# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
|---|---|---|
| Mrs Susan O'Brien | v | Dudley MBC |

# JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**Held at:** Birmingham (remotely via CVP) **On:** 15 September & 12 October 2021

**Before: Employment Judge Dimbylow**

**Appearances**

For the claimant**:** Miss Sue Ellis, Lay Representative & Support Worker

For the respondent**:** Mrs S Riaz, Solicitor

**By consent, this hearing took place against the background of the coronavirus pandemic; and was conducted remotely by Cloud Video Platform (CVP) in accordance with safe practice and guidelines.**

# JUDGMENT

1.Upon the claimant's application to set aside the strike out of her claim pursuant to Rule 38 (2): the application is granted in that I reinstate the claims for (1) unfair dismissal contrary to the Employment Rights Act 1996 and (2) disability discrimination in relation to claims under section 15 (discrimination arising from disability) and sections 20-22 (failure to make reasonable adjustments) of the Equality Act 2010.

2. There will be an Open Preliminary Hearing (OPH) to commence at 10am on 31 January 2022 with a time estimate of one day. The purpose of the OPH is to determine (1) whether the claims have been brought in time and if not whether time may be extended, and (2) whether the claimant is disabled within the meaning of the Equality Act 2010 during the period 8 April 2019 until 6 March 2020. The hearing will be held remotely via CVP or some other video platform.

# REASONS

**Introduction**

1. The purpose of my considering the case on these 2 days was for me to deal with an application by the claimant for the strike out of her case to be set aside under Rule 38(2). I do not propose to dwell on the history and background to the case as I set it out in the preamble to various orders I made at a Closed Preliminary Hearing (CPH) on 15 February 2021, although I repeat 3 paragraphs of my case summary as a brief introduction.

**Case management summary**

1. The claimant was employed by the respondent, a local authority, as a Care Assistant, from 17 November 2003 until 18 December 2019. Early conciliation started on 27 May 2020 and ended on 28 May 2020. The claim form was presented on 29 May 2020.

2. The claim is about the claimant's dismissal and her assertion that it was tainted by discrimination. The respondent's defence is that the claimant was fairly dismissed by reason of capability owing to long-term sickness absence. Furthermore, the claim has been presented out of time, the disability discrimination claims are not properly pleaded and cannot be understood, and the question of the claimant's disability is not conceded.

3. Unfortunately, the claimant did not take part in today's hearing. The tribunal made numerous telephone calls to the claimant and left messages for her. The tribunal also communicated with the claimant by email, but again there was no response from her. Ms Hartley [the respondent's representative] confirmed that she had had no response from the claimant to her own enquiries in the build-up to today's hearing. Without the claimant's contribution to today's hearing it was very difficult to define the issues in her absence. Nevertheless, I did agree to make various orders to move the case forward.

**The claimant's complaints**

2. The claimant was making the following complaints:

   2.1. Unfair dismissal.

   2.2. Disability discrimination.

   2.3. Breach of contract over notice.

   2.4. Holiday pay.

3. I made a number of case management orders and set out the consequences of failure to observe some of them. The order I made (and which was **sent to the parties on 16 February 2021**) included this:

## Unless order

On the application of the respondent and having considered any representations made by the parties I order that unless the claimant:

1. Explains in writing to the tribunal by **4pm on 1 March 2021** (1) why she failed to participate in today's hearing, (2) why she failed to reply to emails from the tribunal office and (3) why she failed to reply to correspondence from the respondent's legal representatives, the whole claim will stand dismissed without further order.

2. Complies with the orders set out below numbered 6, 7, 9, 10 and 11 by **4pm on 15 March 2021** the whole claim will stand dismissed without further order.

3. My reasons for making these orders are that the claimant has failed actively to pursue her claim. She has failed to respond to communications from the tribunal office and the respondent; and failed to take part in today's hearing without offering any explanation for not so doing.

The orders numbered 6, 7, 9, 10 and 11 were these:

## Further information

6. The claimant must write to the Tribunal and the other side by **4pm on 15 March 2021** with the following information: the precise nature of the disability discrimination claims being pursued by reference to the section or sections of the Equality Act 2010 said to have been breached by the respondent.

## Schedule of Loss

7. The claimant must by **4pm on 15 March 2021** send to the respondent and the Tribunal a document setting out how much compensation for lost earnings or other losses she is claiming and how the amount has been calculated. This is called a Schedule of Loss.

9. The claimant must write to the respondent by **4pm on 15 March 2021** confirming what physical or mental impairment(s) she relies on.

10. The claimant must write to the respondent by **4pm on 15 March 2021** with the following information about each impairment:

10.1 How long has the claimant had the impairment?

10.2 What are/were the effects of the impairment on the claimant's ability to do day-to-day activities on the relevant dates which should be set out?

The claimant should give clear examples. If possible, the examples should be from the time of the events the claim is about. The Tribunal will usually be deciding whether the claimant had a disability at that time.

> *In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.*

10.3 Give the dates when the effects of the impairment started and stopped. If they have not stopped, say how long they are expected to last.

10.4 If the effects lasted less than 12 months, why does the claimant say they were long-term?

10.5 Has the claimant had medical treatment, including medication? If so, what and when?

10.6 Has the claimant taken other measures to treat or correct the impairment? If so, what and when?

10.7 What would the effects of the impairment have been without any treatment or other measures? The claimant should give clear day-to-day examples, if possible.

10.8 Any other information the claimant relies on to show that she had a disability.

11 The claimant must by **4pm on 15 March 2021** send to the respondent:

11.1 copies of the parts of her GP and other medical records that are relevant to whether she had the disability at the time of the events the claim is about. She may blank out anything that is clearly not relevant.

11.2 any other evidence relevant to whether she had the disability at that time.

4. At my CPH I also ordered an Open Preliminary Hearing (OPH) to take place over 1 day on **12 May 2021**, and the purpose of it was to deal with the following preliminary issues:

(1) Whether the claimant was a disabled person within the meaning of the Equality Act 2010, and.

(2) Whether having regard to the time limits concerned for any of the claims, the tribunal has jurisdiction to hear the claimant's complaints.

5. The OPH never took place, as **the claim was struck** out pursuant to the unless order, and the tribunal notified the parties of this in writing and it was dated **7 April 2021**.

6. The claimant wrote to the tribunal on 28 February 2021 and asked for a further copy of my CPH order. The claimant wrote again to the tribunal on 28 February 2021. On 1 March 2021 Sue Ellis wrote to the tribunal on behalf of the claimant. The tribunal directed the respondent to comment on what had been said by the claimant in correspondence. There were further emails from the claimant on 7 March 2021 (2), and 8 March (1). The respondent replied on 8 March. The claimant sent a further email to the tribunal on 8 March. The tribunal then received 7 emails from the claimant or Ms Ellis on 9 March, and another on 15 March.

7. On 18 March the respondent wrote to the tribunal seeking the striking out of the claim because of the claimant's breach of the unless order. I made a further order on 24 March 2021 as follows:

"By no later than 4pm on 1 April 2021, the claimant must comply with paragraph 19 of [my order] dated 15 February 2021 and also explain why she hasn't fully complied with the unless order dated 15 February 2021."

At the same time the claimant was reminded that all correspondence sent to the tribunal should be copied to the respondent.

For ease of reference paragraph 19 said this:

"The claimant must send the respondent a witness statement dealing with the out of time issues by **4pm on 15 March 2021**."

8. The claimant emailed the tribunal on 3 occasions on 24 March 2021. The respondent filed an amended response on 29 March 2021. The claimant then emailed the tribunal 3 times on 29 March, 5 times on 30 March, once on 31 March, and once on 1 April. As mentioned before the tribunal notified the parties of the strike out on 7 April. The claimant, via Sue Ellis, emailed the tribunal later the same day drawing attention to the emails dated 1 and 9 March 2021 which she believed meant the unless order had been complied with, and wanted an explanation. On 30 April 2021 the claimant applied to appeal against the strike out decision. I consider the claimant has applied for relief against sanctions in time on 7 April 2021.

9. The respondent filed an amended response on 29 March 2021 (37-46). This includes reference at para 14 to the respondent's occupational health physician confirming that the claimant was suffering from mixed anxiety and depression which was essentially situational, and related to various life circumstances but there was no work related element to this. The narrative confirms that the claimant had numerous absences from work and management of attendance became an issue. Reference is made (para 19) to the impact upon the continuity of care for service users, the financial impact and other members of staff and/or agency staff being brought in to cover. This is, in effect, a justification defence to a section 15 claim in

relation to the dismissal . The respondent also pleads to the issue of failure to make reasonable adjustments (paras 22-23, and 29-31).

10. Since I adjourned the hearing after the 1st day, the claimant has submitted further emails and I have considered them, although they have not had any material impact on my analysis. The claimant is seeking to widen the scope of her claim, and failing to focus on relevant issues.

11. The respondent helpfully provided a bundle of documents of 174 pages (which I marked as exhibit R1) for use at this hearing and I thank them for that.

## The relevant law

### Unless Orders

12. "Unless orders", which had long been used in the civil courts, were introduced in the Employment Tribunal via Rule 13 of the 2004 Tribunal Rules of Procedure 2004 which dealt with compliance with orders and practice directions. Rule 13 (1) provided that non-compliance with an order etc might lead to the making of a costs or preparation time order, or an order for the striking out of the whole or part of the claim or response (etc). Rule 13 (2) provided that:

> "An order may also provide that unless the order is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice under rule 19 or hold a pre-hearing review or Hearing."

### The Employment Tribunals Rules of Procedure 2013

13. The 2004 Rules were superseded by the Employment Tribunals Rules of Procedure 2013 which now provide (so far as is relevant):

> **"Overriding objective**
>
> 2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
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> (a) ensuring that the parties are on an equal footing;
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> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.
>
> **Unless orders**
>
> 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.
>
> (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."

14. **Compliance.** When considering whether there had been compliance with an unless order for a claim to be particularised it was better to consider whether there was "material" rather than "substantial" compliance; and the approach should be qualitative, not quantitative: Johnson -v- Alden Metropolitan Borough Council UKEAT/0095/13.

15. **Effect.** In Markan Shipping (London) Ltd -v- Kefalas & Another [2007] 1 WLR a case concerning the CPR the Court of Appeal said: "It should now be clearly recognised that the sanction embodied in an Unless Order takes effect without the need for any further order if the party to whom it is addressed fails to comply with it in any material respect":

16. That has been repeated in Employment Tribunal cases; the effect of non-compliance with an unless order is that the claim or response is struck out at once; no order or judgment is required for that purpose. "Where a claim is automatically struck out by reason of the operation of an unless order, it is inappropriate to produce a further judgment: rather, the proper course is for the Tribunal simply to write to the parties recording what has already occurred by reason of the earlier order": Felicien v Commissioner of Metropolitan Police UKEAT/0362/12.

17. Once a breach of an unless order had been established it was incorrect to split the order to allow one claim to proceed; all claims subject to the order should be struck out, subject to any relief granted under the review procedure: Royal Bank of Scotland v Abraham UKEAT/0305/09.

18. **The approach to applications for relief from sanctions.** The Civil Procedure Rules in force until fairly recently contained at CPR 3.9(1) a list of 9 factors to be taken into account by a court considering whether to give relief from a sanction. In Neary v Governing Body of St Albans Girls School [2010] ICR 473 CA Lady Justice Smith reviewed the authorities. She concluded that Parliament had deliberately not incorporated CPR 3.9 into tribunal practice; and that while a Judge in the civil courts when considering relief from sanctions is under a positive duty to consider all the CPR 3.9 factors:

> "52. I do not consider that the same detailed requirements are to be expected of an employment judge considering an application for a review of a sanction. Of course, the judge must consider all the relevant factors and must avoid considering any irrelevant ones. He might well find the list in CPR r 3.9(1) to be a helpful checklist, although he would be well advised to remember that, in the instant case, that list might not cover everything relevant. But he is not under any duty expressly to set out his views on every one of those factors. His decision must comply with the basic requirements as set out in English v Emery Reimbold & Strick [2002] 1 WLR 2409. Litigants are entitled to know why they have won or lost and appellate courts must be able to see whether or not the judge has erred. In a case of this kind, it seems to me that the basic requirements are that the judge must make clear the facts that he has regarded as relevant. He must say enough for the reason for his decision to be understood by a person who knows the background. In a case where the draconian sanction of strike-out has been imposed, it will be necessary for the judge to demonstrate that he has weighed the factors affecting proportionality and reached a tenable decision about it. That does not mean that he must use any particular form of words. Any requirement for a particular form of words leads readily to the adoption of them as a mantra. But it must be possible to see that the judge has asked himself whether in the circumstances the sanction had been just.

…

> 64. … The overriding objective requires that the management of the case should result in the case being dealt with justly as between both parties. It also requires the judge to consider the appropriate use of the resources of the court or tribunal. It is entirely within the overriding objective for a judge to take the view that enough is enough. That stage will more readily be reached in a case of deliberate and persistent failure to comply than one where there is some excuse for it."

19. In Thind v Salvesen Logistics Ltd EAT/487/09 the then President of the EAT, Mr Justice Underhill welcomed the decision in Neary commenting the law was 'much more straightforward' in the light of Neary and the law prior to that 'had become undesirably technical and involved'. Underhill P went on to summarise the law:

> '14. The tribunal must decide whether it is right 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.'

20. Part of dealing with a case justly is having regard to the impact of it on the resources of tribunals, to ensure that one case does not does not exhaust a disproportionate share of them, and so deprive other cases of time, or delay the start of them. Again per Smith LJ in Neary:-

> "64. … The overriding objective requires that the management of the case should result in the case being dealt with justly as between both parties. It also requires the judge to consider the appropriate use of the resources of the court or tribunal. It is entirely within the overriding objective for a judge to take the view that enough is enough. That stage will more readily be reached in a case of deliberate and persistent failure to comply than one where there is some excuse for it. …"

21. That point was repeated by Langstaff P in Harris v Academies Enterprise Trust UKEAT/0097/14:-

> "33. … justice is not simply a question of the court reaching a decision that may be fair as between the parties in sense of fairly resolving the issues; it also involves delivering justice within a reasonable time. Indeed, that is guaranteed by Article 6 of the [ECHR]. It must also have regard to cost. Even if the Employment Tribunal is not in the same position as the civil courts because there is no cost-shifting regime, … I would accept, too, that overall justice means that each case should be dealt with in a way that ensures that other cases are not deprived of their own fair share of the resources of the court. If a case drags on for weeks, the consequence is that other cases, which also deserve to be heard quickly and without due cost, are adjourned or simply are not allotted a date for hearing."

22. The reference to Art. 6.1 ECHR is of course to the European Convention on Human Rights which provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

23. Thus, the right is qualified one and not absolute. As a result, a balancing exercise must thus be conducted in cases where Convention rights conflict and as the CA stated in Blockbuster Entertainment Ltd v James [2006] IRLR 630 in the context of strike out "20. … striking out must be a proportionate measure …" but as it went onto say that is also a requirement of the common law:-

> "21. It is not only by reason of the Convention right to a fair hearing vouchsafed by article 6 that striking out, even if otherwise warranted, must be a proportionate response. The common law, as Mr James has reminded us, has for a long time taken a similar stance: see Re Jokai Tea Holdings [1992] 1 WLR 1196, especially at 1202E-H. What the jurisprudence of the European Court of Human Rights has contributed to the principle is the need for a structured examination. The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact – if it is a fact – that the tribunal is ready to try the claims; or – as the case may be – that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist. If a straightforward refusal to admit late material or applications will enable the hearing to go ahead, or if, albeit late, they can be accommodated without unfairness, it can only be in a wholly exceptional case that a history of unreasonable conduct which has not until that point caused the claim to be struck out will now justify its summary termination. Proportionality, in other words, is not simply a corollary or function of the existence of the other conditions for striking out. It is an important check, in the overall interests of justice, upon their consequences."

24. Since the above cases were decided CPR has been amended, and the new version of CPR 3.9 is as follows:

> "On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
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> (a) for litigation to be conducted efficiently and at proportionate cost; and
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> (b) to enforce compliance with the rules, practice directions and orders."

25. In the civil courts and the ET, strike out may be used as a sanction in various circumstances, including non-compliance with orders of the court of tribunal. Parties whose cases have been struck out may apply for relief from that sanction; cases on relief from strike out are thus relevant to applications where a claim has been dismissed pursuant to an unless order. In Blockbuster v James which concerned rule 87 of the 2003 Rules the CA Sedley LJ cautioned that the power to strike out:

> "5. … is a Draconic power, not to be readily exercised. It comes into being if, … a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response. The principles are more fully spelt out in the decisions of this court in Arrow Nominees v Blackledge [2000] 2 BCLC 167 and of the EAT in De Keyser v Wilson [2001] IRLR 324, Bolch v Chipman [2004] IRLR 140 and Weir Valves v Armitage [2004] ICR 371, but they do not require elaboration here since they are not disputed. It will, however, be necessary to return to the question of proportionality before parting with this appeal.
>
> [*But warned as follows*]
>
> 18. The first object of any system of justice is to get triable cases tried. … But the courts and tribunals of this country are open to the difficult as well as to the compliant, so long as they do not conduct their case unreasonably. It will be for the new tribunal to decide whether that has happened here."

26. The Supreme Court emphasised the policy objectives behind the enforcement of sanctions in HRH Prince Al Saud v Apex Global Management [2014] 1 WLR 4495 (the Global Torch):

> "23. … The importance of litigants obeying orders of the court is self-evident. Once a court order is disobeyed the imposition of a sanction is almost always inevitable if court orders are to continue to enjoy the respect they ought to have and, if persistence in the disobedience would lead to an unfair trial, it seems, at least in the absence of special circumstances, hard to quarrel with a sanction which prevents the party in breach for presenting or resisting the claim and if disobedience continues notwithstanding the imposition of the sanction, the enforcement of the sanction is almost inevitable, essentially for the same reasons. Of course, in a particular case, the court may be persuaded by special factors to reconsider the original order, or the imposition or enforcement of the sanction."

27. One of the early EAT cases on the 2013 Rules was Morgan Motor Company Ltd v Morgan UKEAT/0128/15 before Her Honour Judge Eady QC where the claimant was granted relief from the dismissal of his claim for non-compliance with an unless order. The EAT remitted the decision having concluded the Employment Tribunal had failed to import into the balancing exercise factors that were relevant to the proper exercise of the discretion but the EAT again approved the approach in Neary and Thind. The EAT also referred to Global Torch and noted that although the CPR do not directly apply in the Employment Tribunal, the approach to relief from sanctions is likely to give rise to very similar considerations.

28. In Morgan the EAT stated the material factors to be weighed will vary considerably, and set out generally what would be included. HHJ Eady put the issue of the unless order and an application for relief from sanction under the microscope again in the case of Singh v Singh (Trustee Representative of the Guru Nanak Gurdwara West Bromwich UKEAT/0158/16/BA. In her discussion and conclusions at paragraphs 32 to 35 she gave further illustration of the approach that an Employment Tribunal should take. I summarise it briefly. I am to record the factors that I consider relevant, carry out the necessary balancing exercise, and produce an adequate explanation of what had been done. I am obliged to reach a decision judicially, that is: (1) having regard to the relevant factors, (2) showing engagement in a proper assessment of the material circumstances, (3) determining the case in what is in the interests of justice, (4) making it apparent, as a matter of substance, and not simply form, that I did weigh the different relevant factors, and (5) the reasoning must be adequate, demonstrating the relevant balancing exercise was carried out. Since this type of issue brings about the end of the case full reasons should be given. It is recognised that I have a "judgement call" to make, and the

fact is acknowledged that a different Judge faced with the same facts might have reached a different decision. This process is not a science, but an art.

**The claimant's evidence (and submissions)**

28. I received some informal oral evidence from the claimant on the 1st day and we worked through the various orders that I had made originally. We did this relatively informally as the claimant was rather anxious about the proceedings and we all agreed this was the best way forward. Mrs Riaz was able to ask questions in cross-examination if she wanted to do so. The claimant explained that in relation to order 6 she had confirmed in writing that her impairments were as follows: (1) manic-depression (including anxiety and panic attacks), and this impairment was conceded by the respondent although not in relation to any specific dates, (2) asthma, which was not conceded, (3) a slipped disc (not conceded), (4) IBS (not conceded), (5) deafness in the right ear, (not conceded), 6 insomnia (not conceded) and 7 arthritis (not conceded). The claimant confirmed that the 1st act of disability discrimination occurred on 8 April 2019 when she received a warning letter and the last act of discrimination was 18 December 2019 with her dismissal. However, she went on to say that her appeal on 6 March 2020 was also part of the discrimination concerning the dismissal. The claimant said that her letter dated 9 March 2021 (92 in the bundle) complied with paragraph 6, although she conceded that it made no reference to her claims by reference to the equality act 2010.

29. Turning then to order 7 the claimant again submitted that she had complied with this when she had explained in correspondence that she could not give the exact amount as she did not have the ability to formulate it.

30. Then as to order 9 the claimant submitted that this had been complied with when she had answered order 6 and helpfully Mrs Riaz agreed. Order 10 was complied with on 9 March 2021 at 93 with further explanation at 104 and Mrs Riaz confirmed that it was complied with. And the same applied towards 11 the GP notes that were produced at 93 and 95 to 100, and elsewhere.

31. In relation to order 19, it was accepted that this was not subject to the unless order and had been answered although out of time on 11 August 2021. During her oral evidence the claimant submitted that not everything appeared in the bundle prepared by the respondent and said that she relied upon her case worker who was inexperienced.

32. The claimant said that she had added more information to her original claim form, and this was not in the bundle and Mrs Riaz was at disadvantage in not having seen it. We ran out of time for me to make a decision on the 1st day of the hearing and therefore I adjourned it to the 2nd day when I indicated that I would give an oral judgement and reasons, and having had the chance to attend at the tribunal office and look at the physical file. I have now done that.

33. Between the 2 hearing dates I was able to see an email from the claimant dated 1 June 2020 19:32 when she asked to add a further document to her claim form which had been submitted on 29 May 2020. Including the covering email it amounted to 38 pages. Stated very briefly, the attachments were letters, notes of meetings, medical notes and sick notes without any commentary. I cannot tell whether these things were or were not attached to the claim form when it was served upon the respondent. I have had a good look at the file to see if there is anything else that the claimant had submitted that may not have been seen by me or forwarded to the respondent. I could see 2 emails minutes apart on 28 August 2020 when the claimant described various stress factors in her life, and problems with her mental health over anxiety and depression.

34. I noted from the claim form that the claimant ticked the box signifying a preference to be contacted by email. This did not sit well with the suggestion that the claimant was not computer literate and struggled with the task of opening emails. The claimant sent a lengthy email to the tribunal on 28 February 2021 timed at 15:17 in which he explains why she did not attend the hearing. Again, stated shortly, the claimant outlined various matters that she was having to cope with in her life, had problems with memory owing to present mental health problems and she had forgotten the hearing in February 2021. I saw that the claimant asked for everything to be sent by post in that email; but I am not entirely sure if this has been done. In any event the claimant appears more than capable of responding to emails by email.

**The respondent's submissions**

35. Mrs Riaz submitted that this is not the 1st time the claimant had failed to comply with orders. The claimant had argued that she did not read all her emails. There was some contradiction what the claimant said about this having written back straightaway on 1 April 2021, which shows that the claimant was looking at her emails. Mrs Riaz submitted that order 6 has not been completely complied with because of the failure to identify with any precision the nature of the disability claims. Order 7 had not been complied with that all. She submitted that I should grant no relief from sanction. She submitted that there was no relevant case law. However, after I adjourned the hearing she did forward to the tribunal a copy of the case at 1st instance of Bi v E-Act case number 1304471/2015 in support of the respondent's submissions as to why the claimant's claim should remain dismissed. I did ask for a copy of that to be sent to the claimant to seek her comments but I have not seen anything from the claimant about it. Of course, this decision is not binding and is persuasive only. I have read it and taken it into account. However, the facts are different, although the case provides a useful analysis of the law.

**My conclusions and reasons**

36. The claimant complied with the 1st part of the unless order on 28 February 2021 in her email timed at 15:17. The real argument is whether the claimant has stated the nature of the discrimination claims she brings and has she given a schedule of loss? The claimant's email of 9 March 2021 timed at 12:34 provides a narrative of some 3 pages. On page 2 of it the claimant says this: "I cannot provide. Exact figures. For compensation I did not have a payslip it was done on the computer where I had a login account…" On the 3rd page the claimant refers to: "injury to feeling" and later: "but it's all money loss. And. Damage" and later "personal injury", "my unpaid pension contribution", "and my net earnings". Later on she says: "The compensation I would be happy with is not to struggle every day watching what I can I afford to get that extra meal." This is not set out in any sort of professional manner; but it is an attempt by a layperson to provide information in a narrative form to answer the order I made and I find she has done enough.

37. Turning then to the failure over identifying discrimination claims. The last email that I referred to gives a narrative account of the claims. There is plainly a reference to her claim for unfair dismissal. I can see a reference to adjustments, where the claimant had been asked to manage someone who was very challenging when she was in a vulnerable situation herself. Elsewhere there were references to time off through illness being counted against her, and it is not difficult to see that there is a section 15 claim here as well in relation to the detriment of dismissal, and the unfavourable treatment of having absences arising in consequence of her disability held against her when considering a capability dismissal.

38. I now carry out my broad assessment of what is in the interests of justice in this particular case and undertake the balancing exercise. I have regard to the overriding objective. Material factors will vary considerably as between cases. I have had the opportunity of seeing the claimant during the hearing and I have a better understanding of the problems she faces arising out of her various impairments and serious life events. The claimant presented as open and honest in her explanations. She has done her best to explain her position in the numerous emails that she sent to the tribunal. They reflect her personality,

reflecting her mental health issues, with emails sent very late, sometimes several within a short space of time, and rather unfocused and rambling.

39. There is serious prejudice to the claimant if I do not grant the relief that she seeks because that is the end of her claim. The prejudice to the respondent is having to continue to deal with a claimant who is very difficult to communicate with and who has found it difficult to provide the particularity that was needed to make the case understandable to the respondent and the tribunal. This would also involve relisting the OPH to deal with the preliminary matters, although the respondent has made a partial concession on the disability issue.

40. Making my assessment at the point in time when the claim was struck out on the expiration of the unless order, a fair trial was still possible for the respondent. Much of the case from the respondent's side is well-documented, with minutes of meetings, correspondence, and relevant reports. The information from the claimant was there but difficult to decipher. Moving forward in time, and if I had to make the assessment as at the date of the relief from sanction application, a fair trial remained possible, subject to the preliminary issues being resolved at an OPH. I also note that in the response form the respondent did plead in response to the disability discrimination claim. In fairness to the respondent it did point out that the claimant failed to identify what provisions under the Equality Act the claimant was pursuing the claim, and asserted a general denial of liability. Nevertheless, it did plead specifically in relation to any reasonable adjustments claim, by referring to 3 adjustments that had been made. It reserved the right to amend its response upon receipt of further and better particulars. Of course, as described above, it amended its response pleading to the case as then understood on 29 March 2021.

41. There is much importance in finality of litigation and if the claimant is able to proceed with all of her claims (assuming she was able to avoid having them struck out at any resumed OPH) it is unlikely that they would be heard much before the autumn of 2022, given the complexity of the case. Obviously, no trial date has been fixed at this stage. I take into account the issue regarding the importance of the administration of justice within the courts and tribunals system. The claimant has access to the tribunal system; but has not used it properly by advancing her case in an entirely understandable and timely way; which caused the unless order to be made. A day's hearing (the OPH) was cancelled. I also considered the question of alternative sanctions, which would include taking into account whether a costs order should be made. This was not a particularly strong and influential point, because of course the respondent could apply for a costs award irrespective of the outcome of this application by the claimant.

42. The claimant has behaved very poorly in the conduct of these proceedings by failing to attend at a hearing, observe orders in a straightforward and understandable way, and communicate with the tribunal and the respondent in general terms. It was the claimant's lack of engagement which led to the unless order. Although the claimant is a litigant in person, she has had access to Sue Ellis who is a Support Worker. In considering the overriding objective and ensuring the parties are on an equal footing, it is not my function to put the claimant in a better position than she would be in if she was represented. My job is to ensure equality of arms. I look at the balancing exercise again, as I have done throughout; and see the end of the claim on the one hand; and continuing a rather ill-defined claim pursued by, on the face of it, an uncompliant claimant on the other. In my judgement, when determining the claimant's application, what is in the interests of justice? The claimant has not routinely disobeyed the orders of the tribunal and shown she has no respect for them. Quite the opposite, she has done her best to comply, and done so in her own way, and has been quite humble in her approach to the application. Given the claimant's conduct so far in the litigation, I do not conclude that on the balance of probabilities, were I to grant her relief from sanction she would continue in a course of conduct in disobeying orders. Whilst the claims have not been well defined, once I looked at the whole of the file and all of the information available I was able to discern what the claims were in general terms.

43. Therefore, I find and conclude that justice is best served, having regard to the overriding objective, by granting the claimant's application. This outcome, is just, fair and proportionate.

However, I grant it in relation to the claim for unfair dismissal, and disability discrimination pursuant to section 15, and failure to make reasonable adjustments only. The claimant's narrative suggests that she puts forward a claim for direct disability discrimination arising out of the dismissal; but on the information that she has provided it would not be in the interests of justice to reinstate such a claim. The claimant still has to get over the hurdles of the outstanding disability issue and time; and I am going to re-fix the date for the OPH which was previously cancelled. I would mention that there was a reference to an incident of harassment when the claimant was walked off the premises on the day of her dismissal. I can read into that that as possibly a claim for harassment related to disability; but it seems rather weak, and is a one off act, and on the face of it, is out of time. This may be a relevant background fact, but I'm not going to reinstate it as an issue as it is not in the interests of justice, bearing in mind the respondent's pleaded case that the respondent adopts a policy of doing this in like circumstances and the claimant was not simply singled out.

44. In relation to the disability issue I reinstate the claimant on the basis that the claimant relies on the impairment of manic depression which includes anxiety and panic attacks. The claimant told me that her insomnia was a symptom of her anxiety and manic depression. The IBS may also be a symptom of the manic depression. As far as asthma, the slipped disc, the deafness in the right ear and arthritis are concerned I do not reinstate the claims insofar as these are impairments or disabilities that the claimant may rely upon. The information provided by the claimant does not suggest that she relies upon them. For example, she said that she suffered with asthma when she was walking up hills and would use her inhaler to increase mobility. As for the slipped disc, she told me how she had some time off for it but nothing further. The deafness in her right ear improved by the use of antibiotic drops for infection. When there is an infection this reduces the quality of hearing, but the claimant does not require a hearing aid. There was limited information about the relevance of arthritis as an impairment in the claim.

45. I do not think it is in the interests of justice to reinstate the breach of contract claim over payment in lieu of notice. On the information before me claimant was paid in lieu of notice. Similarly, I do not reinstate the holiday pay claim because the claimant has been unable to explain it in any sort of meaningful way which was likely to lead to a judgement in her favour.

46. Both parties asked for written reasons and these are now provided.

Case management order

By consent, the respondent must notify the claimant and the tribunal in writing by **4pm on 26 October 2021** whether or not it concedes that the claimant was disabled by reason of manic depression, including anxiety and panic attacks, during the period from 8 April 2019 until 6 March 2020, and if not why not.

**Signed by Employment Judge Dimbylow**

On 12 October 2021