



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss A Harvey

**Respondent:** NACRO

**Heard at:** London Central (via CVP)

**On:** 2<sup>nd</sup> August 2022

**Before:** Employment Judge Nicklin (sitting alone)

## Representation

Claimant: in person

Respondent: Mr Shephard, Counsel

**Note:** This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was by video, conducted using Cloud Video Platform (CVP). It was not practicable to hold a face-to-face hearing because of the COVID-19 pandemic.

# RESERVED JUDGMENT ON A PRELIMINARY HEARING

It is the judgment of the tribunal that:

1. Subject to paragraph 2 below, the Claimant has not materially complied with the Unless Order dated 27<sup>th</sup> April 2022 (sent to the parties on 28<sup>th</sup> April 2022) (“the Unless Order”) and, accordingly, all of her claims of disability discrimination (including her claims of failure to make reasonable adjustments and disability related harassment) and victimisation stand dismissed in accordance with the Unless Order.
2. The Claimant is granted relief from sanctions in respect of all claims dismissed under the Unless Order only to the extent that she may rely on the admitted disability of Attention Deficit Hyperactivity Disorder (“ADHD”) in any disability related claim. For the avoidance of doubt, this includes the claim of victimisation. Accordingly, the dismissal of her claims specified in the Unless Order is set aside to that extent. The Claimant’s application for relief from sanctions to pursue any disability related claim on the basis of any other alleged disability is refused.

3. The Claimant's application to amend her claim to add a claim of discrimination based on her resignation/constructive dismissal is refused.
4. A separate case management order providing for the progression of the case to final hearing will be sent to the parties with a copy of this judgment.

# REASONS

## **Introduction**

1. This is the reserved judgment of the tribunal following an open preliminary hearing which took place on 2<sup>nd</sup> August 2022. The issues to be determined (and on which submissions were made at the hearing) are:
  - 1.1. Whether the Claimant has complied with the terms of the Unless Order sent to the parties on 28<sup>th</sup> April 2022 ("the Unless Order"). If she has not, her discrimination and victimisation claims stand dismissed as a result of that order.
  - 1.2. If those claims are dismissed, whether the tribunal should grant relief against that sanction to the Claimant. This means that, if relief is granted, the Claimant's claims would be reinstated.
  - 1.3. To determine the Claimant's application for permission to amend her claim to add a new claim of constructive unfair dismissal and/or a new allegation of discrimination in relation to alleged constructive unfair dismissal.
  - 1.4. Subject to the determinations made on the first three issues, any case management required to further prepare the case for final hearing (it is not in dispute that there is a protected disclosure claim which proceeds to final hearing in any event). Following this judgment, I have made a separate case management order which will be sent to the parties.
2. The hearing was listed for 3 hours, originally on the basis that it would hear submissions on the Unless Order. However, in the circumstances, to allow time for both parties to make representations in relation to the Unless Order and the amendment application, it was agreed that the decision on all matters would be reserved.

## **Procedural history**

3. By a claim form presented on 21<sup>st</sup> April 2021, the Claimant brought claims of disability discrimination, victimisation and protected disclosure detriment. She has been assisted by solicitors for most of the time since that point up to the case management hearing on 13<sup>th</sup> January 2022. Prior to that hearing, the Claimant had served further and better particulars and the Respondent had replied with an Amended Response.
4. The Claimant was employed by the Respondent from 20<sup>th</sup> May 2020, having previously been an agency worker with the Respondent from 6<sup>th</sup> August 2019. The Respondent describes itself as a social justice charity which works with vulnerable individuals across England and Wales. This includes the provision of housing services and the Claimant worked in this team, initially as a Service Manager and latterly as a Service Lead.

5. The claim is essentially about the Respondent's treatment of the Claimant in response to concerns it had about her performance. In particular, the Claimant says that the extension of her probationary period and placing her on a performance improvement plan, amongst other things, were detriments in circumstances where any concerns about her performance arose from disability.
6. The Claimant claims: discrimination arising from disability; failure to make reasonable adjustments; indirect disability discrimination; victimisation and harassment related to disability. The Claimant also alleges public interest disclosure detriment in respect of complaints she says she made to the Respondent about the standards and condition of properties let to tenants by landlords through the Respondent. The protected disclosure complaints are not affected by this judgment.
7. Case management orders were made at a hearing before me on 13<sup>th</sup> January 2022, where both parties were represented. The case management orders were sent to the parties the following day (14<sup>th</sup> January 2022). The parties both agreed to a specific direction as to the disclosure of medical evidence by the Claimant in support of her contention that she was disabled within the meaning of section 6 of the Equality Act 2010. This order read (at paragraph 7):

*By 10<sup>th</sup> March 2022, the Claimant is ordered to send all her GP medical notes and specialist reports to the Respondent which are relevant to the issue of whether the Claimant was at all relevant times a disabled person under the Equality Act 2010 ("disability issue"). The records are to be treated confidentially for the purposes of the litigation only.*

8. The order also required the Claimant to provide an impact statement, which was complied with and served on the Respondent.
9. Paragraph 9 of the order required the Claimant to do the following:

*By 10<sup>th</sup> March 2022, the Claimant must also confirm in writing to the Respondent which disabilities (on which she relies in her claim) relate to each of her complaints. This should be by reference to the list of issues prepared by the parties.*

10. In or around 10<sup>th</sup> March 2022, the Claimant began managing the case on her own, as a litigant in person. She was no longer in a position to continue with the instruction of solicitors. She attended this hearing unrepresented and I made any necessary adjustments, such as breaks, to ensure that the Claimant was able to access the hearing and present her case.

**Issue 1: The Unless Order – has the Claimant complied?**

11. On the application of the Respondent, I made the Unless Order, sent to the parties on 28<sup>th</sup> April 2022. This required the Claimant to comply with paragraphs 7 and 9 of the case management order. The terms are set out below:

***UNLESS by 20<sup>th</sup> May 2022*** the Claimant complies with paragraphs 7 and 9 of the case management order dated 13<sup>th</sup> January 2022, the Claimant's claims of disability discrimination (including her claims of failure to make reasonable adjustments and

*disability related harassment) and victimisation will stand dismissed without further order.*

**For the avoidance of doubt:**

1. *This unless order does not include the Claimant's protected disclosure claim.*
2. *In order to comply with this unless order, the Claimant must:*
  - a. *send all her GP medical notes and specialist reports (if any) to the Respondent which are **relevant** to the issue of whether the Claimant was, at all relevant times for the purposes of her claims, a disabled person under the Equality Act 2010 ("disability issue"); and*
  - b. *confirm in writing to the Respondent which disabilities (on which she relies in her claim) relate to each of her complaints. If the Claimant says that all of her disabilities are to be considered in relation to a particular complaint, she should make this clear when writing to the Respondent.*

12. The Respondent contends that the Claimant has failed to comply with the Unless Order, she is default and the discrimination, harassment and victimisation claims are therefore dismissed. The Claimant says she has complied. I heard detailed submissions on this question from both parties and the Respondent supplemented their submissions with a written skeleton argument. I do not set out the submissions here but any relevant matters are included within my findings below.

13. At this hearing, the Claimant confirmed that the only impairments she relies on as her disabilities in this case are Autism and ADHD. The Claimant says that she has experienced other conditions as a result of the treatment which she alleges in the claim, but they are not part of her case on disability.

14. The Respondent accepts in its Amended Grounds of Resistance that the Claimant "is likely to meet the definition of a disabled person [in respect of] Attention Deficit Hyperactivity Disorder ("ADHD")". The Respondent confirmed that this is because of earlier disclosure of ADHD to the Respondent's HR team. I was informed at the hearing that the question as to whether the Claimant meets the test for disability in respect of ADHD at *the relevant times* of the complaints remains in issue. However, in its letter to the tribunal requesting confirmation that the claims specified in the Unless Order are dismissed for non-compliance (dated 25<sup>th</sup> May 2022 – erroneously showing a date of 25<sup>th</sup> April 2021), the Respondent accepts that "*it does not advance a case that the Claimant's conditions of ADHD....do not meet the definition set down in section 6...*". The Respondent says it has not been able to accept that Autism meets the test for disability in this case because of a lack of disclosure.

Relevant Law as to compliance with an Unless Order

15. Rule 38 of the tribunal's Rules of Procedure provide:

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.*

16. In Wentworth-Wood v Maritime Transport Ltd (UKEAT/0316/15, 3<sup>rd</sup> October 2016, unreported), HHJ Richardson identified the three stages for consideration under Rule 38 of the tribunal's Rules of Procedure. First, a decision whether to impose an unless order and, if so, in what terms. Second, a decision on whether there has or has not been material compliance with the unless order and, thirdly, if a party whose claim has been dismissed automatically for material non-compliance applies for relief from sanctions, an analysis of whether it would be in the interests of justice to overturn the dismissal.

17. At this stage of the judgment, I am concerned with the second stage identified in Wentworth-Wood. I must decide whether the Claimant has failed to comply with either aspect of the Unless Order 'in any material respect' (Johnson v Oldham MBC (UKEAT/0095/13, 17<sup>th</sup> April 2013, unreported, per Langstaff J – who applied the principles enunciated by Pill LJ in Marcan Shipping (London) Ltd v Kefalas [2007] EWCA Civ 463; [2007] 3 All ER 365). In Johnson, Langstaff J observed that compliance need not be precise and exact. What matters is whether it is material or substantial and, as to that, much will depend on the actual wording of the order. It was also observed that 'material' is likely a better word than 'substantial' for this test. A quantitative approach to assessing compliance is not the test (the example given was 9 matters being complied with in an order for better particulars but not the remaining 2; this is not material compliance because the purpose of seeking compliance has not been achieved in the context).

18. HHJ Auerbach observed in Uwhubetine v NHS Commission Board England (UKEAT/0264/18, 23<sup>rd</sup> April 2019, unreported), that, at this second stage, deciding whether there has been material non-compliance does not include consideration of whether it is appropriate to grant relief from sanctions. When considering the terms of the order (to decide the question of compliance), a facilitative approach, rather than a punitive approach should be applied, with any ambiguity being resolved in favour of the party required to comply (i.e. the Claimant in this case).

#### Findings as to compliance with the Unless Order

19. On 10<sup>th</sup> March 2022, the Claimant informed the Respondent that she was now acting as a litigant person in the claim. Following an agreed extension to provide the information in paragraphs 7, 8 and 9 of the case management order, the Respondent applied for the Unless Order on 13<sup>th</sup> April 2022 and this was subsequently granted with reasons. One of the reservations expressed in the Claimant's written response to that application was the provision of all of her medical records because of confidentiality and matters in her records which

she considered were not relevant to the issues. The reasons attached to the Unless Order clarified to the Claimant, in line with the express wording of paragraph 7 of the case management order, that the disclosure requirement (which had been agreed by both parties at the hearing in January 2022) was only to disclose *relevant* documents, not all of her medical records in their totality.

20. The Claimant has provided the following in response to (or in attempted compliance with) the Unless Order:

20.1. On 20<sup>th</sup> April 2022 (after the application but before the Unless Order was made), the Claimant sent to the Respondent confirmation of her diagnosis of Autism [94]. The confirmation is a one-page document from RTN Mental Health Solutions dated 11<sup>th</sup> April 2022 which the Claimant obtained from RTN for the purpose of providing it as disclosure. It provides limited statistical information as to the Claimant's scorings. The letter refers to the Claimant's 'full report'.

20.2. The full report was not (and has not, at the time of this hearing) been provided to the Respondent. The Claimant did not want to disclose the report because it refers to other matters which she did not wish to share.

20.3. The disclosure also includes a document from the Spire Hospital, dated 4<sup>th</sup> June 2020, confirming a diagnosis of ADHD. This is a letter to the Claimant's GP, but only the first page has been provided. The first page includes, in tabular format, the Claimant's details and the fact of her diagnosis. The remainder of the letter has not been provided. The letter specifically addresses ADHD, which is one of the two impairments under consideration in this case. However, as noted above, the Claimant has already accepted this impairment as a disability under section 6.

20.4. On 12<sup>th</sup> May 2022, the Claimant sent an email to the Respondent providing further disclosure in response to the Unless Order. This included a statement of disabilities to comply with paragraph 9 of the case management order (discussed below) and "*Specialist reports for ADHD and Autism Diagnosis*". She said: "*I will be sending the photos of medical records over separately as they are exceeding the size I can send via email*". She concluded the email: "*I believe this satisfies the UNLESS ORDER made on 27 04 2022...*".

20.5. The 'specialist reports' referred to in that email were:

20.5.1. A letter from ADHD 360 dated 9<sup>th</sup> February 2021, advising as to her diagnosis. This is a relevant document (provided completely and without redaction) and assists by explaining matters about her condition which deal with the section 6 test (e.g. whether ADHD has a substantial adverse effect on the Claimant's ability to carry out normal day to day activities).

20.5.2. The email attaches a document saved as: 'Autism diagnosis letter', but that is the RTN letter previously provided. There is no other report.

20.6. The screen shots are photographs of parts of the Claimant's GP records. These reveal that there are likely documents which have not been disclosed which are relevant to the disability question. For example, on

14<sup>th</sup> December 2020, there is reference to a letter from a specialist relevant to a diagnosis of ADHD. Further, the screen shots generally show a log of entries on the records (such as a date and the relevant practitioner involved) but do not include the actual notes attached to those entry logs. It is difficult for the reader to determine the relevance of any particular entry, without disclosure of the notes and/or corresponding document to which the entry refers.

21. The second part of the Unless Order required the Claimant to confirm in writing to the Respondent which disabilities were relied upon in respect of each of her complaints. The Claimant sent a one-page document setting out her position on 12<sup>th</sup> May 2022. This listed each head of claim (e.g. discrimination arising from disability; indirect disability discrimination; failure to make reasonable adjustments; harassment and, separately, made reference to her protected disclosure claim). The two impairments relied on in respect of each disability related complaint were Autism and ADHD (as above).

Discussion and conclusions on compliance with the Unless Order

22. I conclude that the Claimant has not materially complied with paragraph 7 of the case management order and the first part of the Unless Order. Significant and relevant pieces of disability related disclosure have not been provided. Whilst some material has been given, the Claimant has withheld other disclosure because she does not want the Respondent to see it. I am mindful that the Claimant may have legitimate concerns about general medical and personal information being made available, but it is clear that the RTN report which will provide further information and evidence about Autism has not been provided whilst it is in the Claimant's possession or control. The Claimant arranged for a limited covering letter to be prepared by RTN which is inadequate for the disclosure process. The information about her diagnosis is more likely within the 'full report' which may provide relevant information going to the test for disability in section 6. The withholding of the remainder of the letter about ADHD from the Spire Hospital is also a failure to materially comply with paragraph 7 (and the first part of the Unless Order). The Unless Order makes clear that "*all...specialist reports...which are relevant*" must be disclosed. However, as above, this impairment is accepted as a disability in this case.

23. Whilst I have in mind that the tribunal must not adopt a quantitative approach in assessing compliance, the object of the disclosure order (as required in the Unless Order) has not been achieved. The selective nature of the disclosure in relation to Autism is insufficient to enable the Respondent to review any medical evidence alongside the Claimant's impact statement in order to comply with paragraph 10 of the case management order (to confirm which disabilities, if any, are conceded for the purposes of section 6).

24. As regards the second part of the Unless Order and compliance with paragraph 9 of the case management order, I am satisfied that this aspect has been materially complied with. The Unless Order and case management order required the Claimant to "*confirm in writing to the Respondent which disabilities (on which she relies in her claim) relate to each of her complaints*". In my judgment, the Claimant has done this. Each head of claim has been linked to the two impairments relied upon. Other conditions (such as depression) are separately identified as 'consequences' of the Respondent's alleged conduct. This makes clear that any other conditions are not part of the Claimant's case

on liability for discrimination. Whilst paragraph 9 of the case management order refers expressly to the Claimant making reference to the list of issues, the object of this requirement is to ensure the Claimant identifies the relevant impairments in respect of each head of claim and the list of issues is the most convenient place for the Claimant to find a list of her claims. I also explained in my written reasons when making the Unless Order (at paragraph 11), that “*the Claimant is not constrained as to how she chooses to present this*”.

25. As the Unless Order clearly requires compliance with *both* paragraph 7 and 9 of the case management order and there has only been material compliance with paragraph 9 (and the second part of the Unless Order), it follows that the Claimant is in breach of the Unless Order and the claims identified in the Unless Order stand automatically dismissed without further order.

**Issue 2: Should the tribunal grant relief from the sanction of the Unless Order and reinstate the dismissed claims?**

26. Turning to the third stage identified in *Wentworth-Wood*, the tribunal had previously signalled to the parties that the Claimant’s email dated 28<sup>th</sup> May 2022 (sent in response to a written request from the Respondent that the tribunal confirm the relevant claims specified in the Unless Order are dismissed for non-compliance) would be treated as an application for relief from sanctions (i.e. an application for an order setting aside dismissal pursuant to Rule 38(2) of the tribunal’s Rules of Procedure). The parties duly prepared for this hearing on the basis that submissions would be made on this issue after consideration had been given to the issue of compliance.

Relevant Law – Relief from sanctions

27. Rule 38(2) makes clear that the tribunal must consider whether it is in the interests of justice to set aside the dismissal. This test has been considered by the Court of Appeal in *Governing Body of St Albans Girls’ School v Neary* [2009] EWCA Civ 1190; [2010] IRLR 124. Smith LJ held (at [49]-[52] of that judgment), that a tribunal considering relief from sanctions is not constrained by a checklist of factors (i.e. akin to those factors originally found in Rule 3.9 of the Civil Procedure Rules prior to the amendments brought about by the Jackson reforms). It must consider all factors relevant to the interests of justice and avoid considering irrelevant matters. The factors or circumstances relevant to such a decision will be case sensitive.

28. Underhill J (as President of the EAT at the time) made the following observations in light of *Neary* in *Thind v Salvesen Logistics Ltd* (UKEAT/0487/09, 13<sup>th</sup> January 2010, unreported) 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.*

29. Further, in *Opara v Partnerships in Care Limited* (UKEAT/0368/09, 15<sup>th</sup> February 2010, unreported), the EAT said (at [56]) as to an application for relief from sanctions:

*when a Tribunal is considering whether to grant relief against a sanction, the main focus will be on the default itself – (1) the magnitude of the default (2) the explanation for the default (3) the consequences of the default for the parties and the proceedings (4) the consequences of imposing the sanction on the parties and the proceedings; and (5) the promptness of the application to remedy the default. These are the principal factors the Tribunal will have in mind when it considers the interests of the administration of justice, and above all whether it is unjust and disproportionate to impose the sanction.*

*Submissions from the parties*

30. I do not set out all of the parties' submissions in these written reasons. However, I have considered the written and oral submissions of both parties in detail, including all of the authorities cited.
31. Broadly, the Claimant says that the tribunal should grant her relief from the sanction of dismissal of the specified claims. She says that she has, as far as she is concerned, provided the relevant evidence of her diagnoses. She does not feel safe disclosing larger volumes of evidence about other personal matters to the Respondent. She believed that she only needed to provide evidence of the diagnoses. She has set out in detail the effect of Autism and ADHD on her ability to carry out normal day to day activities in her impact statement. The Claimant explained the effect of these impairments on her. As far as her ADHD diagnosis is concerned, she says that the GP carries no other details other than the letter from Spire Hospital (the first page of which has been disclosed). As to Autism, the Claimant maintains that there is nothing else to disclose which can assist with proving diagnosis.
32. The Claimant confirmed that she will provide the RTN full report if she is directed to do so. However, she said this would need to be redacted to exclude other personal matters which are not, in her view, relevant to the issues in the case. The Claimant explained that she could not afford to continue with her solicitors from March 2022 and has therefore been managing these proceedings alone. She also reminded me that ADHD is a condition which has been acknowledged by the Respondent.
33. The Respondent maintains that the disclosure provided is insufficient. It relies on the civil procedure principles in the well-known case of *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537. Counsel for the Respondent said that relief should only be given if the breach can properly be regarded as *de minimis*; the party has otherwise fully complied and the application is made promptly, or where there is very good reason for the breach. The Respondent says that there is no good reason; there has been a serious failure to disclose documents in the Claimant's possession or control (which it considers was intentional) and the exercise of dealing with compliance has led to additional cost incurred by the Respondent. The Respondent submits that there is greater prejudice to it, having regard to the overriding objective. The Claimant had an extensive opportunity to comply with the original orders when represented (in and after January 2022). If relief is granted at this stage, the question arises as to how compliance is achieved for a fair hearing. The question posed to the

tribunal in this regard was whether, in the circumstances, the tribunal would go on to make a further unless order for any outstanding disclosure.

*Discussion and conclusions on whether to grant relief*

34. Having regard to Neary and Opara, the following matters are relevant considerations to which I must have regard in considering the interests of justice test: a.) the nature of the default, its seriousness, the reason(s) for it and the extent to which it was wilful or deliberate; b.) the effect of the default on the parties and these proceedings including, critically, prejudice and ensuring a fair trial; and c.) the need to ensure that rules and orders are complied with. However, as Underhill J observes in Neary: “*No one factor is necessarily determinative of the course which the tribunal should take*”.

*The nature of the default*

35. The Claimant has not materially complied with her disclosure obligations in respect of GP records and specialist reports which are relevant to the impairments on which she relies. She has, however, materially complied with the second aspect of the order by confirming that both impairments are relied on in respect of each relevant head of claim. Failure to provide full disclosure of relevant material which would assist the Respondent in determining whether it will (or will not) concede the question of disability is serious. In this case, the Claimant made a positive decision not to provide all of the relevant evidence in her possession. I do not, however, classify the breach as a simple ‘deliberate’ breach. There have been real efforts to provide disclosure, albeit insufficient. The Claimant has plainly operated on the basis that she should disclose evidence of diagnoses and no more than that. In my judgment, her reasons for this were genuine (in that she genuinely was concerned about releasing more personal information than she considers is necessary) and this arose in circumstances where she no longer had legal advisors assisting her. Notwithstanding, this is not what the Unless Order required and its terms were sufficiently clear.

36. She has been given additional time to arrange this disclosure, including by an extension of time reasonably agreed by the Respondent and through the terms of the Unless Order. The reasons given for making the Unless Order also provided additional reassurance that only relevant material was needed. The Claimant could have provided all relevant evidence with her reports in redacted form and the Respondent could then have decided whether it objected to those redactions. At the stage of this hearing, the Claimant is willing to remedy the default by giving further (redacted) disclosure but appears to be reliant on the tribunal in directing her as to what must be done to achieve this.

*The effect of the default on the parties*

37. The breach of the Unless Order (and any relief) has the following relevant effects on the parties:

37.1. The Respondent still does not have sufficient medical disclosure in order to confirm its position in relation to Autism. The final hearing is listed to commence on 4<sup>th</sup> October 2022 and the Respondent is unable to fully respond to this aspect of the case. However, the position is different in relation to ADHD, the other impairment relied on by the Claimant. At paragraph 77 of its Amended Grounds of Resistance, the Respondent accepts that the Claimant “*is likely to meet*” the section 6 test in respect of ADHD. Paragraph 79 makes a direct request for medical disclosure in

relation to Autism and, at paragraph 84 says: “*For the avoidance of doubt, the Respondent does not accept that the Claimant was a disabled person for the purposes of the Equality Act 2010 in relation to any condition other than ADHD...*”. Its letter of 25<sup>th</sup> May 2022 (as above) also says that it “*has insufficient evidence to concede disability in relation to the Claimant’s Autism Spectrum Condition...*”. The Respondent confirmed that it does not advance a case that ADHD does not meet the definition in section 6.

- 37.2. At this hearing, the Respondent submitted that this position was more nuanced. It required full disclosure in respect of ADHD in order to confirm that the Claimant was disabled for the relevant periods of time covered by the claim. However, that is not its pleaded case. At paragraph 85 of the Amended Grounds of Resistance, it says it was first informed about ADHD in October 2020. At paragraph 34, the Respondent acknowledged that the Claimant provided it with a copy of a letter from her psychiatrist in relation to a diagnosis of ADHD in December 2020. At paragraphs 51 and 55, it acknowledges that the Claimant was signed off as not fit for work because of ADHD (and another condition) in January/February 2021. Further notes were provided in April 2021. The Claimant was also referred to occupational health (which produced a report for the Respondent which was not before the tribunal at this hearing). The Respondent’s pleaded position (as reflected in the list of issues) is therefore that it requires further disclosure to decide whether it is able to concede the question of disability in relation to Autism (and other conditions which are not now relied on as disabilities for the purposes of liability for discrimination).
- 37.3. Delay caused by any non-compliance and the process of dealing with the Unless Order are such that the parties are now only six weeks away from final hearing. Any relief granted which required further medical disclosure would inevitably mean that the final hearing would have to be postponed (the parties may decide to apply for postponement for other reasons after this judgment has been sent to the parties but, if medical disclosure is required, postponement is inevitable in any case). Postponement for these reasons would cause prejudice to the Respondent which would have to ask its witnesses to come to the tribunal much later (probably at some point in 2023) to give evidence about matters occurring in 2020/21.
- 37.4. At the request of the Respondent, the other case management orders in this case have been stayed pending this hearing and decision. Accordingly, there are other case management steps to be performed before any final hearing in October. In my judgment, a fair hearing between the parties is entirely possible in October providing a further medical disclosure exercise is not required. I also consider that the parties would encounter further difficulties in correspondence in trying to resolve any further medical disclosure in light of how matters have developed during the case so far.
- 37.5. This exercise has inevitably caused the Respondent to incur significant additional cost. There has been a request for an unless order which followed correspondence attempting to obtain the necessary disclosure. The dispute about compliance has then necessitated this hearing. It is

prejudicial to the Respondent to expose it to further cost which may arise from granting full relief to the Claimant in respect of her disability claims.

- 37.6. If the tribunal decides to grant no relief to the Claimant at all, the Claimant will not be able to pursue any of her discrimination claims, her harassment claim or her victimisation claim. That is, of course, the sanction imposed by the Unless Order. The fact she is so deprived is not a reason to grant relief by itself. However, the particular circumstances of this case mean that she would be deprived of those claims in circumstances where the Respondent has, in its statement of case, accepted that the Claimant is disabled in respect of ADHD and where it has not actively sought any further medical disclosure on this issue (having regard to the letter of 25<sup>th</sup> May 2022). The Claimant is not required to prove ADHD as a disability for the purpose of her claim. Whilst the Respondent says that the timeframe for her impairment may be in issue, that is not reflected in the pleadings, correspondence or list of issues. The only matter as to timeframe is the point at which the Respondent is said to have knowledge of any disability: an issue about which the Respondent may lead evidence at the final hearing.

*The need to ensure Rules and Orders are complied with*

38. There is a clear need for litigants to comply with the tribunal's orders and assist the tribunal to further the overriding objective (Rule 2). The difficulties with disclosure concerning the Claimant's Autism diagnosis are such that, whilst the Claimant is willing to arrange further disclosure (in an unspecified, redacted form), I am concerned that she may encounter further problems with compliance for materially the same reasons which have arisen so far. The gravity of the breach, as determined above, is such that the need to ensure compliance is a relevant factor but it is not, by itself, determinative in this case.
39. As regards disability disclosure, the Claimant has separately provided a detailed impact statement in accordance with an extended deadline under the case management order.

*Conclusion on relief*

40. In my judgment, it is in the interests of justice to allow the Claimant to pursue the claims specified in the Unless Order but only to the extent that she may rely on ADHD as a disability. The Claimant relies on this impairment in respect of all allegations. It is admitted by the Respondent as a disability and, in my judgment, the Claimant is not required to further prove this particular impairment by further medical disclosure. The principal purpose of paragraph 7 of the case management order (and compliance with that obligation through the mechanism of the Unless Order) was to enable the Respondent to decide whether (in the event) Autism (and various other alleged impairments) should be accepted as another disability in respect of the claims. It is not in the interests of justice to allow the Claimant to pursue these claims on the basis of Autism because of her material non-compliance; the outstanding disclosure required; the likely difficulties with further compliance because of the Claimant's concerns about her personal information; the proximity to final hearing and the prejudice to the Respondent in granting such relief.
41. Conversely, the main prejudice to the Respondent by granting relief in relation to claims founded only on ADHD is the delay in the progression of case management (where it must now proceed to prepare the case within six weeks).

However, the Respondent conceded ADHD as a disability in its pleadings, the issues between the parties on the disability related claims are likely to be narrower and a fair hearing is still possible in October (with additional case management directions).

42. It follows that the Claimant is granted relief in respect of the claims specified in the Unless Order and these claims are restored only insofar as the Claimant relies on ADHD as a disability. The Claimant is not entitled to pursue the claims relying on Autism or any other impairment.
43. A separate case management order to prepare for the final hearing will be sent to the parties with this judgment.

### **Issue 3: The Claimant's application to amend her claim**

44. By an email dated 11<sup>th</sup> July 2022, the Claimant applied to amend her claim to add a claim of constructive unfair dismissal. The Claimant resigned on or around 22<sup>nd</sup> February 2022. It is common ground that the Claimant began her continuous employment with the Respondent on or around 20<sup>th</sup> May 2020 (the Claimant's ET1 says 19<sup>th</sup> May 2020). Whilst the Claimant was engaged with the Respondent prior to this date via an agency, she does not have sufficient qualifying service to bring a claim of constructive unfair dismissal pursuant to section 98 of the Employment Rights Act 1996 ("ERA"). The Claimant told me that she had been led to believe that she would be able to bring this claim on the basis that her constructive dismissal was an act of discrimination. However, having explained the minimum service requirement, the Claimant accepted that this meant she could not claim constructive unfair dismissal.
45. The Claimant therefore alternatively framed her amendment application as an application to add an allegation that her resignation (which she says arose in response to an alleged failure by the Respondent to deal fairly and promptly with her grievance) amounted to a dismissal which was an act of direct discrimination because of her disability. Given that the Claimant is not able to pursue an unfair dismissal claim under the ERA, she confirmed that she wanted the tribunal to consider her application on this basis.

### **Relevant law**

46. In considering the application to amend, I have had regard to Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650 and, importantly, Selkent Bus Co Ltd v Moore [1996] ICR 836. Both of these cases give guidance as to amendment applications. In particular, factors to take into account include: the nature of the amendment; the applicability of time limits and the timing and manner of the application. The paramount consideration is ultimately the relative injustice and hardship in refusing or granting the amendment.
47. More recently, the EAT has also provided guidance in Vaughan v Modality Partnership [2021] IRLR 97. It was emphasised by HHJ Talyer that the factors in Selkent are not the only factors which may be relevant and the tribunal should adopt a practical approach to the balancing of hardship and injustice. Consideration should therefore be given to the practical consequences of allowing or refusing the amendment. Some relevant observations made by the EAT in this case are:

47.1. *“Representatives would be well advised to start by considering, possibly putting the Selkent factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions..”* (paragraph 21);

47.2. *“...the real question is will [the Claimant] be prevented from getting what they need. This requires an explanation of why the amendment is of practical importance because, for example, it is necessary to advance an important part of a claim or defence”* (paragraph 22).

48. Further, in *Abercrombie v Aga Rangemaster Ltd* [2013] EWCA Civ 1148; [2013] IRLR 953, Underhill LJ summarised the position where an amendment application arguably raises a new cause of action. At paragraph 48 of the judgment, it was explained that the tribunal should:

*“focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted”.*

49. Where an issue as to time limit arises (for example, where an amended claim might be considered to be out of time) there is no rule that the time limit point must be decided before an amendment can be granted. It may be sufficient that, in a case where a Claimant relies on a ‘continuing act’ of discrimination or evidence may be required to decide if it is just and equitable to extend time, there is a prima facie case that the Claimant will be able to satisfy the time limit point later on (see *Galilee v Commissioner of Police for the Metropolis* [2018] ICR 634). Accordingly, it is open to the tribunal, whilst balancing the relevant factors as to refusing or granting an amendment, to leave the final question as to a time limit issue to the tribunal at any final hearing.

#### The parties’ submissions

50. I do not set out here the detail of all of the oral submissions made at the hearing. However, I have considered all of the legal and factual points raised by both parties in arriving at my decision.

51. The Claimant outlined her experience of the Respondent’s actions (which are not agreed) and explained that it is her case that the Respondent had failed to adequately deal with her grievance. She maintains that the Respondent was in breach of contract entitling her to accept the breach and resign. She had understood that, as, in her words, it was a ‘discriminatory dismissal’ she was able to pursue the claim and believed that the claim would not be out of time because she had an existing claim before the tribunal.

52. The Respondent’s primary argument is that the claim is out of time. The application to amend is dated 11<sup>th</sup> July 2022 and the alleged dismissal was on 22<sup>nd</sup> February 2022. It is therefore around one and a half months out of time. The Respondent says that no good reason has been given for the delay in making the application to amend and the amendment sought has not been supplemented with any written particulars to enable the Respondent to be clear

about precisely what is proposed.

53. The Claimant then explained that she believed the last act in this new discrimination complaint is 10<sup>th</sup> March 2022, which was the date of an email from the Respondent about the matters giving rise to her resignation. The new claim is out of time even on the basis of 10<sup>th</sup> March 2022 in any event.

Discussion and conclusions on the amendment application

54. I refuse the application to amend the claim to bring a new complaint of discrimination based on the Claimant's resignation/constructive dismissal for the following reasons:

54.1. The timing and manner of the application. This application was made shortly before this hearing to determine the issues concerning the Unless Order. The Claimant resigned in February 2022, after the case management hearing but whilst she was still represented by solicitors. Unfortunately, the application has been made at a time when the parties are subject to a short timetable to prepare for final hearing, which has been brought about by the disclosure and compliance issues considered in this judgment. The application indicates the claim is for constructive unfair dismissal but has been reframed orally at the hearing because of the Claimant's lack of qualifying service. There are no written particulars available to clarify the acts complained of. If the amendment is allowed, substantial further directions would be required to enable the Claimant to set out better particulars with additional time for the Respondent to consider its position and prepare a further Amended Grounds of Resistance. Given the timing of the application and the proximity to final hearing, it is not in accordance with the overriding objective to postpone the final hearing for this reason, which will inevitably cause further delay and cost.

54.2. Time limits. Having regard to the submissions made by the parties, I conclude that the Claimant is unlikely to be able to demonstrate that it is just and equitable to extend the time limit for this discrimination claim at final hearing. There is no good reason for waiting to make the application this late on in the timetable. The Claimant is a litigant in person and, in those circumstances, the procedure and legal requirements of this process will be new to her. However, she had solicitors at the case management hearing and at (or around) the time she resigned. The Claimant was then not in a position to continue with legal representation but a list of issues had been agreed (to be determined at final hearing) and it would have been clear to the Claimant that steps would need to be taken to extend that list of issues to include this new complaint. The claim is out of time whether it is dated from the resignation or the later email of 10<sup>th</sup> March 2022, on which the Claimant relies.

54.3. The nature of the amendment. This amendment does concern new issues which have arisen since the presentation of the claim and the case management hearing. I take into account that this is not, therefore, a claim which was known about when the original claim was prepared (or when better particulars were drafted by the Claimant's representatives). However, the precise details of the complaint are unclear and allowing the amendment will create a new line of enquiry to be explored at final hearing. That may engage additional witness evidence, may require

additional hearing time and will cause substantial delay to a timetable which has been truncated by the issues concerning the Unless Order and the necessary stay to case management as a result.

- 54.4. The Claimant still has her disability discrimination and associated claims based on ADHD. She also pursues her protected disclosure claim. These claims enable the Claimant to pursue the relief she seeks in relation to her alleged treatment. There is relatively limited injustice and hardship caused to her by refusing this amendment as compared to the Respondent at this stage of proceedings. If the amendment were allowed, the final hearing would need to be postponed (the parties may apply to postpone for other reasons – which would be subject to judicial discretion, but postponement would be inevitable in the case of amendment to ensure the parties are on an equal footing in respect of this new claim). The Respondent would incur additional cost in further amending its Grounds of Resistance, reviewing these issues with its witnesses and carrying out the disclosure exercise again. The delay to the resolution of all matters may further affect witness memories in respect of the original complaints concerning 2020/21. There is therefore greater practical prejudice to the Respondent if this amendment is allowed.

**Outcome**

55. It follows that the Claimant was in breach of the Unless Order and the claims specified in Unless Order are dismissed. However, it is in the interests of justice to set aside that order and grant the Claimant relief from sanctions to pursue those claims only to the extent that she may rely on the admitted disability of ADHD. The Claimant's application for relief to rely on any other disability in those claims is refused.
56. The Claimant's application to amend her claim is refused for the reasons set out above.

Employment Judge Nicklin

Date: 22<sup>nd</sup> August 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON  
.22/08/2022

FOR THE TRIBUNAL OFFICE