Case No: EA-2019-001272-OO
(previously UKEAT/0165/20/OO)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11 February 2021

Before :

THE HONOURABLE MR JUSTICE BOURNE

- -

Between :

MRS C COLLINS	**Appellant**
- and -	
ULTIMATE FINANCE GROUP LTD	**Respondent**

- -
- -

Mr J Yetman (instructed by Law in Word) for the **Appellant**
Written submissions for the **Respondent**

Hearing date: 11 February 2021

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JUDGMENT

Revised

SUMMARY

Practice and Procedure

The order of an employment judge striking out a claimant's claim because of a failure to provide a schedule of loss was quashed where (1) the failure was because of the illness of the claimant's legal advisor, (2) the claimant was not told that the striking-out was being contemplated and was not given an opportunity to make submissions, (3) the final hearing of the claim was not imminent and there was about to be a preliminary hearing at which the problem could have been addressed and (4) upon a reconsideration, the employment judge was given the mistaken impression that the schedule had still not been provided.

THE HONOURABLE MR JUSTICE BOURNE:

1. The appellant, who was the claimant in the employment tribunal ("ET"), appeals against the decision of Employment Judge Harper on 8 November 2019 to strike out her claim.

2. The appellant was employed by the respondent as an auditor from 8 June 2015 until 23 November 2018. Her claim was for unfair dismissal, discrimination on the grounds of sex and pregnancy and maternity, breach of contract, unlawful deductions and for a redundancy payment.

3. At a preliminary hearing on 29 August 2019 Employment Judge Gray made case management directions. These included orders for a schedule of loss by 26 September 2019, disclosure by 13 January 2020, witness statements to be exchanged by 24 February 2020 and for a hearing of up to three days starting on 23 March 2020. The order included standard wording under the heading "Consequences of non-compliance", stating first that non-compliance with a disclosure order could result in a conviction and a fine, and second, that:

> "2. The Tribunal may also make a further order (an "unless" order) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing."

4. I observe in passing that a layperson might not be sure whether that second paragraph applies to all case management orders or only to disclosure orders. I say that because of the use of the word "also", which could be read as referring back to the threat of prosecution for a failure to disclose; but the more important point about that wording is that it gives an impression that the likely consequence of non-compliance with a direction of the ET is an unless order.

5. The appellant did not comply with the order to provide a schedule of loss by 26 September 2019. On 15 October 2019 the respondent, having enquired of the appellant's representative and received no response, applied for an unless order. That was an orthodox and correct response to the failure to provide the schedule.

6. On 25 October 2019 the ET emailed the appellant's representative to say that Regional Employment Judge Pirani had directed as follows:

> "The Claimant was required to provide the Respondent with a schedule of loss by no later than 26 September 2019. Failure to comply with case management orders risks the claim being struck out. The Claimant is to write to the Tribunal **by return** [emphasis by ET] confirming that the schedule of loss has now been provided."

7. On 4 November the appellant's representative responded to the ET with an email saying:

> "The Claimant's representatives apologise for not having yet provided a Schedule of Loss – the writer has had limited access to his emails recently due to unfortunate personal family circumstances.
>
> We confirm that the Schedule of Loss shall be provided by 8th November 2019 at the very latest. We note that a Preliminary Hearing has been scheduled to take place on 19th November 2019."

8. The circumstance referred to was the illness of the appellant's representative's father, who unfortunately died on 6 November 2019. On 8 November 2019 this matter came before EJ Harper on paper. His decision was emailed to the parties at 3.41pm, before that day's close of business. His short judgment can be quoted in full:

> "1. At a case management hearing attended by Mr. Welsh, an experienced employment law practitioner, on 29th August 2019, the claimant was ordered to file a schedule of loss by 26th September 2019. That Order set out potential consequences for failure to comply. By an email from the Tribunal dated 25 October 2019 it recorded that the claimant had been "required to provide the Respondent with a schedule of loss by no later than 26th September 2019". The email continued "Failure to comply with case management orders risks the claim being struck out'. The letter further stated "The claimant is to write to the tribunal **by return** [emphasis by ET] confirming that the schedule of loss has now been provided."
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> 2. The Respondent emailed the Tribunal on Monday 28th October 2019, copied to the claimant, stating that it had not received anything. The claimant was therefore put on notice of the problem and still did nothing about it.
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> 3. By an email with no attachments, dated 4th November 2019 the claimant apologized for the delay. There was nothing to prevent the schedule of loss being sent then. A promise was made to file it by 8th November 2019. All too little, too late.
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> 4. The simple point is that the schedule should have been provided by 26th September 2019 and this was not done. The claimant should have provided confirmation to the tribunal by 26th October 2019 and this was not done. The schedule could have been attached to the email dated 4th November 2019 and this was not done.

> 5. Non compliance is a serious matter and attracts serious consequences.
>
> 5. [sic] The telephone hearing fixed for 19 November 2019 will not take place, and neither will the final hearing listed for 23-25 March 2020."

9. The appellant's representative sent the schedule of loss via email at 8.11pm that day, 8 November 2019.

10. On 21 November 2019 the appellant's representative made a request for reconsideration via email. He set out the facts and explained that the relevant circumstances had consisted of his father's fatal illness and his having no colleagues who could deal with the matter in his absence. He pointed out that there had been no unless order.

11. EJ Harper's further decision was contained in a letter of the ET dated 11 December 2019 and can, again, be quoted in full:

> "1. On 29/8/2019 the Claimant was ordered to provide a schedule of loss by 26/9/2019 and did not do so.
>
> 2. On 25/10/2019 the Employment Tribunal wrote to the parties making it clear that failure to comply with case management orders risks the claim being struck out and that the Claimant was to reply by return i.e. by 26 October 2019 confirming that the schedule of loss had been provided. The Claimant did not reply by return.
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> 3. By an email dated 4 November 2019, the Claimant apologized for not providing a schedule of loss and said that one would be provided by 8 November 2019. No schedule of loss has been received from the claimant despite what is asserted in the Claimant's email of 21/11/2019.
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> 4. The Claimant was clearly in breach of the order; had been warned on 25/10/2019 of the consequences of not complying; and continues to be in breach. Therefore, the Strike Out Judgment stands, and the reconsideration is refused as having no prospects of success." [Emphasis by ET]

12. It is common ground that the employment judge was mistaken in thinking that the schedule of loss had still not been provided.

13. The notice of appeal contends that the employment judge:

(1) Failed to apply the overriding objective, having regard to the nature of the default when measured against the consequences to the appellant of striking out the claim;

(2) Failed to consider Rule 37(2) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules"), which provides: "A claim or

response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing";

(3) Erred by interpreting the words "by return" in the Regional Employment Judge's letter of 25 October 2019 as meaning the next day; and

(4) Made a perverse decision on reconsideration by overlooking the fact that the schedule had been provided on 8 November.

14. The respondent has provided written submissions in response to the appeal and has elected not to take part in this hearing. It contends in response:

(1) Where the appellant had been told several times of the requirement to provide the schedule and on 25 October had been told to provide it by return, and where there was no good reason for not providing it on 4 November and the excuse given was vague, striking out was within the wide ambit of the ET's discretion.

(2) The appellant had a reasonable opportunity to make representations, which opportunity was taken by the email of 4 November undertaking to provide the schedule by 8 November.

(3) By any view of the phrase "by return", a response ten days later was too late.

(4) The decision was strict but not perverse and the schedule was not provided until after the strike-out order had been made.

15. In my judgement, the appeal succeeds on grounds 1, 2 and 4. I begin with ground 2.

16. Rule 37(2) of the **ET Rules**, in my judgement, requires a party (1) to be told that a strike-out order is in contemplation, and (2) to be invited and given an opportunity to make representations on that subject in writing or if requested at a hearing. The ET's email of 25 October 2019 was probably insufficient to comply with the first of those requirements. A warning that non-compliance with orders can lead to strike-out is not a statement that a tribunal is considering whether to strike out a specific claim or response. Whether or not that that is right, the email did not come close to complying with the second requirement. It was a peremptory demand for compliance "by return". Indeed, it did

not so much as mention any opportunity to make representations, let alone give an opportunity to make them, and also did not mention the right to request a hearing on the question. The respondent argues that the email did give the necessary opportunity, but for these reasons I disagree. What happened here was not in accordance with the principles as interpreted by Simler P (as she then was) in **Baber v Royal Bank of Scotland** UKEAT/0301/15/JOJ at paragraph 49 and her reminder that "Tribunals should not act hastily". In those circumstances the power to strike out under Rule 37(1) did not arise, and therefore the employment judge erred in law by purporting to exercise it.

17. Ground 1 also succeeds, because even if the employment judge had had the power to strike out the claim, his decision to do so was obviously disproportionate and can only have been made in disregard of the relevant principles. That is not to say that the default by or on behalf of the appellant was not serious. Her schedule was several weeks late, and only the vaguest explanation had been given. The case underlines an important point of practice, which is that precisely because sole practitioners may experience any kind of personal difficulties, they must have arrangements in place for clients not to be left in the lurch and must if necessary make applications, however briefly and informally, for any extensions of time that they may need. Nevertheless, in dealing with this case there is not the slightest indication that the employment judge had real regard to any factors other than the serious default.

18. The EAT in **Weir Valves and Controls (UK) Ltd v Armitage** [2004] ICR 371, HHJ Richardson at paragraphs 14 to 18, said that a tribunal must consider all the circumstances, including the magnitude of the default, whether it is the responsibility of the party or her representative, what disruption, unfairness or prejudice had been caused, whether a fair hearing was still possible and whether strike-out or some lesser remedy would be an appropriate response. The respondent argues that there is nothing to indicate that these principles were not considered. However, it seems to me that one cannot simply assume that they were. One has to ask whether any particular principle was plainly relevant and, if it was, a judge must expressly consider it. I agree with this tribunal's decision to that effect in **Tabinas v Kusco-Kingston University Service Co Ltd** UKEAT/0349/14/BA. In

this case the lack of express consideration was an error of law, because most if not all of those factors pointed away from an order striking out the claim. The email of 4 November gave reason to believe that the default lay with the representative for personal reasons. There was no information about any disruption or prejudice caused by the default. Manifestly, the hearing scheduled for March 2020 was not then under threat, and, as to lesser remedy, the respondent had actually applied for an unless order and had not requested a strike-out order. Moreover, it so happened that there was about to be a preliminary hearing on 19 November 2019 to consider an amendment application, and this could have provided an immediate opportunity to deal with the point. Meanwhile, striking out the claim would deprive the appellant of an apparently substantial claim, leaving her to the uncertainty of a claim against her representative for loss of a chance of winning her employment claim.

19. In those circumstances the employment judge manifestly failed to have regard to the relevant principles and in particular to the requirement of proportionality, which required him to consider whether a lesser sanction than strike-out would be sufficient (see **Blockbuster Entertainment Ltd v James** [2006] EWCA Civ 684 per Sedley LJ at paragraph 21).

20. As to ground 4, upon the reconsideration probably the single most important fact was the fact that the schedule of loss had been provided. The default was now historic, and there was nothing to obstruct the progress of the litigation. Unfortunately, the employment judge seems to have been given the misapprehension that the schedule had not been provided. In those circumstances it is understandable that he took a strict view of the matter. However, that view was simply mistaken. That point also is not addressed by the respondent in its submissions. That mistaken assumption by the employment judge means that his decision on reconsideration also cannot stand.

21. In my judgement, ground 3 ultimately does not add anything to the appeal, and it is not necessary to decide whether the words “by return” have some fixed legal meaning. What matters is that, as I have said, a requirement that a document be provided by return does not equate to the provision of a reasonable opportunity to make representations.

22. The employment judge's decision of 8 November 2019 must therefore be quashed. The matter will be returned to the ET for further case management on the basis that the schedule of loss has now been provided.