



EMPLOYMENT TRIBUNALS

Claimant
Mrs G George

Respondent
v University Hospital Southampton
NHS Foundation Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard by Video (CVP)

On: 19 February 2021

Before: Employment Judge Gray

Appearances

For the Claimant: in person assisted by her partner Mr Garnett

For the Respondent: Miss R Owusu-Agyei (Counsel)

JUDGMENT ON APPLICATION TO SET ASIDE AN ORDER DISMISSING THE CLAIMANT'S CLAIM FOR FAILURE TO COMPLY WITH AN UNLESS ORDER

The judgment of the tribunal is that the Claimant's application to set aside the tribunal's order dismissing her claim for failure to comply with an unless order is granted because it is in the interests of justice to do so.

REASONS

1. This is the reserved judgment from a preliminary hearing listed for 3 hours (10am to 1pm) by video on the 19 February 2021. It was listed to determine the Claimant's application for the Tribunal to set aside its order dismissing her claim for failure to comply with an unless order. The parties' submissions were concluded by just after 12:50pm so it was determined proportionate to reserve the decision in this matter.
2. The Claimant had applied to set aside the Tribunal's order dated 13 May 2020 (as at page 62 of the bundle), which was sent to the parties on 18 May 2020 (as at page 59 of the bundle) and that dismissed her claim for failure to comply with an unless order.
3. The initial grounds for doing so are set out in her email dated 27 May 2020 (as at pages 63 to 64 of the bundle). That email was received at the tribunal office on 27 May 2020.

4. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure 2013. Under Rule 38(2) an application to set aside an unless order must be made within 14 days of the date on which the notice was sent to the parties. The application was therefore received within the relevant time limit.
5. The grounds for setting aside an unless order is only those set out in Rule 38(2), namely that it is necessary in the interests of justice to do so.
6. The initial grounds relied upon by the Claimant, as set out in her application dated 27 May 2020, were as follows:

“1. The claim was listed for a Telephone Case Management Preliminary Hearing for one hour on 23 March 2020 at 10.00 am.

2. The telephone number and access code for this hearing was 0333 300 1440 and access code 939116#. These details are documented in all three versions of the hearing bundle.

3. The number was called and the access code entered several times just before 10.00 am without success. On the fifth or sixth attempt, the call connected and an automated message stated that 'the host has not yet joined the party', or similar.

4. The 23 March was the first day of the Covid-19 pandemic lock down imposed nationally by the Government.

5. As there was potential for disruption, the call remained connected for approximately one hour, until shortly before 11.00 am when the battery failed. No other participants joined the call during this time.

6. There was no contact from the Tribunal Service before or subsequent to this event.

7. As the lock down is still in effect, there has been severe disruption to daily life including a loss of almost all resources needed to manage this case.”

7. The Respondent objected to the application. Its initial grounds of objection were set out in its email dated 1 June 2020 (as at page 65 of the bundle) and are as follows:
 - a. “The telephone number and access code for the PH held on 23 March 2020, as set out by the Claimant in her below email, are correct. The Respondent’s counsel had no difficulty in connecting to the telephone PH using these details.”
 - b. “Nevertheless, if the Claimant had difficulties in dialling into the telephone PH, it would not be unreasonable to expect the Claimant to notify the ET and the Respondent of those difficulties immediately by telephone or email

and to ask the ET to confirm what the outcome of that PH was and whether any orders were made. As far as the Respondent is aware, the Claimant did not bring these difficulties to the ET's attention before her below application for reconsideration dated 27 May 2020 (over two months after the date of the PH)."

- c. "Further, a copy of the summary of PH and case management orders containing the Unless Orders were sent to the parties by email on 25 March 2020. We attach a copy of this email which demonstrates that the Claimant was copied to the ET's email and was therefore aware of the Unless Orders which had been issued against her."
 - d. "The Respondent, an NHS Trust, has been under significant pressure due to the covid-19 pandemic and has nevertheless met its obligations to the Tribunal and continued to seek to progress this case. The Claimant has not provided any evidence or information to suggest that the government lockdown / pandemic has affected her ability to comply with the ET deadlines. Had the Claimant had genuine concerns about the affect the covid-19 pandemic and the government lockdown would have on her ability to progress her claim, she should have brought this to the ET and the Respondent's attention at her earliest convenience and in good time before the deadline for the Unless Orders."
8. After further correspondence from the parties, including the submission by the Claimant of photographs of her mobile phone showing she had made the calls she said she had to the hearing telephone number on the 23 March 2020, this hearing was listed to determine the Claimant's application.
9. The parties were informed by the Tribunal by letter dated 10 October 2020 (at page 85 of the bundle) that:

"Employment Judge Gray has reviewed all the correspondence on this file and considers that it is appropriate to have a 3 hour hearing to determine the Claimant's application to set aside the Unless Order and then, if appropriate, consider Case Management. The Judge has noted the copy phone records from the Claimant appear to show she did try to make contact with the Tribunal a number of times when the previous Case Management hearing took place by telephone, however he also notes that the Claimant does not yet appear to have fully complied with the Case Management Orders made at that hearing."

THIS HEARING

10. For reference at this hearing the Tribunal was presented with a bundle of documents running to 98 pages together with a separate index. Counsel for the Respondent had also taken the time to prepare a skeleton argument and had submitted this with copies of the case authorities she refers to.
11. It was confirmed that the Claimant (who was assisted by and represented by her partner Mr Garnett) had access to all the hearing documents. The Claimant confirmed though that she had not yet had opportunity to read the skeleton argument of Respondent's Counsel, so it was agreed that the hearing would be adjourned to allow her to do this before final submissions were made.

12. Before the hearing was adjourned the purpose of the hearing and what needs to be considered was explained to the parties.
13. In short it was explained that what was being considered at this hearing was whether it was in the interests of justice to set aside the Tribunal's order dismissing the Claimant's claim for failure to comply with the terms of an unless order. The applicable rule to this type of application was Rule 38(2) of the Employment Tribunals Rules of Procedure.
14. Broad factors the Tribunal could consider relevant to the Claimant's application were explained as being such things as:
 - a. The reason for the default.
 - b. Seriousness of default.
 - c. Prejudice to the Respondent.
 - d. Whether a fair trial remains possible.
15. The Claimant was asked to explain her reasons for the default. It was submitted by Mr Garnett on behalf of the Claimant that:
 - a. The Claimant tried to join the hearing on 23 March 2020 (photographs of the Claimant's mobile phone showing calls being made to the Tribunal hearing telephone number are at pages 82 to 84 of the bundle).
 - b. Then, that they tried to call the Tribunal but could not get through so assumed matters were impacted by the COVID pandemic national lockdown.
 - c. They did not see the Case Management Summary dated 23 March 2020 (at pages 53 to 57 of the bundle) that contained the unless orders until a copy was forwarded in an email from the Respondent's legal representatives on the 21 April 2020 (as at page 58 of the bundle).
 - d. Mr Garnett then submitted that because he was ill with what he thinks was COVID at that time they did not take any further action, until submitting the application to set aside the order, which followed their receipt of the Judgment dated 13 May 2020 (page 62) which was sent to the parties by email dated 18 May 2020 (page 59).
16. In respect of the unless orders themselves these can be seen at page 56 of the bundle, Case Management orders 2 and 3, and are as follows:

“2. Disclosure of Claimant's documents – UNLESS ORDER

2.1 The Claimant is ordered to disclose to the Respondent's representative, so as to arrive on or before **20 April 2020**, those documents expressly referred to by her in her schedule of loss (including her “reemployment” document) and

witness statement (copies of which were attached to the Respondent's email to the Tribunal dated 18 March 2020).

2.2 This order is made on the standard civil procedure rules basis which requires parties to disclose all documents relevant to the issues which are in their possession, custody or control, whether they assist the party who produces them, the other party or appear neutral.

2.3 Unless by 5pm on 20 April 2020 the Claimant provides the documents as ordered above, the claim will stand dismissed without further order.

3. The Claimant's witness statement – UNLESS ORDER

3.1 The Claimant is ordered to provide to the Respondent's representative, so as to arrive on or before **20 April 2020**, an amended version of her witness statement where the facts must be set out in numbered paragraphs on numbered pages, in chronological order. Further, the documents referred to in that witness statement must refer to the correct page number in the bundle agreed for use at the final hearing. Further, the statement must comply with the word count previously ordered (that is 4,000 words unless any excess is no more than 5% of the total allowed (so up to an additional 200 words)), with the word count clearly shown at the end.

3.2 Unless by 5pm on 20 April 2020 the Claimant provides this amended version of her witness statement as ordered above, the claim will stand dismissed without further order.”

17. In respect of the unless orders Mr Garnett explained that he was not sure what documents had not been sent to the Respondent. He said in respect of the re-employment documents the rejections had been sent and the pay slips for new work were difficult to get hold of as they were online and access was removed when you left the role. The Respondent had suggested they provide bank statements which he submitted was not an easy thing to do as the Claimant was also isolating and not wanting to go to the bank. As to the witness statement he submitted an edited version had been sent to the Respondent. He will check when this was sent when we take the adjournment for the Claimant to read the skeleton argument of Respondent's Counsel.

18. Counsel for the Respondent confirmed that it was her understanding that the Respondent had not received the edited witness statement.

19. As to the missing documents Counsel referred to paragraph 5e of her skeleton argument as to the documents in issue:

“When she provided a document entitled “reemployment” and a schedule of loss on 18 November 2019, and her witness statements on 13 March 2020, the Respondent learnt that the Claimant had failed to disclose relevant handwritten notes [36-45], “supporting documents” [44], letters [46], statements [46-47], job applications [19-21], emails [20] and mitigation evidence [19-23].”

20. Specifically, Counsel referred the Tribunal to the following (acknowledging during this process, following updated instructions from her instructing solicitors, that the letters and statements referred to in Mr Garnett's witness statement (at page 46 of the bundle) had been disclosed and were part of the evidence bundle for the final hearing already):

- a. In respect of documents that focused on the questions of liability:
 - i. The "handwritten notes" were for example shown by reference to them within the Claimant's witness statement (as at page 37 of the bundle). About these it was submitted on behalf of the Claimant that the hand-written notes referred to had been made by the Claimant on such things as hand towels to record things that were happening to her at that time. They would need to check if they still had these as they may have been lost during an eviction they had been through.
 - ii. In respect of the reference to "supporting documents" reference was again made to the Claimant's witness statement (as at page 44 of the bundle) which says, "I managed to obtain three supporting documents before I was excluded from the trust". About these it was submitted on behalf of the Claimant that those documents were already in the final hearing bundle (the Claimant recalling they were documents from Naomi, Lynn and one other) and they will locate the page references for those in that bundle in the planned adjournment.
- b. In respect of documents that focused on the questions of remedy:
 - i. Reference was made to a document created by the Claimant about mitigation (as at page 20 of the bundle) where an email is quoted about unsuccessful job applications, but a copy of the original email had not been provided. About this it was submitted on behalf of the Claimant that it was believed this was a different email account and it had been cut and pasted into the document, and they would check if they still had access to that email;
 - ii. It was acknowledged by Respondent's Counsel that further remedy evidence had since been provided by the Claimant, such as that at page 74 which is a letter showing the Claimant being unsuccessful in a job application and at page 75 which is a copy of her bank statement, but it was submitted by the Respondent that this may not be full disclosure.

21. An agreed 20-minute adjournment then took place to enable the Claimant to read the skeleton argument of Respondent's Counsel and confirm matters as to documents and the witness statement as initially discussed.

22. It was agreed that after the adjournment the Claimant would first update us as to the document questions raised and it would then be for her to confirm her application and for the Respondent to then respond.

23. At the resumption of the hearing it was confirmed by the Claimant that the skeleton argument of Respondent's Counsel had now been read. As to the questions about the documents they confirmed as follows:
- a. As to handwritten notes Mr Garnett explained that he had located a large number of these (he showed a bundle of papers to the video screen) and he confirmed that the transcription from those formed the basis of the content of the Claimant's witness statement. He confirmed that these handwritten notes can be disclosed once arrangements were made for copying and scanning.
 - b. As to the three supporting documents these are the documents of Naomi Darch (page 337 of the final hearing bundle), Lynn Davies (page 338 of the final hearing bundle) and Roderick (page 339 of the final hearing bundle).
 - c. As to the email copied at page 20 this is part of an original email chain and the whole chain can be disclosed if required.
24. Mr Garnett confirmed that he could not confirm when the edited witness statement of the Claimant was sent to the Respondent, as he would need to access the device he was using to connect to the video hearing to find this out, and he did not want to interfere with the connection, but he could confirm that the edited witness statement was now within the permitted word count (now being 3,999 words long) and had numbered paragraphs.
25. Mr Garnett then made his submissions on behalf of the Claimant. In summary he submitted that it would be in line with the overriding objective to allow the claim to continue. Further, that the Claimant's complaints need to be heard and the allegations against the Claimant that the Respondent relies upon to dismiss her have not been proven. He disputes that a fair trial cannot now happen as some of the documents being sought were already in the bundle for the final hearing. The Respondent has considerable resources to call upon. He relies on the explanation of default already given, and that dealing with issues remotely is difficult with email and internet especially when they do not have representation.
26. Respondent's Counsel then made her submissions with reference to her skeleton argument. Counsel submitted that as well as the summary of the factors the Tribunal could consider she also wanted to highlight (with reference to paragraph 8(d) of her skeleton argument) that another factor is that an unless order has been made in this case.
27. Counsel submitted that an unless order was not a new thing for the Claimant and reference was made to a history of non-compliance by the Claimant (as set out at paragraph 5 of her skeleton argument).
28. It was submitted that insufficient explanation had been given to explain the default. It was submitted that the Claimant's email address was the same for the 25 March 2020 email she says was not received as those received subsequently, so it is likely she did receive the email dated 25 March 2021. Further, it was submitted that the Claimant did not act promptly to rectify matters after discovery of the unless orders made.

29. As to prejudice to the Respondent it was submitted that the Respondent had taken the time to draw the disclosure issues to the Claimant before the unless order was made and following the Claimant not remedying matters. This has placed a burden on the Respondent and the administration of the Tribunal. Within paragraphs 16 to 18 of Counsel's skeleton it is submitted:

- a. "The Respondent has been prejudiced in its preparation of its defence to this claim as a result of the Claimant's failure to disclose relevant documents."
- b. "The Claimant's claim concerns events dating back to 2016 [2-3]. The delay caused by the Claimant's continued non-compliance with orders and failure to comply with the 23 March 2020 unless orders prejudices the Respondent's witnesses' ability to recall the historic events that are the subject of this claim."
- c. "The Respondent has also been put to the wasted time and costs of dealing with various applications regarding the Claimant's non-compliance."

30. As to whether a fair trial remains possible, within paragraph 20 of Counsel's skeleton it is submitted that:

- a. "A fair trial must mean trial (a) within a reasonable time period (b) with reasonable and proportionate preparatory work on both sides, and (c) commitment of a reasonable and proportionate share of judicial and administrative resources by the Employment Tribunal (Singh v Singh at 15). This case was issued over 2 years ago and concerns events going back to 5 years ago. A 5 day trial is unlikely to be listed for several months. It is no longer possible to have a trial within a reasonable time period."

31. For completeness I have noted from the case management summary of the hearing on the 23 March 2020 that the final hearing had been listed to take place on the 20 to 24 April 2020 but it was postponed at that time on the application of the Respondent.

32. The reasons for the postponement application being made were those set out at paragraph 8 of the case management summary (as can be seen at page 54 of the bundle) "The Respondent made an application for postponement of the April dates on the basis that the Respondent and the witnesses involved in this matter are currently on the front-line in managing the COVID-19 situation. The Respondent confirmed that its preference remained for a hearing in person due to the factual complexities in this case and the Claimant being without representation. Further, that five days remained appropriate (so the hearing timetable set out by Employment Judge Bax in his Case Management Summary remains appropriate), even though the number of witnesses has now reduced (it is understood that it is now the Claimant and one supporting witness and two witnesses for the Respondent)."

33. A case management order was then made for the parties to provide their dates to avoid for the period of July to December 2020 by the 20 April 2020 for relisting purposes (as at page 55 of the bundle).

THE RELEVANT LAW

34. The relevant rules of the Employment Tribunal Rules of Procedure 2013 are rule 38 and the overriding objective as set out in rule 2.

“2 Overriding objective

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

- (a) ensuring that the parties are on an equal footing;
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and
- (e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.”

“38 Unless orders

(1) An order may specify that if it is not complied with by the date specified the claim or response, or part of it, shall be dismissed without further order. If a claim or response, or part of it, is dismissed on this basis the Tribunal shall give written notice to the parties confirming what has occurred.

(2) A party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations....”

35. Respondent’s Counsel provided a helpful summary of the relevant law in her skeleton argument and provided copies of the two case authorities she wished to refer to, namely; **Morgan Motor Co Ltd v Morgan [2015] 6 WLUK 27** and **Mr H Singh v Mr S Singh Trustee Representative Respondent On Behalf of the Guru Nanak Gurdwara West Bromwich [2016] 10 WLUK 21.**

36. In her skeleton arguments at paragraphs 8 and 9, Counsel relies on these case authorities to show ... “The fact that an unless order has been made is an important consideration (*Morgan Motor Co Ltd v Morgan* [2015] 6 WLUK 27, per HHJ Eady QC at 36)”. Further that ... “Other relevant factors include whether there has been compliance with other Orders and the policy objective behind unless orders, “*the importance of treating such orders seriously and with an understanding as to why they are made*”. This is a “*general concern for the administration of justice within the court and Tribunal system. (Morgan v Morgan at 38; Mr H Singh v Mr S Singh Trustee Representative Respondent On Behalf of the Guru Nanak Gurdwara West Bromwich* [2016] 10 WLUK 21, per HHJ Eady QC at 21 and 38).”
37. I note in the summary of the decision in **Morgan**, it is for the Tribunal to determine whether it is in the “interests of justice” (having in mind the overriding objective) to set aside its earlier order dismissing the claim for failure to comply with an unless order. Further, ... “As to what was in the “interests of justice”, having regard to the guidance laid down in *Thind v Salvesen Logistics Ltd* UKEAT/0487/09, this obviously allowed of a broad discretion, the material factors varying considerably, albeit that they would generally include the reason for the default and whether it was deliberate, the prejudice to the other party and whether a fair trial remained possible. The fact that an unless order had been made was also said to be an important consideration but would only be one such consideration.”.
38. I am required to undertake a broad assessment of what is in the interests of justice, in short, conducting a balancing exercise between relevant factors.

THE DECISION

39. So, to consider then what is in the interests of justice by conducting a balancing exercise between relevant factors.
40. **The reason for the default and the seriousness of that:**
41. Underlying where we are now, namely an application by the Claimant to set aside the tribunal’s order dismissing her claim for failure to comply with an unless order, is the assumption by the Tribunal and the Respondent that the Claimant was in receipt of the email dated 25 March 2020 and therefore a copy of the Case Management Order containing the unless orders.
42. The Claimant as part of her application does appear to have consistently asserted that she did not receive that email. This can be seen from ground 6 of her initial grounds when referring to the hearing on the 23 March 2020 ... “There was no contact from the Tribunal Service before or subsequent to this event”.
43. The next correspondence that the Claimant would have received from the Tribunal is the email dated 18 May 2020 with the order confirming her claim was dismissed. The Claimant did receive this as it is upon receipt that she then makes her application which is the subject of this hearing.
44. The Claimant submits they saw the case management order for the first time when it was attached to the email from the Respondent to the Tribunal dated 21

April 2020, requesting the claim be dismissed due to non-compliance of the terms of the unless orders, which were to be completed by 5pm on the 20 April 2020.

45. Evidence about receipt or otherwise of the email dated 25 March 2020 has not been heard to determine this matter either way. The Claimant has not proven she did not receive the email dated 25 March 2020, but conversely the Respondent has not proven that the Claimant did. It is asserted by the Respondent that it is likely she did receive it, as it was the same email address for emails the Claimant did receive.
46. However, the Claimant's other asserted position, that she made many attempts to join the hearing on the 23 March 2020, is backed by photographs of her mobile phone showing this (as at pages 82 to 84 of the bundle). I accept that the Claimant has documented that she did try to connect to the hearing on the 23 March 2020. This suggests that she was seeking to join and contribute to the process at that time.
47. If therefore I take the Claimant's asserted positions at their highest, that she tried to join the hearing on the 23 March 2020, and that she did not get the email dated 25 March 2020, then it sets the unless order process in a different light. It would be on the 21 April 2020 that the case management order is seen by the Claimant, this is the day after the date for compliance. It would not be unreasonable to expect action at that point, but again reasons are presented as to why it was not (although again not supported with evidence). About this I note that the email of 21 April 2020 is correspondence from the Respondent rather than the Tribunal and it is sent the day after the date for compliance. A party cannot comply with the terms of an order within the required time frame if it only knows of the terms after the date has passed. When the Claimant does hear further from the Tribunal action is taken by her.
48. As to the terms of the unless orders themselves and the seriousness of not completing what was ordered I have noted two things that arise from what the Claimant submits. Firstly, that some of the documents being sought by the Respondent were already in the possession of the Respondent (as was established at this hearing), so in this context the Claimant may find the need for further disclosure confusing. The Claimant is not legally represented so would have benefited from a clarification as to the format of the witness statement and what needed to be disclosed had she been able to join the hearing on the 23 March 2020.
49. Further, the hearing on the 23 March 2020, the unless orders then being made, and the circulation of the case management order all happened in an unprecedented time when the country was experiencing a national lock down due to the COVID pandemic, so it was not "business as usual" at that time. In my view this does set the actions (or inactions as appropriate) of the Claimant in a different light to any previous case management failings on her part. In my view also, further communication or not with the Tribunal at and around that time, should be viewed in that context.
50. Accepting then the explanation for non-compliance and the seriousness of that, what then is the impact of balancing that against the other factors such as prejudice to the parties and whether a fair trial is still possible.

51. Prejudice:

52. It was submitted on behalf of the Claimant that it would be in line with the overriding objective to allow the claim to continue. That the Claimant's complaints need to be heard and the allegations against the Claimant that the Respondent relies upon to dismiss her have not been proven. This really underlies the prejudice to the Claimant, in that with her claim dismissed she loses her right to have the matter determined at a final hearing.

53. In contrast the Respondent sets out the prejudice against it as being:

- a. "... prejudiced in its preparation of its defence to this claim as a result of the Claimant's failure to disclose relevant documents."
- b. "The delay caused by the Claimant's continued non-compliance with orders and failure to comply with the 23 March 2020 unless orders prejudices the Respondent's witnesses' ability to recall the historic events that are the subject of this claim."
- c. "... put to the wasted time and costs of dealing with various applications regarding the Claimant's non-compliance."

54. Considering each of these in turn however in my view I do not consider such prejudice has been substantiated by the Respondent for the following reasons:

- a. In my view the Respondent has not submitted to what extent its preparation of its defence is prejudiced by the Claimant's failure to disclose the relevant documents. It was acknowledged today that some of the documents being sought were already part of the final hearing bundle. Further, the Respondent has had the benefit of the Claimant's original witness statement (albeit not in the exact format the Tribunal directed) to contextualize her asserted factual position.
- b. In my view the Respondent has not submitted to what extent its witnesses' ability to recall the historic events that are the subject of this claim has been prejudiced. It has not submitted for example that it has been prevented from preparing its witness statements for the final hearing or collating the documents it wishes to rely upon to discharge its burden of proof in an unfair dismissal complaint. It has also benefited from the Claimant's original witness statement (albeit not in the exact format the Tribunal directed) to contextualize her asserted factual position.
- c. In my view the Respondent has not submitted why other sanctions for its asserted wasted time and costs in dealing with the various applications regarding the Claimant's non-compliance would not be appropriate, for example by way of an application for its costs.

55. Is a fair trial still possible?

56. It was submitted on behalf of the Claimant that a fair trial was still possible as some of the documents being sought by the Respondent were already in the

bundle for the final hearing. During this hearing it was established that was the situation for some of the documents.

57. The Respondent asserts that a fair trial is not possible because ... "It is no longer possible to have a trial within a reasonable time period".

58. However, merely asserting this does not make it so, particularly as the final hearing as listed for 20 to 24 April 2020 was postponed in response to the Respondent's application at the hearing on the 23 March 2020. Its reasons for applying for the postponement at that time were ... "the Respondent and the witnesses involved in this matter are currently on the front-line in managing the COVID-19 situation. The Respondent confirmed that its preference remained for a hearing in person due to the factual complexities in this case and the Claimant being without representation."

59. It is therefore not certain that such an adjourned in person hearing would have now happened in these unprecedented times of the COVID pandemic. Dates to avoid for relisting purposes were requested from the parties for July to December 2020. We are also now working under a second national lock down.

60. When the Respondent made its application to postpone the final hearing it did not submit then that the delay would mean it was no longer possible to have a trial within a reasonable time period. Nothing appears to have changed to make it so now.

CONCLUSION

61. Having considered and balanced all of these factors it is the judgment of the tribunal that the Claimant's application to set aside the tribunal's order dismissing her claim for failure to comply with an unless order is granted because it is in the interests of justice to do so.

Employment Judge Gray

Date: 23 February 2021

Sent to the parties: 04 March 2021

FOR THE TRIBUNAL OFFICE