Neutral Citation Number: [2023] EAT 39

Case No: EA-2021-000117-AS; EA-2021-000118-AS; EA-2021-000940-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14 March 2023

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

- -

Between :

MRS BIBI ADILAH ROJHA **Appellant**

- and –

ZINC MEDIA GROUP PLC **Respondent**

- -
- -

Patrick Wise-Walsh (instructed by Direct Access) for the **Appellant**
Sam Way (instructed by Niki Walker Employment Law) for the **Respondent**

Hearing date: 22 February 2023

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:30am on 14 March 2023

SUMMARY

Practice and procedure – Unless Order – Deposit Order - Rules 38 and 39 Schedule 1 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

The claimant had unreasonably failed to attend case management preliminary hearings in these proceedings. At the first such hearing, the ET proceeded to give directions for the provision of further particulars of her claims of race discrimination and unauthorised deductions and for a statement of all remedies claimed. It also made a deposit order in respect of a claim of sex and/or pregnancy and maternity discrimination. The claimant did not comply with those directions and did not pay the deposit. At the second hearing, the ET made an unless order relating to the earlier directions but stating that non-compliance would result in the striking out of the claimant's case in its entirety. The claimant did not comply with the unless order and her case was struck out.

Upon the hearing of the claimant's appeals against the making of the unless order and against the deposit order.

Held: dismissing the appeals

The ET had not erred in making an unless order whereby non-compliance would result in the striking out of the entire case, including claims of unfair dismissal and for redundancy pay. The direction for further particulars had specifically related to the redundancy pay claim, which had been put as part of the complaint of race discrimination. As for the unfair dismissal claim, although the respondent bore the burden of establishing the reason for dismissal, the claimant was asserting a positive case in this regard, which was also linked to her complaint of race discrimination. The nature of the case was thus such that the ET was entitled to consider that the sanction for non-compliance with the unless order should apply to all the claims made. Furthermore, the requirement for a remedy statement applied to *all* claims pursued. It was open to the ET to see this as a necessary step for the fair and just management of the case to trial. Taken together with the claimant's conduct of the proceedings,

the ET was entitled to see the case-wide sanction of the unless order as a necessary and proportionate measure.

As for the deposit order, the ET had undertaken a reasonable attempt at identifying the claims and issues (*per* **Cox v Adecco** [2021] ICR 1307 EAT), before permissibly concluding that the claimant's pleaded claim of sex and/or pregnancy and maternity discrimination had little reasonable prospect of success. Taking the claimant's case at face value, there was no reason for the ET to consider that any further particulars were required or would be of assistance and it had been entitled to make a deposit order.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. These appeals raise questions relating to the imposition of unless and deposit orders in Employment Tribunal ("ET") proceedings.

2. I refer to the parties as the claimant and respondent, as below. This is the full hearing of the claimant's appeals against decisions of the London Central Employment Tribunal (Employment Judge Snelson sitting alone): (1) to proceed with a case management preliminary hearing on 31 March 2021 in the claimant's absence (EA-2021-000117-AS); (2) to make a deposit order at that hearing (EA-2021-000118-AS); (3) to make an unless order at a subsequent preliminary hearing on 11 October 2021 (EA-2021-000940-AS). The claimant's appeals were permitted to proceed after a hearing under rule 3(10) **EAT Rules 1993**, before His Honour Judge Auerbach on 11 May 2022, albeit the permission granted at that stage related to grounds that addressed only the second and third of the three appeals.

3. The claimant represented herself in the proceedings before the ET but was represented by counsel, acting under ELAAS, at the rule 3(10) hearing, albeit not by Mr Wise-Walsh, of counsel, who appears for the claimant at this full hearing. At the ET hearings in issue, the respondent's interests were represented by its solicitor; it now appears by Mr Way of counsel.

Background

4. The claimant was employed by the respondent from 18 February 2013 to 26 June 2020. Subsequent to the termination of her employment, the claimant presented a claim to the ET in which she complained of unfair dismissal, race, pregnancy or maternity, and/or sex discrimination, and sought a redundancy payment, arrears of pay and other payments. Particulars of the claimant's claims were set out in a document attached to the form ET1 entitled "*Background and Details of Claim*",

which set out the relevant history in narrative form before stating:

> "(16) In the circumstances and on account of the aforestated matters, the Claimant's dismissal was unfair in the following respects:
> (a) The Respondent had no redundancy policy procedure nor followed any reasonable policy/procedure in making the Claimant redundant.
> (b) It failed to hold any or any proper or adequate redundancy consultation.
> (c) It had no selection criteria nor was transparent in how it selected the Claimant for redundancy.
> (d) The real reason for her dismissal was not redundancy or attributable wholly or mainly to a redundancy situation. The duties of her role that she performed at the time of her dismissal had neither diminished nor ceased nor was there any indication that they were about to do so.
> (e) Her position was not redundant as there was no diminution in the Respondent's need for an employee to carry out the kind of work she was employed to do. Her position was simply re-branded or given a new title of 'Accounts Manager'.
> (f) Her role was substantially the same or similar to the role of Accounts Manager and as such, she should have been assimilated into the role and not required or expected to take part in a selection process regarding this or any other role in the Respondent's organisation.
> (g) No consideration was given to the fact that if there were differences in the roles, these were not substantial or significant enough to affect her ability to perform the same. No consideration was given to the fact that the Claimant, who was an experienced Accounts Manager having worked exclusively in this field since her employment with the Respondent, had always adapted and changed over time to meet the requirements of the Respondent's business.
> (h) No regard was had to providing training/retraining if the view was genuinely taken that there were significant differences in both roles and that she may not have been readily able to perform some of the duties of Accounts Manager.
> (i) The Respondent failed to consider or to provide any alternative employment opportunities for the Claimant and/or training so that she might be re-deployed.
> (j) The decision to dismiss her had been predetermined and the Respondent used the redundancy exercise as a pretext to get rid of her.
> (17) The Claimant further contends that she was directly discriminated against on racial grounds in the respects stated i.e. regarding the conduct of her redundancy and failure to pay her an enhanced redundancy payment as were the white members of staff of the Respondent who had been or were made redundant.
> (18) The [Claimant] also claims that she [was] subjected to direct and/or indirect sex discrimination in relation to the failure of the Respondent to increase her salary following her return from maternity leave in February 2018.
> (19) The Claimant further hereby claims payment of the remainder of or shortfall in her pay for April and May 2020, as she was only paid a fraction of the amount that should have been repaid to her. The Claimant contends that non-payment of the full amount deducted from her pay amounts to an unauthorised deduction of her wages. (20) As a result of the above mentioned

> matters, the action of the Respondent has caused the Claimant health problems and financial hardship."

5. Within the earlier narrative part of the document, the claimant had described herself as "*British, of dual Asian/African origin*" and had set out the history of the redundancy process that had culminated in her dismissal. At paragraph (7), the claimant referred to her complaint to the respondent of discriminatory treatment on grounds of race; at paragraphs (13)-(14) she set out details of her complaint/grievance relating to the handling of the grievance process, and at paragraph (15) she explained how she had pursued an appeal in this regard and about other matters, including the fact that others had received an enhanced redundancy payment and that her complaint about not being given a pay increase in her salary following her return from maternity leave in February 2018 had not been addressed.

6. On 14 January 2021, the respondent entered a response to the claimant's claim. Included within its grounds of resistance, the respondent complained that the claimant's case was "*inadequately particularised ... in part*" and requests for further particulars were then included within the response.

7. On 31 March 2021, a case management preliminary hearing took place before EJ Snelson. The claimant did not attend, which EJ Snelson found was "*not a responsible way to behave*", observing:

> "1. … The waste of time and money … is obvious and inexcusable. It is plain from the claimant's correspondence that she is an intelligent and articulate individual. The purpose of the hearing was to clarify the dispute and agree practical steps to bring it to an effective hearing. Of course [the claimant] was in a position to participate. … If she thought there was any issue as to whether [the ET3] had been presented in time, the telephone case management hearing was precisely the forum in which to raise it. I hope it will not be necessary in future to remind either party that when the Tribunal lists a hearing it expects the parties to attend and when it gives a direction it expects them to comply. …"

8. Going on to consider the claims made in the ET proceedings, EJ Snelson noted that the

redundancy payment claim appeared to be unsustainable as it seemed to be accepted that the claimant had in fact received a redundancy payment; as such, the claim should be withdrawn or the ET might consider striking it out. The unfair dismissal claim was considered to be capable of simple analysis, but the ET ordered that the claimant should provide further particulars of her complaints of race discrimination, including the allegation made in respect of enhanced redundancy terms, and of unauthorised deductions from wages. More generally, the claimant was ordered to provide a "*statement of all remedies claimed in the proceedings*", including copies of "*all relevant documentary evidence*". The ET also made a deposit order in respect of the claimant's "*allegation of unlawful discrimination (either because of pregnancy/maternity or because of her sex)*", which it understood to have been made "*not far short of two years after the apparent date of the alleged wrongful act*":

> "7. … Quite simply, the claim appears to be a very long way out of time and, … there is little reasonable prospect of the Tribunal finding that it can be considered on its merits. …"

Case management directions were otherwise made for the case to progress through to a final hearing, which was ultimately listed to commence on 28 March 2022.

9. By letter dated 12 May 2021, the claimant applied for the ET's orders made on 31 March 2021 to be set aside. It appears, however, that that letter was not referred to EJ Snelson. In any event, the claimant also lodged appeals with the EAT (1) against the ET's decision to proceed with the case management preliminary hearing on 31 March 2021 in her absence (EA-2021-000117-AS), and (2) against the deposit order made at that hearing (EA-2021-000118-AS). It is not in dispute that the claimant did not pay the deposit that she had been ordered to pay within 28 days, and did not provide the further particulars she had been ordered to provide.

10. A further case management preliminary hearing took place on 11 October 2021. The parties were sent a notice of hearing in this regard on 29 September 2021. By letter dated 5 October 2021, the claimant wrote to object to the hearing - albeit she erroneously stated that it was listed for 11

November 2021 – on the basis that it was unnecessary "*given the extant PH CM Order(s) of 31st March 2021*". She also stated that she was not available on 11 November 2021. On 8 October 2021, by email sent at 12:03, the respondent's solicitor pointed out to the claimant that the hearing was in fact listed for 11 October 2021. By email sent to the ET at 13:04 on 8 October 2021, the claimant referred to her error in relation to the date but still suggested that she would not be available.

11. The hearing on 11 October 2021 went ahead, again before EJ Snelson. The claimant did not attend but EJ Snelson was satisfied that there was no good reason to postpone the hearing. As the claimant had done nothing to comply with the orders made at the hearing on 31 March 2021, the respondent's representative explained that no progress with the case had been possible and expressed her concern that the final hearing might not be able to take place as scheduled. It was in those circumstances that EJ Snelson considered that an unless order was both appropriate and necessary, as follows:

> "(1) Unless, no later than 29 October 2021, the claimant complies in full with paras (3) and (4) of the order made orally on 31 March 2021 and received by [the claimant] in written form no later than 6 May 2021, the entire claim will stand struck out without further intervention of the Tribunal."

12. By letter dated 15 October 2021, the claimant sought to have the unless order set aside. She also lodged an appeal against that order (EA-2021-000940-AS). On 1 November 2021, a message was communicated from EJ Snelson to the claimant, stating:

> "… the fact that you have sought to raise an appeal against the unless order is not a ground for revoking it and does not absolve you of your duty to comply with it".

13. On 5 November 2021, EJ Snelson invited observations from the parties as to whether the claimant had complied with the unless order. The respondent responded on 8 November 2021, attaching the correspondence received from the claimant since the unless order was made. On 9 November 2021, the claimant provided her observations, albeit not addressing the question as to whether she had complied with the unless order. On 17 November 2021, EJ Snelson confirmed that

the claimant had failed to comply with the unless order and, accordingly, that her claim had been automatically struck out. As the respondent had made an application for its costs, the ET gave directions for the determination of that application.

14. By email of 1 December 2021, the claimant made an application to set aside what she referred to as the ET's "*strike-out order*" and for a stay of the ET proceedings pending determination of her appeals to the EAT. The claimant referred to her earlier applications to set aside the ET's orders made on 31 March and 11 October 2021, observing that the orders made on both occasions had stated:

> "You may apply under rule 29 for this Order to be varied, suspended or set aside."

I pause to note that rule 29 of Schedule 1 to the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules") provides that an ET may vary, suspend or set aside an earlier case management order:

> "where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made."

15. Returning to the narrative, a further hearing took place before EJ Snelson on 3 December 2021. The claimant again did not attend. In his judgment, sent to the parties on 1 March 2022, EJ Snelson recorded that he had refused the claimant's applications to set aside the earlier orders made on 31 March and 11 October 2021 and had made an award of costs in the respondent's favour, in the sum of £3,975.

16. For completeness, I note that the claimant has lodged a further appeal against the ET's judgment of 1 March 2022 (EA-2022-000229-AS). After a hearing under rule 3(10) **EAT Rules 1993** on 20 January 2023, before Mr Gullick KC, sitting as a Deputy High Court Judge, that appeal was permitted to proceed to a full hearing in relation to the costs award, albeit that it was noted to be contingent upon the success of the present matter and, accordingly, proceedings in EA-2022-000229-AS have been stayed pending the determination of this appeal.

The Relevant Legal Principles

Unless Orders

17. By rule 38(1) of the **ET Rules**, it is provided that an order of the ET may specify that *unless* it is complied with by a specified date the claim (or response), or part of it, shall be dismissed without further order. It is further stated that, if a claim (or response), or part of it, is dismissed on this basis, the ET shall confirm this by giving written notice to the parties. By rule 38(2), a party whose claim (or response) has thus been dismissed, in whole or in part, may apply for the order to be set aside on the basis that it is in the interests of justice to do so.

18. In **Wentworth-Wood and ors v Maritime Transport Ltd** UKEAT/0316/15, His Honour Judge David Richardson noted that rule 38 provided for potentially three separate judicial decisions: (1) the decision whether to impose an unless order and, if so, on what terms; (2) the decision to give notice (which requires the ET to form a view as to whether there has been material non-compliance with the order); (3) on an application under rule 38(2), whether it is in the interests of justice to set the order aside. He further observed:

> "8. At each of these stages there will be a decision for the purposes of section 21(1) of the **Employment Tribunals Act 1996**; so there may be an appeal to the Employment Appeal Tribunal on a question of law. They are, however, separate decisions taken at different times under different legal criteria. An appeal against one is not an appeal against another; and the time for lodging appeals will run from different dates. This point must be kept carefully in mind by any party considering an appeal. …"

19. In the present case, the appeal before me relates only to the imposition of the unless order. Although the claimant made an application to set that order aside, that was addressed by the ET in its subsequent judgment of 1 March 2022, which is the subject of an entirely separate appeal.

20. A decision to make an unless order is one that must necessarily be taken in accordance with the overriding objective in rule 2 of the **ET Rules**; in particular, such an order must be proportionate.

21. It is well-established that care is required when drafting the terms of an unless order,

particularly in a case where there are several allegations; as Langstaff P observed in **Johnson v Oldham MBC** UKEAT/0095/13:

> "6. ... Where an ET1 raises two or more separate claims it must, in my view, be remembered that they are legally separate claims. They are separate causes of action, albeit closely factually connected. … [B]ecause so much … turns upon the precise form of the unless order made and because the consequences of an unless order may be draconian, judges making such an order in the first place may wish to consider tailoring it with particular care. For instance, such an order might provide that any allegation not sufficiently particularised might be struck out. Such an order would leave it open to a subsequent Judge to conclude that there had been compliance in respect of some allegations, which would not therefore automatically be struck out, even though there had been non-compliance in respect of others which were."

22. Moreover, as further observed by HHJ David Richardson in **Wentworth-Wood**:

> "5. … As Rule 38(1) makes clear, an Unless Order is effectively a conditional Judgment, dismissing the whole or part of a response without any further Order: see **Marcan Shipping (London) Ltd v Kefalas and another** [2007] 1 WLR 1864 at paragraph 34 (Court of Appeal, Pill LJ) and **Johnson v Oldham Metropolitan Borough Council** [2013] EqLR 866 at paragraph 3 (EAT, Langstaff P). Care is required before making such an Order because of its drastic effect: **Marcan** at paragraph 36, where it was described as 'one of the most powerful weapons in the court's case management armoury' which 'should not be deployed unless its consequences can be justified' (paragraph 36). Care is also required in drafting the terms of the Order, especially in a case which involves several allegations: see **Johnson** at paragraph 5…."

23. Further, as His Honour Judge Auerbach cautioned in **Ijomah v Nottinghamshire Healthcare NHS Foundation Trust** UKET/0289/19:

> "74. … An Unless Order should not be a punitive instrument, and, in particular, should not have the effect of depriving a party of a claim (or defence) which is properly pleaded and perfectly capable of being fairly litigated."

24. Returning to the need for proportionality, given the potentially draconian effect of an unless order, it can be helpful to keep in mind the warnings that have been given in the context of the striking out of a claim (or response); for example, in **Blockbuster Entertainment Ltd v James** [2006] IRLR 630 per Sedley LJ at paragraph 15:

> "It is not only by reason of the Convention right to a fair hearing vouchsafed

> by Article 6 that striking out, even if otherwise warranted, must be a proportionate response. The common law … has for a long time taken a similar stance: see *Re Jokai Tea Holdings* [1992] 1 WLR 1196, especially at 1202E-H. What the jurisprudence of the European Court of Human Rights has contributed to the principle is the need for a structured examination. The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists."

25. All that said, the power to make an unless order remains a necessary and potentially useful case management tool that can assist the ET in ensuring that the case before it proceeds to a fair hearing; see **Leeks v Brighton and Sussex University Hospitals NHS Trust** [2022] EAT 153 at paragraph 36.

Deposit Orders

26. The power to make a deposit order is provided by rule 39 **ET Rules**. Where an ET considers that any specific allegation or argument in a claim has little reasonable prospect of success, it may make an order requiring a party to pay a deposit as a condition of continuing to advance that allegation or argument.

27. There are thus two stages to the making of a deposit order: (1) the threshold condition that the allegation or argument stands little reasonable prospect of success; and (2) the exercise of a judicial discretion as to whether to make such an order.

28. In determining whether the threshold condition is met, the ET:

> "27. … must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response." See per Elias P (as he then was) in **Jansen van Rensberg v Royal London Borough of Kingston-upon-Thames** UKEAT/0096/07.

29. And, as His Honour Judge Tayler observed in **Cox v Adecco Group UK & Ireland and ors** [2021] ICR 1307 EAT:

> "30. There has to be a reasonable attempt at identifying the claims and the issues before considering strike out or making a deposit order. In some cases, a proper analysis of the pleadings, and any core documents in which the

> claimant seeks to identify the claims, may show that there really is no claim, and there are no issues to be identified; but more often there will be a claim if one reads the documents carefully, even if it might require an amendment. Strike out is not a way of avoiding rolling up one's sleeves and identifying, in reasonable detail, the claims and issues; doing so is a prerequisite of considering whether the claim has reasonable prospects of success. ...."

30. In **Hemdan v Ishmail** [2017] ICR 486, Simler J (as she then was) noted that the purpose of making a deposit order is:

> "10. … to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails."

31. The purpose of a deposit order is *not* to effect a strike out "*through the back door*" (see **Hemdan v Ishmail** at paragraph 11). That said, the potential effect of the order, if the deposit is not paid, must be kept in mind when the ET is exercising its discretion in this regard. In considering whether to make such an order, the ET should, therefore, adopt a similar approach to that required when striking out a claim; see **Sharma v New College Nottingham** UKEAT/0287/11, at paragraph 21.

32. Although the ET must thus be cognizant of the potential implications of making a deposit order, it is a legitimate tool by which the pursuit of claims with little reasonable prospect of success may be discouraged, as was further observed in **Hemdan v Ishmail**:

> "10. … claims or defences with little prospect cause costs to be incurred and time to be spent by the opposing party which is unlikely to be necessary. They are likely to cause both wasted time and resource, and unnecessary anxiety. They also occupy the limited time and resource of courts and tribunals that would otherwise be available to other litigants and do so for limited purpose or benefit."

The Approach of the EAT

33. The exercise of discretion required of the ET in making interim, case management decisions, will only be susceptible to interference by the EAT on what might loosely be described as

Wednesbury grounds (**Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1948] 1 KB 223 CA); that is, where the ET applied the wrong principle, took into account irrelevant matters or failed to have regard to that which was relevant, or reached a conclusion that might properly be said to be perverse (and see **Noorani v Merseyside TEC Ltd** [1999] IRLR 184 CA). That might, however, mean that the EAT would be entitled to set aside an interim order where that had the effect of bringing about the termination of the proceedings but the ET had failed to take that into account (see the discussion, relating to adjournments, in **Andreou v Lord Chancellor** [2002] EWCA Civ 1192). More specifically, in **Mohammed v Guy's and St Thomas' NHS Foundation Trust** [2023] EAT 16, the context of the imposition of an unless order, the ET was held to have erred in law in failing to take into account the relevant fact that:

> "29. … any breach of the order made would result in the entire claim being struck out, including the claim of harassment in respect of which no request had been made and the claims of direct race discrimination and failure to make reasonable adjustments that were substantially particularised. …".

The Grounds of Appeal and the Parties' Submissions

34. The appeal was permitted to proceed to a full hearing on two grounds:

(1) In respect of the unless order (EA-2021-000940-AS): it is said that the ET erred in law in ordering that the claimant's claims of unfair dismissal and for a contractual redundancy payment be struck out for a failure to provide particulars in respect of a claim of race discrimination; alternatively, that it was disproportionate to order a strike out of the unfair dismissal and contractual redundancy payment claims for a failure to provide a schedule of loss.

(2) In respect of the deposit order (EA-2021-000118-AS): it is contended that (a) the ET misconstrued the claimant's pleaded case, and/or (b) that the ET erred in failing to seek further particulars from the claimant as to what she meant by her details of claim.

The Unless Order

35. The claimant objects that the unless order was draconian in effect as it meant that an entire claim would be struck out, including claims of unfair dismissal and for a contractual redundancy payment, which had been properly particularised and were capable of a fair trial on liability; the ET thereby adopted a "*penal rather than a facilitative approach*" see **Johnson v Oldham**. The ET had itself found that the unfair dismissal claim was capable of being "*simply analysed*" (paragraph 5 of its reasoning) and the claim for a redundancy payment was for "*an enhanced redundancy payment*" (paragraphs 17 of the details of claim attached to the ET1), which the ET had apparently failed to understand (paragraph 4 of its reasoning). The making of the unless order thus imposed a sanction that had the effect of depriving the claimant of two claims that were properly pleaded and capable of being fairly litigated (**Ijomah**).

36. The consequences of an unless order need to be justified (see **Wentworth-Wood**). There was no indication from the reasons that the ET took into account the fact that there was a properly particularised unfair dismissal claim that could be tried; this was a highly relevant matter that should have been taken into account when deciding on the sanction for default – the sanction must be tailored to the nature of the default and this was not done. The need for proportionality in respect of the sanction is also required because of the complainant's right of access to court (article 6 **European Convention on Human Rights**) and the overriding objective (see, in particular, rule 2(b) **ET Rules**). The dicta in **Blockbuster Entertainment v James** (requiring a structured approach to proportionality on a strike out for scandalous, vexatious or unreasonable conduct) was apposite for the ET's unless order power, which also has a draconian effect.

37. The respondent submits, however, that it is not appropriate to extend to the making of a deposit order the principles laid down in authorities relating to strike out orders; questions of proportionality do not arise in the same way. Although it was relevant to consider whether the terms of an unless

order might be fatal to all elements of a claim, that was only one factor going to the ET's exercise of its discretion. In the circumstances of the hearing on 11 October 2021, it was not unreasonable for the ET, in the exercise of its case management discretion, to make the unless order in the terms that it did: (i) the claimant had failed to attend two case management preliminary hearings; (ii) on each occasion, her failure to attend had been found to be without good reason; (iii) the claimant had failed to make any attempts to comply with the requirements to provide further information; (iv) she had been expressly warned in the case management summary from the first preliminary hearing of (a) the effect of failures to comply with the orders made and (b) the importance of attending hearings scheduled by the ET; (v) the effect of those failures, and of the claimant's non-attendance at two preliminary hearings, was that no progress with the case had been possible; (vi) there was substantial concern at that hearing that as a result of the claimant's conduct the final hearing date would be lost; (vii) the claimant's correspondence gave no grounds for the ET to consider that, despite her failure to progress her claim, the claimant intended to remedy those failures.

38. More specifically, the respondent notes that no issue was taken as to the imposition of the unless order in respect of the claims of race discrimination and of unauthorised deductions from wages, or for the requirement to provide a remedy statement, which related to *all* claims. As paragraph 16 of the claimant's details of claim made clear, the unfair dismissal claim was intertwined with the discrimination claims; it was not possible to simply analyse the different claims in terms of the different legal tests to be applied. As for the statement of remedy, the ET had been unable to understand what was being claimed by way of redundancy payment, and this was also relevant to the unfair dismissal claim (the respondent was entitled to understand the claimant's position in this regard and the ET would need to know what was being claimed in order to effectively case manage the proceedings).

The Deposit Order

39. For the claimant it is said that, although her pleaded case had related (as set out at paragraph 18 of her details of claim) to the "*failure of the Respondent to increase her salary following her return from maternity leave in February 2018*", this had to be seen in the light of her conjoined grievance/appeal (dated 3 July 2020), as explained at paragraph 15(b) of the details of claim, as follows:

> "(15) … (b) … again the Respondent proceeded to deal with this appeal without responding to the queries raised by the Claimant in this regard … Her complaint about not being given a pay increase in her salary following her return from maternity leave in February 2018 was left unaddressed".

40. The claimant contends that was capable, on its face, of amounting to a failure (or repeated refusal) on or after 3 July 2020 to re-open a request relating to her pay following maternity leave; alternatively, it was capable of forming a continuing state of affairs, subject to the ET hearing evidence in respect of the same. The ET had, however, failed to consider this possible reading of the claim and had thus misconstrued the claimant's case. In consequence, the ET's reasons for making the deposit order were wrongly premised on the claimant's claim being confined to an alleged refusal that took place in February 2018.

41. In addition, the claimant objects that when making a deposit order, an ET needs to have a proper basis for doubting the likelihood of a claimant being able to establish the facts essential to make good her claims; if there is a problem identifying the claim from the pleadings, a deposit order should not be used as a substitute for the ordering of further particulars (**Jansen van Rensberg** and **Tree v South East Coastal Ambulance Service NHS Foundation Trust** UKEAT/0043/17 at paragraphs 36 and 39).

42. For the respondent, it is first objected that the appeal in this regard is entirely academic. As the first ground of appeal did not apply to the discrimination claim, even if the appeal relating to the

deposit order were to succeed, the claimant's claims of discrimination would remain struck out for non-compliance with the unless order.

43. In any event, the respondent contends that the claimant's claim was sufficiently clear for the ET to make a deposit order. The ET had not erred in its construction of the claimant's case: paragraph 18 of the details of claim expressly stated that the act which was alleged to constitute unlawful discrimination in respect of her salary took place in February 2018:

> "(18) … in relation to the failure of the Respondent to increase her salary following her return from maternity leave in February 2018."

44. Paragraph 15(b) of the details of claim provided background to the complaint being made; there was no complaint of unlawful discrimination in connection with the grievance/appeal. Moreover, the ET had expressly considered whether the claimant was linking her complaints to later decisions but had rejected that possibility:

> "6. The Claimant does not advance any case to the effect that the claim here considered forms, with later matters about which she complaints, 'conduct extending over a period' such that time runs from the last relevant act or omission (s 123(3)(a) [**Equality Act 2010**]). Moreover such an argument would have appeared fanciful given the absence of any evident or suggested trend or theme linking them."

45. The ET did not fail to take reasonable steps to clarify the claim before making the deposit order (per **Cox v Adecco**), but, in any event, the claimant had unreasonably failed to attend the case management hearing on 31 March 2021 and had thereby intentionally deprived herself of the opportunity to clarify her claim at that hearing. In those circumstances, it was not wrong of the ET to form its own view as to the scope of the claim and to proceed to make a deposit order on that basis.

Discussion and Conclusions

The Unless Order

46. As my summary of the relevant legal principles will make apparent (see paragraphs 17-25

above), in terms of the approach an ET is to take to the making of an unless order, I favour the claimant's analysis. Given the potentially claim-ending, draconian effect of such an order, the ET must approach its task mindful that an unless order is intended to be a case management tool, not an instrument of punishment (**Ijomah**); it is a powerful means by which to seek compliance with the ET's orders but, given the drastic effect of non-compliance, it should only be deployed when those potential consequences can be justified (see **Wentworth Wood**, citing the Court of Appeal's warning in **Marcan**). Moreover, where the proceedings raise two or more separate claims, particular care must be taken: the ET should not make an unless order that might result in all the claims being struck out save where it is satisfied that that would indeed be a proportionate consequence (**Johnson v Oldham**; **Mohammed v Guy's**).

47. In the present case, the claimant was pursuing a number of different claims, as identified at box 8 of the form ET1 and then particularised in the document attached to that form, setting out the "*Background and Details of Claim*". In some respects, the claimant's complaints were clear (she was plainly challenging the genuineness of the reason given for her dismissal and she had provided particulars of how she said the redundancy exercise was procedurally unfair), but the ET permissibly considered that other aspects of her case required further particularisation. Specifically, the ET directed that the claimant was to provide further particulars of her complaint of race discrimination, both as to the general allegations made in this regard and to the extent that she was claiming that there had been direct race discrimination in respect of what was said to be "*a failure to pay her an enhanced redundancy payment*" (see paragraph 17 of the details of claim). It also directed the claimant to provide particulars of her claim of unauthorised deductions from wages, which the respondent did not understand, and a statement of all remedies claimed. There is no appeal before me relating to the ET's directions in these respects; but, although these were plainly legitimate case management orders, the claimant never provided the further particulars required.

48. When subsequently making the unless order that is under challenge, the ET was clear: if the claimant did not comply with its order by the specified date, "*the entire claim will stand struck out*" (emphasis added). The claimant says, however, that this was disproportionate as it meant that her claims of unfair dismissal and for a redundancy payment were also struck out when (i) further particulars had not been required in respect of these matters (and, indeed, the ET had itself identified that the unfair dismissal claim could be "*simply analysed*"), and (ii) the failure to provide a statement of remedy could not justify the striking out of claims that were still capable of a fair trial.

49. In some cases, it may be apparent that an unless order has been made, providing for the potential striking out of the entire claim, without proper consideration of the fact that the requirements for compliance only relate to particular allegations or issues. That was seen to be the error made in **Mohammed v Guy's**: there was nothing to suggest that the ET had taken this point into account (see paragraph 30 of the EAT's judgment in that case). I do not, however, read the ET's explanation for the order made in the present instance as indicating that the case-wide application of the order was inadvertent. As the reasoning makes clear, EJ Snelson had very much in mind the impact of his order on the progression of the case as a whole. More than that, however, this was a case where the ET had sought to undertake the task required of it (as identified in **Cox v Adecco**), of rolling up its sleeves and grappling with the need to identify the different claims being pursued. It had had to do this without the assistance of the claimant, because she had unreasonably failed to attend either hearing. Having thus identified the claims, however, the ET was in a position to see where further particularisation was required, and was well placed to assess the potential implications of the failure to provide such particulars for the future conduct of the case as a whole.

50. At this stage, I have put the claim of sex discrimination/maternity and pregnancy discrimination to one side: that case was the subject of the ET's deposit order and I have considered the appeal in that regard separately, below. Considering, however, the other claims identified by the

ET, it would be quite wrong to suggest that the further particulars it had directed the claimant to provide did not impact on the pursuit of the redundancy pay claim. As the ET had observed, it did not seem to be in dispute that the claimant had been paid her statutory redundancy entitlement; if the claim was limited to that payment, it appeared to be unsustainable. As for how the claimant had put her claim in respect of any enhanced entitlement, this had been identified as part of her complaint of race discrimination, and the ET had expressly seen this as a matter on which further particularisation was required. Turning to the unfair dismissal claim, although the ET had said that this could be "*simply analysed*", that was a reference to the legal tests that would apply to such a claim; the observation made did not descend into the specific factual analysis that would need to be carried out when determining the claim of unfair dismissal in this case. Undertaking that further exercise, it would be apparent that there was an overlap between the claim of unfair dismissal and the complaint of race discrimination: the claimant was advancing a positive case that redundancy was not the genuine reason for her dismissal and was expressly stating that:

> "(17) … she was directly discriminated against on racial grounds in the respects stated i.e. regarding the conduct of her redundancy and failure to pay her an enhanced redundancy payment …"

51. Given that the ET made clear that it had the entirety of the claim in mind when making the unless order, I do not infer that EJ Snelson lost sight of how the claimant was putting her case; on the contrary, it seems to me that he had the interrelationship between the claims of unfair dismissal and race discrimination very much in mind when expressing his concern as to the need to "*ensure that all necessary steps are taken in good time*" to prepare for the full merits hearing. Although the ET could permissibly take the view that it was unnecessary to separately order that further particulars be provided in respect of the complaint of unfair dismissal, that did not mean that the order made in relation to the race discrimination complaint had no relevance to the ability to hold a fair trial of the unfair dismissal claim.

52. More than that, however, the ET was entitled to take the view that the requirement to provide a statement of *all* remedies claimed was a relevant step for the progression of *each* of the claims pursued. In oral argument, Mr Wise-Walsh made the point that an unfair dismissal claim might be pursued at trial simply for the purpose of obtaining declaratory relief. Whilst that is true, it does not seem to me that this detracts from the purpose of the ET's order, which sought to ensure that the respondent could understand what remedy was being claimed against it, and that the ET could proceed to manage the case in the just and fair manner required (by way of example, the remedy sought in respect of the unfair dismissal claim might dictate whether it was appropriate for all matters to be addressed at one hearing or whether there should be separate hearings for liability and remedy). Given the obligations on the ET imposed by rule 2 **ET Rules** (the overriding objective), the requirement to provide a statement of all remedies claimed was an entirely permissible step. When the claimant failed to comply with that requirement, I do not consider it was necessarily disproportionate of the ET to seek to enforce that earlier case management direction by way of an unless order.

53. In reaching this view, I have also had regard to the particular context in which the ET was making the unless order in this case. The hearing on 11 October 2021 was the second case management preliminary hearing that the claimant had failed to attend without good reason. She had equally failed to provide further particulars in response to the respondent's request or in compliance with the ET's earlier order. There was a legitimate concern that the claimant's failure to progress the proceedings would jeopardise the trial. In those circumstances, I do not consider it can be said that the ET was not entitled to see the making of an unless order, relating to the entirety of the claim, as a proportionate and necessary step to ensure a fair trial in these proceedings.

54. Given the interrelated nature of the claims in issue, taken together with the particular difficulties arising from the claimant's conduct of the proceedings, I do not consider the making of

the unless order fell outside the permissible case management discretion afforded to the ET. There is no proper basis for the EAT to interfere with the decision made and I therefore dismiss this ground of appeal.

The Deposit Order

55. Given my conclusion in respect of the unless order, it could be said that the appeal against the deposit order must be rendered academic. I can see, however, that it might be argued that, if the deposit order should not have been made, the ET would have needed to consider the potential effect of making an unless order that could impact upon the entirety of the case, having specific regard to the specific claim made of sex and/or pregnancy and maternity discrimination. Having previously parked this issue, I therefore now return to the first case management preliminary hearing, on 31 March 2021, and the ET's decision to make a deposit order.

56. It is the claimant's case that the ET erred in its construction of her claim of sex and/or pregnancy and maternity discrimination; alternatively, that it was wrong not to adopt the less draconian step of requiring her to provide further particularisation of this claim. Again, however, I do not consider that the ET can be criticised for the way it undertook the task required of it, to identify the claims pursued in this case and the way in which those had been put in the ET1. In carrying out this exercise in respect of the claim of sex and/or pregnancy and maternity discrimination, the ET permissibly concluded that the complaint related to the respondent's refusal to increase her pay on her return to work in February 2018, following a period of maternity leave. That, indeed, was how the claimant had expressly put her case within her details of claim, complaining that she had been:

> "(18) … subjected to direct and/or indirect sex discrimination in relation to the failure of the Respondent to increase her salary following her return from maternity leave in February 2018."

57. The claimant now says that this was a misconstruction of her claim, which should have been

understood to have also related to a further act or omission by the respondent, in subsequently refusing to respond to the claimant's complaint in this regard on 3 July 2020. In this regard, reliance is placed on the earlier description (at paragraph (15)(b) of the details of claim) of the claimant's complaint of 3 July 2020.

58. I am unable to see that such reliance was placed on paragraph (15)(b) of the details of claim prior to the rule 3(10) hearing in these appeal proceedings, but, in any event, I do not consider the ET's construction of the claim made in this regard can be faulted. Within the details of claim, attached to the ET1, the claimant's complaint of 3 July 2020 was described as part of the narrative background; it was not identified as a separate head of claim. The act or omission of which the claimant was complaining might have had continuing consequences, but it was not pleaded as a continuing act. This was, moreover, a point that the ET expressly considered and analysed, concluding that the claimant was not advancing a case:

> "6. … to the effect that the claim here considered forms, with later matters about which she complains, 'conduct extending over a period' such that time runs from the last relevant act or omission. …"

And further observing that, in any event:

> "… such an argument would have appeared fanciful given the absence of any evident or suggested trend or theme linking them."

59. Allowing that the making of a deposit order is a potentially draconian step, the ET here had undertaken a reasonable attempt at identifying the claims and issues (per **Cox v Adecco**) and had permissibly concluded that the threshold condition was met as the nearly two year delay in bringing the claim gave rise to a proper basis (per **Jansen van Rensberg**) for doubting that the claimant would be able to establish the facts essential to demonstrating that this was a matter over which the ET would have jurisdiction.

60. As for whether the ET can be said to have erred in then proceeding to make a deposit order

rather than taking some lesser step, this has to be viewed in context. The claimant had unreasonably failed to attend the case management hearing on 31 March 2021 and had thereby deprived herself of the opportunity to clarify her claim at that hearing. By her conduct of the proceedings, the claimant had also deprived the ET of the assistance it was entitled to expect from her, pursuant to the obligation imposed on parties to assist in the furtherance of the overriding objective (rule 2 **ET Rules**). There was, in any event, no reason for the ET to consider that further particulars would alter the position. Taking this claim at face value – based on the way the claimant had chosen to state her case in her details of claim – it was open to the ET to conclude that the delay of nearly two years meant that this was a complaint with little reasonable prospect of success and, moreover, that it was appropriate, and in accordance with the overriding objective, to make its continued pursuit subject to a deposit order.

61. For all these reasons, in making the deposit order in this case, I am satisfied that the ET reached a decision that was open to it, as an exercise of its case management discretion. I therefore also dismiss the appeal in this regard.

Disposal

62. The claimant's appeals, combined for hearing before me, are accordingly dismissed. In consequence, it would seem that the further appeal in EA-2022-000229-AS will also fall to be dismissed. That, however, is not a matter that is strictly before me at this stage but, pursuant to the order made by Mr Gullick KC, the papers relating to that appeal are to be restored before a Judge of the EAT for further consideration 14 days after the handing down of judgment in the present appeals. Should either party consider that the appeal in EA-2022-000229-AS can continue notwithstanding my judgment, they should file and serve on the other party concise written submissions explaining their position within 7 days of the handing down of this judgment.