EMPLOYMENT TRIBUNALS

BETWEEN

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

OPEN PRELIMINARY HEARING

Heard at: **Birmingham** On: **28 June 2017**

Before: **Employment Judge Perry**

Appearances

For the Claimant: **No appearance**

For the Respondent: **Ms B Criddle (counsel)**

DECISION

1 It is not in the interests of justice for the r. 38(1) notice dated 4 May 2017 confirming that the claimant's claim was struck out on 3 January 2017 to be set aside.

2 Further, the manner in which the proceedings have been conducted by the claimant have been unreasonable and it is no longer possible to have a fair hearing in respect of the claim. Accordingly, and in the alternative, the claim is struck out.

REASONS

Unless the context suggests otherwise cross references in square brackets below are to the page of the bundle or if prefaced by a citation or a document reference, the paragraph number of that authority or document (e.g. [ET1/8.2]). Cross references in round brackets are references to the paragraph of these reasons.

THE BACKGROUND, ISSUES AND LAW

1 The background to how this hearing arose is principally set out in my decision of 4 May 2017 (the Compliance Decision) in which I addressed whether there had been material non-compliance with an unless order issued on 22 December 2016 by Employment Judge Lloyd and was varied by Employment Judge Hughes (the Unless Order) and if the notice required by r. 38(1) should be given.

2 Within the Compliance Decision I indicated I intended to treat the correspondence lodged by the claimant as an application for relief from sanctions (the Relief Application) and listed it for a hearing on 1 June 2017. Given the claimant in correspondence from the outset of the claim had referred to her state of health I indicated in the Compliance Decision [64] that if she intended to rely upon any medical evidence at the relief from sanctions hearing ideally that should be from her consultant I gave detailed guidance what that should address (see [Compliance Decision/69]). I sought to follow the guidance concerning applications for adjournments on medical grounds in *Teinaz v London Borough of Wandsworth [2002] IRLR 721(CA), Andreou v Lord Chancellor's Department [2002] 728 CA* and *Pye v Queen Mary University of London [2012] UKEAT 0374/11* and the cases that follow.

3 On 25 May 2017 the claimant wrote to the tribunal [620g-h] indicating that she could not obtain a GP appointment until 7 June 2017. Acting Regional Employment Judge (AREJ) Findlay postponed the hearing listed for 1 June 2017 so the claimant could *"obtain any medical evidence she seeks to rely upon"* [620aaa(1)]

4 On 17 May 2017 [617-620] the claimant sought that I recuse myself and also that I reconsider the Compliance Decision. That was referred to me at the start of June 2017 by which time the tribunal also received a number of letters between 16 May and 1 June 2017. I addressed all those issues on 5 June 2017 [620aaa(8)].

5 On 12 and 21 June 2017 the claimant sought answers to a number of questions she posed, and a stay so that outstanding requests for information she had sought could be dealt with and an investigation into matters be completed. I addressed those matters on 22 June 2017; the application for stay was refused [620ccc(10)-(11)].

6 The claimant did not attend today. By an email timed at 18:02 on 27 June 2017 (yesterday) the claimant complained that the tribunal had failed to contact her GP in ascertain her state of health. As I state above it I made clear in the Compliance Decision that if the claimant wished to rely upon medical evidence it is for her to provide that information. The tribunal is an independent judicial body. It is for the parties to bring forward evidence on which they wish to rely, not for the tribunal to seek it out of its volition. That fundamental principle aside, the claimant's medical advisors are subject to patient confidentiality and thus cannot merely correspond with the tribunal without her say so. Thus, even if the tribunal were minded or able to make such requests direct to her medical advisors, her medical advisors would need to seek her approval to respond each time a request was made. She would thus need to be involved at each request. Given the claimant is in any event aware of the detail that would be needed, I set that out at length in the Compliance Decision, that merely duplicates work and causes delay. It is thus unjustified.

7 In her email of 11:02 today (received after the hearing was due to commence) the claimant indicated she could not attend the hearing due to *"blood test and ill health (I supplied information to this effect to the tribunal – see email of 27 June 2017)."*

8 I checked her email of 27 June and whilst it attached a number of notices of hospital appointments none related to an appointment today. Nor do the attachments address the information required in [Compliance Decision/69]. If that blood test was prearranged the first notice that I can discern the tribunal or respondent has had of that is her email timed at 11:02 today.

9 I heard from Ms Criddle. She objected to the way the claimant had conducted matters by making this application so late and without the supporting documentation that I refer to above. She referred to the cost and prejudice caused to the respondent. She told me the claimant had articulated her case at length in her email of yesterday and thus I should accept that as her written submissions (I had indicated in the Compliance Decision [70] that if the event the medical evidence made clear the claimant was not fit to attend that I would consider accepting written submissions).

10 I determined to accept the two emails I refer to above and a subsequent email I refer to below as written submissions from the claimant and that in the absence of written evidence from her medical advisors of a medical appointment, or evidence of her unfitness to attend, given the lateness of the application, the costs the respondent would be put to, the waste of tribunal time and that the claimant had sent lengthy submissions in writing (having been aware for some time of the issues that would be addressed today) that it was in the interests of justice for me to proceed with the hearing today.

11 For completeness sake the final email I refer to above that was received from the claimant was timed at 11:58 today. That principally concerned anomalies in the timings of earlier emails from the tribunal – a reference to a matter the claimant has previously raised concerning the marginal lateness of her 30 page email timed at 00:01 on 4 January 2017 (albeit dated 3 January 2017). Whilst I found in the Compliance Decision that was received one minute late, despite that I considered the

substance of the response and determined that the information supplied did not comply with what was sought by the Unless Order. The claimant appears to focus on my determination it was late rather than the fact it omitted the substantive information required and that she has still failed to do so.

12 Ms Criddle has provided a skeleton [S] of some 17 pages which I read during a break I took so she could consider the various emails from the claimant. Ms Criddle's skeleton relays further an extensive history of events at [S/9-58]

13 In her skeleton argument Ms Criddle states I have set out the relevant law as to the Relief Application in the Compliance Decision [51-58]. That being accepted I will not repeat that here.

14 The respondent pursues an alternative application for strike out (the Strike Out Application) that was first made on 16 March 2017 [565-570]. Ms Criddle asks me to address the Strike Out Application irrespective of my decision in relation to the Relief Application. She also sought written reasons for my decision and that I record that it reserves its position in relation to further applications.

15 As to the Strike Out Application she refers me to one case *Hylton v Royal Mail Group UKEAT/0369/14* as a reminder that the burden was on the claimant to provide evidence if medical reasons were the reason why she had not complied to date and clear evidence that there was a real chance that she would be fit enough to attend the hearing [24] but also :-

> *"21 …. Where accusations have been made on a* http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKEAT/2015/0369_14_2402.html&query=%28Hylton%29+AND+%28v%29+AND+%28Royal%29+AND+%28Mail%29+AND+%28Group%29 - disp17*very*http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKEAT/2015/0369_14_2402.html&query=%28Hylton%29+AND+%28v%29+AND+%28Royal%29+AND+%28Mail%29+AND+%28Group%29 - disp19 *generalised basis, as here, clarity of the accusation is needed. The Respondent is entitled to know what acts it is being accused of, and the Tribunal cannot adjudicate properly unless that is the case. Unless and until that is done, it is difficult if not impossible to have a fair trial. As observed in Johnson* http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKEAT/2015/0369_14_2402.html&query=%28Hylton%29+AND+%28v%29+AND+%28Royal%29+AND+%28Mail%29+AND+%28Group%29 - disp18*v*http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKEAT/2015/0369_14_2402.html&query=%28Hylton%29+AND+%28v%29+AND+%28Royal%29+AND+%28Mail%29+AND+%28Group%29 - disp20 *Oldham [UKEAT/0095/13], parties are entitled to know the case against them.*
>
> *22. It must usually be the case that, where a claim has been struck out because of a failure to provide such information but by the time of an application for relief the information has been supplied, a court will grant relief. The purpose of the orders would have been achieved. Again, as observed in Johnson, the approach should be facilitative rather than penal. That cannot, however, apply where there has been no compliance even at the stage of seeking relief from the order which was made. Orders are made to be observed. As was said by Underhill J (as he was) in the case of Thind* http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKEAT/2015/0369_14_2402.html&query=%28Hylton%29+AND+%28v%29+AND+%28Royal%29+AND+%28Mail%29+AND+%28Group%29 - disp19*v Salvesen Logistics Ltd [2010] UKEAT/0487/09, every case turns on its own facts, and it should not be thought to be usual that relief will be granted from the effect of an unless order (paragraph 36):*

"… Provided that the order itself has been appropriately made, 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 remain possible. …"

16 I had before me a bundle running to 739 pages across two lever arch files. That essentially relates to the correspondence common to both parties. The respondent tells me it sought to provide those bundles to the claimant in advance of today but she has refused to accept the same. I do not need to make a determination on that issue as the only documents I was referred to in the bundle were the common correspondence and thus the claimant has had sight of the same.

RELIEF FROM SANCTIONS

17 I identified in the Compliance Decision [55] six factors from *Morgan Motor Company Ltd v Morgan UKEAT/0128/15* and a further two from the old version of CPR3.9 that the tribunal will generally need to address when considering an application for relief from sanctions. As I state at [54] the Tribunal must take into account all relevant factors and avoid irrelevant factors, thus the material factors to be weighed will vary considerably from case to case. Ms Criddle agreed with that approach and addressed me in turn on those factors. I start by addressing those factors but not in the same order, for reasons that will hopefully be clear.

18 Is a fair trial possible?

18.1 When considering this question the tribunal normally also needs to consider if that question should be determined as at the date of the relief from sanctions application or the date on which the sanction was applied. I found in the Compliance Decision that that the information required to be provided in the Unless Order had not been provided by the date required by the amended Unless Order, as extended. I further found, that the information supplied after the time set by the Unless Order (as amended) had expired did not. I set out my reasons why not at [Compliance Decision/36 & 40]. The detail that I decided was lacking has still not been provided as at today.

18.2 At the heart of the difficulty is that whilst the claimant identified in her claim form and the additional document supplied following a telephone call to the tribunal office on 6 April 2016, a number of claims including *"whistleblowing"* and "*bullying, harassment, discrimination and victimisation*", the claim form does not set out what was said or done by whom and on what dates such that the tribunal and respondent could identify clearly the claims that were being made and how they were put. Similarly, in the additional document submitted by the claimant she makes a number, of what again are general assertions, *"Lots of irregularities …", "Whistleblowing. Failed to investigate my concerns or respondent to my concerns …. Lots of irregularities and cover-up", "Bullying and Harassment – oppressive managers, no measures in place to show meeting Public Sector Equality Duty, Equality Act 2010 …"* without stating what it was that was said or done by whom and on what dates. It is the duty of the claimant to set out his or her case and it is not for the Tribunal or Respondent to have make assumptions about the case to identify what it is about.

18.3 At the hearing on 25 August 2016 the claimant was represented by counsel, Dr Ahmad, he agreed on her behalf to an order in the wider terms originally sought by the respondent on 17 May 2016. The claimant did not comply in full. By the time that non-compliance came to be considered the claimant had ceased to instruct him. The terms of the order for further and better particulars of 22 November 2016 that gave rise to the Unless Order were simplified and

limited to the information sought at paragraphs 1(a), 2(a) and (b) and 8(d) of the *"Respondent's List of Issues".*

18.4 For the reasons given in the Compliance Decision, in my judgment that information was relevant and necessary to allow a fair trial to take place; paragraphs 1(a), and 2(a) and (b) were relevant to whether a disclosure was made and if it was capable of being a qualifying and protected disclosure. Following the amendments made by the Enterprise and Regulatory Reform Act 2013 (ERR) the law differs between disclosures made on or after 25 June 2013 and those before that date. It is thus critical to identify the dates of the alleged disclosures and what was said or done and to whom. The dates and what was said were not identified by the claimant with the necessary detail to enable the respondent and tribunal to identify the statutory regime that applied.

18.5 Head 8(d) related to the unfair dismissal complaint; namely false information was provided to the disciplinary hearing about the claimant. Given the allegation relates to an assertion of a falsehood that goes to both the substance and fairness of both unfair dismissal complaints (s.98(4) and s.103A), potentially also credibility. That information again is thus necessary for a fair trial. The claimant does not address what the false information that was alleged to have been provided in relation to the unfair dismissal claim even if the additional information I refer to at [Compliance Decision/40.4] is taken into account.

18.6 Despite my having identified in the Compliance Decision that the information sought at paragraphs 1(a), 2(a) and (b) and 8(d) had not been provided and what was omitted, the claimant has failed to remedy that omission. I address her reasons why below. Without the information required by paragraphs 1(a), 2(a) and (b) and 8(d) being provided, in my judgment and for those reasons, a fair trial is not possible.

19 <u>The reason for the default and whether it was deliberate</u>

19.1 The claimant acts in person and thus it is not argued that her failure to comply is the fault of a representative. I return to the effect her acting in person has on the issue of relief below.

19.2 Ms Criddle argues that not only did the claimant fail to comply, but that her failure was deliberate. I sought to clarify if Ms Criddle asserted it was a conscious decision on the claimant's behalf not to comply or if in the alternative she asserted that the claimant had not complied in full knowledge of what was required and the time limit for doing so. Ms Criddle confirmed me that she did not seek to assert the former but instead adopted the latter.

19.3 In my judgment, the claimant was or ought reasonably to have aware of what was required of her. She has engaged in a debate at various points over what the contents of paragraphs 1(a), 2(a) and (b) and 8(d) required and if she had complied. Even if she was unclear prior to my Compliance Decision, in my judgment my Compliance Decision set out what had been omitted and why. If that was not so, the claimant has not sought so far as I can identify in the correspondence clarity on what she omitted to provide. If she was unclear she could and should have done so.

19.4 Whilst the claimant has in correspondence made a number of general assertions stating that she has complied previously she does not refer specifically to the documents and where in each she has supplied the information sought. Whilst it is reasonable to expect a party to identify where

information has been provided if there is an issue if it has or not, that is not necessary if it is clear on the face of a document the information has been provided. That is not the case here. In my judgment the tribunal and other party should not be expected to have to search across a large file when the documents in which the information is alleged to have been provided are not clearly identified. When, specific details are required, as here, it is for the person that is required to provide the information to do so clearly and unambiguously. General assertions will not suffice.

19.5 In my judgment the claimant knew or ought reasonably to have known what the request for Further and Better Particulars and Unless Order required and the time limit for doing so and she failed to provide that information.

19.6 The claimant appears to suggest that because of her health the claim should be stayed, during the stay disclosure can be conducted, she should be given access to the respondent's computer system or at least her personal files and NHS email account, she will then be in a position to provide the information sought and the claim can then proceed. I address that below.

20 The prejudice between the parties.

20.1 An unless order is a Draconian sanction; if the claimant does not comply and her claim is struck out she will be deprived of her right to pursue her complaints against the respondent. As part of this decision I therefore must weigh the prejudice to the claimant against that to the respondent.

20.2 Ms Criddle asserts the claim has been ongoing for a year, relates to matters dating back as far as August 2012 (almost 5 years) and thus the cogency of evidence will be diminished by the delay in this claim coming to trial.

20.3 As yet the claim is still far from trial; Ms Criddle repeats the respondent's assertion that the claimant's failure to date to provide the required detail of the disclosures means it still does not know the case it has to meet and thus it cannot prepare its case properly. Further, there is no prospect of that information being provided and thus no prospect of the claim being triable in the foreseeable future.

20.4 Given my finding above that a fair trial is not currently possible in my judgment the prejudice to the respondent is substantial and that will increase because memories of events are bound to fade as time passes.

20.5 Ms Criddle also points me to the prejudice arising from the way the claim has been pursued by the claimant resulting in a disproportionate level of correspondence on this file. The tribunal file has some 300 plus items of correspondence, referrals and instructions. Many run to multiple pages That is shown by the size of the bundle for this hearing which for the most part only includes pleadings, orders, inter parties correspondence and correspondence between the parties and the tribunal, and yet which fills two lever arch files. The claim has not, as yet, reached disclosure. Despite that Ms Criddle points out the respondent has incurred substantial legal costs; excluding VAT I am told they are £80,000.

21 The policy objective behind unless orders.

The importance of finality in litigation.

The extent to which the party in default has complied with rules, orders etc.

21.1 I turn to these matters together because the first two of these three heads were addressed at the same time by Ms Criddle and in so doing she also

dealt with the third. She argues multiple orders dating back to the outset of the case that claimant has not complied with or has complied late:-

21.1.1 The order of EJ Lloyd of 5 July 2016 concerning the provision of medical evidence by the claimant [Compliance Decision/23]

21.1.2 The particulars provided by the claimant on 23 September 2016 did not fully address what had been required by the order of 25 August 2016 and was complied with late. Ms Criddle asserts that should properly have been the subject of an application for relief from sanctions yet EJ Lloyd waived the slight delay having concluded it was in the interests of justice to do so.

21.1.3 The orders of 25 August 2016, 29 November 2016 (which gave rise to the Unless Order) and the Unless Order of 22 December 2016.

21.1.4 Despite my making clear in the Compliance Decision that any application to refer to the claimant's medical condition needed to be supported by medical evidence the claimant continues to refer to the same without providing that evidence (despite the claimant having been treated by AREJ Findlay as having sought an adjournment to enable her GP for that purpose)

21.2 Ms Criddle stated the information that was sought of the claimant in the Unless Order was first canvassed at the Interim Relief Hearing on 16 May 2016 and thus the claimant has been aware of what has been sought for over a year and yet it has still not been provided.

21.3 I accept that there has been not merely a failure by the claimant to adhere with one order but several and that that non-compliance has continued over an extensive period. That breach is compounded because in relation to (21.1.4) the claimant in my judgment understood or ought reasonably to have understood that medical evidence was required of her. She sought time to provide it. In my judgment she knew or ought reasonably to have known what was expected of her and yet in my view has not complied with the tribunal's direction.

22 The availability of alternative sanctions.

22.1 The tribunal must approach this area with some care as is shown by *Morgan Motor Company Limited v Morgan UKEAT/0128/15. There* the ET had taken into account that a costs order could be made. On appeal the EAT cautioned that such an order could be sought by the other party regardless of the outcome of the relief application, and given the balancing exercise included factors that were irrelevant the ET's conclusion was unsafe, and was remitted for consideration afresh.

22.1 Ms Criddle states there are no alternative sanctions available here because a fair trial is not possible for the reasons I summarise at (18) above. She reminds me of the claimant's noncompliance with the orders I refer to at (21). The respondent suggests that none compliance was blatant. Whether that is blatant or not I need to consider if an effective sanction is available which goes hand in hand with compliance.

22.2 The claimant appears to suggest that because of her health, the claim should be stayed, during the stay disclosure can be conducted, she should be given access to the respondent's computer system or at least her personal files and NHS email account, she will then be in a position to provide the information sought and the claim can then proceed.

22.3 Whilst that method is undoubtedly a way forward it does not include a sanction or means of enforcement. As Ms Criddle points out the claimant has not complied with the existing order, and has not attempted to do so following the omissions having been identified by me in detail in the Compliance Decision.

22.4 As I state above at the hearing on 25 August 2016 it was accepted on the claimant's behalf that the claimant needed to supply more detail to the respondent. None of the practical requirements that she now attaches were imposed on the provision of that information. Ms Criddle asserts that it was not until September 2016 the claimant first suggested access to her NHS email account and personal files etc. was required. At the 25 August 2016 hearing the claimant was represented by counsel and thus had access to legal advice. Had the requirements she now identifies been an issue for her then she could and should have raised them at that time. She did not so far as I can discern.

22.5 Nor does the claimant adequately address in the extensive correspondence she has engaged in, where she identified that or why the position is different so that she now needs that access.

22.6 In my judgment, there is a further problem with that course, despite the order of EJ Lloyd of 5 July 2016 and my Compliance Decision [69] the claimant has not provided medical evidence of her fitness. In my order I specifically sought the detail I did to enable a view to be taken if the claimant was not fit, when she was likely to be so, if at all. That evidence is not before me. Thus, if I accept the premise on which the claimant's suggested way forward is based, (namely that she is not fit) there is no evidence before me when she is likely to be fit if at all and how long this litigation will continue for.

22.7 The claimant's suggested way forward fails in my judgment to address the further delay and the prejudice to cogency that gives rise to that I refer to above (19.3). Further, that alternative way forward provides no sanction or means of ensuring compliance by the claimant, and given the claimant's failure to comply with orders to date I conclude there is no prospect of the information required by the unless order being provided by the claimant.

23 Whether the application for relief was made promptly.

23.1 An application is required to be made state within 14 days of the notification being sent (r. 38(2)). Whilst an application was not expressly made Ms Criddle accepted that an application was implied from the correspondence from the claimant and the implied application was made promptly.

24 Other.

In addition to those matters the following points either directly or indirectly also arise:-

24.1 The reasonableness of the claimant's conduct.

24.1.1 The claimant in correspondence continues to argue that the respondent should not have been granted an extension of time to lodge its response and/or the response having been lodged late it should be struck out and judgment entered in her favour. Similarly, she argues the refusal of her application for interim relief was wrong, latterly seeks to argue that hearing was improperly constituted and was thus null and void and her claims other that those pursuant to ss.94-98 and s.103A ERA should not have been struck out.

24.1.2 On presentation, the tribunal file records on the notice of claim (being made against it) the respondent was given until 17 May 2017 to lodge its response. The day before the response was due the interim relief hearing was heard. Ms Criddle told me she was instructed to make an application for an extension of time at that hearing because the claim needed particularising. She told me she made the application orally. As counsel, she is an officer of the court. I would on that basis alone accept that was done. Having checked EJ Lloyd's note of the hearing he appears to record that application was made. That reinforces Ms Criddle's account that that application was made.

24.1.3 There was a fire alarm during that hearing after which the claimant did not feel able to attend the reconvened hearing. I can understand therefore that EJ Lloyd did not address the application in his order. I find however it had been made.

24.1.4 Irrespective of those matter in any event that extension application was repeated in writing alongside the application for particularisation the following day, 17 May 2016 [40]. The written request for an extension of time was thus made before time expired (pursuant to r.20) and thus r. 18(1) - rejection of late responses is not engaged.

24.1.5 The application for an extension was only addressed for a variety of reasons by EJ Lloyd on 25 August 2016. He granted the application and time was extended to 20 October 2016, 28 days after the claimant had been ordered to file particulars of her claims. The respondent lodged its response on 20 October 2016 but asserted certain particulars had not been provided.

24.1.6 In my judgment, it was lodged in time and thus it was correctly accepted. Despite that the claimant has consistently sought to assert that the tribunal should not have accepted the response.

24.1.7 The respondent refers to the claimant's continued references to that issue as an example of her persisting to repeat applications that have been addressed as one example of many by the claimant of unreasonable conduct.

24.1.8 Another example relied upon is the claimant seeking to argue the Interim Relief Hearing was void. Similarly, as to the argument the claimant subsequently raised in relation to the dismissal of her claims other than the two forms of unfair dismissal (ss.98(4) and 103A ERA*)* on the basis she did not early conciliate via ACAS. The claimant argues the failure to address Early Conciliation was not explained to her yet having considered EJ Lloyd's note it suggests discussion took place and the order suggests that was agreed by counsel.

24.1.9 Those examples suggest in my view that having reflected on events the claimant appears to have a different view in hindsight of matters to that which she had at the time.

24.1.10 Whilst viewed in isolation explanations might account for the same collectively in my judgment they constitute unreasonable conduct on the claimant's part because by repeatedly pursuing those issues has substantially increased the time this claim has required.

24.1.11 Other examples the respondent relies upon include the claimant apparently seeking the hearing listed on 1 June 2017 be postponed on the basis she had left the 5 to 9 June 2017 free for the final

hearing albeit at the same time she referred to being placed under "house arrest" [620b of 18 May 2017], the claimant's freedom of information and subject access requests [666-669], the claimant insisting on liaising with the CCG and CSU despite being told that any correspondence was to be with their solicitors, chasing responses before the time for response had been provided and making repeated requests for subject data when this has been provided and other requests that the respondent considers vexatious.

24.1.12 There is no evidence (in the form of witness statements introducing the matters at (24.1.11) into evidence) and the witnesses not having been called there is no evidence before me to enable me to make findings on those matters

24.2 The impact on the tribunal's resources

24.2.1 I indicated in the Compliance Decision [56] by reference to *Singh* that the overriding objective of dealing with a case justly includes having regard to the impact of it on the resources of tribunals. That is to ensure that one case does not does not exhaust a disproportionate share of them, and so deprive other cases of time, or delay the start of them, per Smith LJ in *Neary:-*

> *"64. … The overriding objective requires that the management of the case should result in the case being dealt with justly as between both parties. It also requires the judge to consider the appropriate use of the resources of the court or tribunal. It is entirely within the overriding objective for a judge to take the view that enough is enough. That stage will more readily be reached in a case of deliberate and persistent failure to comply than one where there is some excuse for it. …"*

24.2.2 That point was repeated by Langstaff P in *Harris v Academies Enterprise Trust UKEAT/0102/14, [2015] ICR 617, [2015] IRLR 208:-*

> *"33. … justice is not simply a question of the court reaching a decision that may be fair as between the parties in sense of fairly resolving the issues; it also involves delivering justice within a reasonable time. Indeed, that is guaranteed by Article 6 of the [ECHR]. It must also have regard to cost. Even if the Employment Tribunal is not in the same position as the civil courts because there is no cost-shifting regime, it was designed as a cost-free forum in so far as party-and-party costs were concerned. That is true of most Tribunals; it is a particular feature of most Tribunals. I would accept, too, that overall justice means that each case should be dealt with in a way that ensures that other cases are not deprived of their own fair share of the resources of the court. If a case drags on for weeks, the consequence is that other cases, which also deserve to be heard quickly and without due cost, are adjourned or simply are not allotted a date for hearing."*

24.2.3 Despite EJ Lloyd, AREJ Findlay and myself having asked both parties at different stages of the case and in different ways to reflect on the volume and size of the correspondence, the claimant has continued to send lengthy letters to the tribunal many of which contain submissions that she would no doubt wish to make at a final hearing but cannot be the subject of a substantive consideration at this stage. Many of those submissions are based upon the tribunal being asked to make substantive determinations by the claimant based solely upon assertions by her and without hearing the

evidence from both sides the effect of which would be to determine her case in her favour. Many of those emails are in sent in quick succession and on occasions seek an earlier email is disregarded.

24.2.4 Those matters and the repetition of points that I make substantive determinations upon at (24.1) have in my judgment resulted in this claim taking up a disproportionate amount of the tribunal's resources.

DISCUSSION AND CONCLUSIONS

25 Having looked at those matters I have stepped back and considered matters in the round. I have set out at (18) above, why I consider a fair trial is not possible without the information that was required by the Unless Order. In my view the claimant knew or ought to have known what was required of her by the Unless Order and the order for further and better particulars that preceded it. She continues to fail to provide the information required despite in my view, it being clear what was omitted and why that was relevant. The claimant has failed to provide an adequate explanation why that has not been provided, having previously agreed with the assistance of counsel to provide it.

26 Her application for the stay does not address the failure to provide that detail, all the matters for which details are sought in the Unless Order should be known personally to her. In my judgment given the repeated failures to provide that information the evidence suggests there is no prospect of it being provided in the near future. Whilst that might suggest an inability on the claimant's part to engage substantively with the content of the claim and as I state above I must take into account that she acts in person that is at odds with the content of some of the correspondence from the claimant which identifies an ability to investigate and address technical issues in great detail but also a preparedness to make serious accusations against named individuals.

27 Taking into account the delays to date that lapse of time will cause substantial prejudice to the respondent and named individuals for the reasons I give above. The fact the claimant appears to be unable to provide the detail of what is alleged reinforces the potential effect on cogency that stem from the delay.

28 The respondent argues, and I accept, that the claimant's conduct of the claim has substantially increased the costs of defending the claim, examples of which I have set out above, the claimant repeating issues have not been addressed (or addressed properly) when they have, engaging in long correspondence that at times have little discernible relevance to the issues at hand and without cross referencing where detail that is alleged to have been provided is set out have taken a disproportionate amount of the tribunal's resources.

29 Despite the draconian nature of the sanction and that the claimant is a litigant in person, the absence of an available effect lesser sanction and what I conclude is the minimal likelihood of compliance without it, leads me to conclude that there are no viable alternative sanctions and the prejudice to the respondent that I identify in the preceding paragraphs leads me to conclude, looking at matters in the round, that it is not in the interests of justice that the r. 38(1) notice dated 4 May 2017 confirming that the claimant's claim was struck out on 3 January 2017 be set aside.

Strike Out

30 The provision concerning strike out are contained in r. 37 so far is relevant here:-

> ***"37****(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*

…

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

…

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing."

31 Whilst Ms Criddle asserts the way the claimant has conducted aspects of her claim have been scandalous, principally she argues it has, overall, been unreasonably conducted based on the arguments I summarise above (24.1). Further, she argues a fair trial is no longer possible.

32 In *Blockbuster Entertainment Ltd v James [2006] IRLR 630* the CA albeit in a case concerning rule 87 of the 2003 rules held that the power to strike out was a *"draconic power not to be too readily exercised".* Sedley LJ continued:

"5. … The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response. The principles are more fully spelt out in the decisions of this court in Arrow Nominees v Blackledge [2000] 2 BCLC 167 and of the EAT in De Keyser Ltd v Wilson [2001] IRLR 324, Bolch v Chipman [2004] IRLR 140 and Weir Valves v Armitage [2004] ICR 371, but they do not require elaboration here since they are not disputed. It will, however, be necessary to return to the question of proportionality before parting with this appeal."

33 Given the claimant was not present I considered whilst in tribunal, Harvey P1.1.T.(3) and the cases principally referred to therein *Bennett v London Borough Of Southwark [2002] EWCA [2002] IRLR 407* and *Arriva London North Ltd v Maseya UKEAT/0096/16* amongst others. Save that the latter reminds me that a structured approach and careful analysis of the facts is required, Harvey and those authorities in my judgment reinforce the position set out in *Blockbuster* and the cases cited in the paragraph above. I gave Ms Criddle an opportunity to address me upon the same. She concurred with the view I reached of the same.

34 Rule 37 in my judgment thus imports a two stage test. The first stage is to consider whether any of the grounds (a)-(e) have been established. Thereafter, I have to consider whether or not to exercise the discretion *("… a Tribunal may strike out …")* in favour of striking out; that is question of proportionality.

35 In my judgment, the two cardinal conditions outlined in *Blockbuster* are in the alternative as is connoted by use of the word "either". For the reasons I give above in the absence of the information required in the unless order being provided a fair trial will remain impossible. The claimant has not remedied the failure. The claimant suggests she is unable to do so and proposes an alternative way forward because she is unwell. Contrary to my order she has not supplied the medical evidence either in the detail I identified or at all to show that she is unfit and if she is not fit, if she will ever be fit to do so and when that is likely to be. She continues to assert she is unfit contrary to my order that she was required to supply evidence to support the same. I indicated that if she sought a postponement based on her fitness again medical evidence was to be provided. The burden is on her to do so. She has not done so. She has sought a postponement notwithstanding the absence of the medical

evidence. In my judgment, she thus has disregarded orders that she is clearly aware of. I say disregarded because I find that is so; those points were made clear to her. The claimant has engaged in detailed and lengthy correspondence with the tribunal and respondent which as Ms Criddle points out shows the claimant is capable of engaging in complex matters; in particular, she refers me to the claimant's email of 28 June 2017 timed at 11:02 refers to Art. 6 ECHR cases of the European Court and *Balls v Downham Market High School [2011] IRLR 217* on strike out.

36 I concluded there is no prospect of the information required by the unless order being provided by the claimant. The events that are the subject of those requests date back as far as August 2012. The claimant's failure to date to relay the detail of what she alleges were the disclosures and the false information (see [30] of the Compliance Decision) highlights a critical effect on the cogency of the evidence stemming from the delay. That issue is compounded because this claim has not as yet reached the disclosure stage nor can that stage be completed until he information required by the unless order is provided (although I accept much of the disclosure has been provided at least from the respondent to the claimant in the form of subject access and freedom of information requests). Similarly, for the provision of witness statements. The claim is thus still a long way from trial.

37 In my judgment, the way the proceedings have been conducted by the claimant has been unreasonable and it is no longer possible to have a fair hearing in respect of the claim. For the reasons I give above no alternative sanction is available and the way forward suggested by the claimant does not address the issues I identify in that regard. Whilst strike out is Draconian sanction, for the reasons I give above, in my judgment in this case it is a proportionate one. Accordingly, and in the alternative, the claim is struck out.

Employment Judge Perry

11 August 2017

Sent to parties

14 August 2017