Neutral Citation Number: [2024] EAT 113

Case No: EA-2022-000539-NU

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 July 2024

Before:

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

Between:

MR D CHUMBU

Appellant

- and -

THE DISABILITIES TRUST

Respondent

- -
- -

Niran de Silva KC (instructed the Free Representation Unit) for the **Appellant**
Paul Michell (instructed by Direct Access) for the **Respondent**

Hearing date: 20 June 2024
- -

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 09 July 2024

SUMMARY

Practice and procedure - unless order - relief from sanction - rule 38 ET Rules

The claimant's ET claims had been dismissed upon his failure to comply with an unless order that had required that, by the prescribed date, he (1) serve his witness statement, and (2) pay the sum awarded against him by way of an earlier costs order. The ET having refused to set aside the unless order and grant the claimant relief from sanction, the claimant appealed.

Held: dismissing the appeal

In relation to the witness statement, the ET had not erred in declining to set aside the unless order in circumstances in which there had been a history of non-compliance with orders by the claimant, including an earlier failure to provide a witness statement in accordance with the ET's directions, which had led to the adjournment of the initial listing of the full merits hearing. It was clear that the ET did not accept the claimant's explanation for his further non-compliance with the unless order in this regard, and had found that he had consciously chosen not to start the preparation of his witness statement in good time and, subsequent to the order, had then made the further choice to use his energies in drafting a detailed response to that order rather than focusing on compliance with it. Those were not perverse conclusions, and the ET's reasoning demonstrated that it had the interests of justice in mind, albeit that it had not expressly set out that test.

The ET had, however, erred in making the earlier costs award the subject of an unless order. That had had the effect of turning the costs award into a form of deposit order, absent the safeguards provided by rule 39 **ET Rules**. It was, further, inapt in this case, given that deposit orders had previously been made for far lesser sums, and with a longer period for compliance; the effect of this aspect of the unless order was to place a condition on the claimant's access to justice in respect of claims that had either been considered to have reasonable prospects of success or in respect of which he had already paid a deposit under rule 39. Moreover, given that the claimant had identified material changes to his circumstances since the costs award had been made, it was no answer to say (as the ET had) that his means had previously been taken into account. The ET's decision in respect of the claimant's non-compliance with the costs award aspect of the unless order demonstrated a failure to consider the interests of justice and was properly to be described as perverse.

Although the ET had thus erred in its consideration of the costs award, that did not impact upon its reasoning and conclusion in respect of the witness statement; its decision in that regard revealed no error of law and meant that the refusal to grant relief from sanction was to be upheld.

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

Introduction

1. This appeal concerns the dismissal of a claim upon failure to comply with the terms of an unless order, and the refusal to grant relief from that sanction. It raises a particular question as to whether relief ought to have been granted given that the dismissal of the claim had, in part, been due to a failure to pay a costs award that had been made the subject of the unless order.

2. In giving this judgment I refer to the parties as the claimant and respondent, as below. This is my ruling on the claimant's appeal against the decision of the Employment Tribunal sitting at Croydon (Employment Judge Abbott, sitting alone; "the ET"), communicated by letter of 25 May 2022, refusing to grant relief from sanction and thus confirming the dismissal of the claimant's claim for failure to comply with the unless order of 13 December 2021. In considering the appeal on the papers, Her Honour Judge Tucker had formed the view that it disclosed no arguable question of law; at a hearing under rule 3(10) **EAT Rules 1993**, His Honour Judge Tayler permitted the appeal to proceed on amended grounds.

3. The claimant previously acted in person but has had the benefit of advice and representation from Mr de Silva KC, acting *pro bono*, since the rule 3(10) hearing. The respondent has been legally represented throughout, albeit that Mr Michell did not appear below.

The Facts

The parties

4. The respondent is a charity that provides residential and day care services, including rehabilitation and support to meet the needs of people with acquired brain injury, traumatic brain injury, and neurological conditions. The claimant was employed by the respondent as a support worker from 16 September 2009 until 17 September 2018.

5. In or about August 2019, the claimant was diagnosed as suffering from prostate cancer and began to receive treatment for this condition from September 2019. Also in September 2019, the claimant became a full-time student at University College, London.

The ET proceedings

6. On 25 January 2019, the claimant presented his claim to the ET, in which he complained of unfair dismissal, whistleblowing detriment, and sex and race discrimination, and made various money claims; the allegations raised in some aspects of the claim go back to 2009. In its response, the respondent resisted the claimant's complaints, but also contended that the claim was inadequately particularised.

7. A preliminary case management hearing took place before the ET (EJ Sage) on 27 June 2019. Shortly before that hearing, the claimant had provided some 32 pages of further particulars of his claim and that document, along with the original claim form and response, was used to identify the various complaints made and the issues that arose. The ET ordered the claimant to provide further details of particular aspects of his claim by 29 August 2019, directing that there should then be another preliminary hearing. In response to this order, the claimant then submitted nine further documents to address the points identified.

8. A second preliminary hearing took place before the ET (EJ Fowell) on 4 October 2019. At that hearing, the list of issues was modified, and certain claims against individually named respondents were struck out.

9. A third preliminary hearing took place on 11 December 2019 (again before EJ Fowell). The ET struck out the claim against the remaining individually named respondent and gave rulings on various time limit issues. Having further clarified the list of issues, the ET ordered the claimant to provide a schedule of loss and other relevant information by 10 January 2020, and full directions were given for the progress of the case to trial, which was listed to commence on 14 June 2021 for six days; relevantly, the ET directed that witness statements (in the form described at paragraph 7 of its order) were to be exchanged by 11 September 2020.

10. On 20 January 2020, the claimant applied for an extension of time to comply with EJ Fowell's orders relating to the schedule of loss and further information; that was granted by the ET (EJ Hyams-Parish), extending time until 29 February 2020, as recorded by letter of 13 February 2020. In that letter, the claimant was reminded of the "*importance of compliance with orders or consideration will need to be given [to] whether all or part of the claim should be struck out*".

11. At the outset of the hearing on 14 June 2021 (listed before EJ Khalil and two lay members), a concern was raised relating to the claimant's witness statement (which seems to have been exchanged on or about 10 June 2021), which took the form of a single page of narrative with multiple schedules, cross-referencing

documents in the bundle, and raising further allegations of discrimination not included within the list of issues. Considering how it should proceed, the ET concluded:

> "(10) The upshot of the Tribunal's analysis was that it regrettably concluded that this case was not ready for trial and should be postponed. Before reaching this decision the Tribunal considered carefully if it could Order the claimant to produce an amended witness statement overnight dealing only with those matters which appeared to be the agreed issues in this case but concluded that this would cause significant pressure and burden to the claimant as a litigant in person and also having regard to his health. The claimant had explained to the Tribunal in the context of needing regular breaks and needing questions repeated, that he was on medication for his condition which was causing him side effects such as profuse sweating and hot flushes. He was also experiencing memory problems.
> (11) The overriding objective requires cases to be dealt with fairly and justly and the Tribunal ultimately concluded that proceeding in the current sitting would be of greater prejudice to the claimant than to the respondent caused by the postponement and notwithstanding what was likely to be a lengthy delay. The Tribunal had strong reservations of constructing the claimant's actual evidential case before the Tribunal. The claimant carries the initial burden of proof in relation to his claims. The claims are across multiple jurisdictions: constructive unfair dismissal, sex discrimination, race discrimination, protected disclosure detriment/dismissal and holiday pay. ... The Tribunal did have regard to the respondent's submission that at least 2 of the respondent's witnesses are no longer/will no longer be employed and to the passage of time."

12. Having thus determined that the trial could not proceed, the ET undertook a further (fourth) case management hearing, yet again re-visiting the list of issues and giving additional directions for the particularisation of the claimant's case, which it re-listed for seven days from 10 to 18 October 2022. To ensure that the claim would proceed on the re-listed dates, the ET ordered that, on or before 6 August 2021, the claimant was to serve a new witness statement. The ET then went on to make a deposit order as a condition of the claimant being permitted to proceed with his claims of race discrimination, sex discrimination and holiday pay (a deposit order of £10 being made in respect of each claim). It further made an award of costs against the claimant in the sum of £1,875, although it did not specify a date by which payment was to be made. In assessing the amount of the costs award, the ET noted that the claimant had ceased work from September 2019 when he became a full-time student, although he had worked during the summer vacation in 2020 and intended to work in the forthcoming summer holidays; otherwise he was in receipt of a maintenance grant, had no savings, and depended on family for additional support. The ET's case management orders, deposit order, and costs judgment were dated 21 June 2021 and were sent to the parties on 30 June 2021.

13. By email of 3 August 2021, the claimant wrote to the respondent and the ET, asking for a two-week extension of time to submit his witness statement. He explained that he had problems with his feet, which

prevented him from carrying out his normal work, and this was why he was asking for an extension. On 4 August 2021, the claimant also applied for an extension of time to comply with the deposit order.

14. By letter of 9 September 2021, the ET recorded EJ Khalil's decisions on the claimant's applications, by which he varied his earlier order in respect of the claimant's witness statement, extending time for this to be served by 23 September 2021, and granted a retrospective extension of the deposit order deadline to 4 August 2021 (which is when the claimant had paid the deposits).

15. On 23 September 2021, the claimant emailed the respondent (copied to the ET), stating:

> "I am writing to inform you that I cannot furnish you with my Witness Statement by the end of the day today.
> Despite several attempts, I have not been well enough to put my thoughts together and produce a meaningful document. However, my medication changes end of this September, and I expect the side effects to wear off by mid-October to allow me to construct a Witness Statement. ..."

Attached to that email was a GP fit note, dated 22 September 2021, advising that the claimant was not fit for work for the period 9 August 2021 to 11 October 2021 due to side effects from his prostate cancer treatment.

16. The respondent replied on 8 October 2021 stating that, while not its preference, it would agree to receiving the claimant's statement by 18 October 2021. On 20 October 2021, having heard nothing from the claimant, the respondent emailed asking for an update. As the claimant did not respond, on 4 November 2021 the respondent emailed the ET to ask if it could intervene to progress the submission of the claimant's witness statement. The respondent also enquired what the timeframe was for the claimant to pay the £1,875 costs.

17. By email of 10 November 2021, the claimant wrote to the ET (copied to the respondent) saying that he was providing an update on his:

> "current state of health, which still impacts and prevents me from completing a worthwhile witness statement as is required for a fair and just trial."

He went on to explain:

> "I anticipated producing a meaningful witness statement document after the withdrawal of hormone replacement therapies. The medical opinion ... supported this hope. However, the anticipated results have not materialized as expected ...
> I have resumed taking Tamoxifen 20mg tablets for a trial month. The resumption negates the gains and adds to the side effects that hinder my progress from presenting a worthy witness statement within the deadlines given.
> I am worried about my health and the downturn of events. I am also aware of the Respondent's anxiety, but I am constrained. I am afraid I have to ask for an extension that allows for my recovery under clinicians care."

18. The claimant attached to his email a letter from the UCLH clinical oncology department (where he

was being treated), dated 9 November 2021, which stated as follows:

> "I reviewed Daniel CHUMBU from the uro-oncology clinic today by phone. I am pleased to report that his PSA remains undetectable. He has now completed his course of bicalutamide and tamoxifen, and has stopped this in September. He has had some improvement in his chronic fatigue. ...
> Unfortunately he has also developed [other side effects] ... I have suggested he restart tamoxifen and we will see if this improves his symptoms ..."

19. The respondent emailed the ET on 23 November 2021 objecting to a further extension of time and again raising a question as to when the costs order was to be paid.

The unless order

20. By order sent to the parties on 13 December 2021, the ET (EJ Abbott) ruled as follows:

> "Unless by 30 December 2021 the claimant
> i) pays the costs due under the Judgment on Costs dated 21 June 2021; and
> ii) serves his updated witness statement as per paragraph 1 of the Orders made on 21 June 2021,
> the claim will stand dismissed without further order."

The reasons for making the unless order were explained within the letter as follows:

> "... the claimant has already been offered multiple extensions to prepare his witness statement, which was originally due to be provided in August 2021. Whilst acknowledging the claimant's medical issues, progress needs to be made in these proceedings. It is noted that the medical note dated 09 November 2021 records improvement in the claimant's chronic fatigue. Regarding the costs order, the claimant has provided no reason why this has not been paid notwithstanding the passage of time since the Order was made."

For completeness, I note that the order was stated to have been made on the application of the respondent; in fact there had not been an application expressly in those terms.

21. On 29 December 2021 (the day before the date for compliance), the claimant sent two letters to the ET. The first was headed "*Unless Order: Witness Statement Response*". In this regard, the claimant objected that the 9 November 2021 hospital report referenced by the ET had not said he was rid of the chronic fatigue side effects that had impeded his ability to go out to work, let alone:

> "the mental rigour required of a proper and coherent witness statement"

The claimant explained that, due to his cancer, he had been on hormone replacement therapy for two years and had various other treatments and side effects. His fatigue was made all the worse because of lack of sleep, and this had disrupted much of his daily life and had given rise to the need for extensions, deferments and other adjustments for his studies. Pointing to the fact that he had previously been able to produce a comprehensive

narrative of his case (in his further and better particulars document), the claimant stated that:

> "without the incapacitating fatigue from medication, I could and can produce a witness statement consistent with the Tribunal's requirements."

The claimant sought a review of the unless order, saying the respondent would not be prejudiced if it was rescinded, whereas:

> "Without the reconsideration ... the Unless Order is punitive and unjust."

22. In support of his request for reconsideration, the claimant provided a further report from the UCLH oncology clinic, dated 10 December 2021, which he said superseded the 9 November 2021 letter. The letter of 10 December, which followed a consultation with the claimant on 7 December, explained that, after resuming Tamoxifen the claimant had complained of:

> "tiredness and issues with concentration at his university studies"

going on to observe:

> "He continues to study at UCLH *[sic]*, and says his studies have been affected by poor sleep, fatigue and problems concentrating. ..."

23. The claimant's second letter was headed: "*Costs Order Response*". In this regard, the claimant stated that he had provided the ET and the respondent with fit notes that demonstrated he had been unable to work over the summer holiday (in particular as he had had to shield during the pandemic), and he explained that he had used his student maintenance loan to pay accommodation costs. In the circumstances, he objected that a requirement that he pay the full costs award by 30 December 2021 was unachievable, and that the unless order was punitive and unjust.

The ET's decision on relief from sanction

24. The claimant's letters were not addressed by the ET prior to the date for compliance with the unless order. As the claimant did not comply with that order, his claim was dismissed on 30 December 2022, as confirmed by the ET's notice of 25 May 2022.

25. The claimant's objections of 29 December 2021 were, however, then considered by the ET effectively as an application for relief from sanction, but that was refused for the reasons provided in the ET's letter, also of 25 May 2022, as follows:

> "... Your medical issues were taken into consideration when the Unless Order was made. It is accepted that you are not without symptoms of chronic fatigue.

> However, it is noted that you continue with your studies, and were able to provide a detailed response to the Unless Order within a period of just over 2 weeks from its receipt. It is therefore not accepted that you are prevented by your medical issues from preparing the witness statement. It is also to be noted that your response provides no timeframe in which you say you would be able to complete the witness statement, notwithstanding it was originally due to be provided in August 2021. There has been a history of non-compliance with orders (specifically, that which led to the costs order being made in June 2021) which is relevant context to why an Unless Order was appropriate to seek to move this case forward.
> Regarding the costs order, this was sent to you on 30 June 2021. Fit notes have been provided which show your inability to work between 8 July and 11 October 2021, but not beyond that. Your means was taken into account when the order itself was made. It cannot properly be said that an expectation that you pay the outstanding costs by a date that is 6 months after the costs order was made is punitive or prejudicial. On the other hand, further suspension of that time would be prejudicial to the respondent, which is being kept out of money to which it is entitled."

The grounds of appeal and the claimant's arguments in support

26. The appeal was permitted to proceed on the grounds that the ET: (1) failed to identify and apply the correct test for setting aside an order dismissing a claim following an unless order, namely the interests of justice and/or proportionality; (2) failed to take into account relevant factors, such as the effect of the sanction on the claimant, whether a fair trial was still possible, and the level of prejudice to the respondent; (3) conversely, took account of an irrelevant factor, namely the claimant's failure to pay a costs order; and (4) reached conclusions (that the claimant could provide a witness statement and/or that the costs order could have been paid) that were irrational in the light of the medical evidence and the claimant's studies.

27. Addressing the first ground of appeal, the claimant complains that the ET failed to refer to the interests of justice or proportionality, did not refer to the wording of relevant rule or the authorities referring to the interests of justice and proportionality. In these circumstances, the claimant says there is no reason to assume the ET had in mind the test of interest of justice, not least because it then omitted to consider various important factors. That is the point made by the second ground of appeal, by which it is contended that it was apparent the ET had failed to consider the effect of the sanction on the claimant (who was not guilty of wholescale non-compliance in respect of earlier orders, and whose conduct - in the light of the medical evidence - was not wholly blameworthy or unexplained), or whether there was any prejudice to the respondent, or whether a fair trial remained possible. The claimant says that these were all important matters, in particular given that the final hearing was listed for October 2022, almost six months after the order, there was no suggestion of a danger of postponement and the respondent's preparation for the hearing could not have been materially

affected and had not identified any prejudice (in contrast to the obvious prejudice to the claimant).

28. Separately, by his third ground of appeal, the claimant contends that the ET wrongly took into account an irrelevant factor in having regard to his failure to pay the respondent the costs ordered in June 2021. The costs award was not a case management order and had no bearing on the ongoing conduct of the claim. Further, the purpose of an unless order could not be to force an impecunious claimant to find the funds to satisfy a costs award, and it was wrong in principle to make this the subject of an unless order, not least as there were enforcement procedures available to the respondent in the County Court, where detailed account could be taken of the claimant's ability to pay and orders could be made that would enable the respondent to be paid in such a way as not to cause undue hardship to the claimant (measures that would be less draconian than preventing the paying party from pursuing a claim). Moreover, although means were taken into account when the costs order was made, the claimant had explained why he had been unable to pay the award - providing an update as to his means (his inability to work over the summer; the fact that his grant had been used to pay for accommodation) - an explanation that had been ignored in the refusal to grant relief from sanction (the ET having apparently misunderstood the explanation in this regard).

29. Finally, by his fourth ground of appeal, the claimant contends that, in light of the medical information and the evidence about his studies, the ET's decision was irrational. It was not in dispute the claimant suffers from cancer, and he had explained how his treatment caused him to suffer fatigue, affecting his daily life; he had also explained to the ET that, in relation to his studies, he had needed deadline extensions, deferments and other adjustments for his studies (and had lost marks in his exams and assignment), as he found it difficult to concentrate and pay attention for long periods, let alone deal with long documents. What the claimant had said was supported by the medical evidence (which the ET could not gainsay), which also corroborated what he had explained as to the impact of his condition on his financial situation. The ET ought to have recognised that the claimant was a vulnerable person, making accommodation for him in the light of the overriding objective and the right to a fair hearing and access to justice.

The respondent's position

30. In respect of the first ground of appeal, the respondent urges that there is no definitive test or checklist to be followed and no obligation for the ET to recite the relevant rule or authorities. The ET's decision

demonstrated it had considered what would be just, taking into account the claimant's medical issues and his long history of non-compliance with orders, and demonstrated that it concluded it was not in the interests of justice to grant the relief sought (although it did not use those precise words). More generally, the brevity of the ET's reasoning had to be seen in the light of what was known by the parties. As for the specific points raised by the second ground, having expressly referenced the claimant's medical issues, the ET permissibly considered it relevant that he had nevertheless been able to prepare and provide detailed paperwork; it could be inferred that the ET had found that the claimant could produce a witness statement but had chosen not to - this was a case of deliberate and persistent failure to comply with the ET's orders. As for the effect on the claimant of striking out his claim, that would have been self-evident; as was the extent of any prejudice to the respondent (a charity with limited means, having to spend time and (unrecovered) costs on a case concerning allegations stretching back over many years). Although the question whether a fair trial was still possible was not expressly addressed, that was not determinative (although, again, the difficulties for the respondent were obvious and had been referenced at paragraph (11) of the Khalil ET decision).

31. As for ground three and the question of the unpaid costs award, that was a relevant consideration and it was not wrong in principle to make a costs award the subject of an unless order. In any event, the claim would probably have been dismissed pursuant to the unless order even had the claimant paid the costs/provided a convincing explanation as to why he could not pay: the failure to comply with the unless order in respect of the witness statement was sufficient for relief from sanction to be refused.

32. Finally, in respect of ground four, a finding of irrationality must pass a high threshold and the appeal did not meet this: it could not be said that the medical evidence demonstrated that the claimant could not produce a witness statement, and that was not something that could be inferred from the background; the ET reached a permissible conclusion that the claimant could and should have produced a witness statement, notwithstanding any medical issues (or at least indicated when he could do so). It had equally reached a justified decision on costs.

The legal framework

*The **ET Rules** and the making of unless orders, deposit orders and costs orders*

33. Rules of procedure in the ET are (relevantly) set out within schedule 1 of the **Employment Tribunal**

(Constitution and Rules of Procedure) Regulations 2013 ("ET Rules"). In interpreting or exercising any power given to it under these rules, the ET is required to seek to give effect to the overriding objective, as provided by rule 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. ..."

34. Under the heading, "*Case Management Orders and Other Powers*", the ET is provided with a general power of case management (rule 29) as well as various more specific powers, dealing with matters such as disclosure (rule 31) and witness and third party disclosure orders (rule 32). As part of the ET's procedural armoury, by rule 38 it is then provided with the power to make an unless order, as follows:

> "(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.
> …."

35. Although rule 38 does not specify (or limit) the nature of the orders to which it might be applied, the decision whether or not to impose such an order (and, if so, on what terms) must be taken in accordance with the overriding objective (rule 2), appreciating that it is effectively a conditional judgment, dismissing the whole or part of a claim or response without any further order; see the observations made by His Honour Judge David Richardson in **Wentworth-Wood v Maritime Transport Ltd** UKEAT/0316/15 at paragraph 5, where he cautioned that:

> "Care is required before making such an Order because of its drastic effect: **Marcan Shipping (London) Ltd v Kefalas and another** [2007] 1 WLR 1864 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, ..."

36. Where the ET considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it has the separate power, provided by rule 39, to make a deposit order, such that (relevantly):

> "(1) ... it may make an order requiring a party ('the paying party') to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
> (2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
> (3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.
> (4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. ..."

37. In **Hemdan v Ishmail and anor** [2017] IRLR 228 EAT, it was made clear that the purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage their pursuit by requiring a sum to be paid (and by creating a risk of costs if the claim ultimately fails):

> "11. The purpose is emphatically not, in our view, ... to make it difficult to access justice or to effect a strike out through the back door. The requirement to consider a party's means in determining the amount of a deposit order is inconsistent with that being the purpose, ... Likewise, the cap of £1,000 is also inconsistent with any view that the object of a deposit order is to make it difficult for a party to pursue a claim to a Full Hearing and thereby access justice. There are many litigants, albeit not the majority, who are unlikely to find it difficult to raise £1,000 by way of a deposit order in our collective experience."

38. Under the heading "*Costs Orders, Preparation Time Orders and Wasted Costs Orders*", the **ET Rules** set out the ET's powers in relation to costs. A costs order may be made on the ET's own initiative or on the application of a party (up to 28 days after the promulgation of the final judgment), provided the proposed paying party has been given a reasonable opportunity to make representations (rule 77). Such an order may be made where (most relevantly) the ET considers that a party (or their representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either bringing the proceedings (or part) or in the conduct of those proceedings (or part), or if the claim or response had no reasonable prospect of success, or if a hearing had to be adjourned on a party's application on less than seven days' notice (rule 70(1)). The order may be for a specified amount not exceeding £20,000 in respect of the receiving party's costs, or for the whole or a specified part of that party's costs determined by way of a detailed assessment (rule 78); in either event, the order must be compensatory in nature: the ET's costs jurisdiction is intended to enable it to ensure that, in appropriate cases, the recipient is compensated in costs, it is not a punitive sanction (**Lodwick v Southwark London Borough Council** [2004] EWCA Civ 306, [2004] IRLR 554 at paragraph 23; **Beynon and ors v Scadden and ors** [1999] IRLR 700 EAT at paragraph 31).

39. By rule 84, it is provided that:

> "In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay."

As rule 84 thus makes clear, the ET *may* have regard to a paying party's means but it is not required to do so. Notwithstanding the discretion thus permitted, as the ability to pay might go to the exercise of the ET's discretion to make a costs award, it has been held that, if it is decided not to take means into account, the ET ought to explain why, see **Jilley v Birmingham & Solihull Mental Health NHS Trust** UKEAT/0584/06. As with any sum payable in pursuant of an ET decision, a costs award is enforceable in the County Court (section 15(1) **Employment Tribunals Act 1996**).

Unless orders: relief from sanction

40. Where there has been non-compliance with an unless order, in determining whether to grant a party relief from the resulting sanction of dismissal, the question for the ET is whether it would be in the interests of justice to do so. Considering the approach that an ET is to take in determining this question, in **Governing Body of St Albans Girls' School v Neary** [2009] EWCA Civ 1190, [2009] IRLR 124, the Court of Appeal (per Smith LJ, with whom Ward and Sedley LJJ concurred) made clear that there is no particular checklist of factors; rather, the ET must consider all the factors relevant to the interests of justice and avoid considering irrelevant ones; the decision whether to grant relief must be rational, not capricious; but what factors or circumstances are relevant to a decision will always be case sensitive (see paragraphs 47-50).

41. As for the explanation provided by the ET, it is not under any duty expressly to set out its views on every one of the factors considered, rather (per Smith LJ at paragraph 52 **Neary**):

> "... Litigants are entitled to know why they have won or lost and appellate courts must be able to see whether or not the judge has erred. In a case of this kind, it seems to me that the basic requirements are that the judge must make clear the facts that he has regarded as relevant. He must say enough for the reason for his decision to be understood by a person who knows the background. In a case where the draconian sanction of strike-out has been imposed, it will be necessary for the judge to demonstrate that he has weighed the factors affecting proportionality and reached a tenable decision about it. That does not mean that he must use any particular form of words. Any requirement for a particular form of words leads readily to the adoption of them as a mantra. But it must be possible to see that the judge has asked himself whether in the circumstances the sanction had been just."

In **Neary** itself, the ET's reasons were brief, but - "*read against the background known to the parties*" - were held to be adequate, demonstrating that it had "*implicitly and justifiably rejected Mr Neary's claim of confusion*

as quite untenable" (paragraph 56)

42. Although the Court of Appeal in **Neary** thus made clear that deciding what is in the interest of justice will require a case-specific approach, Smith LJ referenced the guidance earlier provided by Sedley LJ in **Blockbuster Entertainment Ltd v James** [2006] EWCA Civ 684, where - in relation to the ET's power to strike out a claim or response - it was stated that there were two cardinal conditions for the exercise of that power:

> "5. ... either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response."

Satisfied that the ET in **Neary** had found there had been a deliberate and persistent failure to provide particulars of the claim, Smith LJ noted that one of the conditions identified by Sedley LJ had thus been made out; in those circumstances, she considered it was difficult to criticise the ET's refusal to grant relief from the sanction of dismissal of the claim:

> "60. ... It is well established that a party guilty of deliberate and persistent failure to comply with a court order should expect no mercy."

In these circumstances, Smith LJ considered the ET had been entitled to give less weight to the effect that the failure to comply had had, or to the impact that the grant of relief would have:

> "62. ... it seems to me that those factors will be far more important in the context of a case of non-deliberate or partially excusable non-compliance. Where the circumstances were such that the failure was at least to some extent excusable, those considerations may well be determinative. However, where the non-compliance is deliberate and persistent, I do not think those factors are likely to be important in the exercise of judgment."

Moreover, Smith LJ considered that was so, notwithstanding that it would have been possible for the ET to have afforded Mr Neary another chance without delaying the hearing date (which had not been set):

> "64. I accept that some judges might have taken that view. (In passing, I observe that any judge who was thinking of allowing another chance would want to feel some degree of confidence that it would be taken and the particulars would be provided promptly thereafter. This judge could have no such confidence as Mr Neary's most recent promise, made on 26 September, had not been kept.) I do not think it could possibly be said that the EJ was wrong not to give another chance. The overriding objective requires that the management of the case should result in the case being dealt with justly as between both parties. It also requires the judge to consider the appropriate use of the resources of the court or tribunal. It is entirely within the overriding objective for a judge to take the view that enough is enough. That stage will more readily be reached in a case of deliberate and persistent failure to comply than one where there is some excuse for it."

43. Welcoming the guidance provided by the Court of Appeal in Neary, in **Thind v Salvesen Logistics Ltd** [2010] UKEAT/0487/09 Underhill P (as he then was) summarised the approach to be taken as follows:

> "14. ... The tribunal must decide whether it is right, in the interests of justice and the overriding objective, to grant relief to the party in default notwithstanding the breach of the unless order. That involves a broad assessment of what is in the interests of justice, 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."

44. In **Thind**, the EAT considered that the ET had erred in failing to hold a review hearing, and went on to find that, in circumstances in which the default was due to "*straightforward oversight*", the claimant ought to be afforded relief from sanction in that case, albeit Underhill P made clear:

> "36. ... all these cases turn on their own facts. I certainly would not wish it to be thought that it will be usual for relief to be granted from the effect of an unless order. Provided that the order itself has been appropriately made, there is an important interest in employment tribunals enforcing compliance, and it may well be just in such a case for a claim to be struck out even though a fair trial would remain possible. ..."

The approach of the EAT

45. As for the approach I am to adopt, in **Neary**, Smith LJ provided the following guidance:

> "49. It is often said that decisions of this kind are discretionary. It seems to me that a decision such as this is not so much an exercise of discretion as an exercise of judgment. But this may be a distinction without a difference in that, in both cases, there is a duty on the judge to decide the case rationally and not capriciously and to make his decision in accordance with the purpose of the relevant legislation, taking all relevant factors or circumstances into account. He must also avoid taking irrelevant factors into account. In both cases there may be two correct answers or at least two answers which are not so incorrect that they can be impugned on appeal. Whereas with the exercise of discretion, the question will be whether the judge's decision was permissible on the evidence, with an exercise of judgment, the question will be whether his decision was fair. But provided that the judge has met these requirements, his judgment should not be impugned merely because the appellate court would or might have reached a different conclusion."

46. More generally, I bear in mind the guidance provided in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672, [2021] IRLR 1016 at paragraphs 57-58; in particular, I note that, when an ET has correctly stated the

legal principles, an appellate court should be slow to conclude that it has not applied those principles, and should generally only do so when it is clear from the language used that a different principle has been applied to the facts found – a presumption that ought to be all the stronger where the decision is that of an experienced, specialist tribunal, applying very familiar principles whose application forms a significant part of its day-to-day judicial workload.

47. I further keep in mind the requirement on the ET to provide reasons for any decision, as stated by rule 62 **ET Rules**, albeit, by sub-paragraph (4), it is made clear that:

> "(4) The reasons given for any decision shall be proportionate to the significance of the issue and for decisions other than judgments may be very short."

Analysis and Conclusions

The ET's reasoning and my approach

48. The claimant's letters of 29 December 2021 had asked the ET to reconsider the unless order; a request made prior to the dismissal of his claim and the notice confirming that dismissal, although it seems this did not reach the Employment Judge until some time thereafter. In any event, the ET approached this as an application to set aside the order pursuant to rule 38(2) **ET Rules**. The test it was thus required to apply was whether it would be in the interests of justice to set aside the unless order, and thereby grant the claimant relief from the sanction of the dismissal of his claim.

49. The reasoning provided by the ET does not, in terms, refer to the "*interests of justice*"; this is, therefore, not a case where (*per* **DPP v Greenberg**) there can be a presumption that the ET applied the correct test because it is expressly referenced in its reasons. That, however, need not be fatal: if it is nevertheless apparent that the ET's decision was made with the interests of justice in mind, its failure to set out the test in its reasons might be unhelpful but does not mean it necessarily erred in law. Moreover, as was made clear in **Neary**, there was no checklist of factors that the ET was required to go through in its reasoning, and I do not infer that a failure to expressly refer to the effect of the sanction on the claimant means that the ET lost sight of the obvious fact that the dismissal of the claim meant he would no longer be able to pursue his complaints to trial. In reading the ET's decision, I also need to bear in mind that it was entitled to take a proportionate view as to the length of the explanation provided (rule 62(4) **ET Rules**). That was particularly so as the decision was to be read (*per* **Neary**) *"against the background known to the parties"*.

50. When reading the ET's reasons in this instance, the parties were aware of the procedural history summarised at paragraphs 6 to 19 above. That history did not, however, suggest a clear correlation between the claimant's health issues and his ability to engage with the ET proceedings: his claim had been presented prior to his diagnosis, but was inadequately particularised; he had been able to participate in ET hearings and respond to ET orders from August to December 2019, notwithstanding the onset of his illness and the start of his treatment. Accepting that the claimant no doubt experienced varying symptoms at different times (from both his illness and the different stages of his treatment), there was no clear medical evidence that explained these apparent fluctuations in his level of participation and compliance. Moreover, although the Khalil ET had acknowledged the apparent impact of the claimant's ill-health on his ability to draft a witness statement for (what should have been) the full merits hearing in June 2021, the explanation subsequently provided by the claimant for not being able to serve his statement by the later 6 August 2021 deadline related to issues with his feet, not chronic fatigue or his ability to concentrate. The unless order had thus been made against a background (well known to the parties) of intermittent participation by the claimant, with various examples of non-compliance with ET orders, including an unreasonable failure to produce a witness statement for the original listing of the trial of his claims resulting in that hearing having to be adjourned (notwithstanding what was acknowledged to be the likely prejudice to the respondent). The seriousness of the position would have been all the more obvious to the claimant given that the importance of compliance with ET orders had been reiterated when an extension of time had been granted on 13 February 2020, and he had then been made the subject of a costs order when the June 2021 hearing had to be adjourned. When determining whether to grant relief from sanction in May 2022, the ET was not required to set out this history; it was entitled to explain its decision on the understanding that these were matters that the parties had well in mind.

51. Against that background, the ET's reasoning focused on the more immediate explanation provided by the claimant for his failure to comply with the terms of the unless order. In so doing, I do not consider that it failed to have regard to the fact that there was still some time before the re-listed trial of the claims. That was a relevant consideration but it was not determinative (*per* **Thind**), and it is apparent that the ET considered that the history of the proceedings meant that the unless order had been necessary as it "*was appropriate to seek to move this case forward*". Given that this was a case that dated back to January 2019, had taken up considerable resources (with four preliminary hearings, one of which took the place of an earlier aborted trial),

and it had previously been recorded that the respondent was concerned about the passage of time (in particular as at least two of its witnesses were no longer in its employ), it was plainly permissible for the ET to give weight to this history; it was a relevant consideration in determining what was in the interests of justice in this regard and the ET was best placed to determine what weight to give this factor when deciding what was the just way of proceeding.

Relief from sanction: the witness statement

52. Focusing first on the claimant's failure to comply with the requirement to produce his witness statement by 30 December 2021, I do not consider that the ET's decision can be said to have been irrational (the point made under ground 4 of the appeal). The medical evidence did not address the question as to whether, over a period of over six months, the claimant might have been able to draft a witness statement setting out his case before the ET. And, to the extent that there was some evidence relating to the last two months of that period, it did not clearly evince an inability to finalise a statement for the ET proceedings: although the letter of 10 December 2021 referred to the claimant having reported that his studies had been affected by fatigue and problems concentrating, the earlier letter of 9 November 2021 had spoken of some improvement in his chronic fatigue. This is not a case where the ET ignored the claimant's vulnerabilities, but, allowing that the claimant had still had some symptoms of chronic fatigue, the ET also permissibly took account of the fact that he had been able to provide a detailed response (in the form of the two letters of 29 December 2021) within the compliance period. The clear implication of its reasoning was that it had found that the claimant had consciously chosen not to start the preparation of his witness statement in good time (hence its reference to the initial date for compliance) and, subsequent to the unless order, had then made the further choice to use his energies in drafting a detailed response to that order rather than focusing on compliance with it. On the evidence available, and given the procedural history, those were not perverse conclusions.

53. Returning to the questions posed by the first and second grounds of appeal, insofar as it was concerned with the claimant's non-compliance with the requirement to serve his witness statement before 30 December 2021, I consider that the ET's reasoning shows that it had the interests of justice very much in mind. While it would always be preferable for an ET to set out the relevant legal test, seen in context - encompassing both the

non-compliance evidenced by the procedural history, and the view the ET had formed as to the deliberate choice the claimant had made in terms of his response to the unless order - the decision reached demonstrates an entirely fair assessment of where the interests of justice lay in this case. In reaching that decision, I do not infer that the ET lost sight of the obvious impact of its decision on the claimant, or that it failed to take account of the fact that there was still some time before the re-listed hearing; given its view as to the deliberate choices made by the claimant, it was, however, entitled to see those factors as less compelling in assessing where justice lay (see **Neary**, applying **Blockbuster v James**, and **Thind**).

Relief from sanction: the costs award

54. The second part of the unless order required that, by 30 December 2021, the claimant pay the sum due to the respondent (£1,875) pursuant to the costs judgment dated 21 June 2021. Refusing the application to set aside the order, the ET also rejected the claimant's explanation as to why he had not been able to comply with this requirement. The decision in relation to this aspect of the unless order seems to me, however, to be more problematic.

55. I first note that, in giving its costs judgment - sent to the parties on 30 June 2021 - the Khalil ET had set no date for payment; in making its award, the ET had carried out a summary assessment of the costs due, and had taken into account the claimant's evidence of his means, but had otherwise left the question of enforcement to the respondent to take forward in the County Court (the course open to it pursuant to section 15(1) **Employment Tribunals Act 1996**). At the same hearing, the ET had ordered deposits to be paid by the claimant, as a condition of his continued pursuit of certain (not all) of his claims. No doubt mindful of the guidance provided in **Hemdan**, having regard to the claimant's means, the ET set those deposits at £10.00 each (£30 in total). In making its costs award, and in imposing a deposit order on the claimant, the Khalil ET had different purposes in mind: the costs order was intended to compensate the respondent for the wasted costs relating to the full merits hearing that had to be aborted because of what the ET found to be the claimant's unreasonable conduct; the aim of the deposit order was to discourage the claimant's pursuit of claims that (in the view of the Khalil ET) had little reasonable prospect of success. By making the Khalil ET's costs award the subject of the later unless order, the Abbott ET effectively turned the award into a form of deposit order: if the claimant failed to pay the sum in question (£1,875) by 30 December 2021, his claim would be dismissed.

56. Accepting that rule 38 **ET Rules** does not specify the type of orders to which it might apply - and, therefore, does not exclude the possibility that a costs award might be the subject of an unless order - it seems to me that it would be rare for the making of such an order to be consistent with the overriding objective. Certainly, such an order would generally be counter to the aim of ensuring that the parties were on an equal footing, and - given the ET's ability to make deposit orders in appropriate cases - it would seem unlikely to be a proportionate step in most proceedings. By making a costs award the subject of an unless order, the paying party would have to pay the costs due as a condition of pursuing their claim or defence to trial. Although the **ET Rules** provide for a means of imposing such a requirement - through a deposit order under rule 39 - the safeguards that are in place in that context are not replicated in the rules relating to costs. Thus, while rule 39 requires the ET to make reasonable enquiries into the paying party's ability to pay, and to have regard to that information when deciding the amount of the deposit (itself limited to £1,000), there is not the same obligation in relation to costs (rule 84 being permissive in this regard; albeit that an ET ought to explain why it has not taken means into account, *per* **Jilly**). Moreover, a costs award may be imposed (for example) in respect of the unreasonable conduct of a party in relation to the proceedings, or a part of those proceedings, and need say nothing about the merits of the claim or response. Making the pursuit of what might be an entirely meritorious claim or defence conditional upon the payment of a costs award would plainly place the paying party at a particular disadvantage notwithstanding the possible strength of their case. Again, this can be contrasted with the deposit order regime, where the ET will have formed a preliminary view as to the merit of the claim or response, considering that it has little reasonable prospects of success.

57. The present case provides a good example of why it would generally be inapt to make a costs award the subject of an unless order. First, the Khalil ET had carried out a summary assessment of the merits of the claimant's claims and had determined that deposit orders should be made in respect of some, but not all, of his complaints: it had not felt able to say that the claimant's claims of protected disclosure detriment and of constructive unfair dismissal had little reasonable prospects of success. Second, to the extent it had considered it appropriate to make deposit orders, having regard to the claimant's means, the Khalil ET had set these at £10 each, and had given the claimant 28 days to pay (subsequently extended by some seven days). Third, the Khalil ET had not seen fit to set a time within which the costs award had to be paid. The inference I draw is that it considered that this would be a matter to be determined on enforcement - it being open to the County

Court to order payments by instalment or to consider other alternative means of ensuring the award was paid. By making the costs award the subject of the 13 December 2021 unless order, the Abbott ET had made payment of the sum of £1,875, within less than 20 days, a condition of the claimant's continued pursuit of claims that either had reasonable prospects of success or in respect of which he had already paid the deposits previously ordered. In my judgement, by effectively turning the costs award into a further deposit order, absent application of the safeguards required by rule 38, the Abbott ET failed to deal with this case fairly or justly.

58. The injustice arising from this aspect of the unless order ought to have been all the more apparent to the Abbott ET when considering the claimant's application of 29 December 2021. Although, as the ET observed in its decision of 25 May 2022, the claimant's means had been taken into account when the costs award had been made in June 2021, the letters of 29 December 2021 made clear that there had been a material change in circumstances in this regard. Specifically, the claimant made the point that - contrary to what he had hoped when giving evidence about his means to the Khalil ET in mid-June 2021 - his ill-health had meant he had been unable to work during the summer vacation period; an assertion supported by his submission of fit notes attesting to his inability to work between 8 July and 11 October 2021. The claimant had also explained that he had had to use his student maintenance loan to pay accommodation costs. The Abbott ET's failure to engage with this information (and, worryingly, its suggestion that the claimant had omitted to demonstrate an inability to take paid employment after 11 October 2021, when the Khalil ET's assessment of his means had implicitly accepted that he would then be studying full-time and unable to work) gave rise to a clear error of law. Not only did the Abbott ET fail to have regard to a relevant factor (the change in the claimant's circumstances that went to the question of his ability to pay the costs award at that time), it plainly failed to ask itself what was in the interests of justice: certainly, it was perverse to consider that it could be just to refuse to set aside this aspect of the unless order when its effect was to impose a condition on the claimant with which he was simply unable to comply.

My decision

59. For the reasons provided, while I consider the claimant's appeal is not made out in relation to the ET's decision relating to his failure to comply with the requirement relating to the provision in his witness statement, I take a different view in respect of that aspect of its decision that relates to the failure to pay the costs award.

The claimant says this must mean that the ET's decision to refuse relief from sanction must be set aside in its entirety; he contends that the decision in relation to the costs award demonstrates that the ET failed to apply the relevant test and that this aspect of its reasoning cannot properly be separated out from its approach to the witness statement. For the respondent, however, it is said that, even if the ET's decision is set aside in respect of the failure to pay the costs award, it is apparent that it would have declined to grant relief from sanction in relation to the claimant's non-compliance with the requirement to provide his witness statement.

60. On this question, I consider the respondent is correct. I have not found that the ET failed to apply the correct test when considering the claimant's non-compliance with the requirement to serve his witness statement; on the contrary, on this point, I am satisfied that it had the interests of justice firmly in mind and reached a fair assessment as to where those interests lay in this case. My conclusion in this regard is not undermined by what I have found to be the ET's error in respect of the costs award. Furthermore, it seems to me clear that, like the claimant (who, on 29 December 2021, had written separate letters relating to the two requirements), the ET approached the two parts of the unless order separately. Its reasoning first relates to the witness statement, and it is apparent that it considered the claimant's non-compliance in that regard entirely independently from his failure to comply with the costs award. Had it not erred in its approach to the question of costs, and had set aside that aspect of the unless order, the requirement to have served the witness statement by 30 December 2021 would have remained, and the ET's reasons for refusing relief from sanction in that regard would still have held good, demonstrating that it had reached a fair decision as to where the interests of justice lay. On that basis, I therefore consider that the claimant's appeal must fail.