EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/114382/07 and S/112349/08

Held in Glasgow on 30 April 2018

Employment Judge: Susan Walker (sitting alone)

Ms M Macleod	**Claimant** **No appearance**
The University Court of the University of Glasgow	**Respondent** **Represented by:** **Mr Walker, solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the unless order is not set aside and the dismissal of the claims under rule 38 is confirmed.

REASONS

Introduction

1. These claims have been dismissed under rule 38 of the Employment Tribunals Rule of Procedure 2013 as there was a failure to comply with unless

orders issued at a Hearing on 7 December 2017. An application has been made on behalf of the claimant for the order to be set aside under rule 38(2). This Hearing was listed to consider that application and also, in the event that the claimant's application was successful, the respondent's outstanding application to have the claims stuck out under rule 37 and their application for expenses.

Background to the unless orders

2. It is necessary to set out the background to the unless orders in some detail. These claims were presented in 2007 and 2008. The claimant alleged sex discrimination (including victimisation), unfair dismissal and disability discrimination. The Tribunal found in November 2011 that the claimant did not have a disability in terms of the Disability Discrimination Act 1996. The complaint of disability discrimination was therefore dismissed. The claimant appealed that decision without success. There were other Hearings relating to review and applications for expenses.

3. Following the unsuccessful appeal in relation to the claimant's disability status, the case was remitted to the Employment Tribunal to deal with the remainder of the case. There was a Hearing scheduled on 8 February 2012. The claimant sought a postponement which was refused but she did not attend. Employment Judge Cape postponed the Hearing and sisted the claims on 7 February 2017. He indicated that he was not satisfied that the claimant was prevented by ill-health from attending the Hearing (notwithstanding a letter from her GP). However he commented, *"There is an emerging pattern. The claimant seeks a postponement. She fails to attend. The claimant seeks a review. She fails to attend the review Hearing. The claimant indicates that she is considering an appeal or application for review. I have little confidence in the claimant attending for the Hearing on 8 February 2012 if a postponement is refused. I have every confidence that to proceed in the claimant's absence would be met by an appeal or application for a review. Inevitably such an approach would put the respondent to expense; expenses that may or may not result in an order for expenses"*.

4. Judge Cape decided that the cases should be sisted *"until the claimant recovers her health and provides a certificate written on soul and conscience to that effect stating the writer's professional opinion that it is likely that the claimant will be fit to attend and participate in the Hearing."* It is relevant to note that Judge Cape continued *"The claimant must understand that one of the cases before me commenced in 2007. The greater the delay in bringing this matter to a Hearing, the greater the likelihood that the delay will cause prejudice and place at risk the holding of a fair Hearing".*

5. Since then there has been no indication from the claimant to the Tribunal that she is fit to attend and participate in a Hearing. On 26 August 2017, the respondent applied for strike out of the claim under rule 37(1) on the grounds that it had not been actively pursued and, alternatively, that it is no longer possible to have a fair Hearing. The respondent questioned whether the claimant was in fact genuinely unfit to pursue the claims over the period but even if she was, they contended that it was unclear when she would be fit and submit that the passage of time is prejudicial to a fair trial. They asked for the claimant's medical records to be provided.

6. There followed a significant amount of correspondence. The claimant objected to providing her medical information to the respondent. It was explained to her the tests that the Tribunal would need to consider in relation to the strike out application and the relevance of the medical information to those tests. This culminated in a Hearing being fixed to consider the respondent's application for the claims to be struck out and an order was issued by the Tribunal on 2 October 2017 for the claimant to provide medical evidence in advance of that Hearing that confirmed:

    (i) that she had been unfit to continue with the case since the sist,
    (ii) that she remained unfit to continue;
    (iii) when, if at all, she would be fit to do so.

    The claimant was given 21 days to comply.

7. The claimant wrote to the Tribunal on 17 October 2017 to say that she had a medical appointment in 19 October 2017 and a second one on 6 November

2017. She asked for the date of compliance with the order to be extended. That application was granted by Employment Judge Gall to 17 November 2017.

8. On 24 October 2017, the claimant then provided a letter from her GP, Dr MacDonald, dated 24 October, that said the claimant had been attending the surgery over the past few weeks and that she would *"support her in delaying the submission of documents and therefore the Hearings*". The claimant did not at that stage seek an extension of time to comply with the order or a postponement of the Hearing.

9. On 17 November 2017, the claimant provided some documents to the Tribunal. These included the GPs letter of 24 October 2017 that had already been provided and a medical report from 2009. She said that *"due to pressure on my GP's practice"* the appointments necessary to collate the information confirming she had been unfit to continue with the case had been delayed until the 21 and 28 November 2017. She also said that *"an administrative oversight"* resulted in her appointment for *"an assessment and prognosis for recovery"* originally arranged for 6 November 2017 being delayed till January 2018. She asked for the order of 2 October 2017 to be varied or suspended until all the information was available. The Tribunal sought comments from the respondent who objected.

10. Then on 23 November 2017, the claimant wrote again to the Tribunal. In the letter, she said that she was not well enough to make submissions in relation to fairness. She said she had not received the respondent's documents. She sought a postponement of the Hearing on 7 December until full medical evidence was available.

11. Both requests were refused. I considered that the claimant had had sufficient time to comply with the order. If there had been difficulty obtaining appointments, and the claimant wished that to be taken into account, I directed that the claimant should provide confirmation from the medical professional as to why it was not possible to provide the information and when it would be provided.

12. On 4 December 2017, the respondent wrote to the Tribunal to say that they had been trying to deliver documents to the claim without success. The claimant will not provide a telephone number and refuses to receive contact by email from the respondent or the Tribunal.

13. The claimant wrote to the Tribunal by letter dated 30 April 2017 but received 6 December 2017. In that letter she said that she was becoming increasingly unwell and she was "*not coping*". Medical evidence could not be provided by the Hearing on 7 December. She said she was not well enough to attend or make representations at the hearing. A letter was sent to the claimant saying that I noted the claimant was unwell but in the absence of medical information I was not prepared to postpone the hearing.

14. The claimant then wrote again to say that she was to see her GP that day (6 December). I directed that any information provided to the Tribunal by the start of the hearing would be considered. Just before the hearing started a further communication was received by the claimant by fax. This included a letter from Dr Crighton (another GP at the claimant's practice) dated 6 December 2017. This said he confirmed on soul and conscience that he believed she was unfit to attend the Tribunal on 7 December. The covering letter from the claimant, also dated the 6 December, stated that she had an appointment with another doctor (Dr McDonald) on the 7 December and that she had been assured that the documentation showing that she had been unfit since February 2012 would be ready then. She also stated that she had an appointment in January with a consultant who would be able to make a more detailed assessment of her current state of health and prognosis. She said she had further submissions to make in relation to fair hearing but could not do so at present due to ill health.

15. The claimant then faxed a further letter dated 6 December but this was not received until after the hearing had concluded. This covered a number of matters including a request that the hearing be postponed until the end of

January when she hoped to be well enough to deal with all matters and to have full medical evidence.

16. At the hearing, Mr Walker opposed the application to postpone. He had intended to lead evidence from a witness and had a number of documents from which he said he would ask me to conclude that, regardless of the doctor's letter, the claimant was fit to attend. He also drew my attention to the history of the case and the pattern of non-attendance and that previous judges had doubted whether the GP's assessment was reliable. If the hearing was postponed then Mr Walker submitted that the GP should be called to give evidence. He also sought confirmation from the claimant's GP as to when she had first tried to obtain the information in response to the order. He also renewed his application for the claimant's medical records for the period from February 2012.

17. Despite the respondent's objections, I postponed the hearing on 7 December to ensure that the claimant had the opportunity to provide the medical evidence she has indicated was now being obtained. However I had serious concerns that the evidence had not been provided in accordance with my earlier Order and that the events leading up to the hearing reflected the pattern referred to by Judge Cape. I considered it was appropriate to give the claimant a final opportunity to provide the medical evidence as, according to the claimant, she now had that in hand. However, in the circumstances, that opportunity to provide further medical information was in the form of unless orders. These orders were to provide the medical evidence originally ordered in October. They also required confirmation from the claimant's GP that events leading to the hearing being postponed were as described by the claimant.

18. The unless orders issued were as follows:

1 No later than 22 December 2017, the claimant shall provide to the Tribunal and to the respondent (c/o the respondent's agent):

(i) written confirmation from the claimant's GP that the claimant has been unfit to continue with the case throughout the period from 8 February 2012 until 7 December 2017.

(ii) written confirmation from the claimant's GP that an appointment has been made with a consultant who can provide an indication of when the claimant is likely to be fit to continue with the case and the GP should provide the name of that consultant.

(iii) written confirmation from the claimant's GP as to when the claimant first contacted the practice to obtain the information required by the Tribunal Order of 2 October 2017 and, if there was a delay in providing that information, why there was a delay.

2 No later than 9 February 2018, the claimant shall provide to the Tribunal and to the respondent (c/o the respondent's agent) a report from the consultant identified by the GP in response to order 1(ii) that confirms when the claimant will be fit to continue with the case (including attending, giving evidence and being cross-examined at a Hearing in the employment Tribunal and making legal submissions). The report may provide different answers for a Hearing that lasts for 1 day or for 5 days or for a longer period of several weeks.

19. It was intended that the Preliminary Hearing to consider the respondent's strike out application would be relisted for a date in March or April by which point the Tribunal would have the necessary medical information to consider the respondent's application.

Response to unless orders / claim dismissed

20. By letter dated 19 December 2017, the claimant provided a letter from Dr Crighton. That letter was dated 13 December 2017 and states:

"This lady is registered with our practice. I can confirm that she has remained unfit to continue with her Tribunal case throughout the period from 8 February 2012 until the 7 December this year. I understand from

her that she is arranging to see Dr T D Rogers, Consultant Psychiatrist, Spire Murrayfield Hospital, Edinburgh, with a view to obtaining an independent medical opinion. I can confirm that she first met a GP in our practice to discuss providing a letter for the Tribunal on the 19 October this year."

21. In the covering letter, the claimant said she was waiting to hear confirmation of the date in January with the independent consultant.

22. On 3 January 2018, Mr Walker wrote to the Tribunal. He contended that the claimant had not complied with Order 1(ii). No appointment had been "confirmed". Rather the GP said that the claimant had told him she was "arranging to see" a consultant. He pointed out that the claimant had had 3 months by that stage to arrange an appointment in terms of the order of 2 October but none had yet been made. He pointed out a history of activity undertaken by the claimant immediately after the postponed hearing in December. Mr Walker also contended that the response to Order 1(iii) was wholly inadequate. As the unless orders had not been complied with in full, he contended that the claims fell to be dismissed without further order. He applied for expenses. A copy of that letter was sent to the claimant. The claimant was asked by the Tribunal to comment by 12 January 2018.

23. The claimant did not reply by the 12 January but a letter from her dated 11 January was received on 16 January by fax. In it, she contended that she had complied with the order.

24. Having reviewed the correspondence, it was clear to me that the order had not been complied with in full for the reasons outlined by Mr Walker and therefore, the claims fell to be dismissed without further order. Parties were notified of that on 16 January 2018. The respondent was directed that if it insisted on its application for expenses, full details were to be provided. These

were provided on 29 January 2018 although that application has not yet been considered.

Application to set aside the order

25. On 30 January 2018 an application to set aside the unless order under rule 38(2) was received from Mitchells Roberton, solicitors, instructed by the claimant for that sole purpose.

26. The claimant also provided a 5 page letter in support of the application which was received by the Tribunal on 2 February 2018.

27. A Hearing was listed to consider the application on 30 April 2018. At that Hearing I directed that the respondent's application for strike out would be considered if the decision was to set aside the "unless order" as there would be an overlap in the relevant evidence and the issues were clearly related. The Tribunal would also consider the respondent's application for expenses.

Correspondence between the claimant's application and the Hearing on 30 April

28. The claimant continued to send voluminous correspondence to the Tribunal and the respondent's representative, not all of which is set out in this decision. In a letter dated 9 February 2018, she said that it would not be possible for Dr Rogers to comply with the terms of the unless order. She said that Dr Rogers was unable to see her but had offered to assist and had suggested the claimant get additional support closer to home. She said she had arranged extra support. Her first appointment was on 5 February and there was a waiting list of 6-10 weeks for further appointments to allow an assessment to be made by April as to whether she would be fit to attend Hearings. She said that Dr Crighton was unable to predict when she would be fit to do so. She said she had been overoptimistic about her ability to cope with adversarial proceedings and she was requesting alternative dispute resolution.

29. The respondent indicated that it still did not accept that the claimant was in fact unfit to proceed. This was because of evidence of her other activities at the relevant times which the respondent would lead evidence about. The respondent requested a copy of the claimant's medical records from 2012 onwards. The claimant offered to provide a summary of her medical history.

30. I did not order the claimant's medical records to be produced. I considered that, as it was the claimant seeking to have a decision set aside, it was for her to provide the necessary evidence. However, I did order that the claimant arrange for her GP to provide a summary of her health from February 2012 onwards. The claimant had also indicated in correspondence that Dr Crighton would attend as a witness and so I further ordered that the claimant arrange for Dr Crighton to be in attendance at the hearing to answer any questions about that report and about the claimant's fitness or otherwise to participate in Tribunal proceedings during that period and going forward.

31. On 13 April 2018, the claimant confirmed that Dr Crighton would attend the hearing and would provide the respondent with a brief summary of her health (as agreed with her). The claimant said in that letter that she did not know if she would be well enough to *"give evidence, be cross-examined at a Hearing in an employment Tribunal and make legal submissions".* She said she had been unable to look through the bundle of documents provided by the respondent in December because of her ill-health. She requested that the case be considered on the papers or alternatively that the hearing be postponed.

32. On 23 April 2018, Dr Crighton provided a list of the dates of the claimant's appointments with his practice from 2012. His cover letter said that *"I can confirm that she has had difficulties with anxiety symptoms and depression for many years. This has been a persistent and enduring problem. In addition, there have been spells of depressive symptoms. I have reviewed the case notes we hold and I can confirm that her problems with anxiety have persisted*

throughout the period from 2012 to the present time. There are a number of behavioural effects resulting from her chronically anxious condition: she tends to find herself overwhelmed when faced with tasks associated with issues she finds anxiety provoking which can lead her to have difficulty attending to tasks in a timely fashion and has led her to have difficulty trusting others. There have been times when I have been of the opinion that her mood has dipped significantly and we have discussed antidepressant medication at these times. I am aware that she has been more troubled by symptoms over the last 6 months."

33. The respondent objected to the claimant's application to have the hearing postponed or considered on the papers. I refused the claimant's application. I considered that it would not be appropriate to consider the matter on the papers as the respondent had already indicated they wished to lead evidence and to question the claimant and Dr Crighton. In relation to the postponement application, there was no medical evidence provided to support her contention that she was too unwell to attend. That decision was communicated to the claimant by letter.

34. The claimant wrote further letters to the Tribunal. On 25 April 2018 (received 26 April) the claimant sent a fax to say that she had received the respondent's objections and sought time to respond. By that time the decision to refuse her application had already been made.

35. By letter dated 26 April 2018, the claimant said that she had been able to read the respondent's correspondence and *"to an extent*" to review the file and the reasons for the decision taken on 8 December 2017. She indicated she had noted *"confusion in relation to dates and errors, some of which were made by me, which may have had a significant impact on the facts of the case and decisions made".* She then set out some of these errors and said she would provide a "*background summary*" document the following day.

36. By letter of 27 April 2018 ,faxed at 15.59, the claimant said that *"if the Hearing goes ahead my GP is able to attend from 12 noon".*

37. By fax received on 30 April 2018, the claimant said that she respected the decision not to postpone but was sorry she was unable to attend. She said that she had not enclosed a medical certificate as she had wanted to come to the Hearing. She now enclosed a letter from Dr Crighton. That letter (dated 27 April) said the claimant "*has asked that the Tribunal Hearing be carried out as a paper exercise or to be postponed if this is not possible. I support her in this request".*

38. This is not an exhaustive account of the correspondence sent by the claimant or the respondent between the hearing in December and the hearing in April. To set that out in full would be disproportionate and I do not consider it necessary. This is merely the background to the decision taken following the Hearing. However, I have read all of the correspondence and taken it into account where necessary.

The hearing

39. At the start of the hearing, Mr Walker produced a fax sent to him on 28 April 2018 from the claimant which said the claimant was unable to attend the hearing as she was too unwell but saying her GP was able to attend from 12.

40. As noted above, the claimant had sought a postponement or a hearing on the papers. That had not been granted. Having reviewed the medical certificate now provided, this did not appear to me to confirm that the claimant was not well enough to attend. It merely said the doctor *"supported"* the claimant's request. It was not a "soul and conscience" certificate as provided on previous occasions. I also considered it was important that the Hearing go ahead as Dr Crighton was scheduled to attend and would be able to give evidence that would assist the Tribunal to decide the claimant's application. The respondent also had a witness in attendance (for the second time). Further, there was no indication of when the claimant would be fit to attend.

41. Mr Walker gave evidence himself about matters within his own knowledge about the claimant's activities over the relevant period and also led evidence from Joanna King, head of the Data Protection and Freedom of Information office for the respondent (the "DP/FOI"). The evidence of both of these witnesses mainly consisted of confirming the authenticity of documents contained in the bundle. Dr Crighton gave evidence about the claimant's medical condition.

Factual findings

42. The claimant attended a Hearing at the Employment Appeal Tribunal (the "EAT") in Edinburgh on 22 September 2011 at which she represented herself before Mr Justice Underhill who allowed her appeal against the Registrar's order .

43. The appeal was rejected on the sift and the claimant attended a Hearing at the EAT on 18 October 2011 under rule 3(10) in relation to that decision. She represented herself at that hearing. Lady Smith refused that appeal.

44. There was a further Hearing before the EAT on 13 December 2011 in relation to an award of expenses made by the employment tribunal which the claimant attended and again represented herself.

45. Various hearings were listed in the employment tribunal in the intervening period which the claimant did not attend, seeking postponements based on her ill-health and supported by "soul and conscience" certificates from her GP.

46. A hearing was listed in the employment tribunal for 8 February 2012. AS noted above, Judge Cape postponed the hearing although he did not accept the claimant was unfit to attend. He sisted the claims until the claimant

provided a soul and conscience certificate that she will be fit to attend and participate in the Hearing. When intimating that decision, Judge Cape noted *"the claimant must understand that one of the cases before me was commenced in 2007. The greater the delay in bringing this matter to a Hearing, the greater the likelihood that the delay will cause prejudice and place at risk the holding of a fair trial".*

47. No such certificate has been provided and the claims remained sisted until the respondent applied for the claims to be struck out in August 2017.

48. Mr Walker wrote to the claimant in June 2014, October 2015, 17 March and 24 August 2016 inviting her to withdraw her claims. She did not reply to those specific questions and has not indicated that she wishes to proceed with the remaining claims. She replied to say that she remained unwell but she has expressed interest in settling the claims. In March 2016 she said that she would be prepared to meet to resolve the issues informally. This was reiterated in September 2016.

49. The claimant has sent correspondence to the DP/FOI in relation to 11 Freedom of Information Requests between February 2012 and 10 November 2017. These include a letter dated 3 February 2011 (which should read 2012); 2 March 2012, 21 May 2012, 21 May 2012, 21 March 2016, 30 March 2016, 12 April 2016, 2 letters on 23 October 2016, 20 November 2016, 21 November 2016 ,7 December 2016, 21 march 2017, 27 October 2017, 1 November 2017 and 10 November 2017.

50. Between March and December 2016, the claimant was in correspondence with the respondent trying to obtain details of their insurers. She also wrote to the Chief Executive of the respondent's insurers.

51. The claimant made a subject access request to the DP/FOI on 31 August 2017. There was further correspondence about this from the claimant dated 31 August 2017 (received 19 September), 22 September 2017, 17 October 2017, 27 October 2017.

52. The claimant made a complaint to the Senate Office on 28 October 2017 and attended a meeting in relation to this in December 2017..

53. The claimant delivered various documents by hand to the DP/FOI and also telephoned them on a number of occasions.

54. The claimant has sent further extensive correspondence to the respondent and the Tribunal since the respondent applied for the claim to be struck out in August 2017. This includes a letter to the respondent's agent with enclosures on 7 December 2017 and a letter to the DP/FOI on 8 December 2017 complaining about material that was in the respondent's bundle of documents for the Hearing on 7 December 2017.

55. The claimant attended various courses at the University of Glasgow in between 2016 and 2018.

56. The claimant has attended her GP practice on a regular basis for many years. Initially she was a patient of Dr Shaw. She has been a patient of Dr Crighton since 2007 and she has seen him about 10 times a year. She has not been prescribed any medication or other treatment. The nature of the appointments is supervisory so that Dr Crighton can see how she is getting on. Dr Crighton has recommended mediation from time to time but the claimant has rejected that suggestion.

57. Dr Crighton was not aware of all the complaints and correspondence that the claimant has undertaken since 2012.

58. The claimant has attended counselling towards the end of 2017 and is undertaking counselling at the moment.

59. Dr Crighton had met with the claimant twice in the week leading up to the present hearing and considered her fit to attend.

60. The claimant suffers from chronic anxiety. At times this has developed into depression but that is not the case at the moment.

61. The respondent has incurred fees in excess of £80000 to date in dealing with these claims. Some of that is covered by insurance. 3 awards of expenses have been made against the claimant to date totalling over £20000. Steps have not yet been taken to enforce these awards.

Relevant law

62. Rule 38 of the Employment Tribunal Rules of Procedure 2013 provides for *"unless orders".* An order may specify that a claim shall be dismissed "without further order" if it is not complied with by the date specified. The dismissal in these circumstances happens without judicial intervention if there is non-compliance with the order in any respect. It is not a question of the degree of non-compliance and it is not a matter of judicial discretion. (See for example *Scottish Ambulance Service v Laing UKEATS/0038/12*). The parties are simply notified that this has happened (although there may be a hearing if there is a dispute about whether , in fact , there has been compliance).

63. If the claim has been dismissed in these circumstances, Rule 38(2) provides a procedure whereby the party whose claim has been dismissed can apply to the Tribunal *"to have the order set aside on the basis that it is in the interests of justice to do so".*

64. Rule 37(1) provides various grounds on which a claim may be struck out. The grounds relied on by the respondent in this case are rule 37(1)(d) that it has not been actively pursued and rule 37(1)(e) that it is no longer possible to have a fair trial.

65. In **Evans and another v Commissioner of Police of the Metropolis 1993 ICR 151, CA**, the Court of Appeal held that an employment tribunal's power to strike out a claim for want of prosecution (which preceded rule 37(1(c))must be exercised in accordance with the principles as set out by the House of

Lords in **Birkett v James 1978 AC 297, HL**. This means that a Tribunal can strike out a claim where:

- there has been delay that is intentional or contumelious (disrespectful or abusive to the court), or
- there has been inordinate and inexcusable delay, which gives rise to a substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the respondent.

Claimant's application

66. The application from Mitchells Roberton stated that the claimant did arrange an appointment with Dr Rogers for 6 November 2017. Thereafter there was a misunderstanding on the claimant's part as to how the appropriate appointment was going to be organised. The claimant learned shortly in advance of that consultation that it had not been logged as an independent assessment and the earliest appointment was for January 2018. It was submitted that this was understandable confusion for an unrepresented party. In the application it was said that the claimant had written on 15 December 2017, 6 January and 25 January 2018 to Dr Rogers but only that day had it been established that Dr Rogers is too heavily committed to assist.

67. The applications stated that urgent enquiries are being made to identify an alternative consultant. It was submitted that there was *a "ready mechanism whereby the answer to the central question in Part (ii) of the order can be ascertained".*

68. As for part (iii) of the order, it is submitted that Dr Crighton's letter of 26 January 2018, which stated that the claimant met the GP on 19 October and that there was a shortage of appointments at her practice for matters of a non- urgent nature during the month of October 2017.

69. The submissions in support of the application included that the mental health of the claimant is such that compliance with orders and directions and the conduct of the case generally is inordinately difficult for her. She has been unsupported by representation. The claimant has been deprived of her rights to a hearing. Her cases have never been heard and relevant evidence relating to her health has not been considered. It is not in the interests of justice for a claim of this importance to be disposed of by default rather than a judicial determination. The order should be set aside pending the consideration of medical evidence determinative of the claimant's fitness to continue with the case and factual evidence as determinative of whether it remains possible to have a fair trial.

70. As noted above, the claimant provided additional detailed submissions in support of the application made by Mitchells Roberton on 2 February 2018. She said that she had complied with order 1(iii) and that this may have been overlooked by the Tribunal. She said her letter of 19 December 2017 was sent on 21 December by guaranteed next day delivery.

71. As for order 1(ii), the claimant submitted that she had made an appointment for 6 December 2017 for an "initial assessment" and she had been told Dr Rogers secretary would contact her. She was then advised that these appointments were for Dr Rogers own patients and the earliest appointment for an "independent assessment" would be early January 2018. When she called again she was told a formal letter would be required.

72. The claimant said she was unable to attend the Hearing on 7 December 2017 due to ill health and she wrote to Dr Rogers on 15 December 2017 and by recorded delivery on 6 January 2018. She then received a response on 18 January t2018 hat related to a GP referral and wrote to him again on 25 January. The claimant said she had only learned the previous day (through Mitchells Roberton) that Dr Rogers could not accommodate an appointment due to his commitments. She said she would do her best to provide and answer in relation to order 2 by 9 February. She believed it was in the

interests of justice to set aside the order as her cases had never been fully heard and relevant evidence had been excluded from previous Hearings.

Respondent's submissions

73. Mr Walker dealt first with the application to set aside the unless order. He accepted that Order 1(i) had been complied with. He submitted that the remainder of the unless orders had not been complied with. He submitted that the claimant had a repeated history of delaying the case. He pointed out that the claimant had not complied with the orders issued on 2 October 2017 to provide medical information. The claimant had indicated on 17 October that she had confirmed medical appointments on 19 October and 8 November. Mitchells Robertson state that *"the claimant did arrange an appointment with Dr T D Rogers etc"*. However, the claimant has provided no proof that an appointment was confirmed for 6 November. There is then an alternative explanation which is that "*there was a misunderstanding on the claimant's part as to how the appropriate appointment was going to be organized*". Mr Walker submitted that that appears to be inconsistent with the terms of the claimant's letter dated 17 October which is not referred to by Mitchells Roberton. Nor is there anything in the letter from the claimant's GP dated 13 December which supports that contention.

74. It should have been clear by 6 November that any appointment was not proceeding and the claimant had to take appropriate steps to sort it out. This happened a month before the unless orders were issued. The Tribunal is now being told in vague terms that something might be fixed for June with an unspecified consultant. Given the claimant's lack of credibility, the respondent is not prepared to accept the claimant's excuses.

75. By June, it will be 9 months since the Tribunal made its original order on 2 October for medical evidence to be provided .This is entirely unacceptable in the circumstances of this highly unusual case. The respondent also does not consider that the claimant has complied with order (iii). The claimant knew she had to comply with the Tribunal's order dated 2 October. The letter that

Dr Macdonald produced dated 24 October 2017 bore no resemblance to complying with the order of 2 October.

76. Addressing the specific submissions from Mitchell Roberton and the claimant's longer supplementary submissions of 31 January 2018, Mr Walker submitted as follows referring to the headings in the claimant's submissions:

The documented mental health of the claimant

77. The employment tribunal on 26 November 2010, dismissed the disability discrimination claim relying on a jointly instructed medical report by a consultant psychiatrist. This concluded that the *"only impediment to the Tribunal progressing is if she does not wish to engage with the process".* Mr Walker pointed out that that report also comments *"As her general Practitioner has certified her as being too unwell to work in the past it is likely she may again obtain such certificates to delay proceedings if she chooses to".* Mr Walker submitted that the psychiatrist's opinion is borne out by events. Mitchells Roberton have only been instructed for this purpose and appear unaware that the claimant's disability discrimination claim has been dismissed.

78. Mr Walker submitted that the claimant's credibility is a factor and her lack of engagement with the Tribunal process. The employment tribunal has already made 2 awards against her because she was not a credible witness. The respondent believes that the claimant does not want to attend further hearings because she is aware she will be cross-examined on various matters. She has been asked to agree certain matters (including that she had attended various courses at the university and that she has lodged various FOI requests). She has refused to co-operate.

79. Mr Walker submitted that the claimant has undertaken an extensive amount of work indirectly related to these claims, all of which suggests she is fit to pursue her claims including a number of FOI requests, a Subject Access

Request, a complaint to the Senate Office and extensive correspondence with the Respondent.

80. When the order was issued on 2 October 2017, the claimant wrote to the Tribunal on a number of occasions claiming a deterioration of her health. However, in the period between September and 16 November 2017, her health did not prevent her lodging 3 FOI requests and a complaint to the Senate as well as related correspondence and telephone calls.

81. In her letter of 16 November 2017, the claimant states that an *"administrative oversight"* resulted in her appointment of 6 November being delayed until January due to the doctor's other commitments. There is no independence medical verification for this.

82. The claimant included a letter from Dr McDonald which did not address the issues in the Tribunal's order of 2 October 2017 nor was it said on soul and conscience that the claimant was unfit.

83. The claimant obtained a postponement of the hearing on 7 December 2017 based on a soul and conscience certificate from Dr Crighton faxed to the Tribunal in the morning of the hearing. However, despite being purportedly unfit, the claimant wrote to the respondent that day and attached 3 faxes. The following day, she telephoned the respondent's DP/FOI team to arrange to visit them and she also wrote to "Clare" at the DP/FOI team and hand delivered the letter around 4pm on 8 December 2017 which included a complaint against Human Resources and the Disability Service. On 9 December 2017 the claimant wrote to the respondent stating that she was made aware on 7 December 2017 that information held by HR had been released to Mr Walker. Mr Walker submits that this only occurred because the claimant had read the bundle of documents produced for the hearing.

84. Since February 2012, the claimant has lodged at least 11 FOI requests with the respondent. Since August 2017, she has engaged in extensive correspondence with the Tribunal office and the respondent's solicitor. She

regularly quotes provisions in the Employment Tribunal Rules of Procedure to justify a variety of applications which display good analytical skills and a high degree of understanding of fairly complex procedures. She stated in 2010 she was studying for a Masters in Law.

85. Although the claims were sisted in 2012, this did not stop the claimant attempting to appeal the Tribunal's finding that she was not disabled. She sought an appeal against a review and also a separate appeal against the original decision. She represented herself at the EAT before Mr Justice Underhill and then Lady Smith.

86. In 2016, the claimant attended number of university courses.

87. All of the above is inconsistent with the claimant being able to pursue her claims. Mr Walker pointed out that in 2010, the Tribunal held that it had previously refused the claimant's application for postponement of a case management discussion because it accepted evidence that the claimant had been corresponding with the DP/FOI and had gone through documents received and written to the respondent about them the day before she presented herself as too ill to instruct her solicitor.

Purported evidence of ill health

88. Mr Walker submitted that the claimant has had no psychiatric treatment.

89. The claimant did see a psychiatrist, Dr Rogers, in 2009. This was based on a referral by her then agent and a year before the jointly instructed report was agreed to by her then agent. These are the only two occasions on which there is any evidence of the claimant seeing a psychiatrist.

90. On two occasions recently the respondent has sought access to the claimant's medical records but this has been opposed by the claimant. Her GP at today's Hearing was surprised that the claimant was not present. He considered she was fit to be her having seen her twice in the last week. The

GP also confirmed that although the claimant has regular appointments with him, these are of a "supervisory" nature.

91. The claimant has never said she wishes to pursue the claims. Recently she has suggested alternative dispute resolution. This is not consistent with someone who wishes to pursue a claim.

The claimant has been unsupported by representation

92. The claimant may now be represented but that has not always been the case. The claimant has also studied for a Master's degree in law and two other degrees. The claimant's correspondent frequently refers to detailed provisions of the employment Tribunal rules of procedure. Although the claimant has instructed Mitchells Roberton because *of "a further deterioration in my health"*, the following day, she wrote a detailed 5 page letter supplementing the application with additional supporting documents.

The Tribunal understandably seeks to know when the claimant is likely to be fit to continue with the case and there is the means by which that can be factually established or appropriate medical evidence laid before the Tribunal for consideration

93. It is submitted that this is a statement of obvious fact as to what the Tribunal was seeking to achieve in respect of one of the unless orders.

94. The respondent has outlined facts that are inconsistent with the GP's assessment.

95. There has been inordinate delay. Even now no date is fixed with a named medical practitioner. All the claimant has said is that a date may now be fixed in June. This cannot be relied on given the claimant's past behaviour.

The claimant has been deprived of her rights to have a fair Hearing

96. This is inaccurate. This is a very long running claim and the disability discrimination claim has been fully litigated.

Her cases have never been considered and relevant evidence relating to her health has not been considered

97. This is inaccurate. The claim of disability discrimination has been fully litigated. It is only the claims for unfair dismissal and sex discrimination that have not been considered. The claimant has never pursued these and shows no sign of doing so. There has been no relevant evidence about the claimant's health that has not been considered.

It is not in the interests of justice for a claim of this importance to be disposed of without a Hearing

98. There is no breach of natural justice. It is not in the interests of justice to grant this application. This is one of the longest running employment Tribunal claims in the UK and the respondent does not believe the claimant wishes to pursue them.

99. Even if the claimant now states that she is fit enough to pursue the claims there s no reasonable prospect that this will occur. Further the claims of unfair dismissal and sex discrimination include allegations dating back to 1998-99. The claim lacks specification and the sex discrimination claim is arguably time barred. The respondent would not get a fair trial in relation to events dating back almost 20 years.

Strike out application

100. In the event that the decision is set aside, Mr Walker then went on to make submissions in support of his application to strike out the claims, referring to **Birkett v James**, **Peixoto v British Telecommunications plc 2008 WL 1771466; Riley v The Crown Prosecution Service [2013] EWCA Civ 951** . In fairness to the claimant he also referred to **Osonnaya v South West**

Essex Primary Care Trust UKEAT/0629/11 but argued that the facts of that case can clearly be distinguished from the present case.

101. Mr Walker submitted that the present case has been running for nearly 11 years with no evidence being led or near being heard as the pleadings would be subject to a number of preliminary issues. The consultant psychiatrist stated that the only impediment to the case proceedings was if the claimant did not wish to engage with the process. There is clear evidence that the claimant has delayed the process for a whole variety of reasons.

Claimant's further submissions

102. The claimant has sent numerous faxed documents to the Tribunal and some by post. Since the Hearing, there was an 8 page document received 2 May, a 2 page document with 2 attachments received 8 May, a letter received 9 May and a 2 page letter and a 13 page letter received on 11 May. A letter was also sent to the Secretary on 8 May (received 9 May). In that letter, the claimant requests an audio recording of the hearing on 30 April. No such recording was made.

103. She states that she is concerned that allegations and inference made by the respondent are now affecting her personal relationships. She stated that she was unable to attend the hearing in any meaningful way but she was receiving counselling and she had identified a medical expert who may be able to assist in July with a report.

104. In the 2 page letter dated 10 May 2018 (received 11 May) the claimant said that she had already submitted what she could in relation to the medical appointment for a medico-legal assessment with Dr Rogers (in relation to the second part of the order. She states that *"following contact with the Counselling Service mentioned in previous correspondence I have identified a number of medical experts. The earliest appointment so far available is in the second week in June but I am trying to arrange an appointment earlier than that if possible".* She said that she included the "background" she wished

to submit on 30 April together with a list of evidence (medical and procedural) at present available to her.

105. She said that she had been unable to confirm Mr Walker's bundle as due to her ill-health she had been focusing her energy on meeting deadlines and complying with rules that were unfamiliar to her and the orders of the Tribunal. The claimant objected to the relevance of some of the documents relied on by the respondent, in particular the report by Dr McLennan. She considers this report is unreliable and inaccurate and that she was traumatised by her interview with Dr McLennan, the report, the two day case management discussion in July 2010 and the 5 day Hearing in November 2010. She submits that she was in a state of extreme distress between 27 April and 3 May 2018 and could not attend the Hearing on 30 April.

106. In a 13 page document dated 10 May 2018 (received 11 May), the claimant set out a detailed chronology from 1991 to 2012 which appears to be the "background" document she referred to in the separate 2 page letter. This also listed 73 documents.

107. In relation to matters after 2012, the claimant refers only to a soul and conscience certificate from her GP on 14 November 2014.

108. In relation to more recent matters, she says *"Since the case was sisted I have been trying to recover my health. During this time, I have received a number of threatening letters from the respondents saying they will claim expenses if I do not drop the case, I have replied, correctly, that I remain unwell and that it is not in my interests to drop the case. I have offered to meet to resolve matters but this has not been taken up by the respondents."* She then notes there was a letter from Mr Walker to the ET with an application for strike out. (document 73).

109. A further 13 page document was received on 15 May 2018 from the claimant. In that she set out various documents relating to her health that she says have been submitted. These mainly relate to the period from 1999 to 2012.

She then narrates other correspondence between herself and the Tribunal (and some with Dr Rogers) and then she lists medical evidence that she says was excluded by Judge Cape in 2010. She includes a section "medical evidence still required" in which she notes that Dr Crighton was unable to predict the course of the claimant's symptoms over the coming months, that Dr Rogers was unable to provide a report in the time required, that she is *"currently attending interim counselling with a view to a more structured approach. The waiting list is approximately 8 weeks at present. Through this organisation I have identified a medical expert who could provide an assessment in the second week in June".*

110. A further 5 page letter was received on 17 May 2018 which set out the claimant's view of Dr McLennan's report in 2009 and why she says it is unreliable. That letter indicates there are 2 further submissions to follow. However, this judgment has been completed and I do not consider it appropriate to delay issuing it any further. I consider the claimant has had ample time to make any submissions she wanted to.

111. The respondent has provided comments on some of this correspondence. These have not been set out here as they largely replicate Mr Walker's main submissions. The respondent has not been asked for comments as there does not appear to be new material in it and I did not consider it was appropriate to delay issuing of this judgment.

Discussion and decision

112. It is not in dispute that order 1(i) has been complied with (although the respondent takes issue with whether that is in fact true that the claimant has been unfit to attend). There has however, not been full compliance with the other provisions of order 1 and no compliance with order 2. Having read all of the claimant's correspondence, I do not understand her to dispute that. In these circumstances, the claims have been properly dismissed without further order.

113. Rather, the claimant's argument is that it would be in the interests of justice to set aside the unless order and continue the sist until a later (unspecified) date at which she will be able to provide some medical evidence that will confirm when she may be able to continue with her Tribunal case. Originally she suggested that this would be April, then it was July (see paragraph 103 above) . It is now said that it may be available in June by an unspecified person. The claimant says that would be in the interests of justice. The respondent, of course, says it would not be.

114. Looked at in isolation, it might be thought that given that there has been partial compliance with the unless order and given that the claimant has given an explanation for why she has been unable to comply in full, that it would be in the interests of justice to set it aside. However, I have to look at the context in which the order was made

115. These claims are over 10 years old and have been sisted for over 6 years. The reason for the sist was not because Judge Cape considered that the claimant was unable to proceed. Rather he considered that she had chosen not to engage (confirmed by the joint expert medical report) and that it was unfair to the respondent to continue to list hearings that the claimant would not attend. It is significant also that Judge Cape did not accept the accuracy of the soul and conscience certificates provided by the claimant's GP at the time.

116. The unless orders were issued because the respondent had applied for strike out. I had already ordered the provision of medical evidence to assist me in considering that application. That order (of 2 October) was not complied with and the claimant did not attend the hearing at which the strike out application was to be considered. The claimant, on the morning of the hearing, provided a soul and conscience certificate from her GP. She stated she had taken steps to obtain information to comply with the 2 October orders (although this was not independently verified). The unless orders were issued as an alternative to going ahead and considering the strike out application in her absence. In effect it was a last chance. It was also to ensure that the

claimant's account, which had been the basis of the postponement of the hearing, was accurate.

117. Although, strictly speaking, I would only consider the respondent's application for strike out if the claimant's application to have the unless order set aside was successful, I consider it relevant to take into account , the factors I would have to consider if I was dealing with the strike out application and whether it would succeed. It cannot be in the interests of justice to set aside the decision to dismiss if I would then strike it out.

118. During the period that the claimant claims she was unable to proceed, she has attended and presented her case on 2 occasions at the Employment Appeal Tribunal. She has also made numerous detailed FOI requests, and telephoned and attended at the university offices in relation to this.

119. She has undertaken a number of university courses, she has made a complaint to the Senate and has attended a meeting in relation to that.

120. She has engaged in detailed and lengthy with the Tribunal and the respondent's solicitor relating to these claims. From this is clear that the claimant is an intelligent woman with a good understanding of the relevant law. Her letters are clearly structured and address complex legal arguments. There is nothing in this correspondence to suggest someone unable to progress their case.

121. I am troubled by the soul and conscience certificates provided by Dr Crighton (and others) and I would normally be hesitant in questioning the professional opinion of a treating medical professional. However, this is an unusual case. Dr Crighton gave his evidence very frankly. He has clearly had a significant amount of interaction with the claimant as a patient over the relevant period. However he has prescribed no medication or other treatment. He has not referred her to a psychiatrist. He described the appointments as "supportive" and keeping an eye on her. Clearly he accepts that some events are "anxiety-producing", specifically anything to do with these Tribunal proceedings.

However, he was unaware of the claimant's other activities over the period which appear to contradict his opinion as to her fitness to proceed.

122. I consider it is also relevant that he expected the claimant to attend this Hearing and clearly thought she was able to do so, having met with her twice in the preceding week at times when the claimant was telling the Tribunal she was unfit to attend. This appears consistent with previous occasions where there has been a soul and conscience certificate from the GP saying the claimant was unfit to proceed yet she has been able to write complex correspondence, review documents and attend meetings. There is also the opinion of the consultant psychiatrist in 2009 that the claimant could progress her case if she chose to do so. I appreciate that the claimant takes exception to that report. Nonetheless it is accepted in the course of these proceedings and I consider I can take account of it, particularly in the absence of the claimant.

123. I also consider it is relevant that the claimant was able to attend and present her case at the Employment Appeal Tribunal at a date very close to the date on which her GP issued a soul and conscience certificate that she was unable to attend a tribunal hearing.

124. The claimant has also been able to instruct Mitchells Roberton. She also was willing to meet with the respondent in an informal fashion.

125. It seems to me that when her case has been dismissed (in whole or in part) the claimant is then able to take steps to overturn those decisions either by pursuing an appeal herself or by instructing solicitors. This is not consistent with her position that she is unable to proceed with the claim.

126. All of the above is consistent with Dr McLennan's opinion that the claimant could proceed with her case if she chose to do so.

127. I accept that there is a difference between writing correspondence and attending hearings. Dr Crighton, in answer to my question about this,

suggested that the claimant might have difficulty in taking part in a hearing that lasted for 5 days or more. However, even if that is true, the claimant has not attended short hearings when it appears she is capable of attending similar length hearings at the EAT. She has also been able to attend a meeting at the Senate. She has not suggested that the length of a hearing is the issue. Rather her position is that she is unfit to attend at all. I do not accept that on the evidence before me.

128. I consider that the claimant has been able to pursue her case over the period since 2010 but has chosen not to, for reasons that she alone will know. I consider therefore that her failure to pursue her case is intentional in terms of the **Birkett** categories.

129. By any measure, there has been inordinate delay in this case and I consider it was inexcusable. If the claimant was having difficulties in progressing her claim, she has taken no steps to address these difficulties. She has not taken medication or sought other treatment that might assist. It is not for me to say what she should have done about her own health but equally the respondent cannot be expected to have these claims hanging over them indefinitely while the claimant does nothing to help herself. The claimant now says she has arranged for counselling. However, this has only happened, it seems, because her case was in danger of being struck out and I consider she is continuing with this to support her application to have her claims reinstated. There is no explanation for why she has not done this sooner.

130. I would also have to consider in the context of a strike out application whether a fair trial is possible – that is a fair trial for both parties. I consider the time has come where it is not possible. The claimant's entire focus to date has been on her disability discrimination case that was dismissed by Judge Cape. The claimant has refused to accept that it has been dismissed, suggesting to the President and to the respondent that it has been remitted back to the employment tribunal to determine. That is not the position. It is the other complaints of unfair dismissal and sex discrimination that the Tribunal has been asked to determine.

131. There has been no attempt to progress these claims that remain. These relate to events over 10 years ago and, possibly to events before 1999, which have already been the subject of an earlier, unsuccessful claim to the Tribunal. Even in the claimant's recent submission of 13 pages, the meticulous details provided are almost entirely related to what has happened with her disability discrimination case. There is nothing in that correspondence that suggests she is engaging with the outstanding complaints of unfair dismissal and sex discrimination which are still largely unspecified. In addition, the sex discrimination case may have issues of timebar. The claims would require case management and the determination of preliminary issues before they could proceed. The respondent will clearly be prejudiced if it had to defend these claims now when it has not had notice of the detail of the claims in the intervening 10 years.

132. I also have to consider the claimant herself. She already has 3 awards of expenses outstanding against her in relation to these proceedings, one for a considerable sum. My understanding is that the respondent has not, yet, taken steps to enforce these awards. The claimant is at risk of further awards if her behaviour continues.

133. Finally, I have to consider whether, if the claimant was in fact unable to pursue her claims up until now, whether she will be able to do so in the foreseeable future. Whatever the claimant's current state of health is, Dr Crighton was clear that it was stable and unlikely to change. Therefore, even if I was to accept that the claimant is currently unable to proceed with her claim, there is no reasonable prospect of that changing. The claimant in her latest communication suggests that she has identified various experts and hopes to see one of them in June.

134. Unfortunately, I have no confidence that that will happen. The claimant has a history of stating that appointments have been made or steps taken to obtain expert evidence and then that turns out not to be accurate. I note that in the letter to the secretary of 8 May, the claimant states that a medical expert has

been identified who "*may be able to assist in July with a report*". This confirms my suspicion that the possibility of an expert report is not yet really in hand.

135. In conclusion, I do not consider it is in the interests of justice to set aside the decision to dismiss the claims. If I am wrong in what has to be taken into account in considering the application, then I consider that the claims should be struck out the claims on the grounds that they have not been actively pursued AND that a fair trial is not possible.

136. The respondent's application for expenses was not considered at this hearing. If this is insisted on, the respondent should contact the Tribunal and a hearing will be fixed to consider it.

Employment Judge: Susan Walker

Date of Judgment: 18 May 2018

Entered in register: 21 May 2018

and copied to parties