Appeal No. UKEAT/0268/18/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 18 February 2019

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MS J MC CARRON — APPELLANT

ROAD CHEF MOTORWAYS LIMITED & OTHERS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS J MCCARRON (The Appellant in Person)
For the Respondent	MS L GOULD (of Counsel) Freeths LLP 5 New York Street Manchester M1 4JB

SUMMARY

PRACTICE AND PROCEDURE – Striking-out/dismissal

The Claimant's claims included disability discrimination. The Respondents did not admit the Claimant's disabled status in law. At a case management hearing, a further Preliminary Hearing was listed, to determine the issue of whether the Claimant was a disabled person in law. The Judge indicated that, on the basis of the current evidence, the Claimant's case on this point looked likely to fail. Orders were made, setting a deadline for her to provide any further impact statement and any further medical or similar evidence, on which she wished to rely at that hearing. That deadline was subsequently extended, but no further evidence was provided. The Respondents then applied for the disability discrimination claims to be struck out. However, the Tribunal made an Unless Order, in equivalent terms to the original order, but setting a fresh deadline. An impact statement was provide by that deadline, but no other evidence. The Tribunal then issued a notice, under Rule 38(1), declaring that the Unless Order had taken effect and the disability discrimination claims had been dismissed. The Claimant appealed that determination.

Held: On a proper construction of the Unless Order, the direction to provide "any" medical evidence or similar evidence relied upon did not require the Claimant to produce such evidence, but required her, *if* she wished to rely on "any" such evidence, *then* to produce it by the deadline set in the Order. Accordingly, the Tribunal had erred in determining that, because the Claimant had not provided any such evidence, she was in breach of the order, and erred in declaring that her disability discrimination claim had therefore been dismissed.

HIS HONOUR JUDGE AUERBACH

Introduction – The Tribunal Proceedings

1. This matter began with the presentation of a claim form by the Claimant in the Employment Tribunal, now the Appellant, to the Watford Employment Tribunal in August 2017. She presented complaints of unfair dismissal and disability discrimination, alleged to have occurred in various ways by reference to the claimed disability of dyslexia. The Claimant was a litigant in person from the outset and, save that she was assisted by an ELAAS representative at the Rule 3(10) Hearing in the Employment Appeal Tribunal ("EAT"), to which I will come, has been a litigant in person throughout the conduct of her appeal.

2. The Respondents to the Tribunal claim were the Claimant's former employer and a Site Director at the motorway service area where she worked. The Respondents have been throughout represented by solicitors and counsel. In their response to the original claim they disputed the Claimant's status as a disabled person in fact and law. They also raised an issue as to their knowledge of her claimed disability. They also raised issues as to what she said was the impact of her claimed disability. In any event, they disputed all of the claims on their merits, their case being that she was fairly dismissed for conduct, and that, even if she was a disabled person, and even if the knowledge issues went against them, nothing they had done amounted to disability discrimination as alleged.

3. A case management Order was made at an early stage, apparently on paper, by Employment Judge Postle, and sent to the parties on 8 November 2017. It included the following:

> **".1 The Claimant is to set out precisely the nature of her disability and to provide medical evidence in support of her disability together with a short statement setting out the impact**

the alleged disability has on her day-to-day activities and sent to the Respondent and copy to the Tribunal by no later than 24 November 2017."

4. On the last day for compliance with that Order, 24 November 2017, the Claimant emailed the Employment Tribunal ("ET") and the Respondents' solicitors. Attached to that email was a document, which in the first section provided what may be called an impact statement. It began:

> **"Dyslexia has no direct impact on my everyday activities and ability, given that over the years I have adapted and learned various coping strategies in order to overcome the effects, but under extremely stressful conditions and stressful events then my dyslexia will directly impact my abilities."…**

5. She went on to refer to: what she said was the effect of stress and pressure situations; how, according to this statement, the technical aspects of her role interacted with her dyslexia; environmental work factors and how they, according to the statement, would have an impact; and what she said was her sensitivity to the impact of what she described as negative communication. She went on to state that she was not in a financial position to provide what she called "documented evidence of my dyslexia." However, she attached copy documents, which she said demonstrated that the Respondent was aware that the issue had been raised internally during her employment. Later sections of this document set out her substantive case in more detail about alleged acts of discrimination.

6. On 28 November 2017 the Claimant sent in a copy of what appears to have been a manuscript note, said by her to be relevant to this question as well.

7. A Preliminary Hearing for case management purposes took place before Employment Judge Sigsworth on 1 December 2017. The Claimant appeared in person, the Respondent by Ms Gould of counsel, who indeed has appeared today at the Appeal Hearing before me.

8. Under the heading "Case management discussion" there were a number of paragraphs and then the following:

> **"1. The Claimant's claims are for unfair dismissal and disability discrimination. Dismissal is admitted, for the reason of misconduct. Unfairness is denied. The Claimant alleges that she is disabled by reason of dyslexia. However, she has produced no medical or other evidence in support of a diagnosis of dyslexia or in respect of the severity of it. She has provided the Respondent with a disability impact statement, which states that her dyslexia has no direct impact on her everyday activities and ability, as she has adopted coping strategies.**
>
> **2. Thus, on the basis of the evidence as it stands, it is unlikely that the Claimant will be able to establish that she has a disability. She will be given a further opportunity to obtain the necessary evidence. The Tribunal recognises that she is unrepresented and may not have fully understood what was required of her, The Employment Judge at this hearing endeavoured to make full explanations to her. The first step would be for her to go to her GP and obtain a referral to a specialist for an examination and a report. However, she has not been to her GP complaining of any symptoms of dyslexia, although she has sought consultation with her GP in connection with stress, which she says is related to her dyslexia.**
>
> **3.The Respondent considers that the Claimant's substantive case on disability discrimination is any event weak and, as against the second Respondent, potentially out of time. They also consider that the Claimant's unfair dismissal case has little merit as the Claimant was already the subject of two live written warnings when further misconduct arose."**

9. The Judge went on to indicate that it appeared appropriate to list a Preliminary Hearing to determine the issues that he had identified, and also, provisionally, a Merits Hearing for dates in May 2018.

10. Under a section dealing with Orders, after directing a schedule of loss, there were three paragraphs under the heading, "Disclosure of documents":

> **"2. On or before 9 February 2018, the Claimant is ordered to disclose to the Respondents any medical evidence or similar relied on to establish that she is disabled within the meaning of Equality Act 2010 by reference to her dyslexia.**
>
> **3. On or before 9 February 2018, the Claimant is ordered to send to the Respondents any further disability Impact statement.**
>
> **4. On or before 23 February 2018, the Respondents are ordered to provide to the Claimant and to the Tribunal their grounds for their application to strike out the claims or in the alternative for a deposit order."**

11. Further on, the Judge's Orders set a date for a Preliminary Hearing on 25 March 2018 to determine four issues. The first of these was "whether the Claimant is disabled by reason of dyslexia." The second was, "whether the claims of disability discrimination should be struck out as having no reasonable prospect of success or alternatively whether a deposit Order should be made if a determination is made that the claims have little reasonable prospect of success." The

other two issues concerned a time point in relation to the disability discrimination claim against the Second Respondent and whether there should be a deposit Order in respect of the unfair dismissal claim.

12. On 5 February 2018 the Claimant emailed the Tribunal that she had what she described as: "a pending deadline of 9 February to show the court proof of my dyslexia." She said, however, that she was unable to do so, because she had not been able to secure an appointment, but was trying to get one for 21 February, with the British Dyslexia Association. She asked for an extension of the deadline.

13. On 12 February the Respondents' solicitors objected that the Claimant had had a substantial amount of time to provide evidence in relation to her alleged disability. In addition, when no further word was forthcoming from the Tribunal, they wrote again on 20 February restating their objection and their concern that the Preliminary Hearing date was in jeopardy. However, on 24 February, the Tribunal wrote to the parties that the correspondence had been referred to Employment Judge Laidler, who had granted the Claimant an extension to 1 March 2018 to provide medical evidence of her disability.

14. On 6 March the Respondents' solicitors wrote again that no correspondence had been received and asserting that the Claimant remained in breach of the directions. They asked the Tribunal at this point to give consideration to striking out the claims for disability discrimination and vacating the hearing set for 25 March.

15. On 14 March, the Tribunal sent to the parties an Unless Order made under Rule 38 of the **Employment Tribunals Rules of Procedure 2013** ("ET Rules") by Employment Judge Laidler. The full text appears at page 1 of my bundle:

> **"On the application of the respondent and having considered any representations made by the parties, Employment Judge Laldler orders that-**
>
> **Unless by 4pm on 29 March 2017 the Claimant disclose to the Respondent**
>
> **1. Any medical evidence or similar relied on to establish that she is disabled within the meaning of Equality Act 2010 by reference to her dyslexia.**
>
> **2. Any further disability impact statement.**
>
> **The complaint of disability discrimination will stand dismissed without further order.**
>
> **The Judge's reasons for making this Order are that:**
> **1. the Claimant did not comply with the original order requiring this to be done by 9 February 2018.**
>
> **2. She was granted an extension to 1 March 2018 but no compliance has been received."**

16. Also, that day, the Tribunal emailed the parties that Employment Judge Laidler had given directions for the Preliminary Hearing previously listed for 20 March to be postponed.

17. On 28 March the Claimant sent an email and attachments to the Respondents' solicitor:

> **"Please find attached disability impact statement as requested from the court on 14 March 2018. Unfortunately I am unable to comply with the full Unless Order due to the BDA being unable to give me a definitive date to be assessed and also due to financial constraints that I myself have encountered."**

What was attached was a revised version of a disability impact statement.

18. On 29 March the Respondents' solicitors wrote to the Tribunal, referring to that statement having been provided, but asserting that the Claimant had failed to provide any medical evidence or similar to establish that she was disabled by reference to dyslexia, and continuing:

> …
>
> **"We now request that consideration is given to striking out her claim for disability discrimination on the basis that the claim is without merit."**

19. On 29 April 2018, the Tribunal wrote to the parties a letter headed, "Confirmation of Dismissal of Claim **Employment Tribunal (Rules of Procedure) 2013**, Rule 38" and reading:

> **"Further to the unless Order sent to the parties on 14 March 2018, which was not complied with by 29 March 2018, the claims have been dismissed under Rule 38."**

20. Following an email from the Respondents' solicitors seeking clarification, a further letter was sent by the Tribunal on 23 May 2018, which began:

> **"Employment Judge Laidler directs as follows:**
>
> **The original unless Order of the 14/03/18 provided that if there was further non-compliance "the complaint of disability discrimination will stand dismissed without further Order."**
>
> **The letter of 29/04/18 therefore contained an error in stating all claims were dismissed. The Unfair Dismissal claim remains to be determined. "**

21. In addition, it indicated that the full hearing originally scheduled for May had already been postponed, but would now be relisted. I interpose that I have been informed at this hearing that, because of this ongoing appeal, the unfair dismissal claim has yet to be relisted for a Merits Hearing, or at any rate that such a hearing has yet to take place.

The Appeal

22. The Claimant presented a Notice of Appeal to the EAT with grounds of appeal attached, on 4 June 2018. A further document in support of her appeal was received at the EAT on 18 June 2018. She indicated that she was seeking to challenge the dismissal of her disability discrimination claims under Rule 38, dated 29 April 2018. She referred to the overriding objective. She argued that the Respondent had acted inappropriately because it had had knowledge of her dyslexia during the course of her employment. She referred to materials which she said demonstrated this to be the case.

23. On preliminary consideration, a Judge considered that the original grounds of appeal were not arguable, and the Claimant then sought a hearing under Rule 3(10). At that hearing, the Claimant had the benefit of the assistance of an ELAAS representative. The Judge permitted amended grounds of appeal to proceed to a Full Hearing, the terms of which were recorded in a manuscript document that appears at page 17 of my bundle as follows:

> **"1. The Employment Tribunal erred in law in failing to have regard to the partial compliance with the order of 29 March 2018 and/or**
>
> **2. The Employment Tribunal erred in law in failing to properly read the content of the Appellant's email sent at 22.07 on 28 March 2018 as an application for relief from sanctions."**

An Answer was then put in and the matter has proceeded to this hearing.

24. In the run-up to this hearing skeleton arguments were tabled, and exchanged, and chronologies were also tabled. During the course of the hearing today, I have heard oral arguments from the Claimant, once again representing herself, and Ms Gould on behalf of the Respondent. I had a bundle that had been prepared by the Respondents' solicitors and a further bundle containing a number of authorities referred to by them. The Claimant had also prepared an extensive supplementary bundle.

25. In opening discussions, the Claimant indicated that she wanted to rely on materials in her supplementary bundle and what she described as new evidence which she said she understood was to be considered at this hearing. She reiterated points she had made in her original Notice of Appeal to the effect that the Respondent had been told during the course of her employment that she was dyslexic and what the effects were, and that it was not true that they did not have any knowledge of this, as claimed in their Notice of Appearance in the Tribunal. She said that it was wrong that the Judge who determined that her disability discrimination claims stood dismissed had not taken account of that material; wrong, when all these matters had been raised during her

employment, that the Respondent had been permitted to contest the knowledge issue; and wrong that her claim had been dismissed without any consideration being given to the underlying merits.

26. In that initial discussion, I explained to the Claimant the distinction between the dispute as to whether she was a disabled person in fact and law, and the question of the merits of her underlying claims of disability discrimination, if indeed she was a disabled person. I explained that the Order that was under appeal was concerned with matters relating to the first issue, and not the second issue, and, therefore, that it was not relevant on consideration of this appeal for me to be concerned with materials relating to the underlying substantive merits of the disability discrimination claims, nor indeed the underlying knowledge issue.

27. Also in the Claimant's supplementary bundle were some materials that the Respondents' solicitors had also placed into the main bundle, consisting largely of correspondence between the Claimant and the British Dyslexia Association, charting the course of her exchanges with them about seeking to get an assessment carried out by them. It appeared in the opening discussion that there was actually a measure of agreement between the Claimant and Ms Gould that this material was not, or may not, be relevant to what I had to decide today, since it was not all in front of the Judge who took the decision under challenge on this appeal. However, Ms Gould acknowledged that, if I considered that the Judge had erred in law by not giving sufficient consideration to the possibility that the Claimant might have been seeking relief from sanctions, then that material might fall to be considered by the ET on any subsequent remission to it.

28. Since this was the Claimant's appeal, the usual approach would have been for her to make her oral submissions first, for Ms Gould to respond and then perhaps for there to be some further reply from the Claimant. However, the Claimant indicated that she would prefer Ms Gould to go

first. Accordingly, it was agreed that she would do so, but on the basis that there would then be a response from the Claimant and possibly some further discussion before I came to any decision.

29. Ms Gould's principal submissions, both in writing and orally, were as follows. In relation to ground 1, she said that this was a case where the Unless Order had covered two distinct matters. One was the provision of a further impact statement and the other was the provision of further medical or similar evidence. In her written submissions, she suggested that the further impact statement provided by the Claimant did not actually add anything of real substance to her original impact statement.

30. However, either way, her principal point was that, even if the Claimant had done sufficient to provide an impact statement, she had not provided any medical or similar evidence. These were two distinct matters. It could not be said that, because the Claimant had provided a sufficient impact statement, therefore there was sufficient compliance with the Order overall. The test of compliance with an Unless Order was qualitative and not quantitative, as well-established by the authorities. Therefore, the failure to provide any medical or similar evidence meant that the Judge had been right to conclude that there was material non-compliance with the Unless Order, and the provision of an impact statement or a further impact statement made no difference to that.

31. Regarding ground 2 and relief from sanctions, Ms Gould submitted that the email and attachment relied upon, sent by the Claimant on 28 March, could not be treated as having stopped the clock in relation to the deadline set by the Unless Order; see in particular the discussion in **Redhead v London Borough of Hounslow** UKEAT/0409/11/MAA.

32. At best for the Claimant, it might be argued that this was, as it were, a pre-emptive application for relief from sanctions, on the footing that the email was to be read as asking that, if the Tribunal were to decree that the Unless Order had not been complied with, then it should consider whether relief from sanctions should then be granted in accordance with Rule 38(2). However, Ms Gould submitted, there was no such application in terms in the email or attachment of 28 March. The Judge was not obliged to spell out from that email and its attachment, an application that the Claimant *could* have made, but had *not* specifically made. Therefore, there was no error of law in the Judge not treating that as an application for relief from sanctions.

33. During the course of submissions, I raised with Ms Gould a point that had occurred to me as potentially requiring consideration, on my reading into the papers. I did so because the point had jumped out to me, but without prejudice to what Ms Gould or indeed Ms McCarron might say about whether this was a point that I could or should consider, through one route or another. This concerned the fact that Judge Sigsworth's Order referred to the provision of "any" medical evidence or similar to be relied upon by the Claimant, and that the Unless Order also used the same phraseology, referring to "any" medical evidence or similar relied on, and indeed "any" further disability impact statement.

34. It might, therefore, be said that, when considering whether the disability discrimination claim should be treated as having been dismissed for non-compliance with the Unless Order, the Judge should have considered whether failure to produce medical evidence did in fact amount to a breach of the Order at all, or whether the position was simply that, having not produced "any" such evidence by the deadline set, the Claimant would, or might, thereafter not be permitted to produce any such evidence that she wished to rely upon at a later date.

35. Ms Gould submitted, when I raised this with her during the course of submissions in the morning, that that point did not properly fall to be considered as part of this appeal. Firstly, it was not within the scope of the amended grounds of appeal, and in particular, not within the scope of ground 1. Ground 2 was obviously concerned with something else. Secondly, she said it ought not to be considered on the basis of an amendment, in circumstances where we were now at the Full Hearing before the EAT and there had been an opportunity to amend the claim at the Rule 3(10) hearing, and the Claimant had had an ELAAS representative at that time; and, indeed, the point had not been raised by the Claimant herself today but, rather, highlighted by me.

36. Alternatively, considering the point on its merits, she submitted that it was not a good point. Everyone had understood and treated the Order as mandatory, in terms of requiring medical evidence to be produced, rather than permissive, setting a deadline for any evidence that was to be relied upon to be produced, if at all. She said it was significant in this regard that the Order referred to medical or similar evidence, recognising that where the disability relied upon was dyslexia, conventional medical evidence might not be needed, but other specialist or expert evidence might suffice; but that the sense of the Order was that it *had* to be one or the other.

37. In fairness to Ms Gould, and because she indicated that she would wish to have the opportunity to take instructions from her solicitors, although she had her clients with her at the hearing, and because, indeed, she had to appear on another appeal during the course of the morning, I put back consideration of this aspect until 2pm.

38. In the meantime, the Claimant responded on the other points of appeal in general. When she did so, and notwithstanding our initial discussion, the Claimant returned to the original themes that she had highlighted at the start of our discussions. She wished to go back to what was in her

original grounds of appeal and the supporting document she had put in later in June 2018, to refer to materials in the supplemental evidence bundle, and to reiterate her arguments: that the Respondent was told during the course of her employment that she had dyslexia and what its effects were; that the Respondent had wrongly denied this in its grounds of resistance; that it should not have been permitted to reopen the issue during the course of the Tribunal proceedings; and that the Employment Judge had erred by failing to give any consideration to the merits of her substantive disability discrimination claims, or the various materials which showed the state of knowledge that the Respondents had had, and failing to consider the way in which these issues had all been raised during the course of the employment.

39. When we reconvened at about 2.30 this afternoon, Ms Gould had had the opportunity to confirm instructions with her solicitors. She maintained that the point about whether the Unless Order was essentially mandatory or permissive in nature was not within the scope of ground 1 of the grounds of appeal and, for reasons I have described already, that it should not now be entertained as an amendment.

40. She also developed that argument, referring to the provisions of the EAT's Practice Direction concerning amendments, and in particular the starting point being that there is no right to amend, but an application must be made; and that in accordance with the Practice Direction a proposed amendment would normally need to be set out in writing. She also referred to established authority concerning factors to be taken into account when determining whether or not to grant an amendment, and to authorities such as **Chandhok & Anor v Tirkey** [2015] ICR 527, which emphasise the importance of pleadings as the starting point, albeit in that case referring to the conduct of litigation in the ET. She submitted that it would be very unusual for

A the EAT to consider a point that required an amendment, that was only introduced at the Full Hearing stage.

B 41. Ms Gould's position was that, if the Claimant had herself arrived at the hearing today, made an application to amend, and tabled a written amendment, she would have argued that that application should be refused, for the reasons given. In discussion, Ms Gould indicated that, whilst she had referred to the provisions of the Practice Direction, which highlighted the need for C amendments to be tabled in writing, and to what she said were significant reasons why an amendment should be refused, if I was minded to consider this point, then she did not in fact need it to be put into writing for her to be able to address it. Nor, having had the opportunity to make D submissions both this morning and, following the completion of her other hearing, again this afternoon, was she seeking further time in order to prepare submissions on the point on its merits.

E 42. Ms Gould, again, developed the submissions on the merits, that she had made this morning. In particular: her point that the Order had been understood by everyone, the Claimant included, to be mandatory upon her, as Ms Gould said could be seen from the Claimant's correspondence with the Tribunal at the time; her point that the Order did not say, for example, F that the Claimant was permitted to provide such evidence "if so advised"; and that the Order referred to medical or other similar evidence as alternatives, but that one or the other *was* required.

G 43. I allowed the Claimant the opportunity to reply and she, again, reiterated the themes that she had highlighted in all of her oral submissions throughout this hearing today.

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My Decision

44. The starting point is the provisions of Rule 38 of the **ET Rules**, which are a departure from the predecessor Rules, in particular paragraphs (1) and (2):

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> **"38 Unless orders**
>
> **(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."**

C

45. It has been observed in the authorities that potentially the Rule 38 regime can give rise to as many as three decision points for the Tribunal. Firstly, a decision as to whether or not to make an Unless Order, and, if so, in what terms. Secondly, a decision as to whether to give written notice to the parties confirming that the Order has bitten, and a dismissal has occurred. As to that, although it is well-established that non-compliance with an Unless Order will have the effect of causing the relevant claim to be treated as dismissed without any need for further Order by the Tribunal, nevertheless, there may be an issue as to *whether* there has been non-compliance. If there is, a Judge will have to make some sort of determination as to whether there has, and hence whether a notice is to be issued. That determination is itself potentially amenable to appeal.

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46. Indeed, it is that determination that the Claimant, in this case, seeks to appeal rather than the original decision to make the Unless Order.

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47. The third Decision point may arise if such a notice, declaring that the pleading stands dismissed, has been issued, and the aggrieved party then exercises their right under Rule 38(2) to apply for the Order to be set aside, on the basis that it is in the interests of justice to do so.

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48. I observe that theoretically it would also be possible for a party, after an Unless Order has been made, but before it has bitten or been declared to have bitten, to apply for the Order to be revisited or set aside. That is not catered for by Rule 38, but would theoretically be possible by a party seeking to persuade the Tribunal to exercise its general case management powers. However, the authorities establish that the Tribunal will not ordinarily allow a party a second bite of the cherry, in seeking to have an Order that has been made revisited, unless there has been some significant change of circumstances since the Order was made. It may well be deliberate that Rule 38 therefore, does not refer to this option, because it would only be of limited and rare utility. The overall regime of Rule 38 steers a party, rather, towards the option of seeking a reconsideration or review, only if or when it is declared that an Unless Order has bitten.

49. It is also necessary, in view of what follows, to remind ourselves of the relevant provisions of Rule 37 concerning striking out:

> **"(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—**
>
> **(a)that it is scandalous or vexatious or has no reasonable prospect of success;**
>
> **(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;**
>
> **(c)for non-compliance with any of these Rules or with an order of the Tribunal;**
>
> **(d)that it has not been actively pursued;**
>
> **(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."**

50. I turn to the arguments on the grounds of appeal.

51. Firstly, with respect to the Claimant, who is a lay person, her argument that the Judge below erred, because she failed to take into account that the Respondents had been told about the Claimant's dyslexia and its effects on her during the employment, and/or because there was a failure to consider the materials relating to the underlying merits of her claims, are misconceived.

52. The Tribunal had, as I have described, a number of potential questions to consider in relation to the disability discrimination claims. In particular, whether the Claimant was a disabled person in fact or and law is a distinct question from whether, if so, the Respondents knew or what they knew about that, and is also distinct from other matters going to the merits of her disability discrimination claims. I note that there was also indeed a time point in relation to the claims against the Second Respondent, which is a further distinct point.

53. The Unless Order was concerned solely with the matter of evidence relating to the issue of the Claimant's disabled status. There was nothing wrong with the Tribunal, as such, considering that that issue was suitable for a Preliminary Hearing, nor with the Tribunal, as such, making Orders that focused on the question of evidence relating to the Claimant's disabled status.

54. The Claimant plainly considered that she had already put the Respondent on notice of her dyslexia, and indeed she may have felt she had already provided sufficient evidence of it, perhaps during her employment. She appears to have considered that the onus ought not now to be on her to provide such evidence, or further evidence, of it. Nevertheless, the Respondent was entitled, in the course of the ET proceedings, to indicate that it did *not* admit her disabled status *for the purposes of those proceedings*, and to make the point that, since it was her claim, the onus of producing evidence to the ET to demonstrate her disabled status lay, at least to start with, on the Claimant, regardless of what had happened during the course of the employment.

55. Turning specifically to ground 1 of the amended grounds of appeal, I accept Ms Gould's submission that, *if* the correct interpretation of the Unless Order was that it was mandatory for the Claimant to provide medical or similar evidence in support of her claim that she had the disability of dyslexia by 29 March 2017, *as well as* any further disability impact statement, then

the provision of a disability impact statement alone would not be sufficient to amount to compliance with that Order. I accept that the Judge would have been entitled to conclude that failure to provide medical or similar expert or specialist evidence, in addition to the impact statement, meant that there was material non-compliance with the Order.

56. However, should ground 1 be construed as encompassing consideration of whether the Judge erred by not considering whether this Order did, in fact, require the Claimant to produce some medical or similar evidence, or whether, alternatively, it merely set a deadline by which any such evidence on which she wished to rely should have been provided?

57. Ms Gould submits that ground 1 cannot be so construed, and therefore, as I have indicated, that it would require an amendment for that point to be introduced as a distinct ground of appeal. In particular, she says that the reference in the grounds of appeal to partial compliance was a reference to the proposition that the provision of an impact statement amounted to partial compliance, in the absence of the provision of medical or similar evidence. That, she submitted, was what the ELAAS representative and the Judge at the Rule 3(10) hearing had in mind by that particular phrase.

58. I accept that that was what the discussion at that hearing focused on. However, I do not accept that that necessarily puts out of bounds today, consideration of whether the Unless Order was properly construed as not having been complied with by the failure to provide medical or similar evidence by the deadline set, on the basis that it was not mandatory but permissive.

59. I accept that this is a point of which Ms Gould, and those who instruct her, were not on notice prior to the start of this hearing. In particular, it was not raised, I accept, in that explicit

way at the Rule 3(10) hearing, nor was it raised by the Claimant in her skeleton argument in the run-up to this hearing. However, it is still in principle a point capable of being considered by the EAT, provided of course that both parties are treated fairly in relation to it, and in particular the Respondents (and the Claimant) have a fair opportunity to make submissions in relation to it.

60. I have paused for real reflection as to whether I should consider this point on its merits. I accept fully Ms Gould's submissions: that pleadings matter, that the Rule 3(10) process is important because it allows an Appellant, who has been told that her grounds of appeal as they stand are not arguable, a specific opportunity to amend then. I also fully accept that, ordinarily, it is important that amendments be reduced to writing so that there is no ambiguity about them.

61. I also accept that it would be, and Ms Gould would perhaps put it higher than this, but, at any rate, an unusual case in which a point introduced, for example, by application to amend at the start of a Full Hearing in the EAT is allowed to be run, having regard to the usual considerations that need to be weighed up when deciding whether to grant or refuse an application to amend. Ms Gould also makes the point that, on this occasion, it has not been raised as a result of a specific application to amend by the Claimant herself. However, I do not think that any of those points mean that I necessarily do not have the power at all to consider this issue, although they would all be said by Ms Gould to weigh heavily against me entertaining it.

62. In this case, I consider that this point ought to be considered and adjudicated by me and that it is ultimately, as matters have unfolded today, not unfair to the Respondents for me to do so. My reasons for so saying are principally as follows.

63. Firstly, I have to say that this point jumped out at me when I read the papers, as one at least requiring consideration and submissions. I will turn to consider the point in more detail in a few moments, but it did so, particularly having regard to the wording of both Judge Sigsworth's original Order and then the Unless Order. It did so, because it is one of the cardinal principles in relation to Unless Orders, reiterated in a number of authorities, that because of their draconian nature – because an Unless Order can result in a claim or response, or part of one, standing dismissed without any further Order – the Order needs to be clear and unambiguous, with no room for doubt as to what it requires of the party to which it is addressed. Further, a claim should only be treated as dismissed for non-compliance, when it can be said without doubt that on a strict reading of the Order there has indeed been such non-compliance, not merely on the basis of what might be said to be the spirit, but not in fact the letter of the Order.

64. I also consider that the point can and should be considered by me, without injustice to the Respondent, bearing in mind that the Claimant is a litigant in person and bearing in mind what I have seen and read and heard of her ability to articulate her arguments, in what is a highly technical area of the law, as has been evidenced by her reverting repeatedly today to the same points that she put in her original grounds of appeal, even though it has been explained to her why it is not appropriate to do so.

65. I bear in mind that it has been said that the rules about pleadings and so forth apply to all, and are important to be complied with by all, including litigants in person. However, this point is potentially so fundamental to the justice of this case that, I think some allowance has to be made for her status as a litigant in person and notwithstanding that she did have ELAAS representation at the Rule 3(10) hearing. Again, I say that with no disrespect to her ELAAS representative, but the assistance that an ELAAS officer can afford is limited in its nature.

66. Finally, I think that this point ought to be, and can be considered, without doing injustice to the Respondents, because, as Ms Gould has absolutely fairly and in accordance with the overriding objective accepted, the point, really is conceptually a simple one and one that she has been able, during the course of the day, to address and marshal her arguments in relation to. In addition, she has not asked ultimately for more time to be able to present further submissions on the point after today, but has invited me to determine all issues in relation to this appeal today.

67. I should say that my primary view is that this point is potentially within scope of ground 1 of the amended grounds of appeal emerging from the Rule 3(10) hearing. However, if I am wrong about that and, even if Ms Gould is strictly right that amendment is required, it is in similar territory, and for all these reasons I will consider the point on its merits.

68. I turn then to consider the point and the arguments on their merits. Firstly, I go back to Employment Judge Postle's Order. By contrast with Employment Judge Sigsworth's Order, Employment Judge Postle's Order did require the Claimant to provide an impact statement and medical evidence by a set date. It could be said, therefore, that by not providing medical evidence as ordered by Employment Judge Postle, the Claimant was in breach of that Order.

69. However, on any fair reading, the whole subject was looked at afresh by Employment Judge Sigsworth at his hearing. He had the advantage of having the Claimant before him in person and he noted that she was unrepresented and may not have fully understood what that Order of EJ Postle required of her. He also went on to explain, as he records, how she might go about getting such medical evidence, although his case management summary highlights the option of going to her GP, rather than to some other source of expert or specialist input.

70. Looking at the wording of Judge Sigsworth's Order, it is noteworthy, firstly, that he does refer to "any" medical evidence or similar relied on, and indeed "any" further disability impact statement. The natural meaning of these words is not that someone is absolutely *required* to produce such evidence, but that *if* there is any such evidence they wish to rely upon, *then* they are required to produce it by a given date, the implication being that, having been given that chance, they will not, or may not, be permitted to rely on such evidence if they only produce it at a later date. That fits in with Judge Sigsworth having set a date for the Preliminary Hearing of 20 March, and that being the hearing at which the question of disabled status was to be determined. A deadline of that sort would make sense, to ensure that preparations were on track.

71. Pausing there, on a natural reading of that Order made by EJ Sigsworth, the Claimant was not bound to produce such further evidence, but was set a deadline to produce any such evidence she may wish to rely upon, in order to keep matters on course for that Preliminary Hearing. Although Ms Gould mentions in her submissions the paragraphs at the end, dealing with consequences of non-compliance of that Order, and referring to the option of an Unless Order, I observe that those appear to me to be standard paragraphs that always appear at the end of case management Orders. The option of an Unless Order is not anywhere singled out as something that may follow, as having been particularly in the mind of Judge Sigsworth, if the Claimant were not to provide the further evidence mentioned in paragraphs 2 and 3 by the date stipulated.

72. On a fair interpretation, when the Claimant asked for the deadline set by Judge Sigsworth to be extended, and Judge Laidler extended it to 1 March, it was extended on the basis that the substance of the order was the same, and only the date of the deadline had changed, rather than that being the making of an entirely fresh and different Order.

73. Next, I note that the Respondents' solicitor's email of 6 March, although it is asserted that the Claimant was in breach of the directions, did not in fact ask the Tribunal to make an Unless Order, but asked the Tribunal to give consideration to striking out the Claimant's claim, and asked the Tribunal to postpone the Preliminary Hearing. The sense of that was that it was asking the Tribunal to consider a strike out on paper, on the basis that the evidence of disabled status was so weak that the claim ought to be struck out under Rule 37. Had the Tribunal followed that invitation, it would of course have had to give the Claimant notice that it was considering striking out her claim on the basis that it was weak. She would then have had the right, under rule 37(2), to request that the matter be considered at a hearing, whether on 20 March, or on a later date.

74. However, the Tribunal did not go down that road. Instead, it made an Unless Order, something that had not been requested, or intimated might be done. For reasons I have given, I do not accept that that could have been anticipated from Judge Sigsworth case management Order, by the mention of a possible Unless Order in the footnotes; and no submissions were sought from the Claimant before the Unless Order was made.

75. It appears to me further that, on a natural reading, the wording of the Unless Order that was issued, its wording simply followed the wording of Judge Sigsworth's Order, again referring to "any" medical evidence or similar relied on being disclosed, but now by 29 March 2018.

76. Following the Claimant's further communication of 28 March, again it is noteworthy that the Respondents' solicitors, when they wrote in on 29 March, did not in fact invite the Tribunal to issue a letter to the effect that the Unless Order had bitten, but once again asked for consideration to be given to striking out the claim on the basis that it was without merit; a clear reference to the Rule 37 powers.

77. However, once again the Tribunal did not go down that road. Instead the letter of 29 April 2008 was sent to the parties. I observe that it does not actually state in terms that it has been written at the direction of Judge Laidler, or indeed any Employment Judge. I assume that it was, as it should have been, written at the instigation of a Judge, and probably Employment Judge Laidler, as the clarification letter of 23 May clearly was written at the instigation of Judge Laidler. But it should have identified the Judge concerned.

78. In her written submissions, Ms Gould submitted that the Unless Order was fully justified, as there had been what she describes as contumelious delays by the Claimant that had led to the postponement of the Preliminary Hearing and put in jeopardy a fair trial on the original dates set for May 2018. However, the Tribunal was not obliged to make an Unless Order, which it had not been asked to do, nor at the same time to postpone the Preliminary Hearing. It could simply have decided to go ahead with the Preliminary Hearing on the basis of the evidence that was available. Alternatively, it could have decided to go down the road that the Respondents first invited it to do, of considering a strikeout on paper under Rule 37, although the Claimant would, quite properly, have had to been warned that was being considered, and would have had the right to seek for such a strike out to be considered at a Preliminary Hearing.

79. I remind myself, in any event, that this appeal is not against the Unless Order, but it is against the subsequent determination by the Judge that the claim stood dismissed for non-compliance with the Unless Order. The task of the Judge at that point was simply to determine whether, on a proper construction of its terms, in context, the Unless Order had been complied with or not. In my view, however, a consideration of the chain of events, in particular the terms of Judge Sigsworth's Order, leading up to the Unless Order, was essential and relevant to the Judge's consideration of whether or not there had been non-compliance with the Unless Order,

such that it should be determined, and the parties notified that, it had bitten, and the disability discrimination claim had been dismissed.

80. I repeat the importance of always considering whether there has been non-compliance with the letter and not merely what may be thought to be the spirit of an Unless Order. It is essential that this be duly considered when a Judge is having to decide whether, in all the circumstances, the correct view of the situation is that there has been such non-compliance that a claim stands dismissed; see **Hamdoun v London General Transport Services Ltd & Another** UKEAT/0414/14/DM. Such an order may not be construed expansively against the party required to comply with it.

81. Ms Gould says that there was no error in the Judge taking the view that there had been non-compliance with this Order because it was understood by all concerned, including the Claimant, that the Order was intended to mean, and did mean, that she *had* to produce the medical or similar evidence. She refers in particular to the content of the Claimant's emails expressing her concerns that she has been in difficulty complying, and unable to comply, and seeking the Tribunal's indulgence. Clearly, says Ms Gould, the Claimant thought that she was *required* to produce such evidence in order to be in compliance with this Order.

82. However, firstly even if the Order only meant that the Claimant had to produce any such evidence on which she wished to rely by the deadline that it set, that was obviously in any event of potentially critical importance for her case. She had been told by Judge Sigsworth, in terms, that he considered that the evidence she had so far produced was weak. He had set a date for a hearing to determine whether she had disabled status or not. If she did not produce more evidence, and did not do so by the deadline set by him, she was at risk, on this interpretation, that

she would not be permitted to do so at a later date, and risked the Tribunal concluding at the Preliminary Hearing that the evidence did not support the conclusion that she was disabled person.

83. Secondly, the Claimant I repeat, is a litigant in person. Again, with no disrespect to her, she may not have appreciated that there was a material difference between an Order requiring her to produce *any* medical or similar evidence she wished to rely on by a deadline, and an Order saying she had to do so in any event. But in any event, where it is the Respondent who seeks to rely before the Tribunal on an Unless Order as having bitten, it is not a sufficient argument to say that the Judge should treat it as having bitten, on the basis of the Claimant's interpretation or understanding of it, if the Claimant's interpretation is in fact wrong, and assumes the order to be harsher than it is in fact is.

84. Nor do I accept Ms Gould's argument that the Judge did not err, because, on a correct construction, the reference to any "medical or similar" evidence allowed for one or the other, but required that at least one or the other to be produced. That is simply not in my view a tenably correct construction of the Order. The governing word is "any." The evidence that the Claimant might seek to rely on might be, as it were, conventionally medical in nature, that is, coming from a clinician; or it might be similar in the sense of being expert or specialist evidence coming from someone who can claim specialist knowledge or expertise, in relation to dyslexia, but is not strictly a clinician. However, either way the governing word is "any."

85. As to the potential impact on a fair trial going ahead in May 2018, firstly, it is not clear to me how it is said that this ought to have affected the Judge's view of the correct interpretation of the Unless Order. Insofar as it is suggested in Ms Gould's written submission that time was tight

because further directions for the Full Merits Hearing has yet to be given, that may or may not be a valid criticism of the original case management Orders and timetable made by Judge Sigsworth. However, I do not see how it can be laid at the door of the Claimant. Nor can the decision of Judge Laidler both to make an Unless Order and to extend the deadline, and the knock-on implications of that for timetable of the Preliminary or, indeed the Full Merits Hearing be laid at the door of the Claimant, or said to be relevant to the point under appeal.

86. Pausing there, for all of the reasons I have given, I consider that, either within scope of ground 1 or within scope of the point that I consider it fair to determine today in any event as part of this appeal, there was an error of law on the part of the Judge in determining that the disability discrimination claim stood dismissed because of non-compliance with the Unless Order. That is because, on the only fair and correct interpretation of that Order, the Judge should have concluded that, by not providing medical or similar evidence, the Claimant was not in breach of the Order, but merely, at worst for her, she might not be permitted to adduce such evidence thereafter.

87. Accordingly, it is not necessary for me to determine ground 2, but I will address it briefly.

88. As I have indicated, it seems to me that the structure of Rule 38 is designed to afford a party who has been the subject of an Unless Order that *has* bitten, a specific channel through which to apply for that Order to be set aside, *after* it has bitten and within 14 days of being notified of that fact. Insofar as it is argued that the Claimant's 28 March email was an application for relief from sanctions, it may therefore be said that it was premature, in terms of that particular route, because a decree that the Unless Order had bitten had not yet been issued.

89. However, it seems to me that, in circumstances where the Claimant was clearly anticipating that there might be a ruling that the Unless Order had bitten, but was putting forward what she argued were good reasons for not being able to provide medical evidence by the deadline, then, having regard to the express power for an application to be made under Rule 38(2), *some* further step ought to have been taken by the Judge, when directing that a letter be sent to the effect that the disability discrimination claim stood dismissed.

90. Potentially, it would have been an option for the Judge to treat the Claimant's email as an application for relief from sanctions. However, I see some force in the argument (a) that that would have been a premature request, and (b) that it might be said not to be an appropriate course where the Claimant had not said in terms that she was applying for the Unless Order or any consequent dismissal to be revisited.

91. However, as I have said, it was clear *at least* from that letter that the Claimant was saying that there were good reasons why she could not provide further medical or similar evidence by the deadline that then applied. It seems to me that at the very least, the Judge should have directed that, having regard to the Claimant's email of 28 March, she therefore be told that, if she wished, following the notice that the Unless Order had bitten, to apply for it to be set aside, then she should make such an application within 14 days. I do consider, given the content and timing of the 28 March letter, that it was an error not at least to have taken that step. Therefore, had I not allowed this appeal otherwise, I would have allowed it on ground 2.

Outcome

92. The matter must therefore be remitted to the Tribunal. I will hear any further submission on this, but it appears to me that it must be remitted on the basis that the Tribunal should proceed

on the footing that the Unless Order has *not* bitten, and therefore the disability discrimination claims does not stand dismissed, but remains live.

93. On that basis, the Tribunal will not need as such to consider whether relief from sanctions should be granted. However, it will be open to the Tribunal to consider what the next step should now be in relation to the Claimant's disability discrimination claim, including whether it should be relisted for a Preliminary Hearing to determine her disabled status or not, and/or whether the Tribunal should consider striking out that claim, and/or whether it should make some fresh Orders or directions in relation to evidence in relation to the disabled status issue. Those are all matters for the Tribunal to consider. There may be other options.

94. In all events, the Claimant needs to be clear, as much as the Respondents, that there has been no determination, as yet, of whether she is a disabled person for the purpose of her disability discrimination claims, still less of the knowledge issues and/or the other issues relating to the merits, or, in relation to the Second Respondent, the timeliness of her disability discrimination claim. These are all matters to be case managed for determination by the ET in the way it thinks appropriate.