Neutral Citation Number: [2022] EAT 153

Case No: EA-2020-000281-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16 December 2021

Before :

HONOURABLE MRS JUSTICE EADY DBE

- -

Between :

MRS N LEEKS **Appellant**

- and -

BRIGHTON & SUSSEX UNIVERSITY HOSPITALS NHS TRUST **Respondent**

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Daniel Fox for the **Appellant**
Christopher Edwards (instructed by Carter Leydon Millard Limited) for the **Respondent**

Hearing date: 16 December 2021

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE – dismissal of claim for non-compliance with unless order – rule 38 Schedule 1 Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013("the ET Rules") – fair hearing

The claimant, who was acting in person and had various health issues that meant that she needed adjustments to enable her to engage with the Employment Tribunal ("ET") process, had brought claims of unlawful discrimination arising out of the withdrawal of a job offer with the respondent. An unless order was made requiring the claimant to exchange her witness statement with the respondent on 18 November 2019. On 7 November 2019, the claimant applied for that order to be varied (allowing her more time to prepare her statement) but had not received a response from the ET by the required date of compliance. On 18 November 2019, the claimant sent the respondent a document that was said to be her statement, "*submitted in the interim*", pending determination of her application for variation. The statement was essentially in the same terms as the particulars of claim attached to the claimant's ET1. The respondent took the view that the claimant had not thereby materially complied with the terms of the unless order.

This issue was considered by the ET at the outset of the full merits hearing on 2 December 2019. Although the ET delayed the start of the hearing pursuant to the claimant's request for such an adjustment, she was not in attendance and the ET proceeded to make a decision in her absence, finding that she had not complied with the unless order. This was confirmed by letter from the ET on 30 January 2020, although the letter did not state the name of the Employment Judge or specify that the decision had been taken at the hearing on 2 December 2019. Upon the subsequent refusal of the claimant's application for reconsideration, the ET observed that had the claimant made clear that she was seeking to rely on her particulars of claim as standing as her witness statement in these proceedings there would have been no need for the unless order to be made; in stating that she was serving an "*interim*" statement, the claimant had instead indicated that this was not the totality of her evidence. In the circumstances, the ET did not consider she had complied with the terms of the unless order. The claimant appealed.

Held: *allowing the appeal.*

The ET had not erred in proceeding to consider the question of compliance with the unless order in the claimant's absence and she had not thereby been denied a fair hearing. Having delayed the start of the hearing to accommodate the claimant's request, the ET had been entitled to decide to then proceed in the claimant's absence.

The ET had, however, erred in construing the statement provided by the claimant as an "*interim*" statement. As she had made clear, this was her statement provided - so as to comply with the requirements of the unless order - "*in the interim*", while still waiting for a response to her application for variation; the claimant had not suggested that, if that application was refused, she would not rely on the statement she had provided as standing as her evidence at the full merits hearing. Any concern that the ET had that the claimant would subsequently seek to add to her evidence could have been addressed by directing that the statement she had provided was to stand as her evidence in chief. The ET's dismissal of the claim was effectively using the unless order to penalise the claimant for potential future abuses; it did not properly address the question of material compliance.

As for the respondent's submission that the claimant's statement, by taking the form of the narrative of her particulars of claim, failed to address all the issues raised by the grounds of resistance, that was confusing the question of compliance with an analysis of the evidential strength of the claimant's witness testimony. It might well be that there were gaps in the claimant's evidence but that might be explicable given the nature of the claim she was pursuing (a challenge to the withdrawal of a job offer, where the respondent was likely to be better placed to provide evidence as to why it had determined to take the decision it had), or it might simply reflect weaknesses inherent in her case; this did not mean, however, that the claimant had failed to materially comply with the limited terms

of the unless order.

This was not a case where the claimant had been ordered to provide further particulars of her claim. The unless order had been limited to requiring her to exchange her witness statement for the full merits hearing by 18 November 2021. The claimant had complied with the terms of that order in all material respects and the ET had erred in dismissing her claim under r 38 **ET Rules**.

THE HONOURABLE MRS JUSTICE EADY DBE:

Introduction

1. I am today concerned with a (not uncommon) challenge to the dismissal of an Employment Tribunal ("ET") claim on the basis of what was found to be material non-compliance with an unless order. There are also subsidiary points of appeal raising questions relating to the fairness of the ET hearing at which the issue of non-compliance was determined.

2. In addressing the primary issue thus raised (the dismissal of a claim for non-compliance with an unless order), it is helpful to keep in mind the observations of Langstaff P in **Johnson v Oldham Metropolitan Borough Council** UKEAT/0095/13 and UKEAT/0132/13, as follows:

> "It is a critical aspect of fairness that a party knows the case it has to meet. It is also a central tenet of justice that disputes should be heard where a fair hearing is possible and cases should not lightly be ruled out on a procedural technicality without determination on the merits. These two principles may be seen on occasion to be in conflict, as where a case is struck out for the failure of one party to state its case sufficiently to allow the other to answer it, but in truth they are capable of reconciliation by exercising case management powers to facilitate a hearing which is fair for both parties by ensuring that each knows sufficiently what case it has to meet."

3. In giving this judgment, I refer to the parties as the claimant and respondent, as below. This is the hearing of the claimant's appeal against a decision of the London South ET, communicated to the parties by letter of 30 January 2020. The claimant today is represented by Mr Fox of counsel, acting *pro bono*; she acted in person below. Mr Edwards of counsel appears for the respondent on his appeal, as he did before the ET.

The background

4. The ET proceedings commenced with the claimant's presentation of her claim on 27 April 2018, in which she complained of discrimination on the grounds of age, disability and religion and belief, and of public disclosure detriment in relation to a job application she had made

on 24 August 2017, to work for the respondent as a housekeeping assistant. Although an offer an initially been made to the claimant, that had been conditional upon certain pre-employment checks, and the offer was withdrawn by the respondent on 29 November 2017 for reasons that are stated to have been due to the results of the checks in question. In particular, the respondent said it had learned that the claimant had been dismissed for misconduct on three previous occasions, which was inconsistent with the information provided in her application.

5. In the claimant's claim form, under box 12, which asks whether a claimant has a disability and, if so, what assistance might be needed for the progression of the case, the claimant had provided the following information:

> "Scar tissue nerve pains following cancer surgery. Incontinence, fatigue, cold temperature sensitivity - feeling cold all the time, Fibromyalgia [,] generalised muscle pains to the l egs [sic], feet, buttocks, arm pains, overactive bladder, IBS, T2 diabetes, osteoarthritis left thumb. Assistance needed: Comfort breaks, extra time for written information, Indoor wearing of outdoor clothing, woolly caps and ET telephone hearings."

6. On 5 July 2018, the respondent filed grounds of resistance in which it disputed the claims made and put the claimant to proof as to whether she was a disabled person for the purposes of the **Equality Act 2010** (EqA).

7. On 25 July 2018 there was a preliminary hearing before Employment Judge Martin, at which the case was set down for a full merits hearing on 17 and 18 January 2019, with directions given to enable that hearing to take place, including the exchange of witness statements (which would be in the format explained by the ET (to which I will return later)) by 17 December 2018.

8. On 17 December 2018, the claimant was not ready to exchange her witness statement (although I understand she had provided a disability impact statement on 5 October 2018). A telephone preliminary hearing took place on 10 January 2019 at which the claimant sought to amend

her claim and was directed that she must set out the text of any proposed amendment by 15 January 2019. It appears that she failed to do so.

9. In the event, the hearing on 17 and 18 January 2019 was vacated as there was no judge available. A further preliminary hearing was, however, held on 17 January at which Employment Judge Spencer refused the claimant's application to amend and re-listed the full merits hearing to commence on 2 December 2019, giving further directions to enable that to take place, including that the claimant should disclose any additional documents by 31 May 2019 and that witness statements were to be exchanged by 28 June 2019. The claimant did not provide any additional disclosure and was not ready to exchange witness statements on 28 June 2019.

10. It was against that background that a further telephone preliminary hearing took place before Employment Judge Wright on 24 October 2019, when an unless order was made as follows:

> "Unless the claimant sends to the respondent as part of an exchange of witness statements her witness statement on 18/11/2019, her claim shall stand dismissed without further order."

11. In making this order, the ET acknowledged that it would have draconian consequences for the claimant if she failed to comply but observed that there was a history of her having failed to comply with the ET's orders and directions. It was noted there were still 26 days for the claimant to comply with the order and the ET had regard to the fact that the claim related to events in November 2017, and would be over two years old by the date of the final hearing, and that, if that hearing did not place as then listed, there would be a further six month delay before it could be relisted. The ET recorded that the claimant had agreed at the hearing that, notwithstanding her health issues, she would be in a position to exchange her witness statement on 18 November 2019, having herself proposed that date.

12. At this hearing the claimant had also sought leave to add further documents to the trial bundle and was ordered to provide her additional documents (of some 150 pages) to the respondent by 11 November 2019.

13. On 7 November 2019, the claimant applied to vary the order of 24 October 2019, to allow for her additional documents to be produced by 21 November and her witness statement exchanged by 25 November 2019. This was said to be on the basis of health issues suffered by the claimant that had meant that she had had around 33 medical appointments on 1 July to 7 November 2019, had attended A&E on 23 October 2019, and was suffering from urinary bladder incontinence. The claimant said that she was *"(…) currently severely afflicted and substantially disadvantaged by ongoing worsening symptoms and chronic fatigue (…)"*, and this was impacting on her medical and physical stamina, and she contended that she was suffering from health anxiety and anxiety with depression. Explaining that she *"(…) still has a lot of documents to disclose in the … proceedings (…)"*, the claimant contended that the respondent would not be put to any disadvantage by the proposed variation as it had been ready and willing to exchange witness statements since 22 October 2019.

14. Various documents were attached to the claimant's emailed application in support, and she included a completed case management agenda form in which she said she would need reasonable adjustments at the hearing, including a 11:00 am start each day. By letter of 11 November 2019, the respondent made clear that it resisted the claimant's application, noting that only one of the supporting documents provided with the claimant's email post-dated the hearing at which the unless order had been made and that confirmed that she was fit to attend the ET hearing, albeit that she would need some adjustments.

15. Although no application to vary the ET's earlier order had been granted, on 11 November no additional documents were produced by the claimant. On 18 November 2019, the claimant

provided a copy of the text of her grounds of claim, with some fairly insubstantial changes, describing this as her *"(…) statement submitted in the interim … whilst the claimant is awaiting ET response to the 07 November 2019 claimant's application (…)"*, and stating:

> "In accordance with rule 37 (7) the Claimant also hereby earnestly applies for relief from any strike out sanctions, unless order sanctions and or cost order sanctions and or deposit order sanctions."

16. For completeness, I note that, notwithstanding what had been said in her application of 7 November, on 21 November 2019 the claimant did not provide any further documents.

17. On 22 November 2019, the respondent wrote to the claimant stating that it would not accept that the claimant had served a witness statement and, in the circumstances, that it would view the statement as having been struck out.

18. The claimant's proposed revised date for witness statement exchange, 25 November 2019, also passed without anything further being received from the claimant.

19. On 28 November 2019, the ET refused the claimant's application of 7 November 2019.

20. On 1 December 2019, the day before the trial had been listed to commence, the claimant applied for the start time to be put back to 11:00 am. She repeated that application just after 10:00 am on 2 December 2019 itself, albeit that second request does not appear to have made its way before the ET by the time the hearing commenced. In any event, although the ET (Employment Judge Wright, sitting with two lay members) and the respondent were both ready to commence the hearing at the listed time of 10:00 am, the start of the hearing was delayed until 11:00 am in the light of the claimant's application the previous day.

21. When the hearing commenced at 11:00 am, the claimant was still not in attendance and the ET, considering that there had not been compliance with the terms of the unless order, confirmed that the claim had been dismissed.

22. On 30 January 2020, the ET wrote to the parties to confirm that, the unless order of 24 October 2019 not having been complied with, the claimant's claim was struck out. The letter from the ET did not identify the date on which the decision had been taken or the identity of the members of the ET who had made the decision.

23. On 13 February 2020, the claimant made an application that her claim be reinstated, stating that she had nothing to add to her interim statement. This was treated as an application to have the ET's order set aside under rule 38 schedule 1 **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013**, alternatively as an application for reconsideration. On 12 March 2020, the claimant lodged this appeal, which was stayed at the initial paper sift stage, pending the outcome of the ET's determination of the claimant's application of 13 February 2020.

24. On 19 August 2020, the ET directed that a preliminary hearing should take place to consider the claimant's application to reinstate her claim. On 18 September 2020, Employment Judge Wright dealt with the claimant's application for reconsideration on the papers, refusing it for the reasons explained in a letter of that date, in particular noting that the claimant:

> "(…) now says that the narrative of her claim has not changed. She never worked for the respondent and so her particulars of claim are the same as her witness statement, i.e. it is one and the same."

But concluding:

> "If that was the case, all the claimant had to do, was make that clear; either at the preliminary hearing on 24/10/2019 or when serving her statement on 18/11/2019. In fact, at the time, the claimant indicated the opposite, that the statement she had served was an '*interim*' statement' (presumably to comply with the unless order). Not that it was the totality of her evidence-in-chief and that she had nothing further to add. Indeed, if the claimant had complied with the overriding objective, the earlier directions and addressed her mind (including during periods when she was feeling well enough to do

> so) to her evidence-in-chief; she could have confirmed at a much earlier point her evidence-in-chief was limited to the particulars of claim (including the additional comments). Had she done that, there would have been no need for the respondent to apply for an unless order (…) The claimant's reconsideration application on 13/2/2020 was the first time she raised the possibility that she had nothing further to add to her interim statement. That was not however the case when the claimant sent the statement on 18/11/2019."

25. On 1 December 2020 a preliminary hearing took place before Employment Judge Siddall at which the claimant's application for reinstatement was considered but refused for the reasons provided in a decision sent to the parties on 2 December 2020.

The grounds of appeal and the claimant's submissions

26. By her first ground of appeal the claimant says that the ET erred in law in determining that there had been material non-compliance with the unless order. By ground two, she complains that the ET erred in refusing to put in place reasonable adjustments in order to enable her to be on an equal footing with the respondent. By ground three, the claimant complains that (in the ET's letter of 30 January 2020) there had been a breach of natural justice in failing to identify the Judge who had made the decision at the hearing on 2 December 2019. By ground four, she further complains that this denied the claimant her right to a fair hearing.

27. In relation to the material compliance ground of appeal, the claimant says that the claim should not be lightly ruled out on a procedural technicality, in particular where complaints about lawful discrimination are concerned: see **Anyanwu v South Bank Student Union** [2001] UKHL 14 at [24]. The claimant makes the point that compliance with an unless order need not be absolute, and an ET should not dismiss a claim for non-compliance unless the parties have had a fair opportunity to address the point. Moreover, considering the question of compliance required careful consideration of the terms of the unless order in question; in the present case it was the claimant's submission that she had complied with the unless order in sending her statement to the respondent on 18 November 2019 - in her covering email, and at the beginning of the statement, the claimant

had explained that the statement was submitted *"in the interim"* while she was awaiting the outcome of her 7 November 2019 application to vary the unless order. It was the claimant's contention, however, that the statement was intended to be in compliance with the unless order. It was only "*interim*" in the sense that she would have wished to add to it if her application to vary was successful. It would not be unusual for a party in litigation to submit a document in compliance with an order while at the same time challenging that order and reserving their right to submit further documents in the event that the challenge was successful. Given that the statement was a witness statement within the meaning of the unless order, the claimant had materially complied with the order and there was accordingly no legal basis for the immediate dismissal of her claim.

28. In order to make good the claimant's fair hearing grounds of challenge, it is further explained that, in the few days prior to 2 December 2019, the claimant's husband (who had a history of cancer) had experienced rectal bleeding and, on 1 December 2019, had to attend A&E in relation to this. It is said that at around this time the claimant was herself suffering from incontinence and, given her own medical conditions, was relying on her husband to drive her to the ET on Monday, 2 December. It was against this background that, on 1 December 2019, she applied to the ET for the hearing to start at 11:00 am rather than 10:00 am, albeit that was a point she had already raised in her application of 7 November 2019. Having received no response from the ET, she had repeated her request shortly after 10:00 am on 2 December 2019, also informing the ET that she would be late due to her disabilities.

29. While being driven to the ET that morning, the claimant said she rang and checked her email had been referred to the presiding Employment Judge and was told that it had. It is said that she explained to the ET staff that she would be attending but was going to be late. At around 11:00 am, the claimant says she received a call from the case clerk who told her not to come to the ET because a decision had been made. I pause in the claimant's narrative to note that, from the times recorded by those acting for the respondent, it in fact appears that the ET hearing had lasted

between 11:04 am until shortly before 11:30 am, which would suggest that any second call from the ET to the claimant must have been at some time around 11:30 am that morning. In any event, it is the claimant's case that, but for what she was told in this second 'phone call, she would have reached the ET by noon.

30. On grounds 2 and 4, it is the claimant's case that the ET should have borne in mind that she suffers from various physical and mental illnesses and disabilities and that her delay in attending on 2 December 2019 could have been (and was) caused by her illnesses and disabilities, and that, further, she was acting as a litigant in person. She submits that the ET should be ready to provide extended time for compliance with case management steps and she should have been given extra time to consider and make submissions on the issue of material non-compliance; the ET had, however, failed to afford her that opportunity on the morning of 2 December 2019.

31. As for ground three, the ET in its letter of 30 January 2020 had failed to identify the judge who had made the decision, or when the decision had been made, which was a breach of the principle of open justice and (ground four) unfair.

The respondent's submissions

32. For the respondent it is said that this appeal stands or falls on ground one; the fairness grounds could not provide a basis for allowing the appeal.

33. Considering then ground one and the issue of material non-compliance, the respondent submits it would be wrong to adopt a different approach for discrimination claims in this regard; dismissal of a claim for non-compliance with an unless order was different to the striking out of a claim as having no reasonable prospect of success. As for the construction of the unless order, the EAT was bound to adopt a qualitative approach, having regard to the legal and procedural context which would be relevant to any understanding of what the order required: see paragraph 44 of

Wentworth-Wood & Others v Maritime Transport Limited UKEAT/0316/15/JOJ. In the present case, although the claimant was acting in person, she had brought a number of other ET claims (at least nine to the respondent's knowledge), and the ET was entitled to take the view that she was aware of what was required of her; that was part of the relevant context: see per Elias P (as he then was) at paragraph 33 **EB v BA** [2008] UKEAT/0139/08 and UKEAT/0138/08. It was apparent that the claimant was seeking to rely on her interim statement to avoid the consequences of the unless order, but was aware that it was insufficient as it failed to deal with the issues and the evidence in the case. In these circumstances, the ET had been entitled to conclude that there had been material non-compliance.

34. As for the fair hearing grounds of appeal, there had been no unfairness in the ET deciding to proceed with the decision on the question of compliance with the unless order at the hearing on 2 December 2019 in the claimant's absence. It had waited until shortly after 11:00 am before starting the hearing, in accordance with the adjustment requested by the claimant, and was not bound to wait for longer or to adjourn the hearing to be addressed by written submission or at some future date. As for the failure to inform the claimant of the identity of the judge and/or lay members who had made the decision and when it had been made, while accepting that information should have been given, this was not a substantive error and was in any event corrected subsequently on the claimant's application for reconsideration.

The legal framework

35. By rule 38(1) and (2) of Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** (ET Rules), it is provided as follows:

> "Unless orders
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> 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. (…)"

36. An unless order is a necessary and useful case management tool that can assist the ET in ensuring that the case before it proceed to a fair hearing; as Langstaff P recognised in **Johnson** (although there addressing the issue of particularisation of a claim rather than an order for the exchange of witness statements):

> "Cases where one party defiantly refuses to accept a judicial view of what is needed to ensure a fair hearing, such that no fair hearing can be arranged, resulting in the dismissal of the case without a hearing on the merits, will be rare, particularly where case management powers have been exercised with a view to holding a just hearing. Nonetheless, it must recognised [sic] that they do exist where a claim or a response leads to uncertainty about what is being alleged so that the other party does not sufficiently know what they must grapple with. One way in which case management powers can be exercised in such a case is to order particulars of the claim or response to be given. If they are not given in response to such an order, whether through misunderstanding, mental illness, lack of awareness of that which the other party will need to meet the claim or response, or a deliberate refusal or failure to comply an Unless Order may be made. If such an order is not complied with within its terms by the date set out in the Order, the claim or response will stand struck out without the need for any further order. Thus in Marcan Shipping (London) Ltd v Kefalas & Another [2007] EWCA Civ 463, also reported 3 All ER 365, at paragraph 34 Pill LJ said:
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> > 'In my view it should now be clearly recognised the sanction embodied an in Unless Order in traditional form takes effect without the need for any further order if the party to whom it is addressed fails to comply with it in any material respect.'"

37. As HHJ Auerbach identified at paragraph 24 **Ijomah v Nottinghamshire Healthcare NHS Foundation Trust** [2020] UKEAT/0289/19, under rule 38 there are potentially three distinct decision points for the ET: first, the decision to make the unless order; second, the decision in the event of a dispute as to whether the unless order has been complied with; and, if there has been a failure to comply so that the unless order has bitten and if there is then an application for relief under rule 38(2), thirdly, the decision on that application.

38. Although rule 38 does not require any further order to be made when a claim is dismissed for non-compliance with an unless order, it is provided that written notice shall be given confirming

what has occurred. In some cases, the fact of compliance or not will be obvious. In others, it will be rather more open to question and the question of compliance will require a judicial decision. In carrying out that determination, the ET will be bound to approach its task with the overriding objective in mind; that is, to deal with the case fairly and justly, which would include (most relevantly) ensuring (so far as is practicable) that the parties are on an equal footing, dealing with the case in a way that is proportionate to the complexity and importance of the issues, avoiding unnecessary formality, and seeking flexibility in the proceedings.

39. As HHJ David Richardson observed in **Wentworth-Wood v Maritime Transport** at paragraph 55:

> "An Employment Judge, before causing notice to be given under Rule 38(3), must be satisfied that there has been material non-compliance with the Order. But there is no mandatory process to be followed. The Employment Judge's only duty before giving notice is to comply with the overriding objective, which requires cases to be dealt with fairly and justly. In some cases the Employment Judge may be able to see clearly from the file or from correspondence that an Order has not been complied with. In such a case the Employment Judge is entitled to give notice without further reference to the parties. But if there is doubt - for example in a case such as this, where one party writes to the Employment Tribunal to allege that there has been non-compliance with an Unless Order - the Employment Judge will give the other party an opportunity to comment. If there is still doubt, and the Employment Judge wishes to hear argument, the matter may be considered at a hearing. Fairness requires that if the matter is to be considered at a hearing the parties concerned should have sufficient notice of the issue to prepare for it."

40. In **Uwhubetine and Njoku v NHS Commissioning Board England and others** [2019] UKEAT/0264/80, HHJ Auerbach provided the following helpful guidance:

> "45. The starting point for the Tribunal engaged in that task is to consider the terms of the Order itself and whether what has happened complies with the Order or not. This may call for careful construction of the terms of the Order, both as to what the Order required and as to the scope of the Order in terms of the consequences of non-compliance, particularly in cases where there are multiple claims or multiple parties. If there is an ambiguity the approach should be facilitative rather than punitive, and any ambiguity should be resolved in favour of the party who was required to comply. However, what the Tribunal cannot do is redraft the Order or construe it to have a meaning that it will not bear, though its words should of course be construed in context.

> 46. Next, the test to be applied is as to whether there has been material non-compliance, that being a qualitative rather than a quantitative test. In a case where the Order required some further Particulars to be given, the benchmark is whether the Particulars have sufficiently enabled the other party or parties to know the case that they must meet. However, the Tribunal is not concerned with the legal or factual merits of the case advanced, but merely with whether sufficient Particulars have been given to meet that test.
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> 47. Finally, the Rules do not require any particular formalities to be observed in relation to the process for determining whether there has been non-compliance with an Unless Order, leading, if non-compliance be found, to a written notice confirming that the relevant pleading has been dismissed in accordance with it. This is something that can potentially be done by a Judge on paper without a hearing, although a Judge may decide to invite written submissions and/or to convene a hearing, before making that determination. The obligation on the Tribunal, whichever route it goes, is to comply with the overriding objective.
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> …
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> 49. Further, if the conclusion is that the Order has *not* been complied with, and *has* taken effect, although that will have occurred automatically, there is an obligation on the Tribunal to issue a written notice to the parties confirming what has occurred. That is both because that is what Rule 38(1) says and because it is the issuing of such a written notice that triggers the right of a party to make an application under Rule 38(2) to have the Order set aside on the basis that it is in the interests of justice to do so. That is why such an application is treated, as the authorities confirm, as an application for relief from sanctions, as opposed to a freestanding challenge to the original Order having been made in the first place."

41. I further note that, although there are no particular formalities laid down in terms of the process that is to be followed for determining whether there has been material compliance, and that there is no requirement for any further order, or even for the confirmation of the dismissal of the claim, rule 61 of the **ET Rules** requires that a written record be provided, signed by the Employment Judge.

42. Returning then to the task required of the ET in determining whether the terms of an unless order have been met, it is necessary to ask whether there has been compliance in a *material* respect. As Langstaff P went on to explain in **Johnson** at paragraph 7:

> "(…) it draws attention to the purpose for which compliance with the order is sought; that it is within a context. What is relevant, i.e. material, in such a case is whether the particulars given, if any are, enable the other party to know the case it has to meet or, it may be, enable the Employment Tribunal to understand what is being asserted. To use the word 'substantial' runs the risk that it may indicate that a quantitative approach should be taken: thus, where 11 matters must be clear to enable a party to deal fairly

> with a claim, of which 9 have been provided but not 2, which remain necessary, compliance has not *materially* been provided because the purpose of seeking compliance has not been achieved in the context; the other party still cannot obtain a fair trial. To adopt a quantitative approach may erroneously lead the Judge in such a case to conclude that there had been sufficient compliance (9 out of 11) even if the further particulars remained necessary before a fair trial could take place. Substantial compliance has thus in my view to be understood as equivalent to material compliance not in a quantitative but in a qualitative sense."

43. Thus, context will always be important. Where a party has agreed that some of the matters included within a long list of allegations are in fact irrelevant, and has been required to state which are no longer relied on, simply responding that *"all are still being pursued"* would not amount to material compliance with the order: see **EB v BA** per Elias P at paragraph 33. On the other hand, where the terms of the unless order are materially complied with, the fact that this merely exposes the weaknesses of the claim will not provide a basis on which that claim could be dismissed for non-compliance (although, of course, that might then lead to an application for the claim to be struck out on other grounds).

44. As for the approach to be adopted on any appeal, when considering a challenge that is specifically and solely against a ruling on whether an unless order has been complied with, the EAT is concerned only with whether that particular decision has been made in error of law; it is not for an appellate tribunal to seek to substitute its decision or view for that of the first instance tribunal, which is likely to be best placed to determine whether there has been material compliance in these circumstances.

Discussion and conclusions

45. The appeal in this case is brought against the ET's letter of 30 January 2020, confirming that the claimant's claim had been dismissed due to her non-compliance with the unless order of 24 October 2019. The main focus of the claimant's argument on appeal can be put fairly straightforwardly. She says that the ET erred in law in determining that there had been material non-compliance with that order; she further complains, however, that in proceeding to determine this

question at the hearing on 2 December 2019, in her absence, the ET erred in its approach, denying her a fair hearing or a further opportunity to make representations on this question, and failing to make the necessary adjustments that were required, given her particularly vulnerabilities as a litigant in person with various disabilities.

46. I can deal with the fair hearing challenge fairly shortly. Accepting that the claimant was acting in person, and had health issues that might reasonably be understood to impact on her ability to engage with the ET proceedings without some adjustments being made, I am satisfied that there was no unfairness in the process followed in this case. The history of the proceedings demonstrates that the ET had given the claimant further time to comply with its directions at various stages. Moreover, on the morning of 2 December 2019, the commencement of the hearing was delayed, as the claimant had requested, until 11:00 am. The claimant had not asked for a further delay to sometime after noon and, on the information before it, the ET made an entirely permissible case management decision to proceed in her absence.

47. The ET was not, moreover, bound to adjourn the hearing to permit written representations to be made on the question of non-compliance, nor, given the information provided to it on the morning of the hearing, was it required to take further steps to enquire as to the claimant's whereabouts. A different ET might have adopted a different approach, but it cannot be said that the course taken by this ET, given the circumstances with which it was faced, was such that it denied the claimant a fair hearing, nor can it properly be said to have been perverse.

48. An issue does arise in relation to the failure to communicate the ET's decision, which was apparently taken at the hearing of 2 December 2019: that being so, it would appear that rule 61 of the **ET Rules** should have been complied with. I am, however, not persuaded that this gives rise to any substantive issue in this case, given that the omission to identify the Employment Judge concerned was rectified at the reconsideration stage.

49. I turn therefore to the substantive decision taken by the ET to dismiss the claimant's claim for non-compliance with the unless order of 24 October 2019. In approaching this question I agree with the respondent that the requirement laid down in that order has to be seen in its legal and procedural context. In this regard, it is right to note that the claimant had previously fail to comply with the ET's directions and orders on a number of previous occasions, including in relation to the exchange of witness statements. It is also the case that the ET proceedings related to events that had taken place in 2017, and there had been a significant delay in proceeding to a hearing (although not all the reasons for that delay can be seen as due to the claimant).

50. Having had regard to those aspects of the procedural context, however, I have also had regard to the context of the claim itself. This was a claim which related to the withdrawal of a job offer. In contrast with many cases where allegations are made over a lengthy period relating to the history of the claimant's employment, the claimant's case here was rather more basic. She was relying on the circumstances of the withdrawal of the job offer as providing the basis of her claims of unlawful discrimination. For the respondent, on the other hand, it was said that the withdrawal related to inconsistencies that had been found when carrying out the pre-employment checks, and was unrelated to any of the protected characteristics, or protected disclosures, relied on. The case before the ET was thus focused on a quite specific factual matrix and the issues to be determined were very much more limited than might more generally be the case in a claim of discrimination or protected disclosure detriment.

51. It is also relevant that this was not a case where there was a history of orders requiring the claimant to provide further particulars of her claim. It would seem that the case she was pursuing was understood. The ET's desire was to ensure that the evidence that would be adduced for the determination of that case had been provided sufficiently far in advance to enable a fair hearing. It was in that context that the timely exchange of witness statements was important. It had not been identified in the unless order (or at any relevant earlier stage) that the claimant was required to

provide further particulars of her case so that the respondent might understand the case that it had to meet.

52. Although not a point that either side has focused on, it may also be relevant for me to note that the claimant had apparently provided her disability impact statement. That would seem to have been undertaken at an early stage of the proceedings and I cannot see that it was suggested that that statement was inadequate in any way.

53. The requirement laid down by the unless order was that the claimant send her witness statement to the respondent on 18 November 2019 as part of an exchange of statements. The order itself did not lay down any further requirements as to the form that the statement was to take or as to its content, but there had been an earlier direction explaining that it was to be in numbered paragraphs, on numbered pages, in chronological order and should, when referring to a document, reference the relevant page number in the hearing bundle. More generally, and more substantively, the statement was to "*set out all the facts about which a witness intends to tell the tribunal relevant to the issues …*"

54. Although the claimant had applied for the unless order to be varied, she had received no response to that application by the date on which she was required to comply with the order. On 18 November 2019 she then purported to comply with the unless order by sending her *"statement submitted in the interim … while claimant is awaiting ET response to 07 of 2019 claimant's application"*.

55. The document the claimant provided then set out the facts as she saw them, in chronological form, and in consecutively numbered paragraphs. It is true to say that this was substantially the text of the claimant's particulars of claim attached to her ET1 but otherwise it was a statement that, on its face, met the terms of the order that had been made.

56. The respondent has said that even if this was compliance in form it was not material compliance: the claimant had never previously said that her statement would be limited to her grounds of claim, and she was clearly presenting this as an interim statement, presumably with the intention of adding to it at some later stage. In particular, the respondent points out that, by simply relying on her original particulars of claim, the claimant had failed to engage with the issues in the case, specifically as identified in the respondent's grounds of resistance, especially in her failure to address the inconsistencies between her application and what the respondent said had been discovered in the pre-employment checks, which was the reason for the withdrawal of the job offer.

57. In these latter respects, it seems to me that the respondent's submissions confuse material compliance with the merits of the case on the evidence provided by the claimant. It may well be that the claimant's statement did not address the issues raised in the grounds of resistance, but that might be because the claimant did not have an answer she could give. The fact that her statement might thus be considered to have exposed the weaknesses in her case did not mean, however, that the claimant had failed to comply with the unless order in a material respect.

58. The basis of the ET's decision on material non-compliance was itself explained in the reconsideration decision. The Employment Judge had (understandably) been concerned that this appeared to have been presented as an interim statement, a holding position, to simply ensure formal compliance with the unless order, and was not in fact the statement the claimant intended to use at the hearing. I can understand that concern and can see that the ET was anxious to ensure there was a mutual exchange of witness statements, so that no party was potentially prejudiced by having handed over their witness testimony without receiving, at the same time, that relied on by the other side. That said, the justification for the decision on material non-compliance (as provided by the Employment Judge) suggests that the ET was thereby using the unless order to penalise the claimant for failing to do more than had actually been required of her. On its face, the claimant had complied with the order. If the ET was concerned that she would then seek to add to her evidence by

submitting a further statement at a later date, and/or by seeking to add to her evidence in chief, then it had other case management powers at its disposal to prevent that (it could simply order that the evidence in chief should be limited to that given in the witness statements).

59. The difficulty appears to have arisen from the way in which the ET read the claimant's communications as describing this as an "*interim statement*". That is not in fact the language used by the claimant; she described this as a *"statement in the interim"*, referring to her outstanding application to vary the terms of the unless order. It was not suggested that she would not rely on this statement if she failed in her application. If no further time was permitted for the claimant to be able to draft a fuller statement, then this was her statement for the purpose of the ET hearing. There was no requirement on the claimant to provide a statement that did more than had been set out in her particulars of claim (as attached to her ET1); indeed, it may have been impossible for her to do any more than to provide those particulars.

60. Given that context, as has been pointed out at this hearing, the claimant was in reality doing no more than any litigant might in circumstances in which there is an outstanding application to vary an order which has not been addressed by the ET by the date for compliance with that original order. Ensuring that she complied with the strict terms of the unless order in this context was not merely a matter of form but was a substantive way of providing the claimant's statement, as she was required to do, notwithstanding that she might have wished to provide a fuller statement had she been given the time to do so.

61. The error made by the ET is revealed by its reasoning at the reconsideration stage. As the ET then acknowledged, had the claimant simply said at any earlier stage that she was merely seeking to rely on the particulars of claim attached to her ET1, there would have been no need for an unless order, let alone for the dismissal of her claim as failing to comply with such an order. Substantively, therefore, the ET was recognising that, by providing this document on 18 November 2019, the

claimant had provided her witness statement. The only difficulty that the ET had identified was in the reference to this being provided in the interim, erroneously construing that to mean that this was an interim statement. The ET penalised the claimant for simply doing as any litigant might, which was to reserve her position (as it might be) should she be successful on her application for variation which might then give her more time to provide further information). What the claimant was not purporting to do was to provide a statement on which she would not in fact rely should her application for variation be refused.

62. In the circumstances, therefore, I accept the claimant's argument that the ET in this case erred in law in finding there had been material non-compliance and, therefore, in purporting to dismiss the case for non-compliance with the unless order. I therefore allow the appeal.