Neutral Citation Number: [2024] EAT 184

Case No: EA-2022-000420-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17 October 2024

Before :

HIS HONOUR JUDGE BEARD

- -

Between :

MS NKECHI LEEKS **Appellant**

- and –

ROYAL WOLVERHAMPTON NHS TRUST **Respondent**

- -
- -

MS NKECHI LEEKS (in person) as the **Appellant**
MR BRUCE FREW (instructed by **Browne Jacobson LLP**) for the **Respondent**

Hearing date: 17 October 2024

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The appeal was against a reconsideration judgment, where the original judgment had upheld a submission that the claim had been struck out by virtue of an unless order and where costs were awarded. The 3 grounds of appeal were that the reconsideration should have looked at relief from sanctions on the basis that there was partial compliance with the unless order and if that was correct then the costs needed revisiting.

I considered that, essentially, the grounds of appeal were a complaint against the original substantive judgment. I held the first ground should be dismissed because there had not been any compliance with the unless order, that the non-compliance appeared to be deliberate, that the failure was serious and that there was significant prejudice to the respondent all of which was apparent from the substantive judgment. There had been no attempt to comply with the unless order in applying for reconsideration, meaning any hearing would be a second attempt to argue the same points. It was apparent that the unless order was made after a case management hearing which the claimant attended, therefore the substantive judgment was, in fact, a hearing under rule 38(2) of the ET rules 2013 and therefore a reconsideration of that type, and that the finality of judgments principle applied with significant force when there had already been a reconsideration and an application for a further reconsideration pursuant to rule 71 ET rules 2013.

On that basis there was no argument that could properly be advanced as to a costs order and so grounds 2 and 3 also should be dismissed. The ET had found unreasonable conduct and had conducted the discretionary exercise in the substantive hearing, there was simply no basis for this to be re-argued in a reconsideration hearing.

HIS HONOUR JUDGE BEARD:

1. I shall refer to the parties as they were before the Employment Tribunal as "claimant" and "respondent". The claimant represents herself; Mr Frew, of counsel, represents the respondent. The claimant appeals the rejection of an application for reconsideration of a judgment confirming a strike-out of claims and ordering costs. This rejection was made on 20 December 2021 by Employment Judge Lloyd and sent to the parties on 17 January 2022.

2. The grounds of appeal which were permitted at a Rule 3.10 hearing to advance to this hearing by HHJ Auerbach were:

    i) Ground 1. In relation to the whistle-blowing claim only, the tribunal erred by refusing relief from sanctions from the strike-out consequential to the unless order of 21 April 2021. It should have considered if there was sufficient information so that it could go forward to a final hearing.

    ii) Ground 2. Consequential to Ground 1, the tribunal erred in refusing to reconsider the order of costs made on 8 June 2021, as it should have considered the extent to which the claimant had complied with the unless order. If Ground 1 is successful, then a decision on costs will affect the safety of the judgment on costs in relation to the claimant's conduct.

    iii) Ground 3. Further, and to some extent consequential to Ground 1, the tribunal erred in refusing to reconsider the order of costs made on 8 June 2021 by failing to consider the overlap between the sanction of costs and a sanction of striking out for breach of the unless order.

3. In the notes which HHJ Auerbach provided as to his summary reasons for permitting these grounds to advance:

    i) In respect of Ground 1, he thought that it was arguable that the judge should, upon

consideration of the reconsideration application, have granted relief from sanctions in respect of the whistleblowing claim on the basis that the respondent had been given sufficient information about it to be able to fairly defend it.

ii) As far as Ground 2 was concerned, he came to the conclusion that as the award of costs was made on the basis of unreasonable conduct, which appears to have been by failing to comply with the unless order, that if Ground 1 succeeds then arguably the judge ought to have reconsidered the costs order as well.

iii) In respect of Ground 3, he considered that it was arguable that if the unreasonable conduct was the failure to comply with the unless order then, in considering whether to grant the costs order, the judge should have taken into account that this would amount to a further sanction for the same conduct. He noted that the ground faces the obstacle that it is not a challenge to the original costs order but to the reconsideration decision, but he has allowed that through because it is also parasitic on Ground 1 and arguable for that reason.

4. In terms of this case the claimant brought her claim originally in an ET1, presented on 19 May 2020. In the attachment that she created for the details of her claim, paragraph 9 deals with the whistleblowing element and says this:

> "I had also in my 12 November 2019 application form stated that I was dismissed from a previous NHS employment on account of whistleblowing victimisation, allegations of unauthorised access to HR employee files that were made against me, but which allegations were not proved by any actual probative evidence, but rather was purportedly proved on the civil balance of probability by the same St. George's Healthcare NHS Trust/Trust HR managers who made those fictitious allegations against me as victimisation from my raising concern in a very responsible manner in accordance with the

Public Interest Disclosure 1998."

5. In response to that, the respondent in the ET3, provided on 31 July 2020, in the first paragraph of its grounds of resistance indicated that the claimant had failed to properly particularise her claims of disability discrimination, religion or belief discrimination, and, in particular, for the purposes of this case, whistleblowing victimisation. In terms, as a result of that, on 8 August 2020, the respondent sent to the claimant a request for further and better particulars. That request for further and better particulars, in so far as it dealt with the whistleblowing claim, set out this:

> "You allege in box 8.1 of your ET1 that you have suffered whistleblowing victimisation for whistleblowing actions of raising concerns in previous NHS employments. Please therefore:
>
> "1.1 Say whether it is alleged that the respondent:
>
> 1.1.1 Refused your job application; or
>
> 1.1.2 Treated you less favourably because it appears you made a protected disclosure.
>
> "1.2 Give details of the protected disclosure relied upon, in particular:
>
> 1.2.1 When was the alleged disclosure made?
>
> 1.2.2 Was the disclosure made verbally or in writing?
>
> 1.2.3 To whom was the disclosure made?
>
> 1.2.4 What information did the alleged disclosure disclose?
>
> 1.2.5 Which type of alleged wrongdoing, as provided for in the Employment Rights Act 1996 s.43B(1)(a) to (f) did the information

> disclosed show had taken place, was taking place, or was likely to take place?
>
> "1.3 Explain the detriment you have been subjected to as a result of the protected disclosure.
>
> "1.4 All facts and matter relied upon in support of your contention that you were subjected to the detriment because you made the alleged protected disclosure."

6. Matters seem to have gone into an abeyance for some time then, because the Employment Tribunal in a letter dated 11 January 2021, apologised for the failure to pass to the claimant the response. On that date the ET directed her towards the respondent's request for further and better particulars and, in dealing with that, the ET set up dates for case management.

7. However, on 29 March 2021, on the application of the respondent, Employment Judge Dimbylow indicated he was considering striking out the claim because it had not been actively pursued and because there had been a failure to comply with an order of 11 January, which referred to the further and better particulars. It is then clear that on 13 April 2021 Employment Judge Dimbylow wrote or caused the Employment Tribunal to write that the claim was not struck out and was still listed for a preliminary hearing on 21 April 2021.

8. It is at that preliminary hearing that the judge made an Unless Order set out at paragraph 7 of the case-management order as follows:

> "The claimant must write to the tribunal and the other side by 4.00 pm on 5 May 2021 with the following information:
>
> A detailed reply to the respondent's request for further information, dated 12 August 2020. Unless the claimant complies with this order,

> the whole claim will be struck out forthwith and without further order. The reason for making this order is that the claimant has had ample opportunity to explain her case in detail but has failed to do so."

9. The respondent requested that the claim be struck out because of a failure to comply with these requests for further and better particulars. In the application, in an email dated 19 May 2021, the respondent argued that the claimant had failed to comply with the terms of the Unless Order. The respondent contended that the claimant's claim was automatically struck out; that an application by the claimant for an extension of one month for complying with the order had not been made until the claim already stood struck out. Further, the respondent contended that the claimant had not provided a detailed reply to the respondent's request for further information, dated 12 August 2020, but instead had made contentions as to why she should not have to comply with the order and argued that the relevant information had already been provided.

10. As a result of that application, a hearing was held before Employment Judge Lloyd who, on 8 June 2021, found as follows:

> "[5] It is clear at this hearing that the claimant knows that she has failed to meet the terms of the unless order because she has sought a one-month extension of the compliance term of the order. That has not been agreed by the respondent. Neither does the tribunal conclude an extension can fairly be given in the circumstances. The respondent has, over a long period of time, attempted unsuccessfully to persuade the claimant to provide the further detail it needs fairly to understand and to respond to the claim that she has presented.
>
> "[6] I am satisfied that the claimant knows full well that she has persistently failed to provide the information which the respondent seeks. She has spoken extensively at this hearing about what she perceives to

> be her compliance with the respondent's request. However, the plain fact is that she has failed to give the specific information which the respondent properly requires to make sense of the claim that she advances.
>
> […]
>
> "[17] The claimant presented a claim that quite obviously required a lot more detail to be supplied to allow the respondent, as a matter of fairness and justice, to know precisely the nature of the allegations it had to meet. The respondent is a publicly funded NHS body, which has been constrained to expend further legal fees from precious resources in seeking to deal with this claim, which the claimant has persistently neglected if not refused to explain with any precision at all. The respondent and the tribunal have asked repeatedly. Ultimately Employment Judge Dimbylow took a proper and procedurally consistent step in an effort to progress proceedings fairly by making the unless order. Sadly, Judge Dimbylow's making of the unless order was not successful in progressing the case."

11. At paragraph 20, in response to a submission from counsel that the failure had brought about the automatic strike-out of the entirety of the claimant's proceedings, Judge Lloyd said this:

> "[20] It has. It does. The claimant has signally failed to comply with the unless order. Indeed, the fact that the claimant herself has sought an extension of time, but which she now seems to deny she has, demonstrates that she has earlier acknowledged that she had not provided any or all of what had been requested. On no basis can it now be fair or just that she is granted even more time to provide information

which has been persistently not forthcoming."

12. The claimant in response to the promulgation of that judgment sought reconsideration. Her application for reconsideration, sent on 30 June 2021, at paragraph 1 says:

> "[1] The claimant had complied (**unclear**) with the respondent and the tribunal request to comply with the substance of the respondent's further and better particulars. (Refer to attached.)"
>
> The attachments are not clear from the copy in the bundle, because they all have numbered and shortened titles. It says:
>
> "(Refer to various instances of the claimant's compliance in the HMCTS case file for the above proceedings.)
>
> "[2] Hence the claimant had at all times acted reasonably and within the rules of the law. Hence the employment judge's action in striking out the claimant's claim is an abuse of the due process as it is totally lacking in justice and humanity."

13. In respect of the costs order, she wrote that "The onus of proof on why a costs order should be made against the claimant is with the respondent and not for the claimant show why a costs order should not be made", arguing that there was no just cause why an order for the sum of £750 should be made against her. She argued that this was an abusive exercise in discretion (saying that it was akin to economic oppression for the costs order to be made, referring to the claimant being unemployed and on zero income). Her application asked that the strike-out and costs order be withdrawn and for the claim to be transferred to London. The basis of the transfer is unclear from the claimant's complaints.

14. The next stage was the reconsideration judgment, the judgment I am considering on appeal. In

that judgment, Employment Judge Lloyd considered Rule 71 of the Employment Tribunal Rules of Procedure 2013. He rejected the claimant's application for a reconsideration on the basis that there was no reasonable prospect of the original decision being varied or revoked. He relied on the reasons that had already been given in the judgment of 11 June 2021.

15. I heard submissions, both written and oral, from the claimant and respondent.

16. The written submissions relied on by the claimant had been written by counsel acting under the ELAAS scheme and prepared for a Rule 3.10 hearing. The submissions do not focus specifically on the grounds currently before me. However, within that document it is contended that the employment judge erroneously dismissed the application, pursuant to Rule 72(1). It was further contended that the judge did not consider relevant factors in an application for relief under Rule 38.2 which should have applied. Further, it is contended that the judge did not consider the reason for the default, the timing of the unless order and the one-month extension sought. Added to this that the judge did not consider when deciding that the claimant was acting deliberately that the alternative was that the claimant did not understand the order; the argument referred to the requirement to consider prejudice to the parties but also whether a fair trial was still possible.

17. It was argued that the claimant's particulars of claim attached to the ET1 stated that there was a whistleblowing complaint, stated that there was a conditional offer, and that no reasons had been given why she had not completed the necessary checks. It was set out that the respondent had accepted knowledge that some disclosures were allegedly made, had admitted a conditional offer was made, and stated, due to an unsatisfactory reference, it had decided not to recruit. The point was made that at that stage the respondent had failed to disclose the reference, despite the claimant having stated she might withdraw upon considering. The claimant averred that King's dismissed her for taking quiet meditation during an unpaid lunchbreak. The issues in relation to the whistleblowing allegation were substantially known and apparent from the case-

management order.

18. In respect of the costs order, it was argued that it was in the interests of justice to consider whether the claimant had acted vexatiously before applying the discretion to award costs. The sanction of striking out a claim for an Unless Order should not have the double effect of imposing costs sanctions. That would be outside the limits of Rule 38 and an error of law. The claimant's conduct could only have been relevant where it related to matters not covered by the Unless Order. It was argued that it was in the interests of justice to review whether the costs order had considered all relevant factors, including the fact that the claimant was a litigant in person.

19. The claimant's oral arguments were almost entirely unrelated to the grounds of appeal. The claimant made it clear that she was relying on the written submissions previously prepared by counsel for the rule 3:10 hearing. I have taken those submissions, set out above, into account. The claimant argued that the respondent should not have approached lawyers, but should have gone to the police if they considered she had done something wrong. It seemed to me that this was an argument that was related to another of the claimant's cases (that involving the NHS Trust at King's Hospital). The NHS in Wolverhampton had done nothing other than withdraw an offer of employment. The claimant appeared to equate an allegation of gross misconduct (made at King's) with the commission of a crime. The claimant argued that she had not been able to clear her name and would be subject to the long-term sentence of never obtaining a job in the NHS. This was because of she had been a whistleblower, this again relates to the King's case. She referred to it both as "economic oppression" and "bloodless murder".

20. The claimant argued that it was unreasonable to make the Unless Order and therefore unreasonable for the automatic strike-out and for the reconsideration application not to succeed. She argued that she had given sufficient information in respect of the claim of whistleblowing. Further, the claimant contended that the costs order was clearly a punishment which overlapped

with the further punishment of not allowing her to pursue her claim.

21. Mr Frew, in his submissions contended that it was important to remember that the EAT is dealing with the reconsideration judgment and not the substantive judgment. He stated that the easiest argument he could make was to adopt the reasons given by HHJ Taylor at the Rule 3(7) stage of this appeal. HHJ Taylor's reasons were that this was a reconsideration decision being appealed on grounds which could only apply to the substantive hearing decision, which had not been appealed. The reconsideration decision made by Judge Lloyd was entirely appropriate based on the conclusions reached the substantive hearing decision. The respondent repeated that it had asked for further and better particulars. Without those particulars the whistleblowing claim was incomplete; there had been no detailed reply to the request. The respondent had applied for the strike-out. The respondent had provided its objections to the reconsideration application by the claimant.

22. In relation to the amended grounds of appeal, Mr Frew relied on Rule 70. He contended that this provides a single ground for reconsideration which should only be granted if it is necessary to do so in the interests of justice. Mr Frew referred to *Outasight VB Ltd v Mr L Brown* [2015] ICR D11 before HHJ Eady QC, as she then was. In that judgment it was explained that the specific elements required previously in the 2004 ET Rules were no longer necessary elements, however those elements would be taken account of as part of any process of reconsidering a judgment. Mr Frew also argued that there is an underlying public policy that there should be finality in litigation. As such reconsideration judgments provided very limited exceptions to that policy.

23. Mr Frew submitted that the interests of justice must involve the following: ensuring parties are on an equal footing, dealing with cases in a manner which is proportionate to the complexity and importance of the issues, avoiding unnecessary formality, seeking flexibility in the proceedings, and avoiding delay and saving expense. In other words he argued applying the

overriding objective set out at Rule 2 of the ET rules 2013. Mr Frew argued that the substance of the Unless Order was considered by Employment Judge Lloyd. In paragraph 17, set out above, the Judge made it clear that the claimant's application for reconsideration did not provide the further and better particulars of claim. Neither did the application identify what had been produced, and, because of that, it did not answer the question posed by Employment Judge Dimbylow. There was, on that basis, still insufficient information to allow the case to progress and, therefore, no basis for allowing reconsideration. The fact that Employment Judge Lloyd considered the Order, and that it clearly relates to whistleblowing claims. The respondent there can be no criticism of the Judge refusing an application for reconsideration which was simply an attempt at a second bite of the cherry.

24. The respondent then conceded that if Ground 1 is successful then Ground 2 must also succeed. However, if the claimant is unsuccessful on Ground 1, that there was no good reason on a reconsideration application for the Judge to review the position on costs. Similarly, in respect of Ground 3, it was argued no error could be pointed to. This was noted by HHJ Auerbach, and so the decision is parasitic on Ground 1.

25. In oral submissions Mr Frew reinforced his arguments expanding upon his written submissions. He argued that within the judgment and the materials provided there was no basis upon which any misunderstanding could be noted. He argued that the grounds of appeal do not apply to a reconsideration hearing. HHJ Taylor's original decision is correct and should be the result in this case.

26. The Employment Tribunal Rules of Procedure 2013 provide at Rule 38:

> "(1) An order may specify that if it is not complied with by the date specified the claim or response, or part of it, shall be dismissed without further order. If a claim or response, or part of it, is dismissed on this basis the Tribunal shall give written notice to the parties confirming

what has occurred.

> "(2) A party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations."

Rules 70 to 72 apply in respect of costs. Under "Principles", Rule 70 provides:

> "A Tribunal may either on its own initiative, which may reflect a request from the Employment Appeal Tribunal, or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked, it may be taken again."

Under the heading "Application", Rule 71:

> "Except where it is made in the course of a hearing an application for reconsideration shall be presented in writing and copied to all the other parties within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties, or within 14 days of the date that the written reasons were sent, if later, and shall set out why reconsideration of the original decision is necessary."

Under the heading of "Process", Rule 72(1) provides:

> "The Tribunal shall consider any application made under Rule 71. If

> the Tribunal considers that there is no reasonable prospect of the original decision being varied or revoked, including unless there are special reasons where substantially the same application has already been made an refused, the application shall be refused and the Tribunal shall inform the parties of the refusal."

It then goes on to say that if it is decided the other way, a notice for a response to the application by the other parties and seeking views can be sought and the notice may set out the tribunal's provisional views on the application.

27. It can be seen that Rule 70, and those that follow it, and Rule 38, apply the interests of justice test as the measure by which any decision to reconsider should be approached. An application to revoke an unless order should be dealt with, as can be seen, under Rule 38(2). However, that leaves open an application for reconsideration of that decision under Rule 71, at which stage the procedure at Rule 72 is clearly applicable. It is on that basis that, in effect, a claimant is entitled to a second application to alter or remove an Unless Order.

28. An Unless Order needs to be clear in its scope. Compliance with the order is tested against that scope. This means that an order which lacks clarity in what it expects of a claimant will not be enforced in the same way as a clear order, particularly if there has been an attempt at compliance.

29. A Judge should make a broad assessment of the interests of justice. In *Outasight*, HHJ Eady QC indicated that the 2004 elements which permitted reconsideration were encompassed by the interests of justice test. This would involve understanding, in the case of an Unless Order, the reason for the default (in particular whether it was deliberate or unintentional) the seriousness of the default, prejudice to the other party, and whether a fair trial remains possible. I note the similarity between those elements and those that would be considered by a court under the relief from sanctions provisions pursuant CPR 3.9.

30. It is to be remembered that Unless Orders are an important power of tribunals. They should be used sparingly and only when they are necessary to ensure proper progress in proceedings. However, consequently when used they need to be taken very seriously by the party made subject to the order. To overturn such an order without good reason could result in disrespect for the tribunal and its processes.

31. When approaching reconsideration it is not to be treated as a second bite of the cherry. I was referred to the case of *Stevenson v Golden Wonder Ltd* [1977] IRLR 474. The facts of the case are not particularly relevant, however Lord McDonald said in respect of the then review provisions (now reconsideration):

> "[They are] not intended to provide parties with the opportunity of a rehearing at which the same evidence can be rehearsed with different emphasis, or further evidence adduced which was available before".
>
> In the case of *Olomu v Community Integrated Care* [2022] EAT-84-2022 ICR 1329, the Employment Appeal Tribunal before Lord Summers indicated this:
>
> "I do consider that the principle of finality of litigation is germane to the appellant's application to reconsider. The respondent does not accept that the four jobs identified by the appellant on the new list are suitable. If reconsideration was granted, a further remedies hearing would be required to assess the parties' competing positions. *Flint* [1975] ICR 395 emphasises the need for finality in litigation. This is underscored by Underhill P in *Newcastle Upon Tyne City Council v Marsden* [2010] ICR 743 at paragraph 16."

32. The interests of justice I accept, as Mr Frew submitted, includes the overriding objective and will also include those matters that are set out in the elements of the 2004 rule referred to in *Outasight*. It will be an unusual and perhaps exceptional case where the interest of justice goes beyond those particular elements.

33. Rule 76 of the Employment Tribunal Rules 2013 provides:

> "When a costs order or a preparation time order may or shall be made
>
> "76(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
>
> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted".

There is a two-stage test: whether the conduct falls within 76(1), and then whether it is appropriate to exercise discretion to award costs. It is to be remembered in the Employment Tribunal that costs orders are exceptional orders; they are not the rule. A tribunal in dealing with such exceptional orders must take account whether someone is legally represented; should not judge a litigant in person by the same standards as a professional representative; but must recognise that litigants in person are not immune to costs orders; and can meet the required test. The discretionary element must follow on from that.

34. Unusually and specifically in respect of Unless Orders, there is, in effect, a second bite of the cherry set out within the Rules themselves. It appears to me that an application for reconsideration should not be a second opportunity to make submissions not previously made nor to rely on evidence that should have been produced at the original hearing. This approach has all the more force in circumstances such as these where there has been a Rule 38 hearing. In my judgment a rule 38 hearing is clearly what Employment Judge Lloyd dealt with in June 2021, and then there was a later reconsideration by that same judge.

35. The decision that further and better particulars were necessary for the understanding of the case was made by Employment Judge Dimbylow. He decided that the claimant should provide them

and if she did not provide them she should not be able to pursue her case further. That is a judgment made by EJ Dimbylow following a hearing, albeit a case-management hearing. It was a hearing where the parties will have had an opportunity to make submissions about the question both of whether the order was necessary and, if necessary, whether it should be subject to the unless provision. The Unless provision led to an automatic strike out once the date for compliance had passed.

36. Employment Judge Lloyd has then, in my judgment, dealt with his hearing through Rule 38. The claim was struck out by virtue of the Unless Order. EJ Lloyd was engaged in reconsideration of that strike out decision and did so by deliberating over whether or not the claimant had complied with the order made by EJ Dimbylow.

37. EJ Dimbylow's Unless Order was required to have sufficient clarity. Paragraph 7 of Judge's Dimbylow's order of April 2021 sets out specifically the questions asked by the respondent that were to be answered. In my judgment this Order clearly set out what was required of the claimant and was sufficiently clear. The question for Employment Judge Lloyd, was whether the claimant had complied in total or in part with the requirements of the order. That is the second hearing on the issue and therefore complies with Rule 38. At that hearing there was an examination of compliance, along with consideration of reasons for not applying the sanction.

38. In his deliberations, Employment Judge Lloyd found that there was noncompliance. Further, on my reading of his judgment, has found that failure to comply to be deliberate. EJ Lloyd's use of the word "refused" seems to me to set that out clearly as does his finding that the failure to comply has been complete.

39. Within that judgment EJ Lloyd found, therefore, that the reason for the default was a deliberate choice by claimant; the seriousness of the default is obvious in that Unless Orders should be obeyed; that there is prejudice to the other party, because they cannot defend a case where they do not know the basis of that case. In those circumstances questions of relief from sanctions

would be, to some extent, academic, the conditions by which relief from sanctions are decided would have already been answered by the conclusions as to whether a reconsideration should be allowed. In my judgment, there would be no relief granted on these facts. The specifics necessary, in terms of the findings of fact, are set out within the judgment and it indicates clearly that such an application for relief from sanctions would be bound to fail.

40. The grounds of appeal in Ground 1 referred specifically to the whistleblowing claim and, essentially, the contention that there was sufficient information so that the claim should have been allowed to progress. In other words, whether the decision that there was a failure to comply with the Unless Order by Employment Judge Lloyd could be said to be wrong. The claimant's claim at paragraph 9 sets out the basis on which whistleblowing is claimed. From that paragraph it is not clear whether she was claiming that the disclosure relied upon was made to King's or whether there was a disclosure to the respondent. Therefore it was correct for EJ Dimbylow to say that this was a claim that required further, essential, detail. The claimant needed to clarify: (1) what was the information provided; and (2) to whom? No respondent could defend a whistleblowing claim without knowing that information. There was, on the information that was provided in ET1, an incomplete complaint.

41. EJ Lloyd found that no further information was provided in accordance with the request for further and better particulars or in response to the Unless Order. On that basis there was not sufficient information that would allow the case to progress to a final hearing. In terms of Ground 1, on reconsideration, the claim was not made any more clear in the application for reconsideration itself. In terms of whistleblowing in the application there was simply an assertion that further and better particulars had been provided. Nothing that had been provided by the claimant and/or which is found in the bundle prepared for the hearing would permit the judge to find that the necessary further information was available. On that basis, Ground 1 must fail and the appeal dismissed.

42. Taking on board HHJ Auerbach's remarks about the further grounds of appeal being parasitic on Ground 1, I have concluded that it is not possible to say that, at the reconsideration hearing, EJ Lloyd was required to take into account any other matters as to the costs order that had been made. The Unless Order had not been complied with, it was a reconsideration application which could not succeed. Had it succeeded then the issue of costs could have been revisited. Had the claimant taken steps to comply with the Unless Order before the reconsideration decision then that could have been taken into account for relief from sanction. As to the overlap of punishment that would involve EJ Lloyd in revisiting a discretionary exercise already undertaken, and not suitable at the reconsideration hearing in circumstances where the strike out is upheld. It is in those circumstances that Grounds 2 and 3 are also dismissed.

(End of judgment)