EMPLOYMENT TRIBUNALS

Claimant: **Miss L Nightingale**

Respondent: **London Borough of Redbridge**

Heard at: **East London Hearing Centre**

On: **7 September 2020**

Before: **Employment Judge Russell**

Representation
Claimant: **Did not attend**
Respondent: **Ms E Matheson Harley**

JUDGMENT

The judgment of the Tribunal is that:

(1) The complaint of disability discrimination is struck out as the Claimant has failed to comply with Orders of the Tribunal, rule 37(1)(c). In the alternative, because it is not being actively pursued, rule 37(1)(e).

(2) The complaint of unfair dismissal is struck out because it is not being actively pursued, rule 37(1)(e).

REASONS

1 By a claim form presented to the Tribunal on 27 December 2019, the Claimant brings complaints of unfair dismissal and disability discrimination. Whilst the relevant boxes for such complaints were ticked on the pro forma ET1, very little detail was provided of the grounds for the claims. All that is included is the following:

> At box 8.2: "**sickness procedure not followed by senior officers, Kevin Brown from 8 February 2019 to 29 July 2019, not being kept involved in the redundancy process from 17 January 2019 to 24 July 2019, officer made a false claim at Mr Boleyn, letter sent to work email and not my home, notice period shortened, date set not agreed as implied, loss of earnings/pension/holiday from July as they stated to my solicitor that I was still employed, constant contradiction preventing me from moving on, don't feel like I could ever work in an office environment again.**"

At box 15: **"in total LBR contradicted and made false comments about the sorry saga I cannot believe it came to this after 31 plus years."**

2 The Respondent submitted a Response which set out a bare defence, denying all claims and stating that the Claimant had failed to particularise her claim with sufficient detail to enable it fully to respond. The Respondent requested further details of the disability discrimination complaint which was entirely unparticularised, not even indicating the nature of the impairment relied upon. Employment Judge Gardiner agreed that it was necessary in the interests of justice that further information be provided. In a letter dated 27 February 2020, the Claimant was required to provide full particulars of the disability discrimination claim by 20 March 2020, including the names of the impairment alleged to be a disability, the statutory sections relied upon and, in relation to each, the gist of the complaint, including dates and identities of those involved. The Claimant failed to respond.

3 The matter was set down for a Preliminary Hearing on 27 May 2020 before Employment Judge Burgher. In preparation for that hearing, Ms Matheson Harley contacted the Claimant to try to agree a list of issues and joint case management agenda. The Claimant failed to respond.

4 The Claimant did not attend the hearing on 27 May 2020. Employment Judge Burgher accepted that the Claimant was fully aware of the hearing and had failed to provide the further information previously required. He decided to afford the Claimant a further opportunity to provide the information previously required by Employment Judge Gardiner. The Summary and Orders made at the hearing, made it clear that such information must be provided to the Respondent and the Tribunal by 24 June 2020. Rather than make an Unless Order as invited by the Respondent, Employment Judge Burgher decided instead to list an Open Preliminary Hearing to consider whether the claims should be struck out pursuant to Rule 37, on the basis either that they were not actively pursued or that the Claimant had failed to comply with Tribunal orders.

5 The Summary and Orders of the Preliminary Hearing included the reason and date for today's Preliminary Hearing; it was sent to the parties on 1 June 2020. A Notice of Hearing was also sent to the parties on 18 June 2020.

6 The Claimant has not complied with the Orders of Judge Burgher. Indeed, the only contact with the Tribunal was an email sent at 9.34am this morning, to the effect that she was unable to attend the hearing and would appreciate, albeit at short notice, that it be deferred. In her email, the Claimant said that she had no excuse today other than she had not been able to print the documents sent to her and that she does not always have the opportunity to respond. I was satisfied that the Claimant had had notice of the hearing, whilst she had asked for a postponement it was made at very short notice and with no good reason and I also took into account the Claimant's failure to attend the last hearing. There would be cost and significant delay in further adjourning and, applying the overriding objective, I decided that it was in the interests of justice that the hearing proceed in the Claimant's absence.

7 Ms Matheson Harley pursued her application for strike out under both limbs of rule 37, namely failure actively to pursue the claims and/or failure to comply with Orders.

8 Dealing with whether the claim was being actively pursued, Ms Matheson Harley

submitted that today's brief and unsatisfactory email to the Tribunal was the first correspondence or engagement from the Claimant since the claim was presented in December 2019. In the nine months from presentation to date, the case has not progressed at all. The employment terminated in July 2019; over a year later, there are still no proper details of the disability discrimination claim. At the heart of the case is a dispute about whether or not Mr Boleyn, Head of Service, agreed with the Claimant in a conversation on 8 May 2019 that her employment would end by consent as a voluntary redundancy. Mr Boleyn is no longer employed by the Respondent and they cannot contact him. The effect of the delay is therefore to cause the Respondent prejudice such that it can no longer fairly defend the claims. On the alternative basis, failure to comply with Orders, there have been two breaches by the Claimant, for neither has the Claimant given any adequate explanation and, Ms Matheson Harley, submits the failure to comply therefore is wilful and causes delay such that the Respondent is prejudiced in defending the claim.

The Law

9 Rule 37 of the Employment Tribunal Rules of Procedure 2013 gives the Tribunal the power to strike out a claim for non-compliance with orders (r.37(a)(c)) and/or where it has not been actively pursued. Strike out is a draconian sanction, preventing the party from advancing a claim which may be well-founded and ending it without any determination of its merits. It is not a sanction to be exercised too readily, **Blockbuster Entertainment Ltd v James** [2006] IRLR 630. The cardinal conditions for its exercise must be present either that the unreasonable conduct is taking the form of a deliberate and persistent disregard of required procedural steps or that it is made a fair trial impossible. If the two conditions are fulfilled it is still necessary to consider whether striking out is a proportionate response or whether there is a less drastic solution which may be adopted. This is consistent with the approach to conduct strike out applications, considered in **Bolch v Chipman** [2004] IRLR 140, EAT.

10 In **Harris v Academies Enterprise Trust & Others** [2015] IRLR 208, Langstaff J provided further guidance on the correct approach to be adopted by the Tribunal. Relevant factors will include consideration of why the party in default had behaved as she has and the nature of what has happened. Repeated failures to comply with orders of the Tribunal over some period of time may give rise to a view that if further indulgence is granted the same will simply happen again. Equally what has happened may be an aberration and unlikely to reoccur. Justice is not simply a question of the court reaching a decision that may be fair between the parties but it also involves delivering justice within a reasonable period of time, having regard to the costs and ensuring that the case is dealt with in a proportionate manner. There is no requirement for an Unless Order to be made before a strike out application based on non-compliance can succeed. As Langstaff J made clear, Orders are made to be observed, breaches are not mere trivial matters and should result in careful consideration whenever they occur.

11 The overriding objective in ordinary civil cases, including employment claims, is to deal with cases justly and expeditiously without unreasonable expense. Article 6 of the ECHR emphasises that every litigant is entitled to "a fair trial within a reasonable period". This is an entitlement of both parties to litigation. There may to be two types of active pursuit cases: those where the party has deliberately and contumeliously failed to prosecute and those where they have been unable to do so for valid reason, such as ill-health. In either case, the Tribunal must consider the effect of delay upon the

dispensation of justice and decide whether a fair trial is still possible. This can include factors such as the costs incurred by the parties, the dimming of witnesses' recollections, the worries and stresses caused to witnesses, whether or not witnesses are still available and (in ill health cases) the absence of any definite prognosis of recovery sufficient to take part in proceedings in the foreseeable future.

Conclusion

12 Having regard to this history of these proceedings from presentation on 27 December 2019 to date, I am satisfied that there has been a consistent failure by the Claimant to comply with Orders throughout the conduct of the case to date. Judge Gardiner required further information necessary to understand the disability claim on 27 February 2020, some seven months later there has still been neither attempted compliance nor any explanation put forward by the Claimant for her failure to do so. The Claimant was clearly warned in the Summary produced by Judge Burgher that failure to comply with orders may be grounds for the claims to be struck out. She was directed to appropriate guidance given by the President of the Employment Tribunal and urged to seek independent legal advice, with the possibility of free legal advice raised.

13 In deciding whether the failure to comply was wilful, I took into account the further information required from the Claimant. It was not, I conclude, particularly technical or of a type which a litigant in person may struggle to provide. It would be a relatively straightforward matter to name the alleged disability and set out the gist, date and names of those people said to be involved in discriminatory conduct. Identifying the sections of the Equality Act may be more difficult but, again, the Claimant was directed to guidance provided by the Equality and Human Rights Commission. The Claimant has not provided any adequate reason for failure to comply, other to suggest today that she has a problem with printing. However, both Orders were sent by post and the Claimant has not contacted the Respondent or the Tribunal to ask for an extension of time for compliance. On balance, I have concluded that the Claimant's repeated non-compliance was wilful, persistent and without good reason.

14 For the same reasons, I am not satisfied that if granted further indulgence the Claimant would now comply with the Orders. The clear warning from Judge Burgher did not secure compliance, the Claimant has not attended to persuade me that she would now comply, instead at the very last minute she has unilaterally stated that she is unable to attend (without any reason given). The Claimant has provided an explanation for non-compliance which I consider to be weak. The orders were sent by post and the Claimant could have replied in writing, also sent by post. This was not an aberration.

15 As for alternative sanctions, limiting the Claimant to the contents of her claim form is not a fair alternative given that it is the unsatisfactory nature of the information provided that has required the Orders of Judges Gardiner and Burgher, each of whom accepted that it was necessary in the interests of justice that further details be provided. If I were to make an Unless Order, I can have no confidence that it would be more successful. Even if it did produce a response, it would delay the progress of the case and give rise to potential satellite disputes about whether the content of any information which was provided was sufficient to comply. In all of the circumstances, I consider that it is appropriate to apply the draconian sanction of strike out to the disability discrimination claims on grounds of non-compliance with orders. The unfair dismissal claim is not struck out for non-compliance as the Orders made were purely in connection with the disability

discrimination claim.

16 Turning next to active pursuit of the claims generally, no active steps have been taken by the Claimant to pursue either claim between their presentation on 27 December 2019 and today. The Claimant has failed to attend two Preliminary Hearings, without good reason being advanced. For reasons set out above, I have concluded that she wilfully failed to comply with orders made in relation to the disability discrimination claim. The Claimant failed to engage with Ms Matheson Harley's attempts to agree a list of issues in advance of the Preliminary Hearing on 27 May 2020.

17 Looking at the situation today, the issues in the claims cannot fairly be identified because the content of the claim form is so scant. One issue is key: was the Claimant dismissed or was this a consensual termination by reason of a voluntary redundancy. That requires the Tribunal to make a finding of fact on the dispute about what was said and agreed in a conversation on 8 May 2019 between the Claimant and Mr Boleyn. Mr Boleyn is no longer employed; over a year has passed already and it is likely that the final hearing will not take place until summer 2021 even if the case were actively pursued from today. The effect of the nine months lost due to the Claimant's inaction is to render it highly unlikely that the Respondent will be able to call the one witness with direct evidence to support the Respondent's case on an issue which could be determinative in its favour (if accepted).

18 Whilst strike out is a draconian sanction, I must have regard to the right to have a fair trial. I must have regard to the overriding objective to ensure that cases are dealt with justly and expeditiously, without unreasonable expense and the right of both parties to a fair trial within a reasonable period. I am satisfied that the failure by the Claimant actively to pursue her claim has caused significant prejudice to the Respondent and deprived it of the ability to have a fair trial of either the unfair dismissal claim or the disability discrimination claim (assuming that it had not been struck out for non-compliance with orders). No valid reason has been given for the failure to pursue the claim. The only contact with either the Tribunal or the Respondent in nine months was a single email, to the Tribunal only, 25 minutes before today's hearing with the bald statement that she will be unable to attend and has no excuse other than an inability to print, when key documents were posted in any event.

19 I conclude that the draconian sanction of strike out of the claims is appropriate in all of the circumstances of the case.

Post Script

20 After the hearing ended, my clerk provided me with a further email from the Claimant. It was also sent on 7 September 2020, the day of the hearing, but at 10.39am whilst the hearing was continuing. It was not copied to the Respondent. Nevertheless, I have considered whether its contents are such that it is necessary in the interests of justice that I should of my own initiative reconsider the Judgment given orally at the conclusion of the hearing. For the reasons given below, I do not consider it to be necessary to reconsider that Judgment.

21 The Claimant attached what appears to be a solicitor's letter before action dated 7 October 2019 and suggests that this "pretty much explains what has gone on". The Claimant states that she had only just acquired a computer and printer and that she had

not been well due to stress and anxiety. I do not consider that the solicitor's letter provides the information required by Judges Gardiner and Burgher. Nor does the Claimant explain why a document which has existed since October 2019 could not be provided sooner. Nor does the Claimant explain why she did not provide written information or notify the Tribunal sooner about technical or health problems. No medical evidence was provided and no detail about the duration of any ill health or the nature of its impact upon the Claimant's ability to comply with the Orders.

Employment Judge Russell
Date: 12 October 2020