RESERVED JUDGMENT

EMPLOYMENT TRIBUNALS

Claimant: Miss Lianah Burchell

Respondent: Private Clinic of Harley Street Limited

Heard at: Manchester **On:** 8 June 2021
24 June 2021
(In Chambers)

Before: Employment Judge Feeney

REPRESENTATION:

Claimant: Mr S Martins,
Respondent: Mr Tim Davie, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's application for relief from sanction is granted..

2. The respondent's application for costs succeeds. The respondent is awarded and the claimant ordered to pay £500

REASONS

1. The claimant brought a claim on 29 November 2019 against the respondent claiming race and disability discrimination when her employment was terminated after four months employment.

2. The claimant by her representative failed to comply with the orders of the Tribunal originally dated in March 2020 and ultimately was automatically struck out for failure to comply with an Unless Order in October 2020. The

claimant's representative has referred to a number of medical conditions which he asserts have led to him not being able to comply with the directions given by the Tribunal. The claimant applies for relief from sanction, she is represented by the same representative, the respondents oppose the application and also apply for costs.

Witnesses and Evidence

3. The respondents have produced a 108-page bundle and I required the claimant to give evidence. The claimant's representative provided the Tribunal with information but that was not under affirmation.

The Law

4. Under rule 38 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 an Employment Judge or Tribunal has the power to make an Unless Order, namely an order stating that if it is not complied with the date specified the claim or response, or part of it, shall be dismissed without further order. A party whose claim or response has been dismissed as a result of an Unless Order may apply to the Tribunal in writing within 14 days of the date that the notice was notice was sent to have the order set aside (this is the Order of the Tribunal giving written notice to the parties confirming that the case has been dismissed – rule 13(1)), on the basis that it is in the interest of justice that the notice is set aside. Such an application can be decided on the basis of written representations.

5. **Wentworth-Wood v Maritime Transport Limited EAT [2016]** summarised the required approach in relation to Unless Orders. The first stage is the decision whether to impose an Unless Order, and if so on that terms which is to be taken in accordance with the overriding objective. Because of its drastic effect care should be taken in the decision to make an Unless Order and drafting its terms. The second stage is the decision to give notice under rule 38(1), at which stage the Tribunal is neither required nor permitted to reconsider whether the Unless Order should have been made but is required to form a view as to whether there has been material non-compliance with the Unless Order. The third stage on an application under 38(2) is to decide whether it is in the interest of justice to set aside the Unless Order at which stage the Tribunal considers relief against sanction and can take into account a wide range of factors including the extent of non-compliance and the proportionality of imposing the sanction. If an Unless Order is hopelessly ambiguous, that would lead to a consideration that the decision to strike out should be reconsidered.

6. In **Uwhubetine v The NHS Commission Board (England) EAT [2018]**, special care should be taken in deciding whether to make an Unless Order given that its terms cannot be revisited if and when non-compliance is being considered. Where an EAT is determining whether there has been compliance with an Unless Order, and hence whether to give written notice as to whether the relevant pleading has been dismissed by the Unless Order taking effect, the EAT is not concerned at that point with revisiting the terms of the Order in order to decide whether it should have been made and in what terms, nor is it concerned with relief from sanction if there has been non-

compliance with the Order. It is a matter of whether or not there has been material non-compliance which should be addressed as a qualitive rather than a quantitative test, and in a case of orders for further and better particulars the benchmark is whether the particulars have sufficiently enabled the relevant party or parties to know the case they must meet. No special formalities are required for the determination of the issue of non-compliance with an Unless Order, although of course the EAT must comply with the overriding objective.

7. As rule 38(1) makes clear, the consequence of an Unless Order that is not complied with is the automatic dismissal of whole or part of the claim or response. No other act is necessary to effect the dismissal, and as noted in **Uwhubetine**, no time limit is prescribed for the EAT to issue any written notice confirming that the Unless Order has taken effect, but it ought to be dealt with quickly in order that any party who wishes to appeal or apply for relief from sanction can do so.

8. The ground on which an application to set aside will be considered is that it is in the interests of justice to do so, which is the same ground for reconsideration under rule 70, and accordingly the Tribunal should adopt a similar approach.

9. In **The Governing Body of St Albans Girls School v Neary [2009]** the Court of Appeal overruled previous authority in which the EAT had held that the Employment Tribunals were obliged to consider all of the nine factors formerly listed in CPR rule 3.9 on an application of relief from sanction for non-compliance with an Order. It was said:

"It's one thing to say the Employment Tribunal should apply the same general principles as are applied in the Civil Courts and quite another to say they are obliged to follow the letter of the CPR in all respects."

10. The Judge or Tribunal should just decide the application rationally and not capriciously, deciding on the basis of relevant factors and discarding irrelevant factors, demonstrating that the factors have been weighed affecting the proportionality of the sanction:

"It must be possible to see that the Judge has asked himself whether in the circumstances the sanction had been just."

11. The onus is on the claimant to show that relevant matters have not been considered by the Judge.

12. Underhill J in **Thind v Salvesen Logistics Limited EAT [2009]** stated:

"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 in general 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 too readily 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."

13. Although he noted further that provided the Order itself has been made appropriately there is an important interest in Employment Tribunals enforcing compliance and it may well be just in such a case for a claim to be struck out even though a fair trial would still be possible.

14. In **Opara v Partnerships in Care Ltd EAT [2009]** the EAT said:

"When a Tribunal is considering whether to grant relief against a sanction the main focus will be on the default itself:

(i) The magnitude of the default;

(ii) The explanation for the default;

(iii) The consequences of the default for the parties and the proceedings;

(iv) The consequences of imposing the sanction on the parties and the proceedings; and

(v) The promptness of the application to remedy the default."

15. In **Enamejewa v British Gas Trading Limited EAT [2014]** it was held that the Tribunal must, if it is just to do so, take into account events that have occurred since the making of the Order as well as the reason for which it was made. It is not however correct for a Tribunal to approach the application on the basis that the determinative question is whether or not it was wrong for the Unless Order to have been made in the first place. It was also made clear that the mere fact of the delay in complying with the Order is short is not of itself a reason for setting the Order aside, and the facts of **Enamejewa**, although the claimant was only eight minutes late in emailing his witness statement, this was held to be a significant and serious breach which "had the effect of automatically vacating the hearing date and so putting the innocent party, the employers, to significant and unnecessary expense and difficulty".

16. One of the overriding principles set out in **Marcan Shipping (London) Limited v Kefalas [2007] Court of Appeal** is that compliance with an Order need not be precise and exact; what matters is whether it is material or substantial and therefore much will depend on the actual wording of the Order. The purpose is for the other party to know the case it has to meet.

<u>Background</u>

17. The claimant began working for the respondent on 11 March 2019 and her contract was terminated on 24 July 2019. She was a Customer Excellence Team Member.

18. She brought a disability discrimination claim and claimed arrears of pay and other payments. Under the box 'I am making another type of claim' she referred to reasonable adjustments and lack of proper return to work procedures, victimisation and whistleblowing.

19. On 27 January 2020 the respondent responded.

20. On 8 March Mr Samuel Martins of an employment law consultancy service, the Employment Law Service went on record as the claimant's representative although subsequently Malcolm Glazier, communicated with the respondent on behalf of the claimant. Mr Glazier was a Consultant with ESL at the time and may still be. On behalf of the claimant Mr Glazier served an impact statement relating to the claimant's disability claim and some medical records. He indicated that he would be sending more during the day but nothing further was received. The respondent's view at the time was that the impact statement did not meet the requirements for a Tribunal hearing on disability status or indeed for the respondents to come to any conclusions whether to concede disability or not.

21. There was a Preliminary Hearing on 16 March which resulted in case management orders including as follows.

    (i) The claimant to serve a Schedule of Loss by 25 April 2020;

    (ii) The claimant to serve a Witness Impact Statement and medical evidence by 27 April 2020;

    (iii) The respondent had permission to file an amended response by 11 May 2020;

    (iv) The parties to agree a final list of issues by 1 July 2020;

    (v) A second Preliminary Hearing to determine whether the claimant was a disabled person was listed for 27 July 2020.

22. By 27 April the claimant had failed to comply with the Case Management Orders required but on 11 May the respondent submitted amended Grounds of Resistance and applied for an Unless Order due to the claimant's breach of the Case Management Orders.

23. On 21 May Mr Martins advised he had taken over conduct from Mr Glazier and requested a 28-day extension of time to comply with the case management orders which were by that stage three weeks late. The deadline was therefore extended to the 18 June but by this date the claimant had still not complied with the CMOs. The actual extension was not granted until 25 June by which stage in any event the case management orders had still not been complied with.

24. On 3 July the respondent's representative emailed Mr Martins seeking to agree the list of issues but no response was received. The claimant's representative made

an application for a further extension of time which was refused on 18 July by REJ Franey stating that the orders in question dated from March 2020.

25. On 20 July the respondent's representative again contacted Mr Martins with a view to agreeing the hearing bundle and case management agenda for the next preliminary hearing but no response was received.

26. On 22 July the respondents submitted a Tribunal bundle in preparation for the preliminary hearing on disability and made an application to strike out on the basis of the claimant's failure to comply with the case management orders and on the basis, it appeared the claimant was not actively progressing her case.

27. On 23 July the claimant's representative requested a postponement of the hearing based on his personal medical situation which the respondent resisted. He stated

> "I write repeating my request for a postponement of this hearing on the grounds the writer has recently been discharged as a cancer out-patient, that the effects of my radiation treatment have not been kind to my person such that:
>
> - I suffer and continue to suffer extreme fatigue since my discharge on 20 July (see attached).
> - Incontinence.
> - Skin Irritation.
>
> The writer is a sole practitioner and is unable to delegate this case to another practitioner. That even if I were to attend the hearing the stress of the hearing in itself would trigger my incontinence which will affect my concentration which I believe is a substantial disadvantage in comparison with persons who are not cancer sufferers/victims.
>
> Further, but separately the claimant is not in a position to represent herself in any shape or form. That the interests of justice will not be served should the case proceed in the absence of the claimant's representative and in the circumstances, I respectfully request an adjustment be made to obviate the potential disadvantage the claimant would/will suffer in comparison with the respondent should the hearing go ahead on Monday 27 July. I confirm in compliance with Rule 92 that a copy of this correspondence has been sent to the respondent's representative".

28. The claimant attached a print-out setting out the treatment he had received from 23 June 2020 to 20 July 2020. In respect of the dates he did not explain what treatment he had received on those dates.

29. The respondents objected on the basis that they have only just been made aware of his illness and he had never communicated directly with them to discuss or seek agreement to an alternative timeframe. The respondent had continued its preparation for the hearing and incurred all associated costs including instructing counsel and submitting a document bundle.

30. The respondent submitted that ' It was clear Mr Martins had been receiving treatment and was aware of his condition for a considerable period of time and therefore had had time to arrange alternative representation which could have included junior counsel given it is a preliminary hearing. It is not an unexpected last-minute development. He should have implemented contingency plans for all of his clients some time ago. Whilst he described himself as a sole practitioner the claimant had previously been represented by a Malcolm Glazier. Further, none of the Case Management Orders issued in March had been complied with and that this request seemed to be part of a pattern of a failure to engage with the Tribunal. '

31. The respondent stated the overriding objective required Mr Martin's illness to be balanced against the need to avoid delay and deal with cases fairly and justly. It had been seven months since the commencement for these proceedings and the claimant has yet to agree a list of issues or provide medical evidence and demonstrate her disability. We have no desire to try and capitalise on Mr Martins ill-health but this is not a case where the requested postponement was unforeseen or unavoidable and it should not be used as an excuse for poor practice management and a disregard for judicial process. Further, that Mr Martin's primary concerns - being fatigued, incontinent and potential lack of concentration – could presumably be accommodated without too much difficulty by the Tribunal offering regular breaks in the proceedings.

32. On 24 July 2020 Employment Judge Leach refused the postponement request stating that "this is not a situation which was unforeseeable, alternative representation could have been (and still can be) arranged".

33. On 27 July 2020 the second preliminary hearing took place. Neither the claimant nor her representative attended. It was presided over by Employment Judge Warren who noted that the Schedule of Loss remained outstanding and that the earlier impact statement "does not deal with the issues that are required and therefore actually remains outstanding". Judge Warren issued an Unless Order requiring the claimant to:-

    (i) Notify the Tribunal that she intends to proceed with her case;

    (ii) Explain her absence from the Preliminary Hearing on 27 July 2020;

    (iii) Serve a statement dealing with the impact of her alleged conditions on her day to day activities so as to establish whether she is a disabled person under Section 6 of the Equality Act 2010;

34. The claimant was given 14 days to comply with these orders and it was stated that "failure to comply with any one of those three orders would lead to the automatic strike out of all the claimant's claims without further reference". That was sent to the parties on 9 October. 23 October was therefore the deadline for the claimant to comply with the Unless Orders and as no correspondence was received from the claimant, accordingly, the claimant's case was automatically dismissed under Rule 38(1).

35. The claimant's representative then applied on 29 October 2020 to set aside the dismissal based on his own medical condition. The situation was now different, and he said as follows. The email said:-

> "We represent the claimant in these proceedings and respectfully request that the above application be considered on the following grounds:-
>
> - That the writer/representative is disabled by way of a stroke that he has laboured with for over twelve months and therefore qualifies as a disabled person under Section 6 of the Equality Act 2010.
>
> **The Facts**
>
> (i) The representative collapsed in his hotel room and suffered a brain infection resulting in seizures on Sunday 18 October and was blue lighted to Nottingham Hospital.
>
> (ii) That he is currently an inpatient under the care and management of specialist stroke consultants.
>
> (iii) That he has been diagnosed with viral encephalitis – sick note attached.
>
> The disadvantage of complying with the order of 9 October 2020 within 14 days.
>
> - The writer is/was mentally disorientated and therefore mentally incompetent to address the ET's orders; and
>
> - Suffers seizures and pains.
>
> (a) That the claimant intends to proceed with her claims before the ET;
>
> (b) That on 27 July the claimant was suffering with high anxiety, a symptom arising from depression and therefore was not mentally or physically fit to attend the telephone hearing because of the effects of her disability.
>
> (c) We have attached the Impact Statement for your perusal.
>
> He then went on to set out the law stating that "whilst our non-compliance is regrettable it is not sufficiently serious to prejudice the conduct of the case in the light of the particulars we have supplied as ordered by the Tribunal and that the respondents have adequate particulars to know and understand the case it has to meet therefore there is no prejudice and a fair trial was still possible".

36. A sick note was produced from 28 October 2020 stamped with Nottingham University Hospital NHS Trust's stamp stating that "I assessed your case

because of the following conditions: viral encephalitis – brain infection. You are not fit for work and this will be the case for one month".

37. The respondent's replied on 10 November stating "our understanding of the current position is that based on the Tribunal's Case Management Order dated 1 October 2020 the claimant's case was automatically struck out on 23 October 2020 pursuant to paragraph 5 of that order as the claimant had not responded within the 14 days as required. The claimant now seeks to set aside that order relying upon the poor health of her representative Mr Martins. We have the greatest sympathy for Mr Martins various medical conditions and wish him a speedy recovery. At the same time his request for reasonable adjustments under the Equality Act in the form of a dispensation for non-compliance with case management orders must be weighed against the need to progress litigation, prejudice to the respondents (whose witnesses may leave their employment) and the fact that the claimant is free to seek alternative representation. Mr Martin has in recent weeks reported that he is receiving treatment as a cancer outpatient still suffering the effects of a stroke from twelve months ago and is currently certified as unfit to work on account of a brain infection, the effects of these medical conditions have so far caused him to miss several previous case management orders, miss the last preliminary hearing and now miss a critical deadline in connection with his client's case being struck out, looking forward there are serious and on-going medical conditions which it seems likely will affect his ability to comply with future case management orders. With the greatest respect to Mr Martins it must be questioned whether his continued representation of the claimant is appropriate or tenable. It is not our place to dictate who the claimant may or may not instruct to represent her but the respondent is entitled to request there is a limit to the Tribunal's allowances for Mr Martins, given that his involvement is not critical to this litigation and the claimant may at any time arrange alternative representation. For these reasons we invite the Tribunal to reject the claimant's application and rule that the strike out of her case should stand."

38. On 11 December the matter was listed for a hearing which took place before me on 8 June 2021. On 2 June the respondent made an application for costs. The respondent has also produced a draft list of issues where the claimant has made comments in red. This was produced at the hearing on 8 June.

39. A further disability impact statement was produced dated 29 October 2020 and a list of the claimant's medication was produced, plus some entries from her medical records. However, the claimant's name was not on these records.

The claimant's evidence

40. The claimant gave evidence that she had originally had Mr Glazier who worked with Mr Martins but she felt that she was doing a lot of the work and asked that he no longer represent her on in or around May 2020. She was aware of the hearing on the 27 July but had been given the impression she did not need to attend although she was not certain by whom, she expected it was Mr Martins (Of course she would need to attend a hearing to determine disability status to confirm her evidence in chief and be cross examined). She had no details about how to attend that hearing but was considering so doing and says she rang the Tribunal but said she could not get through to ascertain how she could join it. She

had no communication from Mr Martins regarding the fact that he was not attending. In fact, and she was completely unaware of Mr Martins health problems until recently. Today is the first day she has had a direct letter inviting her to attend, I explained to the claimant it is normal where someone has a representative that all the correspondence goes to the representative (where a solicitor is involved it is a practice requirement).

41. The respondent put to her that the reasons given by Mr Martins for the claimant not attending i.e. that she was far too anxious to attend by herself and needed his assistance was inconsistent with what she said about trying to attend. She said it was still true that she didn't want to attend by herself, she was unaware of the position on 27 July. She has sent him numerous text messages in October, but this was highly likely when he was in a hospital. In her review she had given the representative all the requisite information when he had contacted her on 11 October (it seems now in response to the Unless Order being received) and she had replied on 12 October but it appeared this had not been passed on. He had also contacted her on 18 October for information which she had provided on 19 October but by this stage he would have been in hospital.

42. The claimant stated in response to a question from me that she did not intend to continue using Mr Martins given the information which had come to light today and in respect of the application from the respondent.

The respondent's submissions

43. The respondent submitted that there were still many matters outstanding in respect of the case management orders which should have been complied with by the end of April and subsequently there was no Schedule of Loss, and the full medical evidence promised by Mr Glazier has still not been provided. There had been no attempt to rectify any of these issues, even by today.

44. The Unless Order was properly made due to the ongoing failure to comply with any orders and then the catastrophic failure of Mr Martins to attend the hearing on 27 July. Further, he has provided misleading information regarding why the claimant failed to attend on 27 July and it appears made no effort to ensure that if he could not attend the claimant could do so. This was one of the matters subject to the Unless Order that the information be provided as to explain the claimant's absence but the information provided was not accurate. The emails or text messages between the claimant and Mr Martins were not produced today even though it must have been obvious they were relevant and the claimant's evidence was ambiguous as to whether Mr Martins contacted her on 18 or 19 October, this was obviously a highly relevant point as if it was 19 October it showed he was well enough to work despite the matters he has put forward.

45. Further, the representative has provided very little evidence regarding his own ill health, for example there is simply a sick note he says he received on being discharged following his brain infection, there is nothing else from the hospital to confirm a ten day stay. Further, there is no evidence regarding his stroke and at times he has confused matters implying that the stroke is the reason for his failure to comply when the stroke was fifteen years ago. It has been pointed out to Mr Martins on at least one occasion by a Judge of the Employment Tribunal that he has plenty of time to discuss alternative representation with the claimant

if, because of his ill health, and this was prior to the brain infection, he was unable to represent her in a timely fashion or at all. Despite his hospitalisation he had nine days to provide the information before the hospitalisation.

46. A representative's credibility is called into question in relation to a number of matters as described above, the respondent submits therefore the Tribunal may consider it cannot rely on his assertions and whilst the claimant will suffer prejudice if her claim is struck out permanently the respondents also suffer considerable prejudice two years after the claimant's dismissal the case has barely got going. It could easily be a further year before the matter is listed and the respondent is likely during that time to experience staff moving to different jobs who will then be reluctant to attend as witnesses.

Claimant's submissions

47. The claimant's submissions through her representative were that it was not the claimant's fault that there was a failure to comply with the orders. The claimant's representative had ongoing ill-health problems but on 18 October suffered an unpredictable episode which led to the non-compliance with the Unless Order. The representative submitted it was insulting that his ill health should be challenged, that he had not been asked for further and better particulars for the hearing.

48. The claimant had not had any of the correspondence and therefore was unaware of how to join the 27 July hearing and unaware of the orders. She should not be liable for failures which were due to her representative's ill health. She intends to seek alternative representation in the future.

Reply

49. The respondent replied that it was not for them to request evidence to support the claimant's case in respect of her representative's illness and subsequent non-compliance, it was for the claimant via her representative who was the person in question to provide that information for this hearing. The burden was on them not on the respondent.

Conclusions on relief from sanction

50. The relevant cases state that on relief from sanction the tribunal should consider whether it is the interests of justice and the overriding objective whether to grant relief to the party in default, notwithstanding the breach of the Unless Order. In this case the Unless Order was properly made given the multiple failures of the claimant's representative to comply with the orders of the Tribunal and the fact that the claimant's claim made no progress whatsoever over a lengthy period. Further, there was no excuse whatsoever for Mr Martins failing to attend the video hearing on 27 July or failing to obtain alternative representation.

51. However, having taken evidence from the claimant regarding her state of knowledge of these matters I am satisfied that the claimant had no knowledge of these activities and that the claimant would have considered attending by herself on 27 July if she had been aware that Mr Martins was not attending.

52. I accept that the claimant made many efforts to get in touch with Mr Martins and that he failed to respond to her, or to respond to her in a straightforward way explaining that for example his application for a postponement of 27 July hearing had been refused, in fact it is not even clear that on every occasion he explained to the claimant why he was requesting a postponement as she has stated she had no idea of his health issues which is the basis on which he relied.

53. The claimant has been significantly let down by Mr Martins who had the opportunity to make alternative arrangements in the light of his ongoing health issues and whilst the brain infection matter on 18 October could not be predicted he had had a number of days to comply with the order by that stage in any event.

54. The claimant has stated she does not intend to use Mr Martins going forward in light of what was revealed at this hearing and that she is searching for other representation. The claimant should be confident that the Tribunal is designed to deal with unrepresented claimants, nervous claimants and claimants suffering from disabilities and accordingly if she has to progress the case herself this is a matter with which the Tribunal will as far as it can, assist.

55. Although there is prejudice to the respondent I was not pointed to any specific prejudice such as any witnesses which had already left the respondent organisation, which I see this as the most likely prejudice to the respondent that they will not be able to persuade witnesses to attend if they have left the respondent's employment. If there had been evidence of this, then I may have come to a different conclusion when balancing the prejudice to the respondent and that to the claimant. It is always the case that in striking out the prejudice to the claimant will be high and although it could be said in some occasions that a claimant would have a civil remedy against the representative where a case has been struck out so is not bereft of any remedy. In this case however that appears to me to be an unrealistic prospect at this stage and that the Tribunal is the forum for pursuing the claimant's claims of discrimination.

56. Accordingly, I find that it would be in the interests of justice and proportionate to give the claimant relief from sanction. However, going forward there must be timely compliance, the claimant will now be corresponded to directly until the Tribunal hears otherwise and the claimant is reminded that she also needs to keep abreast of developments in her case and she may wish to if she gets another representative ensure that correspondence is copied to her for that purpose.

Costs Application

57. The respondent applied for costs in relation to time wasted on 27 July 2020 and today.

Claimant's Evidence

58. The claimant stated that she had been unemployed since leaving the respondent but is in receipt of a Personal Independence Payment and Universal Credit. She is undertaking a Degree in Counselling and Psychological Therapies at Manchester Metropolitan University, after paying her rent her income was £1,100 a month.

Claimant's Submissions

59. The claimant's representative submitted that it was punitive to award costs against the claimant as she was unaware of the matters which had led to the hearing today until recently. She has anxiety and depression and costs would tip her over the edge. She was unemployed, she was not culpable.

Respondent's Submissions

60. The respondent submitted that the costs did not just concern today but an ongoing failure since the beginning of the case to comply with case management orders properly or at all and it is not simply a question under Rule 76 of the conduct of the claimant and her culpability, the representative's conduct can be taken into account and even if for example the matters towards the end of the process could not be avoided there had been a significant failure to comply with orders up to that point which is what had led to the Unless Order and a significant amount of costs being incurred by the respondents.

The Law on Costs

61. Schedule 1 of the Employment Tribunal Rules of Procedure 2013, Rules 75(1) sets out the powers by which the Tribunal or Employment Judge may order one party to make a payment to another payment. There are three types of orders, one is a costs order which not only includes when a party is legally represented but when they are represented by a lay representative, a lay representative is defined as having the assistance of a person who is not a lawyer and who charges for representation in the proceedings (Rule 74(3)). A preparation time order which is where a party is not represented and is undertaking representation themselves and a wasted costs order which can be made against a representative.

62. The Tribunal can make a costs order of the following descriptions:-

(i) an order for a specified sum not exceeding £20,000;

(ii) an order that the whole or a specified part of the costs to the receiving party be determined by way of a detailed assessment carried out by the County Court in accordance with CPR or by an Employment Judge applying the same principles.

(iii) In order of a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party (now obsolete).

(iv) An order to pay another party or a witness a specified amount in respect of necessary and reasonably incurred witness expenses.

(v) An order for a specific specified sum agreed by the parties.

63. The Tribunal may have regard to the paying parties ability to pay (Rule 84). The fact that a parties' ability to pay is limited does not however require the Tribunal to assess a sum that is confined to an amount that he or she could pay, **Arrowsmith -v- Nottingham Trent University 2011**.

64. Rule 76 states that a Tribunal may make a Costs Order or a Preparation Time Order and shall consider whether to do so were it considers that:

(a) A party (or its representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings or part or the way that the proceedings or part have been conducted….

Reasonable Conduct

65. When making a costs order on the grounds of unreasonable conduct the discretion of the Tribunal is not affected by any requirement to link the award causally to any particular costs which have been incurred as a result of specific conduct that has been identified as unreasonable **(McPherson -v- BMP Paribas 2004 Court of Appeal).** In **McPherson** Mummery stated "the principle of relevance means that the Tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise and discretion that that is not the same thing as requiring (the receiving party) to provide that specific unreasonable conduct by the (paying party) caused particular cost to be incurred"**.**

66. Nor is it necessary to dissect conduct under nature, gravity and effect. In **Barnsley Metropolitan Borough Council - Yerrakalva Court of Appeal 2011.** It was stated that the vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and asked whether there has been a reasonable conduct by the claimant in bringing and conducting the case and in doing so to identify the conduct, what was unreasonable about it and what affects it had. Where the issue is a …… representative the principle that a party can be rendered liable to pay costs because of the way his representative conducts the proceedings has a reduced impact in the light of the power granted to Tribunals to make a Wasted Costs Order. However, it still has relevance, particularly in the case of representatives who are not acting for profit and thus cannot have a Wasted Costs Order made against them personally. Representatives not defined for the purposes of this section but would include any type of representative. Such a situation arose in the case of **Baynon -v- Scadden 1999 EAT**.

67. In this case the claimants were represented by their union and claimed compensation for failure to consult under TUPE regulations however the respondents argued it was clear from the outset there had been no transfer of an undertaking but merely a transfer of shares and the case proceeded nevertheless to a hearing which the claimants lost and costs were awarded against them on the ground of the union's vexatious and unreasonable conduct, that finding was upheld on the basis that the union knew or ought to have known that there was no reasonable prospect of success.

Conclusions on costs

68. It is my conclusion that Mr Martins conduct has been unreasonable. He was clearly refused a postponement for 27 July and made no alternative arrangements for the claimant, indeed the grounds put forward were unsupported by any medical evidence at the time or subsequently in the sense of why he could not attend that particular hearing. In addition, the medical evidence available in respect of the failure to comply with the Unless Order is extremely limited. Mr Martins as a representative should know that a Tribunal would require more detailed evidence

where he and his client are in effect on the backfoot and are seeking to have a serious and significant discrimination claim reinstated. Neither was there any reasonable explanation for the failure to comply with the original orders at any point up to 18 October.

69. The question is whether I visit the failures of Mr Martin on the claimant. I have accepted the claimant's evidence that she made efforts to find out what was going on and that she was not informed of Mr Martins health problems, nor of the possibility she could attend the hearing on 27 July herself without Mr Martins although she attempted to join the hearing. Further she had complained about Mr Glazer and so it was not outwith the claimant's understanding to be aware of when her representation was not going to plan.

70. On balance, it appears to me that the biggest failure was the failure to attend on 27 July. The failure of the claimant to attend that hearing is inexplicable as Mr Martins would always have known that the claimant needed to present herself to be cross examined and he made no steps to ensure she did attend whether or not he did.as she would have been required to attend in order to give evidence regarding disability. The claimant did not say that she had been told it was irrelevant to attend. She did say that someone had told her she needn't attend but this evidence was quite vague, she said she made some attempt to attend but could not get through to the Tribunal. I consider that had the claimant made more significant efforts to attend she would at least have discovered what the situation was and from 27 July been able to make other arrangements for her representation which would have led to her claim not being struck out.

71. In respect of failure to comply with the Unless Order there is some fault there, as orders have still not been complied with when the claimant was aware of the issues. Today's hearing arises from earlier failures and is not entirely related to Mr martins last unpredictable illness.

72. Having considered the claimant's limited means, I would award a limited amount of costs in relation to the two hearings. In particular of £500 representing 5 hours of time at a less than partner rate as I do not believe that level of attention was required.

Employment Judge Feeney
15 July 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
19 July 2021

FOR THE TRIBUNAL OFFICE