Neutral Citation Number: [2024] EAT 24

Case No: EA-2021-000351-DXA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 February 2024

Before :

THE HONOURABLE MR JUSTICE LINDEN
MRS RACHAEL WHEELDON
MRS ELIZABETH WILLIAMS

- -

Between :

DR M TATTERSALL **Appellant**

- and –

MERSEY AND WEST LANCASHIRE TEACHING HOSPITALS NHS TRUST (FORMERLY SOUTHPORT & ORMSKIRK HOSPITAL NHS TRUST)

Respondent

- -
- -

The **Appellant** did not attend
Simon Gorton KC (instructed by Weightmans LLP) for the **Respondent**

Hearing date: 22 February 2024

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The Employment Tribunal ("the ET") made an unless order against the Appellant on 2 November 2020. On 15 January 2021 notice confirming that it had not been complied with, and that the Claim had been struck out pursuant to the unless order, was issued by the ET pursuant to Rule 38(1) of Schedule 1 to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. On 5 April 2022, the Appellant's application under Rule 38(2) for the order to be set aside was refused.

The appeal was against the decision to issue the notice of confirmation pursuant to Rule 38(1). The central issues were whether the ET should have considered whether there was material compliance with the unless order on the basis that any failure to comply had not impacted on the ability of the ET to hold a fair trial of the Claim; and whether the Appellant ought to have been given an opportunity to make representations.

Held: appeal dismissed. When deciding whether to issue a notice of confirmation pursuant to Rule 38(1) the issue for the ET is limited to whether the unless order has been *"complied with"*. A party may argue that they have complied in substance, but Rule 38(1) does not provide scope to argue that they have not complied but that this is not material. In the present case there had been total non-compliance with the unless order and there was no basis on which the ET could have done anything other than issue the notice. The Appellant had made written representations which were taken into account and he had been treated fairly.

THE HONOURABLE MR JUSTICE LINDEN:

Introduction

1. At a hearing on 2 November 2020, Employment Judge Robinson, sitting at Liverpool Employment Tribunal ("the ET"), made an Unless Order against the Appellant which we will refer to as "the Unless Order". This required the Appellant to produce his GP records up to and including 25 May 2018 to the Respondent's solicitors by 4pm on 11 December 2020. It stated in terms that it was an unless order and that if the Appellant did not comply with it by the time and date specified, all of his claims would be dismissed without further order, direction or judgment.

2. On 15 December 2020, the Respondent's solicitors emailed the ET, copying the Appellant, stating that he had not complied with the Unless Order and asking for the ET to issue a concluding judgment and confirm that a hearing which was listed for 29 January 2021 was vacated. By a letter of the same date the Appellant objected on grounds which included that he had not received the Unless Order and did not know what it said but that he had disclosed all medical records in his possession which it was reasonable for him to obtain without the assistance of the ET in making orders.

3. On 15 January 2021, the ET wrote to the parties as follows: "Further to the Unless Order sent to the parties on 25 November 2020 which was not complied with by 11 December 2020, the claim has been dismissed under Rule 38…The hearing listed for 29 January 2021 has been cancelled". This letter was written on the instruction of Regional Employment Judge Franey. We will refer to it as "the confirmation notice" given that its purpose and effect was to confirm that the Claim had been dismissed by operation of the Unless Order.

4. On 24 January 2021, the Appellant applied to the ET for the confirmation notice to be set aside, and lodged an appeal against it at the Employment Appeal Tribunal. A hearing of the Appellant's application to set aside took place before EJ Robinson on 28 February 2022. In a judgment which was sent to the parties on 5 April 2022, that application was dismissed.

5. On 3 February 2021 the Appellant also appealed against the Unless Order but his appeal was 28 days out of time and, on 18 May 2022, his application for an extension of time was rejected by the Registrar. The Appellants not appeal against the EJ Robinson's refusal, on 5 April 2022, to set aside the confirmation notice.

6. This, then, is the Appellant's appeal against the confirmation notice.

7. At a Preliminary Hearing on 25 May 2023, held pursuant to Rule 3(10) of the Employment Appeal Tribunal Rules 1993, His Honour Judge Tayler gave permission to appeal on some of the Appellant's pleaded Grounds of Appeal but not others. The Grounds in respect of which permission was given were, in summary, that REJ Franey should have given the Appellant a further opportunity to make representations before issuing the confirmation notice (Ground 1), that the REJ should have considered whether there had been material non-compliance with the Unless Order as opposed to non-compliance with it, which is said to be *"an important distinction"* (Ground 2); that the REJ should have had regard to a witness statement of the Appellant and a skeleton argument provided to the ET in March 2020 (Ground 4); that the REJ should have considered whether to set aside the Unless Order (Ground 5); and that the he failed to have regard to the Appellant's right to reasonable adjustments, such adjustments having been ordered by a previous Employment Judge, EJ Horne (Ground 7).

8. In his Order dated 25 May 2023, HHJ Tayler directed that the hearing of this appeal would be in person and that any concerns about such a format should be raised within 14 days of his Order. He also made standard directions as to the preparation of the bundle, skeleton arguments and authorities.

The appeal hearing

9. In the run up to this hearing the Appellant maintained radio silence. Although he has used email in the course of the litigation before the ET, on 18 May 2022 the Registrar agreed, by way of reasonable adjustment – he has a diagnosis of Autistic Spectrum Condition ("ASC"), level 1 - that the only method of correspondence between him and the Appeal Tribunal would be by post. His wishes in this regard have been complied with.

10. The Appellant was sent a Notice of Hearing under cover of a letter dated 7 September 2023. The covering letter warned him that if he did not attend at the appointed time for the hearing it may proceed in his absence and drew attention to the requirements of the EAT Practice Direction (2018) in relation to the filing of bundles, skeleton arguments and authorities. The Notice of Hearing also included a form which the parties were asked to fill out to say whether or not they were attending and/or would be represented at the hearing.

11. There was then a letter from the Appeal Tribunal to the parties, dated 8 November 2023, which drew attention to the requirements in relation to bundles, skeleton arguments and authorities and identified the dates by which they had been ordered to be produced.

12. In the light of this, on 13 November 2023 the Respondent wrote to the Appellant by first class post, asking for his proposals in relation to the bundle for the hearing.

13. And, on 31 January 2024, the Appeal Tribunal sent the Appellant a further reminder of the steps which were required to be taken. The letter stated that there had been a failure to comply with the direction to produce the bundle by 25 January 2024. The deadlines for skeleton arguments and authorities which were to come were reiterated, and he was warned that if the hearing had to be adjourned as a result of failure to comply with the Order of HHJ Tayler dated 25 May 2023 there was a risk that he would have to pay the Respondent's costs.

14. Very sensibly and helpfully, the Respondent decided to prepare the bundles for the hearing rather than risk it being ineffective. These bundles comprised a core bundle of key materials and a bundle of relevant background material, which we read carefully in preparation for the hearing.

15. On 2 February 2024, the Respondent's solicitors wrote to the Appellant reminding him of the date of the hearing and providing him with the bundles. In case the bundles were too large to get through his letter box, the letter also gave him contact details so that he could arrange to pick them up.

16. On 8 February 2024, the Appellant was sent the Respondent's skeleton argument and chronology and, on 14 February 2024, he was sent the bundle of authorities.

17. The Appellant did not respond to any of the communications from the Appeal Tribunal or the Respondent. Nor did he take any steps to comply with the Order of HHJ Tayler and nor did he indicate whether or not he would attend the hearing.

18. The Appeal Tribunal nevertheless took steps to ensure that adjustments which had been in place before the ET could be put in place in the event that the Appellant attended, provided we were satisfied that it was reasonable to do so. These included:

    a. Arranging for him to be given a separate waiting room;

    b. Making arrangements to ensure that he did not have to see the Respondent's representatives if he did not wish to. These included placing a screen between him and Mr Gorton KC and arranging for him to be able to come into court before them;

c. Regular breaks.

19. The Appeal Tribunal also reminded itself of the relevant parts of the Equal Treatment Benchbook and discussed in advance the approach which it would take to the hearing, bearing in mind the Appellant's ASC. Our intention was to discuss with him, at the outset of the hearing, any further adjustments to the hearing which he wished to be made.

20. In the event, the Appellant did not attend. We waited for half an hour in case he was delayed. Nothing was heard from him.

21. We concluded, having regard to the history of his dealings with the ET and the Appeal Tribunal, that the Appellant had chosen not to attend. We therefore decided to proceed with the appeal.

22. Mr Gorton's initial position was that we should put the Appellant on notice that he was liable to be struck out for failure to comply with the Appeal Tribunal's directions as to preparation of a bundle etc, and particularly a skeleton argument, pursuant to Rule 26 of the Employment Appeal Tribunal Rules 1993. However, we decided that it would be more consistent with the overriding objective to hear argument on the appeal and then to come to a decision as to the way forward. The materials which we had read, which included the Grounds of Appeal and a written explanation from HHJ Tayler of the reasons why permission was granted, meant that we had a good understanding of the Appellant's arguments. He had in, our view, been given a fair opportunity to develop them orally if he wished to do so. Mr Gorton therefore addressed the Appeal Tribunal briefly on the merits of the appeal.

23. Having considered the matter further, we decided to dismiss the appeal for the reasons sent out below. We will adjourn the Respondent's application to strike out pursuant to Rule 26, which can be pursued in the event that this matter goes further.

Background

24. This case has a very lengthy and unhappy procedural history. However, the issues in the appeal do not require us to recite a good deal of it.

25. Proceedings were issued by the Appellant as long ago as 1 May 2018. His claim relates to a period from 25 January 2017 until 9 January 2018. The Appellant had been working for the

Respondent on a series of locum contracts entered into through an agency. On 25 January 2017 he was given a conditional offer of direct employment as a Speciality Doctor in Obstetrics and Gynaecology, subject to the provision of satisfactory references and other clearances and checks. However, on 9 January 2018 that offer was withdrawn. His case is that the Respondent failed to obtain the necessary references and clearances and withdrew the offer because he had made a number of protected disclosures i.e. he was a whistleblower for the purposes of the Employment Rights Act 1996, and because it had discovered that he has a disability for the purposes of the Equality Act 2010.

26. The issue which gave rise to the Unless Order first surfaced in the ET at a case management hearing before Employment Judge Buzzard on 2 August 2018, when it was agreed that the Appellant would request that his GP disclose his medical records from 1 January 2016 onwards and that these would be provided directly to the Respondent. The resulting Case Management Order directed the Appellant to have authorised and procured the disclosure of the records to the Respondent by 14 September 2018. These and any medical reports relied on by the Appellant were ordered to be disclosed on the basis that they were relevant to the question whether he had a disability at the material times for the purposes of his claims under the Equality Act 2010.

27. Although the Appellant filed and served 2 psychiatric reports on 12 September 2018, his GP records were not provided to the Respondent. On 20 November 2018, Regional Employment Judge Parkin made the following order:

> *"Unless the claimant discloses his medical records to the respondent by 27th November 2018, and writes to the Employment Tribunal confirming he has done so, or he explains by that date in writing to the satisfaction of an Employment Judge that such disclosure is not reasonably practicable, his claim of disability discrimination shall be dismissed for breach of Case Management orders and a failure to pursue the claims actively."*

28. The Appellant's position at that stage was that he had written to his former GP on 4 August 2018 to request disclosure of the records, and he produced a copy of the letter which he said he had sent. The Respondent's position was that he was not telling the truth about this and other matters. In a letter dated 25 November 2018, the Appellant said this:

> *"With respect to the 'Unless Order', the Respondent failed to serve a copy of its*

> *application to the Tribunal upon me. With regard to point 1, I am happy to obtain my medical records from my former GP, but will not be able to do so by 27th November 2018, as it is only 2 days away. Should the Tribunal now wish me to obtain such records (rather than them be sent to the Respondent for onward provision to the Tribunal and myself), I would request that the Tribunal allow me 6-8 weeks to do this as I think this is a reasonable time to allow for a GP to provide medical records and for them to be served upon the parties. I believe it is not reasonably practicable for me to provide the relevant medical records with two days' notice!"*

29. No GP records were produced and, on 29 November 2018, the Respondent applied to strike out the disability discrimination claim on the grounds of unreasonable and/or vexations conduct on the part of the Appellant. One aspect of this conduct was said to be his failure to comply with the orders of the ET in relation to disclosure of his GP records.

30. A further case management hearing was held before Employment Judge Ryan on 3 December 2018, at which the application to strike out was postponed and certain directions were made. Although the Appellant subsequently disputed that he had agreed to this, the Case Management Order records that by agreement it was ordered that:

> *"By no later than 4.00pm on Friday 4 January 2019 the claimant shall obtain from his GP his GP records up to and including 25 May 2018, and he shall provide them to the respondent's solicitors….If the claimant's GP records are not received by the respondent's solicitors by 4.00pm on Friday 4 January 2019 an Employment Judge may strike out the claimant's claim of disability discrimination for breach of Case Management Order and/or a failure actively to pursue his claim…."*

31. EJ Ryan also expressed considerable concern about the lack of progress in the proceedings and about the Appellant's claim that letters from the ET and the Respondent were not arriving at his address, or were arriving late. There was discussion at the hearing of why correspondence could not take place by email. The Appellant said that although he used email to send messages in relation to the litigation, he had been advised that it would be harmful to his health to receive them, hence his use of a "no reply" email address. The EJ directed that, by 21 December 2018, he provide medical evidence to substantiate his case that he could send but not receive emails in relation to the litigation or, alternatively, confirm that he was willing to conduct correspondence by email.

32. On 3 January 2019, the Appellant wrote as follows:

> *"Unfortunately, despite two letters to my former GP surgery, they have failed to provide copies of my GP notes. I enclose copies of these letters, dated 4th and 19th December 2019, together with a proof of postage for the latter letter."*

33. However, he now enclosed his medical records up to the end of 2015 which he said he had previously obtained in 2016 and had offered to provide at the hearing in August 2018. He said that he hoped that the Respondent would now accept that he had a disability, and that he believed that it would not be appropriate to strike out his disability discrimination claim given that he had made attempts to obtain the records and could not be held responsible for his GP's failure to provide them.

34. No medical evidence to explain why the Appellant could not receive emails about the litigation having been provided, on 1 February 2019 EJ Ryan directed that the Appellant correspond with the Respondent by email until further order.

35. On 4 March 2019, EJ Ryan directed that the Appellant's GP records be disclosed by the Appellant by 18 March 2019, failing which the matter would be listed for a preliminary hearing to consider a further application to strike out which had been made by the Respondent on 20 February 2019. This application was to strike out the Claim in its entirely or alternatively the disability discrimination claim.

36. No further GP records were disclosed by the Appellant, and a preliminary hearing was listed for 26 March 2019 to consider the Respondent's application to strike out. However, this hearing was postponed and postponed again. It did not take place before the end of 2019 or, indeed, until 2 November 2020.

37. In the meantime, on 16 August 2019 the Appellant wrote to the ET requesting that adjustments be made to any further hearing. He relied on a 3 page report dated 13 May 2019 from a Veronica Bliss who worked as a consultant clinical psychologist for Lancashire Autism Service Limited 2022. She informed the Appellant that he met the criteria in the DSM-5 for a diagnosis of ASC level 1. The report did not contain much detail about the Appellant's symptoms but, according to Dr Bliss his condition was akin to Asperger's Syndrome. The Appellant had the mildest level of ASC. His ability to cope in some social situations was such that others would not know that there was any difference in his ability to process information,

but a person who spent more than a little time with him would see that there were significant areas in which he struggled to cope with social situations and to manage his emotions.

38. On 18 December 2019, a letter was sent to the parties which said that EJ Horne had directed that there be a hearing of the Respondent's application to strike out on 18 March 2020, and that he proposed to direct that the following special arrangements would be made for that hearing:

> *"(1) The Claimant will be provided with a private waiting room...*
>
> *(2) The tribunal room will be configured in such a way that the claimant will not be able to see the respondent's representatives unless he chooses to do so. This will be done by the sue of a curtain screen or by rearranging the desks in the room. It will be for the claimant to choose between these two methods.*
>
> *(3) The claimant, if he wishes, will be escorted into the hearing room before the respondent's representatives enter the room.*
>
> *(4) When the employment judge leaves the room, the claimant will have the choice of leaving the room first or waiting for the respondent's representative to leave the room.*
>
> *(5) The claimant may bring a companion of his choice to the hearing (which he is entitled to do in any event)... .*
>
> *(6) The claimant may also bring a representative of his choice to the hearing. (A representative is different from a companion, in that, where a party has a representative, the tribunal will normally expect the representative to speak on behalf of the party whom he or she represents.)….*
>
> *(7) The employment judge conducting the hearing will be familiar with the contents of the Equal Treatment Bench Book so far as they relate to tribunal users who are on the autistic spectrum….*
>
> *(8) The respondent will be required to prepare written submissions in support of its strike-out application. Those submissions must be delivered to the claimant and the tribunal at least 14 days before the hearing. The respondent's representative will not*

be prevented from making oral submissions at the hearing, but will be expected not to repeat points already made in the respondent's written submissions."

39. EJ Horne did not propose to direct that the hearing take place with the Appellant appearing via video link, as he had requested. There was no evidence that this would make it easier for the Appellant to participate and it was likely to make it more difficult for him to do so given that he would be obliged to look at the Respondent's representatives.

40. On 14 March 2020, the Appellant made a witness statement for the purpose of the scheduled preliminary hearing and provided a skeleton argument. However, that hearing did not go ahead and was postponed twice more before being listed on 2 November 2020.

41. The Appellant's witness statement of 14 March 2020 accused the Respondent of bad faith in seeking to exploit his ASC, and of providing misleading and inaccurate information to the ET on various occasions. It addressed a chronology which had been provided by the Respondent and went through the entries, date by date, pointing out what the Appellant said were inaccuracies. We note that this included the following:

*"**On 03.01.09**, the Respondent stated that I provided partial disclosure of my GP records from up to 2016 only. Whilst this is true, I believe it is misleading in that it omits to make it clear that I had reported difficulties in getting my GP to provide more up-to-date records and had asked that the Tribunal address this issue by ordering their disclosure by my former GP. I note that these letters were made clear to the Respondent and the Tribunal in my covering letter."*

42. The witness statement went on to identify what the Appellant said were inaccuracies in the Respondent's skeleton argument for the application to strike out. This included the following at [25]:

*"**At paragraph 9**, the Respondent argues that 'there is and can be no reasonable or plausible explanation for the Claimant's failure to disclose all of his relevant medical records'. The Respondent will be aware that such a statement is clearly misleading, as I have repeatedly made it clear that my failure to disclose the entirety of my medical records is due to my former GP simply refusing to respond to my requests to disclose them. again, in failing to draw the Tribunal's attention to my letter of 3rd January 2019, I believe they are deliberately trying to mislead the Tribunal."*

43. The Appellant's own skeleton argument stated that he understood that he was facing an application to strike out for failure to comply with three unless orders. He went on to argue, by reference to *Uwhubetine v NHS Commissioning Board England* UKEAT/0264/18, that he was not in fact subject to an unless order and/or that the orders were defective and/or that he was not in breach. These arguments included the following:

> *"vii. In any event, even if there were to be a valid unless order in place, it would be necessary for the Tribunal to consider if there had been material compliance. Although I am obviously not aware of the precise wording of the order sought, I would assume that any order requiring me to provide or disclose my medical records to the Tribunal could require me to provide copies of my records that were in my possession (including records which I had been able to obtain my from GP) but could not possibly include a requirement for me to disclose records which I had sought from my GP but they had simply failed to provide, particularly where I had asked the Tribunal to make an order against the GP practice given my expressed difficulty in obtaining the records. I believe the Tribunal is required to have regard to the clear and natural meaning of the words used in the order. As, such, I believe it is clear that the records provided under the cover of my letter of 3rd January 2019 provide clear material compliance.*
>
> *viii. In addition, with respect to the issue of material compliance, it is clear that since my letter of 3rd January 2019, the Respondents clearly had sufficient evidence upon which to determine their position and decide if they wished to make an admission of disability, particularly when I had provided two psychiatric reports in addition to the limited evidence which was available from my GP. I believe the Respondent has had complete disregard for the overriding objective and is likely to have significantly misled the Tribunal when seeking their orders in correspondence which they have failed to send to me by first class post."*

44. It was at a hearing on 2 November 2020 that the Unless Order was made by EJ Robinson, as we have noted. It is clear from the Case Management Summary that this was a difficult hearing. Ultimately the Respondent's application to strike out was adjourned to 29 January 2021 on the basis that the Appellant was too ill to continue and wanted to go to hospital. He had said that he was experiencing chest pains and was clutching his chest, an ambulance had attended but the EJ understood from the clerk to the tribunal that the paramedics' view was

that the Appellant did not need to attend hospital. He was insistent and they had ultimately agreed to transport him. The 29 January date was arrived at after the Appellant had said that he was not available on three earlier dates which were suggested, because he was working.

45. Before the Appellant departed, and in his presence, the EJ made the Unless Order. The Case Management Summary says this:

> *"7. Whilst in the Tribunal room I explained to Dr Tattersall that he had not supplied his GP records to the respondent's solicitor as ordered by Employment Judge Ryan on 4 December 2018. Employment Judge Ryan required the claimant to produce his GP records up to and including 25 May 2018 by no later than 4.00pm on Friday 4 January 2019. The claimant did not do so.*
>
> *8. The Tribunal now requires the claimant to provide those GP records to the respondent's solicitors by no later than 4.00pm on* ***11 December 2020****.*
>
> *9. Dr Tattersall protested that he had already supplied the GP notes. However, later on in the discussion with him he accepted that he had only provided them up to 2016. He then pleaded that he could not obtain his GP records from 2016 to May 2018. He told me that his GP was refusing to supply those records. I explained to Dr Tattersall that it was for him now to persuade his GP to release those records and to provide full copies to the respondent's solicitors by* ***11 December 2020****. He told me that he had changed doctors. When that occurred I was not told. I believe Dr Tattersall was suggesting that the change of doctors might inhibit the production of the notes. I do not accept that to be the case and I wish the claimant to understand that. His present doctor must have all his GP records available to him or her.*
>
> *10. I have made the requirement for Dr Tattersall to produce those GP records as an order under rule 38 of the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013. It is* ***an "unless order", and if he does not comply with that order by the time and date specified all his claims will be dismissed without further order, direction or judgment.***
>
> *11. It is imperative that Dr Tattersall understands the precarious position that that Unless Order puts him in. However, he can resolve the situation by compliance with a straightforward order which can easily be satisfied. I have made the order*

> *reluctantly as I well understand the potential draconian nature of such order. However, I see no other way forward as it is essential that progress is made in this litigation. I do not make it to punish the claimant. That is not the purpose of such orders, but merely to concentrate Dr Tattersall's mind on the issues in order that he does not become distracted by other matters which have little or no relevance to these proceedings."*

46. At the 2 November hearing the Appellant was also asked to provide an email address for the purposes of two way communication with the Respondent and the ET, which he did. He said that he could not be responsible for any emails which went into his spam or junk folder, and the EJ urged him to ensure that his email address was an open email address so that he would receive all documentation by email.

47. REJ Franey found, on the evidence, that notice of the hearing on 29 January 2021 and the Case Management Summary containing the Unless Order were sent to the Appellant by first class post and to the email address which he had provided, on 25 November 2020.

48. By email to the ET dated 15 December 2020, copied to the email address which had been provided by the Appellant, the solicitors for the Respondent then applied for a confirmation notice pursuant to Rule 38(1) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) 2013 ("the ET Rules"). The letter enclosed with the email pointed out the terms of the Unless Order and said that the Appellant had not provided his GP records and, accordingly, his claim was now dismissed pursuant to that Order.

49. On 16 December 2020 the Appellant sent a reply to the ET from his "no reply" email address, copying the Respondent's solicitor. He attached a letter, dated 15 December 2020, which claimed that he had not received the Case Management Summary or any Unless Order from the ET. The Appellant said that whilst the EJ had indicated at the hearing that he was intending to make an unless order, he had said that any order which he made would be relayed to the Appellant on paper. The Appellant said that he had not received any correspondence from the ET although he accepted that there would be some mail at his home address which had accumulated over the last 10-14 days which he had not yet been able to review. He asked to be provided with a copy of the Order, unless it had already been posted to him, so that he could decide whether to apply for a reconsideration of the decision of EJ Robinson or appeal against the Order.

50. It will be noted that the Appellant's suggestion that the Unless Order had not been made whilst he was present on 2 November 2020 is at odds with EJ Robinson's account of the hearing; and the implication that the Appellant did not receive the Unless Order by email is at odds with REJ Franey's finding and the fact that the Appellant received the Respondent's letter of 15 December 2020 by email at the address which he had given. We also note that the Appellant did not actually claim that he had not received the Order by post: his position was that he may have, but he had not looked.

51. The Appellant's letter of 15 December 2020 went on to say this:

> *"For the avoidance of doubt, it is my position that I have complied with the order of the Tribunal to disclose all medical records in my possession and which it is reasonable for me to obtain without the assistance of the Tribunal in making the orders I have previously requested to assist me. Although I obviously do not know what the 'Unless Order' purported to exist states, I believe that I am likely to have complied with it by disclosing the medical records which I have disclosed."*

52. He then complained about EJ Robinson's conduct of the hearing on 2 November 2020 bearing in mind his disabilities:

> *"I wish to reiterate that I was diagnosed with Autism in May 2019 and am awaiting assessment for ADHD; the former is obviously particularly relevant to my attendance in Court (I would draw the attention of the Tribunal to the 2020 version of the Equal Treatment Bench Book in this regard) and both are obviously particularly relevant to my request for correspondence to be in writing and my request to be not asked to respond to correspondence at short notice."*

53. The Appellant's letter of 15 December 2020 concluded that he would be grateful to be informed of what orders were made following the hearing on 2 November 2020 and whether his claim had been dismissed. He did not request a hearing.

54. The ET then issued the confirmation notice on 15 January 2021, as we have noted.

55. On 24 January 2021, the Appellant made an application for the confirmation notice to be set aside pursuant to Rule 38(2) of the ET Rules. He accused *"certain judges in Liverpool"* of clear bias against him. He said that even if he had received the Unless Order on 25 November 2020 this would have meant that he had an unreasonably short time to comply. He complained

that the Order was *"hidden"* in the Case Management Summary which he described as *"lengthy"*, although it ran to 4 pages of substantive text, and the relevant parts were emboldened. He complained that adjustments had not been made to the hearing before EJ Robinson and he said that, contrary to the EJ's Reasons, the paramedics had thought it was necessary for him to be taken to hospital. He criticised the conduct of the hearing more generally. He accused EJ Robinson of bias and he criticised paragraphs 7-11 of the Case Management Summary which, he said, showed a lack of a proper understanding of the matter on the part of the EJ. He said that there had been a clear disregard for his position *"that there were likely no further significant documents that should be disclosed"*.

56. The Appellant's letter concluded that he believed that it was in the interests of justice that the order sent to the parties on 25th November 2020 was reconsidered or set aside; that he disagreed with the apparent determination of the ET that he had not complied with the unless order; that the ET appeared to have reached this conclusion without receiving representations from the parties and that the Tribunal should therefore hold a hearing at which evidence could be heard and the order reconsidered. He said that he also wished to make an application that in the event that there had been 'material non-compliance' with the unless order the interests of justice required that he should be given relief from sanction. He said that he remained of the view that his applications should be considered outside the Region to ensure that they were dealt with and the Equality Act 2010 and European Convention on Human Rights were properly complied with.

57. As we have noted, on 3 February 2021 the Appellant appealed against the making of the Unless Order. That appeal was out of time. The Appellant applied for an extension of time on the basis that, he said, he had not received the Case Management Summary until 23 December 2020 and/or that the effects of his ASC and his mental health more generally were such that a reasonable adjustment to the 42 day deadline for an appeal should be made. By a decision dated 18 May 2022, the Registrar did not accept that he had not received the decision of EJ Robinson until 23 December 2020, and she found that the medical evidence relied on by the Appellant did not support his contention that the 42 day time limit could not have been complied with by him. She refused to grant an extension.

58. Meanwhile, a hearing of the Appellant's Rule 38(2) application was held on 28 February 2022, after 2 postponements in 2021. Shortly before that hearing, on 10 February 2022, the Appellant applied for an intermediary to be appointed to assist him with communication. He relied on a letter from Dr Bliss dated 10 July 2020 which suggested that he be given extra

time to process what he was trying to say and what others were saying to him and that he struggled with these aspects of communication, especially when he is anxious or emotional. The letter also said that he does not cope well with remote communication and that a video link which only allowed him to see the judge and not the whole court room would be helpful. There was also a letter from a Dr Lockwood, a GP, dated 8 September 2021 which suggested that in a job interview it would be helpful for the Appellant to be provided with the questions 48 hours in advance, and there was an order which had been made by HHJ Greensmith on 28 October 2021 in the context of proceedings in the Family Court in which the Appellant was involved. This included an order for an assessment of the Appellant by an intermediary which was to be completed by 30 November 2021. Finally, the Appellant enclosed a letter from Dr Lockwood dated 16 December 2021 which said that he was finding it very difficult to communicate by email and therefore requested that all communication be by post. The letter also said that more time was needed for the Appellant to process and consider certain types of information and asked for a longer period to be allowed to respond to correspondence: 6 weeks was suggested.

59. At the hearing on 28 February 2022 the Appellant told EJ Robinson that the assessment directed by HHJ Greensmith had not taken place although the EJ said in his Reasons that the Appellant could not explain why not, other than to say that HMCTS had not set it up. Unsurprisingly, the application for an intermediary was refused. But the adjustments directed by EJ Horne were put in place for the hearing. We note that an application for an intermediary was made to the Employment Appeal Tribunal by the Appellant in the context of this appeal. It was refused by His Honour Judge Auerbach on 8 August 2022. A further application was made and refused by HHJ Tayler on 22 February 2023. The Appellant therefore addressed HHJ Tayler himself at hearings on 22 February and 25 May 2023.

60. As we have noted, the Appellant's Rule 38(2) application was refused. Given that this decision is not the subject of the present appeal and, indeed, was not appealed, it is sufficient for us to note three points.

61. First, the details of what transpired at the hearing on 28 February 2022 are set out in EJ Robinson's Judgment which is a publicly available document. However, despite the fact that the adjustments proposed by EJ Horne were put in place, it was evidently a long and exceptionally difficult hearing owing to the conduct of the Appellant. The EJ's finding in this regard is captured by the following passages from [82] and [109] of his Reasons:

> *"82. ....I considered that the claimant was acting vexatiously and unreasonably, and that his whole purpose during the day had been to thwart any reasonable discussion with regard to the issues."*

> *109. What transpired today was the claimant making it clear throughout that he did not want the hearing to proceed and that he was both prevaricating and procrastinating. This inability to accept the hearing must proceed had no connection with his disability. The claimant was more than capable of explaining himself. No human rights of his have been breached. He had every opportunity, on his terms, to put forward his arguments. When he recognised that his arguments were flawed he resorted to behaviour specifically to make progress in this litigation impossible."*

62. In these passages and in other parts of his Reasons the EJ recognised, as we do, the possibility that the Appellant's behaviour could be attributable to his ASC. Having had lengthy dealings with the Appellant, his conclusion was that it was not. We have no reason to go behind that finding nor, indeed, any jurisdiction to do so given that it is not challenged in this appeal.

63. Second, the EJ specifically considered whether the GP records which were the subject of the Unless Order were relevant and made the following finding at [120]:

> *".. I was able to read the claimant's schedule of acts and omissions relied upon as part of his claim ...I conclude that, with regard to each and every point made by the claimant on 1 October 2018 in his further and better particulars, the issue of his health and GP records is relevant. I conclude that the respondent's requirement to see them was not a fishing expedition nor a ploy to make the litigation difficult for the claimant."*

64. Third, as far as the question of compliance with the Unless Order is concerned at [47] the EJ confirmed that the Appellant had not complied. The EJ noted that when the Appellant was asked whether he had produced his GP notes from between 1 January 2016 and 25 May 2018 he said yes, he had supplied all GP notes that were *"relevant documents"*. The Appellant was therefore asked whether he had supplied GP notes from this period of time. He refused to answer. He then asked for an adjournment. When an adjournment was granted he refused to leave the room and continued to argue that he had produced all his GP notes. He was asked whether he wanted an adjournment or not, but he refused to answer. There was then an adjournment.

65. After lunch the hearing resumed. At [53]-[54] the EJ records the following:

> *"53. The claimant volunteered that he had asked his GP in Huyton, at the Nutgrove Villa Surgery, for the GP notes from 2012 to 2018, but could not obtain those notes from his GP. It was not clear why. The claimant then moved to a new Practice later in 2018. Further discussions continued with the claimant, but ultimately he said that there were no GP records between 2016 and May 2018 at all and that although he had in his possession GP notes from his new doctor, Dr Kinsey, he was not prepared to give copies to Mr Williams or to the Tribunal because they related to issues after 2018.*
>
> *54. I asked the claimant why he had not said at any time previously that there were no notes between 2016 and 2018. He moderated his answer by saying that "to his knowledge" there were no notes, and he then went on to say it is a feature of his disability that he had difficulty communicating. He did not say that there were no notes between 2016 and 2018, just that he was not aware of them. However, he insisted that he had complied with the order….."*

66. There was then a 10 minute break after which the hearing resumed. At [56] the EJ records:

> *"At that point it was established that the claimant accepted that he had not provided GP notes from 2016 to May 2018 as required by the terms of the Unless Order. The claimant did not say anything to me that I had not heard at the previously hearing in November 2020. He again suggested that there were no such notes as he thought he had not seen his GP during that period….."* (emphasis added)

67. The EJ then heard submissions on the evidence from Mr Williams, on behalf of the Respondent, which were to the effect that this was the first time in the nearly 4 years since the proceedings were issued that the Appellant had claimed that there were no GP notes from the relevant period. His position throughout had been that the reason for non-compliance with the ET's Orders was that his former GP would not authorise the release of the notes. The Appellant's statements on this point should not be accepted and he had not complied with the Unless Order. Mr Williams also said that there was now little chance of a fair trial given that the hearing would be unlikely to take place until the end of 2023, getting on for 5 years after

the relevant events. These submissions had to be made in the Appellant's absence, at his request, and then summarised for him by the EJ when he came back into the room.

68. The EJ noted that, although more than a year had elapsed since the confirmation notice, the Appellant had still not obtained the relevant GP notes. His finding was that this was a case of a deliberate refusal to provide the notes, which had nothing to do with the Appellant's ASC. At [111]-[113] the EJ said this:

> *"111. The documentary evidence from the claimant himself shows that he believes he has not complied, but that the reason for non-compliance was that Nutgrove Surgery were not answering his requests to produce the GP notes. He did not suggest that his new doctor, Dr Kinsey, was unable to provide any notes, only that he had notes in his possession from Dr Kinsey that refer to matters after May 2018. However, that argument was disingenuous because, whilst holding those notes in his hand, the claimant suggested that there were references to a medical condition in 2014 and 2015 in the notes from Dr Kinsey.*
>
> *112. The claimant has never explained why he has not been able to get his notes from Nutgrove Surgery. For the first time at this hearing, he suggested, both to me and to the respondent, that those notes do not exist. However, when challenged in the most passive way this morning the claimant admitted that he only thought that there were no such notes but he was not sure, and then indicated that there were no "relevant or significant notes". He changed his argument two or three times.*
>
> *113. As Mr Williams pointed out, it is not for the claimant to decide whether his medical records are significant or relevant but for the Tribunal to decide that if necessary. What is required is an open and proper disclosure of all documents either in his possession or control or available to the claimant after reasonable enquiry."*

69. The EJ's overall conclusion was that the Unless Order was properly made and had not been complied with, that it was not in the interests of justice for the confirmation notice to be set aside. In any event, the manner in which the Appellant had conducted the proceedings was unreasonable and vexations, his application had no reasonable prospect of success and had not been actively pursued.

Legal framework

70. Rules 38(1) and (2) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) 2013 provide:

> "***38 Unless orders***
>
> *(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…. ."* (emphasis added)

71. As is well recognised in the authorities, Rule 38 therefore envisages three potential stages, each of which requires a separate decision, by reference to separate considerations, and may be subject to a separate appeal. The first is the decision whether to make an unless order; the second is the determination of whether the order has been complied with and, if not, the issuing of the notice confirming that it has taken effect; and the third is the decision whether to set aside the order on the basis that it is in the interests of justice to do so.

72. As we have noted, this appeal is concerned with the second of these three stages. As the wording of Rule 38(1) states, the issue when deciding whether to confirm that an unless order has taken effect is whether the order has been *"complied with"* by the date specified. If it has not been, the consequences specified in the unless order follow. The following points should be noted.

73. First, it therefore is not the function of the ET, when considering whether there has been compliance, to revisit the question whether the unless order should have been made in the first place. For the purposes of this question the order is a given: see e.g. *Uwhubetine v NHS Commissioning Board England* UKEAT/0264/18 and *Minnoch v Interserve FM Ltd* [2023] EAT 35, [2023] ICR 861 at [33.7].

74. Second, there may, of course, be an issue as to whether the order has been complied with and/or as to the specified consequence in relation to any failure to comply. Where this is the case, it is a matter for the EJ to determine whether there should be a hearing, or an opportunity to make representations should be afforded: *Uwhubetine* at [44] and *Minnoch* at [33.8]. As His Honour Judge David Richardson said in *Wentworth-Wood v Maritime Transport Ltd* UKEAT/0316/15:

> *"55. An employment judge…must be satisfied that there has been material non-compliance with the order. But there is no mandatory process to be followed. The employment judge's only duty before giving notice is to comply with the overriding objective, which requires cases to be dealt with fairly and justly. In some cases the employment judge may be able to see clearly from the file or from correspondence that an order has not been complied with. In such a case the employment judge is entitled to give notice without further reference to the parties. But if there is doubt—for example in a case such as this, where one party writes to the employment tribunal to allege that there has been non-compliance with an unless order—the employment judge will give the other party an opportunity to comment. If there is still doubt, and the employment judge wishes to hear argument, the matter may be considered at a hearing…."*

75. Third, the phrase *"material non-compliance"* in the caselaw reflects the way that it was put by Lord Justice Moore-Bick in *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463, [2007] 3 All ER 365 at [34], where he said *'the sanction embodied in an unless order in traditional form takes effect without the need for any further order if the party to whom it is addressed fails to comply with it in any material respect'*. (emphasis added). This was adopted by Mr Justice Langstaff in *Johnson v Oldham Metropolitan Council* UKEAT/0095/13. He went on to say that *"It follows that compliance with an order need not be precise and exact"* [7] and that a qualitative rather than a quantitative approach should be taken to this question. But it is important to note that he was referring to a case in which there had been an order for further particulars, and particulars had been provided, but it was said that the unless order had not been fully complied with. In such a case, the question would be whether the party providing the particulars had in substance complied with the order.

76. There may be cases where there is compliance with an order but it is imperfect, and the question arises as to whether the imperfection is material. But, even in those cases, the ET proceeds on the basis that the order is a given and it asks whether the failure is immaterial in

the sense of trivial or irrelevant. Where there has been no compliance with an unless order, it is hard to envisage any circumstances in which it might be held that there had not been a failure to *"comply with"* it and/or a failure to comply with it in a *"material respect"*. It would be contrary to the principle that the order is a given, and that orders of the tribunal must be complied with, for a party to argue that although they had not done so this was immaterial.

77. Fourth, the effect of notice of confirmation that an unless order has not been complied with, and that the specified consequence has followed, is to trigger a right to apply to set aside the order pursuant to Rule 38(2). This is effectively an application for relief against sanctions and it is in determining this application that the justice of the consequences which followed from failure to comply with the order is addressed, albeit on the footing that the party in question was subject to an order of the tribunal with which they failed to comply.

78. Fifth, stages 2 and 3 need not necessarily be dealt with at separate hearings. In principle there could be an application for a confirmation notice which is disputed and a contingent cross application to set aside the order which are dealt with at the same hearing. But the questions in relation to each application at that hearing would be as stated above.

79. Finally, it is worth noting the considerations which will be taken into account in relation to an application under Rule 38(2). In *Thind v Salveson Logistics Ltd* UKEAT/0487/09 at [14] Underhill P (as he then was) said this:

> *"The tribunal must decide whether it is right, in the interests of justice and the overriding objective, to grant relief to the party in default notwithstanding the breach of the unless order. That involves a broad assessment of what is in the interests of justice, and the factors which may be material to that assessment will vary considerably according to the circumstances of the case and cannot be neatly categorised. They will generally include, but may not be limited to, the reason for the default, and in particular whether it is deliberate; the seriousness of the default; the prejudice to the other party; and whether a fair trial remains possible. The fact that an unless order has been made, which of course puts the party in question squarely on notice of the importance of complying with the order and the consequences if he does not do so, will always be an important consideration. Unless orders are an important part of the tribunal's procedural armoury (albeit one not to be used lightly), and they must be taken very seriously; their effectiveness will be undermined if tribunals are too ready to set them aside. But that is nevertheless no more than one*

consideration. No one factor is necessarily determinative of the course which the tribunal should take. Each case will depend on its own facts."

80. Consideration of the seriousness of the default will take into account the extent to which there was compliance with the unless order and the impact of the non- compliance on the fairness of the proceedings. This reinforces the point that it is not open to a party to argue, in relation to the question whether a confirmation notice should be issued, that, in effect, the failure to comply did not matter. That is a matter for an application under Rule 38(2).

Regional Employment Judge Franey's reasons for his decision

81. In an Order dated 22 February 2023 HHJ Tayler requested that REJ Franey answer the following questions:

    a. What material was considered by him?

    b. What legal test was applied?

    c. What was the reasoning that led to the decision to issue the Rule 38(1) Notice?

82. On 13 March 2023, the REJ helpfully provided the following answers.

83. He considered the Case Management Order which was sent to the parties on 25 November 2020; *"The Tribunal's covering letter and email which showed that the Case Management Order had been sent to the claimant by post and by email";* the emails and enclosed letters from the parties on 15 and 16 December 2020; and a further email from the Respondent on 16 December 2020 which said that the Unless Order was clearly explained to the Appellant at the hearing on 2 November 2020 and that the Case Management Order had been sent to the email address provided by the Appellant during that hearing. The REJ said that he did not read the whole file, as the Case Management Summary gave sufficient background.

84. REJ Franey said that the legal test which he had applied was as set out in *Uwhubetine* at [41]-[47]. His summary was that:

    a. "The determination of whether there has been material non-compliance with an Unless Order is the second of three decisions which arise under rule 38.

    b. That decision must be made in accordance with the overriding objective.

c. *Any ambiguity as to whether there has been compliance with the Order should be construed in favour of the party who was required to comply."*

85. We observe that this is a correct statement of the principles.

86. As for the third of HHJ Tayler's questions, the EJ set out his reasoning as follows:

> *"I noted that the Unless Order in paragraph 8 was in clear terms: the requirement was to provide further GP records by 4.00pm on 11 December 2020, failing which the claim would be dismissed without further order.*
>
> *It was also clear from paragraphs 8-11 of the Case Management Order of Employment Judge Robinson that there had been a discussion with the claimant about which GP notes were still required, and that the claimant's assertion that he could not get those records from his GP had been considered by discounted by Employment Judge Robinson.*
>
> *I noted that the respondent said in Weightmans' letter of 15 December 2020 that the claimant had not provided those records by the deadline.*
>
> *I considered the claimant's response emailed on 16 December 2020. He said he had not received the Case Management Order, but I could see that it had been sent to him by post and by email using the email address which he had provided during the hearing. The copy of the Tribunal email to that address was on the file in front of me.*
>
> *Further, he asserted that:*
>
> > ***"It is my position that I have complied with the order of the Tribunal to disclose all medical records in my possession and which it is reasonable for me to obtain without the assistance of the Tribunal in making the orders I have previously requested to assist me. Although I obviously do not know what the 'unless order' purported to exist states, I believe that I am likely to have complied with it by disclosing the medical records which I have disclosed."***

> *My interpretation of this was that the claimant had not disclosed any further medical records since the hearing before Employment Judge Robinson, but was asserting, in effect, that the Unless Order was inappropriate because he had already done all he reasonably could to comply with earlier orders.*
>
> *That was an argument to be pursued in an application to have the Unless Order set aside under rule 38(2). The same was true of the assertion that the claimant did not know what the Unless Order required.*
>
> *I therefore formed the view that there was no dispute in this case that the claimant had not complied with the Unless Order because no GP records had been provided to the respondent since the hearing on 2 November 2020. Material (indeed, total) non-compliance was established.*
>
> *That being so, the Unless Order had taken effect and the appropriate course of action was to confirm the dismissal of the proceedings so that the claimant could then apply for the Order to be set aside under rule 38(2).”* (underlining added; emboldened in the original)

87. As will be apparent, the EJ’s finding that no GP records had been provided to the Respondent since the 2 November 2020 hearing was factually correct. For reasons which we will explain, we also consider that the EJ’s reasoning was impeccable.

The Grounds of Appeal

Ground 2

88. We start with Ground 2 as this raises the question of what the issue was before REJ Franey. This Ground is as follows:

> *“2. The Tribunal erred in law in considering simply whether there had been ‘non-compliance’ with the Unless Order purportedly sent to the parties on 25th November 2020, when it should have considered whether there had been ‘material non-compliance’, which is an important distinction that the Tribunal failed to have regard to.”*

89. HHJ Tayler’s Reasons for allowing the appeal to proceed to a full hearing explain that:

> *“10. This appeal raises issues about what constitutes material non-compliance, and*

> *whether there could be circumstances in which there has been no compliance with an unless order, but the breach should be held to be immaterial, in that it would have no material effect on the fairness of the full hearing.*
>
> *11. I consider it is arguable that the focus of REJ Franey was only on the fact that no further medical records had been provided, so there was total substantive non-compliance with the unless order, rather than on any materiality of the breach, in the sense of any effect it would have on a fair hearing. The medical records apparently were thought to be relevant to the issue of the claimant's disability (Autism). It is arguable that the materiality of the provision of further GP records from January 2016 to May 2018 should have been considered in the context of the issues in the claim, having regard to the other medical evidence that had been produced, and that it would be for the claimant to provide disability. Consideration could have been given to a third-party order for disclosure against the GP practice to obtain the records for the purposes of ascertaining whether there was material non-compliance with the order."* (emphasis added)

90. We do not agree with the suggestion that REJ Franey erred in any way, for the reasons which we have given at [75]-[76] above. We reject the proposition that, in relation to the question whether an ET should issue a notice pursuant to Rule 38(1), confirming that an unless order has not been *"complied with"*, it is open to an ET to decline to do so on the grounds that there has been *"substantive non-compliance"* but that this is not material because it will not prevent a fair trial. Arguments about whether compliance with the order is necessary in order to ensure a fair trial of the issues may be relevant when the ET is deciding, at stage 1, whether to make an unless order; and they may be relevant, at stage 3, to an application to set aside pursuant to Rule 38(2), as REJ Franey said. But it would not make any sense, or be consistent with the terms of Rule 38(1) and the principle that orders are to be obeyed, for an ET to refuse to confirm that an order which has not been complied with has not been complied with. Under Rule 38(1), the question of the materiality of any alleged failure to comply with an order enables a party to argue that they have complied in substance; it does not enable them to say that they have not complied but this does not matter.

91. This was a case in which, on the finding of REJ Franey and the subsequent finding of EJ Robinson at the rule 38(2) hearing, there had been a total failure to take steps to comply with the Unless Order and to comply with it. As EJ Robinson noted at [56] of his Judgment on the Rule 38(2) application, ultimately the Appellant himself accepts that he did not provide any

further GP notes to the Respondent after 2 November 2020 and has not at any point provided them with any notes from the relevant period. Even if, entirely artificially, this is regarded as a partial compliance case on the basis that the Appellant's GP notes to the end of 2015 were provided to the Respondent on 3 January 2019, and there was evidence (albeit contested) that the Appellant had taken steps at that stage to ask his GP to release his records from 2016, the failure to take steps and to disclose the notes after 2 November 2020 could hardly be described as immaterial: these were the notes from the period which the parties and the ET regarded as the relevant one and the notes had repeatedly been held to be sufficiently relevant for the ET to make various orders for their production.

Ground 1

92. This Ground is as follows:

> *"The Tribunal failed to allow the Claimant to make representations regarding his position that there had not been non-compliance with the Unless Order purportedly sent to the parties on 25th November 2020, before reaching the decision that this was the case."*

93. We do not agree that REJ Franey erred in the approach which he took. He had the benefit of the written representations from both parties dated 15 December 2020, which he evidently considered carefully. No request for a hearing was made by the Appellant. Nor did he make any other application at this stage. It was therefore a matter for the REJ to decide whether to call for further written submissions or convene a hearing. He was fully entitled not to do so. The simple issue for him was whether the Appellant's GP notes for the relevant period had been provided to the Respondent since the Unless Order. The Respondent's solicitors had stated, in their letter of 15 December 2020, that they had not been. There was no reason to doubt what they said and, indeed, the Appellant was not actually contradicting them. The REJ correctly interpreted the Appellant's letter of 15 December 2020 as accepting that no further notes had been provided but arguing that he had done all that he reasonably could to produce them.

94. In our view it was perfectly fair for the REJ to proceed to issue the confirmation notice without hearing further from the parties.

Ground 4

95. This Ground is as follows:

> *"The Tribunal failed to have regard to the witness statement of the Claimant dated 14th March 2020 or the skeleton submissions which had been provided to the Court at the same time."*

96. It is true that REJ Franey did not have regard to the Appellant's witness statement dated 14 March 2020 or the skeleton argument which he submitted at that time. These documents were submitted for the purposes of resisting the Respondent's application to strike out the Claim and they argued that this application should be refused in reliance on the correspondence and other exchanges between the parties up to that date. Since then, the Unless Order had been made and the issue had become whether that Order had been complied with since 2 November 2020. Arguments about what had happened up to and including 14 March of that year and whether there should be a strike out on the grounds of failure to comply with earlier orders were irrelevant to REJ Franey's decision and they did not assist. They did not suggest that the GP records for the relevant period had been produced, and therefore did not advance the Appellant's case on the issue before REJ Franey in any event. Again, if they were relevant and the Appellant wished to raise them, the time to do that was in the context of an application under Rule 38(2).

Ground 5

97. This Ground is as follows:

> *"The Tribunal failed to consider if the order purportedly sent to the parties on 25th November 2020 should have been set aside."*

98. This Ground is misconceived. As we have said, it was not for REJ Franey to consider, at stage 2, whether the Unless Order should have been set aside and nor did the Appellant ask him to in his letter of 15 December 2020. He said that he wanted a copy of the Order so that he could consider whether to challenge it by way of an application or an appeal. Whether it should be set aside was the issue at stage 3 in the event that the Unless Order had not been complied with. Moreover, as we have noted, this question was indeed considered in the context of the Appellant's application under Rule 38(2), albeit that application was unsuccessful.

Ground 7.

99. This Ground is as follows:

> *"The Tribunal failed to have regard to the right of the Claimant to have reasonable adjustments provided under the Equality Act and to his rights under Article 6 of ECHR, particularly in refusing to allow the reasonable adjustments which had*

previously been determined to be appropriate by Employment Judge Holme (sic) to be continued when the case was heard by a different judge."

100. Given that there was no hearing for the purposes of REJ Franey's decision there was no need for adjustments to any hearing. Insofar as the Appellant is suggesting (which he does not appear to be given that EJ Horne did not propose longer timescales for written communication) that adjustments should have been made to enable him to make written representations, or he should have been given more time to make written representations, we note that he did make written representations on 15 December 2020 and was able to do so swiftly. Another month elapsed before the confirmation notice was issued, during which time he did not make further representations or indicate any wish to do so. Bearing in mind, also, the hearings on 2 November 2020 and 28 February 2022, the Appellant's rights under the Equality Act 2010 and Article 6 of the European Convention on Human Rights were in our view fully respected by the ET.

Conclusion

101. We therefore dismiss the appeal.