



EMPLOYMENT TRIBUNALS

Claimants Mrs R Grusina

Respondents (1) Leicester City Council Limited
(2) The Governing Body of Marriott Primary School

Heard at: Leicester Employment Tribunal

On: 1 September 2023

Before: Employment Judge Broughton

Claimants In Person

Respondents: Mrs McDade - solicitor

JUDGMENT having been sent to the parties on 11 October 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

JUDGMENT

The claimant made an application under rule 38(2) of the Employment Tribunal (constitution and Rules of Procedure) Regulations 2013 as amended, to have the dismissal of her claim for non-compliance with an Unless Order set aside. That application is refused. **All the claims remain dismissed.**

REASONS

1. The judgment was provided ex tempore to the parties at the conclusion of the hearing on the 1 September 2023. An email from the claimant dated 4 September 2023 has been treated as a request for written reasons.

Background

2. The claim was presented on **10 June 2021**. It included claims of race discrimination and 'whistleblowing' relating to events dating back to **January 2020** when the Claimant alleges she first made a protected disclosure. .
3. The case came before Employment Judge Britton on 26 October 2021 at a Case Management Hearing. Employment Judge Britton set out for the benefit of the Claimant, the applicable legal framework, both in relation to the claims of whistleblowing and also the claim of race discrimination, setting out what he understood the potentially relevant sections of the Equality Act 2010 were in terms of the race discrimination, namely; sections 13, section 19 and section 27. Employment Judge Britton however identified within his orders, that he considered that the claim as described by the Claimant would appear to fall within section 13 and claims of direct discrimination.
4. The claims however required further particularisation by the Claimant and an Order was made that she must provide that particularisation by **4 November 2021**.
5. Orders for disclosure were made for the Respondent to disclose its documents on 25 February 2022 and for the Claimant to identify any documents that she considered to be missing from that bundle and then produce those.
6. The Claimant did not provide further particularisation by 4 November 2021.
7. The Claimant applied for an extension of time to 21 February 2022 to particularise her claim, which in the event was granted. She provided her responses however not on 21 February but on 22 February, but that was not a material non-compliance.
8. However, the claims as particularised remained unclear, and the Respondents' asked for a hearing to further clarify the whistleblowing and race discrimination complaints.
9. The matter then came before me at another preliminary hearing on 7 September 2022.
10. The Claimant was assisted by an interpreter Mr Hatch- Barnwell however, her command of the English language, while not her first language, was good and she confirmed that she only required the assistance of the interpreter in the event there were certain terms used which she did not understand.
11. We spent the entire hearing working through the whistleblowing complaints. I set out within my Case Management Order an appendix making it very clear what I understood, from that preliminary hearing, were the alleged protected disclosures and the detriments. However, because it took such a long time to identify with the Claimant what her whistleblowing complaints were, we did not have the opportunity to go through the race discrimination claims at that hearing.
12. An Order was therefore made and agreed with the parties, that the Respondents' would by 8 September 2022 send the Claimant a Word version of a table setting out the race discrimination claims (**Schedule**). It was explained to the Claimant what she needed to do to complete the table .The Claimant was ordered to send a copy of that completed document to the Respondents' by **29 September 2022**. It

was made clear to the Claimant, and indeed it was repeated in my Orders, that if the Schedule which the Respondents' provided did not include all the allegations of race discrimination that she was making she must add them to the table and that she must ensure that it is a full and accurate account of her allegations. I also attached with the Orders the statutory code of practice produced by the Equality and Human Rights Commission on the Equality Act 2010, which explains the different types of discrimination.

13. I also informed the Claimant that if there was anything in the Schedule which she did not understand, the solicitor for the Respondents' had confirmed that he would assist the Claimant in terms of clarifying what information was required.
14. The Respondents' would later allege that the Claimant sent an email to the Respondents on 30 September 2022 (not on 29 September 2022 as ordered) in which she stated she was attaching the completed Schedule however no Schedule was attached. The Respondent's complained that they contacted the Claimant and asked her to resend it. There was then some exchanges between the Respondents' and the Claimant regarding the Schedule, which she said she had attached to the 30 September email. Her completed Schedule was never received.
15. There was a further preliminary hearing on **22 November 2022** before Employment Judge Adkinson. The Claimant did not produce the completed Schedule at that hearing.
16. The record of that hearing specifically records, at paragraph 39, that the Claimant had not complied with the Order to provide further information by completing the Schedule and goes on to provide at paragraph 40 as follows:

"Discussion with the claimant revealed that the claimant did not properly understand what was expected of her. ..."

17. It was clear therefore, that despite asserting to the Respondent that she had sent the Schedule, she had not in fact completed and sent it. She had not requested additional time in which to complete it, despite previously requesting and been granted an extension of time to comply with the Order for particularisation of her claim.
18. Employment Judge Adkinson records that he had also gone through the Schedule with her and explained to her what was needed again and why the information was needed, namely so that the Respondent would understand the allegations and the Tribunal would understand the issues it had to determine. He went on to set out again the information that would be required at paragraph 16. He explained that in relation to each act she simply had to identify the date it took place, brief details, the identity of any real person that she compared herself to and why she thinks her race was the reason for the difference in treatment. The Order was that the information must be provided by **19 December 2022**.
19. Employment Judge Adkinson also ordered that in terms of disclosure of documents, that **each party must** send to the other party copies of all relevant documents by **27 February 2023**. His orders went on to provide that the parties must by 27 March agree the documents that are to be used at the hearing and then the Respondent will paginate the bundle.

20. The final hearing was listed for **19 June to the 27 June 2023**.
21. The Claimant did not assert at today's hearing that had she remained uncertain about what she needed to do to comply with the Orders, that she had at any point taken steps to obtain further advice whether that was via solicitors, ACAS, a free advice service or otherwise. She had however been given significant assistance at a number of preliminary hearings and efforts made to explain the simple details required in relation to the remaining claims of race discrimination.
22. Following the preliminary hearing on that same day, on 22 November, the Claimant sent a very lengthy email to the Tribunal and Respondents'. It was in narrative form and it was difficult to identify from the way it was presented whether and what were allegations of race discrimination which the Claimant wanted to include in the Schedule. The Claimant did not identify the matters she referred to as acts of race discrimination or explain why she thought race was the reason for any alleged difference in treatment.
23. On the **13 December 2022** the Claimant wrote to the Tribunal asking to amend her claim but she did not set out what amendments she was seeking. Employment Judge Hutchinson then wrote on 12 January 2023 stating that the Claimant had not provided the further particulars that Employment Judge Adkinson had required of her and further explained that if she was applying to amend her claim, she had to do a number of things, namely she had to set out what the fresh allegations were and why they amounted to race discrimination.
24. The Claimant then sent an email on 25 January 2023. It was not clear whether this was an application to amend or not. She did not identify whether these were fresh allegations or not and she did not address any issue of amendment and why the amendments should be accepted.
25. The Respondent then sent a revised Schedule on **10 February 2023** setting out what it understood the claims of race discrimination to be. The Claimant accepts that she received that updated Schedule and that did not comment on it, add to it, correct it or otherwise make any attempt to work with the Respondent to finalise the Schedule.
26. The Respondent made an application on **6 April 2023** for the Claimant's case to be struck out in its entirety. The Respondents pursued the application on four grounds.
 - a. The manner in which the Claimant has conducted proceedings has been scandalous or vexatious under Rule 37.
 - b. The Claimant has not complied with any of the Employment Tribunal Rules or with any Order of the Employment Tribunal.
 - c. The claim has not been actively pursued.
 - d. It is no longer possible to have a fair hearing.
27. The case was listed for a hearing on **11 May 2023** before me to consider that application.

28. At that hearing I concluded that the Claimant had not inserted the required further information into the Schedule.
29. This case was listed for a 7 day hearing commencing on **19 June 2023** i.e. just over a month from the date of that hearing and it still remained unclear, what the Claimant's claims of race discrimination were.
30. The Claimant alleged at that hearing that the updated Schedule (which she had by this stage received from the Respondent three months prior) did not in fact include all her claims of race discrimination. She was asked to identify at this hearing the documents where she had set out all the other claims of race discrimination which she wanted to include in the Schedule but she said she was not in a position to do that.
31. The revised Schedule which the Respondent had prepared, set out six claims of race discrimination. I asked the Claimant at that hearing to confirm whether she was pursuing six claims of race discrimination or more than six, to which she replied that there were more but when I asked her how many other complaints she wanted to include in the Schedule, she stated only "*a lot more*". She did not identify the document or documents which set out all the additional allegations and she was not willing or able to confirm how many more allegations she wanted to add to the Schedule or provide a satisfactory explanation for making no attempt to comment on the revised Schedule in the last 3 months since she had received it. I did not however strike out the claims. The whistleblowing claims had been identified and I considered that it was in the interests of justice, applying Rule 2, to limit the claims of race discrimination to those 6 claims identified in the revised Schedule rather than strike out the race discrimination claims. I decided however, that given the Claimant's conduct and failure to comply with the Orders of the Tribunal, that to encourage her compliance (and taking into account that the final hearing was on a few weeks away), it was appropriate to make an Unless Order to address outstanding disclosure.
32. The judgment dealing with that hearing, sets out in further detail the reasons why I decided to make the Unless Order. The Claimant did not challenge that decision and confirmed at the hearing itself, that she was able to and would comply with the terms of the Unless Order.
33. At the end of that hearing there was a discussion in the Tribunal room between the Claimant and Ms McDade about the arrangements the Respondent's solicitors would make to ensure that someone would be in the office on 15 May 2023 to receive the disclosure from the Claimant
34. The terms of the Unless Order were:

Unless Order

Unless the Claimant:

1. *Sends to the Respondents' solicitors the documents which she currently has in her possession and control and which are relevant to the issues to be determined at the final hearing and which she has not previously sent copies of to the*

Respondents' solicitors, to be received by them no later than 4.00 p.m. on Monday 15 May 2023.

And

2. *Confirms in writing also by 4:00pm on Monday 15 May 2023 (an email will be sufficient) to the Employment Tribunal that she has carried out the step at number 1. above*

the claims in their entirety (the race discrimination and whistleblowing claims) will stand dismissed without further Judgment or Order.

Strike Out

35. The Claimant did not comply with the Unless Order. The Claimant did not provide her disclosure and she did not contact the Tribunal.
36. The Claimant did not apply to vary the terms of the Unless Order before the date and time for compliance.
37. The Respondent contacted the Tribunal on 16 May 2023 regarding the Claimant's default.
38. The Claimant wrote to the Tribunal on 25 May 2023, she accepted that she had not complied with the Unless Order and asked for the final hearing to be rescheduled. It was a lengthy letter, in part repeating allegations regarding the Respondents' conduct while she was employed, repeating that she had been served with significant disclosure (1337 pages) by the Respondent (a matter raised by the Claimant at length at the hearing on 11 May 2023) and referred to being in crisis because of bills, that she had resigned from her cleaning job and that she was unwell. The Respondents' were asked to comment on the Claimant's letter and did so on 6 June 2023, replying that they had still not received the Claimant's disclosure and as there is no finalised bundle the parties would not be in a position to proceed with the hearing.
39. Employment Judge M. Butler issued a notice confirming dismissal of the claims on **6 June 2023**.
40. The final hearing was vacated.

Relief from sanction application.

41. The Claimant wrote a number of letters to the Tribunal including on 5 June setting out reasons for noncompliance and on 19 June 2023 briefly asking for her claim not to be struck out. I treated this as an application under Rule 38.
42. The Claimant wrote another lengthy letter on 20 June 2023, referring to being a single parent, having depression and in a large part referring to her treatment by the Respondent and its impact. It did not directly address why she could not have provided her disclosure as Ordered.
43. The Claimant did not request a hearing. However, I determined that it was in the interest of justice to hold a hearing. The Claimant's correspondence is lengthy and

I considered that it was necessary to clarify with her why she had not complied and whether in fact she had done so since or was in a position to do so at this stage, matters not addressed in her application.

1st September 2023 Hearing

44. This hearing was listed on 1 September 2023 to deal with the application brought by the Claimant pursuant to Rule 38(2).

45. The Claimant wrote into to the Tribunal on 23 August 2023 wanting to postpone the hearing:

"I have urgent situation because of my health condition, I am afraid I will be unable to have the hearing on 1st September 2023 at 2pm. Please I apologise for all this inconvenience and I wish the Employment Tribunal consider to move it to October".

46. The application for a postponement came before Employment Judge M. Butler who refused it on the grounds that it was made very late and the Claimant had provided no information about her health condition. It was explained to the Claimant that any application must be accompanied by confirmation from a medical professional confirming the nature of the conditions and why it means that the Claimant cannot attend the hearing.

47. The Claimant sent in a fit note dated 23 August 2023 citing depression and stating she was not fit for work. Employment Judge M. Butler wrote on the 23 August 2023 explaining that the fit note does not indicate she is unfit to attend the hearing and an interpreter had been booked and there are financial penalties to be paid by HMCTS if that is cancelled. It also set out that hearings in this case had been postponed before at the Claimant's request and in the absence of clear evidence that she was unfit to attend the hearing, it would proceed.

48. On 23 August the Claimant replied stating that she would attend the hearing.

49. On 28 August 2023 she wrote a lengthy email to the Tribunal complaining about the Respondents' conduct, the primary concern appeared to be that their solicitor's had sent her a chronology to assist at the forthcoming preliminary hearing and she complained that she was being sent more documents from the Respondent and appeared to allege that there was some malice in it; *"The timing that closer to the hearing ...of Mrs McDade again made, was always "clever" in a bad way towards me..."sic]*

Today's Hearing

50. An interpreter was present at today's hearing, however the Claimant indicated she would prefer to use Google translate if there were any terms she was not familiar with. The translator however remained in case he was required, and he provided some, albeit limited assistance.

51. I set out at the outset, some of the factors I may take into account when hearing the application: the reason for the default, the seriousness of it, the prejudice to the other party and whether a fair trial remains possible.

52. The Claimant did not produce any medical evidence regarding her health.

Legal Principles

53. Rule 38(2)) provides:

Unless orders

38.— ...(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...* Tribunal stress

Submissions

Claimant

54. It was something of a challenge for the Claimant to focus on the factors relevant to her application. She has a propensity to revisit the history of the complaints and wanted to talk about the impact of the Respondents' alleged behaviour. I stopped the Claimant at times to attempt to encourage her to focus on the application.

55. The Claimant during today's hearing also expressed, it appeared, some criticism of my response at the last preliminary hearing to allegations she raised of slander by the Respondents. She referred to my reaction as having been 'calm'. It was difficult to understand how she felt I should have reacted and why this was relevant to this application. The Claimant had confirmed that the alleged slander was not linked to her complaints of discrimination and I had therefore explained at the hearing in May 2023, that the Tribunal has no jurisdiction to deal with that types of claim.

56. Ultimately, with some persuasion the Claimant did made submissions on the relevant factors and that took almost an hour until she confirmed that she had exhausted all she wanted to say.

57. The Claimant's submissions in essence were that she had agreed to disclosure on the 15 May 2023 because she was concerned that unless she did so her claim may be struck out. She understood, she confirmed, what she was required to do and had agreed that she could comply however she informed me today that:

"I lied to you, I thought you would strike me out, I lied to you, so punish me."

58. The Claimant repeated a number of times that in terms of informing me at the last hearing that she could and would comply, she had "*lied*" to avoid being struck out.

59. The Claimant then asserted that she had disclosed about 10% of the documents which form her disclosure. However, eventually after the Claimant had shown me , on her mobile telephone emails, of the 15 and 16 May 2023 sent to the Tribunal (which she alleged attached her disclosure), she confirmed that what she had attached to those emails were not the documents which formed part of her disclosure but documents where she sets out what she alleges the documents will

evidence and further details of the allegations. She ultimately confirmed that she had not actually sent the Respondent any of the documents that she wanted to rely on at the final hearing.

60. In an email dated 5 June 2023 the Claimant had set out some reasons for her default. In essence those were; that she had received 1337 pages of disclosure from the Respondent (in March 2023), worked 3 hours per day (not per week as recorded in my previous judgment from 11 May 2023) , she is a single mum with school age children and the time allowed to comply with the Unless order had not been sufficient.
61. The Claimant in her submissions also explained that while she had said at the last hearing that she had about 60 pages of disclosable documents, it could be more or less than that number.
62. The Claimant in submissions mentioned that she had the disclosure with her and on being asked to produce it, took out two large bundle of pages, one was a piles of loose pages and the other documents were in a plastic carrier bag. The documents were not ordered and they were not in a folder. The pages were not numbered but may well have filled about 2 lever arches. The Claimant had not brought any copies.
63. The Claimant stated that she had not sent copies to the Respondent because the circa 1000 pages of documents they had disclosed to her in March 2023 had made her depressed and she could not bear to see any more papers.
64. In terms of prejudice, the Claimant asserts that the witnesses should recall what happened and the Respondents' have "*a lot of money*" hence there will be no financial prejudice. In terms of a fair trial, the Claimant asserted that a trial was needed for the children at the school.
65. The Claimant does not allege that her health will cause any delay, she informed me that although she asked to adjourn today's hearing because of her health, she was "*fine*".

Respondents

66. While Mrs McDade for the Respondents initially was operating on the understanding that an application for relief from sanction, had not been made within the requisite 14 days, she withdrew that point in her submission on being taken to the email of 19 June 2023 from the Claimant.
67. Mrs McDade referred to the case of: ***Polyclear Ltd v Mr Daniel Wezowicz & Others [UKEAT/0183/20]*** an EAT decision on 13 May 2021. The finding in that case essentially related to a failure by the Tribunal to take account of the attempt that the respondent had made to comply with the unless order or to analyse the extent of the failure in material compliance in weighing up the interests of justice. At paragraph 42 the EAT considered the decision of Underhill J in the case of ***Thind v Salvensen Logistics Ltd [UKEAT/0487/09]*** which provides helpful guidance on the appropriate approach to relief from sanction. The appropriate relevant paragraph states as follows:

42. I consider that the decision of Underhill J in Thind v Salvensen Logistics Ltd

*UKEAT/0487/09/DA (decided before the current scheme for unless orders was introduced by the 2013 ET Rules) still provides helpful guidance as to the appropriate approach to “relief from sanction”: “The tribunal must decide whether it is right, in the interests of justice and the overriding objective, to grant relief to the party in default notwithstanding the breach of the unless order. That involves a **broad assessment of what is in the interests of justice**, and the factors which may be material to that assessment will vary considerably according to the circumstances of the case and cannot be neatly categorised. They will generally include, but may not be limited to, the reason for the default, and in particular whether it is deliberate; the seriousness of the default; the prejudice to the other party; and whether a fair trial remains possible. The fact that an unless order has been made, which of course puts the party in question squarely on notice of the importance of complying with the order and the consequences if he does not do so, will always be an important consideration. Unless orders are an important part of the tribunal’s procedural armoury (albeit one not to be used lightly), and they must be taken very seriously; their effectiveness will be undermined if tribunals are too ready to set them aside. But that is nevertheless no more than one consideration. No one factor is necessarily determinative of the course which the tribunal should take. Each case will depend on its own facts.” Tribunal stress*

68. The Respondent submits that the Unless order was clear and put in simple terms.
69. The Respondent had been asking for months for the Claimant to deal with disclosure. At the hearing on 11 May 2023 she did not bring her disclosure with her and it was needed urgently given the pending final hearing. The Claimant has a history of noncompliance and the Tribunal at the hearing at the 11 May 2023 hearing took “*significant care*” to make sure the Claimant understood what was required of her. The Claimant had confirmed that she understood and there was a discussion with the Respondents’ solicitors and the Claimant to confirm arrangements to receive her documents in compliance with the Unless Order.
70. The Respondent complains that events go back to January 2020 as far as whistleblowing claims are concerned, but the Respondents’ still do not have the dates from the Claimant of when the alleged acts of race discrimination took place.
71. The Respondent submits that given her history of failing to comply with Orders, there is no evidence that future proceedings would be conducted any differently and it is now almost 3 years from the events she complains about (as far as the dates have been identified by the Claimant).
72. The Respondent complains that it emailed the Claimant after 4pm on 15 May 2023 about her failing to comply with the Unless Order but she did not respond to them and has shown only contempt for the Respondent’s hence her further complaints about the chronology they had prepared for today’s hearing.
73. The Respondent complains that the Respondent has incurred counsel’s brief fee for the final hearing which was vacated, which came out of the school budget and further costs will be prejudicial to the school.
74. Three of the Respondents’ witnesses are no longer employed by the school. The Headteacher retired in May 2023, the Business Manager left in March 2023 and the HR Advisor left since March 20203. The witnesses had an agreement with their

current employer to attend the hearing, but the Respondents are concerned that the witnesses may be less inclined to continue to support the Respondents' and attend a further hearing. Further, if the final hearing is relisted in 2024, memories fade and this will prejudice the Respondents'.

75. The Respondents' referred to the persistent and deliberate disregard shown by the Claimant toward the Tribunal's Orders and referred to her recent request to delay today's hearing on health grounds. Further, it is submitted that a number of employment judges have taken significant time assisting the claimant to set out her claims and she fails to take responsibility for failing to actively pursue the claim but blames others.

Conclusion

76. There has been a history of non-compliance by the Claimant with Orders and significant difficulties in getting the Claimant to clearly identify her complaints.
77. In terms specifically of disclosure, Employment Judge Adkinson had ordered each party must send the other their documents by 27 February 2023. He had also made an Order that the parties must by 27 March 2023 agree the documents to be used and the Respondents' had the responsibility then of preparing the bundle.
78. The hearing had been listed to commence on 19 June 2023 and it was obviously important to ensure that there was an appropriate timetable in place to ensure the parties were ready for that hearing.
79. The Respondents' sent their disclosure to the Claimant on 17 March 2023, but the Claimant did not send hers. The Claimant was asked by the Respondents' for her disclosure by 30 March 2023 but, despite the proximity of the hearing, she did not do so and did not give any indication of when the Respondents' would be in a position of receiving her disclosure. Indeed, by the time of the preliminary hearing on 11 May 2023, the Claimant had still made no attempt to provide her disclosure.
80. By that stage, the hearing was only a few weeks away. The Tribunal was cognisant of the difficulties the Respondents' would face in obtaining instructions from its witnesses on the Claimant's disclosure, given the impending school holiday.
81. The detailed reasons for making the Unless Order is set out in my judgment of 11 May 2023.
82. The Claimant confirmed today that it was clear to her on 11 May 2023, what she was required to do by 15 May 2023. She understood the terms of the Unless Order and, as the Respondents' pointed out in their submissions, care was taken at that hearing to ensure that she understood. She does not assert that there was any misunderstanding on her part.
83. At that hearing on 11 May 2023, the Claimant stated that she would be in a position to provide the documents by 4 pm on 15 May 2023 and arrangements were put in place by the Respondents' solicitors to take delivery of those documents.
84. It is not in dispute that the Claimant did not comply with that Unless Order; she did not provide any of her documents to the Respondents' on 15 May 2023. There was no attempt to affect any compliance at all.

85. The Claimant did not make contact with the Respondents' on 15 May 2023 to explain that she would not be attending to deliver her documents.
86. The Claimant also did not respond to the email from Mrs McDade on 15 May 2023.
87. The Claimant also confirmed today that she did not write to the Tribunal after 11 May 2023 and before the date for compliance, to seek to vary that Order, even though from what she said today, she never intended to comply.
88. In delivering the reasons to the parties orally at today's hearing, I said that the Claimant gave no explanation until today's hearing about why she did not disclose the documents and the Claimant corrected me on that point immediately at the hearing. It is indeed correct that she set out some reasons in her 5 June email to the Tribunal, however that was after the date for compliance had passed. In any event, she had the opportunity to set out her reasons orally today and the reasons set out in that email are the same reasons put forward at the 11 May hearing and considered at that time when making the Unless Order and in her oral submissions.
89. The Claimant's explanation is in essence, that she needed more time to comply. However, she commenced this claim in June 2021, the Unless Order provided for disclosure on 15 May 2023, with the hearing due to start on 19 June 2023. The Claimant had not indicated, either at the hearing on 11 May or indeed at any point prior to or on 15 May 2023, what further time she required. She produced no medical evidence on 15 May or today, to evidence any inability on her part to actively pursue her claim. While she has some ongoing personal issues, in terms of going through a divorce and has children to care for, that does not excuse her apparent failure to devote sufficient time to pursue this claim.
90. The Claimant had effectively by her own admission during this hearing, actively misled the Tribunal by telling them that she could, and indeed would, be complying with the Unless Order.
91. As at today's hearing, which is now more than a couple of months after the date for compliance with the Unless Order, the Claimant still did not come today with copies of her documents or even a list of what those documents are. The Claimant brought with her the originals which consist of two large piles of loose pages.
92. The Claimant had asked on 25 May to adjourn the final hearing of June 2023 and had asked to adjourn today's hearing on 23 August on the basis that she said she was too unwell and due to ill-health urgently needed to adjourn. However, today she confirmed that she was in fact "*fine*".
93. The reason for the default is not satisfactory. It is a serious default being a wholesale failure to disclose any of her relevant documents. Her failure to comply was I find deliberate. She told the Tribunal she could and would disclose her documents on the 15 May 2023 when according to her submissions today, she knew she would not comply with that order and misled the Tribunal to avoid a strike out.
94. I accept the Respondents' submissions that they have incurred wasted costs on Counsel's fees for the final hearing. They have been put to the cost and time of attending today's hearing to deal with the Claimant's application.

95. In terms of a fair trial, the first allegations as currently pleaded, relate to an alleged protected disclosure made on 14 January 2020 and it would be over 3 years from that event, before there would be a new trial date. That is a significant delay. Many of the allegations relate to things which it is alleged were said or concern the manner or the tone of voice that was used toward the Claimant, rather than documents events.
96. Mrs McDade informs the Tribunal today that 3 of the witnesses are now working for new employers. The Claimant says she has documents which set out in detail her account of events which include diaries. Whilst she obviously would use those as an aide memoire, the Respondents' witnesses are unlikely to have the benefit of similar documents. Despite what the Claimant says about not accepting that the witnesses' memories will fade, inevitably delay impacts on the ability to recollect events accurately and that is likely in this case to be more prejudicial to the Respondent.
97. The Respondents' witnesses have faced serious allegations of discrimination for over 2 years, since this claim was presented.
98. I am also not persuaded that the Claimant will conduct the proceedings going forward any differently. She informs me she has still not read all of the Respondents' disclosure (even though it was disclosed in March 2023); she has not sorted out her own disclosure; she has not come along today even with a list of documents or is even able confirm how many documents her disclosure consists of.
99. In terms of her conduct generally, she admits to not being honest about her intentions about compliance with the Unless Order. I consider that there is a very real prospect of continued default, delay and a lack of cooperation in getting any claim ready for a final hearing. I am cognisant that we are now 2 years from the claim being issued and 3 years from the first alleged protected disclosure and there has been no significant progress. The Claimant has commitments, namely the care of her children, dealing with the ongoing divorce and doubtless she feels under time pressure, however this claim has been ongoing for over two years and she has it seems been unable or unwilling to commit the time required to actively pursue it.
100. I consider that on balance a fair trial is no longer possible however, even if that is not the case, taking into account all the other factors and applying a broad assessment of what is in the interests of justice, (including the prejudice to the Respondent and the deliberate and seriousness of the delay). I determine that it is not in the interests of justice to grant this application to set aside the Order dismissing the claims.
101. The claims stand as dismissed.

Employment Judge Broughton

Date: 19 October 2023

JUDGMENT SENT TO THE PARTIES ON

.....11th January 2024.....

AND ENTERED IN THE REGISTER ON

11th January 2024

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