



# EMPLOYMENT TRIBUNALS

**BETWEEN:-**

**Claimant: MISS A FOURNADJIEVA**

**Respondents:**

**(1) CHARING CROSS HOSPITAL, IMPERIAL HEALTHCARE NHS TRUST**

**(2) REED SPECIALIST RECRUITMENT LTD**

**(3) MRS TAHERA JAMA**

**PRELIMINARY HEARING CONVENED PURSUANT TO r. 38(2)**

**HELD AT:** London Central      **ON:** 17 December 2019

**HEARD BY EMPLOYMENT JUDGE:** Oliver Segal Q.C.

***Representation:***

**For Claimant:** In person

**For First Respondent:** Mr B Jones, counsel

**For Second and Third Respondents:** Mr P Powlesland, counsel

## JUDGMENT

Pursuant to r. 38(2), the Judgment dismissing the claim in this matter dated **10 September 2019** is set aside.

## REASONS

### Facts

1. The Claimant gave sworn oral evidence at today's hearing dealing with the circumstances of her non-compliance with the tribunal's orders.
2. The Claimant brought claims of discrimination against the Respondents. At all times she has been and is unrepresented. She stated in the ET1 that her preferred method of communication with the tribunal was by email.
3. At a PH on 10 June 2019, this matter was listed for a FMH to commence 26 September 2019 and directions were given, inter alia, for the Claimant to serve on the Respondents a Schedule of Loss and a list of relevant documents by 24 June 2019.
4. The Claimant had, shortly prior to that PH, sent the Respondent "my evidence for the case", in the form of four emails.
5. The Claimant was in default of those directions to serve a Schedule of Loss and disclose any further documents, partly because of a misunderstanding on her part as to what she was required to do, partly by reason of difficult personal circumstances during the relevant period and partly by reason of inattention.
6. Having chased the Claimant, the Respondents on 7 August 2019 reasonably sought an unless order in respect of compliance with those directions, which I made.
7. The initial Order I made, dated 12 August 2019 (First Unless Order), unfortunately contained a repeated typographical error in stating that the date for compliance was to be 23 September, when it should have stated 23 August. That Order was sent by email to the parties on 13 August 2019.
8. By that time a close friend of the Claimant's had died and a funeral had been arranged in Bulgaria (where the Claimant's family lives) for 17

August 2019. The Claimant saw the First Unless Order shortly before travelling to Bulgaria by car leaving early in the morning of 14 August. The Claimant, having read the First Unless Order, believed, and reasonably believed that she did not have to take any step in respect of her claim until 23 September 2019.

9. The Respondents pointed out to the tribunal the likely error in the First Unless Order and I made an Amended Unless Order on 15 August 2019 – sent by email to the parties on that date – requiring compliance with the original directions (which had still not been complied with) by 24 August 2019. The Claimant was by then in Bulgaria.
10. The Claimant, not for the first time in her experience, was locked out of her Yahoo email account when she tried to access it in Bulgaria. It would have been some effort and have cost some money to arrange for it to be unblocked and initially the Claimant took the view that, with all the personal matters she had to deal with in Bulgaria, this was something which could be left a while.
11. In early September, still in Bulgaria, the Claimant did get her email account unlocked and looked at some of the accumulated contents, but did not notice the Amended Unless Order. In fact, by that time, although no Judgment had been executed, her claim had been automatically dismissed.
12. There having been no compliance with the Amended Unless Order, on 10 September 2019 the tribunal executed a Judgment recording that the claim was dismissed and vacated the FMH listing, which it sent to the parties, pursuant to r. 38(1), on 11 September 2019.
13. The Claimant returned to London on about 12 September 2019 and saw that Judgment.
14. On 25 September 2019 (just within the 14 days permitted by r. 38(2)) the Claimant wrote in to the tribunal seeking a reconsideration of that Judgment – in effect an application pursuant to r. 38(2).

15. Following correspondence with the parties, the tribunal convened today's hearing to decide whether it was in the interests of justice in all the circumstances to have that Judgment set aside.

Discussion

16. It is of the nature of an unless order that the party to whom it is directed has almost always been to some extent in culpable default of previous directions/orders. That was the case here; the extent of the Claimant's default was not egregious (particularly since she had already disclosed the documents she then had on 6 June 2019), but it was a factor.

17. However, what matters, as regards the nature and extent of the Claimant's default in deciding what is in the interests of justice on the present application, is primarily if not exclusively the Claimant's non-compliance with the Amended Unless Order.

18. Whilst some mild criticism of the Claimant is warranted for not being more assiduous in checking to see if the tribunal or the Respondents had been in communication with her since receiving the First Unless Order, the blunt fact is that, in the circumstances described above, the real fault for the Claimant not understanding that, latterly, she had to produce a Schedule of Loss and any further documents by 24 August, lies not with the Claimant but with the tribunal.

19. In short, I do not consider that the Claimant's non-compliance with the Amended Unless Order was particularly culpable – certainly in the strictly material period of 15-24 August 2019.

20. As to the balance of prejudice:-

20.1. On the Claimant's side, it would clearly constitute a considerable prejudice to be deprived of the opportunity to prosecute a claim which, if proved, is likely to be of significant value.

20.2. On the Respondent's side, I was asked to consider:-

20.2.1. The problem of personal memories continuing to fade;  
and

20.2.2. The potential unavailability of certain witnesses.

21. It is right that some, though perhaps not the most important claims will turn on oral evidence, but I do not consider that the additional 7 months is likely to make a critical difference in terms of people being able to recall the relevant events.

22. As to witnesses:-

22.1. The Third Respondent has left the employment of the Second Respondent. However, she continues to instruct legal representatives in this matter and there is no basis for considering that she might not be able and willing to give evidence at the final hearing.

22.2. Another witness, Mr Ahmed, has also left the employment of the Second Respondent and has apparently not responded to a recent communication from the Second Respondent as to his willingness to participate in proceedings. However, having considered the ET3 of the Second Respondent, Mr Ahmed's role was almost entirely conducted by email correspondence and thus his oral evidence will be of little or no significance. Further, if the Second Respondent considers it necessary it can apply for a witness order to be made requiring Mr Ahmed's attendance, which the tribunal would be almost certain to make.

22.3. One of the First Respondent's witnesses, Ms Plevova, has been on maternity leave since about October 2019. Ms Plevova has not said she could not attend a hearing next year during the latter part of such leave and the tribunal would of course readily accommodate her so that her evidence is heard at a fixed time convenient to her. In the circumstances, I do not consider this a significant factor.

23. In summary, I do not consider the Respondents will suffer undue prejudice by reason of the delay in the final hearing of this claim and a fair trial clearly remains possible. In all the circumstances, I find that it is in the interests of justice for this claim to proceed.

24. I therefore set aside the Judgment dismissing the claim and make the following case management directions by consent of the parties, together with the Unless Orders directed to the Claimant in respect of two of those directions, as set out below.

### **DIRECTIONS**

1. The case is listed for **5 days, 27 to 30 April and 1 May 2020** inclusive, to commence 10.00 am each day.
2. It is further directed that the first morning will be at least in part used as a **reading period for the tribunal, thus the parties are only required to attend from 11.30pm on 27 April.**
3. The hearing is intended to deal with liability and remedy.
4. The Claimant will serve on the Respondents on or before **4pm 17 January 2020** a Schedule of Loss dealing with loss of earnings, past and projected up to the date of the full merits hearing; and projected thereafter if appropriate.
5. The parties are to disclose all relevant documents by serving a list and copies (electronic or hard copy as agreed by the parties) on or before **4 pm 17 January 2020.**
6. The Second Respondent is to send a draft index of the trial bundle electronically to the other parties by **4pm 7 February 2020** and the other parties are to send proposed additions or amendments (if any) to the draft index by **4pm 14 February 2020.**

7. The Second Respondent will prepare copies of the trial bundle (double-sided) and send them to the other parties on or before **4 pm 28 February 2020**.
8. The parties are to exchange witness statements on or before **4pm 13 March 2020**.
9. The Respondent will provide 4 copies of the trial bundle (double-sided) and witness statements to the tribunal by **9.00 am 27 April 2020**.

**UNLESS ORDER**

If the **Claimant** has not:-

- 1) **By 4pm 17 January 2020** served on the Respondents a Schedule of Loss dealing with loss of earnings, past and projected up to the date of the full merits hearing; and projected thereafter if appropriate, as per para 4 of the orders set out above; and
- 2) **By 4pm 17 January 2020** disclosed all relevant documents by serving a list and copies (electronic or hard copy as agreed by the parties) on the Respondents, as per para 5 of the orders set out above;

**then her claims will be dismissed by the tribunal without further order.**

**EMPLOYMENT JUDGE - Segal**

**17 December 2019 London Central**

**Date Sent to the Parties  
20/12/2019**

**For the Tribunal Office**