EMPLOYMENT TRIBUNALS

Claimant: Mrs S Badshah

Respondent: Castle Villas Limited

Heard at: Leeds (via CVP) **On:** 28 June 2022

Before: Employment Judge Deeley

Appearances
For the claimant: In person
For the respondent: Ms S Clarke (Counsel)

RESERVED JUDGMENT

(Claimant's application for Relief from Sanctions)

1. The claimant's applications for relief from sanctions in relation to the Unless Order (issued by Employment Judge Wade at the preliminary hearing on 7 September 2020) is denied.

REASONS

Background

2. This claim has previously been the subject of case management including:
   2.1 Preliminary hearing on 7 September 2020 – Employment Judge Wade;
   2.2 Preliminary hearing on 28 January 2021 – Employment Judge Brain;
   2.3 21 April 2021 – Employment Judge Brain (reserved judgment);
   2.4 8 July 2021 – Employment Judge Brain (considering the parties' written submissions on the papers);
   2.5 Preliminary hearing on 6 December 2021 – Employment Judge Brain; and
   2.6 14 January 2022 – Employment Judge Brain (considering the parties' written submissions on the papers).

3. Employment Judge Brain's case management summary of 6 December 2021 sets out some of the complex procedural background to today's hearing. A copy of the relevant paragraphs of that summary are attached at Annex 1 to this Judgment.

4. The purpose of this preliminary hearing was to consider the matters set out at paragraph 56 of Employment Judge Brain's case management summary of 6 December 2021:

   (1) "The claimant's application for a variation of the judgment promulgated on 21 July 2021 by way of revocation of paragraph 3 thereof.

   (2) The hearing of the claimant's application for relief from sanctions.

   (3) The claimant's amendment applications of 2 July 2021 and 6 December 2021.

   (4) Any outstanding specific disclosure issues."

5. Employment Judge Brain's judgment of 21 July 2021 stated:

   "The Judgment of the Employment Tribunal is that:

   1. Upon the claimant's application for reconsideration (subject to paragraph 2) there is no reasonable prospect of the Reserved Judgment promulgated on 21 April 2021 ('the Judgment') being varied or revoked.

   2. It cannot be said that there is no reasonable prospect of the Judgment being varied to permit the following complaints to proceed by way of amendment:

      2.1. That the claimant suffered an unauthorised deduction from her wages between February and June 2020 inclusive;

      2.2. That the respondent failed to pay the claimant her holiday pay for the period between 28 October 2019 and 30 June 2020;

   3. The claimant's application for relief from sanction by reason of material non-compliance with the Unless Order dated 7 September 2020 ('the Unless Order') is refused."

6. This preliminary hearing therefore considered the claimant's application for relief from sanctions. Unfortunately there was insufficient time to consider the claimant's amendment applications of 2 July 2021 and 6 December 2021 and any outstanding specific disclosure issues. These matters will be considered at the next preliminary hearing.

Adjustments

7. The claimant emailed the Tribunal on 16 May 2022, requesting that this preliminary hearing be conducted via video link instead of in person due to the impact that her anxiety and depression had on her ability to travel. The claimant said: *"I am afraid that attending the hearing in person would increase the symptoms and I would not be able to participate effectively"*. The Tribunal granted the claimant's request and converted this hearing to CVP video link.

8. The claimant also emailed the Tribunal on 23 June 2022 to request various further adjustments, including that the hearing be recorded and a transcript be made available to her at her request. The claimant stated:

"I request this adjustment due to having adverse experience at previous hearings where accurate record was not maintained and I have a constant fear and worry that could be eased with recording the full hearing."

9. I directed that the Tribunal respond on the afternoon of 24 June 2022 stating:

The Judge has concluded that it would not be a reasonable adjustment to record the preliminary hearing and provide a transcript of the hearing at the claimant's request, given the matters to be discussed at the preliminary hearing. The key reasons why the Judge has reached that conclusion are:

1) *the Leeds Employment Tribunal does not record hearings as a matter of normal practice;*
2) *the Judge will prepare a written summary of the matters discussed and orders at the preliminary hearing;*
3) *recording the hearing will not alleviate the claimant's concerns because the written summary of the matters discussed and orders made will not be a verbatim record of the hearing; and*
4) *the claimant will have the opportunity to comment on the accuracy of the summary if she wishes to do so.*

10. In terms of the other adjustments requested by the claimant, I noted that the Tribunal could accommodate the claimant's request to conduct the hearing at a slower pace, using short clear question, avoiding complex language and taking additional breaks if required. I also noted that if there was a need to refer to caselaw during the hearing, the parties could have additional time to provide their comments on such caselaw.

11. I checked that the claimant had received the email quoted above and we discussed my response to her request. I concluded that it would not be appropriate to record this preliminary hearing because that would not alleviate the concern that the claimant had raised, i.e. that the summaries of previous hearings were not accurate. However, I told the claimant that she could have additional time and/or breaks to take notes if needed. I then checked at various points during the hearing whether the claimant needed additional breaks.

Preliminary hearing procedure

12. The documents that I considered during the hearing today consisted of:
    12.1 the pages that the parties referred me to in an updated joint preliminary hearing file consisting of 731 pages, including the claimant's medical records (the "**Litigation Bundle**");
    12.2 the claimant's written submissions at p609-p622 of the Litigation Bundle, in addition to her original application and attachments at p258-288;
    12.3 the respondent's written submissions at p226 (paragraph 35 onwards) of the Litigation Bundle.

13. I heard oral submissions from both parties during this preliminary hearing. The hearing started at 10am and finished at 4.15pm. However, there was not enough time for me to reach a decision because of the length of time that was taken in:
    13.1 reading relevant documents (approximately one hour); and
    13.2 listening to the parties' oral submissions. The claimant's oral submissions lasted approximately one hour. The respondent's submissions lasted approximately 30 minutes. We also spent approximately one further hour, during which the parties responded to my questions and made further submissions.

14. I reached the decision set out below after the hearing had ended.

15. All references to page numbers in this document are references to pages in the Litigation Bundle (defined below).

Unless Orders – Tribunal Rules of Procedure

16. Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the "**Tribunal Rules**") sets out the provisions for unless orders at Rule 38:

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."

Reconsideration applications – Tribunal Rules of Procedure

17. The Tribunal Rules set out the following provisions for reconsideration applications:

Reconsideration of judgments

Principles

70. *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.

Application

71. *Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.*

Process

72.*—(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.*

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

Reconsideration by the Tribunal on its own initiative

73. *Where the Tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused).*

Unless Order - 7 September 2020

18. Employment Judge Wade held a preliminary hearing on 7 September 2020, during which she discussed the claimant's complaints with the parties. She noted during her hearing:

*"**Introduction***

The claims discernible in the claim form as clarified today are: unlawful deductions from wages (historic hours unpaid), breach of contract (notice pay), protected disclosure dismissal and dismissal as Equality Act victimisation because of concerns alleged to have been raised about the treatment of others with health issues/disabilities. Although the claimant says she suffers with anxiety and depression, I could discern no arguable complaint of any type of disability discrimination in the claim details (which were presented separately). There was no further clarification available from the interim relief application hearing."

19. Judge Wade set out a draft list of issues for the Tribunal at the final hearing to decide (along with remedy issues, not reproduced here) in her case management summary which stated:

"The Issues

39. The potential issues the Tribunal will decide are set out below.

1. ***Employment status***

1.1 Between October 2019 and January 2020 was the claimant an employee of the respondent entitled to bring a damages complaint outstanding on the termination of employment about her then pay?
1.2 Was the claimant at that time a worker of the respondent within the meaning of section 230 of the Employment Rights Act 1996 entitled to bring a deductions from wages complaint?

2. ***Time limits***

2.1 Given the date the claim form was presented and the dates of early conciliation, was the deductions from wages complaint
2.1.1 Made to the Tribunal within three months (plus early conciliation extension) of the deductions complained of?

2.1.2 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit (the claimant asserts lack of knowledge of deductions)?

2.1.3 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

3. ***Wrongful dismissal / Notice pay***

3.1 Was it permissible/lawful for the respondent to require the claimant when giving one week's notice to take holiday during her notice period – if not was she entitled to damages for her notice pay?

4. ***Protected disclosure/Victimisation dismissal***

4.1 Did the claimant make protected disclosures when she did what she asserts in the paragraph beginning "on 16/06/20, I raised with Employer….".

4.1.1 Did she disclose information?

4.1.2 Did she believe the disclosure of information was made in the public interest?

4.1.3 Was that belief reasonable?

4.1.4 Did she believe it tended to show that:

4.1.4.1 a person had failed, was failing or was likely to fail to comply with any legal obligation;

4.1.4.2 the health or safety of any individual had been, was being or was likely to be endangered;

4.1.5 Was that belief reasonable?

4.1.6 And/or did the claimant's communications amount to protected acts within Section 27 (2) (c and d) of the Equality Act"

20. Judge Wade issued an unless order (p62) in the following terms (the "**Unless Order**"):

"Unless by 4pm on 5 October 2020 the claimant provides succinct details of any arguable complaints in addition to those listed in the Summary below, which she says are contained in her claim form, any such further complaints shall stand dismissed without further order (including any complaints related to disability)."

21. Judge Wade also issued a deposit order (relating to a wages complaint relating to the period October 2019 to January 2020 that was presented outside of the Tribunal's normal time limits). She arranged for a further telephone hearing to take place 6 weeks later to clarify the claimant's claims and set out various standard case management orders.

22. The Tribunal sent a Notice of Hearing to the parties on 10 September 2020, arranging a three day final hearing of the claim to take place from 1-3 February 2021.

Key correspondence during September and October 2020

23. The claimant emailed the Tribunal on 13 September 2020 (email not included in the Litigation Bundle), attaching a document named "Amended claim castle villas.docx" and stating:

"I seek permission to amend my claim, I believe the incident I am adding to my claim are within time. I will clarify other content of my claim in line with preliminary hearing order…".

24. The claimant also sent a separate email to the Tribunal at 11.51am on 2 October 2020 with a twelve page attachment named "Amended claim further and better particular.docx" (the "**October Document**"). This email was not included in the Litigation Bundle, but the October Document is at pages 76 to 87. The claimant's email stated:

"I have sent an email to employment tribunal on 13/09/20, where I had requested permission to add additional complaints to my claim. I have made number of mistakes due to poor concentration, currently suffering with depression and anxiety. I was feeling down , thankfully Social prescriber has encouraged me to make correction and sent a follow up request. I do apologies on the errors and seek permission to amend my claim with further and better particular. I therefore request the grant of permission to amend my claim. I have forwarded the amended claim further and better particular to respondent in line with tribunal orders."

25. The claimant submitted the October Document to the respondent in a separate email at 12.03pm on 2 October 2020 (page 75). She stated in her cover email to the respondent:

"Please see attached amended claim with further and better particular. Please can you send an acknowledgement of receipt."

26. The claimant did not state in the October Document which of her complaints were previously included in the claim form. There were three paragraphs of the October Document which specifically refer to the claimant's legal complaints of protected disclosures or victimisation under the Equality Act. All three of these paragraphs referred to events on 22 June 2020 and 23 June 2020 (the date on which the claimant was dismissed with one week's notice).

26.1 Page 82 (paragraph 27), which relates to the incident on 16 June 2020:

"27 - Respondent rather than taking notice of my stress and providing me support was constantly referring to my notice which has caused further distress and injury to feeling and I was subjected to disability discrimination by respondent."

26.2 Page 84 (paragraph 36), which relates to incidents on 22 June 2020:

"36- Respondent has altered my contract of employment, where she has reduce my work hours as well reduce my pay, I was subjected to victimisation on making protected disclosures and raising concerns under Equality Act."

26.3 Page 84 (paragraph 38), which relates to the claimant's dismissal on 23 June 2020:

"38- In evening, respondent has terminated my employment and I was not given a reason. Respondent failed to follow ACAS code of conduct on disciplinary and grievance. Respondent has subjected me to dismissal due to protected disclosure and addressing employees health related matters on supervision."

26.4 Page 86 (paragraphs 43 and 44):

"43- Respondent in her ET3, also use this ground as defence that, I have made complaint to safeguarding and employment tribunal. Respondent acts unlawfully and pressurizes employees to implement her unlawful instruction. I followed internal process and raised my concern with respondent, she choose not to deal with my grievance and subjected me to victimisation and discrimination.

44- On 17/07/20, I raised my concerns via email about victimisation, unlawful deduction from wage, I raised with Respondent that her action has affected my mental health and I am struggling to manage my daily life. Respondent failed to response to my formal concerns."

26.5 Page 87 (paragraph 6 – under the heading 'Unlawful wage deduction':

"6- Respondent has subjected me to victimisation due to protected acts and has withheld my notice pay, Respondent other employees were not required to take annual leave as notice pay."

27. The claimant's only reference to disability discrimination was in relation to the compensation that she was seeking, as stated at page 87 (paragraph 10 – under the heading 'Unlawful wage deduction'):

"I seek compensation for unfair dismissal, victimisation and disability discrimination. I seek compensation for injury to feeling, personal injury and aggravated damages. I seek an uplift on employer failure to give me written reason of dismissal, failure to follow ACAS code on disciplinary and grievance. I seek full pay for additional work hours covering October 2019 to June 2020 along holiday pay etc."

28. The claimant informed me during the hearing that the October Document in fact consisted of an amalgam of:
    28.1 further particulars of her claim, replacing the previous further particulars document that she had emailed to the Tribunal on 13 September 2020; and
    28.2 her response to the Tribunal's Unless Order.

29. The claimant emailed the Tribunal on 5 October 2020 (page 88), applying for an extension of Judge Wade's Deposit Order and the deadline for the submission of her Schedule of Loss:

"I seek extension permission for preliminary hearing (dated 7th September 2020) order. I seek two-week time extension to prepare Schedule of Loss as well as I seek time extension for deposit order…I am litigant in person, suffering with depression and anxiety, receiving medical treatment and support from social prescriber and waiting for Cognitive behaviour therapy.

I am suffering with flash back and Pareidolia, low mood, insomnia, anxiety and struggling to manage daily routine. My concentration is poor and I am depending on my son to draft the document. I with my son assistance has submitted my amended on 2nd October 2020, however due to his own studies and helping me with daily routine, I am unable to prepare a schedule of loss in given time."

30. Employment Judge Lancaster granted the claimant an extension of time to submit her Schedule of Loss, but refused her application for an extension of time in relation to the Deposit Order.

31. The claimant provided a four page detailed schedule of loss on 19 October 2020. The claimant's schedule of loss included a claim for injury to feelings which stated in her schedule related to:

"Injury to feelings (protected disclosure, harassment, victimisation, disability discrimination, unlawful deduction from wage, failing to follow acas code of conduct on disciplinary and grievance etc.)"

32. The Tribunal arranged for a preliminary hearing to take place on 18 December 2021. This was postponed and rearranged for 28 January 2021 because no judges were available to conduct the preliminary hearing.

33. The claimant then submitted a Scott Schedule of her complaints on Wednesday 27th January 2021 (the "**Scott Schedule**") (pages 159-177). The Scott Schedule was submitted three working days before the final hearing of the claim was due to start on Monday 1st February 2021. The claimant stated that the Scott Schedule amounted to substantial compliance with the Unless Order. The claimant's cover email stated:

"Respondent stated in his amended response that amended claim is not in a form to response properly, I attach the Scott schedule to clarify my claims…"

34. The Scott Schedule referred to:

34.1 ten protected disclosures that the claimant stated she made (in addition to the protected disclosure that Judge Wade identified in the draft list of issues);

34.2 eight incidents that the claimant stated amounted to protected acts, victimisation, discrimination arising from disability and a failure to make reasonable adjustments.

Compliance with Unless Order

35. Employment Judge Brain considered the submissions provided by the claimant on 26 February 2021 and the respondent on 18 March 2021. Judge Brain concluded in his judgment of 21 April 2021 (the "**April Judgment**") that the claimant was in material non-compliance with the Unless Order for reasons including those set out at paragraph 31-36 of his judgment:

"31. The question for me therefore is whether there has been material non-compliance by the claimant with the terms of Employment Judge Wade's Order recited in paragraph 11 above. I am not concerned with the question of whether the Order should have been made nor is it for me to revisit the terms of the Order.

32. What was envisaged was for the claimant to provide succinct details of any arguable complaints (other than those summarised by Employment Judge Wade in paragraph 39) and which the claimant says were contained in her claim form. It was clearly contemplated that the claimant would need to link the details to be provided pursuant to the Order (by 4pm on 5 October 2020) with the claim form. That this is a proper construction of the Order and may be discerned by the fact that the word "are" is emphasised: "… which she says ARE contained in her claim form".

33. In the further and better particulars of 2 October 2020, there was simply no attempt to link the details provided with any of the complaints in the claim form. That in and of itself in my judgment constitutes material non-compliance. The object of the exercise was plainly the ascertainment of whether any complaints additional to those identified by Employment Judge Wade in paragraph 39 of the Order (cited in paragraph 3 above) may be fairly discerned. In reality, all the claimant did was present a more detailed narrative over 12 pages (in the document of 2 October 2020) rather than over the seven pages document which accompanied the claimant's ET1.

34. Qualitatively, the 2 October 2020 cannot fairly be interpreted as being in compliance with the requirement to provide succinct details of arguable complaints in circumstances where it in fact was an expansion of the particulars presented by the claimant with her claim form and with no attempt to cross refer to it.

35. It follows, therefore, in my judgement that the respondent is correct to submit that there has been material non-compliance with the terms of the Unless Order set out in paragraph 11 above. It follows therefore that any further complaints within the claim form (other than those set out in paragraph 39 of the Order) stand dismissed without further order.

36. Accordingly, the only complaints that the Tribunal has jurisdiction to consider in this matter are those referred to in paragraph 39 of Employment Judge Wade's Order."

36. The claimant applied for reconsideration of Employment Judge Brain's judgment of 21 April 2021 and for relief from sanctions on 4 May 2021. Employment Judge Brain considered written submissions from both parties and stated in his judgment of 8 July 2021 (page 330) (the "**July Judgment**") that:

28. "I now turn to the claimant's application for relief from the sanction arising from the dismissal of the claims within the claim form (other than those identified in paragraph 39 of Employment Judge Wade's Order) dismissed by reason of non-compliance with her Unless Order.

29. In the Judgment, I set out in paragraph 43 the relevant test to be applied upon an application for relief from sanctions.

30. The claimant's application for relief from sanction starts by making a request for the revocation of the Unless Order of 7 September 2020. This is a matter which has been referred to Employment Judge Wade who has refused the application. The Unless Order remains extant and therefore, I proceed to deal with the application for relief from sanctions.

31. I am satisfied that there is no reasonable prospect of this aspect of the Judgment being varied or revoked.

32. As I said in paragraph 43 of the Judgment, I need to consider:

32.1. The seriousness of the breach;

32.2. Whether there is a good explanation for the breach; and

32.3. All the circumstances of the case.

33. In paragraph 18 of her application for relief from sanction, the claimant contends that she partially complied with the Unless Order. This is an admission that she has not wholly complied with it. There has been non-compliance with the Tribunal's Order. The breach is serious.

34. The claimant advances as good reasons for default that English is not her first language and that she suffers from mental health issues. Nothing is said in the reconsideration application which persuades me that these provide a good explanation for the breach.

35. I accept that English is not the claimant's first language. However, it is apparent from the history of the matter that the claimant has assistance and has submitted to the Tribunal documentation which is impressive in and of itself.

36. The claimant has submitted medical evidence in support of her case that she has mental health issues. I accept that she does so, but the same point remains - she has assistance and was therefore able to comply with the Unless Order but simply did not do so. In fact, in paragraph 27 of her submissions she refers to having a legal representative available from 2018. The claimant has also not explained how the medical evidence demonstrates

an inability to comply with the Unless Order. It is not for the Tribunal to try work out this out for itself from medical notes and records.

37. I must then consider all of the circumstances of the case. As I said in paragraph 46 of the Judgment, one set of trial dates has been lost. This was attributable to difficulty ascertaining the extent of the claimant's claims and the need for further case management. The difficulties that have beset this case have principally been because of the propensity of the claimant to seek to add claims as she goes along. This is contrary to the overriding objective as so clearly explained by the President in Chandhok v Turkey*.*

38. For the reasons I explained in the Judgment, it is simply not proportionate to allow the claimant to greatly expand the complaint in circumstances where the preponderance of the claimant's claims are for pecuniary loss arising from the dismissal which is before the Employment Tribunal in any case. Further, there is already a claim for non-pecuniary loss arising out of the extant victimisation claim. Disproportionate time and resource will be expended should the scope of this complaint be permitted to expand greatly. Such would be unjust to the respondent and in breach of the Tribunal's obligation to apply the overriding objective to keep matters proportionate.

37. Employment Judge Brain later recognised at the preliminary hearing on 6 December 2021 that he should have held a hearing to consider the claimant's application for reconsideration and for relief from sanctions. He recused himself from hearing those applications and stated in the Case Management Orders of 6 December 2021 (with my underlining added for emphasis):

42. "I therefore refuse the claimant's application to recuse myself generally. However, I consider there to be merit in the claimant's application for me to recuse myself from hearing her relief from sanctions application.

43. This is because I have expressed a firm and concluded view against the claimant. Mr MacPhail said that it is not uncommon for judges to be asked to reconsider decisions which they have taken and where they have expressed a firm and concluded view already. An example may be found in the Employment Tribunals' Rules of Procedure. A party may apply for reconsideration of a judgment which has the effect of finally disposing of a matter. By definition, that is an application to the judge for reconsideration where he or she has expressed a firmly concluded view.

44. In my judgment, the difference here is that I reached a firm and concluded view that the claimant's relief from sanctions application should be refused before affording her the right to a hearing. A reconsideration application will usually arise only after a party has had the right to be heard. That seems to me to be a distinguishing and important feature. The claimant was deprived of a right vested in her within the rules. In my judgment, a fair minded and informed observer apprised of all of the relevant circumstances would conclude that there would be a real possibility of bias were I to hear the relief from sanctions application. I therefore recuse myself from hearing it.

45. In order to have her relief from sanctions hearing, the claimant firstly requires there to be a revocation of the relevant part of the judgment promulgated on 20 July 2021. The claimant has not applied for reconsideration of that

Judgment as would have been her entitlement pursuant to Rules 70 to 72 of Schedule 1 to the 2013 Regulations.

46. *It is open to the Tribunal upon its own initiative to reconsider any judgment where it is necessary in the interests of justice to do so. By Rule 73, where the Tribunal proposes to reconsider a decision upon its own initiative, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall then be reconsidered in accordance with Rule 72(2) (as if a reconsideration application from a party had been made and not initially refused as having no prospect of success).*

47. *Rule 72(2) provides that the decision shall be reconsidered at a hearing unless the Employment Judge considers that a hearing is not necessary in the interests of justice. In such a case, the matter may be decided upon the basis of written representations.*

48. *Rule 72(3) says that where practicable, any reconsideration under rule 72(2) shall be made by the Employment Judge who made the decision under reconsideration. Where that is not practicable, the President, Vice-President or a Regional Employment judge shall appoint another Employment Judge to deal with the application.*

49. *During the course of the hearing today, we touched upon the issue of how best to proceed, particularly given the overriding objective to deal with cases proportionately, avoiding undue delay and saving expense. It appeared to be common ground that the preferred course would be for the reconsideration of the 20 July 2021 judgment to be immediately followed, should it be revoked, by the relief from sanctions hearing. That avoids the need for separate hearings. Plainly, such would be a proportionate way of proceeding.*

50. *The difficulty which presents itself, and upon which I invite the parties' further submissions, is that the tenor of the rules is that it ought to be the Employment Judge whose decision is under reconsideration who determines whether the decision ought to be varied or revoked. As I said this afternoon, it appears to me that, quite candidly, there was an error of law in depriving the claimant of her right to a hearing upon the issue of relief from sanctions and it is therefore in the interests of justice to revoke that part of the Judgment of 20 July 2021 and then proceed to have the relief from sanctions hearing.*

51. *It seems to me that, upon a hearing of Rules 72 and 73, the matter can only be referred to another Employment Judge to consider reconsideration of the impugned judgment where it is not practicable for the matter to come before me. In* ***Benney v Department for Environment Food and Rural Affairs*** *[UK EAT/0245/13] it was held that the word "practicable" (in the 2004 Rules which then applied) had to be construed bearing in mind the overriding objective and was not limited to cases in which the original judge was dead, too ill or "beyond the reach of electronic or telephonic communication". In* ***Benney****, it was held that the proper construction of the word "practicable" should be informed by the overriding objective which brings into consideration issues of functionality, expedition, fairness and the saving of expense.*

> *52. It seems to me therefore that the correct approach here is to put the file before the Regional Employment Judge to consider whether it is not practicable for the reconsideration of the relevant part of the 20 July 2021 judgment upon the Tribunal's own motion to be dealt with by me, but rather that matters should go to another Employment Judge so to do. In that case, if the new Employment Judge decides that it is in the interests of justice to vary the judgment of the Tribunal's own motion then the relief from sanctions application may be heard at the same time. This seems to me to be a sensible, proportionate and practicable way of dealing with matters. The parties' further submissions are invited accordingly."*

38. The claimant then sent a document to the Tribunal on 4 January 2022 with the title: *"claimant reservation over preliminary hearing record, request issue Judgment on recusal application and reconsideration."* Employment Judge Brain considered at a preliminary hearing in the absence of the parties on 14 January 2022 and concluded at paragraph 11:

> *"In reality, the claimant simply repeats the submissions which she made on 6 December. I am satisfied that there was no legal error in my refusal to recuse myself generally and that I applied the correct principles. As I said in paragraph 41, it is open to the claimant to complain to the Employment Appeal Tribunal if she thinks that I have made legal errors in my judgments generally and upon the issue of recusal in particular. I agree with the respondent's solicitor that there are no or insufficient grounds to vary the Order of 6 December 2021. It is not in the interests of justice to do so."*

39. For the sake of completeness, I note that in a separate judgment of 14 December 2021, Judge Brain reconsidered the April Judgment and permitted the claimant to add two additional unauthorised deductions from wages complaints to her claim with the respondent's consent (relating to wages from February to June 2020 and holiday pay from 28 October 2019 to 30 June 2020).

40. Regional Employment Judge Robertson directed on 14 March 2022 as follows:

> *"… (1) it is appropriate and in accordance with the overriding objective that the matters set out at paragraph 56 of Employment Judge Brain's orders made on 6 December 2021 should be dealt with at the same time and by the same Employment Judge;*
>
> *(2) as Employment Judge Brain has stood down from further consideration of the claimant's application for relief from sanctions, it is no longer practical within rule 72 of the Employment Tribunals Rules of Procedure 2013 for him to deal with the application for reconsideration;*
>
> *(3) accordingly, the Tribunal will list the case for a public preliminary hearing before any Employment Judge (except Employment Judges Brain and Wade) with one day allowed to decide the matters set out at paragraph 56 of Employment Judge Brain's orders made on 6 December 2021 together with any further case management that is required."*

RECONSIDERATION OF PARAGRAPH 3 OF THE JULY JUDGMNET

41. Paragraph 3 of the July Judgment stated:

> *3. "The claimant's application for relief from sanction by reason of material non-compliance with the Unless Order dated 7 September 2020 ('the Unless Order') is refused."*

42. On the Tribunal's own initiative, I reconsidered paragraph 3 of the July Judgment and revoked that paragraph. The reason that I revoked paragraph 3 of the July Judgment because Employment Judge Brain identified that he committed an error of law by depriving the claimant of her right to a hearing upon that issue under Rule 38(2) of the Tribunal Rules (as set out at paragraph 50 of Judge Brain's December 2021 case management orders).

43. Following that reconsideration, I proceeded to hear the claimant's application for relief from sanctions relating to Employment Judge Brain's April Judgment that the claimant was in material non-compliance with the Unless Order.

CLAIMANT'S APPLICATION FOR RELIEF FROM SANCTIONS

Claimant's submissions

44. During the claimant's written and oral submissions to this hearing, the claimant commented on Judge Brain's reasons set out in his April Judgment and in his July Judgment. I have not reproduced every submission that the claimant made in her written submissions and oral submissions (which lasted around one hour), however I have taken all of the points that she raised into consideration. The claimant's key submissions included that:

    44.1 she accepted (at paragraph 28(i) of her written submissions, p613) that she adopted the wrong approach: *"C agrees, she adopted the wrong approach. C submit, if shew as well enough, she would have divided further and better* [particulars] *of claim into four sections as compliance with unless order, amendment dated 13/09/20 with correction, additional amendments request and finally amendment to unlawful wage deduction. C low mood, lack of motivation and anxiety made it difficult…"*;

    44.2 the EAT's caselaw states that the Tribunal should not place all of the burden on a litigant in person and that her pleadings should be read in full. She stated that the 7 September 2020 only lasted 60 minutes and that her second preliminary hearing was only allocated 2 hours, when she had requested 3 hours;

    44.3 the Unless Order referred to 'any arguable complaint' which requires individual assessment of her complaints. The claimant stated that the Unless Order did not say that she had to cross-refer to her claim form or state whether the matters raised related to protected disclosures, victimisation or disability discrimination;

44.4 she would normally have the 'skills' needed to comply with the Unless Order, but her mental health was so poor at the time that she could not comply with the Unless Order (please refer to paragraph 33 below where more detail is provided on this point);

44.5 the only assistance that she received in relation to the October Document was from her 15 year old son, who helped her to put events into chronological order;

44.6 the October Document sets out her protected disclosure, including the concerns that she raised regarding medication, shouting at service users and subjecting colleagues to disability discrimination and stated that she had suffered detriment and victimisation as a result;

44.7 she previously stated that the October Document was in 'partial compliance' with the Unless Order. However, when she read the caselaw, her view was that she was in material compliance with the Unless Order because the respondent and the Tribunal were able to understand her claim;

44.8 she has not received any legal advice in relation to her current claim. The claimant said that she had previously received advice in 2018 from a barrister in relation to a whistleblowing claim against a former employer and that he had provided her with a draft Scott Schedule of her complaints for her previous claim against a different employer;

44.9 when she had recovered from the deterioration in her mental health, she looked at her old case file from her claim against Anchor Trust and used the schedule that her barrister prepare for her claim against Anchor as the basis for her Scott Schedule. She also did an online search for information which helped her to fill in the Scott Schedule;

44.10 her Scott Schedule constituted compliance with the Unless Order, albeit that this was prepared after the deadline for compliance with the Unless Order due to her ill health;

44.11 her table emailed to the Tribunal on 4 May 2021 cross-referenced the complaints in the October Document to those in her Grounds of Complaint and the only thing that was lacking were the heads of claims. The respondent was able to identify her heads of claim because they are legally represented;

44.12 she was concerned that if the Tribunal did not grant her application for relief from sanctions, she would not be able to bring the complaints were the subject of her amendment applications of 2 July 2021 and 6 December 2021, which would cause her significant prejudice;

44.13 she had complied with all of the Tribunal's other orders;

44.14 the respondent delayed in submitting its amended response, which resulted in the preliminary hearing arranged for October 2020 being vacated at the last minute;

44.15 she informed the Tribunal on 19 January 2020 that the parties were not ready to proceed to a final hearing on 1 February 2020 and she also noted that the hearing file prepared by the respondent on 25 January 2020 was incomplete, but the respondent wished to proceed with the final hearing on 1 February 2020;

44.16 the updated hearing file provided on 28 January 2021 (i.e. four days before the final hearing) did not contain the specific disclosures requested by the claimant (some of which the claimant believes remain outstanding);

44.17 the respondent did not apply for and the Tribunal did not make any orders to strike out any parts of the claimant's claim not referred to in Judge Wade's draft list of issues until the hearing on 28 January 2021;

44.18 she believed that the Covid-19 pandemic had placed a strain on everyone, including herself and the Tribunal;

44.19 the respondent made a false submission to the Tribunal on 18 March 2021 that they were prejudiced because a potential witness (SR) had left the respondent's employment. SR was in fact still employed by the respondent at that time, although the respondent terminated her employment shortly afterwards;

44.20 she accepted that her additional complaints would increase the hearing time, but that justice required them to be heard. She said that she made protected disclosures in the interests of the general public and that the Tribunal should hear them or (if they thought the complaints did not have merit) then the Tribunal should issue a deposit order rather than strike them out; and

44.21 in paragraph 41 of the April Judgment, Employment Judge Brain realised that the Tribunal had not issued the notice required under Rule 38(1) but still went ahead and expressed his views in relation to relief from sanctions;

44.22 her EAT appeals are ongoing, the case has not been finalised and no further final hearing date has yet been fixed. In addition, the witnesses relied upon by the respondent at a final hearing would not change.

45. The claimant stated that English was not her first language. She also said that her mental health deteriorated significantly during September and October 2020, which affected her ability to comply with the Unless Order. In particular, the claimant noted that:

45.1 she could not focus or do anything for herself in Autumn 2020. Instead, she was dependent on her children (aged 8-15) for her basic day to day needs;

45.2 she regained some strength by mid-January 2021, following a course of cognitive behavioural therapy and having been placed on the maximum dose of an anti-depressant and other medication;

45.3 pages 563-574 and 645-652 contained relevant medical history and medical records, which referred to her ill health during Autumn 2020. The claimant's medical records included the following entries:

45.3.1 10 September 2020: *Ongoing issues with depression and feeling numb, lack of motivation. Sounds better on the phone today but states does not really feel much better. Feels extremely tired with any activity taking a long time to do things and when doing them states head and shoulders get so heavy that has to stop and rest…"*

45.3.2 23 September 2020: *"Is feeling ok sometimes and other times not…Feels that she had too much burden on her [referring to her work and family issues]….Finds herself getting mixed up. Sent incorrect dates to employment* [tribunal] *[suggested she send email with correct dates."*

45.3.3 2 October 2020: *"Feeling a little better, trying to stay more active and now trying to take and collect children to and from school. Feeling 'lighter' and feels able to do more tasks at home although still needing hours afterwards to recover."*

45.3.4 13 October 2020: *"Seema said she is not feeling much better. However, she spoke louder and was articulate. She did sound brighter. She feels guilty that she is not able to do more for the children and feels fed up about circumstances. She says she knows she is capable but feels there is too much pressure. I asked where this pressure is coming from and it seems that it is coming from herself."*

45.3.5 3 November 2020: *"Feels is not improving, however, she sounds brighter and capable of having long, involved conversations. Very articulate and able to express herself."*

46. I shall refer to the October Document and the Scott Schedule as the "**2020 Amendment Application**" because the claimant made two further amendments applications on 2 July 2021 and 6 December 2021 which will be considered at the next preliminary hearing of this claim.

47. I noted that Employment Judge Brain refused the 2020 Amendment Application as part of his reserved judgment on 21 April 2021 (page 241-251, see paragraph 62). Judge Brain also reconsidered his refusal on 20 July 2021 (p330-338, see paragraph 20) at the claimant's request and again concluded that the claimant's amendment application should be refused.

48. I therefore asked the claimant to clarify which parts of the October Document consisted of her compliance with the Unless Order and which parts related to her amendment application because this was not stated in the October Document. The claimant referred me to a table which she sent to the Tribunal on 4 May 2021

as part of her application for relief from sanctions relating to the Unless Order (page 265-268) (the "**2021 Table**"). The claimant stated that the table cross-referred paragraphs in the October Document to her Grounds of Complaint. She stated that the paragraphs from the October Document that she cross-referred to consisted of her response to the Unless Order (i.e. paragraphs 4, 9, 12, 14, 15, 17, 18, 20 (points 1, 5, and 6), 23, 21, 28, 36 and 46). She stated that all remaining paragraphs in the October Document were either background or the subject of her 2020 Amendment Application.

49. I note that the only paragraph 36 of the October Document contains a reference to the claimant's legal complaints (as stated at paragraph 26 of this Judgment). This complaint relates to the claimant's dismissal, which Judge Wade had already recorded on 7 September 2020 as a complaint of protected disclosure or victimisation.

Respondent's submissions

50. The respondent provided written and oral submissions (lasting around 20 minutes) to the Tribunal. The respondent's key submissions included:

50.1 the correct test for the Tribunal to consider was set out by the Court of Appeal in *Denton v TH White Ltd* [EWCA Civ 906], which required the Tribunal to consider:
50.1.1 the seriousness of the breach;
50.1.2 the reason why the breach occurred; and
50.1.3 all the circumstances of the case.

50.2 an unless order is a very important order, by way of contrast with an ordinary case management order of the Tribunal, any breach of which must be regarded as serious;

50.3 this was not a case where there was a brief delay in filing a witness statement or a schedule of loss – two years after proceedings commenced, the respondent still did not have a clear idea of the issues raised by the claim;

50.4 the claimant attended all of the hearings on her own without an interpreter and she has a very good grasp of written and spoken English. She is well able to navigate the Tribunal's rules, make applications and refer to relevant caselaw;

50.5 the evidence regarding the claimant's health does not indicate that the claimant was unable to engage with court proceedings, for example:

50.5.1 the claimant applied to amend her claim on 13 September 2019;
50.5.2 the October Document was lengthy and detailed;
50.5.3 the claimant applied on 5 October 2019 for an extension of time to prepare her schedule of loss and to revoke the deposit order;
50.5.4 the claimant submitted a lengthy Scott Schedule on 27 January 2021 and stated that she did so without legal assistance;

50.6 the claim started out as a straightforward claim with a three day listing, but has now been the subject of four preliminary hearings, several judgments and lengthy correspondence. The claimant had also submitted applications for revocations, reconsiderations, recusals and EAT appeals;

50.7 the claimant did not object to the respondent's request for an extension of time to submit their amended response;

50.8 as at 1 February 2021 (the original date of the final hearing) the Tribunal had not determined whether the claimant had complied with the Unless Order and the claimant had submitted a detailed Scott Schedule four days previously;

50.9 many of the claimant's allegations relate to verbal discussions between the claimant and the respondent's witnesses and memories will have faded, given the time elapsed since the events;

50.10 if the claimant's application for relief from sanctions succeeded, further preliminary hearings would still be required to determine whether any additional complaints were contained in the claimant's Grounds of Complaint;

50.11 the respondent would suffer severe prejudice if the claimant's application succeed, including an increased time estimate for the final hearing, additional costs and time (on top of those already expended) which the respondent would be unable to recover via a costs order; and

50.12 Judge Wade's draft list of issues includes complaints that would provide the claimant with compensation for loss of earnings, injury to feelings and other matters if she succeeded in her existing complaints.

Key legal principles

51. In *Wentworth-Wood v Maritime Transport Ltd* UKEAT/0316/15, HHJ Richardson summarised at paragraphs 5 to 7 the three stages of consideration by a tribunal under r 38:

51.1 a decision whether to impose an unless order and, if so, in what terms;

51.2 a decision on whether there has or has not been material compliance with the unless order; and

51.3 if a party whose claim (or part of a claim) has been dismissed automatically for material non-compliance with an unless order applies for relief from sanctions, analysis of whether it would be in the interests of justice to overturn that dismissal.

52. The claimant has made an application for relief from sanctions in relation to the Unless Order. 'Relief from sanctions' refers to an application by a party to avoid the consequences of their breach of a Rule or order, such as under Rule 38(2).

53. This Judgment therefore deals with the third stage identified in *Wentworth-Wood*, i.e. whether it would be in the interests of justice to overturn the dismissal of that part of the claimant's claim which is not set out in Judge Wade's draft list of issues.

54. The EAT in *Thind v Salvesen Logistics Ltd* UKEAT/0487/09, applied the Court of Appeal's decision in *Governing Body of St Albans Girls' School v Neary* [2009] EWCA Civ 1190, [2010] IRLR 124. The EAT stated (with my underlining added for emphasis) that:

"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, and 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 puts 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 one not to be used lightly) and they must be taken very seriously; their 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."

55. In *Opara v Partnerships in Care Ltd* UKEAT/0368/09 *(15 February 2010, unreported)* the EAT summarised the most common relevant considerations when hearing an application for relief from sanctions:

"When a Tribunal is considering whether to grant relief against a sanction, the main focus will be on the default itself – (1) the magnitude of the default (2) the explanation for the default (3) the consequences of the default for the parties and the proceedings (4) the consequences of imposing the sanction on the parties and the proceedings; and (5) the promptness of the application to remedy the default. These are the principal factors the Tribunal will have in mind when it considers the interests of the administration of justice, and above all whether it is unjust and disproportionate to impose the sanction."

56. The EAT has held that the tribunal considering whether to grant relief from sanctions will first need to reach conclusions on the nature of the breach of the Rules or order (the question of whether there was a breach is one that has obviously already been considered before this stage has been reached). Analysis will include whether it was a breach of one or more elements of an order or the

Rules and whether any breaches were total or partial (*Polyclear Ltd v Wezowicz* *UKEAT/0183/20* (23 June 2021, unreported)).

57. In *Amey Services Ltd v Bate UKEAT/0082/17* the EAT held that where a party has had their claim dismissed for failure to comply with an unless order, if they cannot show that at the point relief from sanctions is assessed they have remedied that failing by materially complying with the order, they cannot hope to be granted such relief. However, the EAT stated in *Enamejewa* that the mere fact that there is a short delay in complying with the order (in that case an eight minute delay in emailing witness statements) is not of itself a reason for setting the order aside.

58. The Tribunal must consider the effect of the breach of the order on the parties and on the proceedings in general. In *Morgan Motor Co Ltd v Morgan* *UKEAT/0128/15*, the EAT emphasised the importance of complying with unless orders and the finality of litigation when considering whether to grant relief from sanctions.

59. The fact that a fair trial may still be possible is not determinative. The EAT in *Singh v Singh Trustee Representative* (UKEAT/0158/16) held that it was permissible for the Tribunal to take into account factors including:

"…that a fair trial must mean trial (a) within a reasonable period of time, (b) with reasonable and proportionate preparatory work on both sides and (c) commitment of a reasonable and proportionate share of judicial and administrative resources by the ET…".

60. In addition, the EAT in *Emuemukoro v Croma Vigilant (Scotland) Ltd* EA-2020-000006 (previously UKEAT/0014/20) considered a similar point in the context of a strike out under Rule 37. The EAT concluded that where a claimant's conduct makes a fair trial during the listed trial window impossible, the fact it would be possible, were the case adjourned and re-listed, to have a fair trial at a later date, is irrelevant.

Conclusions

Default – seriousness of breach and explanation for breach

61. I have considered the seriousness or magnitude of the claimant's breach of the Unless Order. Judge Wade identified the claimant's complaints at the preliminary hearing on 7 September 2020, having discussed the claimant's claim form with the parties. Judge Wade made the Unless Order to provide the claimant with one final opportunity to clarify any additional complaints (including any disability discrimination complaints).

62. Employment Judge Brain concluded that the October Document failed to clarify the claimant's complaints as required by the Unless Order. The Unless Order required the claimant to provide *"succinct details of any arguable complaints in addition to those listed in the Summary below, which she says are contained her in her claim form"*. I have concluded that the seriousness or magnitude of the breach was significant for the following key reasons:

62.1 the October Document was 12 pages long, compared to the claimant's seven page Grounds of Complaint. The claimant explained during this preliminary hearing that it was an amalgam of an amendment application and her response to the Unless Order. It did not contain the 'succinct details' of the additional complaints that were ordered by Judge Wade;

62.2 I found it difficult to ascertain what complaints the claimant was raising in the October Document that were already referred to in her claim form, in addition to those already identified by Judge Wade. When I asked the claimant for her comment on this point during this preliminary hearing, she referred me to the 2021 Table. However, I note that according to the 2021 Table, only paragraph 36 of the October Document contains a reference to the claimant's legal complaints (as stated at paragraph 21 of this Judgment). This complaint relates to the claimant's dismissal, which Judge Wade had already recorded on 7 September 2020 as a complaint of protected disclosure or victimisation; and

62.3 the Scott Schedule provided by the claimant on 27 January 2021 (over 3 months after the original Unless Order deadline and three working days before the original dates of the final hearing of the claim) also contained a significant amount of additional information. The Scott Schedule did not make any distinction between the complaints which were already in the claimant's claim form and those which were part of an amendment application.

63. I accept that the claimant's default was not deliberate and that she sought to comply with the Tribunal's other orders (or to apply for time to be extended for such compliance), both those made at the preliminary hearing on 7 September 2020 and subsequent case management orders.

64. I note that the claimant has relied on two key reasons for her failure to comply with the Unless Order:
64.1 that English is not her first language; and
64.2 her poor mental health in Autumn 2020.

65. I accept that English is not the claimant's first language. However, the claimant herself stated that she had the skills to manage legal proceedings and that it was her poor mental health in the Autumn of 2020 that caused her difficulties. The claimant has demonstrated in her written correspondence and in her articulate submissions during today's hearing that she is able to understand and pursue complex legal points in a thorough and reasoned manner. The claimant has not asked for an interpreter at any point during these proceedings nor has the Tribunal considered an interpreter to be necessary.

66. The claimant provided her medical records, in support of her contention that her poor mental health in Autumn 2020 led to her failure to comply with the Unless Order. However, I do not accept that the claimant's ill health prevented her from complying with the Unless Order for the following key reasons:

66.1 the claimant sent a three page amendment application to the Tribunal on 13 September 2020, which she later amended to produce the twelve page October Document;

66.2 the October Document did not comply with the Unless Order, but it demonstrates that the claimant (with assistance from her son) was able to conduct matters relating to Tribunal proceedings at that time;

66.3 the claimant could have asked for an extension of time to comply with the Unless Order, as she requested an extension of time to submit her schedule of loss and of the deposit order (in order to apply for revocation of the deposit order) on 5 October 2020. When I asked her why she did not make such a request, she said that this was due to 'poor judgment' related to her health at the time. However, her email of 5 October 2020 does not demonstrate such poor judgment;

66.4 the claimant submitted a detailed four page schedule of loss on 19 October 2020. The claimant's schedule of loss included a claim for non-pecuniary losses related to injury to feelings and referenced protected disclosure detriment, harassment, victimisation and disability discrimination as heads of claims, as well as a personal injury claim;

66.5 the claimant's medical records suggest that her health had improved significantly by early November 2020: *"Feels is not improving, however, she sounds brighter and capable of having long, involved conversations. Very articulate and able to express herself."*;

66.6 the claimant stated that she had recovered sufficiently by late January 2021 to prepare a Scott Schedule. However, the Scott Schedule does not contain succinct details of her additional complaints contained in her claim form, as ordered by Judge Wade.

Balance of prejudice

67. I note that both parties have been affected by the delays to these proceedings, which I accept are in part due to the Tribunal's handling of the claim (as set out at Annex 1 by Employment Judge Brain).

68. However, I accept that the prejudice to the respondent if the claimant's application for relief from sanctions is granted would be significant for the following key reasons:

68.1 there is still no final list of issues (or questions) to be considered at the final hearing of the claim. Judge Brain has rejected the claimant's 2020 Amendment Application, however the claimant's amendment applications of 2 July 2021 and 6 December 2021 remain outstanding;

68.2 if the claimant were to be granted relief from sanctions, the Tribunal would still have to consider whether the claimant's Grounds of Complaints identify any additional complaints because the October Document, the Scott Schedule and the claimant's table of 4 May 2021 fail to do so clearly;

68.3 the memories of all witnesses will be affected by additional delay to these proceedings, albeit that the fault for some of the delay is that of the Tribunal rather than the parties; and

68.4 the respondent has already incurred significant time and costs in responding to the claimant's interlocutory applications, as is evidenced by the length of the preliminary hearing file. Granting relief from sanctions would inevitably lead to an increase to those costs.

69. The claimant would be prejudiced if the relief from sanctions application were not granted, particularly as she will not be able to pursue a disability discrimination complaint. However, I note that:

69.1 she is still able to pursue her claims set out in Judge Wade's draft list of issues, including complaints relating to her dismissal (which she states are linked to protected disclosures and/or victimisation under the Equality Act), and the complaints of unauthorised deductions from wages which were subsequently added as an amendment to the claim by consent of the parties in April 2021;

69.2 even if the claimant's application were granted, the Tribunal would still have to consider whether the claimant's Grounds of Complaints identify any additional complaints because the October Document, the Scott Schedule and the claimant's table of 4 May 2021 fail to do so clearly. As stated above, only paragraph 36 of the October Document contains a reference to the claimant's legal complaints (as stated at paragraph 21 of this Judgment). This complaint relates to the claimant's dismissal, which Judge Wade had already recorded on 7 September 2020 as a complaint of protected disclosure or victimisation;

69.3 Judge Wade recorded in her summary of the preliminary hearing on 7 September 2020 that: "*Although the claimant says she suffers with anxiety and depression, I could discern no arguable complaint of any type of disability discrimination in the claim details.*"

Whether a fair trial remains possible

70. A fair trial of this claim remains possible in that further hearing dates could be arranged and will need to be arranged in relation to the complaints that Judge Wade identified, along with the two additional wages complaints accepted as an amendment in April 2021. I note the guidance in *Morgan* and *Singh* referred to earlier in this Judgment which emphasises the importance of:

70.1 the importance of complying with unless orders and the finality of litigation when considering whether to grant relief from sanctions; and

70.2 the fact that a fair trial may still be possible is not determinative. In particular, the EAT stated in *Singh*: *"…that a fair trial must mean trial (a) within a reasonable period of time, (b) with reasonable and proportionate preparatory work on both sides and (c) commitment of a reasonable and proportionate share of judicial and administrative resources by the ET…".*

71. This claim has already taken up a significant amount of the Tribunal's limited judicial and administrative resources in reaching this stage of the proceedings and there is still further case management required before a final hearing can be arranged. The Tribunal's overriding objective does not only require parties to be placed on an equal footing so far as practicable. It also requires that cases should be dealt with 'fairly and justly', including by dealing with cases in a manner proportionate to the complexity and importance of the issues, to avoid delay and save expense.

Outcome

72. I have reconsidered paragraph 3 of Employment Judge Brain's July Judgment in relation to the Unless Order and have revoked that paragraph.

73. I have then heard the claimant's application for relief from sanctions. I have concluded that it is not in the interests of justice to grant the claimant's application for relief from sanctions under Rule 38(2) of the Tribunal Rules for the reasons set out in this Judgment.

Notes

74. I will send the parties a separate Notice of Hearing for the preliminary hearing on 15 July 2022 (the date of which was agreed at this preliminary hearing).

Employment Judge Deeley

1 July 2022

Annex 1 – extract from Employment Judge Brain's case management summary of the preliminary hearing on 6 December 2021

"REASONS AND NOTES

1. *At the conclusion of today's hearing, the claimant asked for reasons for the several decisions which I had reached. These are now set out here.*
2. *Regrettably, this case is amongst the most complex which I have encountered. It is, I think, necessary to set out a summary of the procedural history. This will, I hope, assist the parties, the Regional Employment Judge and any other Employment Judge who deals with the case.*
3. *May I say at the outset of these reasons that during the course of today's hearing, the claimant drew my attention to an issue which has led me to conclude that, regrettably, there has been an error of law on my part. This only adds to the complexity. When I came to prepare the reconsideration judgment and the order following today's hearing and to the preparation of these reasons, a further matter occurred to me which I did not air with the parties. Accordingly, it is right that I ask the parties for comments and observations before the matter is referred to the Regional Employment Judge, and then to the administration for listing. The parties' attention is drawn to paragraphs 45 to 52 below.*
4. *I am grateful to the respondent's solicitor for putting together the bundles of documents. I shall instruct the administration to ensure that the bundles filed remain upon the Document Upload Centre for future use. Unless otherwise stated, the page numbers to which I refer below are to those in what has been called the 'litigation bundle.'*
5. *The claimant presented her claim form on 29 June 2020 (pages 1 to 21). Upon receipt of the respondent's notice of appearance (pages 25 to 43) the matter was listed for a case management preliminary hearing.*
6. *This came before Employment Judge Wade on 7 September 2020. The record of this preliminary hearing is at pages 61 to 69.*
7. *In paragraph 3 of her case management orders, Employment Judge Wade directed that the claims and issues are as set out in paragraph 39. She made an Unless Order (in paragraph 4) that unless by 4 o'clock pm on 5 October 2020 the claimant provides succinct details of any arguable complaints in addition to those listed in the schedule in paragraph 39, any further complaints shall stand dismissed without further Order. In paragraph 5 the Order, she made a Deposit Order upon the basis that there was little reasonable prospect of the claimant succeeding with her complaint about being owed extra pay for additional hours worked from October 2019 to January 2020.*
8. *On 7 October 2020, Employment Judge Lancaster issued a judgment (sent to the parties on 9 October 2020) that the claimant's complaints the subject of the Deposit Order are struck out upon the basis that she failed to pay the deposit as ordered by Employment Judge Wade. This judgment is at pages 95 to 97.*

9. *The matter was then listed for a case management preliminary hearing which came before me on 28 January 2021. I directed that the hearing of the case (which had been listed for 1, 2 and 3 February 2021) shall be vacated.*

10. *In order to determine whether there had been substantial compliance with the terms of the Unless Order, I then gave directions for the claimant to file a document explaining the basis of her contention that she had complied with paragraph 4 of Employment Judge Wade's Order made on 7 September 2020. I then gave directions for the respondent's reply. A copy of the order which I made on 28 January 2021 is at pages 187 to 191.*

11. *On 21 April 2021 promulgated a reserved judgment. This is in the litigation bundle at pages 238 to 251.*

12. *I held that:*

    (1) The claimant was in material non-compliance with Employment Judge Wade's Unless Order.

    (2) The application made by her to amend her claim should be refused.

    (3) The Tribunal shall therefore determine only those matters identified in paragraph 39 of the Order of 7 September 2020.

13. *With reference to the amendment issue referred to in paragraph 12(2), it had been contemplated in my order of 28 January 2021 that the claimant may seek to apply to amend her claim. This is because she had presented a "Scott Schedule" on 27 January 2021 (pages 158 to 177). (This was the day before the hearing before me). It appeared to include matters not referred to in the claim form or the grounds of complaint. She was ordered by me on 28 January 2021 to demonstrate to my satisfaction which complaints in the Scott Schedule were referred to in the grounds of complaint which accompanied her claim form and then, in so far as the Scott Schedule contained new claims, the basis of any application made by her to amend the claim to include them.*

14. *The judgment dated 6 April 2021 promulgated on 21 April 2021 was accompanied by a letter from the Employment Tribunal. This is at page 238.*

15. *The letter notified the claimant that her claims within the claim form and grounds of complaint (other than those set out in paragraph 39 of Employment Judge Wade's order of 7 September 2020) stand dismissed because of her breach of the Unless Order made that day. However, the letter informed the claimant that she may apply for relief from the sanction of the claims being dismissed for non-compliance and to have the judgment of 6 April 2021 set aside. The application had to be made within 14 days of 21 April 2021. The letter went on to say that the application may include a request for a hearing. Otherwise it shall be considered upon the papers.*

16. *On 4 May 2021 the claimant applied for relief from the sanction of having her complaints dismissed because of breach of the Unless Order. This is at pages 258 to 263. In paragraph 31 of her letter, the claimant requested that the Unless Order should be set aside and that she should be granted relief from sanction imposed upon her. She also requested a hearing at which for the Tribunal to address the relief from sanctions application.*

17. *At around the same time (by way of separate emails), the claimant also applied for reconsideration of my refusal of her amendment application (289 to 296). She also applied for revocation of Employment Judge Wade's Deposit Order and Unless Order and to set aside Employment Judge Lancaster's judgment. That application is at pages 254 to 257.*

18. *On 24 June 2021, Employment Judge Wade refused the claimant's application for revocation of the Deposit Order and the Unless Order made by her on 7 September 2020. The letter from Employment Judge Wade to this effect is at pages 300 and 301.*

19. *On 25 June 2021, Employment Judge Lancaster refused the claimant's application for reconsideration of his judgment of 7 October 2020. The judgment issued by Employment Judge Lancaster to this effect of 25 June 2021 is at pages 302 and 303.*

20. *On 2 July 2021, the claimant made a second application to amend her claim. This is at pages 304 to 309. She applied to add additional complaints of detriment for having made public interest disclosures and complaints of victimisation and harassment under the Equality Act 2010. She also applied to amend the claim by adding Ghazala Aleem as a second respondent to the claim.*

21. *On 20 July 2021 I caused to be promulgated a judgment which I prepared on 8 July 2021. This is at pages 330 to 338.*

22. *I ruled in July 2021 that there was no reasonable prospect of the reserved judgment of 6 April 2021 promulgated on 21 April 2021 refusing permission to amend being varied or revoked except upon the following matters:*

    (1) The claim that the claimant suffered an unauthorised deduction from her wages between February and June 2020 inclusive.

    (2) That the respondent failed to pay the claimant her holiday pay for the period between 28 October 2019 and 30 June 2020.

23. *In addition, I ruled against the claimant upon her application for relief from sanction by reason of material non-compliance with the Unless Order of 7 September 2020. These determinations were upon the basis of written representations received by the Employment Tribunal from the parties.*

24. *By Rule 38(2) of Schedule 1 to the 2013 Regulations, a party whose claim has been dismissed as a result of an Unless Order may apply to the Tribunal in writing, within 14 days of the date that a notice was sent, to have the Unless 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.*

25. *It is here that, regrettably, a wrong turn was taken by the Tribunal. Plainly, the Tribunal complied with Rule 38(1) confirming what had occurred and that the Tribunal's judgment upon 6 April 2021 (promulgated on 21 April 2021: pages 238 to 251) was that the claimant had failed to comply with Employment Judge Wade's Order and had fallen foul of the Unless Order. The Tribunal had also notified the claimant of her right to apply for relief from sanctions and to have that application determined at a hearing. The claimant had complied as she applied for relief from sanctions within 14 days of 21 April 2021 and had asked for a hearing.*

26. The Tribunal proceeded to determine her application for relief from sanctions upon the papers. Unfortunately, therefore, the claimant was denied the right which she has pursuant to Rule 38 to have matters determined at a hearing.

27. The claimant has presented an appeal to the Employment Appeal Tribunal. This is at pages 361 to 379. In fact, the first ground of appeal raised by the claimant (at page 362) is that the Tribunal erred in law in deciding the application without affording her the right to be heard. (The claimant's appeal is against both limbs of the judgment promulgated on 20 July 2021: the refusal of the claimant's application for reconsideration of the Judgment promulgated on 21 April 2021; and the refusal of the claimant's application for relief from sanctions).

28. On 15 November 2021, the respondent filed written objections to the claimant's application dated 2 July 2021 to amend her claim. This is at pages 408 to 413. At the same time, the respondent's solicitor said that the respondent was not seeking a postponement of the hearing listed for 6 December 2021 pending the outcome of the claimant's appeal.

29. On 29 November 2021, the claimant made an application to the Employment Tribunal for a specific disclosure order. This application covers six categories of documents. It is at page 246. There had been correspondence between the parties about disclosure issues prior to the claimant's application (pages 419 to 424).

30. On 6 December 2021, the claimant made a further (third) application to amend her claim. This application is not in the litigation bundle as it was made very late in the day.

…"