Neutral Citation Number: [2026] EAT 151

Case No: EA-2024-001529-RN

EA-2025-000060-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 2 October 2026

Before :

MARCUS PILGERSTORFER KC
DEPUTY JUDGE OF THE HIGH COURT

Between :

MISS Z CHOWDHURY

Appellant

- and -

THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE

Respondent

- -
- -

Zayn Chowdhury (Solicitor) for the **Appellant**
Paul Smith (instructed by the Government Legal Department) for the **Respondent**

Hearing date: 23 June 2026

- -

JUDGMENT

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SUMMARY

Practice and Procedure

During a part-heard final hearing of her claims, the claimant became unwell and the hearing was postponed. The Employment Tribunal ordered her to provide medical evidence addressing her fitness to participate in the resumed hearing, any adjustments required and, if she remained unfit, when she was likely to become fit. After the claimant failed to provide the specified evidence, the Tribunal made an unless order providing that all her remaining claims would stand dismissed upon material non-compliance. The Tribunal subsequently gave notice confirming dismissal. Two appeals were brought: (i) against the making of the unless order, and (ii) against the notice confirming dismissal.

Held:

1. The appeal against the making of the unless order was allowed. Before making an unless order, a Tribunal must consider whether the dismissal stipulated would be a proportionate consequence of material non-compliance. Relevant factors may include the scope of the dismissal, the nature and practical requirements of the obligation, the importance of compliance, the history of non-compliance and whether a less drastic measure would achieve the legitimate purpose of the order: **Marcan Shipping (London) Ltd v Kefalas [2007] 1 WLR 1864** and **Mohammed v Guy's and St Thomas' NHS Foundation Trust [2023] ICR 587** applied. The Tribunal had legitimate concerns about delay, previous non-compliance and the need for medical evidence. However, it did not assess whether automatic dismissal of the entire claim would be proportionate to a future breach. The unless order was set aside.

2. The claimant was in material non-compliance with the unless order. No independent error was established in the Tribunal's determination to that effect. Nevertheless, once the underlying unless order was set aside, the notice confirming dismissal was declared to have no continuing effect.

3. The respondent's cross-appeal was dismissed. The case was remitted, if practicable, to the same Tribunal to resume the part-heard hearing.

MARCUS PILGERSTORFER KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. An unless order is a conditional judgment. It gives a litigant an opportunity to comply with a case-management requirement, but stipulates that material non-compliance will automatically result in dismissal of all or part of the claim, response or reply. It hangs like the sword of Damocles, concentrating the mind and exerting pressure to achieve compliance. It is therefore among the most powerful orders available to an Employment Tribunal. Before making one, the Tribunal must consider not only whether further pressure to comply is justified, but also whether the stipulated dismissal would be a proportionate consequence of a future breach.

2. This case concerns an unless order made after a final hearing had been adjourned part-heard because of the Appellant's ill health. She had almost completed her evidence. Before relisting the remaining two days, the Tribunal ordered her to produce medical evidence addressing her fitness to participate, any adjustments which might be necessary and, if she remained unfit, when she was likely to become fit. When that evidence was not provided, the Tribunal made an unless order in substantially the same terms. The deadline passed without the specified evidence being supplied, and the Tribunal confirmed that the Appellant's claims stood dismissed.

3. The Appellant brings separate appeals against the making of the unless order and the subsequent notice confirming dismissal. There is no appeal against a later refusal to set the unless order aside. The central question is whether, when making the unless order, the Tribunal considered whether dismissal of all the Appellant's claims would be a proportionate consequence of material non-compliance with a requirement directed principally to the relisting of a part-heard hearing. I have concluded that it did not. The unless order must therefore be set aside, with the result that the notice confirming dismissal cannot remain effective.

Background

The June 2024 hearing, the adjournment and the Tribunal's order of 26 July 2024

4. By an ET1 presented on 27 August 2023, the Appellant brought various claims of discrimination, unfair and wrongful dismissal, and in respect of other payments owed. These claims were case managed towards what became a four-day hearing before an Employment Tribunal at London Central. The case came on before a full panel (Employment Judge Goodman and members) on 17 June 2024. The Appellant was represented by Zayn Chowdhury (who represented her before this Tribunal). Mr Chowdhury is a solicitor and is also the Appellant's brother. The Respondent was represented by Mr Smith of counsel (who also represented the Respondent before this Tribunal). The Tribunal spent the first morning dealing with some preliminary applications and reading into the case. There was medical evidence to say that the Appellant was depressed but fit for work. In the absence of specific evidence relating to adjustments, the Tribunal agreed that the Appellant could take a break from giving evidence when she wished, or when she appeared distressed.

5. In the afternoon of the first day, the Appellant started giving her evidence. This continued for the entire second day, 18 June 2024. By that point, the Appellant had about an hour of further evidence to give, and then the Respondent's witnesses were to be called. On the morning of 19 June 2024, however, the Appellant did not attend. Mr Chowdhury did appear and informed the Tribunal that the Appellant had been taken to hospital the previous night. No further information was available to provide the Tribunal with a fuller picture. Mr Chowdhury's application was that the panel should withdraw so another panel could hear the claim. This was treated as an application for the panel to recuse itself. It was refused. Instead, the Tribunal decided to adjourn the hearing, initially to dates later in June. On 20 June 2024 the hearing was postponed again; it was relisted for two more days on 29 and 30 July 2024.

6. In the run-up to that hearing, on 23 July 2024, the Appellant's husband applied for a further postponement on behalf of the Appellant. Reliance was placed on a report from Dr Orfanos, a psychiatrist, dated 18 July 2024. The report indicated that Dr Orfanos had originally assessed the Appellant in May, but when seen in July, the Appellant felt worse. It recorded that the Appellant had collapsed and lost consciousness after a stressful ET hearing on 18 June 2024 but no abnormality was detected in hospital. Dr Orfanos diagnosed severe depressive episode without psychotic symptoms. The

Appellant was to be reviewed in around four weeks' time.

7. On 26 July 2024, the Tribunal vacated the listing for 29-30 July 2024 and made the following order:

> *"Employment Judge Goodman has read the Claimant's application to postpone the resumed hearing on 29 and 30 July and the respondent's reply. She directs that the hearing is vacated and relisted at a later date. This is because the report of Dr Orphanos [sic] of 18 July indicates [a change in treatment followed by review].*
>
> *The tribunal does however need to know when the hearing can be resumed. The longer the delay, the more difficult it will be to have a hearing which is fair to both sides, given that much of the evidence has already been heard.*
>
> *The Claimant is therefore ordered to supply medical evidence to the tribunal and the Respondent, by 30 August 2024 which states:*
>
> *(1) whether she is now fit to participate in the remaining two days of the tribunal hearing*
> *(2) whether she would be fit if adjustments could be made, and if so, what adjustments the doctor recommends to enable her to participate.*
> *(3) if not now fit, even with adjustments, when she will be able to participate.*
>
> *The parties should write to the tribunal by 6 September 2024 with details of the availability of witnesses and representatives for a hearing within the time period envisaged by the claimant's medical advisor."*

8. By 12 September 2024, the Appellant had not complied with that order. Accordingly, EJ Goodman directed that the following be sent to the parties:

> *"Employment Judge Goodman has directed me to say that the tribunal notes with concern that the claimant has not provided medical information by 30th of August 2024 as ordered. The claimant is asked to comply with the order as soon as possible. An open preliminary hearing will be listed shortly to consider whether and when the hearing can resume, or whether the claim should be struck out for failing to comply with the tribunal's orders, or because the claim has not been actively pursued."*

9. I understand that after receiving that communication, the Appellant's husband sent to the Tribunal Dr Orfanos' report of 18 July, an earlier report from May 2024, along with other material. That material did not, however, give the information required by the Tribunal's order.

10. A notice of a preliminary hearing listed for 16 October 2024 was later sent to the parties on 26 September 2024 in accordance with EJ Goodman's direction.

The unless order of 16 October 2024

11. When the preliminary hearing came to be heard on 16 October 2024, Mr Chowdhury and the Appellant's husband were in attendance but the Appellant was not. It was initially assumed that the Appellant was at home unwell. However, at the Respondent's prompting, the Appellant's husband confirmed to the Tribunal that in fact she was at work at the UK Space Agency working in a Grade 7 civil service role. She had commenced a phased return to work on 2 October 2024, working three days per week. The Appellant's husband and Mr Chowdhury could not confirm how long the phased return was to be. The Judge asked about whether an Occupational Health report had been obtained setting out the basis for the phased return, but was informed no such report had been obtained. The Judge asked various questions about the Appellant's health. She recorded the responses at §7 of her reasons (sent to the parties on 24 October 2024):

> *"I was told that [the Appellant] was seeing her GP once a month [for] review … On 22nd of July her GP, Dr Brown, referred her to the mental health team. She was seen by that team on 17th of September 2024, and again yesterday, 15th of October 2024. [The Appellant's husband] said that he had asked the mental health team to provide medical evidence in line with the tribunal's order, but the staff would not look at the letter. Mr Chowdhury added that this was because of GDPR. Mr Chowdhury invited the tribunal to write to the team direct. Asked for the name of the practitioner she saw, and the address of the team, I was told that the team are sited at the same address as Dr Brown, but are not part of the GP practi[c]e. Mr Chowdhury said that his sister would not be able to provide the name of the person she saw yesterday, or on the 17th of September, for another 21 days."*

12. On behalf of the Appellant it was submitted that it was unlikely the doctors treating her would ever be able to provide the evidence set out in the order. Although she was working three days each week, the Appellant's position was that the hearing could not proceed unless managed differently. When the Tribunal asked how the hearing should be managed differently, no further proposed adjustments could be identified. Later, Mr Chowdhury submitted that the Tribunal should write to the mental health team treating the Appellant. He said that the GP had been asked to supply the information required in the Tribunal's July order, but had not done so. He said he did not think Dr Brown had been shown the Tribunal's order.

13. The Respondent did not seek a strike out of the claim at the hearing. Rather, the Respondent submitted

that an unless order should be made, requiring medical evidence to be filed. The Respondent's right to a fair trial within a reasonable period was emphasised.

14. After referring to Rule 38 in Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the 2013 Rules"), the Tribunal decided to make an unless order. The reasons are set out in §14-15, which I set out below:

> *"I consider that it is necessary to make this order an unless order:*
>
> *14.1 First of all, the claimant did not comply with the order to supply medical evidence about her fitness for hearing [and] what adjustments might be needed within the time required. Nor did she ask to extend the time. The tribunal has only had an explanation today. I have no reason to believe that a further order without some penalty attached will be complied with.*
>
> *14.2 Secondly, it has been difficult today to get clear answers. The tribunal is still not clear from the answers of [the Appellant's husband] and Mr Chowdhury whether the mental health team has seen the tribunal's order of July 2024, or the GP has seen the order, and it is hard to understand why, if they know the position, they are so unhelpful. It was also disturbing that Mr Ch[ow]dhury spoke at length about his sister's illness, the ongoing treatment, and that it was not yet possible to give answers about her fitness, without informing the tribunal that she had in fact been back to work for two weeks on a phased return basis. This lack of frankness is unhelpful.*
>
> *14.3 Thirdly, I have considered whether the tribunal needs medical evidence at all, or whether I should not simply relist the hearing without it. I have relisted it, so to keep its place in the queue, and avoid more delay in bringing it to a conclusion, but the tribunal does need to know what other adjustments may be needed. Mr Chowdhury, on his sister's behalf, considers still that the last hearing was not managed properly given her disability, despite the breaks arranged to accommodate her. It would be helpful to have a doctor's opinion on how a hearing could be adjusted or modified so the claimant can participate.*
>
> *14.4 The tribunal also needs to know, as does the respondent, whether the claimant will be fit for a hearing in February, and if not, when. A further request for adjournment at a late stage will be disruptive to both the tribunal and the respondent.*
>
> *14.5 Lastly, I have some concern that the reason why the claimant has not complied with the earlier order, or supplied availability dates, or explained why she cannot comply, until today, is that she does seek to put off a resumption of the hearing. It is important that it does resume. It is difficult for the panel and the parties to be confident of a fair hearing if there is a long gap before her case can resume. I hope that making this an unless order will help the claimant, or those family members assisting her in [t]his claim, to focus on the need to supply evidence of her fitness for the resumed hearing.*
>
> *15. When I said that I would allow until the 2nd of December for compliance with the unless order, Mr*

Chowdhury said that this was not fair because she would not be seeing the mental health team again until December. However, no further appointment date has been set. I also know that [the Appellant's husband] confirmed that the claimant was seeing her GP once a month [for] review … If the GP can be shown the order, so that he understands what is being asked, it is to be hoped that he can provide a short note of what is required. Or the claimant could ask Dr Orphanos [sic], who has seen her before."

15. The Tribunal accordingly made the unless order and sent it to the parties, along with the reasons, on 24 October 2024. The form of the order was as follows (emphasis in the original):

*"**Unless by the 2 December 2024** the claimant sends the respondent and the tribunal medical evidence about:*

(1) her fitness to participate in a hearing in February 2025

(2) what adjustments are, in the opinion of the medical practitioner, required for the claimant to be able to participate in the hearing and

(3) if she will not be fit in February, even with adjustments, when it is anticipated she may be fit

***all her remaining claims shall stand dismissed without further order**."*

Events after the unless order

16. The Appellant (or her husband on her behalf) then communicated with her GP surgery as follows:

i. On 1 November 2024, the Appellant sent an email for the attention of Dr Brown. The unless order was attached. The email asked Dr Brown to provide the medical information required by that order in the form of a letter. The email referred to having previously asked for medical evidence and having been told *"that the practice does not deal with such request[s]"* and that the doctor had not wanted to *"get involved with court stuff"*.

ii. On 13 November 2024, the Appellant's husband emailed Dr Brown referring to the Appellant's email saying there was a *"strict deadline to meet"*. The request for medical evidence was repeated.

iii. On 22 November 2024, the Appellant's husband wrote again to Dr Brown requesting the information required by the Tribunal *"[a]s a matter of urgency"*.

iv. On 25 November 2024, the Appellant's husband wrote to the Deputy Practice Manager ("DPM") referring to a conversation between the Appellant and the DPM during which the DPM had confirmed that the practice cannot provide the letter requested. The Appellant's husband asked for the practice's response by email.

v. On 26 November 2024, at 15:47, the DPM emailed the Appellant. It said: *"After speaking to one of [our] GP Partners, Dr Selva has informed the management team that we would not be able to complete your request. You will need to go to Occupational Health or alternatively, go to a private GP."*

vi. In response, on 26 November 2024 at 16:24, the Appellant replied saying that she had thought an urgent task had been assigned to Dr Brown and urging that he be consulted, suggesting there had been a misunderstanding.

vii. The Appellant wrote again on 29 November 2024 enclosing a further copy of the Tribunal's order. The email referred to a previous conversation on 26 November 2024 when a staff member had apparently promised to ask whether a partner of the practice would agree to respond via email to the Tribunal's questions. The email referred to needing an update, and there being a *"strict deadline"* on the order.

17. On 1 December 2024, the Appellant's husband wrote to the Tribunal enclosing the correspondence that had taken place with the surgery. He said that the GP and NHS Mental Health Community Team had been contacted *"many times"* but they had not provided the requested information. He suggested a letter from the Tribunal to the GP or mental health team would have addressed the issue. The email asked the Tribunal to provide such a letter and gave the address of the GP surgery.

The notice confirming dismissal of the claim – 5 December 2024

18. On 5 December 2024, EJ Goodman directed that the Tribunal send the parties a letter headed *"Confirming Dismissal of Claim".* The letter explained:

> *"…because the [Unless] Order was not complied with by 2 December 2024, the claims of race, age and religious belief discrimination have been dismissed under Rule 38.*
> *The Judge considers that there was no material compliance with the Unless Order because the Claimant has not obtained medical evidence from her GP or any other medical or clinical practitioner as to her fitness for hearing or how the hearing should be adjusted, as her brother suggested it should have been, but has suggested only that the Tribunal should seek medical evidence. The Claimant has been otherwise uncooperative with attempts to resume the hearing. Such evidence has been requested from June 2024."*

19. The Tribunal's letter informed the Appellant that she could apply within 14 days to have the unless order set aside on the basis that it was in the interests of justice to do so.

Application to set the unless order aside

20. On 12 December 2024, the Appellant's husband wrote to the Tribunal applying for relief from sanctions. EJ Goodman dismissed that application on the papers on 13 February 2025 (the Appellant not having requested a hearing when asked). Reasons were sent to the parties on 19 February 2025.

21. After setting out the background, and after reviewing the correspondence provided (summarised at paragraph 16 above), the Tribunal weighed up the competing considerations. The Judge took the view that this was not simply a case of a busy and uncooperative medical practice such that it might be possible to look for alternative ways to obtain the information required for relisting. The Judge had regard to the fact the Appellant was well enough to work in a demanding job, yet there had been a reluctance properly to communicate with the Tribunal since the adjournment in June. The Tribunal had not been kept updated, despite it being obvious that it was concerned to discover when the hearing could

resume. The Judge referred to an email the Tribunal had sent on 5 December 2024 recording that a clerk had telephoned Mr Chowdhury asking to speak to the Appellant and had been told *"we cannot speak to the claimant due to her ill health".* The Tribunal considered it was hard, in all the circumstances, not to draw the inference that the Appellant had not cooperated because she did not want the hearing to resume, and she did not want contact with the Tribunal. Having weighed in the balance the passage of time since the matters in dispute occurred, the further delay that would ensue were the case to be relisted, and the risk that the Appellant would again not attend (with resulting wasted costs and Tribunal resources), the Tribunal concluded that it would be very difficult to have a trial that was fair to both sides. Whilst recognising that triable cases should, wherever possible, be determined on their merits, the Judge refused the application and concluded that the dismissal of the claims should not be rescinded.

Unless Orders: Relevant Legal Principles

General

22. The Employment Tribunal has the power to make conditional orders which specify a consequence or sanction which is to apply in the event that a condition is fulfilled. The condition is often that a party must take some step, or refrain from doing so. When the condition is fulfilled, the consequence or sanction embodied in the order takes effect automatically without the need for any further order: see **Marcan Shipping (London) Ltd v Kefalas & Another [2007] 1 WLR 1864**, §§11, 14, 34.

23. One type of conditional order is that identified by the **Employment Tribunal Procedure Rules 2024** ("the 2024 Rules") as an unless order: see Rule 39. At the time the Tribunal reached the decisions which are under appeal, Rule 38 of the 2013 Rules fell to be applied[1]. Rule 38 provided as follows:

> *"38.— Unless orders*
>
> *(1) An order may specify that if it is not complied with by the date specified the claim or response, or part of it, shall be dismissed without further order. If a claim or response, or part of it, is dismissed on this basis the Tribunal shall give written notice to the parties confirming what has occurred.*
>
> *(2) A party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application*

[1] For the purposes of this appeal, there are no material differences between the two provisions.

includes a request for a hearing, the Tribunal may determine it on the basis of written representations.

(3) Where a response is dismissed under this rule, the effect shall be as if no response had been presented, as set out in rule 21."

24. An unless order stands out from other more routine orders a Tribunal might make, including other conditional orders, because the sanction that applies is so serious: the order is a conditional judgment dismissing the whole or part of a claim, response or reply. If the condition is triggered, a claimant or respondent will automatically lose the ability to pursue or defend the claim, or a specified part of it. As a result, such orders have been described as *"an important part of the Tribunal's procedural armoury (albeit one not to be used lightly)"* (**Thind v Salvesen Logistics Ltd (UKEAT/0487/09, unreported, 13 January 2010),** §14); and *"one of the most powerful weapons in the court's case management armoury"* (**Marcan** §36). The litigant is thereby placed on clear notice that material non-compliance will automatically produce the stipulated consequence.

25. As Griffiths J explained in **Forrest v Amazon Web Services EMEA SARL UK Branch [2025] IRLR 656**, at §41, *"The salutary effect of an unless order is that it so clearly concentrates the mind. It provides that, unless there is compliance, strike out will follow automatically and without a hearing. That is a stark choice, which in many cases does result in compliance."* In that case, a Tribunal had struck out the appellant's claim for non-compliance without first trying to secure compliance using an unless order. The EAT held the Judge had been wrong to do so and that there was no good reason not to have given an unless order a try: *"The need, therefore, was to apply pressure to see if it would persuade the Appellant to change his mind. That is exactly what an unless order would have done."*

Three Decisions Relating to Unless Orders

26. It is well understood that there are three types of decision relating to an unless order that an Employment Tribunal can make. Each requires the application of a different legal test and can give rise to a separate appeal. They are: (i) a decision whether or not to make an unless order; (ii) a decision to give written notice under Rule 39(1) of the 2024 Rules that dismissal has occurred; and (iii) if an application is made under Rule 39(2) of the 2024 Rules, a decision whether or not to set aside the unless order. See §§4-8

of **Wentworth-Wood v Maritime Transport Ltd (UKEAT/0316/15, unreported, 3 October 2016)** per HHJ David Richardson.

27. In the present appeal, whilst all three types of decision were made, the Appellant has only appealed the decision to make the unless order on 16 October 2024, and the decision to give written notice on 5 December 2024. There is no appeal against the Tribunal's refusal of the application to set aside the unless order.

Making an unless order

28. Before making an unless order, the Tribunal must consider all relevant circumstances and satisfy itself that the dismissal stipulated by the order would be an appropriate and proportionate consequence of material non-compliance with its requirements. That will ordinarily require consideration both of the nature of the obligation imposed and the extent of the dismissal which would follow, including, where relevant, whether the legitimate purpose of the order could adequately be achieved by a less drastic measure. The proportionality assessment is undertaken in the circumstances existing when the order is made, recognising that the nature and effect of every possible future breach cannot be anticipated and that relief from sanctions remains available.

29. These requirements clearly emerge from the authorities. In **Marcan**, at §36, Moore-Bick LJ explained (emphasis added):

> *"…the judge should consider carefully whether the sanction being imposed is appropriate in all the circumstances of the case. Of course, it is impossible to foresee the nature and effect of every possible breach and the party in default can always apply for relief,* ***but a conditional order striking out a statement of case or dismissing the claim or counterclaim is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified****. I find it difficult to imagine circumstances in which such an order could properly be made for what were described in Keen Phillips v Field as "good housekeeping purposes"."*

30. Further, in **Mohammed v Guy's and St Thomas' NHS Foundation Trust [2023] ICR 587** the EAT, HHJ Tayler presiding, said this (at §22):

> *"…Before making an unless order an employment judge must consider with great care what the consequence of non-compliance will be. If an order will result in the entire claim being struck out if*

there is any material non-compliance the judge must be satisfied that the strike out of the entire claim, that will be the automatic consequence of material non-compliance, is a proportionate response to any material breach of the order, no matter how minor. An unless order is, in effect, a contingent decision to strike out the claim if there is any material non-compliance. The whole point of an unless order is that the dismissal of the claim is automatic without any further consideration of proportionality or the interests of justice."[2]

31. The proportionality assessment is necessarily fact-sensitive and it is neither necessary nor appropriate to prescribe an exhaustive set of factors or checklist for consideration in every case. Some or all of the following considerations may, however, be relevant depending on the circumstances:

i. The scope of the stipulated dismissal. Would material non-compliance result in dismissal of the whole claim, response or reply, or only the part affected by the requirement?

ii. The nature of the requirement being imposed under the unless order and the time allowed for compliance. What is the relevant litigant being required to do? When, and how burdensome is the obligation in terms of practical compliance? Are third parties (e.g. experts) likely to be involved? Is there any vulnerability or disability which might affect the party's ability to comply?

iii. The importance of compliance with the requirement to the fair and efficient determination of the proceedings, including whether, and to what extent, non-compliance would impede a fair hearing.

iv. The history (if any) of non-compliance. Has the litigant failed to comply with relevant orders previously? If so, why? Was the non-compliance deliberate or persistent, what explanation was given, and what attempts were made to comply?

v. Whether the legitimate purpose of the proposed order would adequately be achieved by a less

[2] See further the application of these principles at §§28-30.

drastic measure. Depending on the circumstances, that might comprise a further ordinary case management order, an unless order confined to the affected part of the proceedings, or a conditional order providing for a consequence other than dismissal. In respect of the latter, HHJ Tayler remarked at §33.5 of **Minnoch & others v Interservefm Ltd & others [2023] IRLR 491** that *"... although not specifically provided for by r 38 ET Rules, an order could provide for a lesser sanction than strike out on non-compliance, such as a claimant being limited to reliance on the material set out in the claim form if additional information is not provided"*.

32. The key point is that the Tribunal must determine whether, in light of the relevant factors (such as those set out above), and recognising that relief from sanctions remains available, the automatic dismissal provided for in the order would be proportionate to a future material breach.

33. A Tribunal's reasons must be proportionate to the significance of the issue: Rule 60(6) of the 2024 Rules. For an interlocutory order, they may be short and succinct. But they should explain why the specified consequence of material non-compliance is justified, addressing the most important considerations bearing upon proportionality. Although concerned with review of a sanction already imposed, Smith LJ's observations in **Neary v Governing Body of St Albans Girls' School [2010] ICR 473** at §52 are instructive: the reasons must enable the parties to understand the decision and demonstrate that the relevant factors have been weighed and a tenable conclusion reached. No particular form of words is required.

34. Authority also requires the Employment Tribunal to take real care when drafting the terms of an unless order. This is particularly so in cases involving several different causes of action and allegations (see **Johnson v Oldham MBC (UKEAT/0095/13); [2013] EqLR 866** at §5) or where the order places requirements on several claimants or respondents (**Wentworth-Wood** §5). In **Johnson**, Langstaff J gave the following guidance (§6):

"For the assistance of Tribunal Judges, ... I would simply note that because so much in my view turns upon the precise form of the unless order made and because the consequences of an unless order may

be draconian, judges making such an order in the first place may wish to consider tailoring it with particular care."

35. As HHJ Tayler put it in **Minnoch**, the Employment Judge should bring his or her "A game" to the task. Ambiguous orders must be avoided[3] and close attention should be paid to the proper meaning of the order as made. In **Wentworth-Wood**, HHJ Richardson explained that (§44):

"The starting point, in construing an Unless Order, as any other Order, is the ordinary meaning of the words used. The legal and procedural context will always be relevant: for example the context may show that the ordinary meaning cannot have been the meaning in the Order. In any event the party who has to comply with an Order must be able to see from its terms what is required to comply with it; an Order cannot be read expansively against the party who has to comply."

36. Where a Tribunal applies these principles, it is afforded a case management discretion whether or not to make an unless order. The EAT will usually only interfere to correct an errant legal approach, to ensure all legally relevant circumstances are considered to the exclusion of all legally irrelevant circumstances, and to correct a truly perverse decision: see, for example, **Neary** at §49.

Giving notice that dismissal has occurred

37. Where the sanction of dismissal occurs in accordance with an unless order, the Tribunal *"must"* give written notice to the parties confirming what has occurred: see Rule 39(1) of the 2024 Rules and Rule 38(1) of the 2013 Rules. It is clear from the use of the word "must" that the Tribunal is not exercising a discretion whether to give notice. The decision at this point simply turns on whether there has been any material non-compliance with the condition specified in the unless order. The Tribunal is not concerned with whether the unless order should have been made, or whether there should be relief from sanctions.

38. This was again helpfully explained by HHJ Richardson in **Wentworth-Wood** at §6:

"In giving notice the Employment Tribunal is neither required nor permitted to reconsider whether the Unless Order should have been made: it has already been made, and if there has been any material non-compliance the sanction contained within it will already have taken effect. The decision to give notice simply requires the Employment Tribunal to form a view as to whether there has been material non-compliance with the Order: see Marcan at paragraph 34 and Johnson at paragraph 7. The notice (or refusal to give notice) sets out its decision on this question and brings clarity to the position for

[3] For an example, see **Rogers v Department for Business, Industry and Skills (UKEAT/0251/12, unreported, 28 February 2013)** at §16.

the parties."

39. The references in that passage to **Marcan** at §34 and **Johnson** at §7 are worth noting. There, the Court of Appeal, and the EAT, emphasised that what matters is whether the party to whom an unless order is addressed failed to comply with the order *"in any material respect"*. What is being assessed is material compliance in a qualitative (rather than quantitative) sense.

40. HHJ Auerbach drew the relevant principles together in his judgment in **Uwhubetine & another v NHS Commission Board England & others (UKEAT/0264/18, unreported, 23 April 2019)**. I shall cite his summary of the principles at §§45-51:

> *"45. The starting point for the Tribunal engaged in that task is to consider the terms of the Order itself and whether what has happened complies with the Order or not. This may call for careful construction of the terms of the Order, both as to what the Order required and as to the scope of the Order in terms of the consequences of non-compliance, particularly in cases where there are multiple claims or multiple parties. If there is an ambiguity the approach should be facilitative rather than punitive, and any ambiguity should be resolved in favour of the party who was required to comply. However, what the Tribunal cannot do is redraft the Order or construe it to have a meaning that it will not bear, though its words should of course be construed in context.*
>
> *46. Next, the test to be applied is as to whether there has been material non-compliance, that being a qualitative rather than a quantitative test. In a case where the Order required some further Particulars to be given, the benchmark is whether the Particulars have sufficiently enabled the other party or parties to know the case that they must meet. However, the Tribunal is not concerned with the legal or factual merits of the case advanced, but merely with whether sufficient Particulars have been given to meet that test.*
>
> *47. Finally, the Rules do not require any particular formalities to be observed in relation to the process for determining whether there has been non-compliance with an Unless Order, leading, if non-compliance be found, to a written notice confirming that the relevant pleading has been dismissed in accordance with it. This is something that can potentially be done by a Judge on paper without a hearing, although a Judge may decide to invite written submissions and/or to convene a hearing, before making that determination. The obligation on the Tribunal, whichever route it goes, is to comply with the overriding objective.*
>
> *48. To those points, which emerge from the foregoing authorities, I add the following. Firstly, the Rule does not actually impose an obligation on the Tribunal to issue a written notice if it considers that an Unless Order has been complied with. However, if it is alleged that it has not then this must lead to a determination of whether the Order has been complied with and has taken effect, or not.*
> *49. Further, if the conclusion is that the Order has not been complied with, and has taken effect, although that will have occurred automatically, there is an obligation on the Tribunal to issue a written*

notice to the parties confirming what has occurred. That is both because that is what Rule 38(1) says and because it is the issuing of such a written notice that triggers the right of a party to make an application under Rule 38(2) to have the Order set aside on the basis that it is in the interests of justice to do so. That is why such an application is treated, as the authorities confirm, as an application for relief from sanctions, as opposed to a freestanding challenge to the original Order having been made in the first place.

50. Further, however, I note that the Rule prescribes no time limit within which the Tribunal must issue any written notice confirming that the Order has taken effect. However, I consider that, when such an issue arises, it needs to be the first order of business of the Tribunal to determine whether or not to issue such a written notice, because, if the Unless Order has not been complied with, and hence the claim, if it is a claim to which it relates, has already automatically been dismissed, then nothing else of substance can happen in relation to that claim, unless of course there is some successful appeal or successful application for relief from sanctions.

51. Finally, as the authorities do note, particularly where the Order that is, or becomes, the subject of an Unless Order concerns the giving of Particulars, particular care is needed by the Tribunal, when considering whether to make such an Order, and, if so, in what terms. That is because there can later be real difficulty and uncertainty as to whether whatever has been done was or was not sufficient to comply with the Order, for the purposes of the material non-compliance test. Particular care also needs to be taken as to how the Order is framed as to the consequences of non-compliance, given that the terms of the Order itself cannot be revisited at the stage when the Tribunal is simply having to consider whether there has been compliance or not."

41. See further **Minnoch** at §§33.7-33.12 and **Tattersall v Mersey and West Lancashire Teaching Hospitals NHS Trust [2024] EAT 24** at §§73-78.

Applications to set aside an unless order

42. Although not of direct relevance in these appeals, where an application is made to set aside an unless order, the Tribunal must decide whether it is in the interests of justice and the overriding objective to grant relief from sanctions by setting aside the original unless order. As explained in **Wentworth-Wood** at §7, the question is not whether it is in the interests of justice for the unless order to have been made in the first place. The focus is on whether it should be set aside. The relevant considerations were set out by Underhill P in **Thind** at §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."

43. See further the summary in **Minnoch** at §33.15.

The Appeal against the Unless Order

44. The Appellant's appeal against the unless order was advanced by a Notice of Appeal lodged on 26 November 2024. HHJ Tayler permitted grounds 1 to 6 to proceed to a full appeal hearing at a Rule 3(10) hearing.

The Core Contentions

45. **Ground 1** is the centrepiece of the appeal. It contains several overlapping complaints about the making of the unless order, which I summarise as follows:

    i. First, it is said that the tribunal failed to take the necessary degree of care when making the order as required by the authorities, and particularly because this was a case involving medical evidence. Complaint is made that the drafting of the order failed to contemplate circumstances where medical professionals might fail to provide the Appellant with the medical evidence in question.

    ii. Secondly, the Appellant argues the Tribunal failed to consider the proportionality of the consequence (that her entire claim would be struck out) in the event there was material non-compliance with the order. She argues automatic strike out was a disproportionate interference with her rights under Article 6 of the **European Convention on Human Rights** ("ECHR") given that her evidence was mostly complete at the end of 18 June 2024.

iii. Third, it is said that it was wrong for the Tribunal to impose an unless order because the Appellant had in fact complied with the previous orders by providing medical evidence.

iv. Fourth, it is argued that an unless order was inappropriate because contact had been made with the treating doctors and they had not provided the information sought. The Appellant argued it was not appropriate to make an unless order where compliance depends upon the actions of a third party. It is argued that the Tribunal should instead have sent a letter addressed to the Appellant's medical team requiring them to provide the information.

v. Finally, complaint is made that the Tribunal failed to refer to or apply the overriding objective.

46. Mr Chowdhury made oral submissions at the appeal hearing advancing these contentions, placing particular emphasis on Article 6 ECHR, the need for proportionality and the overriding objective.

47. For the Respondent, Mr Smith argued that given the history of the case up to 16 October 2024, it was unsurprising that the Judge considered making an unless order. He argued that, like **Mohammed**, the case involved serious ongoing default. It was submitted that the necessary degree of care had been taken when making the order, that the overriding objective had undoubtedly been considered, and that the order had been expressed in clear and unambiguous terms. He contended that the Judge had in mind the relevant principles, even if she did not cite the authorities. Mr Smith submitted that the consequences of non-compliance, and the proportionality of those consequences, had been considered, as was apparent from the reasons at §§12–13, 14.1, 14.5 and 15. The Respondent argued that there was a proper legal basis for the Tribunal to order a party to provide information from their treating practitioners, and that this is commonly done. Mr Smith submitted that the wording of the order did not mean that compliance depended on a non-party because it only required the Appellant to send medical evidence concerning the matters set out in the order and she could have complied by giving a written account relaying what her treating medical practitioner had told her in consultation. Further, Mr Smith argued that if the GP would not assist the Appellant, she could and should have obtained the required information from

elsewhere, such as a private GP.

Discussion and Conclusions

48. The appeal against the unless order falls for consideration in the context of the Tribunal having made orders requiring the provision of medical evidence for the purposes of case management. More precisely, the Tribunal was considering when to relist an already adjourned part-heard final hearing. The Tribunal wanted to know whether the Appellant was fit to participate, whether she would be fit to participate with further adjustments (and if so, what those adjustments would be), and if she was not fit (even with adjustments) when she would be fit to participate.

49. Those considerations were plainly relevant to the Tribunal's decision on relisting. They went directly to the balancing of the various aspects of the overriding objective: on the one hand reducing delay and aiming to get a part-heard final hearing back on as soon as possible, but equally wishing to ensure that the Appellant would have a fair opportunity to participate and to avoid a situation where the parties incur costs (and Tribunal resources are taken up) only for there to be a further postponement.

50. There can be little doubt that a Tribunal has the power to make an order requiring medical evidence addressing particular points to be filed by a particular date. Such an order falls within the Tribunal's wide case management powers contained, now[4], in Rule 30 of the 2024 Rules to make a "case management order", defined by Rule 2(1) as *"an order or decision of any kind in relation to the conduct of proceedings, not including the determination of any issue which would be the subject of a judgment"*.

51. In **Teinaz v Wandsworth London Borough Council [2002] ICR 1471**, the Court of Appeal recognised that where a Tribunal did not consider that (or had doubts as to whether) evidence supporting an adjournment was genuine or sufficient, the Tribunal has a discretion to give a direction to enable such issues to be resolved. That includes the possibility of directing that further evidence be provided

[4] See also Rule 29 of the 2013 Rules, applicable at the time of this Tribunal's decisions.

promptly: see §22 per Peter Gibson LJ.

52. Such an order was made in **Andreou v Lord Chancellor's Department [2002] IRLR 728**. There, the Tribunal had adjourned a final hearing on the first day. Given the limited medical information that was then available, the Tribunal also made an order that the claimant should, within 3 days, produce a medical report addressing particular matters that were set out in the order: see §8. A medical report was provided within that timescale (§9), but the Tribunal concluded that the claimant had not complied with the order (§§16-17) and ultimately decided to strike out the claim. Peter Gibson LJ described the decision to make the order for the production of a medical report as a "sensible course". At §41 he said this (emphasis added):

> *"41. ... **The Tribunal, knowing that it was for an applicant for an adjournment to satisfy it that an adjournment was appropriate, could arguably have dismissed Mrs Andreou's application, as the employer had urged, on the basis that she had not discharged the burden on her. But instead the Tribunal adopted the sensible course of giving Mrs Andreou a further limited opportunity of making good the deficiencies in her evidence in support of her application for an adjournment. Further, it helpfully spelt out what information was required.** Although the EAT described the timetable as "short", I have to say that in the circumstances the timetable seems to me to have been not ungenerous to Mrs Andreou. Moreover, the Tribunal was at pains to point out that on 13th November the Tribunal would also consider the employer's application to strike out. **Mrs Andreou and her representative could have been in no doubt as to what might happen if the medical report which was to be produced in accordance with the Tribunal's order did not satisfy the Tribunal."***

53. In that case, the Court of Appeal proceeded to reject the argument that the Tribunal had been wrong to refuse a further adjournment[5] and to dismiss the claims (see §§42-49).

54. Mr Smith submitted that there is no reason in principle why an unless order cannot be made requiring a litigant to produce medical information or evidence in documentary form. He referred me to **McCarron v Road Chef Motorways Ltd (UKEAT/0268/18, unreported, 18 February 2019)**. There, ahead of a preliminary hearing to determine whether the claimant was a disabled person, orders were made setting

[5] See in particular §46. There, Peter Gibson LJ identified a number of factors that were relevant to the Tribunal's decision whether or not to adjourn including fairness to both sides, the passage of time since the subject matter of the complaint and *"the fact that other litigants are waiting to have their cases heard"*. He explained it was, at that time in 2002, *"notorious how heavily burdened employment tribunals are… Fairness to other litigants may require that indulgences given to those who have had the opportunity to justify an adjournment but have not taken that opportunity adequately are not extended"*. That is a factor of particular resonance in light of the current case-load burden on the Tribunals.

a deadline for the claimant to produce any further impact statement and any further medical or similar evidence on which she wished to rely at the hearing. When nothing further was provided, the Tribunal made an unless order in equivalent terms to the original order but setting a fresh deadline. The EAT (HHJ Auerbach) allowed the appeal because, on a proper construction of the unless order, the direction to provide "any" medical or similar evidence did not *require* the production of such evidence, only that if the claimant wished to rely on any such evidence, then she had to produce it by the deadline. Whilst **McCarron** was a case in which a Tribunal made an unless order requiring "any" medical or similar evidence to be produced, it does not appear to have been a point of argument in the appeal that the Tribunal was not empowered to make such an order.

55. Nonetheless, I accept Mr Smith's submission as a matter of principle. Neither the 2013 Rules, nor the 2024 Rules, place express limits on what the Tribunal can require of a litigant when framing an unless order. There is therefore no reason in principle why an unless order cannot require a litigant to provide medical evidence, even though compliance will involve obtaining assistance from a medical practitioner, provided that the principles governing the making of unless orders are properly applied.

56. Were those principles applied properly in this case?

57. The Appellant's central argument is that when making the unless order, the Tribunal failed to consider whether an automatic dismissal of her entire claim would be proportionate to any material non-compliance. Mr Smith accepted the principle that when making an unless order, the Tribunal must be satisfied of such proportionality. He was plainly correct to do so. It is a proposition well established in the authorities, including **Mohammed**. Mr Smith's response on behalf of the Respondent was that the Tribunal *did* consider the consequences of non-compliance and its proportionality to any future default. He referred to a number of passages of the reasons to which I must now turn.

58. At §§12-13, the Tribunal set out how Rule 38 operates and that because the effect of dismissal can be draconian it should not be done lightly. Those passages demonstrate that the Tribunal understood how

the order would operate and that material non-compliance would result in dismissal of the entire claim. Those passages do not, however, involve the Tribunal considering the proportionality of that outcome to a future breach.

59. Mr Smith next took me to §§14-15. I have set these passages out above.

i. At §14.1, the Tribunal concluded that there was no reason to think a further order without some penalty attached would be complied with. In my judgment, this was a conclusion that was reasonably open to the Tribunal on the material before it. The Tribunal needed to be satisfied that the pressure of an unless order was justified. However, it does not involve consideration of, nor does it establish that, the penalty of automatic dismissal would be a proportionate response to a future breach.

ii. §14.2 records the Tribunal's view (again one that in my view it was entitled to reach) that there had been a lack of frankness about the Appellant's medical position. It similarly contains no assessment of the proportionality of dismissal for future breach.

iii. At §14.3, the Tribunal considered whether it should simply relist the hearing without further medical evidence. The Tribunal concluded it needed to know what other adjustments might be needed and it would be helpful to have a doctor's opinion on that question. Again, that seems to me unobjectionable. The Tribunal was entitled to consider whether instead of making a further order, it should simply relist the case on the basis of what it then knew. In my view it was within its case management discretion to choose not to adopt that course, but rather to make some form of further order requiring the provision of the medical evidence. However, this sub-paragraph does not assess the proportionality of automatic dismissal of the entire claim in the event of a future failure to provide the required medical evidence.

iv. At §14.4, the Tribunal stated that it and the Respondent needed to know whether the Appellant

would be fit for a hearing in February, and if not, when. It stated that a late adjournment application would be disruptive. Whilst these are all reasonable points to make, I am unable to detect an assessment (however brief) of the proportionality of dismissing the claim in the event the order was not complied with.

v. Next, at §14.5, the Tribunal indicated it had "some concern" that the Appellant was seeking to put off a resumption of the hearing, indicating that an unless order would help the Appellant focus on the need to supply the evidence required. As I have explained above (and see further, **Forrest**) an unless order can be an important procedural tool which has the effect of concentrating a litigant's mind and putting pressure on them to comply with an order. However, even where it is reasonable for the Tribunal to wish to apply pressure, it is still a prerequisite to making an unless order for the automatic sanction of dismissal to be proportionate to a potential future breach of the order. §14.5 does not involve the Tribunal considering this issue.

vi. Finally, at §15 the Tribunal considered the time allowed for compliance and the practical means by which the Appellant might comply. Again the required proportionality assessment is absent.

60. I have stood back and considered the judgment as a whole. I have reached the view that, whilst the Tribunal referred to a number of relevant matters, it failed to assess whether the automatic dismissal of the entire claim would be proportionate to a future material breach of the order. That in my judgment amounts to an error of law requiring the unless order to be set aside.

61. In appropriate circumstances, a Tribunal might well be satisfied of the proportionality of an unless order prescribing automatic dismissal of all claims for breach of a requirement to provide specified medical evidence. That was not, however, considered in the present case. In my judgment there is force in the Appellant's submission that the analysis ought to have included consideration of the fact that her

evidence in support of her claims was almost complete. Since she was represented, her personal attendance was required only for the completion of her cross-examination. In those circumstances there ought to have been some consideration of the proportionality of dismissing her claims entirely for failing to provide medical evidence relevant to relisting.

62. A relevant consideration in the circumstances of this case was whether the legitimate purpose of the proposed unless order could adequately have been achieved by an order carrying less drastic consequences in the event of future breach. I recognise the difficult case-management position which confronted the Tribunal: there had been a breach of the 26 July 2024 order, no application for an extension of time for compliance, no proper explanation for the breach, and a lack of clarity and frankness about the current medical position. The Tribunal was legitimately concerned that the Appellant was seeking to delay the resumed hearing and that the proceedings needed to be brought to a conclusion. It was legitimate for the Tribunal to want to have medical evidence to help it with the relisting decision. It was legitimate for it to choose to order the Appellant to provide it (rather than accepting the invitation to write directly to the doctors concerned). However, on 16 October 2024, as well as considering the alternative course of relisting (which the Tribunal did at §14.3), the Tribunal ought to have considered whether less draconian orders would be effective. By way of one example, the Tribunal might have considered requiring the Appellant to supply the specified medical evidence by a set date, with the express consequence that if she defaulted, the Tribunal would wait no longer and simply proceed to relist on the basis of the information then available. Such an order would not have been a mere repetition of the 26 July 2024 order, which carried no specified consequence for default. It would have represented a meaningful escalation — the loss of any further opportunity to influence the relisting — whilst stopping short of automatic dismissal of the entire claim. Any future application to adjourn the relisted hearing would then fall to be considered in light of all relevant circumstances including that there had been a failure to provide medical evidence for the purpose of listing, that the Appellant had completed the majority of her evidence, and that she was represented.

63. Given my conclusion above, I can deal briefly with the Appellant's remaining criticisms. I start with the

suggestion that it was wrong for the Tribunal to impose an unless order because the Appellant had in fact complied with the order of 26 July 2024 by the provision of medical evidence. This argument is misconceived. Whilst those assisting the Appellant had provided some medical evidence, it was clearly not medical evidence that met the terms of the order. The order required three particular matters to be addressed and there is no question that they had not been. The Tribunal was entitled therefore to make a suitable case management order on the basis that there was ongoing breach of the order of 26 July 2024.

64. Next, it is suggested that the Tribunal failed to take into account the overriding objective. The Appellant is correct that the Tribunal was obliged to seek to give effect to the overriding objective when exercising its case management powers (see Rule 3(3)(a) of the 2024 Rules, and Rule 2 of the 2013 Rules). However, it is clear from §14 of the reasons that the Tribunal was in fact considering the various elements of dealing with the case justly. It was concerned to list the case at a time that was fair to the Appellant, to reduce delay, to avoid costs being wasted by the Respondent, and to avoid wastage of the Tribunal's resources. I am therefore satisfied the Tribunal did take into account, and was trying to further, the overriding objective.

65. Next, the Appellant argued that an unless order was in principle inappropriate where compliance by the Appellant depended on actions of a third party. Reliance was placed on **Tanase v Barchester Healthcare Ltd [2023] UKEAT 84.** There, Lord Fairley P allowed an appeal against the automatic dismissal of the claimant's claims for breach of an unless order. The order in question was found, on analysis, not to be an unless order but an ordinary case management order. Nonetheless, Lord Fairley observed that aspects of the order directed to the claimant were entirely beyond his power to comply. Those parts of the order required *the Respondent's* solicitors to take certain steps (contact a witness asking them to respond; indicate if evidence was agreed by the Respondent): see §9.

66. I do not consider the Appellant's criticism to be well founded. The terms of the unless order required the Appellant to supply "medical evidence" covering specified matters by 2 December 2024. That was

an obligation placed on the Appellant that was within her power to comply. She had the opportunity from 16 October 2024 until 2 December 2024 to seek and obtain from a medical practitioner evidence on the topics identified by the Tribunal. That could have been evidence from her treating GP, mental health team, Dr Orfanos, or a privately instructed GP. As set out above, by 26 November 2024, the Appellant had been told by her GP that she would need to contact Occupational Health or a private GP to obtain the medical evidence required. The need for involvement and cooperation of a third party with medical expertise does not mean that the obligation was (as in **Tanase**) entirely outside the Appellant's ability to comply. As I have explained, I do not accept that, as a matter of principle, an unless order cannot be made where compliance requires the involvement of a third party. Of course, that issue should be considered when making the unless order, not least when considering the proportionality of the sanction of dismissal to a potential future breach of the unless order. It might also be of particular relevance if an application is made under what is now Rule 39(2) to set aside the unless order.

67. Mr Smith also submitted that the Appellant could have supplied "medical evidence" by setting out in a witness statement what she had been told by those treating her. Construing the order in accordance with the principles set out in **Wentworth-Wood** at §44 (see paragraph 35 above), I do not accept that submission. "Medical evidence" would be an unnatural description of a lay person's hearsay account of what a medical practitioner had said in consultation. Further, the second requirement of the "medical evidence" specified in the order was that it should state what adjustments were required "in the opinion of the medical practitioner". That seems to me a strong indication that the "medical evidence" was to emanate from a medical practitioner. Whilst the Tribunal could have referred expressly to "medical evidence from a suitably qualified medical practitioner", it is tolerably clear to me that this is what the order required. Ultimately, however, this point does not alter the central thrust of the analysis above.

68. Finally, it is said the Tribunal took insufficient care when making the unless order, including in respect of the drafting of its terms. In particular, complaint is made that the Tribunal failed to contemplate that medical professionals might refuse to provide medical evidence when requested. I do not accept this criticism. The Tribunal took account of what it had been told in respect of liaison with the Appellant's

treating doctors when it was making the unless order (see further below), and took care when drafting the terms of the order.

Other Grounds

69. The remaining grounds of appeal can be taken more briefly.

70. **Grounds 2 and 3** are related. In the former, it is argued that the Tribunal made an error in its treatment of the facts: it failed to acknowledge that the Appellant had provided some medical evidence and had requested further information from her treating doctors. In the latter the Appellant contends the Tribunal was wrong to find that there had been an unhelpful lack of frankness at §14.2 of the reasons.

71. I do not consider that these grounds are well founded. The Tribunal did acknowledge that the Appellant had provided some medical evidence, indeed it relied on the report of Dr Orfanos when making the order of 26 July 2024 (see §§1-2 of the reasons). At §7 of the reasons the Tribunal further set out what it had been told by the Appellant's husband about requests to the mental health team to provide medical evidence in line with the Tribunal's order. These matters were plainly considered and assessed (see §14.2). The Tribunal nonetheless still had to grapple with the fact that the questions relevant to the relisting of the case, as set out in its order of 26 July 2024, remained unanswered. At the appeal hearing, Mr Chowdhury relied on other communications sent *after* 16 October 2024, however those emails were not before the Tribunal when it made the decision to make an unless order and do not establish that it made an error of law in so doing.

72. As for the finding at §14.2 that there was an unhelpful lack of frankness, in my judgment it was open to the Tribunal to reach this conclusion for the reasons that it gave. The Tribunal was critical in that paragraph that it had been *"difficult today to get clear answers"* and that the Tribunal was still not clear whether the treating doctors had seen the Tribunal's previous order. Given (i) it was clear from the 26 July 2024 order what the Tribunal needed to know, (ii) the discovery that the Appellant was in fact at work on the day of the preliminary hearing (see §6 of the reasons), and (iii) the representations made

(see §§7-8 of the reasons, including that it was unlikely the treating doctors would ever be able to provide the evidence required by the Tribunal), in my view the Tribunal was entitled to reach the view that there had been a lack of frankness and this was unhelpful. I therefore dismiss grounds 2 and 3.

73. **Grounds 4, 5 and 6** can also be taken together. By Ground 4, the Appellant complains the decision to make the unless order was perverse. By Ground 5, the Appellant argues the Tribunal "wrongly" exercised its discretion. Finally, by Ground 6, the Appellant contends the decision was inadequately reasoned. These grounds of appeal expressly rely on the same reasoning as given in ground 1 which I have dealt with above. I do not consider that these grounds add anything of substance to ground 1.

The Appeal against the Notice Confirming Dismissal of the Claim

74. The Appellant also appeals against the notice dated 5 December 2024 confirming the dismissal of her discrimination claims. That appeal is brought by a Notice of Appeal lodged on 13 January 2025. Six grounds of appeal were advanced. HHJ Beard considered that all except ground 6 were sufficiently arguable to proceed.

75. Given my conclusion on the first appeal, the notice confirming dismissal cannot remain effective once the unless order on which it depended has been set aside. It is therefore unnecessary to determine the second appeal in order to dispose of the proceedings. Nevertheless, since the grounds were fully argued and concern the distinct function performed by the Tribunal when giving notice of dismissal, I shall state my conclusions on them briefly.

76. **Ground 1** is that the Tribunal erred when concluding there was no material compliance with the unless order because the Appellant had provided all the medical evidence within her control. This ground is not well-founded. The wording of the unless order did not merely require the Appellant to send the medical material already in her possession. It required her to send to the Tribunal and the Respondent medical evidence about the three specific matters set out in the order (see paragraph 15 above). That

obliged her to go out and obtain and then send that evidence to the Tribunal and the Respondent by the deadline. There is no real dispute that the material which the Appellant sent to the Tribunal both before the unless order, and on 1 December 2024, was not medical evidence about the three matters set out in the order. In my view it is clear that the Appellant was in material breach of the order. The issue the Appellant raises is effectively a complaint that it was not fair for her to be deemed to be in material breach when she sought the evidence from her treating medical practitioners and they did not provide it to her. That, however, is not the point the Tribunal had to decide at this stage. It was not for the Tribunal to revisit the making of the unless order, or to consider relief from sanctions: see **Uwhubetine** (above). To the extent the Appellant's complaint is that it was unjust for the sanction to operate where compliance proved impossible despite reasonable efforts, that is a matter for an application for relief from sanctions, not for the compliance determination. The only question was whether the Appellant was in material breach of the order. The Tribunal did not err in answering that question.

77. **Ground 2** is that the Tribunal's decision was not adequately reasoned. I see no merit in this ground. The Tribunal's reasons for giving the notice were entirely adequate and explained the basis on which the Appellant was in material breach of the unless order and confirmed the sanction of dismissal had occurred.

78. **Ground 3** is that there was an absence of evidence to support the finding that there was no material compliance with the unless order. In my judgment this ground adds nothing to ground 1. For the reasons I have given, there is no merit in that contention.

79. **Ground 4** is that the Tribunal's decision was perverse. There is no merit in this contention. For the reasons I have given under ground 1, not only was there an adequate basis for the Tribunal to conclude as it did, I consider it was plainly correct to find the Appellant in material breach of the order.

80. Finally, **Ground 5** is that the Tribunal exercised its discretion wrongly and failed to take into account the correspondence that had been sent to the treating doctors. That ground cannot succeed. The decision

whether or not to issue a notice confirming automatic dismissal did not involve the Tribunal exercising a discretion. It involved the Tribunal determining whether the Appellant was in material breach of the order. As I have explained, the Tribunal determined that point correctly.

81. For those reasons, none of the grounds directed specifically to the Tribunal's determination of material non-compliance is made out. Nevertheless, because the underlying unless order is set aside, the notice confirming dismissal has no continuing effect and must also be set aside as a consequential matter.

The Cross Appeal

82. In its Answer dated 21 March 2025, the Respondent advanced a cross-appeal on a single ground. The Respondent argued that the Tribunal erred in law by only confirming in the notice of 5 December 2024 that the Appellant's discrimination claims were dismissed. Reliance was placed on the unless order stating that the consequence for breach was that *"all"* the Appellant's remaining claims were to be dismissed.

83. The cross-appeal had already become academic when, on 9 April 2025, EJ Goodman sent the parties a further notice confirming that all the remaining claims had been dismissed pursuant to the unless order. In any event, it now falls away because the unless order itself is to be set aside. Had the order remained in force and the Tribunal not corrected the position, the ground of cross-appeal would have been well founded: the notice dated 5 December 2024 did not correspond with the sanction specified in the unless order. In the circumstances, however, the cross-appeal is dismissed.

Conclusion and Disposal

84. I allow the appeal against the making of the unless order dated 16 October 2024 and set that order aside. I also set aside, as a consequence, the notice dated 5 December 2024 confirming dismissal. The Appellant's claims therefore no longer stand dismissed pursuant to that order, and the case must return to the Tribunal.

85. Having considered the factors set out in **Sinclair Roche & Temperley v Heard [2004] IRLR 763**, I

have concluded that the case should, if possible, be returned to the same Tribunal that heard the first two days of the final hearing in 2024. Although a significant period has elapsed, that Tribunal remains best placed, if practicable, to resume the part-heard hearing. The error of law in the making of the unless order does not call into question the Tribunal's ability professionally and fairly to adjudicate on the substance of the claim. Remission to the same Tribunal offers the best prospect of avoiding the loss of the first two hearing days and thereby saving costs and Tribunal resources.

86. It will be for the remitted Tribunal to make all necessary case-management decisions concerning the relisting. That might include determining the number of days for the relisting (bearing in mind some additional time may be required to read back into the case). It will be open to the Tribunal to consider making further orders as to medical evidence if it sees fit to do so.

87. To assist the Tribunal in furthering the overriding objective and to relist as soon as possible, I shall exercise my powers to order that:

    i. The Appellant and the Respondent must, by 4pm on 16 October 2026, send to the London Central Employment Tribunal any dates to avoid during the remainder of 2026 and in 2027 for the resumed part-heard hearing. In the event that a party fails to comply, the Tribunal may proceed to relist the part-heard hearing without regard to that party's dates of unavailability.

    ii. If the Appellant wishes the Tribunal to consider any medical evidence when deciding when to relist this case, that must be sent by her to the Tribunal by 4pm on 16 October 2026. In the event the Appellant fails to send any medical evidence, or the medical evidence provided does not cover the matters set out in the Tribunal's order of 26 July 2024, the Tribunal may proceed to relist the part-heard hearing on the basis of the information then available.

88. At the appeal hearing I was shown an Occupational Health report dated 20 November 2024. In light of it, Mr Chowdhury submitted in his skeleton argument that by November 2024, the Appellant *"was*

managing her condition well and she was fit to attend [the] hearing". No current medical evidence has been provided to show that the Appellant is now unfit to attend the resumed hearing. The Tribunal will therefore be entitled, when relisting, to proceed on the basis that the Appellant has not shown that she is unfit to attend, unless she provides further medical evidence to that effect. The second part of my order affords her an opportunity to place before the Tribunal evidence addressing the legitimate considerations identified in the order of 26 July 2024. If she does not do so, it will be for the Tribunal to decide how to exercise its case-management powers. That may include relisting on the basis that the Appellant has not shown that she is unfit, or making a further case-management order.

89. The Appellant should understand, however, that once the case has been relisted there will be a strong expectation that the hearing will proceed. Any later application for postponement will fall to be determined by the Tribunal in light of all the circumstances then existing, including the opportunities previously afforded to the Appellant to provide medical evidence before relisting.