EMPLOYMENT TRIBUNALS

Claimant: Miss A Garvey

Respondent: The Christie NHS Foundation Trust

Heard at: **Manchester** **On: 4-6 December 2023**

Before: **Employment Judge Leach; Dr B. Tirohl; Mr. B Rowen.**

Representation

Claimant: In person

Respondent: Ms. A.Smith (counsel)

JUDGMENT having been announced to the parties on 6 December 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided. These are the reasons for the unanimous decision of the Tribunal.

REASONS

Introduction

1. This hearing was listed to hear and decide on complaints of discrimination made by the claimant.

2. Three case management hearings had been held in the previous 8 weeks. the claimant had not complied with case management orders and the final hearing was in jeopardy.

3. An Unless Order was issued by the Tribunal on 22 November 2023. The respondent claimed that the claimant had not complied with the terms of the Unless Order and therefore, under Rule 38 of the Employment Tribunal Rules of Procedure 2013 ("Rules") the claim was dismissed.

4. The claimant disputed material non-compliance with the Unless Order and, even if there had been, it was in the interests of justice to set the order aside (under Rule 38(2) and proceed with the final hearing.

5. An order was made requiring the determination of these 2 issues (the "Unless Order issues") at the beginning of this hearing.

6. In addition to the determination of the Unless Order Issues, Ms Smith made known to the Tribunal the respondent's intention to apply for strike out of the case under Rule 37 of the Rules because the claimant's non-compliance with other case management orders and unreasonable conduct on the part of the claimant. The respondent's position was that it was not possible to have a fair trial because of the claimant's non-compliance and conduct.

7. We decided it was appropriate to receive submissions relevant to the strike out application as well as the Unless Order issues, recognising that an important aspect of considering that application was whether a fair trial was possible. Consideration of whether a fair trial was possible would also be an important part of our consideration of the claimant's application under Rule 38(2). Further, should this claim survive our determination of these issues, we could proceed with the final hearing without more delay.

The Law relating to Unless Orders

8. Rule 38 of the Employment Tribunal Rules of Procedure 2013 ("Rules") states as follows:-

> *(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.*

9. At paragraph 60 of its decision in **Polyclear Limited v. Wezowicz and others UKEAT/0183/20**, the Employment Appeal Tribunal (EAT) indicated that where there was an issue about material non-compliance and it was clear that the party against whom the Unless Order had been made would apply for relief from sanctions (under

rule 38(2)) it may be wise to consider one hearing for the determination of the 2 issues. That is what has happened here.

10. Material Non-Compliance

11. When deciding whether there has been material non-compliance with an Unless Order, the Tribunal should not revisit the terms of that order to consider whether it should have been made either in the terms it was made or at all. Our role is to consider the terms of the order as drafted and whether or not the claimant has complied with it.

12. We need to consider whether there has been non-compliance in any material respect (paragraph 34 of the Court of appeal's judgment in **Marcan Shipping Limited v. Kefalas [2007] EWCA Civ 463**). Our consideration and decision must not be pedantic and of course must be in accordance with the Overriding Objective at Rule 2 of the Rules.

13. Unless orders are invariably provided in the course of case management; as a last resort to ensure a party complies with orders already made and to ensure the case in question can proceed to a fair hearing. We note the following extracts from the Judgment of the EAT in the case of **Hylton v. Royal Mail Group Limited (UKEAT/0369/14).**

> *"21. The purpose of case management orders is in general to secure, where that remains possible, that there should be a fair hearing of the allegations made by one party against the other. ……*
>
> *22. It must usually be the case that, where a claim has been struck out because of a failure to provide such information but by the time of an application for relief the information has been supplied, a court will grant relief. The purpose of the orders would have been achieved. Again, as observed in **Johnson**, the approach should be facilitative rather than penal. That cannot, however, apply where there has been no compliance even at the stage of seeking relief from the order which was made. Orders are made to be observed.*

14. The judgment in **Hylton** then quoted from the judgment in the earlier case of **Thind v. Salveson Logistics Limited UKEAT 04876/09.** Paragraph 36 of the Thind judgment says this:-

> *I wish to close by emphasising, in case this judgment is referred to in other cases, that, as I have already observed, all these cases turn on their own facts. I certainly would not wish it to be thought that it will be usual for relief to be granted from the effect of an unless order. Provided that the order itself has been appropriately made, there is an important interest in employment tribunals enforcing compliance, and it may well be just in such a case for a claim to be struck out even though a fair trial would remain possible.*

15. We have considered the recent EAT decision on Unless Orders and applications for relief from sanctions, being **Minnoch and Others v. Interservefm**

Limited and Others [2023] EAT 35 and note the listed "key points" when considering material non-compliance and applications for relief from sanctions (at 33 of the judgment):

> *Stage 2 - Giving notice of non-compliance.*
>
> *33.7. at this stage the employment tribunal is giving notice of whether there has been compliance – it is not concerned with revisiting the terms of the order.*
>
> *33.8. particularly if there has been some asserted attempt at compliance, careful thought should be given to whether an opportunity should be given for submissions, in writing or at a hearing, before the decision is taken.*
>
> *33.9. the question is whether there has been material compliance.*
>
> *33.10. the test is qualitative rather than quantitative.*
>
> *33.11. the approach should be facilitative rather than punitive.*
>
> *33.12. any ambiguity in the drafting of the order should be resolved in favour of the party who was required to comply.*
>
> *Stage 3 - Relief from sanction*
>
> *33.13. this involves a broad assessment of what is in the interests of justice.*
>
> *33.14. the factors which may be material to that assessment will vary considerably according to the circumstances of the case.*
>
> *33.15. they generally include:*
>
> *33.15.1. the reason for the default - in particular whether it was deliberate.*
>
> *33.15.2. the seriousness of the default*
>
> *33.15.3. prejudice to the other party*
>
> *33.15.4. whether a fair trial remains possible*
>
> *33.16. each case will depend on its own facts.*

16. On the issue of whether a fair trial is possible, we note the following passage commenting on strike out applications in the EAT's decision (Choudhury J) in **Emuemukoro v Croma Vigilant (Scotland) Ltd and another *UKEAT 14/20***

> *I do not accept Mr Kohanzad's proposition that the power can only be triggered where a fair trial is rendered impossible in an absolute sense. That approach would not take account of all the factors that are relevant to a fair trial which the Court of Appeal in Arrow Nominees set out. These include, as I have already mentioned, the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court.*

> *These are factors which are consistent with taking into account the overriding objective. If Mr Kohanzad's proposition were correct, then these considerations would all be subordinated to the feasibility of conducting a trial whilst the memories of witnesses remain sufficiently intact to deal with the issues. In my judgment, the question of fairness in this context is not confined to that issue alone, albeit that it is an important one to take into account. It would almost always be possible to have a trial of the issues if enough time and resources are thrown at it and if scant regard were paid to the consequences of delay and costs for the other parties. However, it would clearly be inconsistent with the notion of fairness generally, and the overriding objective, if the fairness question had to be considered without regard to such matters.*

17. On the same point we have also referred to the decision in **Itulu v. London Fire Commissioner UKEAT/0298/18** and particularly paragraph 22.

Relevant Background and fact finding.

18. In order to consider and determine the Unless Order issues, we decided we needed to understand and, where required, reach decisions about the case management process and the parties conduct in that process.

19. Relevant documentation was contained in part in the main hearing bundle (comprising 1235 pages) and also in bundles provided for the purpose of the Unless Order issues (a bundle called the supplementary pleadings bundle – 25 pages; as well as a bundle of correspondence particularly around the disclosure of witness statements – 192 pages).

20. By claim form presented on 3 February 2022, the claimant raised complaints of discrimination (protected characteristics, disability and race). The claimant withdrew complaints of disability discrimination and this was confirmed by judgment in July 2022.

21. At a case management hearing on 15 July 2022, the Judge endeavoured to identify the different complaints in this case and a list of complaints and issues was drafted by the Judge. The complaints raised are one of harassment, direct discrimination (both relying on the protected characteristic of race) and victimisation. There have been requests to add to the list of complaints and issues including a request made shortly before the final hearing. However our focus has been on the steps taken with documents and statements.

22. Clear case management orders were issued at the hearing on 15 July 2022. These included:-

a. Orders about the disclosure of documents
b. Orders about the provision of statements of evidence.

23. Whilst the case management orders required disclosure of documents in November and December 2022, this was delayed until 2023. The exercise of providing

and receiving documents and then putting together an agreed bundle became protracted. We note the following from the correspondence:

a. On 2 February 2023 the respondent's solicitors (Hill Dickinson "HD") wrote to claimant (having received a list of documents from her and also provided their own list and copies of documents) to ask for copies of some of the documents she had listed. The claimant did not provide these documents, saying that they must be on their client's (the respondent's) computer server.
b. On 5 March 2023, the claimant asked for the inclusion of some documents in the bundle *"I would also like to include within the miscellaneous section, emails from JK and from DB to CH et al which I will send shortly."* The claimant did not send the emails.
c. On 9 March 2023 HD emailed the claimant (page 108) to ask about the emails and to offer to the claimant the option that they could receive all of her documents and go through the process of identifying what was new and what was duplicate; or another option for the claimant to provide documents that she wanted including in the bundle from her list that had not been included.
d. On 25 April and 25 May 2023 HD chased for a response.
e. On 6 June 2023 the claimant replied to say that she would be seeking E disclosure and required the respondent to retain all relevant documents.
f. On 13 June 2023 HD replied to explain that they did not understand the claimant's email and that they wanted to complete the process of agreeing a bundle because witness statements needed to be exchanged on 30 June 2023.
g. The claimant requested an extension of time to provide witness statements which respondent/HD granted and asked again whether there was anything the claimant wanted to add to the bundle.
h. On 20 July 2023, the claimant replied to state that the bundle was not complete but did not expand on this. On 21 July 2023, HD asked the claimant to send through additional documents she wanted including in the bundle.
i. The claimant did not reply except to ask for more time for the exchange of statements. Her email on 6 September 2023 said "*Unfortunately I will require some further time and ask if I could have an extension til 21 September. It has been a little difficult getting witness statements together. The witness statements gained so far show a pattern of discriminatory behaviour."*

24. As a the end of September therefore, the exercise of disclosure was incomplete, the putting together of an agreed file of documents to use at the final hearing and the provision of witness statements (essential case management steps) were outstanding.

25. The Judge at the preliminary hearing in July 2022 had decided to list a short (one hour) preliminary hearing to take place on 6 October 2023, the purpose of which

was to ensure that all steps had been taken in readiness for the 10-day final hearing starting on 4 December 2023.

26. At the preliminary hearing on 6 October 2023 the Judge (Employment Judge Benson) identified serious concerns about the state of preparedness. This is clear from the case management summary and orders that followed and from the fact that those concerns could not all be addressed within the time allocated on 6 October. Judge Benson arranged for the case to be listed again before her so that she could finish the necessary case management. That hearing was listed quickly – 13 October 2023.

27. Pausing here; having reviewed the correspondence and considered the evidence of the claimant and the representations from both sides, we are satisfied that the reason why the case management steps had not been taken was because of the claimant's conduct. The claimant had listed documents that she had. She was asked to provide copies but she did not. She was insistent that the respondent would identify documents listed by her on their server and provide them to HD. We find that her behaviour was uncooperative and I am afraid we are concerned that it was deliberately so. She simply needed to provide the respondent those relevant documents she had listed. That was recognised by the Judge on 6 and 13 October and the claimant was told that she had to provide her documents. Paragraph 18 of the record of the 6 and 13 October hearings illustrates how far behind the claimant was in terms of disclosure:

> *When it became clear on 6 October, that the claimant had not disclosed her documents, she was ordered to immediately send to Ms Rogers the documents she had in her possession relevant to the issues. She confirmed she would do that by post the following day. That did not happen, and she had made efforts to scan them which she thought would be more helpful. Unfortunately, that was unsuccessful. Disclosure was still nowhere near complete. Although the claimant originally told the Tribunal there were about 30 documents, she said there were in fact about 500. With the assistance of Ms Rogers, and in order to ensure that disclosure took place as soon as possible, the claimant agreed that she would take all her documents to the respondent's solicitors offices in Leeds on Monday 16 October by 12.00 noon. Ms Rogers would arrange for them to be copied.*

28. The case management orders themselves included a requirement for the claimant to deliver to HD's offices in Leeds her documents by noon on 16 October 2023. The orders also made clear that disclosure included audio recordings and, where an audio recording was to be disclosed, then a typed transcript was also to be disclosed.

29. It is also relevant to note the terms of paragraph 20 of this preliminary hearing record which summarised discussions about witness statements.

> *The claimant intended calling 9 or 10 witnesses. She had signed statements from 4 witnesses. All witnesses had agreed to attend the final hearing and give evidence on her behalf. The respondent intended calling 3 witnesses. I*

> *explained the statements that would be required and referred to the guidance available. The links to such guidance are in the Guidance section below.*

30. The orders also required HD to complete a bundle of documents by 3 November – a month before the start of the final hearing. The parties were ordered to provide witness statements by 20 November 2023, just 2 weeks before this scheduled 10-day hearing.

31. The case management orders made required the claimant, on 16 October 2023, to attend at the respondent's offices in Leeds to provide her documents and to collect a copy of the bundle as it then was. The claimant has since explained that she did not attend because her car broke down. We note the deliberate choice of the respondent's Leeds office for the claimant's convenience, given that the claimant lived in Leeds. The solicitors responsible for the case were based in HD's Liverpool office. We also note the offer by HD to undertake to copy themselves the documents provided by the claimant.

32. The claimant did not attend on that day or on the following days (whether by car or other means). We find that she made no serious attempt to comply with the terms of the order made on 13 October (the terms of which had been explained and agreed with her).

33. At 09.00am on 18 October 2024 the claimant sent an email to the Tribunal and copying the respondent representative

> *"Despite numerous requests I have yet to receive the respondent's documentation, with the exception of two PDFs.*
> *I was sent a link by Hill Dickinson LLP on 13th October during the preliminary hearing to my NHS mail which does not work.*
> *I had asked that the link be sent to agarvey3@icloud.com, it has not yet been received.*
> ***Having provided 75% of my documents on 6th October/ 16th October to date have held back 25% in the hope that I may receive some if not all of the respondents documents**.*
> *Please let me know what if anything can be done to expedite the respondents documents and have them sent to me.*
> *Many thanks & kind regards"*
>
> (our emphasis)

34. Also on 18 October 2023 (a few minutes later) HD (understandably) replied to the claimant.

> " *As ordered by the Judge at the Preliminary Hearing our hard copy bundle of documents remains at reception at our Leeds office for you to collect when you attend to drop off your hard copy documents. You were ordered to drop off your documents and collect this bundle by noon on Monday 16th October."*

35. The Tribunal had set out a straightforward course of action designed to put the case back on track. The claimant did not comply. Further, she was telling the tribunal and the respondent that she was being deliberately obstructive in holding back 25% of her disclosure.

36. The claimant emailed the Tribunal and Respondent to say she was unable to physically drop off the documents and that she had tried to send a downloaded file which appeared to have been unsuccessful.

37. On 19 October 2023, the respondent applied for an Unless Order. A further preliminary hearing was listed on 22 November before the same Judge (Employment Judge Benson) .

38. On 15 November (a week before the next preliminary hearing and less than 3 weeks before the start of the final hearing) HD wrote as follows

> *As at the time of writing the Claimant still has not provided us with full disclosure of her documents. Despite this, the Claimant emailed us on Sunday (see attached) to propose that exchange of witness statements might take place tomorrow, notwithstanding that we are still without her documents and so there is not yet an agreed bundle.*
>
> *By this email the Claimant also offers to bring her documents to our Leeds office today or tomorrow. We have no confidence that the Claimant will attend to this task or that her disclosure will be complete for the reasons set out below (not set out)*

39. The preliminary hearing took place and resulted in more Case Management Orders as well as 2 Unless Orders. .We note the following extracts from Employment Judge Benson's record of that hearing which was sent to the parties on 23 November 2023:-

> *(2) Regrettably it became clear form correspondence that the claimant had not complied with the very clear orders which I had made in respect of disclosure. Initially the respondent applied for an unless order but following an ongoing failure to comply, Employment Judge Eeley ordered that this hearing would be converted to a public hearing to consider a strike out application and in the alternative, the respondent's application for an unless order.*
> *……...*
>
> *(9) I am very concerned that the claimant will continue to fail to comply with the remaining case management orders. The hearing is only 7 working days away. Disclosure is not complete; a final bundle had not been agreed and witness statements have not been exchanged.*
>
> *(10) A final hearing bundle has been produced by the respondent which is paginated and which the claimant has in a paper copy. She says that she has not yet looked at it. She had prior to the bundle being produced sent or asked for inclusion of some documents which it is anticipated the respondent has included. Since then, the claimant provided the respondent with 360 pages which she brought in person to their offices on 6 November 2023. Ms Kaye has agreed that these documents will be added*

to the final hearing bundle and a copy in paper form will be provided to the claimant in accordance with my order below. The claimant may not add any further documents to that bundle.

(11) Once the final bundle is completed, the claimant and respondent can complete their witness statements and they can be exchanged. The claimant had originally started embedding documents or parts of documents which she wished to refer to in the statements. I have advised her that this is not appropriate, and the statements should refer to page numbers of any documents she wished to refer to in the hearing bundle. An example was given during the hearing and is repeated here for her assistance:

"On 1 January 2020, I was given a letter dated 31 December 2019 [page 123]"

Unless order

(12) Although Ms Garvey produced evidence, which I accepted showed that on 16 October her car broke down, such that she was unable to attend the respondent's offices to deliver her papers and collect a paper version of the respondent's documents, there has been an ongoing failure to comply with the Tribunal's orders concerning disclosure and other case management both before and since that date. I have further ongoing concerns that the claimant may to seek to retain documents and disclose them late in the day to and delay disclosure of witness statements to seek to gain an advantage over the respondent. I have formed this view from exchanges with me during the preliminary hearings and correspondence to the respondent, including that dated 18 October 2023. If that occurs, there is a real risk that the hearing on 4 December 2023 cannot proceed and would have to be relisted sometime in late 2025. This would prejudice the claimant and the respondent's witnesses, all of whom wish the hearing to proceed as listed. It would also bring into question whether there could ever be a fair trial of the claims.

(13) I have therefore taken the step of issuing an unless order in respect of production of the claimant's and her witnesses' statements. It is essential that the claimant complies, and she has confirmed to me that she will be able to do so. That order is set out below.

40. The terms of the Unless Order were clearly set out by the Judge in the Case Management Orders.

3. Unless Order (Rule 38)

3.1 UNLESS the claimant by 4pm on Monday 27 November 2023:

3.1.1. removes the embedded documents in her witness statement and replaces them with references to pages the final hearing bundle; and

3.1.2 sends to the respondent by email that statement together with the statements of those witnesses she intends will give evidence on her behalf at the final hearing.

her claim will stand dismissed its entirely without further order of the Tribunal.

41. In addition to the Unless Order, other case management orders were made concerning the final exchange of documents (particularly 4 video recordings), collection of a final witness bundle and finalising the list of complaints and issues . Whilst the hearing on 22 November 2023 had been listed as a public hearing so that strike out could be considered, the case was not struck out.

42. 4pm on 27 November 2023 was the date and time that exchange of statements should have taken place. We note here that the Unless Order required exchange by 4pm. The claimant did not provide any statements by then but having reviewed the email exchanges we do not find that the provision of statements in the 30 minutes or so after 4pm amounted to material non-compliance.

43. At 18.17 on 27 November HD emailed the claimant to state as follows (we accept their statement as accurate) *"you have sent us five witness statements, all of which came after 4:00 PM. You have indicated one is still to arrive and we are still waiting for you to send us the statement of Parveen. The E-mail to which it ought to have been attached was blank. If the link within the email "Parveen" is intended to take us to Parveen's witness statement please note that link has been flagged as harmful to open by Outlook. Please resend it as a word document."*

44. At 7pm the claimant provided another statement, of Eleyn Anandam.

45. At 21.17pm the claimant provided a statement of Olumide Kuye.

46. At 09.59 on 28 November 2023 the claimant wrote to Respondent "*You have the statements in my earlier evidence to the trust of Diane Byrne and Jim Moore."* Nothing was attached. The claimant told us that these references were to 2 emails that had been provided as part of an internal process in 2021. Having considered everything we have decided that it was abundantly clear to the claimant by 13 October 2023 (and should have been clear to her before then) that she was required to provide copies of her disclosable documents by 16 October 2023 and that these emails were disclosable documents. We also note the discussions about witness statements and the guidance provided. We are satisfied that the claimant knew that she was to provide a statement from the witnesses that she intended to rely on and the consequences of her not doing so.

47. At 10.25 on 28 November 2023 the claimant wrote to HD *"I have a witness statement from Jane Bennet."* The statement itself was sent at 10.54 on 28 November 2023

48. At 14.13 on 28 November 2023 the claimant sent to the respondent a copy of an email dated 21 December 2021 that was provided as the statement of Jim Moore.

49. Also on 28 November 2023 the claimant emailed to say that she would be also getting a statement from "Katie."

50. The claimant has told us that these delays were because she was waiting for confirmation from her witnesses that they would support her case. It contradicts what

she told the judge at the preliminary hearing on 13 October 2023 (see para 29 above) and we do not accept it.

51. A little later on 28 November 2023 HD wrote to the Tribunal to say that there had been non-compliance with the terms of the Unless Order. A line in their email (copied to the claimant) said this "*The claimant's own statement appears to be incomplete."*

52. It is the claimant's own statement that we focus on next. On 27 November 2023 the claimant provided what we have now been told was a draft, incomplete version of her statement. She sent it 3 times from 2 different email addresses. Having considered the statement provided we see that sentences are unfinished, parts missing and it goes no where near addressing the long list of complaints she has brought.

53. On day one of this hearing (Monday 4 December) the claimant attended the Tribunal with 2 hard copies of a document headed "Anita Garvey Witness Statement Part 1 July 2021 -October 2023." It is 24 pages long. The document sent on exchange of statements was 12 pages. The version of the statement provided on day one contains several embedded documents even though the Unless Order specifically required that the claimant did not embed documents into her statement but provided page references to the bundle itself. There is no indication as to whether these documents are in the bundle and if so where (with the exception of an embedded email which the claimant told us was in the bundle but was not easy to read).

54. The claimant explained that she had prepared this document as the final version of her witness statement but only realised on Sunday evening (3 December- the evening before the first day of this hearing) that it was not the document that she had attached to her emails on 27 November. Understandably she wanted to rely on the longer statement.

55. Initially the claimant only provided hard copies of this statement (together with copies of yet more documentation that we refer to below). Ms Smith asked for an electronic copy. This was received and Ms Smith observed later that afternoon that, according to the metadata properties on the document, it was not created until Wednesday 29 November at 20.10. She expressed doubt about the claimant's explanation.

56. Whilst the claimant appeared keen to continue to explain her position on the afternoon of day one, we decided that the parties should reflect their position overnight and ended day one of the hearing. (We had by that stage reached our decision on the material non-compliance point and communicated this to the parties.)

57. On the morning of day 2 the claimant provided her own metadata print outs that she wanted to refer to. We decided that it was fair to provide the claimant with an opportunity to give evidence on the information being provided as well as on the other facts that were relevant to our decision as to whether it was in the interests of justice

to allow the claim to proceed. The claimant confirmed that she wanted to give this evidence and she did so under oath.

58. We summarise the claimant's evidence and explanation about the statement as follows:-

a. The claimant's statement was created on a different computer (an Apple mac).

b. She had problems in attaching her statement to an email on the day of exchange (as noted above, the claimant sent 3 emails on that day attaching her statement – or rather the draft one -) but thought she had attached the correct statement.

c. 2 days later, on 29 November, the claimant decided to give her Apple mac computer to a relative. In exchange she received an ASUS laptop.

d. On that same day, the claimant transferred documents from her Apple mac to the ASUS computer. To transfer her statement, she needed to put the document in to Google docs. That is why the metadata obtained by the respondent shows the document as being created on 29 November.

59. To support her version the claimant attended on day 2 with her own metadata reports which she told us had been obtained from the Apple mac, where the statement was originally stored and which her relative had. The claimant told us that on Monday evening she collected her Apple mac from her friend/relative to be able to print out the metadata report. Two reports were provided. One shows a report of a document called "Anita Witness Part 1" being a 12-page document with 132 paragraphs created on 14 November and modified on 19 November. The other shows a 23-page document with 198 paragraphs. (In contrast the respondents report on the witness statement provided on day one which shows a 24-page document with 215 paragraphs). We did not see the documents themselves from which the 2 metadata reports had been obtained.

60. The claimant explained the difference in length from actions she took on Sunday 3 December 2023 when she decided to add some tables to the witness statement. It was only then, says the claimant, that she realised that the wrong statement had been disclosed. She sought to correct this by attending the tribunal on Monday morning with copies of the final version.

61. I am afraid that we find the claimants version as difficult to accept and, on balance we do not accept it. We do not accept that the claimant unwittingly sent a short draft on 27 November and only on the evening of 3 December, discovered this. We find that the claimant intended to produce more information on the morning of day one (in terms of the longer statement) Our decision is based, not just on our consideration of the version of events provided but on the claimant's wider conduct in this litigation.

Employment Judge Benson expressed real concern about the claimant's conduct in this regard - see para 12 of the order of 22 November (above). Her comments neatly summarise much of the claimant's conduct in this litigation until that stage. We have also seen the claimant's conduct for ourselves, of attending day one of the hearing with yet more documentation. We comment on this late disclosure next.

62. On the morning of day one the claimant provided hard copies of various previously undisclosed documents (around 50 pages) which included 2 typed transcripts of meetings. They are detailed and will take some going through.

63. On the afternoon of day one Ms Smith told us the claimant had at lunchtime that day sent to HD yet more disclosure – another 125 pages or so. Combined, the claimant's disclosure on day one amounted to an additional 175 or so pages, notwithstanding all reasonable efforts previously made to ensure that the claimant complied with her disclosure obligations and provided documents to complete the preparation of the file bundle.

64. The claimant told us later that afternoon that she would "withdraw" the second tranche of that days disclosure. Whilst we accept that might have been some attempt at cooperation; (1) the disclosure had by that stage been made (2) it does not escape the concern that the claimant had not complied with the orders about the disclosure of documents.

65. The claimant also provided evidence (in response to questions from Ms Smith) of more recordings of meetings or discussions. When referred to her obligation to provide these she explained that a number were on her mum's phone (online meetings having been covertly recorded) and that there was difficulty retrieving them. Later that afternoon the claimant told us that there were no other audio recordings and that she had only been referring to the 2 recordings that resulted in the transcripts. We are afraid that inconsistency simply added to our concerns about the reliability of what the claimant was telling us.

66. We also note a response provided to another question from Ms Smith, when the claimant told us that she was not entirely sure that the version of her statement provided on the morning of day one, was the final version.

67. we observe the claimant's role in education within the NHS; her high level academic and professional qualifications; her ongoing employment with the respondent and our understanding that the claimant has received her salary throughout this case. We note this because:

a. We find that the claimant had (or should have had) from the start of these proceedings, sufficient understanding of processes such as meeting deadlines, the production of documents, following rules.
b. She had skills and resources such as communication, administration and organisational skills.

c. She acknowledged in response to questions, that it might have helped had she been able to access appropriate, paid for advice. The reason that she gave for not doing so was that she could not find a firm of solicitors that was prepared to take on the NHS. We observe, from our own experience, that she cannot have looked very far.

68. Finally in this section, we note the claimant told us of the death of her mum during this litigation. We are sure that this would have adversely impacted the claimant's ability to conduct the litigation for a period of time. However what we have set out above is a refusal to comply with orders; a refusal to cooperate with HD over a 9- or 10-month period.

Consideration and conclusions

Material non-compliance.

69. We decided that there was material non-compliance with the terms of the Unless Order.

70. Had we been asked to consider whether the service of statements, in sequence a little after the deadline time, amounted to material non-compliance, our decision would have been that it did not. What has particularly concerned us (and led to our decision that there was material non-compliance) is:-

a. The position regarding the statements of Diane Byrne and Jim Moore. We note that the claimant has yet to provide a statement of Diane Byrne.
b. Jane Bennet's statement which was sent a day after the Unless Order required.
c. The position regarding the claimant's own statement. Effectively this was not provided until the morning of day one.

71. We considered whether the claimant had materially complied with the terms of the Unless Order as far as her own statement was concerned; that she had provided a statement and whether we might instead need to consider an application by the claimant for her to rely on a supplementary statement. It was clear from our discussions with the parties and particularly the claimant, that she had not provided her statement on 27 November 2023. She had instead, provided a document that was not her intended statement. That amounted to non-compliance.

72. In considering whether this non-compliance was material, we considered the attempts by the claimant to comply with the terms of the order. On day one, we had regard to the claimant's conduct as a whole regarding the exchange of statements and we decided that there was nothing to indicate that there was anything approaching an asserted attempt to comply with the terms of the order.

73. On day 2, on determining the application for relief from sanctions, we considered further the circumstances around the claimant's failure to provide her

statement until day one and our findings of fact and decision on this are set out elsewhere in this judgment, particularly paragraphs 57-60 above.

Relief from Sanctions

74. We have decided that it would not be in the interests of justice to overturn the dismissal of the claim because of the material non-compliance with the terms of the Unless Order made on 23 November 2023.

75. Our decision making has followed closely the guidance provided by the **Interserve** decision of earlier this year. We have carried out an assessment of what is in the interests of justice. In doing so we have taken account of various factors including the 4 specifically noted in the Interserve decision.

The reason for the default - in particular whether it was deliberate.

76. We are afraid that is our conclusion in relation to the claimant's own statement as well as the (yet to be seen) statement of Diane Byrne. The decision reached by us, on balance, is that the claimant had adopted a practice of withholding information, making life difficult for the respondent and HD and deciding to disclose information when it suited her. The claimant was intent on continuing this practice, even though in doing so she was defying the terms of the Unless Order.

77. If we are wrong about that then we are very clear that the claimant has to accept responsibility for the disorganisation and confusion over such a long period in this litigation culminating in the period of time that she had to comply (and failed to comply() with the Unless Order. We cannot ignore the claimant's position within the NHS as an Education programme manager, her academic and professional qualifications, the resources available to her through ongoing employment and salary which would have enabled her to obtain advice should she consider she was overwhelmed.

78. Whilst the claimant is a litigant in person (a factor that we have considered very carefully in reaching our decision) she was not without ability or resources. Nor can we ignore the cooperative actions of the respondents solicitors (we refer to these in more detail below) as well as the attempts by the Tribunal itself to ensure the claimant was clear about what was required and could set about complying with the requirements in an organised way.

The seriousness of the default.

79. It is very serious. It demonstrates that the claimant has no regard for case management orders right up to and including the start of the final hearing of her case. The default does not impact the statement of a witness with little importance or relevance. It impacts the claimant's own evidence. As for Diane Byrne's statement, this default is ongoing. It is even possible that the default relating to the claimant's statement is ongoing given the comment made by the claimant that casts some doubt on whether the statement provided on day one is the final version or whether (had the hearing continued) the claimant might attempt to produce another statement over the coming days.

Prejudice to the other party.

80. Should we grant the claimant's application, overturn the dismissal under rule 38(2) and now proceed with the final hearing, then the respondent will be put to additional work because of the claimant's non-compliance.

81. The respondent has prepared for the final hearing on the basis of the information provided. That information has already changed significantly. The respondent, HD and counsel will need to review the new information including the claimant's witness statement; they will need to take instructions from the various witnesses; to consider the statement of DB when that is provided, possibly consider whether other witnesses might be required and all at the same time as the organisation and hard work that a final hearing demands anyway.

82. There would also be prejudice should we decide not to maintain the dismissal of the claim but to list this case to take place at a later date. That would almost certainly require the parties to wait another 18 months or so; that would be another 18 months that the parties did not have an outcome; that this litigation process would continue. Memories would fade even more than they may already have.

83. Finally there is the very real (albeit not certain) prospect of the claimant looking to introduce yet more evidence over the coming months, even though she had been provided with deadline after deadline.

Other relevant factors

84. We have also taken the following into account.

a. The extent to which the Tribunal provided guidance and assistance to the parties (but particularly to the claimant) in trying to ensure that this case was ready for hearing in December 2023. We are sure, from our review of the preliminary hearing records that on each of the 4 preliminary hearings in this case that the judge explained in clear terms what was required. Further the claimant was provided with information and access to guidance documents to assist her in the preparation of her case.

b. The Tribunal rejected the respondent's application for the claimant's claim to be struck out but made an unless order; providing the claimant with a clear and final opportunity to ensure case preparation was on track.

c. The extent of the claimant's defaults before the Unless Order was issued. This is not a case in which a party has generally complied with orders made.

d. The need for confidence and respect in the Employment Tribunals and their processes. We are concerned that a reasonable respondent in this

position would lose that confidence and respect if we decided to provide the claimant with an opportunity to now proceed with the hearing, requiring instructions to be taken on more statements, various documents disclosed on day one of the hearing and with no confidence that nothing else will appear. The respondent is aware of the steps taken and time allowed to the claimant, all of which have tried to ensure as far as reasonably possible, that she is on an equal footing with the represented respondent. She has been provided with every reasonable opportunity to advance her claim; to ensure that the necessary case management steps are taken. It will be plain to any interested observer of this hearing over the last 2 days that the claimant has had little regard for the documents and guidance provided to her in order to help ensure that she is able to advance her claim and be on an equal footing.

e. The conduct of the respondent's solicitors, Hill Dickinson. The respondent (through its solicitors) has sought at all times to give effect to the case management orders and prepare for the final hearing. We have seen enough from the correspondence between the parties to accept this. We would go further and note that these solicitors have not at any stage sought to take advantage of a litigant in person. On the contrary, they have taken steps in this litigation that we are quite sure they would not have taken had the claimant had professional representation. They have not sought strike out or unless orders at an earlier case management stage notwithstanding the claimant's defaults. Their correspondence is non-threatening. They have asked the claimant for more information about documents that she wants included. They have provided the claimant with a marked up copy of their draft index to help show the claimant where certain documents might be. They have offered to receive the claimant's documents and work through them to identify those documents that are already in a draft bundle and those that are not. They have offered to include in the bundle all documents that the claimant provides. They have made arrangements with their Leeds office for the claimant to attend there, drop off and pick up bundles. On exchange of witness statements, they kept the claimant up to date about the statements that they had received and not received. We are satisfied that the respondent through the conduct of their solicitors have acted in a cooperative way, with the genuine intention of advancing this case to a fair hearing (and so in accordance with the terms of the overriding objective) notwithstanding the additional time and costs that their assistance will have incurred.

Fair trial?

85. Finally we have considered whether a fair trial is possible. We have no confidence that, if we were to allow relief from sanctions and now start to hear the evidence, that a fair trial would take place. It is apparent that the claimant has been intent on holding back information and producing it at a point that she considers may

benefit her. Based on the claimant's conduct to date, we have no confidence that the claimant has now stopped from providing further disclosure. We have no confidence that another version of her statement or another witness statement will not appear. That has already happened in this case. Such actions may seriously jeopardise the fairness of a trial.

86. A fair trial requires the advance disclosure and review of documents and statements. We accept that sometimes a litigant in person will envisage a process where "rabbits can be pulled from hats" during a trial or final hearing. Case management tries to avoid that. The tribunal has done all that it reasonably can to inform the claimant of the processes. It has made orders and ultimately an unless order. Yet still the claimant has provided more statements; more documentary evidence right up to an including this hearing.

87. In considering whether a fair trial has been possible, our focus has been on whether we consider it is possible if we proceed within the remainder of the 10 days allocated (according the with EAT's comments in the **Itulu** and **Emuemukoro** decisions noted earlier.

88. However, even if we are considered to be wrong on this point; that a fair trial could have taken place, when considering the circumstances of this litigation as a whole, we have decided that this is one of those cases (as explained in **Thind** – see paragraph 14 above) where, given the facts, there is an important interest in enforcing compliance. It is in the interests of justice and in accordance with the overriding objective, to dismiss the application for relief from sanctions.

89. Given our decision on the Unless Order issues, we do not need to consider further the respondent's Strike Out application made under Rule 37.

Employment Judge **Leach**

Date: 8 December 2023

JUDGMENT SENT TO THE PARTIES ON

Case No: 2400794/22

8 December 2023

AND ENTERED IN THE REGISTER

FOR THE TRIBUNAL OFFICE