Appeal No. UKEAT/0264/18/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 23 April 2019

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

DR S UWHUBETINE
DR E NJOKU — APPELLANTS

(1) NHS COMMISSION BOARD ENGLAND
(2) CLINICAL COMMISSION GROUP
(3) DR DAVID BLACK
(4) DR DAVID BROWN — RESPONDENTS

Transcript of Proceedings

JUDGMENT

Revised

APPEARANCES

For the Appellant	MS MARY O'ROURKE QC (of Counsel) Instructed by: Slater Heelis Solicitors LLP Oaklands House 2nd Floor Suite 2 34 Washway Road Sale Manchester M33 6FS
For the First, Third and Fourth Respondent (NHS Commission Board England, Dr David Black and David Brown)	MR SPENCER KEEN (of Counsel) Instructed by: Messrs Blake Morgan Solicitors One Central Square Cardiff CF10 1FS
For the Second Respondent (Clinic Group Commission Group)	MR ANDREW SUGARMAN (of Counsel) Instructed by: DAC Beachcroft LLP St Paul's House 23 Park Square South Leeds LS1 2ND

SUMMARY

PRATICE AND PROCEDURE – Striking-out/dismissal

The Claimants had presented a claim form making multiple allegations of treatment contrary to the **Equality Act 2010** and by way of whistleblowing detriment, against four Respondents, over a period of several years. The Employment Tribunal had determined, after hearing argument at a Preliminary Hearing, that documents tabled on behalf of the Claimants had materially failed to comply with the terms of an Unless Order requiring a Scott Schedule, and had therefore been dismissed automatically at the moment when time for compliance had expired. During the course of the hearing before the EAT, the challenge to that decision as it related to the Second Respondent was abandoned. The appeal in that respect was therefore dismissed. In relation to the other three Respondents:

Held: Having earlier taken a wrong turn, the Tribunal had correctly decided at the hearing in question that it needed to determine whether there had been material non-compliance with the Unless Order, before considering any other substantive issues: and, if so, then to give written notice to the parties confirming what had occurred. The Claimants' representative had had a fair opportunity to make submissions on the issue at the hearing in question. The Tribunal had been entitled to find that there was material non-compliance in respect of a number of the allegations covered by the Order. The terms of the Unless Order were extremely wide and draconian. In particular, their natural meaning was that, as a result, all of the claims had stood dismissed. However, the Tribunal Judge's task at the hearing in question had been solely to consider whether there had been material non-compliance, and, if so, the consequences that had flowed from that in accordance with the terms of the Unless Order. There had been no appeal in respect of the making, or terms, of the Unless Order itself; and the EAT could not, as part of its consideration of this appeal, interfere with it. The appeal as a whole was therefore dismissed.

HIS HONOUR JUDGE AUERBACH

1. This is another appeal about the perils and pitfalls of Unless Orders.

2. Dr Njoku and Dr Uwhubetine presented a claim to the Employment Tribunal ("ET") on 3 November 2017. There were four Respondents: the NHS Commissioning Board for England, the NHS Doncaster Clinical Commissioning Group ("CCG") and two individuals – Dr D Black and Dr D Brown.

3. The Claimants are GPs in practice in partnership together at a surgery in Doncaster. Their surgery has a contract with the First Respondent. The Third and Fourth Respondents both at relevant times had roles working for the First Respondent.

4. The Second Respondent, the CCG, is a distinct entity from the First Respondent. It was common ground before me today, and this is reflected in their response form, that they, and CCGs up and down the country, came into existence in April 2013 as part of an NHS reorganisation in which Primary Care Trusts ("PCTs") were abolished and CCGs were created. However, it was also part of their grounds of resistance that they only became involved in managing the First Respondent's contract with the Claimants' practice, on its behalf, from April 2016.

5. This is an appeal from a Judgment of the ET at a Preliminary Hearing held at Sheffield, EJ Brain sitting alone, on 12 June 2018. That hearing had originally been listed for the purposes of determining certain preliminary jurisdictional issues. However, it was decided at the hearing by the Judge that he would determine whether or not there had been compliance with an earlier Unless Order.

6. At that, hearing for reasons that he gave orally, he determined that the Claimants had failed to comply with that Order and therefore that their claims were struck out on the date which was the last day for compliance, without any need for further Order. Thereafter, he signed a written Judgment on 22 June 2018, promulgated that day, which reads as follows: "(1) The Claimants failed to comply with paragraph 3 of the Order of EJ Little of 21 March 2018 in material respects; (2) Accordingly, the Claimants' claims were struck out upon 29 March 2018 without any need for further Order."

7. The Claimants then representative, Mr Echendu, described sometimes as counsel and sometimes there as a non-practicing barrister, had at some point, in a timely fashion, requested Written Reasons. These were accordingly produced, signed by the Judge on 2 August 2018 and promulgated on that day.

8. This appeal is brought by the Claimants in the ET and was resisted by all of the Respondents in the ET. I shall continue to refer to them as Claimants and Respondents.

9. The Notice of Appeal raises seven grounds. HHJ Eady QC, who considered it on paper, was of the opinion that certainly some of them and potentially all of them were arguable. The matter has come before me for a Full Hearing today. Today, the Claimants have been represented by Ms O'Rourke QC and the Respondents, as below, by Mr Keene for the First, Third and Fourth Respondents and Mr Sugarman for the Second Respondent, both of counsel.

10. Towards the end of oral argument, and after a break, and having regard to certain matters having been clarified during the course of the hearing, Ms O'Rourke, on behalf her clients,

withdrew the appeal insofar as it relates to the Second Respondent. I will therefore, in my Order, dismiss that appeal upon withdrawal, to which she did not object.

11. Mr Sugarman has, with my permission, left today's hearing prior to my giving this Decision in relation to the remaining live appeal against the other Respondents. There was no further application from him in relation to the appeal, now withdrawn against his clients, before he departed.

12. The chronology of the litigation in the ET is this. The claim form was presented on 3 November 2017. In section 8 the box was ticked to signify that the Claimants were claiming race discrimination. They also referred to "victimisation, harassment, detriment as a result of having made a protected disclosure." Mr Echendu was identified as their representative.

13. Attached to the claim form was a 21-page document. That document was subsequently, as I will describe, twice revised. I do not actually have the original version in the bundle that is before me. However, all three counsel agreed that it was the same as the final version, which was the third version, that was ultimately tabled on 28 March 2018 as I will describe, save for two areas of difference.

14. First, in the original version, paragraph 81 headed "Grounds" and which had a number of lettered subparagraphs, did not identify which individual Respondents were said to have been involved in the various impugned conduct, to the extent that the second and final versions did, where one or more of the four Respondents was mentioned in each subparagraph. It appears that this may have been true of some of the subparagraphs in the original version, but not of many or most of them. Secondly, the final version presented on 28 March 2018 had an additional

paragraph 83, which asserted that the Claimants were being controlled as employees, including in respect of wages, pensions, sick pay and maternity allowances.

15. I do not need to set out in great detail the substantive content over many paragraphs of the Particulars of Claim, but I need to give some flavour and highlights from it.

16. It described how both Claimants are GPs, how the First Claimant joined the practice in question in 2006 and then the Second Claimant in March 2013, initially as a locum GP and in due course as a partner. It alleges that, upon joining, the Second Claimant identified that there had been some financial misappropriation taking place on the part of an individual, and that this was an issue that he raised. It also says that around this time allegations were made anonymously against him which led to an investigation which he was told would be happening, by the Third and Fourth Respondents, who, at that time, both had positions within the First Respondent.

17. The Particulars of Claim then go on to give an account of events in the years since 2013, said to have involved a series of investigations, inspections, breach notices served by the First Respondent, imposition of practice conditions by the First Respondent and visits by the Care Quality Commission ("CQC"). They also say that during this period they and their HR Manager raised issues of breaches of confidentiality in relation to patient data, which were not actioned.

18. A bird's eye view of their case as to what was going on over these years can perhaps be gleaned from paragraph 15, which reads:

> **"The 4 Respondents had from April 2013 onwards mapped out series of strategies to harass, discriminate and victimise the Claimants because the surgery which was previously under the supervision of a white English GP partners have now been under the management of black British GP partners, and the 2nd Claimant contends that he had been victimised and harassed for blowing the whistle and has been suffering detriment as a result of this."**

A The Particulars go on to allege that in 2016 they also sent a grievance about what was going on to the NHS Chief Executive, but that no action was taken.

B 19. As I have already mentioned there is then a section headed "Grounds" with lettered subparagraphs referring to various alleged incidents as involving discriminatory treatment or victimisation for whistleblowing.

C 20. A response was entered on behalf of the First, Third and Fourth Respondents who were represented together. This raised a number of jurisdictional issues, including as to whether there was jurisdiction under the **Equality Act 2010** ("EqA") or **Employment Rights Act 1996** at all

D as against those parties, and time points.

21. It also asserted that the substance of the complaints and the position as to which

E complaints were being asserted against which Respondents was unclear, and it asked the Tribunal to direct the Claimants to serve a Scott Schedule. It then however set out a brief chronology of events from these Respondents' point of view, identifying their case that there had been an anonymous complaint about the Second Claimant, that there had been a decision by a team within

F the First Respondent that an investigation was required, and that later on in 2015 a relevant panel, the Performers List Decision Panel, had decided to place conditions on the Second Claimant's entitlement to be entered onto a list of practitioners, although subsequently, according to the

G defence, it was decided that he could remain fully on the list without conditions in April 2016.

22. It denied that the First Respondent had requested the CQC to conduct an inspection. It

H agreed that there had been a number of notices of remediable breaches in 2014, 2015, 2016 and 2017, but said that these were done in response to reasonable concerns about the standard of the

practice, and not because of race or by way of victimisation, harassment or because of any disclosures. It acknowledged that the surgery had raised complaints against the NHS Respondents which it said were being investigated. It denied all of the claims on their merits and asked for a Preliminary Hearing to determine jurisdictional issues and/or whether the claims should be struck out as having no reasonable prospect of success.

23. A separate response was entered by representatives for the Second Respondent, the CCG. This took a range of jurisdictional points and in short form denied the claims on their merits. It noted that some complaints predated the creation of the CCG and asserted that it had only taken delegated management of the contract with this surgery on behalf of the First Respondent in April 2016. In the agenda document tabled for what was anticipated to be the first Case Management Hearing in the Tribunal in relation to this litigation, the Second Respondent also indicated that it considered the Claimants should be required to set out in precise terms each allegation pursued against it, specifying dates, names of those involved and the legal basis for such claims.

24. On 14 February 2018 there was a Case Management Preliminary Hearing before EJ Little with Mr Echendu representing the Claimants, Mr Keene of counsel for the First, Third and Fourth Respondents and on that occasion Mr Boyd of counsel for the Second Respondent. The Judge indicated that it had originally been envisaged that certain jurisdictional points would be considered at that hearing, but they had not been sufficiently prepared. Therefore, instead, that hearing was confined to case management and he had directed that certain jurisdictional points would be considered at a three-day Preliminary Hearing, which he listed to take place on 12, 13 and 14 June 2018.

25. In summarising the complaints, the Judge said:

> **"The claimants' details of claims documents attached to the ET1 is lengthy, (82 paragraphs) but it was agreed today that further and better particulars were required. Among other things, many of the allegations are levelled at 'the respondents' and counsel for the respondents point out that they need to know whether each of those allegations, apparently against all four respondents, is actually directed at them. In addition, in respect of the "corporate" respondents there needs to be an identification of which particular individuals allegedly unlawfully discriminated against the claimants. In certain cases some dates are missing."**

Further on he said it would also be helpful if more Particulars were given of the alleged protected acts and disclosures. He identified a number of jurisdictional issues to be determined at the June hearing and noted that there were also further time issues and possible other jurisdictional preliminary issues and possible consideration to be given to linking these claims to separate claims that had been brought against the CQC.

26. In the section headed "Order" Order 1 required the Claimants to provide further and better Particulars of the basis on which they contended they were employees within the meaning of the **EqA** and/or alternative routes to **EqA** liability against any of the Respondents. Order 2 read as follows:

> **"2. The claimants will prepare a Scott schedule which will identify each act of less favourable treatment, unwanted conduct or detriment that is alleged; the date when it is said to have occurred; which respondent or respondents are regarded as potentially liable and in the case of the first and second respondents which individual within those organisations is said to be the perpetrator. The Scott schedules in respect of each claimant will be served on all respondents no later than 7 March 2018."**

Further preparation directions were given in respect of the Preliminary Hearing which was listed for 12, 13 and 14 June. Also arising from that hearing a Deposit Order was made in relation to certain jurisdictional arguments.

27. On 5 March 2018 Mr Echendu emailed a document which he described as the Claimants' better Particulars as ordered by the Tribunal. This attached the second version of the Particulars of claim, which now, as I have mentioned, referred to which numbered Respondents were said to

A be concerned with each of the sub-lettered grounds in paragraph 81 throughout. He also raised issues about the Deposit Order, which he argued should be revoked.

B 28. The Second Respondent's solicitors emailed on 12 March 2018, amongst other matters complaining that a Scott Schedule had not been provided as ordered to be done by 7 March. The First, Second and Fourth Respondents' solicitors also wrote on 15 March, among other things complaining about what they said was the continuing lack of Particulars and reserving their C position in relation to what they said was non-compliance with the February Orders.

D 29. On 20 March the Second Respondent's solicitors wrote specifically requesting that an Unless Order be made in respect of paragraphs 1 and 2 of the case management Orders emanating from the February hearing.

E 30. On 21 March, at the direction of EJ Little, the Tribunal wrote to the parties addressing a number of matters that had arisen in relation to the recent correspondence. By this time, it appears, the deposit had been paid, but the Judge noted that it was being alleged that there were deficiencies in the Particulars that had been filed pursuant to Order 1. The Judge considered that F it was difficult to work out what the difference was between the original and the revised Particulars, and the Respondents' solicitors should not be expected to do so. The Judge then continued:

G > **"In any event no Scott Schedule has been prepared as required by Order 2. I will in a separate document be making an Order so that the Claimants re-file their amended Particulars showing precisely how and where they have been amended to deal with the matters in Order 1 and I will make an unless Order with regard to Order 2 which has not been complied with at all."**

H 31. That same day, 21 March 2018, EJ Little signed, and the Tribunal promulgated, an Order which read in substance as follows:

> **"1. The Claimants will re-file the Details of Claim document (that they filed on 5 March 2018) clearly indicating where and how that has been amended so as to provide the information required by paragraph 1 of the Order made on 14 February 2018. If that document did not include the required information that must now been provided.**
>
> **2. In either case, that is to be done no later than 28 March 2013.**
>
> **3. The Claimants are required to comply with paragraph 2 of 14 February Order (Scott Schedule) by 28 March 2018 and UNLESS they do their claims will be struck out without further notice."**

32. The Claimants' representative, Mr Echendu, emailed the Tribunal and the other representatives on 28 March 2018 saying in the covering email, "Please find attached the Claimants' Scott Schedule and updated Claimants' details of claim as ordered." As attached to that email was a document describing itself as the Scott Schedule which in a short opening narrative said:

> **"Regarding to Order 1 the details will state *inter alia* that the 1st respondent is vicariously liable to the acts of the 2nd , 3rd, and 4th respondents and the various acts of harassment, discrimination and victimisation set out above are being carried out by all the respondents in both capacities as 1st respondent and 2nd respondents thus there is no material difference between 1st respondent and 2nd respondent.**
>
> **The Claimants have further inserted dates and the specific respondent/s liable for various acts set out above in addition to the SCOTT SCHEDULE now added."**

33. The Scott Schedule had columns for dates, grounds of claims, Respondent responsible and details of claim paragraph. There were then a number of rows set out over the next three pages. The dates column indeed gave dates, although in some cases "BTW", presumably meaning between two dates. The second column sometimes gave a brief description of what was alleged, but sometimes referred or cross-referred to the lettered grounds in paragraph 81 of the amended Particulars of Claim. The Respondent responsible column referred to one or more of the Respondents by number. The last column cross-referred to paragraph numbers of the amended Particulars of Claim. Further amended Particulars of Claim were indeed also attached to this email, but, as already noted, these were essentially the same as the second draft that had been sent on 5 March, but with the addition of paragraph 83

34. The Second Respondent's solicitors emailed attaching a letter on 29 March 2018 saying amongst other things that they did not accept that the Claimants had complied with the terms of the Order and submitting that the claims were therefore liable to be dismissed without further Order pursuant to Rule 38. In relation to the Unless Order they wrote:

> **"The Scott Schedule is not compliant with the terms of the second Order (now in unless form) because it does not specify which individual at the 2nd respondent is allegedly responsible for the allegations against the 2nd respondents. More fundamentally however, the Scott Schedule is meaningless in the light of the claimants continued and unexplained failure to comply with the first Order. Nearly five months after the claims were presented the second respondent still does not know what is the legal or factual basis (by reference to the EqA or any other enactment) for the claims against it."**

That application was supported, in an email the same day, by the solicitors for the other Respondents, who said they agreed with it and supported the application and asked the Tribunal to dismiss the claims against their clients.

35. The Claimants' representative, Mr Echendu, emailed a response to the Second Respondent's application on 9 April, although the attachment was dated 6 April 2018. He expressed his concern at what he described as the unreasonable and vexatious conduct of the "purported" Second Respondent's representative. He went on to set out his points over a couple of pages, including saying that it was not clear under what grounds the Second Respondent was asking for the claims to be dismissed or struck out and why they were saying that they had not complied with the Unless Order. Further on he alleged that the Second Respondent was obviously part of the First Respondent, and, further on, that there was no material difference between them; and he reserved the right to seek costs against them.

36. The Tribunal wrote to the parties at the direction of EJ Little on 27 April 2018. He indicated that he had considered the application based on the proposition that there was material non-compliance with the Unless Order and that, if this was correct, the effect would be that,

without more, the claims would already have been struck out at midnight on 28 March 2018. However, he noted that there was a Preliminary Hearing listed and observed.

> **"I cannot see that any of the alleged deficiencies in the Scott Schedule will prejudice the respondents in putting their cases as far as the jurisdictional issues are concerned. Accordingly, I do not consider that the Overriding Objective would be achieved by arranging a hearing in the meantime on the unless matter. Preparing for that hearing is likely to distract the parties from preparing for the preliminary hearing to determine jurisdictional issues listed for June 2018. Accordingly, I intend to postpone further consideration of the respondents' current applications until after the June hearing by which time it will be known whether all or any of the complaints survive."**

37. The next event was the hearing on 12 June 2018. The Reasons start by recapitulating on the history of the litigation in some detail up to that point. Then at paragraph 16 the Judge said the following:

> **"16. This morning, the respondents' counsel urged upon me the determination of the question of material non-compliance now. Their submission on was that the cases have effectively been struck out by reason of the unless order and it makes no sense to expend time and resources determining jurisdictional issues upon a case that has been struck out anyway. The claimants' counsel urged upon my the determination of the jurisdictional issues and preliminary issues, pursuant to the order. It was submitted on behalf of the claimants that the Tribunal did not list the issue of material non-compliance with the terms of the unless order for determination today. He pointed to the letter of 27 April 2018 cited at paragraph 15 in support of his position. The respondents say that there will be no prejudice to the claimants in determining that issue first because the claimants' counsel is able to make representations upon the issue (and indeed did so this morning).**
>
> **17. Rule 2 of schedule 1 to the 2013 Regulations sets out the overriding objective of the Rules of Procedure. The overriding objective of the Rules is to enable Employment Tribunals to deal with cases fairly and justly including so far as practicable dealing with cases in ways which are proportion to the complexity and importance of the issues, avoiding delay so far as compatible with proper consideration of the issues and saving expense. Rule 53(1) provides that at a preliminary hearing a Tribunal may (amongst other things) determine any preliminary issue (that term meaning *"any substantive issue which may determine liability*": Rule 53(3)).**
>
> **18. The claimants' counsel made detailed submissions this morning in which he sought to defend the claimants' position that there had been material compliance with the unless order. I am satisfied therefore that the claimants were not prejudiced by a determination today of the question of whether or not the claim had been struck out when the clock struck midnight on 2819 March 2018 and that consideration of that issue first is entirely consistent with the overriding objective. It is in my judgment an exercise in futility to spend considerable time and resource determining the preliminary issues identified on 14 February 2018 in circumstances where that would be for nought anyway were the Tribunal to determine that the claims were struck out by reason of non-compliance with the unless order in any event. In my judgment, it makes eminent sense to deal with the question of compliance with the unless order first. This is just to both parties, is proportionate (at the Tribunal's and the parties' time will not be expanded dealing with the issues set out in the case management order and which may have become academic by virtue of the operation of the unless order). Further, determination of that preliminary issue may save considerable expense in avoiding the need for a three day hearing in order to determine those issues."**

38. After citing Rule 38 of the Rules of Procedure the Judge said the following:

> **"20. Where there is non compliance with an unless order in any material respect a Tribunal has no discretion as to whether or not the claim or response as the case may be should be struck out. The claim or response is automatically struck out as at the date of non compliance and there is no requirement for a further order addressed to the party against whom the unless order was made.**
>
> **21. The issue before me therefore is whether or not there has been material compliance with the unless order. What is relevant in this, case (that is to say, material) is whether the particulars given enable the respondents to know the case they have to meet or to enable the Tribunal to and understand what is being asserted. Given the automatic effect of an unless order it is important that the relevant parties are given clear unequivocal notice of the order. When a claim or response is dismissed following a failure to comply with' an unless order the Tribunal must give written notice to the parties confirming what has occurred.**
>
> **22. The claimants' counsel sought to argue that as the Tribunal has not given such a written notice pursuant to Rules 38(1) then the unless order has not yet taken effect. Counsel for the second respondent argued that the claimants had effectively misunderstood the operation of Rule 38(1). He submitted that the notice requirement in Rule 38(1) is not a necessary pre-condition to the unless order taking effect where there is material non-compliance with it. The notice provision is a formality to confirm what has occurred by way of the operation of the unless order. I agree with Mr Sugarman's submissions. In my judgment, the terms of the unless order of 21 March 2018 are very clear. The claimants were required to comply with paragraph 2 of the order of 14 February 2018 and unless they do so the unless order made plain that their claims would be struck out without further notice. I would have agreed with the claimant's counsel had the order itself included words to the effect that the unless order would not operate against the claimants' absent notice from the Tribunal pursuant to Rule 38(1). However, those words were not included within the terms of the unless order.**
>
> **23. The Judgment that I caused to be sent out on 22 June 2018 constitutes the necessary written notice confirming what has occurred. l note in passing that the claimants have not, as they were entitled to do pursuant to. Rule 38(2), applied in writing within 14 days on 22 June 2018 seeking to have the order that I made on that day set aside in the interest of justice. All that has occurred is that the claimants' counsel has made a request for these written reasons.**
>
> **24. I therefore turn to the key issue which is whether or not there has been material non-compliance with the unless order. The question I have to ask is whether the particulars given (in the form of the Scott schedule) enable the respondents to the claim to know the case they have to answer or to enable the Tribunal to understand what is being asserted. It is worth re-visiting, in this connection, paragraph 2 of the order made on 14 February 2018. This is set out at paragraph 8 above.**
>
> **25. It is plain that there has been material non-compliance in this case. The Scott schedule fails to identify the individuals at the first and second respondent said to be responsible for the impugned acts of discrimination. There has been a failure to give the date when incidents are said to have occurred in some respects. Very wide timescales have been given (for example upon the first page of the Scott schedule the dates of the impugned acts are said to have occurred between 9 April 2013 and 20 July 2015). Similar wide timescales are given in places upon the second page of the Scott schedule (the allegations of 'inciting and inviting of CQC to carry out racially aggravated inspections' were said to have occurred between 14 August 2013 and 16 June 2015). Similar wide timescales can be, seen on the third page of the Scott schedule (in particular the final entry).**
>
> **26.There has been no attempt to identify the acts of less favourable treatment, unwanted conduct or detriment that had been alleged. In general terms there has simply been a cross-reference back to the particulars of claim (which were in the event not amended pursuant**

to paragraph 1 of the order of 14 February 2018: I am of course cognisant of the fact that there was no unless order in place in relation to the question of further particularisation of the claimant's claim. The unless order operates solely upon the failure to serve a Scott schedule compliant with paragraph 2).

27. Mr Keane gave as an example of material non compliance ground J set out in the Scott schedule (upon the second page). This ground of claim was that *"the claimants' former practice manager resigned and got employed by the fourth respondent"*. This cross-refers to paragraph 23, 26 and 27 of the grounds of claim. Neither the Scott schedule nor those grounds of claim give any explanation compliant with Employment Judge Little's order of 14 February 2018 (later the subject of the unless order) as to the alleged act of less favourable treatment, unwanted conduct or detriment that is alleged. Mr Keane made similar well-founded points about grounds L, M and Q.

28. The first and second respondents are in reality no wiser by reason of the Scott schedule as to the allegations made against them. This is a material failure.

29. The claimants' counsel also failed to make any satisfactory submissions as to how it was said that the claimants had materially complied with the unless order. The claimants' counsel prayed in aid the overriding objective in Rule 2 of the 2013 Regulations to which I have referred and the need to avoid unnecessary formality. The difficulty with that submission is that the unless order was made in circumstances where the claimants had had opportunities to properly plead their case and had failed to do so. The unless order was therefore a necessary formality in pursuit of the overriding objective. It was a necessary formality because the respondents had to know the case they have to meet and the Tribunal has to understand what is being asserted neither of which was possible given the state of the claimants' pleadings prior to 21 March 2018.

30. My conclusion therefore is that the claimants have failed to materially comply with the unless order. A consideration therefore of the jurisdictional issues identified by Employment Judge Little is rendered otiose as the claims were struck out by reason of the operation of the unless order at the stroke of midnight of 28/29 March 2018."

39. As I have said, following the hearing the written Judgment was promulgated on 22 June and then, Written Reasons having been requested, these followed on 2 August.

40. The grounds of appeal were as follows:

"The grounds upon which this appeal is brought are that the employment tribunal erred in law in that (*here set out in paragraphs the various grounds of appeal*).

a. The Employment Judge erred in law in finding that there was material non-compliance by the Claimants with an unless Order made on the 21 March 2018 as to service of a Scott Schedule in that if fairly considered and cross-referenced to the Claimants' claim document served in conjunction with the Scott Schedule there was in fact substantial compliance which document set out the chronological history of events and explained the composite dates and the involvement of many named individuals.

b. In any event the Employment Judge erred in law in ruling that the claim had been struck out on 12 June 2018 when (i) the hearing scheduled for 12 June 2018 related to a preliminary issue in respect of which a deposit had been ordered and paid and (ii) when the scheduled 3 day hearing wherein he made his Order had been fixed for trial of a preliminary hearing as to jurisdictional matters and the Tribunal had not complied with Rule 38 of Schedule 1 to the

Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 by serving written notice under Rule 38(1) following the relevant date of 28 March thereby depriving the Claimants of the saving provisions of applying for a set aside within 14 days of the notice being sent.

c. The Employment Judge erred in confusing paragraph 1 of the Order made on 21 of March with paragraph 2. Paragraph 2 only contained an unless Order. The non-compliance was with paragraph 1. The Employment Judge confused the two and intermixed them when attempting to provide reasons for material non-compliance with that part of the Order which was an unless order and in particular by his focus on the Respondents having particulars which enabled them to know the case against them (rather than a Scott Schedule).

d. The Employment Judge erred in law in striking out the claims retrospectively or deemed them struck out as of 3 months earlier (when no notice was served by the Tribunal for non-compliance) and when the Order of 21 March was not clear in its consequences and the interplay with Rule 38 of the 2013 Rules.

e. The Employment Judge erred in that he accepted there was no prejudice to the Respondents in relation to the Scott Schedule not being particularised and yet decided to strike the Claimant's claim out in any event.

The decision of the Employment Judge was perverse in all the circumstances.

g. The Employment Judge failed to give proper reasons for his determination to strike out the Claimants claim when looked at in all the circumstances."

As I have said, HHJ Eady QC considering the grounds for appeal on paper allowed all of them to proceed to a Full Hearing.

41 I turn to the arguments before me today and my decision. As to the law, Rule 38 of the **Employment Tribunals Rules of Procedure 2013** provides:

"Unless orders

38.—(1) An order may specify that if it is not complied with by the date specified the claim or response, or part of it, shall be dismissed without further order. If a claim or response, or part of it, is dismissed on this basis the Tribunal shall give written notice to the parties confirming what has occurred.

(2) A party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations.

(3) Where a response is dismissed under this rule, the effect shall be as if no response had been presented, as set out in Rule 21."

42 A number of propositions emerge from the authorities, in particular **Royal Bank of Scotland v Abraham** UKEAT/0305/09; **Marcan Shipping (London) Limited v Kefalas** [2007]

EWCA Civ 463; **Johnson v Oldham Metropolitan Borough Council** UKEAT/0095/13; and **Wentworth-Wood and Others v Maritime Transport Limited** UKEAT/0316/15.

43 I can summarise these points as follows. Firstly, there are potentially three distinct decision points for a Tribunal under Rule 38. Firstly, there is the making of an Unless Order. Secondly, there is the determination of whether an Unless Order has been complied with, and hence whether the relevant claim or response or part thereof has been automatically dismissed by operation of the Unless Order. Thirdly, the determination of an application, if there be one, to set aside the Order on the basis that it is in the interests of justice to do so. These are distinct decision points to be approached on distinct bases, in respect of which, if any such decision is to be challenged, a separate appeal is required and time would run from the date of the relevant decision.

44 Where a Tribunal is determining whether there has been compliance with an Unless Order and hence whether to give written notice as to whether the relevant pleading has been dismissed by the Order taking effect, the Tribunal is not concerned at that point with revisiting the terms of the Order: whether it should have been made, or whether it should have been made in those terms. Nor is it concerned at that point with the question of whether, if there has been non-compliance with the Order, there should be some relief from sanctions.

45 The starting point for the Tribunal engaged in that task is to consider the terms of the Order itself and whether what has happened complies with the Order or not. This may call for careful construction of the terms of the Order, both as to what the Order required and as to the scope of the Order in terms of the consequences of non-compliance, particularly in cases where there are multiple claims or multiple parties. If there is an ambiguity the approach should be

A facilitative rather than punitive, and any ambiguity should be resolved in favour of the party who was required to comply. However, what the Tribunal cannot do is redraft the Order or construe it to have a meaning that it will not bear, though its words should of course be construed in context.

B

46 Next, the test to be applied is as to whether there has been material non-compliance, that being a qualitative rather than a quantitative test. In a case where the Order required some further Particulars to be given, the benchmark is whether the Particulars have sufficiently enabled the other party or parties to know the case that they must meet. However, the Tribunal is not concerned with the legal or factual merits of the case advanced, but merely with whether sufficient Particulars have been given to meet that test.

C

D

47 Finally, the Rules do not require any particular formalities to be observed in relation to the process for determining whether there has been non-compliance with an Unless Order, leading, if non-compliance be found, to a written notice confirming that the relevant pleading has been dismissed in accordance with it. This is something that can potentially be done by a Judge on paper without a hearing, although a Judge may decide to invite written submissions and/or to convene a hearing, before making that determination. The obligation on the Tribunal, whichever route it goes, is to comply with the overriding objective.

E

F

G 48 To those points, which emerge from the foregoing authorities, I add the following. Firstly, the Rule does not actually impose an obligation on the Tribunal to issue a written notice if it considers that an Unless Order *has* been complied with. However, if it is alleged that it has *not* then this must lead to a determination of whether the Order has been complied with and has taken effect, or not.

H

A

49 Further, if the conclusion is that the Order has *not* been complied with, and *has* taken effect, although that will have occurred automatically, there is an obligation on the Tribunal to issue a written notice to the parties confirming what has occurred. That is both because that is what Rule 38(1) says and because it is the issuing of such a written notice that triggers the right of a party to make an application under Rule 38(2) to have the Order set aside on the basis that it is in the interests of justice to do so. That is why such an application is treated, as the authorities confirm, as an application for relief from sanctions, as opposed to a freestanding challenge to the original Order having been made in the first place.

B

C

D

50 Further, however, I note that the Rule prescribes no time limit within which the Tribunal must issue any written notice confirming that the Order has taken effect. However, I consider that, when such an issue arises, it needs to be the first order of business of the Tribunal to determine whether or not to issue such a written notice, because, if the Unless Order has not been complied with, and hence the claim, if it is a claim to which it relates, has already automatically been dismissed, then nothing else of substance can happen in relation to that claim, unless of course there is some successful appeal or successful application for relief from sanctions.

E

F

51 Finally, as the authorities do note, particularly where the Order that is, or becomes, the subject of an Unless Order concerns the giving of Particulars, *particular* care is needed by the Tribunal, when considering whether to make such an Order, and, if so, in what terms. That is because there can later be real difficulty and uncertainty as to whether whatever has been done was or was not sufficient to comply with the Order, for the purposes of the material non-compliance test. Particular care also needs to be taken as to how the Order is framed as to the *consequences* of non-compliance, given that the terms of the Order itself cannot be revisited at

G

H

A the stage when the Tribunal is simply having to consider whether there has been compliance or not.

B 52 In this connection, whilst the phrase "Scott Schedule" and the use of what are called Scott Schedules has become extremely common in ETs for some years now, and particularly in cases where there are multiple allegations of discrimination and/or whistle blowing detriment, while that is no doubt a very useful tool in the Tribunal's case management kit, there is no one size fits all of so-called Scott Schedules. It is a matter for the Judge giving directions to decide what Particulars should be directed, and covering what topics or types of issue or types of information, which claims or responses (in multi-party cases), and so forth.

C

D 53 It is for a Judge considering, or making, an unless Order to consider with some care what the scope of any such Order should be, both in terms of what substantive requirements it imposes and in terms of how the Order is framed with respect to the consequences of non-compliance.

E

F 54 In this particular case it was common ground that there was no appeal before me, nor any that had been instituted, in respect of the terms of the original Unless Order. Therefore, I am not concerned, in relation to this appeal as such, with whether that Order should have been made or should have been made in the particular terms that it was. There has also been no application thus far from relief from sanctions. There is therefore certainly no appeal before the Employment

G Appeal Tribunal ("EAT") in relation to any decision on that subject.

H 55 I turn then to the grounds of appeal. It is convenient to take them somewhat out of order. The last two grounds were not free-standing grounds, but were, as it were, umbrella grounds alleging perversity and failure to give sufficient reasons.

56 Of the substantive grounds it is convenient to take first ground (b). There were two sub elements to that. The first was to the effect that the Judge had erred by determining that the Order had bitten without any prior notice being given that such a determination might be made or was being contemplated. It was said that this also deprived the Claimants of the opportunity to seek relief from sanctions.

57 This ground is, with respect, misconceived. There is no requirement in Rule 38 for written notice to be given, that a Judge may or will consider issuing a written notice to the parties confirming that an Unless Order has not been complied with, and that a claim or response, as the case may be, has therefore already been dismissed.

58 Ms O'Rourke submitted that EJ Little, as reflected in the 27 April letter, found no basis to say that there had been non-compliance or that such a notice should be served. However, it is absolutely clear from the terms of that letter, and in particular its conclusion, that EJ Little had not decided that point either way, but rather had decided that *consideration* of it should be put off until after the Preliminary Hearing.

59 Ms O'Rourke *is* right to submit that the Judge took the wrong approach by putting that matter off until after, as he envisaged, jurisdictional issues had been determined at the forthcoming Preliminary Hearing. As I have indicated, in a case where it is alleged that claims have already been dismissed by an Unless Order having taken effect, that must be the first order of business, because, if that submission proves to be correct, then the claims, subject to any appeal or an application for relief from sanctions, are simply over at that point.

60 However, I do not agree that, because the Judge took the wrong approach and directed that the Preliminary Hearing to consider jurisdictional issues should be the first order of business that somehow this resolved the question of compliance or not with the Unless Order in the Claimants' favour; or somehow that it meant that that issue could not be subsequently considered or determined by the Tribunal at all.

61 In the event this issue was determined at the hearing, as the first and ultimately only order of business, on 12 June 2018. The Tribunal *then* correctly, as such, and in accordance with Rule 38(1), having determined that the Unless Order had bitten and that the claims therefore had been dismissed on the stroke of midnight on the last day for compliance with it, properly gave written notice to that effect following that determination. This was, in the event, therefore, dealt with in the right order.

62 Nor is it correct to say that the Claimants thereby lost the right to seek relief from sanctions. Once the Judge had determined, and confirmed in writing in accordance with Rule 38(1), that the claims had been dismissed for non-compliance, that triggered the right under Rule 38(2) to make an application to have the Order set aside on the basis that it was in the interests of justice to do so. The question of whether or not to grant relief from sanctions had not been determined, or indeed considered at all, at the hearing on 12 June, which was solely concerned with the question of whether the Unless Order had bitten.

63 I observe that in principle the 14 days is allowed by Rule 38(2) for the making of such an application, which would run from the date when the Judgment was promulgated. However, it certainly would have been open to the Claimants to seek an extension of time for the making of that application and to do so in particular on the basis that Written Reasons were being sought

A and/or indeed on the basis that an appeal was planned in respect of the determination that the Unless Order had bitten.

B 64 Indeed, unless I allow this appeal, and as Mr Keene acknowledged was contemplated by the EAT at very end of its decision in the **Abraham** case, it will be open to the Claimants to make such an out of time application to the ET hereafter, although I say nothing more about that because, if such an application is made, it will be a matter for the ET to consider, whether as to
C extension of time and/or as to substance.

65 The second part of this ground was to the effect that it was wrong for the Tribunal to deal
D with this matter at the 12 June 2018 hearing when the hearing had not been listed for that purpose. There was no prior notice that the matter would or might be dealt with at that hearing.

E 66 As to that, no prior notice was necessarily needed as such, a point which emerges from the **Wentworth-Wood** decision. The procedure is at large, so long, of course, as parties are treated fairly and in accordance with the overriding objective. In this case the Judge appears to have considered that this was a preliminary issue, and that it was desirable for good pragmatic
F reasons, saving of costs and so forth, to determine it first. In fact, as I have indicated, there was a principled reason why it needed properly to be determined first, so that the question of whether the claims were still alive could be resolved. Although that was not, in terms, the reason why EJ
G Brain decided to deal with the matter first, he nevertheless got to the right result on that point.

67 The real issue is whether it was *unfair* to the Claimants for him to go ahead and deal the
H matter *at that hearing*. That depends essentially on whether, in accordance with the overriding objective, the Claimants' representative had a sufficient fair opportunity to put his case. The fact

A that the Judge could have dealt with the matter on paper, and not at a hearing at all, does not necessarily provide a complete answer to that question because one can envisage circumstances in which it would be *unfair* to deal with the matter on paper, for example, having considered written representations from one side, but not allowed a fair opportunity for written representations for the other side.

B

C 68 In this case, however, the Claimants' representative was already aware, prior to the hearing, that the Respondents considered that the Unless Order had not been complied with. He had also written a letter responding to the Second Respondent's submissions on that subject.

D 69 Ms O'Rourke however made the point that the Tribunal had not previously directed written representations on this question. Furthermore, she said, unlike in **Wentworth-Word**, this was not a case where such representations had been directed but had not been forthcoming. Nor

E was this a case where, prior to the day of the hearing itself, any of the Respondents had flagged up that they wanted this matter dealt with at this hearing. Ms O'Rourke said it was unfair that the first that the Claimants' representative knew that this matter might be dealt with at this hearing was at the hearing itself. It meant that he had not had the opportunity to marshal his detailed

F arguments, to consider the authorities, and so forth.

70 However, the minute of the hearing records very fully that the Judge considered whether

G there was any prejudice to the Claimants' representative in dealing with the matter at that hearing, and noted more than once that he was both able to and did make submissions on the substantive question of whether there had been material compliance with the Unless Order. The Judge also

H identified particular arguments made in some detail by Mr Keene on behalf of three of the Respondents.

71 It seems to me that the Claimants' representative would have been able, had he thought it necessary, to ask for more time to consider those matters, to consult the authorities, or even to seek a postponement. The Claimants' representative's only objection appears to have been a procedural one, that he considered that a prior notice of listing of this matter was necessary. However, for reasons I have indicated, the Judge rightly rejected that.

72 Ultimately, this was a question of appreciation for the Judge in terms of case management; and provided it appears to me that he has properly considered the matter and concluded on proper reasoned grounds that it could be fairly dealt with at that hearing, I should not interfere. I bear in mind that the representative who appeared for the Claimants at that hearing was the same individual who had been their representative throughout the litigation, and who had presumably had a hand in the drafting of the Scott Schedule and the Particulars of Claim or at any rate should have had some prior familiarity with their contents.

73 Though, I do bear in mind, as Ms O'Rourke said, that there had been a previous decision indicating that this matter was going to be put off, and that the representative was not aware that it was going to be dealt with until the day of the hearing itself, I do not think I can say that the matter was not handled fairly, and in accordance with the overriding objective by the Judge, given the careful consideration that it was given and in all the circumstances that I have described. This ground therefore fails.

74 I turn next to the fourth ground. This has two elements. The first is to the effect that the Order of 21 March, the Unless Order, was not sufficiently clear as to what is described in the

A Notice of Appeal as its interplay with Rule 38. However, I do not agree with that. It did what Rule 38(1) says. It did not need to cite Rule 38, as it were, by number.

B 75 It is true that it used the phrase "struck out without further notice" rather than the precise words of the Rule: "dismissed without further Order." It would have been better to use the precise words, but the import of these words is the same and it used the word 'UNLESS' in capital letters. The fact that an Unless Order was being made was also flagged by the letter from the Tribunal of
C the same date. There really could be no doubt that this was an Unless Order made under Rule 38(1).

D 76 Secondly, under this ground, it was said that it was not now open to the Tribunal to make such a determination, three months after the date when the Unless Order was said to have bitten.

E 77 As to that, it is unfortunate that it took so long for this matter to be resolved, but as I have indicated, there is no time limit in the Rule for the issuing of such a determination, and it is necessary that the matter be determined by the Tribunal where there is a dispute about it. The fact that there was a potential issue in this case, as to whether there had been compliance, was
F flagged up very shortly after the 28 March letter had been written by the Claimants' representative. There may be cases where a Judge considers that a hearing is needed to resolve the issue, and it may take a little bit of time to get to that point. This ground therefore also fails.

G

78 I turn next to ground (e), which asserted that the Judge had erred in that he had accepted that there was no prejudice to the Respondents in relation to the Scott Schedule. However, Ms
H O'Rourke did not pursue this today, and rightly, as there is no such statement by the Judge at any point in his Decision.

79 Leaving aside the, as it were, overarching grounds of perversity and failure to give sufficient reasons, that takes us to grounds (a) and (c), which really, I think, lie at the heart of this appeal.

80 The starting point, as has been said in previous authorities, is the terms of the Unless Order. That itself involves a consideration both of the Order of 21 March 2018 and the Order made at the hearing on 14 February 2018, to which it refers back.

81 I note the following features of the original 14 February hearing Order, paragraph 2, which is what became the subject of the Unless Order subsequently. Firstly, it is addressed to both Claimants collectively, requiring "the Claimants" to prepare a Scott Schedule.

82 Secondly, it directs them to identify each act of less favourable treatment, unwanted conduct or detriment that is alleged. Contrary to Mr Keene's submission, I do not agree that this should be construed as requiring them to specify, in relation to each such act, whether it was said to be something amounting to direct discrimination, harassment, victimisation, detriment for making a protected disclosure, or more than one of the above. If that was intended, it should have been spelled out. The use of the different language, of less favourable treatment, unwanted conduct or detriment, is not sufficient, because the gist of that is that what is needed is to set out each *factual* act that is said to amount to one or more of those things. However, the Order does not go further and say that it must also be specified which of those things it is, still less therefore what type of *legal* claim was in mind. That sort of thing often is included expressly in Scott Schedule directions, but it was not on this occasion.

A

83 Next, the Order *does* require the Claimants to say, in relation to each such act, the date when it is said to have occurred, though it seems to me that there is potentially some room for flexibility, if a date is not given precisely, if the lack of precision is judged not to be material. Next, it required the identification of which Respondent or Respondents was said to be liable in respect of each such act. Further, and finally, if that was the First or the Second Respondents, then who the human agent or agents was in each such case needed to be identified.

B

C

84 The terms of the 21 March 2018 Unless Order itself need to be considered with some care as well. Firstly, it says that the Claimants are "required to comply with paragraph 2 of 14 February Order Scott Schedule" by the given date. It refers, therefore, to the whole of paragraph 2, and, on its face, requires them to comply with *all of it and in all respects* by that date. That is the natural meaning of the words.

D

E

85 Secondly, it says that, unless they do, their claims will be struck out without further notice. The natural meaning of the words is therefore that, unless they comply (and unless any failure to comply is not material), with *all* of the requirements of the previous Order, then *all* of their claims – the whole of their claims against all of the Respondents – will be struck out without further notice. That, it seems to me, is the clear and natural meaning of the terms of the Order, even in context.

F

G

86 I have to observe that it is an extremely widely-drawn and draconian Order in that respect. However, there is no appeal before me, or the EAT at all, against the drawing of the Order in those extremely wide and draconian terms. As the authorities make clear, it is not part of any function that I can perform in relation to the appeal, to rewrite that Order to cause it to mean something that it does not mean, for example to cause it to be read as though it provided that if

H

there is non-compliance in relation to a *particular* claim or complaint, then that particular claim or complaint shall stand dismissed, rather than the claims across the board.

87 I make one further observation about the construction of the original Order, which is that it does not prohibit the Scott Schedule from cross-referring to another document, provided of course that the two documents, read together, materially comply.

88 In argument before me it was said on behalf of all the Respondents that the chief deficiency of the Particulars and the Scott Schedule read together was that in a number of instances they did not provide identification of who were the human agents said to be responsible on behalf of the First or Second Respondents. However, Mr Keene in particular, on behalf of the First, Third and Fourth Respondents, also submitted that they did not provide sufficient material Particulars in relation to other matters, including dates, in instances where a span of dates of more than two years had been provided, and in instances where it was insufficiently clear what the act or acts alleged on the part of one or more of the Respondents he represented was.

89 In the course of today, as I have indicated, Ms O'Rourke, on instructions, withdrew the appeal in respect of the Second Respondent, because she accepted on behalf of her clients that no individual at all had been identified as an individual identifiable human being who had rendered the Second Respondent liable. Only one individual who worked for it had been mentioned, but not in the context of an allegation that was a live allegation that her conduct had been something of which the Claimants complained.

90 However, Ms O'Rourke said the position was different in relation to the First, Third and Fourth Respondents. That was, firstly, because the Third and Fourth Respondents were

themselves individuals for whose acts the First Respondent could be liable, and indeed they were the main individuals alleged to render it liable. Secondly, she said, other individuals were mentioned in these documents, in particular a Dr Coleman, who was involved in dealings with the Claimants, and also, at certain points, Mr Tony Shaw.

91 Further, she said, dates *had* been given, and whilst some of the dates covered a very broad period of more than two years, nevertheless they were dates and they had been given. The point was made in the **Wentworth-Wood** case in particular that the Tribunal, and hence the EAT, are not concerned with whether the case will succeed as a matter of fact or law, but whether the requisite Particulars have been given. Thirdly, she submitted that on a careful reading of the cross-referencing between the two documents, it *was* possible to discern with sufficient particularity the allegations that were being made in substance.

92 Finally, she said the Judge had erred, because he had taken too expansive approach by referring to the general issue of whether or not there had been material compliance with the Order, on the basis of whether it enabled the Respondents to know the case that they had to answer. However, he had strayed into other areas of particularity, including into Order 1 made at the February hearing, which was not the subject of the Unless Order, whereas his focus should have been simply on whether the requisite Particulars had been given.

93 On that last point Mr Keene submitted that there was no error. Firstly, the Judge was perfectly clear, and knew, that the Unless Order only operated in relation to the Scott Schedule complaint under paragraph 2: see the last sentence of paragraph 26. The fact that the Judge also mentioned that there had in his view been a failure to provide Further Particulars of the Particulars of Claim ordered by paragraph 1, did not show that he had erred on this point. Indeed, there was

A nothing at all in this Decision to suggest that the Judge was affected by a consideration of whether there had been sufficient Particulars of the jurisdictional grounds, which was what paragraph 1 was concerned with.

B

94 On that point I agree with Mr Keene. There is no suggestion here that the Judge was affected by the lack of Further Particulars, as he saw it, of the jurisdictional grounds. I think it is clear from a reading of this Decision as a whole, that he was mindful that the focus needed to be C on whether sufficient Particulars had been given in the Scott Schedule to enable the Respondents to know the case against them. In addition, that was precisely why the Orders had been made in the first place: because these were considered to be material and important details that were D needed so that the Respondents could fairly defend themselves.

95 In relation to the point of substance submitted by Ms O'Rourke, that there had been substantial compliance, Mr Keene referred to a number of examples, he said, of instances where E it could be seen looking closely at the amended Particulars and Scott Schedule together that the compliance was in substance deficient. He referred in particular to the following examples.

F

96 Firstly, it was alleged, by reference to grounds U, V, W and X in the Particulars of Claim, that there had been unlawful conduct on 2 February 2016, said to involve conduct by the First Respondent, and with a first further cross-reference to paragraphs 54, 55, 62, 63 and 64 of the G amended Particulars of Claim. However, he correctly submitted that no individuals were referred to in either the lettered grounds there cited, or the relevant numbered paragraphs of the ET1. Further, the date of 2 February 2016 could not be related to those paragraphs.

H

97 Another example concerned the opening series of allegations in the Scott Schedule, all said to refer to a period running from 19 April 2013 to 20 July 2015 and to involve wrongdoing on the part of the First, Third and Fourth Respondents. This was described as the Second Claimant having been subjected to a series of unmeritorious investigations by reason of having made a protected disclosure, racially aggravated investigations by Dr Coleman and his team and having been subjected to strenuous interviews, intimidation and bullying by Dr Coleman and his team. There were cross-references to paragraphs 10, 11, 14, 15, 19, 20 and 21 of the Particulars of Claim.

98 However, said Mr Keene, the series of investigations, and the occasions of the interviews concerned, on which there was alleged intimidation and bullying, were not identified. The relevant paragraphs of the ET1 that were cited did not assist. Further, there was a mismatch with paragraph 11, for example, referring to all the Respondents having resorted to investigations and using their position to intimidate and harass and discriminate against the Second Claimant and against the First Claimant, but with no individuals being identified and no distinction drawn between particular Respondents.

99 Whilst Ms O'Rourke made the submission that this related to what was said to be an ongoing investigation that continued for more than two years, this was not, it seemed to me, how the more detailed allegations in these three rows were put. Rather, they were said to relate to a series of investigations over this period, to a number of interviews over this period, and so forth.

100 I reflected on, Ms O'Rourke point that, either way, dates had been given and names had been given and neither the Tribunal nor the EAT should be concerned with whether these allegations would as such hold up at trial. However, it seems to me that the mismatch between

the proposition that there was an extended *single* investigation over more than two years, and the actual detailed flavour of the allegations being put forward, and the mismatch and lack of any particularity of dates or incidents being given, was something that the Judge was entitled to regard as a material non- compliance in this case. I say this having regard to the submission fairly made by Mr Keene in particular, that it is of real importance to identify the individual or individuals said to have been involved in treatment or in different treatment on different occasions, where the allegations are of discrimination, or indeed of someone being influenced by an individual having made a protected disclosure. That is because the task of the Tribunal is then to consider the motivation or not of that individual or individuals, a point explored in **Reynolds v CLFIS (UK) Ltd** [2015] EWCA Civ 439 in relation to discrimination claims.

101 Further examples given by Mr Keene were the entry relating to 13 September 2017 and ground Z, said to involve the First Respondent and cross-referring to paragraphs 77 and 78. However, again there is a lack of particularity of who were said to have been the individuals involved. Also Ground AA referred to as relating to conduct between 8 April 2016 and 7 March 2018, cross-referring to paragraphs 73 to 79, but again with insufficient particularisation in those paragraphs, given particularly that those paragraphs refer to a number of different episodes and incidents over that all-embracing time period, but without indicating in relation to each one who the individual or individuals alleged to be involved were.

102 Ms O'Rourke made a very forceful submission to the effect that the Claimants may have been in genuine difficulties, particularly at this stage of the litigation, in giving more details of dates, or in particular in identifying who the individual or individuals behind these various acts or correspondence, in terms of the actual decision-makers were, and that this was something that may or may not have emerged later, for example as a result of disclosure that had not yet been

completed. She submitted that it cannot be right that the Claimants should be penalised for this to the extent indeed of their claims entirely falling away, if they had in fact done the best that they could to give this information at this point in the litigation. Alternatively, she submitted that the worst that they should suffer is that those claims that have been insufficiently particularised should fall away, but with the others left standing.

103 I have real sympathy with that submission, in both respects. I have real sympathy with the submission that the outcome seems extraordinarily harsh for these Claimants, who have made extremely serious allegations that, as two black practitioners having taken over a historically white practice, they have been targeted in a sustained way over some years because of their race and/or because they raised issues of discrimination, or other serious issues, according to their Particulars of Claim, of malpractice.

104 However, I am effectively bound by the terms of the Unless Order, as was the Judge. This is not something that, on the application that was before the Judge could have revisited, and nor can I in relation to this appeal. Whilst I will confess to having some misgivings about the outcome, it seems to me that the outcome to which I am driven by the words of the Unless Order, and by the material to which I have been directed, is that I cannot say that the Judge was wrong to conclude that there had been material non-compliance with the terms of that Order, particularly because the identification of individuals does matter.

105 A further argument raised before me concerned whether the Respondents could as it were piggyback in respect of one Respondent upon the failure to comply in respect of another Respondent? Could the First, Third and Fourth Respondents piggyback on failures to comply in respect of the Second Respondent? Could the Third and Fourth Respondents piggyback on

failures to comply in respect of the First Respondent? Ultimately, I agree with Mr Keene that it was not necessary for him to rely on such a proposition, in order to succeed in fending off this appeal, because there was material non-compliance in relation to the First Respondent, *and* in relation to the Third and Fourth Respondents for the reasons that I have given.

106 However, I have to say that I would have struggled to see a basis on which the piggyback consequences could be evaded, given the way the Order was worded. I agree with Ms O'Rourke that it is deeply unattractive that a Claimant's claims against one Respondent should be dismissed because of non-compliance in respect of another Respondent. However, that is on analysis really no more unattractive or unpalatable than that one type of claim, which has been perfectly sufficiently particularised, should be dismissed because another type of claim has not been, or the claims of one Claimant should be dismissed, because the claims of another Claimant had not been. However, everything in every case comes back to the terms of the Unless Order. I have been quite candid in my view that this was an extremely draconian Unless Order, but not one with which I can interfere in relation to this appeal.

107 For all of these reasons these remaining grounds do not succeed, and nor did the perversity or lack of sufficient reasons challenges, which were parasitic on the other grounds.

108 For these reasons the appeals in respect of the First, Third and Fourth Respondents must be dismissed. Whether the Claimants now apply for relief from sanctions, in view of the result of this appeal will be a matter for them, if so advised; and if they do, whether to consider and/or grant such an application out of time, will be a matter for the ET.