EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: Mr Steven Haynes

Respondent: Musicians' Union

Heard at: Croydon (London South Tribunals) **by** CVP

On: 8th November 2021

Before: Employment Judge Clarke (sitting alone)

Appearances:
For the Claimant: Ms J Franklin (solicitor)
For the Respondent: Mr D Sorensen (solicitor)

WRITTEN REASONS

Introduction

1. The hearing on 8th November 2021 was to determine the Claimant's application to set aside an order of the Tribunal dated 1st October 2020 and re-instate his claims, essentially an application for relief from sanctions.

2. At the hearing, the Claimant was represented by Ms J Franklin, the Respondent was represented by Mr Sorensen.

3. No oral evidence was called.

4. I was referred to, and considered, a bundle of documents comprising 474 pages prepared for the hearing. It contains relevant documents including the Claims and Responses, various Tribunal orders made, inter partes and Tribunal correspondence and the Claimant's medical disclosure. References in square brackets hereafter are to the page numbers of this bundle.

5. I also heard oral submissions from both Ms Franklin and Mr Sorensen.

6. I was provided with a bundle of authorities, comprising: (i) *The Governing Body of St Albans Girls' School and Hertfordshire County Council -v- Neary [2009] EWCA Civ 1190*; (ii) *Mitchell -v- Newsgroup Newspapers Ltd [2013] EWCA Civ 1537;* (ii) *Wentworth-Wood & Others -v- Maritime Transport Ltd [2018] 1 WLUK 187, UKEAT/0184/17/JOJ*; and (iv) *Polyclear Ltd -v- Wezowicz & Others [2021] 6 WLUK 32, UKEAT/0183/20/VP* to which I was referred during submissions and have had regard.

7. Additionally, I received and considered a document prepared by the Respondent summarising the Claimant's alleged non-compliance with Tribunal orders.

Background

8. The Claimant was employed by the Respondent from 12th September 2016 until the termination of his employment on 23rd January 2019. At all relevant times he was employed as a Regional Officer.

9. He commenced 2 claims in the employment tribunals against the Respondent. The first, on 17th December 2018 under claim number 2304523/2018, was brought whilst the Claimant was still employed by the Respondent and sought compensation for disability discrimination. The second, on 20th April 2019 under claim number 2301380/2019, was brought following the termination of the Claimant's employment for gross misconduct. By that claim the Claimant claimed for disability discrimination, unfair dismissal and notice pay. The disability asserted by the Claimant is a recurrent depressive disorder with a significant degree of anxiety subsisting since 2008.

10. The Respondent resisted all of both claims, disputing that the Claimant had a disability or, if the Claimant did have a disability, that the existence of the disability was known to the Respondent. It also denies a failure to make reasonable adjustments and that the Claimant's dismissal was unfair. Further or alternatively, it relies on its conduct being a proportionate means of achieving a legitimate aim.

11. The 2 claims were subsequently consolidated by a case management order made on 27th June 2019 at a preliminary hearing. The case management order included a detailed list of issues and further case management directions, made by the consent of both parties, which sought to prepare the claims for a final hearing. The final hearing was listed for 5 days commencing on 2nd November 2020 [**85-96**].

12. Thereafter there were a multitude of delays, correspondence and further case management orders. These culminated in a case management order made by EJ Andrews at a provisional hearing on 1st October 2020, by which time the final hearing due to commence on 2nd November 2020 had become unachievable and had been vacated.

13. It is not necessary to recite the full details of the correspondence and case management history of this case between 27th June 2019 and 1st October 2020 but they are known to both parties and are set out fully in the bundle provided to me. Anything particularly relevant to the decisions I have had to make is referred to below.

14. The most relevant history can be briefly summarised by noting that there had been various correspondence from both the Respondent and the Tribunal that had not been addressed by the Claimant or his solicitors and wholesale non-compliance with Tribunal orders of 27th June 2019 by the Claimant.

15. On 9th April 2020 the Tribunal extended time for compliance with the directions given on 27th June 2019 and by letter dated 27th May 2020 the Tribunal wrote to the Claimant warning that the Tribunal was considering striking out Claimant's claims unless the Claimant complied with the outstanding orders within 7 days or provided a good reason why strike out should not occur.

16. On 4th June 2020 the Respondent applied to strike out the Claimant's claims for failure to comply with orders requiring the Claimant to provide further particulars, medical evidence and a schedule of loss.

17. It was against this background that the preliminary hearing on 1st October 2020 took place. It is common ground that both parties were represented at the hearing and comprehensive case management directions were given [**373**].

18. Paragraph (1) of the order of 1st October 2020 read as follows:

"*Unless the claimant discloses to the respondent his GP records for the relevant period (2008 – termination of his employment) by* ***4pm*** *on* ***7th October 2020*** *all his claims will be struck out without further order*".

19. The order then went on to provide for 2 alternative sets of case management directions on the assumption that the terms of paragraph (1) were met. One set were premised on the Respondent accepting, following disclosure of the GP records, that the Claimant had a disability. The other set were premised on the Respondent not accepting that the Claimant had a disability. The orders made were careful and detailed but largely repeated the directions made on 27th June 2019 as no substantial progress in preparing this case for final hearing had been made in the intervening period.

20. On 5th October 2020, before the date specified in the unless order, the Claimant sent to the Respondent and to the Tribunal some medical records accompanied by an e-mail [**372**] in the following terms:

"*Dear Sirs,*

Further to the Order made by EJ Andrews at the Preliminary Hearing on 1st October 2020, we can confirm that we have today sent to Mr Sorensen (by e-

mail) a copy of the relevant entries from the GP records (relevant to the Claimant's pleaded disability).

We trust that this satisfies the first direction made by EJ Andrews, however if the Respondent believes that the records provided are deficient in any way, we would be obliged if:

1. *Mr Sorensen can notify us of how the records are considered deficient and we will work with him to rectify this; and*
2. *The time limit for complying with the Unless Order could be extended in order that any requested clarification can be provided.*

Thank you for your assistance."

21. The records provided were sparse, incomplete and covered only the period from 22nd March 2018 onwards [**380-451**]. Some of the records that were provided had been partially redacted and some entries referred to drug and/or psychological treatments and/or anxiety related sickness absences from work which pre-dated 22nd March 2018 but for which no records (including consultations, fit notes, reports or prescribing history) were disclosed.

22. That was the only disclosure of medical records that was provided by the Claimant before 7th October 2020. Consequently, on 7th October 2020 the Respondent wrote to the Tribunal advising that the Claimant had failed to comply with the unless order of 1st October 2020 as the records provided were incomplete and requesting that the Tribunal strike out the claim as per the unless order [**376-378**].

23. The Claimant then wrote to the Tribunal and the Respondent on 9th October 2020 objecting to the Respondent's request that the claim be struck out, disputing that the unless order had not been complied with and pointing to the failure of the Respondent to reply to their correspondence of 5th October 2020 and take issue with the adequacy of the records provided [**379**]. That letter included the following:

"*We have disclosed the Claimant's relevant GP records, relevant to the disability relied upon. We have not disclosed the Claimant's medical records insofar as they relate to other medical conditions not relied upon in relation to this claim. The Claimant's GP records contain some very personal unrelated entries, and, out of respect for the Claimant's privacy, we have not disclosed such records. If the Tribunal requires evidence of this, we are content to disclose the Claimant's medical records to the Tribunal but do not believe that we are required to disclose the Claimant's entire medical history to the Respondent…… Whilst the Respondent may now question why records in respect of particular periods have not been disclosed, if no relevant records exist for those periods we have not been able to disclose them – put simply, we cannot disclose what doesn't exist ….. We requested the Claimant's medical records in their entirety and have disclosed in full all relevant material contained within those records, as provided to us by the GP surgery*."

24. In response, on 26th October 2020 the Tribunal wrote to the parties noting that EJ Andrews had reviewed the recent correspondence regarding the unless order dated 1st October 2020. That letter requested that the Claimant send a copy of the records disclosed to EJ Andrews for review by 2nd November 2020. The parties were also advised that the final hearing on 2nd November 2020 would be vacated and that if the case proceeds, the Case Management orders premised on the Respondent disputing disability would apply [**452**].

25. The Claimant did not respond to the correspondence and did not send a copy of the records to the Tribunal.

26. On 5th November 2020 the parties were notified that case was listed for a final hearing on 11th to 15th October 2021.

27. The Respondent chased confirmation as to whether the claim had been struck out and on 15th December 2020 the Tribunal wrote to the Claimant that EJ Andrews had instructed that the Claimant had failed to reply to the Employment Tribunal's letter of 26th October 2020 and a judgment was being prepared further to the unless order dated 1st October 2020 [**458**].

28. On 17th December 2020 the Tribunal sent a further letter to the Claimant entitled "CONFIRMATION OF DISMISSAL OF CLAIM Employment Tribunals Rules of Procedure 2013 Rule 38". That letter confirmed that the claim had been dismissed under Rule 38 as the unless order sent to the parties on 1st October 2020 was not complied with by 7th October 2020 [**459**].

29. By a letter dated 31st December 2020 the Claimant applied for a reconsideration of the Tribunal's decision to dismiss the proceedings, setting out the grounds for the request and repeating the offer to send the full records to the Tribunal for review (but not in fact doing so) [**460 – 462**]. That letter also asserted that the unless order had been complied with and it might therefore also be read as a request for reconsideration of the Tribunal's determination that it had not. The Respondent responded by e-mail dated 11th January 2021 opposing the Claimant's application [**463-465**].

30. The Tribunal wrote to the parties on 5th February 2021 noting that no judgment was formally required following non-compliance with an unless order, asking the Claimant to confirm within 7 days whether an oral hearing was requested and to comment upon the failure to comply with the order of 26th October 2020 to send copies of a full set of GP records to the Tribunal by 2nd November 2020 [**466-467**].

31. The Claimant's request for re-consideration was subsequently listed for the preliminary hearing which took place before me on 8th November 2021. At the conclusion of the hearing, an oral judgment and reasons were given. I dismissed the application. No request was made for written reasons at that time, but the Claimant made a request for written reasons by letter dated 9th November 2021.

32. There is a further matter relevant to the history of this case. For a period of at least 18 months during the period from June 2019 to 8th November 2021, the Claimant's representative, Ms Franklin, had been having a very difficult personal time and had had periods of absence from work. Her difficulties had, at least in part, contributed to the manner in which the litigation was dealt with by the Claimant. I pay tribute to Ms Franklin for explaining her undoubtedly immense difficulties and the frank disclosures, admissions as to impact of them upon her working life and the progression of this case, and apologies that she made. None of my subsequent observations or comments should be taken as a personal slight on Ms Franklin. Nevertheless, Ms Franklin is an employee of Slater and Gordon a large firm of solicitors, who were representing the Claimant and there could, and should, have been other people to step in and assist with the difficulties she faced and keep this litigation on track. For whatever reason (which does not concern me), that did not happen.

Relevant Law

33. Tribunal Rule 38(1) confers on the Tribunal the power to make an order which specifies that, if the order is not complied with by the dates specified in the order dismissed the claim without further order (an unless order).

34. The rule also provides that where such an order is made and the claim is dismissed on this basis, the Tribunal shall give written notice to the parties confirming what has occurred.

35. Tribunal Rule 38(2) gives a Claimant whose claim has been dismissed in whole or in part as a result of an unless order the right to apply to the Tribunal in writing within 14 days of the date the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so and accordingly gives the Tribunal the right to set aside the dismissal of the claim if it is in the interests of justice to do so.

36. There are therefore 3 stages at which judicial decisions may be made under Tribunal Rule 38:
    (i) The decision to make an unless order;
    (ii) The decision that the order has not been complied with and the automatic sanction of dismissal specified in the unless order has taken effect;
    (iii) The decision as to whether the order should be set aside and the claim or response re-instated.

    Polyclear Ltd -v- Wezowicz & Others [2021] 6 WLUK 32, UKEAT/0183/20/VP

37. Provision for reconsideration is made under Tribunal Rule 70 which states:

"*A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again*."

Tribunal Rule 38(2) is analogous to a reconsideration.

38. When considering whether to exercise its powers under Rule 38 or Rule 70 the Tribunal must also have regard to the overriding objective in Tribunal Rule 2 and deal with the case fairly and justly. This requires the Tribunal to, so far as is practicable:
    (a) ensure that the parties are on an equal footing;
    (b) deal with the case in a way which is proportionate to the complexity and importance of issues;
    (c) avoid unnecessary formality and seek flexibility in the proceedings;
    (d) avoid delay, so far as is compatible with proper consideration of the issues; and
    (e) save expense.

39. In dealing with an application for reconsideration and/or under 38(2), the Tribunal must consider all relevant factors. There is no definitive list of those matters which should be considered or take into account. Guidance as to factors that are likely to be relevant is given in cases including: *Enamejewa -v- (1) British Gas Trading Ltd & (2) Centrica Plc UKEAT/0347/14/DXA*, *The Governing Body of St Albans Girls' School and Hertfordshire County Council -v- Neary [2009] EWCA Civ 1190*, *Polyclear Ltd -v- Wezowicz & Others [2021] 6 WLUK 32, UKEAT/0183/20/VP,* and *Thind -v- Salvesen Logistics Ltd/0487/09/DA.*

40. Notwithstanding that Civil Procedure Rule 3.9 (relief from sanctions) has not been expressly incorporated into the employment tribunal rules, its provisions and relevant authorities as to the application of that rule also provide general guidance as to relevant factors to be considered in applications under Tribunal Rules 38 and 70 - *The Governing Body of St Albans Girls' School and Hertfordshire County Council -v- Neary [2009] EWCA Civ 1190*.

41. *Mitchell -v- Newsgroup Newspapers Ltd [2013] EWCA Civ 1537 [2014] 1 WLR 795* (which was included in the bundle of authorities provided to me by the Claimant) considered the application of the relief from sanctions test in CPR 3.9 and set out guidance as to how an application for relief from sanctions should be approached. The guidance in *Mitchell* was subsequently clarified in the further Court of Appeal case of *Denton -v- TH White Ltd [2014] EWCA Civ 906 [2014] 1 WLR 3296* which set out a 3 stage test:
    (iv) Identify and assess the seriousness and significance of the breach;
    (v) Consider why the default occurred;
    (vi) Evaluate all the circumstances of the case so as to enable the court to deal justly with the application.

42. Tribunal Rule 37 confers on the Tribunal a discretion to strike out all or part of a claim or response, provided that the party liable to be struck out has been given a reasonable opportunity to make representations, either in writing or at a hearing (if requested), on any of the following grounds:
    (f) That it is scandalous or vexatious or has no reasonable prospects of success;
    (g) 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;
    (h) For non-compliance with any of these Rules or with an order of the Tribunal;
    (i) That it has not been actively pursued;
    (j) 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).

The Issues

43. This issues for the preliminary hearing on 8th November 2021 are:
    (2) Was the unless order dated 1st October 2020 complied with?
    (3) If not, would it be in the interests of justice to set aside the order and effectively re-instate the claim?

44. In respect of (2) above, this requires consideration of all of the relevant circumstances but particularly incudes:
    (i) the seriousness and significance of the default
    (ii) the reason for the default and whether it was deliberate
    (iii) The extent of compliance with the order;
    (iv) the impact of the breach on the trial date and whether the final hearing date can still be met;
    (v) the prejudice to each of the parties (of re-instating or of not re-instating) including, but not limited to, whether a fair trial remains possible;
    (vi) the previous conduct of the Claimant and the extent to which he has complied with previous orders;
    (vii) the interests of the administration of justice, which include the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with tribunal directions; and
    (viii) the overriding objective in Tribunal Rule 2.

The Submissions

45. The Claimant's submissions can be briefly summarised as follows:

    There was material, if not actual, compliance with the unless order. The Claimant's medical records that were obtained were continuous from 2008 to

2018 but primarily relate to the Claimant's asthma. All relevant records were disclosed and only those unrelated to the Claimant's mental health were not. The Claimant did not wholly ignore the order. Any non-compliance arose from the Claimant's representatives misunderstanding/misreading of the unless order. The Respondent is not prejudiced by the delay and may still challenge disability. All matters are still capable of being litigated. The Claimant's solicitor has had a difficult time personally and has not coped well. This has caused or contributed to delays.

46. The Respondent submissions can be briefly summarised as follows:

The Claimant has purposefully and consistently refused to disclose the complete medical records. The complete records are important and required. The unless order was unambiguous and clear in its terms and unopposed at the hearing on 1st October 2020. The Claimant never applied for a reconsideration or variation of it. There has been no material compliance with the unless order. Only selective records have been provided and the failure to comply was deliberate. There is long history of non-compliance, including after the breach of the unless order, and a high level of failure which has caused the Respondent prejudice. Over 2 years after the initial disclosure orders and 1 year after the unless order the full medical records have still not been provided. The delay has also caused prejudice and there will be further delay until final hearing. Key witnesses may not be able to attend. The Respondent has no confidence in the Claimant's future compliance. Enough is enough.

Tribunal's Findings and Reasons

In relation to whether the unless order was complied with:

47. As the Claimant's application appears to include a request for reconsideration of the determination that the unless order was not complied with, the first thing I have to decide is whether the unless order was in fact complied with. If it was complied with, the claim cannot have been struck out by reason of the order of 1st October 2020 and must be re-instated.

48. Although Ms Franklin sought to address me on the fact that the unless order required only relevant records, that qualification does not appear in the wording of the unless order [**373 and see paragraph 8 above].** The only qualification in relation to 'relevant' is in relation to the period for which the records must be supplied, which was from 2008 to the termination of the Claimant's employment with the Respondent.

49. Further, it is quite clear from the records that were sent and the e-mail of 5th October 2020 that accompanied them [**372 and see paragraph 10 above]** that only the records that the Claimant considered to be relevant to the

question of disability were sent, not the entire records covering the relevant period.

50. It is also clear from the Claimant's further e-mail of 9th October 2020 in response to the Respondent's request for the claim to be struck out for non-compliance [**379 and see paragraph 13 above],** that not all of the GP records received by the Claimant were disclosed. Ms Franklin also made admissions during submissions today that there were other records available to the Claimant prior to 7th October 2020 which were available, and she provided a summary of what those records contained.

51. I therefore have no hesitation in finding that the unless order as drafted in paragraph 1 of the order of 1st October 2020 was not fully complied with.

52. Ms Franklin further submitted that even if there was not full compliance, there was material and/or substantial compliance with the unless order.

53. The issue as to whether or not the Claimant was disabled within the meaning of the Equality Act 2010 was the keystone of all of the Claimant's claims. It is, and was, disputed by the Respondent. Further, the Claimant's claims centre not only on the existence of a disability but also whether he had that disability at the time of the events that he relies upon and whether the Respondent was aware of any disability at the time of the relevant events. The Claimant's first hurdle if his claims are to succeed is to establish his disability and everything else hinges on that. The unless order was quite clearly targeted to that issue.

54. If the Claimant was not disabled, his claims are bound to fail. The medical records that were the subject of the unless order were the primary independent evidence necessary for a determination of this issue.

55. The Claimant asserts that all material records, that is those relating to the Claimant's consultations for mental health issues, in the relevant period covered by the unless order were disclosed. I am therefore asked to conclude that even if there was not strict compliance with the terms of the unless order there had been material or significant compliance and the claims should not have been dismissed.

56. Having not seen the full medical records, I cannot confirm that all the material records as defined by the Claimant, ie those relating specifically to the Claimant's mental health, were in fact disclosed prior to the deadline imposed by the unless order. However, even assuming that they were, I do not find that the Claimant had materially complied with the unless order.

57. I note that the information given by the Claimant to Dr Das and in his disability impact statement refers to the Claimant having been prescribed beta blockers in 2008/2009. His disability impact statement clarifies that his GP prescribed this medication in connection with anxiety. The Claimant has also repeatedly asserted that he has received treatment from a psychologist since about 2014, which his disability impact statement asserts was as a result of referral by his GP. Neither of these matters are covered by the disclosed records nor

does the e-mail enclosing the "relevant records" explain why they are not or that full records for the entire relevant period had been obtained (which at the very least was necessary in view of the fact that the records disclosed only date back to March 2018).

58. Further, and in any event, as the claimed disability relates to mental health, even those entries in the Claimant's GP records which do not specifically relate to mental health may contain other personal material, such as information about the Claimant's general health, state of mind or outlook. Any comments within those non-mental health consultation records which tend to suggest that the Claimant was in a positive frame of mind, or the absence of any mental health issue, could therefore be equally important to the issue of whether the Claimant has a disability as those consultations in which he specifically sought help with his mental health.

59. The Claimant disclosing only those consultations that related directly to mental health and simply asserting that relevant entries had been disclosed was not adequate in this case. From the way in which the Respondent had repeatedly put their case, it should have been clear to both the Claimant himself and Ms Franklin long before the unless order was made that full disclosure was necessary and why.

60. There was no actual, material or substantial compliance with the unless order, accordingly, the sanction imposed by that order (that all the Claimant's claims should be struck out for failure) took effect automatically and without the need for further order with the result that the Claims have been struck out.

61. The inclusion in the Claimant's e-mail providing disclosure of the request to the Respondent to notify the Claimant if the records are considered deficient is irrelevant to the question of whether the order was complied with. The onus is on the Claimant to comply to avoid the sanction, not upon the Respondent to take issue with purported compliance.

62. I also note that the Claimant had raised in correspondence the question of whether or not the Tribunal was required to give a judgment striking out the claims in such circumstances. No judgment has in fact been made. The point was rightly not pursued before me today as it is clear from the wording of Tribunal Rule 38(1) that the sanction takes effect automatically and that all that is required is a notice from the Tribunal to say what has occurred. In this case the notice was sent on 17th December 2020. The requirements of Tribunal Rule 38(1) having been met, the Claimants claims stand struck out unless and until they are re-instated.

63. I must therefore go on to consider whether it would be in the interests of justice to give relief from sanctions and set aside the unless order and effectively re-instate the claims.

In relation to the application to Set-Aside/Re-instate:

64. Tribunal Rule 38(2) deals exactly with this type of situation where an unless order has not been complied with. It gives the Tribunal a discretion to undo the sanction imposed for non-compliance where it is in the interests of justice to do so.

65. The exercise of judgment as to whether it is in the interests of justice allows broad and unfettered consideration. Nevertheless, it is clear from the Tribunal Rules and the authorities that there are a number of factors that I should or must take into consideration when reaching a decision.

66. The factors I must consider are broadly those set out in paragraph 34 above and I will deal with them below, save in relation to the extent of compliance with the order, which I have already considered at paragraphs 37-53 above where I concluded that there had not been material compliance.

67. Despite Ms Franklin's valiant attempt to fall on her own sword and say that the failure to comply with the unless order was hers and was due to a misunderstanding of the content and therefore the requirements of the order, I find that the fault was deliberate and was not hers alone but was also as a result of the Claimant's express instructions not to disclose the entire records.

68. It is clear from the contents of her submissions and from the history of this case that at the time she was required to comply with the unless order she had instructions from Claimant not to disclose all medical records but only those that the Claimant considered relevant to issue of disability on which the claims were based and that this was the reason for the default.

69. In submissions she described the Claimant as being "..at times a little paranoid…" as regards disclosure of the full contents of his medical records and confirmed that at the time of disclosure under the unless order the Claimant objected to his full medical records being disclosed.

70. That followed a pattern that had been set for a long time by the Claimant and was entirely consistent with his failure to permit the disclosure of his medical records to the Respondent's doctor, Dr Das, in 2018. Dr Das was instructed by the Respondent during the Claimant's employment to ascertain whether it was safe for the Claimant to return to work and the nature and extent of the Claimant's mental health difficulties. Whilst the Claimant initially gave the Respondent his written authority to obtain the records [**398-399**], his GP required him to sign a further permission before releasing his records to the Respondent [**397**] and the Claimant failed to sign that form and return it to his GP so that his records were not in fact obtained by the Respondent or Dr Das [**300 at para 11**].

71. Ms Franklin spoke of a recent change in instructions. I note that Ms Franklin advised that she had sent the full records (for the first time) to both the Tribunal and the Respondent on 5th November 2021 (the working day before the hearing). This was over 12 months after the Tribunal's request for the same in its letter of 26th October 2020 and despite the confirmation on 17th

December 2020 of the dismissal of the Claims in consequence of failing to disclose the full records.

72. In fact, neither the e-mail to the Respondent nor that to the Tribunal has been traceable and so the position remains that neither the Tribunal nor the Respondent have yet seen the full records, and consequently they are not available to me. Nevertheless, I accept Ms Franklin's submission that she did try to send them and that she is unable to explain where they have gone.

73. I also find that not only were the words of the unless order clear and unambiguous as to what was required, that the full medical records for the specified period were expected and required should have been obvious from the Respondent's prior correspondence and its skeleton argument prepared for the preliminary hearing which indicated that all records were required and its arguments to support this. Particularly against that backdrop, had the unless order been intended to be of narrower scope it would have been drawn differently and clearly indicated any limitations of relevance.

74. Further and in any event, even if Ms Franklin is correct that she misunderstood the terms of the order, I find that her misunderstanding did not extend to a misunderstanding as to whether she was fully complying with it. I reach this conclusion on the basis of the correspondence that was sent with the medical disclosure on 5th October 2020 [**372 and see paragraph 10 above]** which makes it clear to me that in her own mind she realised that there was at least a possibility or a risk that she was not fully complying.

75. I am therefore satisfied that it was a deliberate failure on behalf of both the Claimant and, on his instructions, Ms Franklin, not to permit disclosure of the Claimant's full medical records in breach of the unless order.

76. I note that the Claimant had the opportunity at the hearing on 1st October 2020 to contest the terms of the unless order and ask that the disclosure it required be restricted to "relevant records" if that were all he wished to disclose. Thereafter, if that restriction were not granted, the Claimant could have appealed that decision. At any other time subsequent to the unless order but prior to the dismissal, the Claimant could have requested that the terms of the unless order be varied, explaining why a variation to refer only to the 'relevant records' was desirable, necessary or would achieve the same objective. None of those opportunities were taken.

77. The default in this case was both very serious and very significant.

78. As set out at paragraphs 47 to 49 above, disclosure of the full records was of the utmost importance in this case.

79. The failure to comply resulted in very serious consequences, namely the dismissal of all of the Claimant's claims, resulting in the loss of his right to have a Tribunal determine his serious allegations of race discrimination. I am mindful that the financial value of this claim to the Claimant is potentially substantial. The Schedule of Loss dated June 2020 (which did not include the

claim for pension loss, interest or any ongoing loss which may or may not be awarded from that date on) was in the region of £62,000.00, a significant amount for the Claimant.

80. Further, as a result of the dismissal of the claims, the final hearing listed for 5 days commencing on 11th October 2021 was vacated. I note that this was the second time that a 5 day final hearing had been listed and vacated as a result of the Claimant's failure to comply with directions, with the 5 day hearing due to commence on 2nd November 2020 also having been lost.

81. The disclosure of the medical records was a matter which had been argued about between the Claimant and the Respondent and there had been substantial number of requests made by the Respondent for the Claimant's medical records. Additionally, at the time of the unless order there was already a lengthy history of the Claimant breaching the orders made by the Tribunal. The case management orders from 27th June 2019 had been comprehensively ignored or not complied with, were still not complied with after an extension was given on 9th April 2020 and the default had persisted for in excess of a year, a lengthy period of time.

82. Although there were multiple failures to comply with numerous orders to provide information and evidence, by the time of the unless order the only outstanding disclosure was the medical evidence. This disclosure was nevertheless crucial to the future of this claim for the reasons set out at above.

83. In essence, despite the eventual compliance with the other orders, by the time the unless order was made the case was not significantly closer to being progressed than it had been a year earlier, or than it would have been a year earlier had the orders made on 27th June 2019 been complied with.

84. Further, following the failure to comply with the unless order matters have deteriorated further. It is now almost another year on and this case has not progressed beyond where it would have been 2 years ago had the original directions complied with.

85. There is still a substantial amount of work to be done to prepare this matter for final hearing even if the full medical records are now immediately disclosed. As a result of the non-disclosure it has not been possible for either the Respondent or the Tribunal to see what the impact of the undisclosed records might be on this case and it remains effectively stuck at first base.

86. If the case were to be re-instated there would need to be further case management directions covering (at a minimum) expert evidence on the issue of disability, pension loss calculations, bundles of documents, witness statements and the listing of a further final hearing for 5 days.

87. I have also had regard to the fact that other matters, which are the fault of neither party, have arisen over the course of this litigation and have impacted upon it and caused delay. Since March 2020 when the UK was hit by the

Covid pandemic and restrictions were imposed by the UK government in an effort to contain and curtail it, there has been an impact on all cases and the ability of the Tribunal to hear them. This has led to an increased backlog of cases in the Tribunal and there is now an extensive list of cases waiting to be heard such that hearings have been, and will continue for some time to be, substantially delayed.

88. The interests of justice require, amongst other things, as part of the proportionality a consideration of the impact of re-instating this claim.

89. In respect of the parties, the immediate impact is clear. The Claimant will have the opportunity to bring a potentially valuable claim and the Respondent remains at risk of being held accountable for any inappropriate conduct and having to make a possibly substantial payment to the Claimant. The Respondent essentially loses the benefit of the claim being dismissed, what some might consider to be a windfall.

90. Additionally, it is inevitable that there will be further costs and further delay before the litigation can be concluded. Both sides have been represented throughout and I have no doubt that the litigation costs on both sides are already significant and will only increase substantially if the claim is re-instated. Costs orders in the Tribunal are not common and even in cases where the conduct of the litigation is unreasonable, are not inevitable and may be difficult to enforce, particularly against Claimants.

91. Delay also has had, and will continue to have, an impact on both parties. Ms Franklin has suggested there has been no prejudice to the Respondent in the delay that has already occurred, but I cannot accept that submission.

92. Whilst I do not consider that a fair hearing has been rendered wholly impossible as a result of the delay to date and likely delay in future, it is inevitable that memories fade and alter over time. Consequently, the longer the delay between the occurrence of events and their recollection in written and/or oral evidence, the greater the reduction in its potency and reliability. There is therefore a significant risk of prejudice to the Respondent in terms of the quality of the oral evidence likely to be available at any hearing of this matter, particularly given that the prospects of a swift final hearing are low (for the reasons set out at paragraph 77 above).

93. Although Mr Sorensen, on behalf of the Respondent, submitted that one of the Respondent's witnesses is expected to retire shortly and this causes the Respondent additional prejudice, I do not accept that proposition either. Ms Franklin correctly submits that there are way and means to bring even a reluctant witness to a tribunal hearing if necessary. However, I do bear in mind that the longer the delay, the greater the prospects that witnesses may become unavailable due to inherent risks such as death, ill health or incapacity, or loss of contact and inability to trace and those risks may be greater with older witnesses and where the witness is no longer employed.

94. I also consider it likely that the Respondent has been prejudiced as a result of the delay simply in terms of resources, cost and the general stresses that the litigation inevitably places on the people within the Respondent that have to deal with it.

95. The costs and delay will be even greater if there is further failure to comply with directions by the Claimant. I have taken into account that some of the previous failures to comply appear to be, and are admitted by Ms Franklin to be, the fault of the Claimant's solicitors, not the Claimant himself and to have arisen as a result of the difficulties Ms Franklin has faced in her personal life, which difficulties have clearly been substantial and had a significant and ongoing impact on her. I have no doubt that the assurances that she has given today about future compliance with orders were genuine and well-meant. Notwithstanding those assurances, the Respondent has understandable doubts and I find Ms Franklin assurances are not wholly convincing in light of the history of this case and the previous failures, her ongoing difficulties, and the fact that Ms Franklin is not an individual or sole practitioner but part of a much larger organisation which could have provided resources beyond her to ensure this litigation remained on track but did not do so.

96. I asked both representatives whether, in considering whether it was in the interests of justice to re-instate the claim I should consider the overall merits of this case. Having heard their various submissions, I accept that the merits of this case are a matter which cannot be realistically assessed at the moment, although on the basis of what I have seen and heard it appears that the Claimant may face an uphill battle in establishing the existence of a disability and the Respondent's knowledge of disability, at least in relation to some of the earlier claims he makes. Ms Franklin makes a valid point that much of this case turns on the evidence and I should not take the merits into account. Notwithstanding the observations above, I have not done so.

97. By contrast, if the claim is not re-instated, future costs, delay and prejudice to the Respondent are eliminated but the Claimant loses the opportunity to bring a potentially meritorious and valuable claim against the Respondent.

98. In the circumstances of this case, if the claim is not reinstated, the Claimant may have an alternative claim against his representatives. However, I place no significant weight on this. It is undesirable for the Tribunal to encourage or rely upon the possibility of alternative satellite litigation if other factors point in favour of reinstatement and in light of my findings as to the Claimant's personal contribution to the dismissal of his claim, as set out above, the prospects of such a claim are far from certain.

99. In considering the overriding objective and the proportionality of re-instatement the claim, I have also taken into account the impact of re-instatement not merely on the parties to this case but also on the parties to other cases before this Tribunal.

100. There are, unfortunately, a limited amount of Tribunal resources. It is in the interests of justice to ensure all litigants are allotted a fair and appropriate share of those resources and have the opportunity to bring their case expeditiously and without delay, whilst bearing in mind the need to allot resources to other cases. This case has already had two 5 days listings vacated, this is its third preliminary hearing, and numerous other judicial and administrative resources have been utilised dealing without hearings with the issues it has given rise to. This case has therefore already had more than its fair share of resources. Any further expenditure of resources is likely to be at the expense of other litigants who have pursued their cases expeditiously.

101. I have also taken into account the need to enforce compliance with rules and orders in order to ensure that cases are dealt with in accordance with the overriding objective whilst also balancing the need to avoid excessive formality and to seek flexibility.

102. It is rare for an employment tribunal to impose an unless order of this nature and it is usually only done with reluctance and as a last resort. The history of this case is a prime example of that.

103. There has been a lengthy history of requests for, and orders requiring, disclosure of the records with which the Claimant had not engaged.

104. Numerous orders have been breached by the Claimant, not merely in relation to this disclosure and the Claimant's history of non-compliance is dismal.

105. Even after the unless order was made and in light of the Respondent's assertions that it had not been complied with and that the claim had effectively been struck out, the Claimant was given multiple further opportunities to try to redeem matters. The first opportunity was to respond to EJ Andrews' letter dated 26th October 2020 and send copies of the records to EJ Andrews for review within 7 days (i.e. by 02nd November 2020) in order to ascertain whether there had in fact been compliance or material compliance with the unless order. Unfortunately, that opportunity went unheeded although for the reasons set out above it is unlikely that it would have resulted in a decision not to issue the notice of dismissal.

106. The Second opportunity was the letter from Tribunal to the Claimant dated 15th December 2020 noted the Claimant's failure to reply to EJ Andrew's letter and warned that a judgment was being prepared further to the unless order of 01/10/20. That therefore also afforded another opportunity to the Claimant to avoid notification of the dismissal of the Claim being sent, but it did not result in any contact from the Claimant.

107. It was only on 31st December 2020 after the Tribunal had written to the parties on 17th December 2020 confirming that the claim had been dismissed under Rule 38 that the Claimant wrote back to ET requesting reconsideration of dismissal.

108. Even at that time they did not provide the documents requested by EJ Andrews on 26th October 2020 despite the Claimant's offer, on 9th October 2020 to provide the full medical records to the Tribunal [**379**] so as to protect the Claimant's privacy as against the Respondent but to satisfy the Tribunal that all relevant records had been disclosed. In fact, despite the claims having been automatically struck out and the application for reinstatement having been pending for many months now, the Claimant made no attempt until the working day before this hearing to send to either the Respondent or the Tribunal the full records in accordance with the requirements of the unless order (or indeed to send to them to the Tribunal alone in accordance with EJ Andrews' request). The delay in hearing the Claimant's application afforded the Claimant further ample opportunity to comply before his application was considered. Had the Claimant taken that opportunity shortly after the default and/or notice of dismissal the default would perhaps have been mitigated.

109. It also worth noting that Tribunal Rule 37 allows the Tribunal strike out all or part of claim either on the application of a party or its own initiative. The grounds which might justify that action (when considered in accordance with the overriding objective) are where the manner in which the proceedings have been pursued by the Claimant has been scandalous, unreasonable or vexatious. Also, for non-compliance with Tribunal Rules or orders of the Tribunal or where the claim has not been actively pursued.

110. Regrettably, I have reached the conclusion that all 3 of these grounds are made out on the basis of the history of the Claimant's non-compliance and failure to engage with this litigation over an extended period as set out above.

Conclusion

111. Taking all of the above factors into account, and despite the sympathy I have for Ms Franklin's extremely difficult personal circs and the understanding that those have contributed to Claimant's failures in this case, I have reached the conclusion that it is neither proportionate nor in the interests of justice to provide relief from sanctions by setting aside the order of 1st October 2020 and re-instate this claim. The dismissal of the claims, which took effect automatically on the Claimant's failure to comply with the unless order, will stand.

Case Number: 2304523/2018 & 2301380/2019

Employment Judge Clarke
Date: 8th March 2022

Judgment sent to the parties and entered in the Register on:

Public access to employment tribunal decisions
Note that both judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the parties.