EMPLOYMENT TRIBUNALS

Claimant: **Mrs Grace Robinson**

Respondent: **Sandwell and West Birmingham Hospitals NHS Trust**

Heard at Birmingham on 29 November 2018

Before Employment Judge Coghlin QC (sitting alone)

Appearances
The claimant in person
The respondent: Mr D Brown, counsel

ORDER

The claimant's application for relief from sanctions (rule 38(2) of the Employment Tribunal Rules of Procedure 2013) is refused. The claimant's claims accordingly remain dismissed as notified to the parties by the tribunal on 5 September 2018.

REASONS

Introduction

1 This hearing was listed to consider two applications by the claimant. The first is an application for relief from sanction under rule 38(2) of the Employment Tribunal Rules of Procedure 2013, by which she seeks to reinstate a claim which stands dismissed by reason of her non-compliance with an "unless" order made on 17 August 2018. The

second is for a two-day extension of time pursuant to rule 5 for making the first application.

2 The claimant represented herself before me with ability and persuasiveness. The respondent was excellently represented by Mr D Brown of counsel. I am grateful to them both.

The facts

3 There is little real dispute about the facts. Mr Brown produced a helpful chronology in advance of the hearing. At the start of the hearing the claimant indicated that she agreed its contents, and having read the documents on the tribunal file I am also satisfied that its contents were accurate. I heard evidence on oath from the claimant. I began by asking her to confirm the accuracy of a letter which she had written, which is dated 8 November 2018 but stamped as having been received by the tribunal on 14 November 2018 which she did, save that she corrected a mistaken date in the last sentence of that letter. I also asked the claimant a series of questions to draw out her account and explanations, and she was cross-examined by Mr Brown.

4 The claimant's claim was one of constructive unfair dismissal, whistleblowing detriment and unpaid holiday pay. It arises from her employment with the respondent NHS Trust, for whom she worked between 2000 and 2017, initially as a Band 5 nurse and latterly as a Band 6 bowel cancer specialist. She resigned on 24 July 2017 and her employment ended, I assume on the expiry of her notice period, on 3 September 2017.

5 The claimant presented her ET1 on 15 October 2017. The respondent resisted her claims by an ET3 and grounds of resistance filed on 16 November 2017.

6 A preliminary hearing for case management took place on 21 March 2018 at which Employment Judge Algazy QC identified the broad issues in the case. However he directed that the claimant give further particulars of her claims of constructive unfair dismissal (her case in outline being that the respondent acted in breach of the implied duty of mutual trust and confidence by an accumulation of many acts over a 13 month period), the protected disclosures on which she relied, and the detriments to which she said she was subjected because she had made such disclosures. EJ Algazy QC adjourned an application by the claimant to amend her claim so as to add complaints

of discrimination. He listed the case for a 7-day full merits hearing starting on 21 January 2019 and gave general case management directions.

7 A second preliminary hearing was heard by Employment Judge Harding on 15 June 2018, who refused the claimant's application to amend her claim to raise complaints of direct disability discrimination, indirect discrimination, harassment, victimisation and a failure to make reasonable adjustments. EJ Harding noted that further particulars had not been provided by the claimant because she understood that that question had been stayed pending the resolution of the amendment application. The claimant told her that there were "hundreds of detriments to be identified". EJ Harding decided that particularisation should take place at a third preliminary hearing, which she listed for a full day on 17 July 2018.

8 On 16 July 2018 the claimant applied to postpone the 17 July preliminary hearing on the grounds that she was suffering from vomiting and diarrhoea. Her application was refused for lack of medical evidence. The hearing took place in her absence. EJ Harding ordered the claimant to provide medical evidence confirming her unfitness to attend, and listed a fourth preliminary hearing, again for the purpose of obtaining proper particularisation of the claimant's claim, for a full day on 17 August 2018. The claimant subsequently provided evidence in the form of a doctor's note indicating that she had been suffering from vomiting and diarrhoea on 16 and 17 July but it did not say that she had been unfit to attend.

9 On 13 August 2018 a close family member of the claimant's, to whom I will refer as L, was hospitalised due to an acute medical emergency.[1] The claimant, entirely reasonably and understandably, found this exceptionally distressing. L, who is an adult, does not and did not live with the claimant, but on L's discharge from hospital on 14 August L went to stay with the claimant for about a week, to around 21 August.

10 On 15 August 2018 the claimant wrote to the tribunal to apply for the 17 August preliminary hearing to be postponed due to being occupied caring for L. Since leaving the respondent's employment the claimant had obtained employment as a Ward Sister in an acute medical unit at Walsall Manor Hospital, and she sent this email of 15 August

[1] For reasons of that individual's confidentiality I confirmed with the parties that in my written reasons I would refer to the individual and their situation in these terms. The relevant facts are known, and agreed, between the parties.

from her NHS email account (which is also the email address she has given on her ET1 form). She was aware when she sent this email that an adjournment would not follow automatically from her making an application of this sort. Nor did it: in the absence of evidence to support the claimant's application the application to postpone the preliminary hearing was refused, and the hearing proceeded in her absence. This was the fourth preliminary hearing in the case. Employment Judge Harding made an "unless" order in the following terms:

> "**Unless by the 31 August 2018 the claimant** provides to the respondent and the tribunal the following information:
>
> 1 Confirmation from [*the hospital to which L was admitted*] of [*L's*] admission and discharge, including the dates of admission and discharge and the reason for admission, and
>
> 2 A letter from one of the [*treating medical team*] confirming that [*L*] is currently living with the claimant and in the claimant's care
>
> **the claim will stand dismissed without further order.**
>
> The judge's reasons for making this Order are:
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> This case has now been listed for 3 preliminary hearings, the last two of which the claimant has failed to attend.[2] A last-minute application was made by the claimant to postpone the 17 July hearing, om the basis of ill health and this application was refused. The claimant failed to attend. The claimant was ordered to provide medical evidence confirming that she was not fit to attend the hearing. The claimant only partially complied with this order providing a letter from her GP saying that the claimant had diarrhoea and vomiting but failing to provide confirmation that this rendered her unfit to attend the hearing.
>
> The claimant has now failed to attend the case management preliminary hearing listed for 17 August. An application to postpone was made by the claimant just 2 days prior, on the basis of personal difficulties, but which was unsupported by any evidence, and accordingly the application was refused and the case remained listed.
>
> The claim was submitted 10 months ago and remains wholly unparticularised. The purpose of the preliminary hearing is to help the claimant particularise her case – in respect of which she has indicated that there are 'hundreds' of detriments. A trial date is fixed for January 2018 and unless progress can be made this trial date will be jeopardised."

11 EJ Harding also listed the matter for a fifth preliminary hearing, the intention being, once again, to ensure the proper particularisation of the claimant's claims.

12 The Unless Order was sent to the claimant at her NHS email account. I do not know if it was also posted to her. By this point however the claimant was not engaging with correspondence. She had stopped opening post on about 14 August: a pile of unopened post, which she knew must include important correspondence, was building

[2] In fact there had been four, not three, preliminary hearings.

up at her home. It continued to build until 21 September when a friend of hers, Mr New, saw what was happening and went through her correspondence for her, and urged her to deal with it.

13 Although she was not facing up to dealing with her correspondence, during the period when L was staying with her between 14 and around 21 August, the claimant did go to work on two occasions, on each occasion working a 12½ hour night shift; and after 21 August she continued to work on her normal rota (3 days on / 4 days off rota): she worked until 23 or 24 August before having some days off pursuant to this rota and then beginning a period of annual leave. As I have said, the claimant was a Ward Sister. This is a responsible Band 6 role with supervisory responsibilities.

14 The claimant told me, and I accept, that emails from her NHS email account are not "pushed" to her mobile phone, although she can access them with her mobile phone, or on the computer at work, by logging on through the internet. She told me that her work is largely clinically-based and she has little need to read her emails. I think it is implausible that the claimant did not check her work emails at all during the various shifts which she worked between 14 and 24 August. She knew that there would be likely to be correspondence from the tribunal, both in relation to her postponement application of 15 August and following the hearing that had been listed for 17 August. If she did not see any email correspondence from the tribunal, it is because she was deliberately chose not to look for it. If she did see it, she turned a blind eye to it.

15 The claimant was on a pre-booked holiday in Cyprus from 29 August and returned on 10 September. She had not wanted to travel given L's condition but was encouraged to go by her sons. While in Cyprus, she had her phone with her and had internet access, but she did not check her NHS email account. She often thought about her tribunal claim, and regretted not having opened her correspondence. She admitted that she hoped that she hadn't "blown it" with her case. She knew that there was a possibility that her case would have been closed by the tribunal. She told herself that she would deal with the matter with the tribunal on her return to England. She was in Cyprus with her son whom she does not see as often as she wishes and whom she had not seen for 3 months. She focussed on him and tried to put on a brave face for him.

16 The time for compliance with the "unless" order expired on 31 August 2018 while the claimant was in Cyprus. There having been no compliance by the claimant with the

terms of that order, the tribunal wrote to the parties on 5 September 2018 to record that the claim now stood dismissed. The fifth preliminary hearing and the January 2019 full merits hearing were both vacated.

17 The claimant got back to England in the early hours of Monday 10 September. She was not at work either that day or the next: she was due back at work on Wednesday 12 September. L was at the claimant's home when the claimant got back. At that point L seemed well. Nothing untoward happened between then and the next afternoon. Despite what she had been telling herself while in Cyprus the claimant did not face up to her pile of unopened correspondence or go through her emails; nor did she contact the tribunal.

18 The following day, 11 September, L suffered a second medical emergency, similar to the first, of which the claimant became aware at around 4.30pm, in highly distressing circumstances. The claimant took L to hospital. L was discharged on 13 September and again went to stay at that point with the claimant until about 16 or 17 September. That week the claimant was due to work shifts on 12, 13 and 14 September, but was granted emergency leave to look after L. She then had some days off in accordance with her rota and returned to work on 20 September 2018.

19 The deadline for an application under rule 38(2) expired on 19 September.

20 On 21 September the claimant's friend Mr New discovered the pile of unopened paperwork, opened it, and urged the claimant to deal with the items which were pressing. In particular he told her that the claim had been dismissed. He encouraged the claimant to contact the tribunal to ask for her claim to be reinstated. She did so that day.

21 On 24 October 2018 the matter was listed to be heard on 29 November 2018 and the claimant was ordered to serve on the respondent and the tribunal by 14 November evidence of L's admissions to hospital and the dates of admissions and discharge, and a letter from one of L's treating medical team confirming the dates when L lived with C and that L had been in C's care. The claimant broadly complied with this order by a letter dated 8 November, but marked as received by the tribunal on 14 November, which provided the relevant evidence save that no letter had been received from the treating medical team. However attempts had been made by L to obtain this evidence, and there was also a confirmatory letter from L; and I was anyway satisfied having

heard the claimant's evidence that L was staying with the claimant and being cared for by her as I have set out above. The claimant's broad compliance with this order also meant that she had now, albeit very belatedly, complied with the tribunal's unless order.

The law

22 Rule 38 of the Employment Tribunal Rules 2013 provides so far as relevant:

> **Unless orders**
>
> **38.**
>
> (1) An order may specify that if it is not complied with by the date specified the claim …, or part of it, shall be dismissed without further order. If a claim …, 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 … 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.
>
> (3) …

23 The tribunal has a general discretion to extend the time limit set out in paragraph 38(2) under rule 5:

> **Extending or shortening time**
>
> **5.**
>
> The Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired.

Analysis and conclusions

24 The claimant's application proceeds on the basis that it would be in the interests of justice to set aside the unless order, with the result that her claims would be reinstated. I have come to the conclusion that it would not be in the interests of justice to follow this course of action.

25 The starting point is that the "unless" order was properly made. The claimant has not sought to suggest otherwise. EJ Harding gave clear reasons for making it and they are in my view self-explanatory and powerful. Next, it is not in dispute that the claimant

failed entirely to comply with the unless order; her claim therefore automatically stood dismissed.

26 I accept the period from 13 August to 21 September 2018 was a very difficult one for the claimant. She was struggling to cope with a highly distressing situation concerning a close family member, and at times (particularly the first few days after each of L's medical emergencies) this occupied a significant proportion of her time, energy and attention. Having heard her evidence and having considered the circumstances I have real sympathy for her. But it remains true that a claimant is expected to take reasonable steps to prosecute her own case. That expectation arises due to the interests of the respondent and its witnesses, including in particular those of its employees and agents who face allegations of acts of alleged wrongdoing, and the interests of the tribunal itself in ensuring that it can allocate its limited resources to those that need them. It is quite clear to me that, while struggling with the difficult circumstances in which she found herself, the claimant chose to ignore the tribunal proceedings altogether, and turned a blind eye to email and postal correspondence which she must have known she would be sent by the tribunal. She cut herself off from all communication with the tribunal from 15 August until Mr New encouraged her to get back in touch on 21 September. She was fully aware that doing so might bring about the loss of her claim.

27 I am not satisfied that the claimant was unable to cope during this period. She does not suggest that she was suffering from a diagnosed mental illness at this time, and there was no medical evidence to that effect, and she took no time off work due to sickness on her own part (when she did take a few days off it was emergency leave to enable her to care for L). And I am struck by the fact that the claimant was able to work long shifts in what I am sure is a demanding and responsible role as a Band 6 Ward Sister working in an NHS hospital. This is relevant for two reasons. First, it showed that even during the period after L's first medical emergency in August, when L was staying with the claimant, the claimant was not caring for L "24/7", as she suggested at one point in her correspondence with the tribunal. And second, it led me to conclude that the claimant remained fully capable of undertaking complex, responsible and difficult tasks.

28 Further, during this time the claimant not only worked but also had a significant period, from 21 August to 10 September, when she was neither working nor caring for L. I do not consider that there was a persuasive reason for her not turning her attention to the

tribunal claim during this period, and in particular the period up to 31 August 2018 which was the deadline for complying with the "unless" order.

29 For these reasons, while as I have said I have great sympathy for the claimant, I cannot conclude that she has a good reason which excuses her from not complying with the unless order.

30 The claimant's default had an immediate and obvious effect in that the trial date of January 2019 was lost by reason of the claimant's default.

31 In fact very limited progress was made in this case even by the point at which it was dismissed. The claimant's employment ended in early September 2017, and her claim of constructive unfair dismissal must focus on alleged breaches of contract occurring prior to her resignation in July 2017. By August 2018, when the "unless" order was first made and then took effect, the most recent elements of the claims were already about a year old, and they had still not yet been particularised – that task was expected to take up a full day-long preliminary hearing in addition to those which had already taken place. Five preliminary hearings in total were listed; the fifth was vacated on 5 September once the claims had been dismissed.

32 Were the case now to be reinstated, the tribunal would need first to list (for the sixth time) a preliminary hearing and also to list the matter for trial. It is unlikely that a trial could be listed before the second half of 2019 (even assuming that a 7-day listing were still considered sufficient which, given the "hundreds of detriments" which might be in play, cannot necessarily be assumed to be the case). That further delay would create real prejudice for the respondent and a real threat to the possibility of a fair hearing. The tribunal has been told that the claimant seeks to rely on "hundreds of detriments" for the whistleblowing detriment claims. The respondents, and those individuals who would be alleged to have subjected the claimant to such detriments, would be expected not only to give their factual response to the allegations, but also to explain their conscious and subconscious thought processes in relation to any of their acts and deliberate omissions which may be proven. The fading of memories in this regard is inherently likely to disadvantage the respondents (as Simler J observed in the context of a discrimination claim in **Redhead v LB Hounslow** UKEAT/0086/13 at [70]).

33 For these I consider that a reinstatement of the claimant's claims would create significant prejudice to the respondent. The claimant, for her part, would also be prejudiced. She would remain shut out from pursuing claims which may on analysis

have been meritorious and about which she stressed she feels very passionate. There is a public interest in claims being pursued, and perhaps particularly so in respect of whistleblowing claims than some other types of claims. However weighing up all the circumstances I consider that it would not be in the interests of justice to set aside the unless order.

34 That conclusion makes the resolution of the claimant's application to extend time under rule 5 rather academic. Had I considered that it would be in the interest of justice to allow the claimant's application under rule 38(2), I would have extended time to do so under rule 5, bearing in mind the shortness of the delay (only 2 days) and the lack of any prejudice to the respondent by reason of that short delay.

35 I note also that Rules 70-73 provide the tribunal with the power to reconsider a judgment where it is necessary in the interests of justice to do so. This may be done at the tribunal's own motion or on the application of a party; an application must be made within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties. I consider that the appropriate mechanism for considering the claimant's application here is rule 38(2), but if I were considering it as a Rule 70 reconsideration I would have reached the same conclusion and for the same reasons.

Employment Judge Coghlin
3 December 2018