Case Number: 1300610/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant Respondent

Mrs L Baldwin **v** **Sandwell & West Birmingham Clinical Commissioning Group**

Before: **Employment Judge Perry**

DECISION

1 The claimant failed to comply with the unless order issued on 22 December 2016 by Employment Judge Lloyd (as varied by Employment Judge Hughes on 23 December 2016). Her claim was struck out on 3 January 2017. For the avoidance of doubt the final merits hearing listed for 23 June to 3 July 2016 is vacated and any directions orders no longer apply.

2 The claim is listed for a hearing before me on **1 June 2017** to determine (1) the claimant's application for relief from sanctions and if relevant (2) the respondent's application dated 16 March 2017 for strike out of the claimant's claim based on the unreasonable conduct of the litigation time estimate 1 day.

3 The parties shall serve upon the other party a paginated bundle including all documents they intend to rely upon at that hearing by no later than 19 May 2017 and the respondent shall prepare a paginated bundle including that documentation and serve the same upon the claimant 26 May 2017.

REASONS

1 This claim has been referred to me by Acting Regional Judge Findlay to consider if an unless order issued on 22 December 2016 by Employment Judge Lloyd (as varied by Employment Judge Hughes) has been complied with.

2 Whilst the claimant has sought the advice of and retained counsel for at least one hearing she currently appears in person. In correspondence she has stated she cannot afford to instruct counsel going forward so I will proceed on the assumption she will not be represented going forward.

3 Following the introduction of rule 38 Employment Tribunal Rules of Procedure 2013 there are three discrete stages of the Employment Tribunal procedure concerning Unless Orders, each of which involve different legal tests. In *Wentworth-Wood & Ors v Maritime Transport Ltd* UKEAT/0316/15 HHJ Richardson summarised the position :-

> *"5. Firstly, there is the decision whether to impose an Unless Order and if so in what terms. This is a decision to be taken in accordance with the overriding objective set out in Rule 2. As Rule 38(1) makes clear, an Unless Order is effectively a conditional Judgment, dismissing the whole or part of a response without any further Order: …*
>
> *6. Secondly, there is the decision to give notice under Rule 38(1). This feature was new to the 2013 Rules. Until that time there was no specific process for*

declaring whether an Unless Order had taken effect, and there could be doubt or confusion as to whether this had happened. In giving notice the Employment Tribunal is neither required nor permitted to reconsider whether the Unless Order should have been made: it has already been made, and if there has been any material non-compliance the sanction contained within it will already have taken effect. The decision to give notice simply requires the Employment Tribunal to form a view as to whether there has been material non-compliance with the Order: see Marcan at paragraph 34 and Johnson at paragraph 7. The notice (or refusal to give notice) sets out its decision on this question and brings clarity to the position for the parties.

7. Thirdly, if the party concerned applies under Rule 38(2), the Employment Tribunal will decide whether it is in the interests of justice to set the Order aside. This is not the same as asking whether it was in the interests of justice to make the Order in the first place. It is the stage of the procedure at which the Employment Tribunal considers relief against sanction, and it can take into account a wide range of factors, including the extent of non-compliance and the proportionality of imposing the sanction; see Neary v Governing Body of St Albans Girls' School [2010] ICR 473 CA at paragraphs 48 to 53. ..."

4 The file was referred to me to address stage 2. That is undertaken by the Tribunal not a specific Employment Judge. As *Wentworth-Wood* at [6] makes clear the Employment Tribunal is neither required nor permitted at stage 2 to reconsider whether the Unless Order should have been made. I discern from the correspondence sent by the claimant that she argues she has complied with the order and further that the claim should not be struck out, asserting amongst other matters, the interests of justice require it and her health is preventing her from pursuing the claim in the way that she would wish. In my judgment that is an application seeking relief from sanctions (stage 3). That is also undertaken by the Tribunal not a specific Employment Judge and I thus intend to consider if relief should be granted. Several ancillary matters will arise from that that I shall need to address if I find in the claimant's favour, these include various applications the claimant refers to as not having been addressed and case management generally.

5 References in round brackets below are unless the context suggests otherwise to the paragraph of these reasons and in square brackets to the paragraph of a cited case.

6 Before I address compliance and the application for relief I first turn to the background against in which the Unless Order was made (8) because it is lengthy and complex, I then relay the relevant law including that with regard to relief from sanctions (51), my findings and conclusions on whether the unless order was complied with (59) and then how I intend to determine the question whether the claimant be granted relief from sanctions (62).

7 The background below is a summary of the principal events as they appear to me. It is not intended and is not exhaustive, it would be disproportionate to relay that in full nor is it necessary.

BACKGROUND

8 This claim was presented on 5 April 2016. The claimant made a number of complaints including unfair dismissal, age discrimination, race discrimination, sex discrimination, religion or belief discrimination, a failure to pay a redundancy payment, failure to pay notice pay, failure to pay arrears of pay and also a failure to make "other payments". In

the narrative of her claim she referred to her raising concerns which she described as "whistleblowing" and "bullying, harassment, discrimination and victimisation". She also claimed to have suffered detriment in the context of the Public Interest Disclosure Act 1998. She made it clear she wished to bring a claim for interim relief.

9 In her claim the claimant states that she was employed as a business support officer by the respondent and her employment commenced on 9 May 2009. Whilst she ticked the box to indicate her employment was continuing in section 8.1 of her claim form (ET1), in the narrative she indicated she was suspended on 16 July 2015 and dismissed on 30 March 2016.

10 In section 2.6 of her ET1 the claimant stated that her claim contained an application for interim relief but did not provide a conciliation certificate number from ACAS.

11 Prior to the Interim Relief hearing the claimant sought a postponement on the basis her health was not up to it, as not knowing what was expected of her caused her anxiety. The respondent objected. On 12 May 2016 Employment Judge Dimbylow directed she lodge medical evidence in support. She lodged in response an undated letter from her GP which indicated the claimant had been feeling very stressed and low, that she had been undergoing counselling and had started on medication. The GP recorded the claimant did not fell mentally fit enough to be able to attend, *"I support her. I would be grateful if this could be considered and she could be helped in any way".*

12 That was referred to the duty judge on 13 May 2016 (me) and I rejected that application on the basis :-

12.1 the GP letter did not identify what medication the claimant was on and/or state his view of her state of health or a diagnosis,

12.2 the GP did not identify why any of those matters would prevent her attending a 1 day hearing and

12.3 the interests of justice dictated a speedy determination of the interim relief application by virtue of the very nature of the same.

13 Via an email response the same day the claimant sought amongst other matters "***leniency and your understanding"*** essentially on the basis that she needed to rebuild her (mental) health. I again rejected that application on 13 May on the basis the interim relief application needed to be addressed urgently and there was no indication when the claimant would be fit. The claimant was reminded if she wanted to lodge submissions in writing could she do so.

14 At 00:52 on the morning of the interim relief hearing (16 May) the claimant lodged a 4-page letter seeking clarification of what documents she needed to lodge stating despite having 390 pages of notes she could not construct a clear and concise document detailing all the acts and omissions on which she relied. She enclosed a 33-page letter of appeal dated 4 May 2016.

15 Her application for Interim Relief was heard by Employment Judge Lloyd on 16 May 2016 and was refused. Having referred to the tests in *Taplin v Shippam Ltd [1978] IRLR* and *Ministry of Justice v Sarfraz [2011] IRLR 562* he concluded that:-

> *"3.10 For all these reasons I come to the conclusion that there is not "a pretty good chance" of the claimant establishing that the reason for her dismissal was that she made a protected disclosure. Even in the event that it is established that*

any of her complaints amounted to a protected qualifying disclosure that can still not demonstrate that she was dismissed because she had made such complaints Rather, the evidence before the tribunal at a substantive hearing will be that she was dismissed in circumstances where her behaviour rendered her an unmanageable employee and that there had been a complete breakdown of working relationships involving her."

16 However, as to the absence of the early conciliation certificate he stated:-

"1.3 The claimant's claim in relation to whistleblowing has not been set out with absolute clarity. However, the claimant is a litigant in person and although she has not explicitly set out that she was dismissed for whistleblowing and that she has acquired the right to make an application for interim relief, I believe that is fair for me to conclude that she is indeed contending that she was dismissed for making a protected disclosure."

17 Having delivered judgment, he sought to address case management but was prevented from doing so due to a fire alarm. The judgment and reasons were signed on 18 May and sent to the parties on 20 May 2016.

18 On 17 May 2016 the sole current respondent wrote to the tribunal and claimant making 3 applications:-

18.1 The second respondent be removed from the proceedings on the basis it was not the claimant's employer,

18.2 Requesting further and better particulars of the claimant's claim by 13 June 2016, and

18.3 The respondent be granted an extension of time to present its response to 11 July 2016 (28 days after the further and better particulars of the claimant's claim had been provided)

19 The further and better particulars sought were:

"a) In respect of the claim that the Claimant was dismissed because she made a protected disclosure (whistle blowing), the Claimant is asked to identify:

i) *each disclosure she says that she made; if in writing Identifying the document in which it was made and if orally, identifying the substance of what she said which amounts to a disclosure;*

ii) *to whom were the disclosure(s) made;*

iii) *what was the date of the disclosure(s);*

iv) *what information was disclosed; and*

v) *In respect of each disclosure, on what basis does she allege that it amounts to a qualifying disclosure for the purposes of section 43B of the Employment Rights Act 1996: which provides that "a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following*

(a) *that a criminal offence has been committed, is being committed or is likely to be committed,*

(b) *that a person has failed, is falling or is likely to fall to comply with any legal obligation to which he is subject,*

(c) *that a miscarriage of justice has occurred, Is occurring or is likely to occur,*

(d) *that the health or safety of any Individual has been, is being or is likely to be endangered,*

(e) *that the environment has been, is being or is likely to be damaged, or*

(f) *that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.*

vi) *Why she reasonably believes that the disclosure(s) were made 'in the public interest';*

vii) *Which of the protected disclosure(s) she says caused her dismissal;*

viii) *The basis of her contention that she was dismissed because of the protected disclosure(s) made i.e. how does she say that the dismissal was caused by the protected disclosure(s).*

b) *In respect of the claim that she was unfairly dismissed, on what basis does the Claimant allege that the dismissal was unfair, by reference to the reason for the dismissal and/or the procedure used by the First Respondent to carry out her dismissal?"*

20 On 2 June 2016, the claimant sought a reconsideration of the orders made by Employment Judge Lloyd on 16 May 2016 and amongst other matters in a 10-page letter again referred to her ill health (whilst she did not identify the condition from which she was suffering she explained that she had been awaiting an assessment since late 2015), and stated she had obtained an Early Conciliation Certificate and made amongst other matters a number of serious allegations including fraud in a public office.

21 By a notice of 15 June 2016 the case management hearing was re-scheduled for 5 July 2016 and listed to take place in person (because the claimant was a litigant in person).

22 The claimant lodged further correspondence which Employment Judge Lloyd subsequently referred to as a request for the postponement of the hearing on the grounds of her health and her "*ability to represent her case"* and essentially seeking a stay of the claim *"… until a diagnosis has been received or my health has improved sufficiently well to allow me to present my case."*

23 The claimant's postponement application was refused but the hearing of 5 July was converted to be heard by telephone. That was again heard by Employment Judge Lloyd. He recorded in the Order at (3) that he was:-

"b) … acutely concerned during this hearing about the lack of medical evidence but also about the implication in what the claimant says; namely that she will only resume her progression of her claims when she feels able to do so. It is clear that her medical position is not clarified in any respect. The tribunal is concerned as is the respondents' solicitors that these proceedings may come to a halt indefinitely. The respondents may be acutely prejudiced in such circumstances. We may reach a point where a fair trial of these claims becomes inordinately difficult if not impossible though sheer passage of time without progress of the litigation.

c) I fully acknowledge the tribunal's duty of fairness to the claimant as well as the respondent, but I agreed with Ms Edwards for the respondents that the claimant has a duty actively to pursue her claims; which claims are so far vague and ill-defined and are not moving forward. That is due to the claimant's inaction; she says because she is unwell but that is not corroborated by evidence. The tribunal and the respondents are entitled to require the claimant to evidence properly her capacity to conduct these proceedings. If she is not fit to carry on now, precisely when will be able, actively to pursue her claims with clarity? Until then, the respondents cannot know exactly the claims they are expected to meet.

d) I accept as does Ms Edwards, albeit with reluctance, that it is probably counter-productive to attempt to address the variety of case management and preliminary issues at this hearing. But a clear and time-limited obligation must now be placed on the claimant to properly evidence her position, with a view to putting this case back on track as quickly as possible. The respondents' solicitor is candid; that further lack of certainty or urgent progress will certainty give rise to a strike out application on behalf of her clients on the next occasion.

e) It is imperative that the claimant commissions independent and cogent expert medical evidence as to her capacity to proceed and precisely when she will be capable.

f) I invited the claimant to seek independent legal advice about the ongoing conduct of her proceedings and if at all practical her representation in the litigation."

24 The claim was listed for a further in person hearing on 25 August 2016 before Employment Judge Lloyd with a time estimate of one day as that would allow time to address any applications made in the interim to include the possible strike out of part or all of the claimant's claims. He made the following orders:-

"1. Medical evidence

1.1 The claimant shall provide to the respondents and the tribunal by 16 August 2016

(a) Copies of all medical notes, reports and other evidence in the possession of the claimant or her GP and other medical and health professionals on which the claimant relies to evidence her (i) state of health and (ii) her capacity to proceed with her claims (iii) precisely when she will be capable of actively pursuing her claims.

(b) In addition, provide to respondents and the tribunal a written medical report from an independent suitably qualified and specialist medical consultant also addressing issues (i) (ii) and (iii) at (a) above.

2. Agenda for the preliminary hearing

2.1 The agenda and issues for the PH of 25 August shall be;

a) That all the claimant's claims, other than those under ss.94-98 ERA and 103A ERA be struck out on the grounds that she had not complied with the requirements to engage in ACAS Early Conciliation (EC).

b) That the second respondent shall be removed as a party to the proceedings.

c) That the claimant provides further information about her claim; in line with the respondents' request in the letter of 17 May 2016.

d) The respondents' presentation of the ET3 and grounds of resistance.

e) Whether the claimant's medical evidence at 1.1 a) – b) above declares the claimant fit, actively to pursue her claims forthwith.

f) Subject to e) above, whether her claims are/will be capable at all of a fair and reasonably expeditious trial."

25 The claimant took up Employment Judge Lloyd's suggestion at 3(f) (see (23) above) and instructed counsel, Dr M Ahmad, to attend the hearing on 25 August 2016 on her behalf. As to issues 2(e) and (f) the result of that hearing was recorded thus :-

> *"3) … No relevant evidence had been produced by the claimant and the three questions have not been addressed at all. The letter from Dr Pavir Sharma dated 2 August 2016 addressed to the claimant's GP is wholly inadequate to meet paragraph 1.1 (a) and (b)."*

26 Employment Judge Lloyd then gave the following judgment and directions which he recorded were made by consent:-

> 1. *"I dismiss the respondents' application to strike out all of the claims brought by the claimant in her ET1 of 5 April 2016. However;*
>
> 2. *The claimant's claims, other than those under ss.94-98 ERA and 103A ERA, shall be struck out forthwith in their entirety on the grounds that she had not complied with the requirements to engage in ACAS Early Conciliation; and as a consequence the tribunal has no jurisdiction to hear them.*
>
> 3. *The second respondent shall be dismissed from the proceedings forthwith.*
>
> 4. *The claimant shall* ***on or before 22 September 2016*** *provide to the respondent and the tribunal further and better particulars of her remaining claims, compliant with the respondent's request for further information set out in Messrs Capsticks letter of 17 May 2016.*

5. *The respondent shall **on or before 20 October 2016** lodge with the tribunal and copy to the claimant a completed ET3 and detailed grounds of resistance by way of response to the claimant's remaining claims.*

6. *There shall be a further preliminary hearing in person at this tribunal, for further case management directions on **Tuesday 29 November 2016**, commencing at or about 10:00am with a time estimate of half a day.*

7. *The parties agree that there shall be presumption of the claimant's fitness actively to pursue the proceedings to their conclusion, including all tribunal attendances as required and all other engagement with the tribunal process. The burden shall rest with the claimant in respect of any contention of non-fitness or ill-health, subject that any such contention must be supported by independent medical evidence. The respondent shall have leave to challenge such medical evidence as appropriate."*

27 Thus, it was agreed by the claimant with the assistance of her barrister that going forward the claimant was fit to pursue the tribunal claim. Notwithstanding that the claimant continues to assert she is not fit. So far as I can discern she has not provided the information that was set out in paragraph 1.1 of the order of 25 August 2016 (24) that would enable the tribunal to re-consider the same.

28 Whilst a reconsideration request was subsequently made that was rejected. Accordingly, the only live claims before me are claims of unfair dismissal pursuant to s.98(4) and s103A.

29 Further and better particulars were provided by the claimant on 23 September 2016. On 22 September 2016 Employment Judge Lloyd identified that whilst the claimant had complied late, the infringement was a marginal one and it was in the interests of justice that her non-compliance be waived. A response was lodged by the respondent on 20 October 2016. Around this time a number of requests were made by the claimant. Amongst other matters they included an application to strike out the response on the basis it should have been lodged by 3 May 2016 (see the claimant's email of 26 October 2016).

30 Prior to the hearing on 29 November 2016 the respondent lodged an agenda setting out the applications it understood were being made by both the respondent and the claimant and a list of issues. The respondent's list of issues identified further and better particulars that were sought in square brackets. Those requests with the relevant headings were:-

*"**Protected disclosures***

1. Did the Claimant make disclosures of information:-

a) verbally to Claire Parker, Andy Williams and Jon Dicken in August 2012;

[The Claimant to identify what she said to each of (i) Ms Parker; (ii) Mr Williams and (iii) Mr Dicken, when and where which she contends amounted to a protected disclosure.]

…

2. *If so, did that information tend to show in the Claimant's reasonable belief that:*

   a) *the Respondent had failed, was failing or was likely to fail to comply with legal obligations to which it is subject;*

      [The Claimant to identify by reference to <u>those disclosures</u> which legal obligations she believed had not been complied with, were not being complied with or were likely not to be complied with (as opposed to any other views that the Claimant holds about the Respondent which she has expressed since the disclosures)].

   b) *The health and safety of any individual had been, was being or was likely to be endangered.*

      [The Claimant to identify by reference to <u>those disclosures</u> how she believed that an individual's health and safety has been, was being or was likely to be endangered (as opposed to any other views that the Claimant holds about the Respondent which she has expressed since the disclosures)].

…

Unfair dismissal

…

8. The Claimant contends that her dismissal was unfair because:

…

d) False information about her employment record was provided at the disciplinary hearing;

[The Claimant to identify what false information she says was provided about her at the disciplinary hearing.]"

31 Following the hearing on 29 November, on 20 December 2016 a Judgment was issued by Employment Judge Lloyd dismissing applications by the claimant of

31.1 2 June 2016, for a reconsideration of the tribunal's judgment refusing interim relief,

31.2 30 August 2016 for

31.2.1 reconsideration of the tribunal's judgment striking out the claimant's claims, with the exception of those under ss.94-98 ERA and s.103A ERA,

31.2.2 to add as respondents "NHS England" and "The Secretary of State for Health" and to remove the present respondent.

32 An order was also made requiring the claimant provide under the heading "*FURTHER INFORMATION*" the following:-

"*1.1 The claimant shall provide to the respondent by 20 December 2016, the further information required by the respondent and shown in square brackets in the document headed "Respondent's List of Issues", dated 22 November 2016.*

…"

Thus that order related to paragraphs 1(a), 2(a), 2(b) and 8(d) of the request for further and better particulars.

33 At 15:21 on 21 December the respondent sought an unless order and at 17:13 a number of corrections to the judgment and Order of 20 December 2016. The claimant at 20:07 respondent and amongst other matters referred to the respondent's failure to provide a valid contract of employment and making an allegation or perjury. She stated the judiciary know the detriment I have been subjected to for blowing the whistle was to be subjected to a raft of abuse. The respondent was asked to indicate if it accepted the claimant's response addressed the default. It indicated it did not address the same and an unless order was issued by Employment Judge Lloyd on 22 December 2016 that the claimant was to provide "… by no later than 4:00 pm on Wednesday 28 December 2016, the further and better particulars ordered by paragraph 1.1 of my order of 21 December 2016." in default of which the claimant's claim would be struck out without further order or application.

34 The claimant thereafter wrote to the tribunal asking why her concerns had not been addressed at the hearing on 29 November without identifying what they were and referred to a recusal request she had made. The file was referred to Employment Judge Hughes in Employment Judge Lloyd's absence on leave and directed that the correspondence would be referred to Employment Judge Lloyd on his return and that the time for compliance would be extended to 3 January 2017.

35 On 28 December 2016 the claimant lodged a 14 page email referring to her own illness and that her husband and other members of her family had had to undergo emergency medical treatment in recent days. The claimant referred to a recusal request made of Employment Judge Lloyd on 13 December, objected to being asked to provide a response over the Christmas period as a practicing Christian, objected to orders being made against her as a tax payer, that she was not on an equal footing with the respondent had had to pay a fee to bring the claim (implying she was entitled to assistance form the Tribunal) and that her own requests had not been dealt with. She alleged the respondents were asking for information they had been given during the course of her disciplinary hearing in March 2016 and in her grievance hearing file. She referred to the failure of the tribunal to address a request she had made on 24 & 25 August and 30 September to strike out the respondent's response and for disclosure of documents made on 24 & 25 August and 30 September. She referred to the perverse requests being made of her by the respondent (and the tribunal).

36 The claimant in section 9 of that response addressed the request (and subsequent order for) further and better particulars (see (30) above). She adopted the descriptions (following the numbering in the request for further and better particulars) "section 1(a), 2(a), 2(b) and 8(d)". Addressing these in turn.

36.1 Section 1(a). The claimant stated what had been said to Claire Parker was relayed in her grievance documentation but did not identify what sections of that document she relied upon. She did not address what was alleged to have been said to Mr Williams and Mr Dicken despite identifying that she was being asked

to relay what had been said to them. I note that sub paragraph (p) cuts off after one word. The intervening paragraphs give considerable detail of a number of events, some of which date back to 6 August 2012, without identifying how those events related to what was being sought of her.

36.2 Section 2(a). The claimant states that the nature of the disclosures were fully elaborated upon "… in a great number of communications, to include letters and emails spread over a wide period of time …" but did not state or cross reference what had been said or done by whom and on what dates. She did however state that she had explained in several communications from 6 December 2012 to 1 February 2016 ("and later communications") that that was due to the nature of her healthcare problems which she stated included the inability to remember dates and where she had filed papers.

36.3 Section 2(b). The claimant stated that her health and safety and that of others was effected but did not identify in which disclosures she had said that, or how that was linked.

36.4 Section 8(d). As to the request that the claimant identify what the false information was provided about her to the disciplinary hearing the claimant referred to Andy knowing she had applied for PA roles as he and Dr Harding had interviewed her. Again that paragraph cut off ending "to be completed". In my judgment it is not clear what was asserted to be the false information that was relayed to the disciplinary hearing and instead the claimant relayed what Andy knew.

37 I find the claimant failed in relation to each of those four heads to supply the detail that had been sought of her.

38 On 30 December at 12:59 the claimant requested that document be deleted because she was not aware time had been extended. A substantially longer (30 page) version of the email of 28 December was supplied at 00:01 on 4 January 2017 (although it was dated 3 January).

39 I find that was thus received one minute late. The Appeal Tribunal has confirmed on many occasions that Tribunal time limits are strict; a few seconds late is a few seconds late.

40 Notwithstanding that being lodged late I have considered the substance of the same:-

40.1 Section 1(a)

40.1.1 Claire Parker. The claimant asserted what was said was addressed in her earlier grievance. She stated this related to reporting difficulties concerning staffing levels, bullying and excessive workloads from 6 August 2012. I find the claimant did not state what precisely was said and when, or cross reference where this was set out in her grievance (and what she referred to as her grievance) or how she contends that amounted to a protected disclosure. Instead she went on to relay the basis of her complaints.

40.1.2 Jon Dicken & Andy Williams. The claimant refers to a lift she received from Jon Dicken to Soho Road surgery on 28 November 2012 and a lift back the same day from Andy Williams (para. (n) page 26). She refers to

"cat fights" where managers ganged up on Celine. She then went on to say how "they" were bringing about health and safety incidents by their bad attitudes and failures to act. In my judgment the lack of clarity over what was said makes that at best an allegation and it is unclear how that related to the health and safety concerns.

40.2 Section 2(a). Again the claimant asserted she had relayed what had been said "in a great number of communications" but I find she did not identify when these were or where what she relied upon was relayed. She did however refer to the nature of her health problems affecting her ability to remember dates and where she had filed papers and these related to all the s.43B(1) criteria save for the environment.

40.3 Section 2(b). Rather than identifying by reference to her disclosures how she believed that an individual's health and safety had been, was being or was likely to be endangered the claimant identified that managers did not commission anyone to carry out workforce planning and PDRs; in my judgment, she thus failed to relay how the health and safety dangers were linked to her disclosures as had been required of her.

40.4 Section 2(b). The claimant's response to this issue is by no means clear given the numbering she adopts but appears the detail she relays related to Andy knowing the claimant had applied for PA roles. In my judgment, she does not state what false information was relayed.

41 I find as to each head the claimant failed to provide the information sought of her.

42 The claimant again referred to her illness and that her husband had been hospitalised, essentially sought her recusal application should be addressed before the need for her to respond was addressed, again repeated that orders were imposed her as a customer of the tribunal and when her requests for disclosure and strike out had not been addressed and the respondents were asking for information that had previously been supplied. She then repeated her request for strike out on the basis the overriding objective required it (para. 8) addressed the Tribunal's failure and in doing so relayed vexatious behaviours on the part of the respondent (at page 12 following).

43 On 10 January 2017, the respondent sought that the Tribunal confirm the claim had been struck out for non-compliance. The claimant responded at 15:44 that day and by a further email timed at 00:50 the following morning. In the former amongst other matters she referred to her concerns having been vindicated as evidenced by various press reports, her recusal request remaining outstanding, her claim not having been dealt with in accordance with Tribunal Rules that there had been major material irregularities which needed to be corrected without stating what these were or which rules had been breached, instead referring to the need to ensure the case was dealt with justly and fairly and in accordance with the interest of justice. She repeated her earlier assertion that her strike out request was outstanding since August 2016, her request for an "order" be placed on the respondents given they had not complied with their own constitution, that the request for the unless order was perverse, the one second delay was negligible and referring to how her state of health meant it was unfair to expect her to forward documents to the respondent. The second referred to the claimant's complaints, asking for an outcome in relation to the recusal application and for the judiciary to advice on why there had been procedural irregularities regarding the running of her claim.

44 On 11 January 2017, the respondent repeated its request stating amongst other matters the claimant had not explained why she was unable to comply. The claimant thereafter made complaints and a recusal application against Employment Judge Lloyd. They are not matters for me to address.

45 Also, that day the Tribunal informed the parties the file would be referred to REJ Findlay for further directions to include the respondent's request for a declaration on the strike out issue and that little purpose would be served by further correspondence.

46 On 12 January at 11:16 the claimant emailed the tribunal amongst other matters correcting a date error in an earlier document without specifying what that document was, again questioning Employment Judge Lloyd's decisions and identifying a number of typographical errors in earlier documents. She went on to refer to a blockage in my "Brian", a heart attack and heart problems and high blood pressure. Later that day she sent a further 50 pages of documents as "a snapshot" why the respondent had lied not only to her but also investigators.

47 I do not propose to relay the extent of the correspondence thereafter in detail suffice to say that on 17 January the claimant wrote again to refer to health conditions and that it had been her intention to comply with orders. She again referred to her complaints about how she was treated and why the respondent provides a different account. On 24 January, the claimant stated that she had hoped due to an increase in medication she would have seen some improvement in her health but the medication was having little effect and so sought an extension to comply with any outstanding matters. She went on to state she was currently too ill to construct and engage in letter writing but annexed a further 50 pages or so of documents. On 3 February, she lodged a Schedule of loss and complained about the respondent's conduct and the public funds wasted by it defending the claim.

48 On 24 February 2017 the claimant emailed the tribunal attaching a letter of 17 February 2017 from her GP which referred to her suffering a possible TIA earlier in the year, that further investigation had shown a blocked carotid artery that her physicians were attempting to control the high blood pressure but it remained very high and she had two hospital attendances and was regularly been seen by her GP. Her GP supported her request for the hearing to be delayed or "slowed" until her condition has improved.

49 On 28 February the respondent acknowledged that whilst the parties had been asked not to correspond with the tribunal the claimant continued to do so, objected to further postponement on the ground it was already unclear if a fair trial were possible given the lapse of time since the vents in question, referred to the claimants' failure to supply medical evidence to support the contentions as to her ill health and disputed that the GP letter of 17 February 2017 assisted in that regard, that the claimant had made detailed 3 requests for statutory information on 3, 9 and 23 February exceeding 6 pages in length that it was dealing with and seeking clarification on orders for disclosure.

50 The claimant thereafter lodged a number of letters repeating the assertions and applications she has made previously, as well as enquiring in relation to judicial mediation, and when disclosure and witness statements were required to be exchanged position amongst other matters. On 16 March the respondent repeated its application seeking confirmation the claim was struck out and seeking a preliminary hearing. Further, correspondence ensued from the claimant thereafter.

THE RELEVANT LAW

51 "Unless orders", were introduced in the Employment Tribunal via rule 13 of the 2004 Tribunal Rules of Procedure 2004. Rule 13 (2) provided that:

> *"An order may also provide that unless the order is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice under rule 19 or hold a pre-hearing review or Hearing."*

52 The 2004 Rules were superseded by the Employment Tribunals Rules of Procedure 2013 which now provide (so far as is relevant):.

> ***"Overriding objective***
>
> *2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*
>
> *(a) ensuring that the parties are on an equal footing;*
>
> *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
>
> *(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
>
> *(d) avoiding delay, so far as compatible with proper consideration of the issues; and*
>
> *(e) saving expense.*
>
> *A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.*
>
> ***Unless orders***
>
> *38 (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.*
>
> *(3) Where a response is dismissed under this rule, the effect shall be as if no response had been presented, as set out in rule 21."*

53 Under the 2004 Rules there was power for a Tribunal to review a judgment, but not an order. Both the 2004 and 2013 Rules make a distinction between a judgment and an order (rr.28 and 1(3) respectively). The power to review under the 2004 Rules has been replaced in the 2013 Rules by a power to reconsider. That power too applies to judgments but not to orders. Under the 2004 Rules when made, an unless order was not

susceptible to review. However, where upon non-compliance with it a claim has been struck out, that is a final determination of the proceedings, and therefore a judgment and capable of being reviewed: *Uyanwa-Odu v Schools Offices Services Limited UKEAT/0294/05.* The 2013 Tribunal Rules make express provision at r.38 (2) for a party whose claim or response is dismissed to apply for the order to be set aside.

54 In *Singh v Singh (The Guru Nanak Gurdwara West Bromwich)* [2016] UKEAT 0158/16 HHJ Eady set out the basis upon which this should be approached.

> *"18. I have previously had to consider the approach the EAT should adopt when hearing appeals relating to ET decisions under Rule 38(2), in Morgan Motor Company Ltd v Morgan UKEAT/0128/15/DM. The obvious starting point is to note that the ET is bound to determine such applications on the basis of what it considers to be in the interests of justice. The determination of that question necessarily requires that the ET exercise its judgment, and it must do so rationally, not capriciously, and reach its decision in accordance with the purpose of the relevant legislation, taking into account all relevant factors and avoiding irrelevant factors (Transport for London v O'Cathail [2013] ICR 614 CA and Neary v Governing Body of St Albans Girls School [2010] IRLR 124 CA). Provided the ET's decision meets these requirements, it is not for an appellate court to re-hear a case or, absent an error of law, interfere with an ET's exercise of judicial discretion in this regard (see Neary and paragraph 2 of Harris v Academies Enterprise Trust [2015] IRLR 208 EAT).*
>
> *19. As for what an ET has to take into account, that will depend upon the particular circumstances of the case. The fact that an Unless Order has been made will be one factor but is not determinative. Indeed, it cannot be said that any one factor will be necessarily determinative of the course an ET should take (Thind v Salvesen Logistics Ltd UKEAT/ 0487/09/DA). What is required is a broad assessment of what is in the interests of justice in the particular case under consideration (Thind), which will inevitably involve a balancing exercise on the part of the ET, as should be apparent from its reasoned Judgment (see BBC v Roden UKEAT/0385/14/DA at paragraph 39)."*

55 In *Morgan Motor Company Ltd v Morgan UKEAT/0128/15* the EAT stated the material factors to be weighed will vary considerably, albeit that they would generally include:-

55.1 the reason for the default and whether it was deliberate [and no doubt whether the default was caused by the party of his legal representative],

55.2 the prejudice to the other party,

55.3 whether a fair trial remained possible, and when considering that question the ET should consider whether that should be assessed as at the date of the relief from sanction application rather than the date on which the sanction was applied.

55.4 if an unless order had been made that was also said to be an important consideration (as was the policy objective behind unless orders) but that would only be one such consideration,

55.5 the importance of finality in litigation, and

55.6 when considering if alternative sanctions were appropriate the ET would need to take account of whether such an award should be made whether or not relief from sanction was granted.

As the EAT emphasised in both *Thind* and *Morgan* the relevant factors will vary from case to case. Other factors mentioned in the previous version of CPR and not referred to in these cases, and which an ET might also consider relevant, are:

55.7 Whether the application for relief was made promptly; and

55.8 the extent to which the party in default has complied with other rules, practice directions, orders and any relevant pre-action protocol.

56 In *Singh v Singh (The Guru Nanak Gurdwara West Bromwich)* the Tribunal had determined the Unless Order had been properly made and that the requirement was necessary and that the Claimant was in breach of the Unless Order, the ET considered such explanation as had been provided but found it was neither plausible nor satisfactory. It then went on to consider if a fair trial was still possible and accepted that was so in terms of availability and continuing reliability of evidence. The ET turned to consider that question in a broader sense having identified that a fair trial must mean trial (a) within a reasonable period of time, (b) with reasonable and proportionate preparatory work on both sides, and (c) commitment of a reasonable and proportionate share of judicial and administrative resources by the ET, the ET questioned whether it could have confidence that a fair trial was still possible in terms of meeting those requirements given the Unless Order had still not been complied with and there was no satisfactory and credible explanation for non-compliance. The ET also took into account the possibility of an award of costs as an alternative sanction, the history of the proceedings more broadly, the application for relief from sanction had been made promptly, and the ET had not found the Claimant specifically at fault in respect of earlier Orders, save for one Order regarding witness statements, which had of course led to the Unless Order. Ultimately, however, the ET considered that it must have regard to public policy concerns: triable cases must be brought to a hearing if possible and in a proportionate manner; taking all factors into account, the ET did not consider that it should grant the relief sought.

57 As to the public policy concerns HHJ Eady QC referred in *Morgan* to the Supreme Court in *HRH Prince Al Saud v Apex Global Management* [*2014] 1 WLR 4495 (the Global Torch)* where policy objectives behind the enforcement of sanctions was emphasised at [23]. Whilst she noted that *the Global Torch* concerned the CPR, which do not directly apply in the ET, the approach to relief from sanctions is likely to give rise to very similar considerations.

58 In *Aslam v Travelex UK Ltd [2015] UKEAT/0028/15* HHJ Richardson having cited the quote of Smith LJ in *Neary* at paragraph 56 above, placed compliance with Unless Orders in context:-

> *"28. … It is important not to treat a Tribunal's warning letter under Rule 40 as equivalent to an unless order. An unless order follows breach of an existing order of the Employment Tribunal. Failure to comply with an unless order therefore generally involves a failure to comply with two specific Tribunal orders. These are matters of considerable weight in any balancing exercise. In a case under Rule 40 there may be no breach of any existing order. The deadlines given, both in a notice to pay and in a Rule 40 warning letter, are short. While*

the Rule 40 letter is a trigger to the operation of dismissal under Rule 40, failure to comply with it does not carry the same degree of weight as failure to comply with an unless order."

MY FINDINGS AND CONCLUSIONS

Was the Unless Order complied with?

59 I found for the reasons I relay above that the claimant's emails of 28 December 2016 and that timed at 00:01 on 4 January 2017 failed to provide the information required by the unless order. The latter was also late and time limits are strict.

60 The claimant has repeatedly referred to the information sought in the unless order having been supplied previously. If that was so she should have been able to identify where that was, the Tribunal could have then clarified if the information supplied had addressed the issue. So far as I can discern from an extensive consideration of the file she has not. The claimant's failure to point the tribunal to where the information has been supplied is a matter I will need to consider in relation to the application for relief from sanctions as it appears to me she argues medical grounds underlie that. I address that below.

61 Accordingly, in my judgment the claimant failed to comply with the unless order issued on 22 December 2016 by Employment Judge Lloyd (as varied by Employment Judge Hughes on 23 December 2016) and her claim was a struck out on 3 January 2017.

Should the claimant be granted relief from sanctions?

62 The claimant's application for relief from sanctions (and if appropriate the respondent's application dated 16 March 2017 for strike out of the claimant's claim based on the unreasonable conduct of the litigation) shall be listed for a hearing before me. In advance of the same each party shall serve upon the other (but not the tribunal) by no later than 19 May 2017 all documents they wish to rely upon in a paginated bundle. The respondent shall prepare a paginated bundle including that documentation and serve the same upon the claimant by no later than 26 May 2017. Further the respondent shall bring three copies of the bundle to the hearing.

63 As I indicated above the only claims that fall for consideration by me are the claims pursuant to s.98(4) and s.103A, the reconsideration requests in relation to the other complaints having been refused. Several ancillary matters will arise from that that I shall need to address if I find in the claimant's favour, these include various applications the claimant refers to as not having been addressed and case management generally

64 From the outset of the claim the claimant has stated that she is unwell. That has an impact on whether the breach is deliberate. I record at (11) that the undated letter from the claimant's GP lodged in support of her application for a postponement of the Interim Relief hearing on the basis the claimant health was not up to attending, was unspecific; her GP stating, *"I support her. I would be grateful if this could be considered and she could be helped in any way".*

65 It was subsequently recorded in the order on the hearing on 25 August 2016 (see (26)) that it was agreed by the claimant's counsel, Dr Ahmad, that there was to be the presumption of the claimant's fitness (see paragraph 7 of that order) on the basis that *"no relevant evidence had been produced by the claimant and the three questions have*

not been addressed at all. The letter from Dr Pavir Sharma dated 2 August 2016 addressed to the claimant's GP is wholly inadequate to meet paragraph 1.1 (a) and (b).".

66 However, in a letter dated 2 August 2016 from Dr Sharma, a consultant in Psychiatry, to the claimant's GP, Dr Sharma recorded that in his view the claimant was of low mood which was likely to have resulted from stress at work (although he noted she was unable to give a coherent account of her trouble at her workplace). He recorded amongst other matters that on several occasions she had demonstrated poor planning and judgment, had for instance left food in the frying pan, that she was unkempt and a little muddled, seemed to be worried about her memory and ability to do things as efficiently as before. He stated she had told him she had started to believe she was being watched by her employer and had carried all her paperwork relating to her grievance around with her prior to her dismissal.

67 Dr Sharma increased the claimant's prescription of Sertraline to 100mg from 50mg and referred her for an MRI scan. He stated he did not consider she was fit to attend tribunal hearings until she recovered from her depression but that a diagnosis of dementia will have more long standing implications on her ability. He indicated he would see her again in 8 weeks as by that time he would have had the result of the MRI scan.

68 Subsequent to that hearing the claimant in a document dated 23 September 2016 (see (29)) provided very detailed information. Whilst the claimant continues to refer to her ill health I have not been provided with that update. All I have is the subsequent letter from her GP. I am not told why that is so.

69 If the claimant intends to rely upon any medical evidence at the relief from sanctions hearing ideally that should be from her consultant and should address the following matters:-

69.1 The nature of any impairments or conditions from which the claimant suffers or has suffered from 5 April 2016 onwards, the cause of the same, when that condition (and if different) the cause was diagnosed.

69.2 Any symptoms or medication that might effect the ability of the claimant to respond to the requests made, to personally conduct the litigation, and to represent and attend any hearing, and if so the effects on the same.

69.3 Was the claimant's state of health was such that from 5 April 2016 onwards she was able to provide the information sought at paragraphs 1(a), 2(a), 2(b) and 8(d) of the request for further and better particulars (again see (30) and (32) above)?

69.4 If that was not so, when was that not possible and why not?

69.5 If the claimant's state of health such that from 5 April 2016 onwards she was able to personally conduct the litigation as described herein?

69.6 If that was not so, when was that not possible and why not? If it is not possible for her to do so currently, if it is likely (on the balance of probabilities) that she will be able to do so at a future point, when that will be?

69.7 Is the claimant's health such that she is currently able to attend, conduct and give evidence at what is likely to be a hearing lasting several days at least at which she will be expected to cross examine (ask questions) of witness on relevant disputed matters for possibly several hours (usually with a short break each

hour), be cross examined herself for possibly a day or more (again usually with a short break each hour) and summarise her case at the conclusion?

69.7.1 If so, why not, and if it is not possible for her to do so currently, is it is likely (on the balance of probabilities) that she will be able to do so at a future point, and if so when that will be? If it is possible for her to do so currently, what adjustments that could be made to allow that to be done?

69.8 If it is not possible to provide an answer at this time to the above questions, what is the likelihood an answer will be able to be provided at a future point and when that will be?

70 In the event the medical evidence makes clear the claimant is not fit to attend that hearing I will consider accepting written submissions.

Employment Judge Perry
Dated: **4 May 2017**

sent to the parties on
4 May 2017