Neutral Citation Number: [2023] EAT 43

Case No: EA-2019-001149-OO
EA-2021-000941-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 March 2023

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT
MRS RACHAEL WHEELDON
MR CLIFFORD EDWARDS

- -

Between :

DR S BI
Appellant/Respondent to the Cross-Appeal

- and –

E-ACT
Respondent/Cross-Appellant

- -
- -

Thomas Croxford KC (Advocate) for the **Appellant**
Douglas Leach (instructed by Veale Wasbrough Vizards LLP) for the **Respondent**

Hearing date: 8 March 2023

- -

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 10:30 on 28 March 2023

SUMMARY

Practice and procedure – application to set aside an unless order – application for reconsideration – rules 38(2) and 72(1) schedule 1 ***Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013*** *("ET Rules 2013")*

The claimant having succeeded (in part) in her claims at the liability stage, directions were given for the trial of remedy, which ultimately led to an unless order being made for the claimant to provide her consent to the full disclosure of her medical records. When the claims were dismissed for failure to comply with that order, the claimant applied for the order to be set aside (rule 38(2) **ET Rules 2013**) but the application was rejected. The claimant appealed (EA-2019-001149-OO). During the course of the appeal proceedings, the claimant received a diagnosis of autism which she sought to rely on as potentially explaining her earlier failure to comply with the unless order; the appeal was stayed to allow the claimant to apply out of time for reconsideration (rule 70 **ET Rules**) of the decision under challenge. The Employment Tribunal ("ET"), however, refused the application for reconsideration. The claimant appealed this further decision (EA-2021-0009410-OO), additionally arguing that the ET's failure to hold oral hearings of her applications rendered the procedure unfair. The respondent resisted the appeals for the reasons provided by the ET and also cross-appealed.

Held: *dismissing the appeals and cross-appeal*

In circumstances in which neither party had requested an attended hearing, the ET had not erred in considering the rule 38(2) application on the papers and there was nothing in the new evidence relating to the claimant's autism diagnosis to suggest she had thereby been prejudiced or that this was unfair. Equally, in subsequently determining that reconsideration of its earlier decision was not in the interests of justice, the ET did not err in not setting this down for a hearing: it adopted the procedure laid down by rule 72(1) **ET Rules 2013** and there was no basis for concluding that it ought to have made an adjustment to this procedure in the light of the claimant's diagnosis of autism (**Presidential Guidance: Vulnerable Parties and Witnesses in Employment Tribunal Proceedings** considered).

As for the ET's substantive reasoning, it had not been perverse for the ET to conclude that full

disclosure of the claimant's medical records did not merely go to the claim for compensation for psychiatric injury but was necessary for the fair trial of remedy in this case as a whole. The ET had also been entitled to conclude that, even if the application to set aside was allowed, the claimant would still refuse to give her consent. Accepting the strong public interest in ensuring that complainants are properly compensated in respect of public interest detriments and acts of unlawful victimisation (the relevant heads of claim here), a refusal to disclose relevant medical records might impact on the fair determination of remedy and the ET had been entitled to find this was the position in these proceedings. The ET had taken account of all relevant considerations in determining the interests of justice in respect of both applications in issue (guidance in **Thind v Salvesen Logistics Ltd** UKEAT/0487/09 applied), including the partial disclosure that had been made by the claimant (per **Polyclear Ltd v Wezowicz** [2022] ICR 175 EAT). Moreover, in considering the new evidence relating to the claimant's autism diagnosis, the ET had been entitled to find that any explanation thus provided for the claimant's failure to comply with the unless order (albeit that explanation was not complete) did not outweigh the impact of that failure on the ability to hold a fair trial of remedy in this case: the interests of justice cannot be viewed from just one perspective (see **J v K** [2019] EWCA Civ 5).

As for the cross-appeal, the ET had not erred in considering the application for reconsideration to relate to its judgment of 5 November 2019; as such the points raised by the respondent fell to be dismissed.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. These appeals raise questions relating to how an Employment Tribunal ("ET") is to approach an application to set aside an unless order, or for reconsideration of an earlier judgment, where there is new evidence to suggest that a party was suffering from a disability at earlier stages of the proceedings, which is relied on to explain a previous failure to comply with the ET's order.

2. This is our unanimous decision. In giving this judgment, we refer to the parties as the claimant and respondent, as below. By her appeals, the claimant challenges decisions of the West Midlands ET (Employment Judge Perry, sitting alone): (1) of 5 November 2019, by which the ET declined to set aside an unless order of 12 December 2018; and (2) of 18 August 2021, by which it subsequently refused the claimant's application for reconsideration out of time. The claimant acted for herself in the ET proceedings but has had the benefit of representation by Mr Croxford KC, acting *pro bono*, since the preliminary hearing in these appeals. The respondent resists the appeals, relying on the reasons provided by the ET, but has also entered a cross-appeal on alternative grounds. The respondent has had the benefit of representation by Mr Leach, of counsel, throughout.

Background

3. The claimant's ET claim was presented on 11 November 2015; it related to events that occurred between 14 and 23 September 2015. The claimant had been placed, as an agency worker, to work as a learning support mentor/teaching assistant at Heartlands academy, one of two dozen or so schools sponsored by the respondent. In her ET claim, the claimant made a number of complaints relating to the termination of her placement at the school. After two substantive hearings, the ET (Employment Judge Cocks sitting with lay members) upheld the claimant's claims of unlawful detriment, in that her placement was terminated by reason of a protected disclosure and that this also constituted victimisation because she was perceived to have made an assertion that the academy was anti-Muslim; the remaining claims brought by the claimant were otherwise dismissed (the ET's

liability judgments in these respects were sent out to the parties on 22 March and 4 October 2017).

4. On 29 September 2017 (shortly before the second full merits hearing, listed to commence on 2 October 2017), the claimant disclosed additional medical documents, which included a letter of 28 September 2017 from a Dr Ali Al-Kammar Abdulkadir referring to the claimant suffering post-traumatic stress disorder. The respondent objected to the late disclosure of this evidence and the question of remedy was not considered at the October 2017 hearing (as had originally been intended), but the claimant was given permission to rely on the late-disclosed documents when the issue of remedy was determined at a later stage, and directions were given for the parties to obtain a joint expert report relating to the psychiatric conditions suffered by the claimant.

5. In advance of the subsequent remedy hearing, the agreed expert was sent a joint instruction on 3 May 2018. At that stage, however, the claimant objected to sending her full medical records to the respondent, although she did send some records to the expert (who seems to have received these on 7 June 2018). On 11 June 2018, EJ Perry converted a remedy hearing that had been listed for 14 and 15 June 2018, to a case management preliminary hearing. On 12 June 2018, the report of the joint expert (Dr Chahl) was sent to the parties, confirming that the expert had seen the claimant's GP records but not her psychiatric records; the report otherwise addressed the questions provided with the letter of instruction, which included questions relating to the claimant's future employability. The claimant made clear she wished to raise follow-up questions with Dr Chahl and the respondent maintained its position that there needed to be full disclosure of the claimant's medical records (with Dr Chahl's report being up-dated thereafter).

6. The case management preliminary hearing then took place before EJ Perry on 14 June 2018. At that hearing, the claimant ultimately agreed to provide her consent: (a) for the release of her psychiatric records to both the joint expert and the respondent, and (b) the release by the joint expert, to the respondent, of the records that the claimant had previously disclosed to the expert. The ET accordingly made an order (sent out on 15 June 2018) that the claimant return a form of consent (to be supplied to her by the respondent) and the remedy hearing was re-listed for 15-17 January 2019.

7. The draft consent form was sent to the claimant on the same day as the hearing, and she was chased for its return on 22 June and 27 September 2018. On 3 October 2018 the claimant sent copies of some of her medical records to the respondent's representatives. On the same day she was sent a further reminder seeking the return of the signed consent form.

8. By email of 5 October, the claimant stated that, on 18 June 2018, she had pointed out an error on the consent form and had asked for that to be amended. On 8 October, those acting for the respondents explained that they had not received this and asked for her 8 June email to be re-sent. An amended consent form was also forwarded to the claimant, with the corrections she had requested. This was not returned by the claimant, who has in fact never returned the signed consent form.

9. On 23 October 2018, the respondent sought an unless order to require that the claimant provide the consent form for her medical records. On 4 December 2018, the claimant responded, giving an address at Yale University, explaining there had been errors in the consent form and she had received no response to her request for these to be remedied; meanwhile she had tried to prevent delay by providing medical records to the respondent and the expert in any event. The claimant noted that the respondent was seeking "*an unless order … to dismiss the remainder of my claims*" and urged that, as a litigant in person, she would be prejudiced if the order was granted, and it was disproportionate to deny her the right to bring a fundamental claim, namely for psychiatric damage.

10. On 5 December 2018, the claimant asked the ET to send any correspondence to her via email or to her UK address, giving an address in Birmingham.

11. Also on 5 December 2018, the respondent sent a further submission, stating that it would have been open to the claimant to amend the consent form herself, and complaining that she had written to the expert directly, without informing the respondent or copying it in, and had still not complied with the requirement to return the signed consent form. The consent was necessary to ensure the information supplied by the claimant was complete; at present, the information supplied to the expert seemed incomplete.

The Unless Order and the Dismissal of the Claim

12. Having considered the parties' representations, on 12 December 2018, EJ Perry made an order in the following terms:

> "Unless by the 19 December 2018 the claimant complied with paragraph (2) of the 14 June 2018 order [that she should return the form of consent], the claim will stand dismissed without further order."

13. The unless order was sent to the claimant's Birmingham address; it is not suggested that she did not receive it. The claimant did not, however, comply with the order and, pursuant to rule 38 of the **ET Rules**, at 12:13 on 8 January 2019, a notice of dismissal was sent out.

14. By an email timed at 14:58 on 8 January 2019, the claimant contacted the ET to complain that the entirety of her claim had been struck out, not merely the psychiatric injury claim - which is what she said she thought the unless order had referred to. She said her claim should not be dismissed as she had been working on her PhD thesis, and had not been able to check her emails regularly, and had thought the unless order applied only to the psychiatric injury claim. On 31 January 2019, the claimant contacted the ET giving a Yale university email address for correspondence. On 6 March 2019, the respondent provided comments on the claimant's correspondence, to which, on 13 March 2019, the claimant replied.

15. Having considered the parties' correspondence, by order of 18 July 2019, EJ Perry directed that the parties provide written representations addressing the specific question whether it was in the interests of justice for the order to be set aside, directing that this matter would be:

> "1. … listed for a 3 hour hearing before me on a date to be fixed without the parties present to consider if it is in the interests of justice to set aside the Unless Order issued on 12 December 2019 (and the rule 38 notice of dismissal of 8 January 2019).
> 2. By no later than 4:00 pm on 23 August 2019 the parties shall lodge any representations they wish to rely upon in advance of the hearing and (if any) objections to my determining the application on the papers alone."

16. Neither party raised any objection to the course proposed by EJ Perry. It seems, however, that a notice of hearing was nevertheless sent out by the ET, and the claimant sought to clarify whether the parties were to be present at the hearing. By letter of 26 September 2019, EJ Perry explained that

the order of 18 July 2019 (setting out the procedure whereby this matter was to be determined on the papers) took precedence over any ambiguity created by the notice of hearing.

17. In the meantime, on 21 August 2019, the claimant lodged her representations pursuant to the ET's order of 18 July 2019. She argued that the consent form had contained errors, and explained that her mindset on leaving for Yale was to focus on her studies to mitigate her loss, and that she still believed the unless order solely related to the psychiatric injury claim. The claimant referred to **Civil Procedure Rule** ("CPR") 3.9(1) and to the case of **St Albans Girls' School v Neary** [2009] EWCA Civ 1190, and argued that striking out the entirety of her case was unjust. The respondent sent in its representations by letter of 23 August 2019. It contended that it would not be in the interests of justice to set aside the dismissal of the claim by reason of non-compliance with the unless order: the claimant had intentionally chosen not to comply and a fair hearing would not be possible as the requirements of the order of 14 June 2018 had still not been complied with.

The ET's Decision of 5 November 2019

18. Notwithstanding EJ Perry's earlier clarification of 26 September 2019, on 5 November 2019, the claimant attended the ET only to be informed by the clerk that the matter had been listed for a hearing without the parties present.

19. EJ Perry then proceeded to determine the application to set aside, on the papers. It was noted that the claimant had claimed losses under the following heads:

> "12 … financial loss, future loss(es), injury to feelings, stigma damages and psychiatric injury."

20. Having set out the relevant procedural history, and referred to the applicable case-law, EJ Perry found that the account provided by the claimant did not adequately explain her default: although she had been studying at Yale, she had been able to respond in detail to correspondence regarding the unless order on 4 and 5 December 2018 and had promptly sent in her objections once she had learned of the notice of dismissal. Concluding that the failure to comply with the unless order was deliberate (in that she had made a decision not to comply, notwithstanding that she had knowledge of what was

expected), EJ Perry did not accept that the claimant could reasonably have come to the view that the order drew any distinction between psychiatric injury and other claims. Indeed, EJ Perry was clear:

> "48 … her psychiatric injury is not … a discrete issue; the medical evidence is pertinent generally to the other awards the claimant seeks given her medical position may potentially have an affect *[sic]* [on] her losses including any injury to feelings award."

21. EJ Perry further noted that an issue had been raised as to whether the claimant had in fact disclosed all her medical records to the expert; that raised questions that might be relevant to remedy even if the psychiatric injury claim was withdrawn. The claimant's failure to provide the necessary consent had continued and that was prejudicial to the respondent. As a result, the case would not be ready to proceed to the determination of remedy on the date listed in January 2019. That would be the second occasion when the remedy hearing had had to be postponed due to the claimant's default, which was a waste of ET time and gave rise to delay in relation to a claim that was four years' old. Even if the claimant's application was granted, EJ Perry considered that she was unlikely to provide her consent, finding she had implicitly changed her position on that issue, and concluding:

> "52 … Accordingly, in my judgment a fair trial of the remedy issue is and was not possible."

22. By a decision sent out on the same day (5 November 2019), EJ Perry thus determined that it was not in the interests of justice to set aside the unless order issued on 12 December 2018 or the rule 38 notice of 8 January 2019.

23. On 17 November 2019, the claimant applied for a reconsideration of that decision; that application was refused on 19 November 2019.

Appeal EA-2019-001149-OO

24. The claimant appealed against the ET's decision of 5 November 2019 (EA-2019-001149-OO). Upon the initial, on-paper, consideration of the appeal, Linden J took the view that it disclosed no question of law. The claimant expressed her dissatisfaction with that response and the proposed appeal was then considered by HHJ Tayler, at a hearing under rule 3(10) **EAT Rules 1993**, on 4 December 2020. On that occasion, the claimant explained that she had recently discovered that she

has autism and contended, for the first time, that this may have explained (at least in part) her failure to comply with the unless order. HHJ Tayler ordered that the appeal be stayed to provide the claimant with an opportunity to lodge relevant medical evidence with the EAT. The claimant duly filed evidence of a diagnosis of autism spectrum disorder and, by further order seal dated 21 May 2021, HHJ Tayler extended the stay to allow the claimant to submit an out of time application for reconsideration to the ET.

The Application for Reconsideration

25. By letter of 7 June 2021, the claimant applied, out of time, for a reconsideration of what was said to be "*EJ Perry's judgement striking out my case*". It seems this letter was in fact sent to the ET under cover of an email of 14 June 2021, which enclosed HHJ Tayler's order of 21 May 2021.

26. The claimant's application was made on the basis that her diagnosis of autism demonstrated why she had not complied with the unless order. In addition to her application, the claimant provided an autism diagnostic assessment summary report by Charles Parkes Clinical Psychologist and Samantha Draxler Speech and Language Therapist, which explained that the claimant, who had considered she might have autism for some time, had been assessed on 21 and 26 January 2021 and was considered to meet the criteria for a diagnosis of autism spectrum condition. She also provided a document entitled "*Common cognitive difficulties experienced by adults with autism*" of 28 January 2021, and a further report entitled "*How Dr Bi's autism spectrum disorder (ASD) may have affected her ability to respond to the unless order which was issued during Employment Tribunal proceedings*" prepared by Charles Parkes, of MIND professionals, dated 8 February 2021, which (in summary) identified four issues that might have impacted upon the claimant's ability to comply with the unless order: (i) a difficulty in dividing attention between tasks, or an obsessive focus on one thing (such as the completion of her PhD); (ii) according undue importance to errors, with consequent extreme distancing from a situation; (iii) a difficulty in divining precise intentions or wishes from written communications, consequently believing she had met, or would meet, the needs of others without in fact doing so; and (iv) failing to appreciate the bigger picture, focussing on specific details

and thereby failing to anticipate consequences obvious to the neurotypical.

The ET's Decision of 18 August 2021

27. In addressing the claimant's application, EJ Perry treated this as relating to the following: the unless order made on 12 December 2018; the notice of dismissal of 8 January 2019; the refusal to set aside the unless order/notice of dismissal, sent out on 5 November 2019; and the subsequent refusal of the claimant's earlier reconsideration application, of 19 November 2019. By a decision sent to the parties on 18 August 2021, the application was refused.

28. Noting that the expert evidence relied on by the claimant did not comply with the **CPR**, EJ Perry nevertheless took the documents provided at face value, accepting that there was a clear diagnosis of autism provided in reports that had been prepared by experts in the relevant field. EJ Perry further observed that a diagnosis had been reached in the claimant's case by 26 January 2021, and that the claimant had presented evidence to the EAT, pointing to her diagnosis, at a hearing on 5 December 2020. EJ Perry noted that the report stated that the claimant had felt for some time that she may have autism, albeit she provided no detail as to when she first suspected that might be the case or as to the steps she then took to obtain her diagnosis; that, EJ Perry considered, was highly relevant given the impact delay can have on a fair trial and noting that the events giving rise to the claim had occurred some six years before, and the date for compliance with the unless order had expired two and a half years earlier. Notwithstanding the effect of the claimant's diagnosis, in the absence of any detail from the claimant concerning her delay in making the application, and obtaining the evidence on which it was based, EJ Perry did not consider it was in the interests of justice to exercise any discretion to address the reconsideration application out of time.

29. In any event, EJ Perry went on to consider the application on its merits. The claimant had not returned the completed consent form sent to her on 14 June 2018, but said she had not done so because the error in the form caused her to distance herself from the process ("*the distancing issue*"); albeit EJ Perry considered that assertion seemed at odds with the various emails sent by the claimant in relation to these proceedings in October and December 2018. Moreover, contrary to the request made

by the respondent, EJ Perry was unable to see that the claimant had re-sent the email in which she had identified the error in the consent form. There were also other omissions in her explanation, including when the claimant left for Yale, when she returned, and when she actually received the unless order. And, although the claimant said she did not respond to the respondent's letters because of what she described as the "*gating issue*", whereby her focus was solely on completing her PhD, this was inconsistent with her ability to engage in correspondence in early October 2018, and with her email of 4 December 2018, in which she had provided a detailed rationale why the unless order should not be issued.

30. EJ Perry took the view that these inconsistencies required the claimant to provide an explanation that was absent from her application. The claimant had not complied with the unless order and had not given any indication that she intended to do so, and the expert evidence did not explain why she had not remedied the non-compliance. The claimant suggested her medical records were no longer required because she had withdrawn her psychiatric injury claim but, as at 4 December 2018, she was indicating that this complaint was still pursued. Although prepared to accept that the medical evidence supported the claimant's assertion that the reason why she could not comply with the unless order was connected with her disability, EJ Perry considered that the questions surrounding the gating and distancing issues led to them being outweighed by the necessity of consent for a fair disposal of the claim and the continued non-compliance (or prospect of compliance) by the claimant. In the circumstances, it was concluded that the interests of justice required that the application for relief from sanctions be refused, and, therefore, that the application for reconsideration be dismissed.

Appeal EA-2021-000941-OO

31. The claimant appealed against the decision of 18 August 2021 (EA-2021-000941-OO); that appeal was duly combined for consideration with the appeal in EA-2019-001149-OO.

32. HHJ Tayler directed that the two appeals should be considered at a preliminary hearing, which was listed before Eady P on 18 May 2022. At that hearing, the claimant was represented by Mr Croxford KC, acting under ELAAS, and was granted permission to amend her grounds of appeal in

accordance with those drafted by Mr Croxford.

The Legal Framework

33. Before turning to the grounds of appeal and the parties' submissions, we have reminded ourselves of the relevant legal principles and guidance.

General

34. ET proceedings are regulated by the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013**, which set out the relevant rules of procedure at schedule 1 ("ET Rules 2013").

35. In exercising or interpreting any power afforded by the **ET Rules 2013**, the ET is required to seek to give effect to the overriding objective, as provided by rule 2, as follows:

> "Overriding objective
> 2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable— (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense.
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

36. In seeking to deal with cases fairly and justly, regard should be given to particular vulnerabilities that might otherwise impact on a party's (or witness') ability to fully participate in ET proceedings. Such a vulnerability might arise from a disability that requires adjustments to be made to the procedures that would otherwise apply. As is recognised in the **Presidential Guidance: Vulnerable Parties and Witnesses in Employment Tribunal Proceedings** ("Presidential Guidance"), published pursuant to rule 7 **ET Rules 2013**, although part 3 of schedule 3 to the **Equality Act 2010** exempts judicial functions from the duties and obligations of that Act, a duty to make adjustments to the judicial process may derive from other sources, namely: the overriding objective; the right to a fair hearing in public within a reasonable time (article 6 of the **European**

Convention on Human Rights, read in conjunction with the non-discrimination principles at article 14); the common law concepts of justice, fairness and fair hearing; and the duty to ensure effective access to justice for disabled persons on an equal basis with others (article 13 **UN Convention on the Rights of Persons with Disabilities**). See also, the discussion in **Rackham v NHS Professionals Ltd** UKEAT/0110/15 at paragraphs 32-36.

37. The **Presidential Guidance** provides examples of potentially relevant considerations in this regard (see paragraph 14) and emphasises that active case management on the part of the ET will be an important feature in enabling proper participation of a vulnerable person in the case management process (paragraph 19), which may include allowing additional time for compliance (see paragraph 21). Whether a particular case management step is an appropriate or possible adjustment in any particular case is, however, a matter of judicial discretion, in the light of all the relevant circumstances (paragraph 23). Different disabilities – and the different individual impact of disabilities – may give rise to varying considerations: in some cases, it might be appropriate to take decision on paper without an in-person hearing, in others it might be helpful to allow more time for participating in a hearing (see footnote 7 of the **Presidential Guidance**); there is no one-size-fits-all answer to these issues.

38. As the **Presidential Guidance** advises, a refusal to make a particular adjustment for a vulnerable person to ensure their active participation in proceedings should be a reasoned one but, as it cautions, the obligations that might arise are not without limits: the right to a fair hearing applies to both parties (see paragraph 34). As was observed by Underhill LJ in **J v K** [2019] EWCA Civ 5 (albeit in the context of an application for an extension of time in the Employment Appeal Tribunal):

> "39(3) … although applicants suffering from mental ill-health must be given all reasonable accommodations, they are not the only party whose interests have to be considered."

39. Having considered the general obligations upon the ET, we then turn to the specific rules in issue in the present appeals, in relation to (1) the unless order (appeal EA-2019-001149-OO), and (2) the reconsideration decision (appeal EA-2021-000941-OO).

The Unless Order

40. The power to make an unless order is provided by rule 38 of the **ET Rules 2013**, (relevantly) as follows:

> "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.
> …"

41. In **Wentworth-Wood and ors v Maritime Transport Ltd** UKEAT/0316/15, His Honour Judge David Richardson noted that rule 38 thus provides 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. …"

42. Under earlier rules governing ET proceedings (schedule 1 of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004**; "ET Rules 2004"), there was no separate provision for the making of unless orders, albeit that such orders were recognised to be "*an important part of the tribunal's procedural armoury*" (see per Underhill P (as he then was) in **Thind v Salvesen Logistics Ltd** UKEAT/0487/09). Where a party wished to apply for an unless order to be set aside (including where that application sought relief from sanction (to use the terminology of the **CPR**)), that had to be by way of application for review under rules 34-36 of the **ET Rules 2004** (see

Governing Body of St Albans Girls' School and anor v Neary [2009] EWCA Civ 1190). It was in that context that the EAT in **Opara v Partnerships in Care Ltd** UKEAT/0368/09 considered the question whether the ET ought to have convened a hearing in order to determine the application for relief against sanctions in that case, on the basis that:

> "40. … the meaning and intention of the [2004] Rules is that a review pursuant to rule 36(1) – in contrast to the Employment Judge's initial consideration under rule 35(3) - will be undertaken at a hearing convened in accordance with rule 14, notice being given in accordance with rule 14(4). Of course, the scope of the hearing will depend on the subject matter of the review... But where there is a fully contested application for a review under rule 36, the Tribunal should not dispense with a hearing."

Albeit, the EAT in **Opara** also went on to hold:

> "43. Quite apart from the position under the Rules, it is in our judgment plain that the Tribunal ought to have convened a hearing in a case such as this in order to do justice between the parties. The Tribunal was being invited to make – as it eventually made – a finding tantamount to or at the very least akin to dishonesty on the part of Mr Opara. Even if Mr Opara had not been a professional man the finding would have been of the utmost seriousness. No Tribunal should make a finding of this kind without affording to the person against whom it is to be made a full and proper opportunity to be heard upon it."

43. Where the ET is concerned with a number of different claims, it has been emphasised that particular care must be taken to ensure that an unless order is proportionate (see **Johnson v Oldham MBC** UKEAT/0095/13); it would be wrong for the potentially draconian consequence of an unless order to apply to the entirety of the proceedings when that would not be justified in respect of particular claims or allegations made within those proceedings; 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…."

44. And, as His Honour Judge Auerbach cautioned in **Ijomah v Nottinghamshire Healthcare NHS Foundation Trust** UKEAT/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."

See also, **Mohammed v Guy's and St Thomas' NHS Foundation Trust** [2023] EAT 16.

45. A party notified by the ET of the dismissal of a claim or response for breach of an unless order under rule 38(1) **ET Rules 2013** may apply under rule 38(2) to have the order set aside on the grounds that it is in the interests of justice. The application must be made within 14 days of the date of the notice and, unless the applicant applies for a hearing, the ET may decide the application on the basis of written representations (see rule 38(2)).

46. As HHJ Tayler observed at paragraph 58 of **Polyclear Ltd v Wezowicz** [2022] ICR 175 EAT, the application under rule 38(2) relates to the original unless order, not to the notice of dismissal, albeit allowing an application under rule 38(2) would result in the unless order being set aside and thus render the subsequent notice of dismissal a nullity.

47. The touchstone for granting relief from sanctions, so as to reinstate a claim that has been dismissed for breach of an unless order, is whether granting the relief sought would be "*in the interests of justice*" (rule 38(2)); as Underhill P observed at paragraph 14 **Thind**:

> "… 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. … 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."

48. Although **Thind** was decided under the **ET Rules 2004**, the guidance provided is of equal

application under the **ET Rules 2013**; see **Polyclear**, at paragraph 42. In **Polyclear**, it was considered relevant that there had been some attempt at compliance with the unless order: in that case, that had been "*a vital element in analysing whether to grant relief from sanction*" (see paragraph 51).

Reconsideration

49. By rule 70 **EAT Rules 2013**, it is provided that an ET:

> "… 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."

50. An application for reconsideration made subsequent to a hearing, is to be made within 14 days of the date the original decision was sent out to the parties (rule 71). The process that the ET is required to adopt is then set out at rule 72, (relevantly) as follows:

> "(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.
> …"

The approach of the EAT

51. The exercise of a case management discretion by the ET will only be susceptible to challenge 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 (**Noorani v Merseyside TEC Ltd** [1999] IRLR 184 CA). To the extent that rule 38(2) **ET Rules**

2013 permits an ET to determine an application under that provision on the basis of written representations (without a hearing), that will generally be very much a matter of case management discretion. In the present case, however, it is said that the procedure adopted by the ET infringed the claimant's right to a fair hearing; where such an objection is raised on appeal, the appellate tribunal:

> "… must determine for itself whether a fair procedure was followed … Its function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required." per Lord Reed JSC at paragraph 65, **R (Osborn) v Parole Board** [2014] AC 111 HL (and see paragraphs 30 and 45 **Shui v Manchester University** [2018] ICR 77 EAT).

The Grounds of Appeal and Submissions in Support

52. By her first ground of appeal, the claimant contends that the ET erred in not holding hearings on 5 November 2019 and/or 18th August 2021 in person (or by CVP), but instead considering the matter on the papers. Specifically, the claimant complains that: (a) on each occasion, the ET was on notice as to the claimant's status as a vulnerable party, within the meaning of the **Presidential Guidance** (albeit the obligation on the ET to take account of the claimant's potential vulnerabilities pre-dated the **Presidential Guidance**); (b) in circumstances where the ET expressed itself to be uncertain as to the underpinning factual issues, it was incumbent upon it to hold an in-person hearing to satisfy its obligations pursuant to the **Presidential Guidance**, and/or where it then proceeded to make a finding against the claimant of contumelious default (see, by analogy, **Opara** (supra)); (c) alternatively, the decisions to hold no hearing were outwith the ambit of the discretion open to the ET under rule 72 **ET Rules**.

53. Secondly, the claimant argues that the ET's decisions were perverse, alternatively took into account irrelevant matters, or took no account of relevant matters. This was a case where the claimant had succeeded in her claims of protected disclosure detriment and unlawful victimisation; there was a public interest in ensuring that the ET afforded her a remedy for these wrongs. More specifically: (i) the ET had prayed in aid of its decisions the delays since the events giving rise to the claim, but the delays between 2015 and 2018 were not the claimant's fault; (ii) it was overly harsh to suggest (as the ET had in its 5 November 2019 decision) that the claimant was responsible for earlier

postponement of the remedy hearing, when the expert report was only served shortly before and the parties both had further questions for the expert; (iii) there was evidence of the claimant having suffered health issues and the ET and the respondent had been made aware that she would be leaving the UK to complete her PhD in Yale in September, returning to the UK in December 2018, so (even without knowing of her autism diagnosis) there were potential explanations for her failure to respond to the respondent's requests regarding the consent form (although the ET was aware that she had responded in June 2018 pointing out errors in the form); (iv) moreover, the ET having already reached its conclusions on liability, further delay could not affect the reliability of evidence but would serve to assist in reaching a more certain conclusion on remedy.

54. By her third ground of appeal, the claimant also argues that the ET erred in its approach to proportionality: (i) the more proportionate approach was to strike out merely her claim for psychiatric harm (and see **Wentworth-Wood**, **Ijomah**, and **Mohammed v Guy's**); (ii) in circumstances where the only proper justification for requiring the claimant to disclose medical records related to the claim for psychiatric harm, the striking out of the entirety of her entitlement to a remedy was necessarily disproportionate (**Ijomah**).

55. Fourthly, the claimant says the ET erred in its application of the test set out in **Polyclear**, by failing to consider: (i) the extent to which the past provision of medical records by the claimant amounted to action short of material compliance; and (ii) the true extent to which the claimant's autism had rendered compliance difficult or impossible.

The Respondent's Response and Cross-Appeal

56. The respondent's submissions address each of the ET decisions under challenge in turn.

57. First considering the judgment of 5 November 2019, the respondent contends:

(1) Fair hearing: (a) the ET correctly treated the claimant's communication of 8 January 2019 as an application under rule 38(2) and, as such, was only required to hold a hearing if requested (there was no request) - this was different to the position in **Opara**, under the earlier (2004) **ET Rules**, which also concerned a finding of dishonesty, which was not the

position here; (b) there was no other reason to consider an attended hearing was required: this pre-dated the **Presidential Guidance** and the claimant only referred to the possibility of an autism diagnosis in September 2020 (in the EAT proceedings) - this was not raised with the ET until 14 June 2021; (c) the judgment expressed no uncertainty about underlying factual issues and it was not incumbent on the ET to convene a hearing speculatively to coax an explanation from the claimant; (d) in any event, the decision of 5 November 2019 was justified for the other reasons provided, which did not require exploration at hearing.

(2) Perversity: the ET had been entitled to find the earlier delays were caused by the claimant but, in any event, delay was not seen as determinative. EJ Perry permissibly concluded that, even if the application was allowed, the claimant would not provide the consent, and this was prejudicial to the respondent such that a fair trial was not possible. The prejudice did not arise from failing memories but from the inequality in arms due to the claimant's refusal to provide her consent so that both the expert and the respondent could see all her medical records. The medical records were relevant to all heads of loss claimed (not just psychiatric injury) and it would not suffice to say the claimant could not rely on the medical evidence as the respondent itself wished to rely on certain aspects of the joint expert report but (appropriately) wanted to ensure that was based on full disclosure. The ET had also recognised that there were potentially issues relating to credit arising from the claimant's partial disclosure.

(3) Proportionality: this was not the relevant question under rule 38(2) (the guidance set out in case such as **Ijomah**, and **Mohammed v Guy's** related to the initial making of the unless order), but, in any event, EJ Perry had permissibly held that compliance with the unless order did not just go to psychiatric injury.

(4) **Polyclear**: the ET had expressly taken into account the fact that the claimant had disclosed some medical records but that did not amount to *material* compliance in this case.

58. As for the decision of 18 August 2021:

(1) Fair hearing: although the ET had a discretion to extend time (rule 5 **ET Rules 2013**), EJ Perry had permissibly concluded he should not do so, which meant that there could be no reasonable prospect of the original decision being varied or revoked and the application was to be dismissed without a hearing (rule 72(1)). Even if time was to be extended, EJ Perry permissibly concluded that there was still no reasonable prospect of the original decision being varied or revoked, so the application would again have to be dismissed without a hearing pursuant to rule 72(1).

(2) Perversity: on the question of the claimant's delay, the evidence suggested she had been aware of her potential diagnosis for some time but had given no explanation why she had not sought to investigate this earlier; the decision not to extend time in these circumstances was not perverse. In any event, EJ Perry took full account of the new evidence but permissibly concluded this did not impact on the decision of 5 November 2019.

(3) Proportionality: this ground failed for the same reasons provided in relation to the 5 November 2019 decision.

(4) **Polyclear**: this ground could not apply to the 18 August 2021 reconsideration decision.

59. In the alternative, and by way of cross-appeal, the respondent contends that, on its face, the claimant's application of 14 June 2021 sought a reconsideration of the notice of dismissal; as such: (1) there was no jurisdiction to determine this by way of reconsideration as it was not a "judgment" as defined by rule 1(3)(b) **ET Rules 2013**, and (2) the ET had wrongly entered the arena by widening the scope of the application to encompass other decisions (including that of 15 November 2019).

The Claimant's Response to the Cross-Appeal

60. Accepting that the ET would not have had jurisdiction to reconsider the notice of dismissal (which was not a judgment), the claimant said that it was clear that her application for reconsideration related to the judgment of 15 November 2019; the cross-appeal objections therefore did not arise.

Discussion and Conclusions

Appeal EA-2019-001149-OO

61. The first appeal before us relates to the ET's judgment of 5 November 2019, by which it was ruled that it was not in the interests of justice to set aside the unless order of 12 December 2018. This was a determination under rule 38(2) **ET Rules 2013** and, as such, the ET was not bound to hold a hearing where, as here, this had not been requested. As the claimant has observed, however, the ET still had a discretion as to how to proceed in determining this matter and would, therefore, have needed (as with any exercise of judicial discretion) to have had regard to all relevant circumstances. Such circumstances could include the particular vulnerabilities of a party, which might (in certain instances) have dictated the necessity of an attended hearing: even prior to the publication of the **Presidential Guidance**, a duty to make adjustments to the normal procedure could arise given the need to deal with the case justly and to afford the parties a fair hearing (see paragraph 36 above).

62. In the present case, the ET was aware that the claimant was acting in person and there was some medical evidence (although not formally adduced in evidence) that she had suffered some form of stress or anxiety (the letter of 28 September 2017 from Dr Ali Al-Kammar Abdulkadir had referred to post-traumatic stress disorder; Dr Chahl's opinion was that she had suffered from an adjustment disorder, with mixed anxiety and depression). It had no evidence, however, to suggest that those matters meant that the claimant had a particular need, on her application under rule 38(2), to make her case in person. It was thus entirely open to EJ Perry to reach the preliminary view that this was a matter that could be determined on the papers. The ET did not, however, simply present this as a *fait accompli* to the parties; by its order of 18 July 2019, the proposed procedure (for the matter to be considered without the parties present) was explained and an opportunity given for any objection to be made in advance. Had the claimant considered that she faced any difficulty in articulating her case in writing, rather than at an oral hearing, she was thus given the opportunity to raise this. She did not. Moreover, from the ET's perspective, although the claimant was self-representing, she was someone who was evidently well able to express herself in writing. In the absence of any difficulty having

been identified by the claimant, the ET was not bound to take it upon itself to make assumptions as to her position (and see the observations made at paragraph 37 above).

63. For completeness, we should add that we do not consider this position changed when the claimant attended the ET on 5 November 2019. As explained in the judgment, a slight confusion had arisen from the sending out of a notice of hearing and, notwithstanding EJ Perry's attempt to clarify the position, the claimant could be forgiven for wanting to make sure she was not absent from an ET hearing. We do not agree (as was suggested by Mr Croxford KC) that EJ Perry should then have invited the claimant into the hearing room to hear from her in person; as the respondent was not present, that would have been inappropriate. In any event, we do not consider that any purpose would have been served by adopting that course. There was no confusion as to the claimant's position that required clarification and, although EJ Perry reached conclusions adverse to the claimant, these were not in the nature of the finding of dishonesty in **Opara** (a decision, in any event, that was reached under the entirely different regime relating to unless orders under the **ET Rules 2004**).

64. Of course, in 2019, the claimant had not been diagnosed as having autism spectrum condition and would not necessarily have been aware of the ways in which this might have impacted upon her (although the evidence suggests that she had previously suspected that she might have autism). Approaching this question objectively, we have therefore considered whether there is anything in the evidence that has subsequently become available that would suggest that the claimant was *in fact* prejudiced by the procedure adopted by the ET (even if neither she nor the ET appreciated that at the time). We are satisfied, however, that she was not. On 4 December 2018, notwithstanding any "*gating*" issues, the claimant had made clear written submissions regarding the unless order, and she was equally clear in setting out her case when applying to set aside that order (see her submissions of 8 and 31 January, 13 March and 21 August 2019), effectively making the same substantive points as have been made on her behalf on this appeal. There is, furthermore, no suggestion in the evidence relating to the claimant's autism spectrum condition diagnosis (or, indeed, in the claimant's own correspondence seeking a reconsideration of the 15 November 2019 judgment, even after she was

aware of her diagnosis) that she had been disadvantaged by the failure to hold an attended hearing.

65. We have then turned to consider the challenges made to the substance of the decision reached by the ET on 15 November 2019. Whether or not the ET was correct to observe that two hearings had been vacated as a result of failings on the part of the claimant, we agree with the respondent that that was not an operative part of the reasoning for refusing her application to set aside the unless order. Equally, whilst the ET referred to the lengthy history of the proceedings, that does not form a material part of the explanation for its decision. As the reasons provided by the ET make clear, the findings that informed its conclusion were three-fold: (1) that the medical records (to which the consent to disclosure related) were not only relevant to a claim for compensation for psychiatric injury but were also "*pertinent generally to the other awards*" and potentially went to the claimant's credit; (2) that the claimant had changed her position on providing consent and, even if the application were granted, would not provide that consent in the future; and (3) that the respondent would be prejudiced by the claimant's failure to provide her consent, such that a fair trial of remedy was not possible.

66. In arguing that the ET failed to adopt a proportionate approach, and/or reached a decision that was perverse, it is the claimant's case that the medical records in issue could only go to the claim for compensation for psychiatric injury and that – notwithstanding the clear language of the unless order – it was wrong to say that a fair trial was no longer possible in respect of her other claims. In this regard, the claimant emphasises that she had succeeded at the liability stage and ought to be compensated for the wrongs done to her. Moreover, while a fair trial of the issues would normally be jeopardised by the passage of time, the opposite could be said to be true in terms of remedy: indeed, the more time that had passed, the greater certainty the ET could have as to the actual losses suffered (or not) by the complainant.

67. Whilst superficially attractive, on a proper analysis of the various heads of loss in issue, we do not consider it can be said that the medical records in issue only went to the claim for compensation for psychiatric injury. This was not a case where (by analogy with the observations made in cases such as **Johnson v Oldham**, **Ijomah** or **Mohammed v Guy's**) the unless order was being used

punitively, to deprive the claimant of claims for compensation that were still capable of being fairly litigated. As the ET observed, the claimant's medical position was also potentially relevant to the question of injury to feelings: even if the claimant did not, herself, seek to rely on any medical evidence in this regard, the respondent might wish to argue that there were other matters that explained the injury to feelings claimed. Furthermore, as Mr Leach emphasised in his submissions, the joint expert had been asked to opine on the claimant's future employability and the respondent was entitled to seek to rely on the conclusion provided in Dr Chahl's report (which it considered helpful to its position) in addressing the claim for pecuniary losses. Although it is unclear to us whether the ET had seen a copy of Dr Chahl's report, it is apparent EJ Perry had a copy of the questions that had been asked and would have been aware of these wider aspects of the joint expert's evidence.

68. Having proper regard to the issues to be determined at the remedy hearing, therefore, the potential unfairness of proceeding without full disclosure of the medical records can be seen. As the ET had identified as early as the hearing on 14 June 2018, the respondent was entitled to require that the full records were provided to the joint expert, so that the reliability of that report could be assured, and, given the nature of the claims made, was further entitled to seek to consider those records for itself. Even if the ET had ruled that the claimant would not be able to rely on any medical evidence at the remedy stage, that would (i) contrary to the claimant's contentions, have impacted on the claims for injury to feelings and pecuniary losses, as well as the claim made in respect of psychiatric injury; and (ii) have unfairly denied the respondent the opportunity to rely on evidence that it saw as potentially supportive of its case.

69. Even if the ET had been mistaken in its finding as to the potential relevance of the medical evidence in respect of the other heads of loss, it had also permissibly concluded that an issue had been raised that went to the question of the claimant's credit. Although the claimant had sent some of her medical records to the joint expert, the respondent's objection was that this had been partial and it was concerned that the claimant had been selective in what she had been prepared to disclose. That

raised a question as to why the disclosure had been incomplete, and the ET considered this was a point that the respondent was entitled to investigate at the hearing. Even if the claimant withdrew her claim for psychiatric injury, this would not avoid the question that had thus been raised by her conduct. Again, we do not consider that it can be said that the ET was not entitled to reach this conclusion. And, having so found, it was equally entitled to hold that the respondent would be prejudiced if it was unable to explore this issue after full disclosure of the records in issue.

70. The claimant objects that the ET's findings as to the prejudice that would thus be suffered by the respondent (and, therefore, the threat to a fair trial of remedy) were predicated on an erroneous assumption that she would not provide her consent to the disclosure of her medical records. On the claimant's behalf, Mr Croxford has said that, even now, she would be prepared to provide her consent; the fact that she had still not returned the signed authorisation was understandable given that her claim had been dismissed by the ET.

71. Accepting (as we do) that Mr Croxford is reporting his client's current instructions, we do not consider it can be said that the ET was not entitled to reach the conclusion that the claimant had in fact changed her position on providing the required consent. The ET did not thereby fail to have regard to the steps the claimant *had* taken (per **Polyclear**): EJ Perry expressly related the claimant's account of how she had raised the errors in the consent form with the respondent and also referred to the disclosure of records that the claimant had made. Equally, the other difficulties facing the claimant were carefully set out within the judgment: the fact that she had been studying in the US in the latter part of 2018, completing her PhD studies at Yale, and that she was having to deal with this as a litigant in person. The fact was, however, that the claimant had had the corrected consent form from 8 October 2018 and had never returned it. Even if the view was taken that the claimant might not have been able to return the consent form whilst she was in Yale (and we are mindful of the subsequent evidence relating to her autism diagnosis that might be seen to support that view), the claimant's correspondence with the ET suggested that she had returned to the UK on or about 5 December 2018 and there was no explanation for why she could not have returned the signed consent

form at that stage; still less for why she could not have done so during the period allowed under the unless order (12–19 December 2018). Yet further, in her various representations to the ET (whether resisting the unless order, or in support of her application to set aside that order), the claimant had at no stage stated that she would now be returning the signed consent; on the contrary, in her representations in support of her rule 38(2) application, the suggestion made by the claimant was that she considered that her medical records could only go to her claim for psychiatric injury and that the remedy hearing could thus still proceed in respect of the remaining claims, which would (as she argued) not require her to provide her consent to the disclosure of those records.

72. We do not lose sight of the very strong public interest in ensuring that complainants who have been held to have suffered protected disclosure detriments and unlawful victimisation are adequately compensated. Where a claimant determines, however, not to disclose evidence that is relevant to the just determination of the claims for compensation that have been made, that may well mean that a fair trial of remedy becomes impossible. Ultimately, that is what the ET permissibly concluded had happened in this case. For all the reasons given, we do not consider the ET's decision was reached on the basis of a denial of the claimant's right to a fair hearing, or that it can be said to be perverse, disproportionate, or to otherwise fail to take into account relevant considerations or to be based on that which was irrelevant. The ET properly asked itself whether it would be in the interests of justice to set aside the unless order in this case, taking into account the various considerations identified in **Thind** (*supra*); it did not err in having regard to the potential prejudice suffered by the respondent or in concluding that a fair trial of remedy in this case was not possible. We duly dismiss the first appeal.

Appeal EA-2021-000941-OO

73. The second appeal before us relates to the ET's reconsideration decision of 18 August 2021. No doubt seeking to exercise an abundance of caution, EJ Perry treated this as potentially relating to a number of decisions (the unless order of 12 December 2018; the 8 January 2019 notice of dismissal; the judgment of 5 November 2019; and the subsequent reconsideration decision of 19 November 2019) but we consider that it was in fact plain that the claimant was seeking to apply for a

reconsideration of the 5 November 2019 judgment. Although the content of the claimant's letter of 7 June 2021 may not have made this clear, the covering email (of 14 June 2021) also enclosed HHJ Tayler's order of 21 May 2021, which did. We therefore do not need to further address the respondent's cross-appeal: the ET did not err in treating this as an application to reconsider the judgment of 5 November 2019.

74. The claimant contends, however, that the ET nevertheless erred in failing to permit her to put her case at a hearing. The straightforward response to this is that it thereby acted in accordance with the procedure laid down by rule 72(1) **ET Rules 2013**: having concluded that there was no reasonable prospect of the judgment of 15 November 2019 being varied or revoked (*either* because the application for reconsideration had been made out of time and EJ Perry did not consider time should be extended, *or* because the new evidence relied on would not have impacted upon that earlier decision), the ET was bound to refuse the application at that stage. Accepting that there may be circumstances in which an ET ought to make an adjustment to this procedure (where that would be required in order to give effect to the overriding objective and/or to ensure effective access to justice for a disabled person – see the **Presidential Guidance** in this regard, paragraph 36 above), we are unable to see that there is any basis for considering that such a duty arose in this case: as we have already observed, there is nothing in the evidence relating to the claimant's autism diagnosis that suggests that she was in any way disadvantaged by being required to make her case by way of written, rather than oral, representations.

75. The claimant argues that, in any event, the ET was wrong to hold that delay constituted a basis for finding that there was no reasonable prospect of the earlier decision being varied or revoked in this case: it was unjust to hold the timing of the claimant's autism diagnosis against her and delay was, in any event, irrelevant to the question whether there could be a fair trial of remedy. We have some sympathy for the claimant's criticisms of this aspect of the ET's reasoning, given the particular sensitivities that may arise for many who have to contemplate the possibility of a diagnosis of autism in adult life. We can also see that the usual difficulties arising from delay (for example, arising from

the fading memories of witnesses) would not necessarily arise when considering questions of remedy. As the respondent has emphasised, however, this was merely one aspect of the ET's reasoning: EJ Perry then went on to consider the potential merits of the application in the alternative.

76. Turning then to the decision reached on this alternative basis, we find that the claimant has failed to meet the high threshold required to make good her perversity challenge and has established no other valid objection in this regard. Accepting the evidence relating to the claimant's autism diagnosis at face value, EJ Perry did not consider that demonstrated that it was in the interests of justice for the decision of 5 November 2019 to be varied or revoked. The "*distancing*" issue that had been identified, was inconsistent with the claimant's engagement with the process in her correspondence in October and December 2018, and the "*gating*" issue, did not explain her continued failure to comply with the requirement to return the signed consent form after her return to the UK on or about 5 December 2018 when she had been able to provide a detailed rationale as to why the respondent's application for an unless order should be refused. Moreover, and in any event, the issues raised did not outweigh the necessity of full disclosure of the claimant's medical records for the fair disposal of the claim. That, we consider, was a conclusion the ET was entitled to reach: even where issues of disability arise that might have an impact upon a party's ability to comply with ET orders, the interests of justice cannot to be viewed from just one perspective; the accommodation required has to be that which is reasonable, the considerations of justice are not all one way (and see **J v K**, *supra*).

77. Considering, once again, all potentially relevant issues going to the interests of justice in this respect (and adopting an approach entirely consistent with **Thind**), the ET saw no reasonable basis for varying or revoking the conclusions it had reached on 15 November 2019. For the reasons we have already provided in respect of appeal EA-2019-001149-OO, we consider it was entitled to take that view. There was nothing in the new material relied on by the claimant that went to the decision EJ Perry had reached as to the relevance of the medical evidence in issue (and, therefore, as to the necessity of her consent to full disclosure in this regard) or to his finding that she had changed her

position in relation to the giving of her consent. In the circumstances, the ET was entitled to conclude that there were no reasonable prospects of that earlier decision being varied or revoked and the second appeal must also be dismissed.

Disposal

78. For all the reasons we have given, the claimant's appeals and the respondent's cross-appeal are duly dismissed.

Postscript

79. Adopting the customary practice in EAT appeals where both parties are legally represented, the draft judgment in this matter was circulated to counsel before hand-down, to allow for the opportunity for any obvious errors or typographical mistakes to be identified before the Judgment was finalised. As well as receiving corrections from both counsel, the President's clerk was, however, also sent a lengthy letter from the claimant, along with a number of documents. The claimant further asked for an additional hearing at which she might make submissions directly to the President. This is not a proper use of the procedure adopted in these circumstances. As the direction given (on the top of the first page of the draft judgment) makes clear, it is for representatives to submit any typing corrections or other obvious errors; it is an abuse of this process for parties to seek to directly communicate with the Judge. Although the regard has been given to the points identified by Mr Croxford KC, accordingly no account has been taken of the direct communication from the claimant.