificates from her doctor, the first of which was dated 16 March 2018 and was written before the email from the tribunal of that date was sent to her, enclosing the orders of Employment Judge Bedeau. The second certificate was dated 3 April 2018. However, neither certificate referred to the claimant's blood pressure. They both stated as the (only) reason for the claimant's not being fit to work: "Stress related problem".

19 The claimant said that she did not look at her emails because she was ill and wanted to minimise her stress. As a result, she said, she tried to do "as little as possible".

20 I said that I found it very hard to believe that Mr Lewis did not tell her that she had to comply with the orders of Employment Judge Bedeau made on 1 March 2018, and the claimant said that it was nevertheless true that he did not do so.

21 The claimant was, however, adamant that she wanted to progress her claim. She said that she had not realised in January 2017 the seriousness of the consequences of not complying with the directions of Employment Judge Lewis and Employment Judge Manley. She emphasised that she wanted her claims to be heard.

The respondent's position

22 Ms Miller said that one of the respondent's critical witnesses now lives in Japan, with the result that the interests of the respondent would be negatively affected by the passage of time since the claim was struck out, with the result, she said, that it would be unfair to the respondent for the claim to be permitted to proceed.

23 Ms Miller also emphasised the fact that the respondent had had to prepare for a number of hearings, before the one of 1 March 2018, which did not occur. She said it was not fair to the respondent for it to have to prepare for more hearings.

24 Ms Miller also said that Mr Lewis had on 1 March 2018 negotiated a longer time-period for compliance with the orders made by Employment Judge Bedeau than Employment Judge Bedeau had initially intended to give, and that it was inconceivable that Mr Lewis did not tell the claimant about the need to comply with the orders made by Employment Judge Bedeau on that day.

The applicable law

25 I had to take into account the overriding objective when applying rule 70. The overriding objective is stated in rule 2, which is in these terms:

> "The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

26 In addition, I had to take into account the fact that striking out a claim is a "draconian" measure (i.e. a "rigorous, harsh, severe, cruel" measure, according to the Oxford English Dictionary).

27 Furthermore, I referred myself to the decision of the House of Lords in *Anyanwu v South Bank Student Union* [2001] ICR 391, where Lord Steyn said this in paragraph 24 (albeit against a different factual background):

> "Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."

28 As for the "interests of justice" test in rule 70, I noted the discussion in *Harvey on Industrial Relations and Employment Law* at paragraphs P1[1147]-[1151.03], to which I also referred the parties. I noted in particular the first paragraph in that passage, which is in these terms:

> "Under previous rules, the interests of justice ground was described as 'a residual category of case, designed to confer a wide discretion on [employment] tribunals' (*Flint v Eastern Electricity Board* [1975] ICR 395 at 401, per Phillips J). But whilst the discretion is undoubtedly wide, it was held not to be boundless; it must be exercised judicially and with regard, not just to the interests of the party seeking the review, but also to the interests of the other party and to the public interest requirement that there should, as far as possible, be finality of litigation (see *Flint*, above, at 404). Moreover, as with the exercise of any other power under the Rules, tribunals and employment judges must seek to give effect to the overriding objective (see para [68] above) when exercising their discretion under SI 2013/1237 Sch 1 rr 70–73)."

My conclusion on the application, and my reasons for it

29 In the end, having weighed up the various relevant factors very carefully, and having concluded that the claimant had been less than convincing in her explanations for not complying with the tribunal's previous orders, I concluded that the claimant, as a litigant in person whose experience of the process of litigation in early 2017 was apparently minimal, should have one further chance to advance her claim. I stated that conclusion at the hearing, and I emphasised that the claim would be struck out if the claimant did not comply with the first of the orders which I made at the end of the hearing, namely to state her case sufficiently clearly for the respondent to know precisely what was the case that it had to meet.

30 I then held a case management discussion. I decided to seek to avoid the need for a further case management discussion by giving directions of a sort that it could reasonably be hoped would enable the case to be prepared for trial without the need for a further hearing (whether by telephone or in person). This is in part because the parties are not represented, but also because the issues should be apparent from the first of the orders made below. If, however, difficulties subsequently arise in regard to the management of the case, then the parties, or either of them, can apply for there to be a further case management discussion. That discussion would be likely to be concerned only with the issues to be determined at the trial of the case, and if there is to be a

case management discussion about those issues, then the parties will need to put before the tribunal in advance of the discussion either individual lists of issues, i.e. as proposed by each party, or a proposed jointly-agreed list, with indications of the areas where there is disagreement.

CASE MANAGEMENT SUMMARY

31 During the hearing, as a result of the manner in which the parties discussed the claimant's complaints which had led her to resign, both parties were given by the other a much clearer picture than they had previously had of the other party's case. Also during the hearing, I explained what the claimant needed to be able to show the tribunal that heard her claim (assuming that the case went to a full trial) by reference to the effect of the case law concerning the law of constructive unfair dismissal and by reason of the application of section 136 of the Equality Act 2010, concerning the burden of proof. Having concluded that the claim should be permitted to proceed after all, I said that I would give an indication in my written reasons for my judgment of the things which the claimant would need to say in her restatement of her claim that I was going to direct her to give.

32 I do that below, in the order requiring the claimant to state her case with sufficient particularity for the respondent to understand it and respond to it properly.

Listing of the case

33 After discussion with the parties, I decided that the case should be listed for 4 days at Watford, to start at 10.00am or as soon after than as possible, on 15 October 2018. This is on the basis that it is envisaged that the time will be used as follows:

33.1 The tribunal will need up to 2 hours to read the witness statements and other relevant documents before hearing oral evidence.

33.2 The oral evidence of the parties will take up the rest of the first day and the whole of the second day. This is likely to be so even if it is necessary, as discussed at the hearing, to hear the evidence of one of the respondent's witnesses by video link from Japan. It is envisaged that the claimant will give evidence on her own behalf and that the respondent will call 3 witnesses.

33.3 There will be a maximum of 2 hours (one hour each) for oral submissions (it being envisaged that the parties will put before the tribunal written skeleton arguments in support of their oral submissions).

33.4 The tribunal will need a day to determine the case and give judgment. If the claim is to any extent successful, then the remedy to be awarded to the claimant can be determined in the rest of the fourth day.

34 The parties and I agreed (after a discussion on each of them) the rest of the orders which I record below.

ORDERS
Made pursuant to the Employment Tribunal Rules 2013

Restatement of the claimant's case

1 The claimant must, **by 4pm on Tuesday 15 May 2018**, state in detail what is the factual basis of her claim. Bearing in mind that her claim is of (1) constructive unfair disimssal, (2) race discrimination, and (3) disability discrimination through a failure to make reasonable adjustments for the disability on which she relies, namely dyslexia, in particular, she must state the following things:

1.1 On what acts or omissions of the respondent the claimant relies in saying that the respondent breached the implied term of trust and confidence (the obligation not, without reasonable and proper cause, to act in a way which is likely seriously to damage or to destroy the relationship of trust and confidence which exists, or should exist, between employer and employee as employer and employee).

1.2 On what factual basis the claimant asserts that she was discriminated against because of her race in the circumstances which led up to her resignation. If she believes that she can compare the circumstances in which she resigned to similar circumstances where a person of a different race, ethnicity or national origins, or colour, was treated differently, then she must say so and must identify that other person and describe those other circumstances. If the claimant cannot do so, then she will be relying on a hypothetical comparator. If she is relying on a hypothetical comparator, then the claimant must say on what facts or factors she relies in saying that if she had been of a different race, ethnicity or national origins, or colour, then she would have been treated more favourably than she was in fact treated.

1.3 What adjustments the respondent did not make which the claimant says it would have been reasonable to make for her difficulties arising from her dyslexia.

2 **If the above order (number 1) is not complied with by the time for compliance stated in it, i.e. 4pm on Tuesday 15 May 2018, then the claim shall be dismissed without further order.**

3 The respondent may, by **4pm on Tuesday 5 June 2018**, file an amended response to the claimant's claims as amended in compliance with order number 1 above.

Disclosure

4 It is ordered that the parties will give mutual disclosure of documents relevant to the issues stated in paragraph 1 above and the circumstances described in the claim form and the respondent's response, as discussed at the hearing of 10 April 2018, by the provision of a list of documents and copies of the documents on the list, to arrive on or before **4.00 pm on Tuesday 3 July 2018**. This order is made on the standard civil procedure rules basis which requires the parties to disclose all documents relevant to the issues which are in their possession, custody or control, whether they (1) assist the party who produces them or the other party, or (2) appear to be neutral.

5 The parties shall comply with the date for disclosure given above, but if despite their best endeavours, documents to come to light (or are created) after that date, then those documents shall be disclosed as soon as practicable in accordance with the duty of continuing disclosure.

Bundle of documents

6 It is ordered that the respondent will have primary responsibility for the creation of the single joint bundle of documents required for the hearing of the claims. To this end, the claimant is to notify the respondent on or before **4.00pm on Tuesday 17 July 2018** of the documents to be included in the bundle at her request. These must be documents to which the claimant intends to refer, either by evidence in chief or by cross-examining the respondent's witnesses, during the course of the hearing.

7 The respondent is ordered to provide to the claimant a full, indexed, paginated bundle on or before **4.00 pm on Tuesday 31 July 2018**. The respondent is to bring to the hearing 4 copies of the agreed bundle for the use of the tribunal.

Witness statements

8 It is ordered that oral evidence in chief will be given by reference to typed witness statements from parties and witnesses. The witness statements must be full, but not repetitive. They must set out all the facts about which a witness intends to tell the tribunal, relevant to the issues as identified above. They must not include generalisations, argument, hypothesis or irrelevant material.

9 The facts must be set out in numbered paragraphs on numbered pages, in chronological order.

10 If a witness intends to refer to a document, the page number in the bundle must be set out by the reference.

11 It is ordered that witness statements are exchanged so as to arrive on or before **4.00 pm on Tuesday 21 August 2018**. The parties must bring 4 (additional) copies of their witness statements to the hearing.

_____
Employment Judge

Date: 8 / 5 /2018

Sent to the parties on: .....

.....

For the Tribunal Office