# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms. HM Angus**

**Respondent:** **Academy Enterprise and Trust**

**Heard at:** **Cloud Video Platform (Midlands East Region)**

**On:** **17th September 2024**

**Before:** **Employment Judge Heap (Sitting alone)**

**Representation**
**Claimant:** **Mr. W Brown - Solicitor**
**Respondent:** **Ms. K Sheridan – Counsel**

# JUDGMENT AT A PUBLIC PRELIMINARY HEARING

The application for relief from sanction made by the Claimant is refused and the claim stands as dismissed.

# RESERVED REASONS

## BACKGROUND & THE ISSUES

1. This hearing was listed to consider what had been determined by Employment Judge Adkinson to be an application made by the Claimant for relief from sanction. That followed the Claimant's failure to comply with the terms of an Unless Order which Employment Judge Shore had made at an earlier Preliminary hearing in January 2024 and which saw the whole of the remainder claim dismissed as a result. I come to the detail of that Unless Order below including the circumstances in which it came to be made and the events following that Preliminary hearing. There is, in that regard, a lengthy and somewhat complex history which needs to be set out in full as it has invariably informed the decision that I have made today.

## THE HEARING

2. The hearing was conducted by Cloud Video Platform ("CVP"). There were technical difficulties on the Tribunal's part which meant that I was initially able to join the hearing but no-one could see or hear me. Relocating to the hearing centre eventually resolved that position although approximately one hour of hearing time was lost as a result for which I again apologise to the parties and thank them for their patience. During the time that my clerk was making the

alternative arrangements to enable me to successfully join the hearing I was able to conclude my reading in of the necessary documents, including the helpful outline submissions made by Mr. Brown on behalf of the Claimant and Ms. Sheridan on behalf of the Respondent.

3. Once the initial technical difficulties had been resolved no further issues arose and I am satisfied that we were able to have a fair and effective hearing.

4. The hearing had been listed for three hours of hearing time. Whilst there was sufficient time to hear submissions and to make my decision, there was insufficient time available to deliver oral reasons. I therefore delivered my decision to the parties but reserved the reasons which were to follow.

**BACKGROUND TO THE MAKING OF THE SHORE UNLESS ORDER**

5. I have taken this narrative as to the history of these proceedings directly from the Orders of Employment Judge Shore made on 15th January 2024. Neither party has suggested that there is any error in that narrative. Employment Judge Shore recorded the history of the proceedings as follows:

*"This case has a long and complex history. I have put this summary together as it may assist the tribunal and the parties at the final hearing. Some of the history is taken direct from the case management orders from pervious (sic) preliminary hearings. This claim is the claim number for all claims following the consolidation of five claims presented by the claimant in the East Midlands, South East and London Central Regions. All claims were consolidated. The claim presented in South East Region (330-0391/2021) was struck out by Employment Judge Ord in a judgment sent to the parties on 10 January 2022. The case was struck out because the claimant had failed to comply with tribunal orders and had failed to actively pursue her case.*

*The claimant started early conciliation with ACAS in respect of this claim (2600051/2022) on 30 May 2022 and obtained a conciliation certificate on 8 June 2022. The claim was presented on 27 June 2022. At the time that the claim was presented, the claimant was represented by Daniel Ibekwe of Brighton & Hove Race Project. The claimant claimed race and disability discrimination.*

*The claimant was employed by the respondent at Sir Herbert Leon Academy between 4 May 2020 and 26 August 2020, latterly as Assistant Principal and Designated Safeguarding Lead. The claimant is a teacher. The respondent operates more than 50 academies across England.*

*On 27 June 2022, the claimant submitted an amended Particulars of Claim without the leave of the court or agreement of the respondent. The amended particulars appeared to withdraw the claimants claims of race discrimination. I cannot see that a formal Judgment recording the withdrawal has ever been prepared, so I have prepared one. Claims of breach of contract and automatically unfair dismissal (section 103A of the Employment Rights Act 1996) and detriment (section 47B Employment Rights Act 1996) for making protected disclosures (whistleblowing) were also struck through in the amended Grounds of Resistance but the claim for detriment because of whistleblowing remains.*

*The respondent applied for strike out or deposit in respect of several of the claims.*

*A preliminary hearing was held before Employment Judge Michael Butler on 25 January 2023, who produced a Judgment and case management order dated 6 February 2023. The claimant was represented by Mr Ibekwe. The hearing considered the four remaining cases – 2600051/2022 (this case); 2203812/2022; 2602094/2022; and 3311589/2022.*

*EJ Michael Butler's Judgment:*

*Dismissed claim 3311589/2022;*
*Struck out claim 2602094 entirely; and*
*Struck out parts of claim 2600051/2022.*

*EJ Butler made several case management orders, the most significant of which for today's hearing was at paragraph 2:*

> **"By 23 March 2023, the Claimant shall send to the Respondent up to date medical evidence of her ASD to include her GP records from 1 January 2019 onwards. She must also send to the Respondent a detailed impact statement giving information as to how her alleged disability affects her ability to carry out normal day-to-day activities".**

*The respondent presented its ET3 in case number 2600051/2022 and Grounds of Resistance on 23 February 2023, as ordered by EJ M Butler.*

*On 11 April 2023, the claimant made an application by e-mail for stay in the proceedings, including a stay on all case management orders on the grounds that her representative, Mr Ibekwe, had passed away suddenly on 28 March 2023. The claimant said she had no access to the documents in the case, which were with Mr Ibekwe's family, and would not be released to her until his family "had finished examining his possessions". Mr Ibekwe's death also left the claimant without a representative.*

*The respondent replied on 12 April 2023 opposing the application for a stay. It suggested varying the order of EJ M Butler.*

*On 27 April 2023, Employment Judge Victoria Butler refused the application for a stay, but varied EJ M Butler's order as* follows:

> *"The Claimant has until **12 June 2023** to send to the Respondent up-to-date medical evidence of her ASD to include her GP records from 1 January 2019 onwards and a detailed impact statement giving information as to how her alleged disability adversely affects her ability to carry out normal day-to-day activities; and*
>
> *The Respondent has until **26 June 2023** to notify the Claimant and the Tribunal as to whether it concedes organise the claimants ASD is a disability."*

*On 12 May 2023, a further preliminary hearing was held before EJ Michael Butler, which produced a case management order dated 12 May 2023, which was sent to the parties on 8 June 2023. The claimant had not complied with the order to produce an impact statement and GP records but the extension to the order had not yet expired. The claimant was represented by Mr. John Neckles, a trade union advisor but did not attend the hearing herself. EJ M Butler made the following comments:*

> *"Sadly, Mr Ibekwe, who previously represented the Claimant died on 29 March 2023. This has left the claimant in a difficult situation although it seems nothing has been done to progress her claims since then. It is hoped that the Claimant's GP has been requested to send her medical records so there will be no further delay. Certainly, with a timely request made after the last hearing, those records should have been received by now. It is, of course, for the claimant herself to request them."*
>
> *"I asked Mr Neckles to impress upon the Claimant that the Tribunal's orders must be complied with. An extension has been granted by Employment Judge Victoria Butler to provide the medical records. Further delays may ultimately prejudice the final hearing proceeding next April as listed and non compliance with orders may also lead to her claims being struck out".*

*EJ M Butler made further case management orders (paragraphs 3 and 4 of the order) that required:*

- *The parties to exchange lists of documents by 13 October 2023;*
- *The parties to send each other copies of those documents by 20 October 2023;*
- *The respondent to prepare an index and bundle by 1 December 2023; and*
- *The parties to exchange witness statements by 26 January 2024.*

*A further preliminary hearing was listed for 27 July 2023 by a Notice dated 13 May 2023. The Notice was sent to the claimant personally.*

*On 15 June 2023, the respondent emailed the Tribunal, copying the claimant and Francis Neckles, noting that the extended date for the claimant to produce an impact statement and GP records had passed and quote in the comments of EJ M Butler that were made at the preliminary hearing of 12 May that I've reproduced above. The respondent asserted that this was not the first time that the claimant had failed to comply with an order of the Tribunal on time and requested an Unless Order (an order that unless a party does something by a specified time, some or all of their claim or response may be struck out).*

*The respondents e-mail said that Francis Neckles had confirmed on 4 June 2023 that he was assisting the claimant with her claim until she found alternative representation. The respondent said it had forwarded Mr Neckles*

*the relevant documentation on 5 June 2023 and had emphasised the upcoming 12 June deadline.*

*In response, Employment Judge Heap made an Unless Order on 21 June 2023 as follows:*

> ***"Unless by 4:00 PM on 30th June 2023 the claimant complies with paragraph 2 of the Orders of Employment Judge Victoria Butler sent to the parties on 1st March 2023 all complaints of disability discrimination will stand dismissed without further Judgment or Order.***
>
> ***The Judge's reasons for making this Order are that the Claimant has not complied with the Order of Employment Judge Victoria Butler nor subsequent Order of Employment Judge Michael Butler to provide medical evidence and an impact statement and the disability discrimination claim cannot progress until she does so. No explanation has been provided as to why this latter set of Orders has not been complied with and no reasons given why an Unless Order should not be made in reply to the Respondent's application."***

*The order was emailed to Francis Neckles and the respondents representative at 10:14 am on 22 June 2023 (no copy of e-mail in bundle - date taken from ET digital file). At this hearing, the claimant confirmed that she had been advised by John and Francis Neckles of her trade union. I will return to the point she made about her representation below.*

*On 26 June 2023, the respondent emailed the tribunal, copying Francis Neckles and the claimant, noting that the claimant had failed to provide her GP records and sought to strike out for failure to comply with EJ Heap's Unless Order.*

*On 18 July 2023, the Tribunal sent the respondent and Francis Neckles a Notice Confirming Dismissal of Part of Claim, which stated:*

> *"Further to the Unless Order sent to the parties on 22 June 2023 Employment Judge Ahmed direct us to notify the parties that because the Order was not complied with all complaints of disability discrimination have been dismissed under Rule 38.*
>
> *The claimant may apply in writing within 14 days of the date of this notice to have the unless order set aside, on the basis that it is in the interests of justice to do so."*

*On 21 July 2023, John Neckles emailed the tribunal, copying the respondent and Francis Neckles with an application to postpone the preliminary hearing listed for 27 July on the following grounds:*

- *The death of Mr Ibekwe;*
- *Both John and Francis Neckles were on pre booked annual leave abroad on 27 July. They were the only two representatives the PTSC union available;*

- *The union had sought assistance from a lay representative, who was not available: and*
- *No prejudice would be caused to the respondent.*

*The application was considered and refused by EJ M Butler. His decision was sent to the parties (including the claimant direct) at 11:56 am on 26th July 2023.*

*The claimant attended the hearing on 27 July 2023 before EJ M Butler in person. In the first paragraph of the order, EJ M Butler noted that since the last preliminary hearing on 12 May "… the claimants discrimination claims were dismissed following her failure to comply with the Tribunal's orders and a subsequent unless order." The claimant indicated that she intended to apply to set the Judgment dismissing her discrimination claims aside, which she was still in time to do.*

*Amongst other things come up the claimant was ordered to provide a Schedule of Loss by 29 August 2023 and further information required to complete the List of Issues by 19 August 2023.*

*On 28 July 2023, the point the Claimant wrote a letter to the Nottingham Justice Centre headed "Request to have unless order set aside". I will return to the details of the letter below.*

*The respondent wrote to the Tribunal, copying the claimant on 4 August 2023 opposing the application. The letter was an attachment to an e-mail dated 16 August 2023. I will return to the details of the letter below.*

*The claimant's application was referred to Employment Judge Clark, who caused a letter to be sent to Francis Neckles and the respondent of 15 August 2023. EJ Clark directed that:*

> *"Further directions will follow in respect of arrangements for considering the application to set aside the unless order.*
>
> *Please note that the unless order was made by EJ Heap and not EJ Ahmed (who simply directed notice be sent of its consequences on non-compliance).*
>
> *By 29$^{th}$ August 2023 the respondent may, if so advised, provide any comments to the tribunal (and copy to the claimant) on the claimant's application.*
>
> *By 29th August 2023, the claimant must notify the tribunal that she has now complied in full with the original order of E J Butler, that is paragraph two of the order sent to the parties on 1 March 2023. For the avoidance of doubt that required the claimant to do the following:*
>
> *By 23 March 2023, (subsequently extended to 12 June 2023) the Claimant shall send to the Respondent up to date medical evidence of her ASD To include her GP records from 1 January 2019 onwards. She must also send to the Respondent a detailed impact statement giving*

> *information as to how her alleged disability affects her ability to carry out normal day-to-day activities".*

*The claimant submitted an e-mail to the Tribunal, copying the respondent on 28 August 2023. The e-mail stated that it contained two "Files demonstrating impairment", an impact statement, a chronology and a Statement of Loss. Only the Schedule of Loss was included in the bundle.*

*EJ Heap caused a letter sent to Francis Neckles on the respondent on 22 September 2023 directing a preliminary hearing to determine:*

- *The claimant's application to set aside the Unless Order previously made;*
- *If the Unless Order is not set aside to determine whether the Claimant should be granted relief from sanction and the dismissal of her claim for disability discrimination set aside; and*
- *To make any further necessary Orders for the conduct of the claim or the parts of it that remain.*

The letter indicated that a Notice of Hearing would follow.

*The respondent sent an e-mail to the Tribunal, copying the claimant on 3 October 2023 setting out a brief history of all of the claimants claims, noting several examples of failure to comply with Tribunal orders and requesting that an Unless Order be made against the claimant in respect of her failure to provide further information about the List of Issues as ordered by EJ M Butler on 27 July 2023. The further information contained the protected disclosures that the claimant was contending for.*

*The respondents e-mail was copied to Frances Neckles by the Tribunal. The claimant was asked for comments by 20 October 2023.*

*On 24 October 2023, the respondent had emailed the claimant with a copy of the Tribunal's letter of 20 October 2023. The claimant emailed the respondent and "MidlandsWestET" on 30 October 2023 stating:*

> *"I wish to confirm, all documents have been exchanged and shall be relied upon in the final hearing. In addition to this, the remedy has already been submitted in the schedule of loss. I would also wish to use this time to state that given the departure of Jonathan Harris, I would also accept reinstatement following a skills and experience assessment at the Herbert Leon School or another suitable school within the trust."*

*On 22 November 2023, the respondent sent the Tribunal a copy of the claimant's e-mail of 30 October 2023 and renewed the application for an unless order first made on 3 October.*

*The claimant replied to the respondents e-mail on 22 November 2023, copying the respondent. In the email the claimant asked for additional time to seek advice on the emails sent to the claimant on 24 October 2023 and 22 November 2023.*

*On 30 November 2023, the respondent wrote to the Tribunal, copying the claimant, with further information about the unless order applied for. It was*

*alleged that the claimant had still not sent the further information about the alleges (sic) protected disclosures as ordered by EJ M Butler on 27 July 2023 or list and copy documents that were du e (sic) on 13 October 2023 by order of EJ M Butler dated 12 May 2023.*

*The application was considered by EJ V Butler, who, by a letter dated 1 December 2023 ordered a further preliminary hearing to finalise the List of Issues and the claimant "… should provide the further information required from the respondent prior to the hearing. If she does not, the application for an unless order will be discussed at the preliminary hearing".*

*In response to EJ V Butlers letter of 1 December, the respondent wrote to the tribunal on 12 December 2023 to remind it of EJ Heaps orders of 22 September 2023 about the claimant's application to set aside the unless order, which had not been actioned. It was pointed out that the final hearing was listed for seven days to start on 22 April 2024 and disclosure was still not complete. A CVP hearing was requested for 3 hours to determine the issues referenced in EJ Heap's letter of 22 September and revise the case management orders made.*

*A notice of hearing was sent to the parties on 16 December 2023, listing a 90-minute telephone preliminary hearing to "finalise the issues".*

*The respondent renewed its application for a 3-hour CVP on 20 December 2023 and sent copies of correspondence between the parties between 1 September 2023 and 24 October 2023 and all the files that had been attached to the claimant's e-mail at 28 August 2023.*

*The respondent prepared a Preliminary hearing bundle of 198 pages and sent a copy to the tribunal and to the claimant".*

6. That narrative from Employment Judge Shore sets a helpful scene as to what had happened in respect of the claims that the Claimant had issued at that stage and how the matter came before him at the next Preliminary hearing. Employment Judge Shore Ordered a letter to be sent to the parties prior to the Preliminary hearing which was to come before him converting it to a three hour CVP hearing to determine the following matters:

    (a) The Claimant's application dated 28th July 2023 to set and less aside the Unless Order that I had made;

    (b) If that Unless Order was not set aside to consider whether the Claimant should be granted relief from sanction from any strike out that followed the Unless Order;

    (c) The Respondent's application for a further Unless Order of 3rd October 2023;

    (d) The Claimant's compliance with paragraph two of the Order of EJ Butler of 1 March 2023; and

    (e) To determine the claims and issues and to make any further case management orders.

7. Employment Judge Shore determined that there had been non-compliance and he heard from both the Claimant and the Respondent in connection with her application for relief from sanction. That application was refused.

8. The reasons given by Employment Judge Shore in refusing the application for relief from sanction can be summarised as follows:

   (a) The chronology and the fact that the Claimant had had advice in preparing and presenting claims up to June 2023;

   (b) That her criticisms of John and Francis Neckles were not credible and they had never previously been mentioned as a reason for not having complied with the Unless Order;

   (c) That the suggestion that the Claimant had not understood the Unless Order was not credible as she had been represented at the time that it was made and that it was unlikely that Francis Neckles would not have relayed the comments of EJ Butler at the hearing on 12 May 2023 and that the Claimant had never mentioned a lack of understanding before that hearing;

   (d) That the Claimant had been able to produce other documents to a deadline;

   (e) That the Claimant had not provided an impact statement nor a complete set of GP notes;

   (f) That the Respondent was considerably more prejudiced than the Claimant was because if the claims were restored the final hearing then listed to commence in April 2024 would have to be postponed and that would cause additional expense to the Respondent, the Claimant and the taxpayer; and

   (g) It was not in the interests of justice to grant the application.

9. Moving on from that, Employment Judge Shore then dealt with the Respondent's application for further Unless Orders in respect of the remaining part of the claim. The Respondent made an application for three Unless Orders. The first was for the Claimant to provide further information about the protected disclosures that she was relying on as had been Ordered by Employment Judge M Butler on 27th July 2023. The second and third related to disclosure and the exchange of witness statements.

10. Employment Judge Shore granted all three applications. I am only concerned with the first Unless Order because the others only came into play if the Claimant complied with the first of them. If she failed to comply with the first Unless Order the others fell away because the whole of the claim would be dismissed for non-compliance.

11 The terms of the first Unless Order (hereinafter referred to as the Shore Unless Order) were as follows:

> ***"Unless, by 4.00pm on Monday 5 February 2024, the claimant provides the further information ordered by Employment Judge M Butler on 27 July 2023 relating to her claims of whistleblowing, namely:***
>
> ***The date and time of any disclosure that the claimant relies upon;***
> ***The name of the person to whom the information was made;***
> ***What information was disclosed;***
> ***How was the information disclosed (i.e. verbally, by email, by text message, etc.)***
>
> ***all the claimant's claims shall be struck out in their entirety without further reference to the parties or an Employment Judge.***
>
> ***For the avoidance of doubt, compliance with this order requires the claimant to produce all the further information required in each of the four sub-paragraphs of this order."***

12. The Shore Unless Order was in simple terms and clearly set out what was required of the Claimant. It set out exactly what information was required and did not simply refer back to the earlier Orders of Employment Judge M Butler which had not been complied with.

13. The date and time for compliance were underlined in red type.

14. Employment Judge Shore set out his reasons for making the Unless Order at paragraphs 71 and 72 of his case management summary, which were as follows:

> "*I then moved onto the respondent's applications for Unless Orders of 3 October 2023 (in respect of the claimant's failure to provide the further information required to complete the draft List of Issues as ordered on 27 July 2023) and 22 November 2023 (in respect of the list and copies of all documents that the claimant wishes to refer to at the final hearing or which are relevant to any issues in the case, including the issue of remedy as ordered on 12 May 2023.*
>
> *Given the claimant's repeated failure to comply with previous orders, and the proximity of the final hearing, I explained to her why I was going to make the Unless Orders and the consequences if she did not comply would be that her entire claim would be struck out. She said she understood what I had said. I have moved the date for compliance back seven days because of the delay in producing this lengthy order for which I apologise*" (see paragraph 72 of the Case Management summary from the Preliminary hearing of 15th January 2024)

15. In addition to what was recorded at paragraph 72 above, another important part of the Orders of Employment Judge Shore recorded this:

> *"I explained to the Claimant exactly what the order required and what the consequences would be if she failed to comply with it: her whole claim would de (sic) dismissed. She confirmed that she understood".*

16. The Claimant cannot of course have failed to understand what would happen if she did not comply with the Unless Orders because the disability discrimination complaints that she had advanced had already been dismissed for failure to comply with an Unless Order and she had been refused relief from sanction at the very same hearing before Employment Judge Shore.

17. The Claimant did not comply with the Shore Unless Order. Mr. Brown accepts, as I have already observed, that there was material non-compliance. That was a sensible concession.

18. It is worth setting out, however, some of the reasons why that was a sensible concession. In purported compliance with the Shore Unless Order the Claimant set out 19 alleged disclosures. Many of them could not be understood. I list here a few examples:

    (a) Some alleged disclosures did not name the person to whom they had made and relied on references to HR, AET, London HR, "Various including Sir Herbert Leon Academy" and even simply "Letter";

    (b) Some did not have a clear date and relied on "early 2021" and "Various"; and

    (c) A number of the parts completed in relation to "information disclosed" lacked any detail to understand what the information it was said disclosed was. A few examples are as follows:

        (i) My professionals and leadership background is in curriculum and data;
        (ii) Timetable concerns;
        (iii) Multiple examples;
        (iv) I expressed I would be happy to enter into mediation via Beverley Haywood (former representative) but this was ignored;
        (v) Intent to appeal made;
        (vi) Raised concerns with trustees;
        (vii) Probation outcome;
        (viii) Appeal of decision to terminate contract of employment;
        (ix) Appeal outcome; and
        (x) Job applications.

19. On 12th February 2024 the Respondent wrote to the Tribunal to say that the Claimant had not complied with the terms of the Shore Unless Order and asking if the claim was now struck out. They set out their view as to why it was said that the information provided by the Claimant was inadequate.

20. The Respondent's correspondence was referred to Employment Judge M Butler who accepted the submission that there had been non-compliance and that he was striking out the claim. He referred to a Judgment following,

although of course that was not necessary because the effect of non-compliance was to dismiss the claim without the need for further Judgment or Order.

21. A Judgment was nevertheless signed by Employment Judge Adkinson on 26th February 2024 which was sent to the parties on 25th March 2024. That Judgment struck out the remaining parts of the claim and cancelled the three day hearing which had been due to commence on 22nd April 2024. The Claimant applied for Reconsideration of that Judgment. Employment Judge Adkinson supplied his provisional views and that he was considering revoking the Judgment (essentially because it was unnecessary given the automatic dismissal of the claim for non-compliance with an Unless Order) and that he would do so unless the Respondent objected. The Respondent did object but unfortunately that does not appear to have been referred to him. I have now directed that it should be done without delay and understand that he has now dealt with the application. The Claimant has also appealed that Judgment to the Employment Appeal Tribunal ("EAT"). Neither the Reconsideration nor Appeal is a matter for me.

**THE LAW**

22. Where there has been non-compliance with an Unless Order the party in default may apply for relief from sanction. Rule 38(2) Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 deals with such applications and provides as follows:

> *"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".*

23. Whilst it is important for Tribunals to enforce compliance with Unless Orders and should not set them aside too readily so as to undermine their importance, in certain circumstances the interests of justice and the overriding objective will best be served by granting relief to the party in default. Factors to be considered will generally include, but may not be limited to, the reason for the default, and in particular whether it was deliberate; the seriousness of the default; the prejudice to the other party; and whether a fair trial remains possible. No single factor is necessarily determinative, and each case will depend on its facts (see ***Thind v Salvesen Logistics Ltd EAT 0487/09***).

24. Underhill P (as he then was) summarised the approach to be taken as to relief from sanction in **Thind** as follows:

*"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."*

Underhill P also made clear:

*"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 CLAIMANT'S POSITION**

25. I have recorded the submissions made on behalf of the Claimant – and also those on behalf of the Respondent – in relatively brief terms. They can be assured, however, that before taking my decision I have taken into account all that they have told me, the content of their written submissions and the relevant documents to which I have been taken in the hearing bundle.

26. Contrary to the position that the Claimant had adopted in her application for reconsideration in respect of the Judgment of Employment Judge Adkinson where she contended that she had at all times complied with the terms of the January 2024 Unless Order, Mr. Brown sensibly and candidly accepted that she had not. That was an appropriate concession to make as I shall come to in the context of the seriousness of the default.

27. The submissions on behalf of the Claimant can be summarised as follows:

(a) That the Claimant was neurodiverse and had an inability to process information. Whilst Mr. Brown accepted that there was no medical evidence to support that he indicated that his belief was that it was this that had hindered the Claimant in complying with the Shore Unless Order;

(b) That the Claimant was also a litigant in person and she may not have understood what was required of her. Mr. Brown pointed to the fact that the Orders of Employment Judge Shore had not set out exactly what a whistleblowing claim entailed and that he had seen other Orders which had set that out and which may have made it easier for the Claimant to comply if that information had ben included;

(c) That the Claimant had attempted to comply with the Shore Unless Order and had not just ignored it even if she had not provided all of the required information;

(d) That although it was not argued that the default by the Claimant was not serious, that had been remedied now because having taken instructions Mr. Brown had set out the sole protected disclosure which it was said was now relied upon;

(e) That that alleged protected disclosure was discrete and now that it had been detailed the parties were virtually ready for trial and matters could be concluded without too much further delay; and

(f) Now that the Claimant had legal representation there would not be any further issue as to compliance with Orders.

28. Mr. Brown therefore submitted that for all of those reasons the interests of justice merited the application being granted.

**<u>THE RESPONDENT'S POSITION</u>**

29. Ms. Sheridan submitted to the contrary. Again, I have summarised the Respondent's position but have taken everything that has been said into account. In brief, those submissions were:

(a) That there was no medical evidence to demonstrate that the alleged disability relied upon, neurodiversity, had prevented the Claimant from complying with the Shore Unless Order;

(b) That the Claimant had been given the opportunity to file such evidence and also a witness statement upon which she could have been cross examined but she had also failed to comply with that Order;

(c) That there was a wholesale pattern of non-compliance with Orders made, including earlier Unless Orders, which needed to be taken into account;

(d) That it could not now be said that the Claimant did not understand the requirements of the Shore Unless Order because it was clear from what was said by Employment Judge Shore in the Orders themselves that they had been explained to the Claimant and that she had specifically said that she understood what was required;

(e) That the case was not trial ready as was suggested by Mr. Brown. The fact that the protected disclosure had now been identified was only one part of the picture and there would need to be further enquiry as to the alleged detriment etc;

(f) That the Respondent ought not to be continued to incur additional costs which could best be used elsewhere to the benefit of the pupils that it served;

(g) That the Respondent was prejudiced if relief from sanction was granted because a number of potential witnesses had left the Respondent, including Jonathan Harris - the person who it is said that the sole alleged protected disclosure had been made to;

(h) That there was going to be a further delay in relisting the hearing which probably would not be for at least six months and the cogency of the evidence

was already being compromised;

(i) That a fair hearing was no longer possible and certainly not within the previous hearing dates allocated which had been vacated by Employment Judge Adkinson because of the Claimant's non-compliance; and

(j) That in all events the Claimant was seeking to rely on an alleged disclosure made on 26th September 2020 and witnesses were going to be asked by the time of trial to give evidence about a disclosure and events of over four years ago. That also rendered a fair trial impossible.

**CONCLUSIONS**

30. In dealing with the application for relief from sanction I have considered the guidance provided in **Thind** and the factors to be considered which will generally include, but may not necessarily be limited to, the reason for the default, and in particular whether it was deliberate; the seriousness of the default; the prejudice to the other party; and whether a fair trial remains possible.

31. All of those matters are inherently problematic for the Claimant although Mr. Brown has argued her case ably and as best as he possibly could have given the circumstances, background and extent of her default.

32. Many of the issues which I have considered today resonate with the position adopted by the Claimant at the hearing before Employment Judge Shore, but I have nevertheless considered the position afresh in respect of non-compliance with the Shore Unless Order.

33. The first issue relied on by Mr. Brown is that the Claimant is neurodiverse and that it may be that that condition had prevented her complying with the Shore Unless Order. Matters are put no higher than that because there is no evidence in support of that position.

34. It is in that regard somewhat surprising if the Claimant's neurodiversity was said to be to blame for her failure to comply with the Shore Unless Orders that she has not produced medical evidence to that effect, not least in light of the fact that one reason that Employment Judge Shore refused relief from sanction in respect of the earlier Unless Order that I had made was that there was no cogent medical evidence. The Claimant cannot have failed in view of that to recognise that if she was relying on neurodiversity as being the reason for non-compliance, it would be very important to produce medical evidence to that effect. She was given the opportunity to do so by Employment Judge Shore in preparation for the Preliminary hearing today. She again failed to comply with those Orders.

35. As a result of that lack of supporting evidence, I cannot accept that the Claimant's neurodiversity was the reason for non-compliance.

36. I turn then to the second position adopted as to the fact that there may have been a lack of knowledge about how to comply with the Shore Unless Order. I do not accept the submissions of Mr. Brown that the Claimant may not/did not understand the Shore Unless Order. It was made in very clear terms. Moreover, the Claimant has never said that she did not understand what was required until that has been suggested as a reason for non-compliance today. That echoes the position as it was before Employment Judge Shore in respect of non-compliance with my Unless Order where nothing about that was mentioned before submissions were made concerning relief from sanction.

37. Furthermore, the Shore Unless Order was explained to the Claimant very carefully. She was asked clearly if she understood them. She said that she did. If she had not understood I would have expected that she would have told Employment Judge Shore or written to the Tribunal subsequently to ask for clarification. She could also have sought legal advice as she did when instructing Mr. Brown for the appeal to the EAT. What is now said about a lack of understanding flies in the face of what the Claimant told Employment Judge Shore at the 15th January 2024 Preliminary hearing.

38. Whilst I have taken into account Mr. Brown's submissions that the discussion within the case management summary did not set out further details about what was required in a whistleblowing claim, that would have had much more force if any of what the Claimant had been asked to do required her to engage with the legal basis of the claim – for example what part of Section 43B Employment Rights Act 1996 she was contending was engaged or how she was saying that she had a reasonable belief that the disclosure was made in the public interest - but that was not the case. All that she was being asked to do was set out the factual basis for the alleged disclosure(s). That information was well within the Claimant's gift and she did not need a detailed explanation of the law to provide it.

39. The next issue relied on by Mr Brown is that the Claimant had not simply ignored the Shore Unless Order, she had attempted to comply with it. Whilst I accept that some information had been provided, it was wholly deficient with the simple things that the Shore Unless Order required the Claimant to do. The information that was provided made it almost impossible to determine what the vast majority of the alleged protected disclosures were said to be and took matters no further despite almost twelve months having elapsed since the Claim Form had been presented.

40. Whilst Mr. Brown accepts that the Claimant's default has been serious, he points out that there has now been compliance and the alleged protected disclosure is a discrete matter. However, that does not outweigh the fact that there had continued to be non-compliance for a period of over seven months and no attempt was made to properly comply with the Shore Unless Order until the very morning of Preliminary the hearing to deal with relief from sanction. Moreover, as I shall come to below that was a disclosure which it is alleged was made some four years ago and to a person, Jonathan Harris, who has already left the employment of the Respondent.

41. Finally, Mr. Brown submits that the case is now trial ready and that the matter can be moved on quickly in the event that relief from sanction is granted. I am afraid that I cannot agree. There is much work yet to be done and as I

shall come to below I am far from convinced that there would not be further problems and default with other Orders made should the application be granted. Moreover, the hearing date has now been lost. The Tribunal is currently listing cases into mid 2026. It will be a year at the very least and perhaps even more before this case is going to be able to be relisted for a full hearing. That would mean that evidence was being given about an alleged protected disclosure made five years previously and about decisions taken at a similar period of time. The cogency of the evidence will almost inevitably be compromised.

42. I should say that I have taken into account Mr. Brown's point that now that he is instructed that should assist in moving things forward and ensuring compliance with other Orders made. However, that needs to be balanced against the fact that Orders had been made for the Claimant to comply with to provide evidence for her application today. She also failed to comply with those Orders and nothing at all was done in preparation until the very morning of the Preliminary hearing. I understand from Mr. Brown that that was because of a misunderstanding as to who was going to be undertaking that work because he had only believed that he was instructed in respect of the appeal to the EAT and the Claimant had believed her instructions were in respect of al matters. Whatever the position, it is clear that even having representation has not seen the Claimant comply with Orders made and the ability of Mr. Brown to do so on her behalf is entirely dependant on clear instructions being given. I have little confidence that even with legal representation that there is not going to be a repetition of non-compliance. That is not least as the Claimant has failed to comply with Orders made previously, including Unless Orders, at a time when she had legal/professional representation. The best indicator of what is likely to come is what has gone before.

43. Taking all of those matters into account, I am not satisfied that there was any reason let alone a good reason for the default. The non-compliance, as Mr. Brown candidly accepted, was serious. The attempt to comply with the Shore Unless Order was wholly inadequate and that was still not remedied for seven months until the very day of the Preliminary hearing to deal with the Claimant's application for relief from sanction. That was also compounded by the Claimant's failure to comply with Orders made for this Preliminary hearing and all of the background of non-compliance with Orders and Unless Orders.

44. Those matters must all weigh against the granting of the Claimant's application for relief from sanction.

45. I turn then to the issue of prejudice. Whilst I accept that there is prejudice to the Claimant in not granting the application, that is tempered by the fact that this situation is of her own making. The prejudice to the Respondent, however, is much greater. They have already spent a considerable amount in costs trying to understand the claims against them which have been advanced on many fronts under a number of different Claim Forms. Those claims have never really got off the starting blocks and if the application is granted further costs are going to be incurred which could best be spent on the benefit of the Respondent's students.

46. Moreover, there is prejudice to the Respondent in terms of the cogency of the evidence and the ability to defend the claim given the departure of Mr. Harris and the passage of time from the alleged protected disclosure and the events in question. A fair hearing is therefore no longer possible.

47. In addition to the position of the Respondent, it is also necessary to consider the position of other parties to proceedings before the Tribunal. The Claimant has had a number of hearings and use of Judicial time in claims that have been either abandoned, struck out or dismissed for non-compliance with Unless Orders and none of which have ever made it out of the starting gates. Given the likelihood of the same problems manifesting themselves again if relief from sanction was granted, it is not in accordance with fairness or the interests of justice for further Judicial time to be taken up dealing with this claim which could be put to good use for parties who are complying with Orders made and are ready for their claims to be heard.

48. For all of those reasons and having balanced matters carefully, the scales tip squarely against granting the Claimant's application for relief from sanction and it is accordingly refused because it is not in the interests of justice to do so.

______________________________

Employment Judge Heap

Date: 2nd October 2024

JUDGMENT SENT TO THE PARTIES ON

.......03 October 2024.................................

...................................................................

FOR THE TRIBUNAL OFFICE

**Notes:**

**Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

**Recording of the hearing and transcription**

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a Judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/