EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms C Agyei-Kyem London Sovereign Limited

RECORD OF A PRELIMINARY HEARING

Heard at Watford **On**: 10 November 2022

Before Employment Judge Manley

Appearances
For the Claimant: Ms K McCarthy, lay representative
For the Respondent: Ms R Blythe, solicitor

RESERVED JUDGMENT

The claim is now struck out under Rule 37 Employment Tribunal Rules of Procedure 2013 for the reasons given below. The hearing listed for 17-21 April 2023 is now vacated.

REASONS

History

1 The claim having been presented in September 2019, this is now the third preliminary hearing. There have been significant delays and considerable and disproportionate communications between the parties and with the tribunal so that the document bundle for this hearing produced by the respondent extended to almost 500 pages. I also had to consider emails in the tribunal file, many of which repeated points already made.

2 The claims and issues which could proceed in this case were identified at the first preliminary hearing in May 2020 as being for sex discrimination, disability discrimination and unlawful deduction of wages/breach of contract. The employment judge there stated that the claims were those as set out at paragraphs 9-12 and 14 as recorded. He specifically rejected some other suggested claims. He also made various relatively standard orders for information and, importantly for matters before me today, for

documents to be disclosed recording the continuing duty of disclosure. The matter was listed for four days between 18-21 January 2022.

3 Unfortunately, because there remained issues about disclosure, the merits hearing in January 2022 was converted into an open preliminary hearing by CVP. Both parties made applications to strike out for alleged non-compliance with orders but the judge refused those applications. In a very detailed, helpful and full judgment, the judge set out what preparation was needed for the merits hearing which was then listed over 5 days in April 2023 to deal with liability and remedy.

4 It seems sensible to include in this judgment what was recorded as an obviously very detailed discussion on documents. These were the orders made:-

" 4. Disclosure of Documents

4.1 On 25 May 2020, EJ R Lewis ordered:

6.1 On or before 30 October 2020 the claimant and the respondent shall send each other a list of all documents that they wish to refer to at the final hearing or which are relevant to any issue in the case, including the issue of remedy. They shall send each other a copy of any of these documents if requested to do so.

6.2 The parties remain under a duty of disclosure even after exchanging the above lists. That means that if a party later finds an item which should been included in the list but wasn't, the item must be disclosed at once in accordance with the above procedure.

4.2 That on-going duty still applies.

4.3 Documents includes hard copy versions, and recordings, emails, text messages, social media and other electronic information. The order applies to relevant documents in the party's possession or control. A document is in the party's control if they could reasonably be expected to obtain a copy by asking somebody else for it.

4.4 The Respondent says that it does not have a copy of the P45. I cannot order it to disclose something that it does not have, and so the Claimant's application for such an order is not granted. Clearly the document is a potentially relevant one and so falls within paragraph 6.2 of EJ Lewis's orders.

4.5 The Respondent is ordered to carry out a reasonable search for any referrals to Occupational Health, any reports from Occupational Health, or any other communications between management or HR and Occupational Health, which relate to the Claimant and, as the case may be, disclose such items to the Claimant or expressly confirm to her that the search has been completed and no new items (that is, no items which have not previously been disclosed to her) have been discovered.

4.6 The Respondent is ordered to carry out a reasonable search for any shift rotas created which include planned shifts for the Claimant (regardless of whether she actually worked the shift in question or not). This includes any planned shifts for dates falling after the

termination date. The Respondent is ordered , as the case may be, disclose such items to the Claimant or expressly confirm to her that the search has been completed and no new items (that is, no items which have not previously been disclosed to her) have been discovered. For avoidance of doubt, this order does not require disclosure of information or documents relating to any person other than the Claimant, and any data relating to other individuals may be redacted.

4.7 Any documents which the Claimant possesses which relate either to her search for work after the end of employment with the Respondent, or the income from any such employment, or any state benefits she has received, are relevant documents within the terms of EJ Lewis's orders. Thus, paragraph 6.2 of his orders continues to apply, and that relates to any new period of work or benefits from the end of employment until the dates of the final hearing. That means that she must supply copies of any payslips (or similar) or other notifications of the amounts of payments she has received, whether by cash, cheque, bank transfer, or any other method. If she does not have such items in her possession, but some other person would be obliged to supply her with copies if she requests them, then she must obtain such copies and disclose them to the Respondent.

4.8 If there are any periods in which the Claimant was employed, but for which she does not possess payslips, then she must write to the employer and request them. If the employer refuses, or says it cannot comply, then any such written response from the employer is a document which must be disclosed to the Respondent. In such circumstances, the Claimant has permission, if she wishes, to ask the tribunal to make an order that the employer disclose documents. However, if the Claimant cannot provide payslips for the full periods of employment, then she must instead disclose copies of her bank statements covering all periods in which she was employed (and for which no payslips are available) from the termination of employment with the Respondent, to the final hearing date. She may redact the statements to block out information which does not relate to payments from an employer.

4.9 The Claimant is ordered to carry out a reasonable search for any job applications made between 5 July 2019 and the date of termination and as the case may be, disclose such items to the Respondent or expressly confirm that the search has been completed and no new items (that is, no items which have not previously been disclosed) have been discovered.

4.10 The Claimant must disclose unredacted copies of all documents related to the job she took up upon leaving the Respondent's employment, including adverts, application forms, offer letters, contracts, and any other communications about that application or that job, its duties or its start date.

*4.11 The parties must comply with the terms of this paragraph by **11 March 2022**. This is not an Unless Order, but both parties have*

been warned that if there is any (further) failure to comply with orders then the claim/response might be struck out upon the application of the other party".

5 After the judgment and the case management summary was sent, there was correspondence which led to the judge writing to the parties on 26 March 2022 to state *"If either side has not yet complied with paragraph 4 as a whole, then they must do so asap, and parties must co-operate reasonably so as to get back on track for the remaining compliance dates*"

6 On 19 April 2022 the respondent's representative wrote to say that the claimant had failed to comply with orders 4.7- 4.10. They stated that the claimant had written to her new employer for copy payslips but had not applied for any order from the tribunal for specific disclosure as order 4.8 advised her she could. The claimant had provided no payslips or bank statements for the relevant period. The respondent applied for strike out of the claim or an unless order. The respondent sent a follow up email on 25 April 2022. Both were copied to the claimant's representative.

7 On 14 May 2022 the same judge who had dealt with the matter in January and March caused a letter to be sent warning the claimant that he was considering striking out the claim because;

- *"The manner in which the proceedings have been conducted by or on behalf of the claimant has been scandalous, unreasonable or vexatious;*
- *You have not complied with the orders of the tribunal as identified in the applications*
- *It has not been actively pursued"*

8 The claimant was ordered to reply by 30 May 2022 to say if she objected and to supply *"full details of whether she has complied with the order for disclosure of documents and, in not, why not".*

9 On 30 May, in an email sent at 23.53, the claimant's representative did object to a strike out. She said that the claimant had emailed her new employer and "*We await the full response we add that this request was made three days after the hearing and more recently a call and chase email. The trial will not be until next year which allows the claimant enough time to either apply for a summons or wait for the information*". She went on the say other documents and bank statements had been provided to the respondent. She commented on the respondent's case and said the response should be struck out. She added that the claimant's witness statement had been served.

10 On 6 June the respondent's representative replied to that email. They stated that the claimant had not complied with the disclosure orders nor stated why she had not complied. The respondent stated that the claimant had not supplied bank statements (for the relevant period) or applied for a disclosure order as in order 4.8. She had not provided any job applications and only supplied a redacted offer letter. She had supplied bank statements for April to October 2019 which were not relevant for her new employment.

11 This open preliminary hearing was therefore listed to consider the respondent's strike out application and the claimant's objections. This is that hearing which was held in person. The respondent's representative had prepared a skeleton argument and a bundle of documents which had been sent to the claimant.

The hearing

12 I started the hearing by introducing myself and explaining its purpose. I outlined the history, pointing out that it was not a satisfactory way to conduct litigation and reminding the parties that this was the third preliminary hearing for what should be a relatively straightforward matter. I reminded the claimant of the orders made at the January 2022 hearing and we began to discuss orders 4.7-4.10 to ascertain whether there had been compliance and to what degree.

13 Things became difficult as both the claimant and her representative tried to answer my questions and were looking at their phones to find emails and items which related to the claim. The claimant seemed unsure of the content of the orders, especially order 4.8 with respect to bank statements. I decided it would be wise to ask the claimant to give evidence on oath so that questions could be asked by me and by the respondent's representative.

14 I asked the claimant about order 4.7 which related to her search for work after the end of her employment with the respondent. She told me she applied on line in early August (whilst she was still in the respondent's employment) as the respondent was not paying her. She said she applied to Reed, but then realised, when she checked her phone, it was Webrecruit. She had no copies of her application as it was on line but she had an acknowledgment email of 5 August 2019 which she showed me on her phone. I asked if that email had been sent to the respondent and she believed it had. (It later transpired she had forwarded it to her representative in May 2022 but there was no evidence it had been sent to the respondent). She said she had no copies of payslips nor had she received a P45 from the new employer after she left, although she at first believed she did have one.

15 As far as order 4.8 was concerned, the claimant seemed unaware that bank statements covering her new employment was what had been ordered to be disclosed. She said she had been warned about sending copies of bank statements by the bank. As far as the redacted offer letter is concerned, the claimant said she had received it in that form, that is, with several red crosses in place of rate of pay and her name and so on. She said she had later received another unredacted document which she believed had been disclosed. The claimant's employment with the new employer was between 29 September 2019 and 13 August 2020 although her LinkedIn page shows it lasting until February 2021.

16 The claimant was becoming upset and said she was frustrated and I sought to explain that I was trying to find out what relevant documents there might be and what was said to have been disclosed and, if not, why not. I said we

should take a break to give the claimant an opportunity for her and her representative to go through their phones to find out if they can show they sent the respondent a copy of the Webrecruit email of 5 August 2019; a copy of an unredacted offer letter and whether they accept only bank statements for April to October 0219 had been disclosed.

17 After the break, the hearing did not become easier to manage. The claimant and her representative talked at the same time, talked over me and the respondent's representative and seemed unable to answer straightforward questions. Neither the claimant nor her representative were able to show any evidence they had sent the documents they said had been sent.

18 I asked the representatives to address me on the question of whether the claim should be struck out as it was clear there had not been compliance with the orders made. The claimant's representative stated that the documents were only necessary for mitigation and pointed out that the respondent had not sent their witness statements. She showed me a document which was for an Occupational Health appointment for the claimant dated 3 September 2019 and said that meant that the respondent had not complied with order 4.5. She said the respondent was misleading the tribunal and a fair trial was still possible. She said the respondent's representatives had told her the claimant's file had been lost but was not able to take me to that email (although there was one which referred to an HR record not being located). She pointed out there was considerable time for documents to be disclosed before the hearing in April 2023.

19 For the respondent, the representative reiterated what she had said in the skeleton argument. She said there were clear breaches of very clear orders and still no copies of job applications or bank statements for the relevant time. She said this prevented the respondent from producing their best evidence at the trial. She said that, on public policy grounds, orders should be complied with and the delays used up limited tribunal and respondent's resources. The explanations given were not clear and there were real issues about credibility. The claimant and her representative failed to answer points made and continually obfuscated, amounting to vexatious and unreasonable conduct. She said the respondent had written to the claimant 31 times with respect to this documentation.

20 The claimant became upset and left the hearing abruptly. Her representative said we should continue and she then purported to reply to the respondent's representative. She alleged that the respondent and/or their representative were abusing the tribunal process and said she would report the representative to the authorities. I asked the claimant's representative to pause several times so I could assess and discuss what we needed to do but she seemed unable to comply. I decided to reserve judgment, not least because we had exhausted the three hours the hearing had been listed for.

The relevant rules

21 The respondent asked me to strike-out the claim under Rule 37 (1) Employment Tribunal Rules of Procedure 2013 on two grounds. The first is

under 37 (1) (b) - the manner in which the proceedings have been conducted by or on behalf of the claimant has been scandalous or vexatious; and 37 (1) (c) non- compliance with Rules or orders the tribunal. In Bennett v London Borough of Southwark [2002] IRLR 407 it was said that scandalous had two meanings – "*One is the misuse of the privilege of the legal process in order to vilify others; the other is giving gratuitous insult to the court in the course of such process*". When considering whether to strike out for unreasonable conduct, I must consider whether the conduct amounts to deliberate and persistent disregard for orders or whether it has made a fair trial impossible. Strike out must be a proportionate response (James v Blockbuster Entertainment Limited [2006] EQCA Civ 684.

22 I must also bear in mind the overriding objective contained in Rule 2 Employment Tribunal Rules of Procedure 2013 to deal with cases fairly and justly, including in ways that are proportionate to the complexity and importance of the case, avoiding delay and saving expense. In Arriva London North Limited v Mr C Maseya UKEAT/0096/16, tribunals were reminded that the "*fundamental question …….is whether the party's conduct has rendered a fair trial impossible*". Finally, guidance in Ms P B Sud v The Mayor and Burgesses of the London Borough of Hounslow UKEAT 0156/14 is to the effect that deliberate or contumelious disobedience with an order is unreasonable conduct.

Conclusions

23 This was a somewhat difficult decision. First, I considered the failure to comply with the clear orders for disclosure made at two separate preliminary hearings. In particular, at the January 2022 preliminary hearing, the judge had to consider a strike out application because of failures to disclose documents. He declined to strike out the claim and spent time discussing and making very clear orders with the warning at the end of order 4.11. There was further warning in the strike out warning sent to the claimant in May 2022 and at today's hearing, the claimant and her representative said there had been compliance, in part, but failed to show what had been allegedly disclosed or when. There has not been compliance with the order about bank statements and there would appear to be other outstanding documents in the claimant's possession which have still not been disclosed. This is entirely unsatisfactory in litigation that has been ongoing since late 2019. It is true the hearing is some 5 or 6 months away but that is no reason for documents not to have been disclosed when ordered. Given that the claimant showed me at least one email today that should have been disclosed, it appears to me that the failure to comply is deliberate.

24 Although the tribunal often has to make allowances for some litigants, particularly those who are in person, and who find the proceedings upsetting and challenging, this behaviour goes beyond that. The claimant and her representative seem to be unable or unwilling to conduct the litigation appropriately. What is more, it is quite clear to me that there is little prospect of a fair trial in this case. The claimant and her representative were unable to take advice and constantly interrupted me and the respondent's

representative. Towards the end of the hearing, after the claimant had left the room, this became particularly marked and I had to bring the hearing to a conclusion. The way in which this litigation has been conducted to date is disproportionate. The tribunal has to consider the overriding objective and the ability of the tribunal to deal with other cases in the system. It is simply impossible to proceed with a matter where a litigant decides to take issue with each and every tiny point which is designed to progress matters and this impacts on other cases in our system. There have been delays in this case, some of which were not directly attributable to the claimant but it adds to the difficulty of proceeding to a hearing. I have reluctantly formed the view that it is no longer possible to have a fair hearing in this case and that it is proportionate to strike the claim out.

25 For these reasons, I have decided the claim should be struck out and the hearing vacated.

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Employment Judge Manley

Date: 15 November 2022

Sent to the parties on: 18 November 22

For the Tribunal Office

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