EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106915/2017 Preliminary Hearing at Edinburgh on 17 October 2018

Employment Judge: M A Macleod (sitting alone)

Kathleen Dykes	Claimant In Person
Whitbread Group PLC	Respondent Represented by Mr P Bownes Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the respondent's application to strike out the claimant's claim is refused; but that the Order of 21 June 2018 is now reissued as an Unless Order, to be complied with by no later than Friday 11 January 2019.

REASONS

1. A Preliminary Hearing was fixed to take place on 16 October 2018 in order to determine whether the claimant's claim should be struck out on the respondent's application. The claimant appeared on her own behalf, and Mr Bownes, solicitor, appeared for the respondent.

2. The claimant presented some documents in support of her position, and parties made submissions on their respective positions.

Submissions for Respondent

3. The respondent set out the history of the claim, and in particular referred to the Preliminary Hearing which took place before the sitting Employment Judge on 16 February 2018. The Note issued following that PH recorded that the respondent was concerned about the lack of detail within the claim, and that the claimant agreed that it would be appropriate to provide that further detail by way of further and better particulars. In addition, specific questions were set out for the claimant to answer, in relation to her disability status, within 28 days, with the respondent setting out questions in relation to the claimant's substantive claims for the claimant to answer.

4. Mr Bownes stated that the respondent's representative set out a list of 9 short questions on 13 March 2018.

5. He then submitted that the claimant has not responded to the questions either set out by the Tribunal or by the Tribunal, and that the matter is therefore no further forward than it was at the original PH some 8 months before, and the respondent remains unclear as to the claims which it faces.

6. On 25 May 2018, the respondent's representatives wrote to the Tribunal requesting further case management directions to enable the case to be progressed. As a result, the Tribunal issued an Order dated 21 June 2018, requiring the claimant to provide information by no later than 2 July 2018. No response was received from the claimant to this Order.

7. On 9 July 2018, the Tribunal wrote to the claimant asking her to explain why she had not complied with the Order of 21 June 2018, and noted that if she did not, a Strike Out Warning may be issued on the grounds of non-compliance and failure actively to pursue her claim.

8. On 20 July 2018, the Tribunal issued a Strike Out Warning to the claimant, noting that if the claimant disagreed with the warning she should set out her reasons for doing so by 1 August 2018. The claimant did respond on 31

July, asserting that the respondent's representatives were badgering and bullying her, to which the respondent's representatives responded on 9 August, denying such assertions.

9. Mr Bownes pointed out that in this and other correspondence, the claimant had asserted that there were medical reasons for her non-compliance with the Order. The Tribunal requested medical evidence in support of this by email dated 28 August 2018 within 14 days.

10. On 18 September, the claimant sent to the respondent's representatives only a photograph of evidence, confirming only that she was in hospital from 28 June to 3 July 2018, but did not explain non-compliance in the months before or after.

11. On 24 September 2018, the respondent's representatives made application to the Tribunal for postponement of the hearing on the merits, and for a Preliminary Hearing to be fixed instead to consider strike out on the basis of the warning letter of 20 July 2018.

12. The claimant emailed the Tribunal on 25 September 2018 to say that she had provided the medical information in a timely manner, and to ask what further information was to be required of her.

13. Mr Bownes then summarised the law on strike out of a claim under Rule 37(1)(c) of the Employment Tribunals Rules of Procedure 2013, referring to the leading case of **Weir Valves & Controls (UK) Ltd v Armitage [2004] ICR 371**. He also referred the Tribunal to related authorities, and in particular to **Khan v London Borough of Barnet UKEAT/0002/18**, in which the circumstances were "strikingly similar" to those in this case.

14. He submitted that the claimant has for some 8 months now refused to engage with the Tribunal process which she chose to initiate against the respondent. She has only chosen to respond to certain correspondence, but has not engaged with the substance of the case. He referred to the claimant's statement in her email of 25 September 2018 when she said that she intended to go through the Tribunal hearing on or around 16 October.

He said that the claimant cannot simply choose when, and to what extent, to participate in the proceedings.

15. He argued that the delay in the proceedings is entirely down to the claimant's failure to engage with the Tribunal, despite repeated requests. He submitted, then, that the claimant's non-compliance was repeated, deliberate and persistent. It is serious as it relates to the fundamental basis of the claim, and has resulted in the hearing being lost as the case was not in a triable state. He described this as disruptive and unfair to the respondent and to the Tribunal.

16. He further submitted that the claimant's refusal to engage actively with her claim has been both intentional and disrespectful to the Tribunal, except in relation to the period where she gave birth when she was understandably unable to engage. The respondent still does not understand the claims which it requires to face, and the memories of witnesses will fade as time passes, given that the claimant has not worked for the respondent since she was signed off sick on 27 March 2017.

17. Mr Bownes fairly set out the considerations which ran counter to his submissions, and in particular the point that strike out is a draconian measure which must be proportionate to the default to which the Tribunal is responding. However, he maintained that strike out is proportionate in this case, and invited the Tribunal to take this step for the reasons set out under Rule 37(1)(c) and (d).

Submissions for Claimant

18. The claimant opened by apologising that she had only brought one copy of the sick lines and medical evidence to illustrate why she had not been able to comply with the Tribunal's directions.

19. The claimant provided some medical information in the form of correspondence, and sought to show the level of support which she required in coping with the birth of her child due to her mental health difficulties.

20. She said that she believed that she could comply with the Order 4 weeks from the date of this PH, as she was now in a much better mental state, and past the initial danger period post partum. She considers that she is now healthy and much happier as a result of having a happy, healthy baby.

21. She said that she is both willing and able to comply with the order, and stressed that she was not unwilling to do so. She does wish to pursue her claim.

Medical Information

22. The claimant presented a Statement of Fitness for Work dated 13 June 2018, following an assessment by her GP, Dr Blake, on 23 May 2018. Dr Blake assessed the claimant as unfit for work due to "pregnancy related disorder". The certificate covered the period from 23 May until 27 July 2018.

23. She also provided a discharge letter from the Department of Obstetrics at the Royal Infirmary of Edinburgh, dated 2 July 2018, which confirmed that she underwent an Emergency Caesarean Section delivery on 28 June 2018. The letter confirmed the details of the birth (which are largely irrelevant for these purposes) but it was noted that the antenatal course was "Background of bipolar affective disorder – mood monitored closely postpartum". It is understood that the term "postpartum" refers to the period shortly after birth.

24. The letter concluded by saying that follow up by her GP would be required for ongoing monitoring of her mood.

25. The claimant submitted a Pre-Birth Plan completed by the Perinatal Mental Health Service, at Mountcastle Medical Practice, dated 23 May 2018. It was recorded that the claimant's risk of illness was "60 percent chance of developing post partum psychosis", and her diagnosis was Bipolar Disorder including episodes with psychosis.

26. In attendance at the meeting were a number of health and social practitioners, including health visitors, social workers, a consultant psychiatrist, and 2 Community Psychiatric Nurses, of whom one, Marion

Salthouse, was the author of the plan. The post natal treatment plan included psychiatric review on the post natal ward, and confirmed that she was not to be discharged before this.

27. Finally, the claimant provided an appointment letter dated 13 September 2018, sent to her by the Department of Perinatal – MHT (understood to mean Mental Health Team), to see Marion Salthouse on 26 September 2018, at a home visit jointly made with the claimant's Health Visitor.

The Relevant Law

28. Rule 37(1)(b) and (c) provide:

"At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds-

…(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious.

(c) for non-compliance with any of these Rules or with an order of the Tribunal…"

29. In **Weir Valves & Controls (UK) Ltd v Armitage [2004] ICR 371**, at paragraph 14, the EAT said that *"Where the unreasonable conduct which the employment tribunal is considering involves no breach of a court order, the crucial and decisive question will generally be whether a fair trial of the issues is still possible…"* In paragraph 15, the court said that even if a fair trial as a whole is not possible, the question of remedy must still be considered so as to ensure that the effect of a debarral order does not exceed what is proportionate. It is, they said in paragraph 16, an additional consideration where there has been disobedience to a court order, and the court must be able to impose a sanction where there has been wilful disobedience to an order. However, at paragraph 17, it was said that *"…it does not follow that a striking-out order or other sanction should always be the result of disobedience to an order. The guiding consideration is the*

overriding objective. This requires justice to be done between the parties. The court should consider all the circumstances. It should consider 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 still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience."

30. In **Blockbuster Entertainment Ltd v James 2006 IRLR 630 CA**, the Court of Appeal found that for a Tribunal to strike out a claim based on unreasonable conduct, it has to be satisfied that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible; and in either case, striking out must be a proportionate response.

31. The court went on to say (paragraph 21): *"The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact – if it is a fact – that the tribunal is ready to try the claims; or – as the case may be – that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist."*

32. Another decision of the EAT, **Khan v London Borough of Barnet UKEAT/0002/18**, was relied upon by the respondent. It was stressed that what is appropriate is a matter for the circumstances of each case, but that in that case, *"…the reality was that the Claimant was not engaging with the process. At most, he would do just enough at each juncture to avoid potentially strike out, but not, in my judgment, enough to demonstrate a real intention to progress his claim…"*

Discussion and Decision

33. In this case, the claimant has represented herself throughout. The fundamental issue before the Tribunal is whether or not it would be in the interests of justice (considering the various tests which the authorities have laid down) to strike out the claimant's claim.

34. This is a matter of judgment, and the exercise of a discretion, by the Tribunal.

35. The reason why this matter has been raised by the respondent in this way is primarily, as it seems to me, that the claimant was sent an Order dated 21 June 2018, to which she has not yet responded. The respondent is concerned at the lengthy passage of time without a response to the Tribunal's Order, and wishes the Tribunal to take the draconian step of striking out the claimant's claim.

36. The first matter for the Tribunal to address, then, is whether the claimant is in default in relation to the Order of 21 June 2018. This is a simple matter. The claimant has not provided a response to that Order, and accepts that. She has, therefore, failed to respond to an Order, and as a result, is vulnerable to criticism and possible sanction by the Tribunal.

37. The Order requires her to provide both records and reports, and answers to questions, in order to allow the Tribunal to determine whether or not she is, or was at the material time, a person disabled within the meaning of section 6 of the Equality Act 2010. This is a critical part of her claim, and without this information, the Tribunal cannot make an assessment of her assertion that she is so disabled.

38. The absence of any response is extremely unhelpful, and has prevented any meaningful progress being made in these proceedings. In addition, a claimant, or indeed any party, to Employment Tribunal proceedings cannot simply choose either to ignore or only selectively respond to Orders of the Tribunal. A Tribunal has the power to order parties to provide information, and without the respect and compliance of those parties with its Orders, the authority of the Tribunal is likely to be diminished or undermined if no action is taken in response.

39. The claimant does not argue that she has failed to comply with the Order, but seeks to explain why. She has had two medical issues which she says have intervened and have prevented her taking the necessary steps to respond to the Order, namely that she has given birth to a baby, and has suffered, throughout, from fragile mental health. She has produced a number of pieces of correspondence which demonstrate not only that she gave birth on 28 June 2018, but that before and since that event she has been the subject of considerable attention from Mental Health clinical services in order to ensure that the effect of this event upon her mental health does not cause her a severe reaction.

40. The respondent argues that she has had since January to provide further information in relation to her claim, and has deliberately failed to do so.

41. I am not persuaded that the claimant has deliberately defied the Tribunal's Order to provide information, nor that the period until June is of primary relevance, since the issue before me is whether she has failed to comply with the Order of 21 June, and as a result, failed to pursue her claim actively, and, importantly, if so, why.

42. It is correct to say that the acute episode of hospitalisation and preparation for birth took place in June, but the claimant was admitted to hospital for a caesarean section operation on 28 June, some 7 days after receiving a fairly detailed and lengthy Order from the Tribunal. Given the multi-disciplinary concerns being expressed in any event about her mental health before and after this period, however, the claimant's health is a concern for longer than the short period during which she was hospitalised for the birth of the baby. It is quite plain that a number of practitioners were observing her closely in order to provide her with significant support, because they were concerned about her mental wellbeing.

43. This Tribunal has no medical expertise to bring to these considerations, but I have concluded that the claimant's explanation for her failure to comply with the Order is a genuine one, namely that she was unwell and preoccupied both with the birth of her baby and the potential and actual

consequences for her mental health. When she appeared before me, the claimant confirmed that she believes herself now to be well, at least partly because her baby is home, healthy and happy, and that the period of difficulty has now passed. She stressed that not only does she wish to pursue her claim, but she believes that she will be able to comply with the Order within a short space of time.

44. I do not criticise the respondent for taking the position which they have in this case. They are entirely justified in expressing frustrations at the length of time which it has taken to reach a point which represents very little progress in meaningful terms. There is no doubt that the claimant has been, and remains, in default of the Order of 21 June 2018, and that that is a situation which cannot be ignored.

45. However, I am persuaded that the claimant's default, while serious, has been caused in large part due to the personal and health circumstances which she has faced since the Order was issued to her. As a result, I do not consider that matters have reached the stage where a fair trial of the case is no longer possible. There may be difficulties which arise for both parties in the delays which have arisen, but at this stage it is not clear to me that any clear prejudice has been demonstrated by the respondent as having been caused here.

46. I am not prepared to grant the respondent the draconian measure of strike out of the claimant's claim at this stage.

47. However, it is crucial that the Tribunal's Order is taken seriously, and given a proper response. As a result, the Order is now reissued to the claimant, and attached to this Judgment, but now in the form of an Unless Order. An Unless Order is an Order which requires compliance by the party against whom it is directed, by the date which is identified in the Order. If compliance is not received in respect of the Order, the claim will be dismissed automatically. This is therefore a final warning to the claimant that she must comply with this Order, by no later than Friday 11 January 2019. I have extended the period for compliance simply because the festive

holiday period will intervene during the next four weeks, but the claimant should be in no doubt that if she fails to answer the Order this time, her claim will not be allowed to continue.

48. Accordingly, the claimant's claim is not struck out under Rule 37(b) or (c), and will be allowed to continue.

Employment Judge: Macleod
Judgment Date: 23 November 2018
Entered Into the Register: 26 November 2018
And Copied to Parties