Neutral Citation Number: [2022] EAT 137

Case No: EA-2020-000741-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 8 February 2022

Before:

GAVIN MANSFIELD KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between:

MR R BRYCE	**Appellant**
- v-	
TRIDENT GROUP SECURITY LIMITED	**Respondent**

- -
- -

Raymond Bryce the **Appellant**
Trisitan Jones (instructed by **Advocate**) for the **Appellant**
Respondent debarred from proceedings

Hearing date: 8 February 2022

- -

JUDGMENT

SUMMARY

Disabilty Discrimination

The Claimant was a disabled person, on account of his Asperger's syndrome and dyslexia. He brought claims of disability discrimination, whistleblowing detriment and automatically unfair dismissal. The claims were dismissed under r.38(1) ETR because the Claimant failed to comply with an unless order within the specified time. The Claimant was refused relief from sanction under r.38(2) on an application determined on paper. He appealed.

The claim had a tortuous procedural history. Neither party attended a 1-day PH listed in December 2019 to determine the Claimant's status as an employee. That PH was the fourth PH in the case. The EJ made an unless order requiring the parties, by a specified date, to explain: the reason for their failure to attend; whether they wished to proceed with their claim/response; and whether they had complied with directions made at a previous PH. The Claimant sent a response to the unless order 8 days late (which period included the Christmas bank holidays). He sought relief from sanction under r.38(2). He claimed his disabilities affected his communication abilities, memory and ability to read and understand dates. He said that he had not been given long enough to comply with the unless order.

HELD: The Tribunal has a wide discretion in making a decision under r.38(2). However, the Tribunal has a duty to consider making reasonable adjustments to accommodate the disabilities of litigants (**Heal v University of Oxford** [2020] ICR 1294 applied). The Tribunal erred in failing to consider the question of adjustments. In particular in evaluating the Claimant's explanation for default it failed to evaluate whether his disability had impeded him in giving an explanation. In consequence, it may have failed properly to consider the extent to which the Claimant's disabilities were the cause of his procedural failures. The Tribunal failed to consider whether adjustments, including holding a hearing, were appropriate. The matter would be remitted to the Tribunal to consider the application under r.38(2) afresh.

GAVIN MANSFIELD KC, DEPUTY JUDGE OF THE HIGH COURT

Introduction:

1. This is an appeal brought by Mr Bryce, the Claimant in Employment Tribunal ("the Tribunal") proceedings against the Respondent, Trident Group Security Limited. I will refer in this judgment to the parties as they were below as Claimant and Respondent. The Respondent has played no part in this appeal and, by order of the Registrar sealed on 6th January 2022, has been debarred from taking further part in the appeal. It subsequently indicated by e-mail that it did not intend to attend the hearing today.

2. The Claimant, suffers from two disabilities: Asperger's syndrome and dyslexia. That has been his pleaded position since the beginning of the claim. There has been no pleaded position by the Respondent in relation to the existence of his disability;it stated in its Grounds of Resistance that it was unaware of the Claimant's disability. The existence of the Claimant's disability is not a matter that has been considered on evidence at any hearing.. However, I have no reason to doubt that the Claimant does suffer from those disabilities.

3. In the documents bundle before me there are two medical reports submitted to the Employment Appeal Tribunal ("EAT") which were not before the Tribunal below. They indicated that the Claimant does indeed, suffer from those conditions, albeit those reports are quite old and are not to be taken as a detailed or up-to-date account of the effects upon him.

4. Mr Jones does not rely on those reports as relevant to the Grounds of Appeal against the decision under appeal but, it seems to me, the reports constitute material evidence setting out the Claimant's disability for the purposes of my consideration of any adjustments which need to be made today in the conduct of the appeal and in the giving of my judgment. I have had regard to the reports for those purposes.

5. The Notice of Appeal was originally presented by the Claimant himself and was sifted by His Honour Judge Barklem, who made an order under Rule 3(7) of the **EAT Rules**. The Claimant applied under Rule 3(10) for a hearing. He was represented at the 3(10) hearing under the

ELAAS scheme by Mr Tristan Jones of Counsel, who also appears at the hearing today under the aegis of Advocate. I am extremely grateful to him for his assistance today, both to the EAT and to Mr Bryce.

6. At the Rule 3(10) hearing, His Honour Judge Tayler allowed the Appeal to proceed on the basis of Amended Grounds of Appeal drafted by Mr Jones.

7. At the beginning of today's hearing, Mr Jones addressed the question of reasonable adjustments that may be appropriate for the conduct of the hearing today. He proposed short breaks if needed; the opportunity for Mr Bryce to intervene to ask any questions if he didn't understand something; and the opportunity for Mr Jones (at the end of the hearing) to be able to take instructions and come back on any points that Mr Bryce raised with him. None of those created any difficulty and I could see the sense of them.We proceeded in that way through the course of the hearing.

Decision on the Appeal

8. Given Mr Bryce's disability, I have already indicated that there will be a transcript of this judgment in due course, but it may assist the Claimant if I state at the outset what my decision is and then give the reasons for it..

9. My decision, for which I will give reasons in a moment, is that I am going to allow the appeal. Essentially, I have been persuaded by Mr Jones that the Tribunal erred in failing to give consideration to the question of what reasonable adjustments were appropriate to alleviate the effects of the Claimant's disabilities when it came to determining the application for relief from sanctions. That is my decision and the case will need to be remitted to the Employment Tribunal for the matter to be considered afresh. I will come back to the practicalities and consequences of that when I have set out my decision in more detail.

10. I will now set out my reasons for the decision that I have just outlined.

Procedural History

11. First, the procedural history: the claim arises out of two shifts that the Claimant worked for

the Respondent as a door supervisor in 2018. He claimed various forms of disability discrimination, whistle-blowing detriment and automatically unfair dismissal. He also brought certain smaller claims in relation to unpaid wages and failure to provide particulars of employment.

12. The Claim was presented on 17th April 2018. At that stage, just an ET1 Form was presented. The Respondent responded by an ET3 Form, again, just in the form with no attached grounds of resistance. The Respondent's defence, at that stage, was in essence that Mr Bryce had worked for a trial weekend, that he hadn't been an employee, and that they were not aware of his disabilities.

13. From those beginnings, almost four years ago, the claim has had a long and torturous procedural history that led to it being struck out, as I shall come to explain. The matter had a case management preliminary hearing on 20th August 2018 before Employment Judge Dimbylow. The Claimant attended in person, the Respondent was not represented and did not attend. Directions were given for a four-day full hearing to be listed in July 2019 and a one-hour preliminary hearing to be heard on 17th June 2019, to consider whether directions had been complied with. A detailed list of issues was identified by the employment judge and directions were set out, including various things that the Respondent specifically needed to do.

14. The preliminary hearing on 17th June 2019 was heard by EJ Monk. Again, the Claimant attended but the Respondent did not. EJ Monk made an unless order, that unless the Respondent complied by 28th June 2019 with various of the directions imposed upon it by EJ Dimbylow's order, the response would stand dismissed. At that stage, the hearing listed for 29th July 2019 remained listed.

15. It appears from a later Reconsideration decision from EJ Findlay (to which I will come in due course) that, by a letter of 26th July 2019 EJ Findlay set aside EJ Monk's order on the basis that the Tribunal had sent the order to the wrong address. EJ Findlay was satisfied that the

Respondent had never received it.

16. Be that as it may, on 29th July 2019 (which was the date originally listed for the start of the four-day full hearing) there was a third preliminary hearing, this time in front of EJ Findlay. The Claimant attended and on this occasion the Respondent was represented by a Mr Davis who, I am told, is a director of the Respondent company. The decision of EJ Findlay records that an old address had been used for the Respondent and that the Respondent had said that it did not get communications sent to it. EJ Findlay expressed some scepticism as to why the Respondent would not have received e-mails but, as I have indicated, EJ Monk's unless order had already been set aside. Further, it appears that, at least by the date of that hearing, the full hearing had been postponed because the hearing proceeded only for case management.

17. A further full hearing was listed for June of 2020 and a further preliminary hearing was listed for 13th December 2019. That was to be a one-day preliminary hearing to consider the Claimant's status to bring claims, i.e. the question as to whether he was an employee for the purposes of those claims (primarily unfair dismissal) for which he needed to be an employee.

18. EJ Findlay also made an unless order, on this occasion against the Claimant, that unless he wrote to the Tribunal to establish reasonable prospects of success on his claims of dismissal for asserting statutory rights (referred to his as his s104 claims) those claims would be struck out. That unless order was to be complied with by 19th August 2019.

19. Following the preliminary hearing on 29th July, the Tribunal sent out a Notice of Preliminary Hearing, a Notice of Full Hearing and a record of the preliminary hearing. All of those were sent out on 19th August 2019. I should note that that was the date of the deadline for the unless order. So the written record of the hearing before EJ Findlay did not reach Mr Bryce until the day of the deadline for the unless order to be complied with.

20. I also note at this stage that the Notice of Preliminary Hearing sent out on 19th August incorrectly referred to the date of the further preliminary hearing as being 13th August 2019, rather than 13th December 2019. The December date had been the date referred to during the

course of the hearing on 29th July itself and it was the date that was set out in the record of the preliminary hearing. Nonetheless, I can see that some confusion could have been caused by an incorrect Notice of Hearing being sent out.

21. The Claimant wrote to the Tribunal on the same day, 19th August stating, in essence, that he did not understand the unless order and asking for relief from sanction: effectively, for an extension of time. That request, as far as I can see, does not appear to have been addressed by the Tribunal, at least not from any documents I have seen.

22. It appears from paras, 2 to 6 of the decision under appeal that there was some further correspondence by both sides to the Tribunal which was, in due course, referred to EJ Gaskell. I have not seen any of that correspondence. EJ Gaskell, apparently, had noted non-compliance with the directions on both sides but appears to have made no reference to the Claimant's application for an extension of time to comply with the unless order.. Nor did EJ Gaskell address what the Claimant had complained of in his application for extension of time, which was that the order of EJ Dimbylow and the EJ Findlay's unless order lacked clarity.

23. The decision under appeal records that, whatever EJ Gaskell's directions were, they were not sent to the parties until 3rd December 2019. I am told by Mr Jones, on instruction from the Claimant, that the Claimant had provided a Schedule of Loss to the Respondent as per the Tribunal's directions, but that the Respondent had not provided disclosure of the documents it was required to provide. Thereafter the directions for preparations of bundles and witness statements had somewhat fallen by the wayside (my expression, not Mr Jones') because the Respondent had not complied with the prior direction in relation to disclosure of the documents.

24. That was the situation as at the fourth preliminary hearing in this case, on 13th December 2019, which came before EJ Self. On that occasion, neither party attended the hearing. EJ Self made an order which was sent to the Parties on 16th December 2019. In relation to the s104 claims, EJ Self struck those out because the Claimant had failed to comply with EJ Findlay's

unless order. EJ Self regarded that order and the directions that it referred to as being sufficiently clear. EJ Self made no express reference to the Claimant's application for an extension of time.

25. Mr Jones has confirmed to me today that there is no appeal against the decision to strike out the s104 claims, but consideration of the Claimant's failure to comply with the first unless order (as will become apparent) is relevant to the question of setting aside of the later order striking out the remaining claims.

26. Having struck out the s104 claims, EJ Self noted that neither party had turned up to the hearing and, being satisfied in his mind that both knew it was taking place, he made a second unless order which stated that the claim or response would be struck out unless, by 4pm on 23rd December 2019, each party wrote to the Tribunal, first, explaining why it failed to attend; second, indicating whether or not it wished to proceed; and third, indicating whether it had complied with the directions of EJ Findlay and if not, why not.

27. The Respondent did respond, within the required deadline, on 23rd December. Although it gave answers to the questions, it is fair to say that none of the answers was impressive Essentially, its position was that it had only just instructed lawyers and had not previously understood what it was required to do.

28. The Claimant did not reply to EJ Self's unless order within the deadline; indeed, he did not do until 31st December 2020. In an e-mail on that date he wrote:

> **"I write in relation to the Order dated 13th 2019. I must kindly remind the Tribunal is conscientious efforts to afford myself reasonable adjustments. Whilst it is unfortunate that the parties did not attend on 13th December 2019 for which I apologise for my part. But I do have a disability that inhibits ability to read, write and communicate. This inhibits my ability to interpret information sometimes misreading dates and times for an alternative and effects my memory. In any event I had recently changed jobs and I did not have enough accrued annual leave to depart from my employer."**
>
> **…**

The Claimant goes on in subsequent paragraphs to state that he has complied with the previous orders and to complain about the Respondent's lack of engagement in the process thus far

before saying:

> **"…It seems to me that the Tribunal misdirected itself that in the balance of fairness by not reminding itself that between the parties the Claimant had up till that point pulled through at every hurdled and when at a particular juncture the Tribunal applied an unless order sanction when the Claimant made a particular request for 'extra time' for relief from sanction before the sanction could be applied.**
>
> **It seems to me the Claimant has not been adequately provided the same balance of fairness all because of an isolated incident through cause of the disability and issues relating to his employer.**
>
> **…"(**original emphasis)

He goes on to say that, given there was six months until the full hearing was to take place, there was enough time to do justice between the parties and to allow the claim to proceed.

29. It appears from EJ Findlay's later decision under appeal, that that e-mail of 31st December 2019 did not come to an employment judge's attention until April of 2020, whereupon EJ Findlay sent out an order indicating that the claim had been struck out for reason of failure to comply with the second unless order, i.e. EJ Self's unless order. That order triggered a further application for relief from sanctions by the Claimant on 24th April 2020, in which he argued that the Tribunal had been wrong to dismiss the Claim in five numbered paragraphs. In those paragraphs he explained that he wrote to the Tribunal on 31st December 2019 (attaching a copy of that e-mail); he pointed out that no response had been made to that e-mail some four months later (which would appear to be correct); he referred to the case of **Thind v Salvesen Logistics Limited** UKEAT/0487/09 (an authority which sets out the principles in relation to applications for relief from sanctions where an unless order has been made and there has been a failure to comply with it); and at paragraph 4 he states this:

> **"4. The Tribunal did not give enough time to respond to the Unless Order and was mistaken that the Claimant had not participated through proceedings when, indeed, the Respondent had not. The Claimant has complied with all of the orders so far. It would be wrong in the interests of justice to sanction the co-operative party. There is still enough time for a fair hearing."**

At paragraph. 5, he makes it clear that he relies on what he wrote in his e-mail of 31st

December 2020.

30. That application of 24th April 2020 led to the Tribunal's decision of 14th August 2020, which is the decision under appeal.

The Decision under Appeal

31. I will turn now to the Tribunal's decision under appeal. The employment judges notes at paragraph 1 that the case had previously been before her on 29th July 2019 and that both parties had been present at that hearing. She then goes on to set out the history of the case through to paragraph 17 of her decision, before reaching the conclusion at paragraph 17 that she does not consider that it is in the interests of justice to set aside the unless order made by EJ Self. Paragraphs 18 to 31 then set out her reasoning for that conclusion. At paragraph 18, she refers to the Claimant's failure to comply with the earlier unless order made by EJ Findlay on 29th July 2019. In essence, her reasoning is that that order had been sufficiently clear for the Claimant to comply with. At paragraph 19, she goes on to state that this particular application relates to EJ Self's unless order of 16th December 2019 (there is a typographical error in the Reasons it states "16 December 2020", not 2019). EJ Findlay states:

> **"19. … As noted above, the claimant's email of 31 December 2019 does not actually say that he had misread the date- and he had also been told it at the hearing on 29 July 2019. If the reason for his non-attendance was that he could not get leave from his new job, he has never explained why he did not inform the tribunal of that prior to 13 December (or indeed before 23 December 2019).**
>
> **20. I [sic] addition, the claimant has not explained why he could not respond to Employment Judge Self's "Unless" Order by 23 December 2019.**"

32. At paragraph 21, EJ Findlay did not accept that the failure to attend the hearing was the first example of non-compliance, in part by reference to failure to comply with the unless order of 29th July. She also states that it is not clear whether the Claimant has complied with the other orders made on that occasion. I note that in his e-mail of 31st December 2019, the

Claimant had said that he had complied with the earlier orders and there was certainly no clear evidence that he had not done so.

33. At paragraph 22 EJ Findlay states, quite rightly, that failure to attend a hearing is a serious matter because it wastes valuable tribunal resources and delays other cases. The employment judge also rightly states that the requirements of EJ Self's order were clear and not at all onerous. A number of other factors are raised in consideration of the overriding objective at paragraph. 23 onwards, all of which Mr Jones accepts were relevant factors to take into account in balancing the interests of justice and deciding whether to set aside the debarment.

34. At paragraph 30, the employment judge notes the concern about the age of the claim and that it would be likely to be nine months before the claim would be likely to be listed. I note that paragraph with some irony:the Claimant had asked for relief from sanctions on 31st December 2019, only a week after default in complying with the unless order. As I have already indicated, that 31st December e-mail was not addressed by the Tribunal until April and the subsequent relief from sanctions application of 24th April was not addressed until 14th August. Had those matters been dealt with more promptly in June 2020 might have been able to have gone ahead, but that was a matter for the Tribunal to consider.

The Reconsideration Application

35. I turn now, briefly, to the reconsideration application. Following 14th August 2020 decision, the Claimant made an application, sent to the Tribunal on 31st August 2020, for a reconsideration of the decision. The document that follows quite closely the Grounds of Appeal that was submitted by the Claimant himself originally in this appeal. EJ Findlay considered that on 10th October 2020. It was treated not as a reconsideration application but as an application to vary a case management order. EJ Findlay held that it was not in the interests of justice to vary the 14th August order, and I note that the employment judge stated this:

> **"As I stated in the reasons for my order of 14th August, the Claimant has never given any reasons as to why he was unable to comply with the Unless Order of 16th December 2019. I did take account of the Claimant's alleged disability in my reasons sent on 14th August but noted that it had not previously prevented him from responding to Tribunal orders on the day they were sent out (see, for example, para. 29 of those reasons)."**

Legal Framework

36. I turn next to the relevant legal framework. **Employment Tribunal Rule** 38(1) states:

> "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."

There is no challenge to the fact that the Claimant did not comply with the second unless order by the relevant deadline and, therefore, that an order under Rule 38(1) was properly made.

37. Rule 38(2) states this:

> **"(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"**
>
> **…**

38. The Approach to an application under Rule 38(2) is most conveniently set out in the judgment of Mr Justice Underhill (as he then was) in **Thind v Salvesen Logistics Limited**. In that case, Mr Justice Underhill stated at paragraph 14:

> **'14. … The tribunal must decide whether it is right, in the interests of justice and the overriding objective, to grant relief to the party in default notwithstanding the breach of the 'Unless Order'. That involves a broad assessment of what is in the interests of justice, the factors which may be material to that assessment will vary considerably according to the circumstances of the case and cannot be neatly categorised. They will generally include, but may not be limited to the reason for the default, and in particular, whether it is deliberate; the seriousness of the default; the prejudice to the other party; and whether a fair trial remains possible. The fact that an 'Unless Order' has been made, which of course put the party in question squarely on notice of the importance of complying with the Order and the consequences if he does not do so, will always be an important consideration. 'Unless Orders' are an important part of the Tribunal's procedural armoury (albeit not one to be used lightly), and they must be taken very seriously; there effectiveness will be undermined if Tribunals are**

> **too ready to set them aside. But that is nevertheless no more than one consideration. No one factor is necessarily determinative of the course which the Tribunal should take. Each case will depend on its own facts...'**

39. The scope of the EAT's power to interfere on appeal against a decision under Rule 38(2) depends, first, upon whether the ET erred on the approach taken. If there has been no error in approach taken, in the assessment of the interests of justice, an appeal will only be allowed if the employment judge has taken a decision this outside the generous ambit of decisions permissible on such an assessment. The EAT is reluctant to interfere in such discretionary case management orders.

40. However, upon that framework in this case one must impose consideration of the effect of the Claimant's disability. Mr Jones took me to a number of authorities. I can most conveniently start with the decision of Mr Justice Choudhury (then-EAT President) in **Dr R Heal v The Chancellor, Master and Scholars of the University of Oxford and Others** [2020] ICR 1294. In that case, the President considered the ET's duty to consider reasonable adjustments in cases of disability. At paragraph 18 of his decision, Mr Justice Choudhury pointed out that the duty under s124 of the **Equality Act** to make reasonable adjustments does not apply to the exercise of a judicial function. However, he goes on to state this:

> **"However, as also stated in J v K, as a matter of general law, the exercise of a judicial discretion must take into account all relevant considerations, and the party's mental condition or other disability would plainly be a relevant consideration.": per Underhill LJ at [33]. Numerous cases have made similar points. These include O'Cathail v Transport for London [2012] IRLR 1011, in which Mummery LJ said at [27]:**
>
> **"…[t]he appellant undoubtedly suffers from a recognised disability. Its affects are relevant factors in deciding whether he had a good excuse for not complying with the time limit and whether there were exceptional circumstances justifying an extension of time."**
>
> **19. As well as the obligation to take account of all relevant factors, including the fact that a person has a disability, it is now well-established that, as a matter of general law and fairness, the Tribunal has a duty to make reasonable adjustments to accommodate such disability. In Rackham v NHS Professionals Ltd [2015] UKEAT 0110/15/1612, Langstaff P said at [32]:**

> **"We do not think it could sensibly be disputed that a Tribunal has a duty as an organ** of the state, as a public body, to make reasonable adjustments to accommodate the **disabilities of Claimants. Miss Joffe accepts, and indeed submits, that the particular route by which the obligation rests upon the Tribunal is unimportant, though it might be one of a number, because there can be no dispute there is such an obligation. It may be, as Mr Horan submits, through the operation of the United Nations Convention by the route he suggests. It may be by operation of the Equal Treatment Directive or it may arise simply as an expression of common-law fairness."**

41. I was also taken by Mr Jones to the decision of the Northern Ireland Court of Appeal in **Galo v Bombardier Aerospace UK Limited** [2016] NICA 25, in which the court held on the particular facts of the case that the requirements of procedural fairness had not been met in relation to the disabled claimant. The court's decision, as recorded in the headnote, is that it is a fundamental right of a person with disability to enjoy a fair hearing and to have been able to participate effectively in the hearing. Courts and tribunals should pay particular attention to the Equal Treatment Bench Book (published by the Judicial College) when the question of disability, including mental disability, arises. That points out that adjustments to court or trial procedures may be required to accommodate the needs of persons with disabilities. It also gives practical advice on particular situations where they arise. In the particular facts of **Galo**, the court suggested an early ground rules hearing, which would involve a preliminary consideration of the procedure that the tribunal or court would adopt, tailored to the particular circumstances of the litigant.

42. Mr Jones also relies upon that case as an indication that the duty may fall on the tribunal itself to consider what adjustments are appropriate in the case of a particular claimant, even if the claimant or his representative are not asking for particular adjustments to be made.

43. Mr Jones also took me to **Rackham v NHS Professionals Ltd.** , but I don't think I need lengthen this judgment by reference to passages from **Rackham**, having referred to **Heal** in which **Rackham** is cited. He also took me to certain passages in relation to autism and dyslexia in the Equal Treatment Bench Book.

Amended Grounds of Appeal

44. I turn now to the Amended Grounds of Appeal. In essence, there are two points: paragraphs 2 and 3 allege that the Tribunal failed to consider or ask the Claimant what reasonable adjustments were required to enable him to participate in the tribunal process and that, it is alleged, led to a number of errors in the employment judge's reasoning in refusing the application for relief.

45. Paragraphs 4 and 5 allege that, given the Claimant felt he had been treated unfairly in comparison with the Respondent (which had also been in default of the Tribunal's orders in a number of ways), the Tribunal erred in failing to consider whether striking out would achieve justice between the parties, having regard to the treatment of the Respondent.

46. Those, then, are the broad heads of the Grounds of Appeal.

Discussion and Conclusion

47. It appears clear from the cases to which Mr Jones has taken me that, although the tribunal has a broad discretion to consider the interests of justice in making a decision under Rule 38(2), that has to be read alongside the duty of the tribunal to consider reasonable adjustments in the case of a disabled person. The cases to which Mr Jones referred me on reasonable adjustments for litigants in the tribunal deal with decisions as to the conduct of hearings; but, it appears to me that the same broad principles apply to the taking of case management steps. It is all part of the general consideration of fairness to disabled litigants in being able to participate in their claims.

48. The Claimant's argument, per Mr Jones' Skeleton Argument developed orally today, is that the papers before EJ Findlay on 14th August gave extensive indications as to the nature of the Claimant's disabilities. He is inhibited in his ability to read, write and understand information; he sometimes misreads dates. He wanted reasonable adjustments and he was treated unfairly because of events which arose due to his disability. Mr Jones says the employment judge should have considered those matters and, in particular, should have considered what

reasonable adjustments were required to enable the Claimant to fairly participate in the process. He goes on to argue that a key adjustment, which may have been appropriate, would have been to discuss matters with the Claimant; first, to understand more fully why he had failed to understand certain matters; and second, to give him an opportunity to explain himself more fully to the Tribunal. Alternatively, as Mr Jones puts it, the Tribunal in considering the explanations that were offered should have given the Claimant the benefit of the doubt where his explanations were ambiguous or clear.

49. I consider the information that was before the Tribunal about the Claimant's disability. In the Claim Form at box 12.1, the Claimant ticked the box for disability and in response to the question "… tell us what assistance, if any, you will need as your claim progresses through the system, …" the answer was: "On request".

50. After the first preliminary hearing before EJ Dimbylow, the Claimant submitted detailed Particulars of Claim and in those he identifies his Asperger's Syndrome and dyslexia and he states this:

> **"The complexities are not limited but exhaustive. Some that can be listed are that the Claimant suffers from a social impairment and learning difficulties."**

At paragraph 30, he refers to high functioning autism as a term that is applied to people with autism and are deemed to be cognitively higher functioning than other people with autism; he says individuals with HFA or Asperger's Syndrome exhibit deficits in areas of communication, emotional recognition and social expression.

51. It appears from EJ Findlay's reasons in the decision under challenge, that the Tribunal also had the Claimant's Impact Statement before it. It is referred to in the reasons, and the reasons also refer to the Claimant's law degree and experience in litigation. That Impact Statement is not before me;I note simply that the Tribunal had it and had regard to it.

52. As I have already indicated in the procedural background, when, on 31st December 2020, the Claimant wrote to the Tribunal asking for relief from sanction in relation to EJ Self's unless order, he indicated that he had difficulty with communication and difficulties in relation to

sometimes misreading dates and times, and difficulties with his memory. All of that material was before the Tribunal.

53. The Tribunal evaluated the Claimant's explanation for both his failure to attend the hearing on 13th December and his failure to respond to EJ Self's unless order within the deadline. It might be thought that the evidence of disability and its impact on the Claimant in his ability to comply with orders and attend the hearing was slender. The information provided in the 31st December 2020 e-mail and 24th April 2020 e-mail were, indeed, slender grounds for explanation for the Claimant's default. However, as Mr Jones rightly points out: first, it is clear from those documents that the Claimant referred to his disability and the effect on communication, memory, and misreading of dates; second, he requested reasonable adjustments to be made, albeit not identifying what those adjustments were.

54. I do not suggest for a moment that any employment tribunal is obliged to take at face value what a claimant or any party says about their disability, its impact or its causative relationship with any default in a particular case. An employment judge is entitled to evaluate the evidence in front of him/her. In this case, the disability potentially had an impact on a number of factors and, in my judgment, four in particular:

    a. First, the question as to the failure to comply with EJ Self's unless order. The Claimant said that he had not had enough time to comply with it, but said so in the context of the points that he had already made about his disability;

    b. Second, EJ Self's unless order had been granted because of the failure to attend the hearing on 13th December. The 31st December e-mail advanced an explanation (in part, at least) that was caused by the misreading of dates; that, in itself, was said to be an effect of the Claimant's disability;

    c. Third, EJ Findlay, had regard to the Claimant's earlier failure to comply with the first unless order. EJ Findlay's reasoning being that the default on the second unless order

was not the Claimant's first failure to comply with an order. To the extent that the earlier failure to comply was a relevant consideration affecting the balance of the interests of justice, it was relevant to consider the impact of disability on that earlier failure. In respect of the first unless order, the Claimant had applied promptly for an extension of time and had said that he did not understand the order;

d. Fourth, finally and perhaps most significantly, when the Tribunal considered the Claimant's application for relief from sanction, it may be relevant to consider the Claimant's disability in deciding whether adjustments were necessary in determining the application; and to consider whether it was necessary to take into account the Claimant's difficulty in communicating and expressing himself. It is necessary to consider whether the Claimant had been given a full and proper opportunity to give an explanation.

55. EJ Findlay, in the Reconsideration Decision of October 2020, indicated that she did take into account that the Claimant's disability, but noted that it had not previously prevented the Claimant from responding to Tribunal orders on the day that they were sent out. It seems to me that reasoning may not properly appreciate, without further consideration, the impact of the Claimant's disability. It might be said the fact that one can do things sometimes in accordance with deadlines doesn't meant that one is always able to do so. It may not negate the argument that a mistake had been made on a particular occasion, particularly as to timescales.

56. In many respects, EJ Findlay's reasons reflect a careful consideration of the various factors. Absent the question of the Claimant's disability, I doubt very much that EJ Findlay's decision would have been open to attack on appeal, but the crucial problem is that EJ Findlay's reasons do not expressly consider the need to make adjustments for the Claimant's disability at all. There is no reference to the authorities to which I have been referred nor to the Equal Treatment Bench Book. There appears to have been no express consideration, when

evaluating the application for relief from sanction, of whether any adjustments were necessary to make sure that the Claimant had been able to advance his case. Indeed, there is force in the point that there had never been any consideration throughout the history of the proceedings of any need for adjustments to be made for the Claimant to be able to advance his case.

57. In the context in which the evidence before the Employment Tribunal was that the Claimant was disabled in a way that affected communication, memory and his ability to read and understand dates and times, in my judgment, that was an error of approach. The Tribunal ought properly, before fully considering the interests of justice on the Rule 38(2) application, to have considered what (if any) adjustments were necessary, both in determining the application and in evaluating the various factors that I have outlined that were relevant to the application.

58. Although the Tribunal on an application under Rule 38(2) has a wide ambit of discretion in determining the interests of justice, I cannot be confident in what the outcome would have been had there been what I find to be a necessary consideration of the impact of Claimant's disability and the need for any adjustments. It is possible that the Employment Tribunal may have decided that no adjustments were appropriate or would have made any significant difference, having considered the position. It is possible, even had adjustments been made, that the Tribunal would have reached the same decision but, given that I have found that the Tribunal erred in not considering those questions, I cannot be confident as to those outcomes and the matter will have to be considered by the Tribunal again.

59. So, I will allow the Appeal on that ground and the case will have to be remitted to the Employment Tribunal for the application under Rule 38(2) to be considered afresh. In doing so, the Tribunal will need to consider what (if any) adjustments should be made in the light of the Claimant's disability. One adjustment may be that a hearing will be the most appropriate way of dealing with the application under Rule 38(2). The Claimant has indicated to me today that he wishes for there to be a hearing and, as I read Rule 38(2), and as Mr Jones submits, once a party has requested a hearing under Rule 38(2), it is entitled to one.

60. The case can go back before EJ Findlay. I am not directing that it needs to go to a new tribunal, but it need not necessarily go before EJ Findlay. If it is more convenient, then it could be considered to go before another judge. That is a matter for the Regional EJ.

61. Finally, the second ground advanced is effectively a ground as to the weight of fairness between the parties in the light of the Respondent's failures to comply with various orders or properly participate. I dismiss that ground – that was an evaluation that was well within the ambit open to the employment judge and, in my judgment, it adds nothing to the case. Given that I am allowing the Appeal on the first ground, that makes no difference to the outcome.