EMPLOYMENT TRIBUNALS

Claimant: Dr M Tattersall

Respondent: Southport and Ormskirk Hospital NHS Trust

Heard at: Liverpool **On:** 28 February 2022

Before: Employment Judge Robinson

REPRESENTATION:

Claimant: Litigant in person
Respondent: Mr E Williams, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The Judgment striking out all the claimant's claims on 15 January 2021 will not be set aside, as it is not in the interests of justice.

2. The Unless Order made on 2 November 2020 was properly made.

3. In any event, at today's hearing, the manner in which the proceedings have been conducted by the claimant has been unreasonable and vexatious, his application has no reasonable prospect of success and has not been actively pursued.

REASONS

Issues to be determined

1. After notice was received by the claimant that all his claims had been struck out, he applied on 24 January 2021 for a reconsideration hearing. Between then and March 2021 he also made an application to the Employment Appeal Tribunal ("EAT") on various grounds which was sent, most probably, on 24 January 2021. A copy of the notice of the appeal was sent to the Tribunal on 27 March 2021.

2. In view of the claimant's application to have the Case Management Orders reconsidered and the striking out of his claims reconsidered, I made directions that a further "in person" hearing should be arranged.

Chronology and history of the case

3. The history of the case was set out in paragraphs 16-24 of my minute dated 4 November 2020, which was sent to the parties on 25 November 2020.

4. It is worth adding, in view of my decision, today, the following details.

5. An Unless Order was issued by Regional Employment Judge Parkin on 20 November 2018 requiring the claimant to produce medical records to the respondent by 27 November 2018.

6. The claimant partially complied with that order and consequently when Employment Judge Ryan dealt with the matter on 3 December 2018 he made an order that the balance of the claimant's GP records, up to and including 25 May 2018, should be provided to the respondent by no later than 4.00pm on Friday 4 January 2019. That was not an Unless Order, although Employment Judge Ryan did make it clear to the claimant that if those GP records were not received by the respondent's solicitors by the above time and date an Employment Judge may strike out his claims relating to disability discrimination for breach of Case Management Orders, and/or failure actively to pursue his claim.

7. Employment Judge Ryan made it clear that such orders should have no effect on the claimant's claim in relation to public interest disclosures.

8. On 20 February 2019 the respondent sought an order that all the claimant's claims be struck out as a consequence of the claimant's failure to disclose his GP records by 15 February 2019.

9. Eventually, as there had been no progress with regard to the litigation generally, the respondent made an application to strike out all the claimant's claims or in the alternative, the disability discrimination claims, before a hearing on 18 March 2020. That hearing was postponed and eventually came before me on 2 November 2020.

10. For the reasons set out in the Case Management Summary containing a record of the preliminary hearing on 2 November 2020, Mr Williams' application was not dealt with.

11. In view of the claimant's distress and his inability to deal with the issues on that day as recorded in the Case Management Summary I adjourned the strike out application to 29 January 2021.

12. However, I felt that some progress should be made with regard to the litigation. At that point the respondent had been waiting for all the claimant's GP notes to May 2018 for nearly 2½ years. On this occasion I made it plain to the claimant that all his claims (not just the disability discrimination claims) would be struck out for non-compliance if he did not make the notes available and I was also

careful to ensure that I identified the email address that the claimant wished documents to be sent as set out in paragraph 12 of my minute.

13. I instructed the administration to send the application to the claimant, both by first class post and by using the email address provided by the claimant.

Chronology since 2 November 2020

14. The Case Management Order was signed off by me on 4 November 2020 and sent to the parties on 25 November 2020.

15. The claimant however knew, because I explained that to him at the hearing on 2 November 2020, that an Unless Order had been made.

16. At 12:19 on 15 December 2020 the Tribunal received an email from Mr Williams of Weightmans acting for the respondent confirming that the claimant had not complied with the Unless Order, and a copy of that email was sent to the claimant. The email expressed the wish that a concluding Judgment should be sent by the Tribunal to the claimant.

17. At 13:43 on 16 December 2020, from a "no reply" email address, a letter dated 15 December 2020 was attached to an email. In that letter, the claimant said he had not received the written order.

18. The claimant also suggested that he had complied with the order and disclosed all medical records "in his (my emphasis)opinion which it is reasonable (my emphasis) for him to obtain without assistance of the Tribunal". The claimant suggested that he is "likely to have complied with the order".

19. The claimant made the point that he has been diagnosed as autistic since May 2019 and he is awaiting an assessment with regard to, what he believes, is his ADHD. Today, the claimant also confirmed that he had his autism diagnosis and he was still awaiting an assessment with regard to ADHD.

20. Nothing more was heard from the claimant. However the respondent's solicitor sent a letter, both to the Tribunal and the claimant, suggesting that the claimant's points made in his letter of 15 December 2020 did not stand up to scrutiny as firstly, the Unless Order had been explained to the claimant at the November hearing and secondly, the Case Management Order was sent to the email address given by the "claimant to the Judge" on 2 November 2020.

21. On 15 January 2021 Regional Employment Judge Franey then ordered the claims to be dismissed under rule 38 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 regulations").

22. On 24 January 2021 the claimant made an application for reconsideration and also (it transpired later) that he made an application to the Employment Appeal Tribunal.

23. The claimant's application contained the following details:

(1) That his rights under the Equality Act 2010 and under article 6 of the ECHR had been breached;

(2) That certain Judges in Liverpool showed bias against him;

(3) That even if he had received the order on 25 November 2020 there was an unreasonably short timescale to comply with the order;

(4) That the Unless Order was "hidden" in the CMO minute;

(5) That reasonable adjustments were not put in place;

(6) The timescale for compliance was too short;

(7) That I, as the Judge, should have recused myself;

(8) That there was no regard to his witness statement of 14 March 2020;

(9) If the Unless Order was justified, then the order should have only applied to the disability aspect of his claim and not the PIDA element of his claim;

(10) That the Tribunal should have considered his written application and correspondence of 20 October 2020 before making a decision.

24. The claimant went on to say that he believed an order in the interests of justice should be made setting aside the Unless Order on reconsideration. He disagreed with the confirmation of the dismissal of the claim sent to him on 15 January 2021.

25. On 22 February 2021, when I was informed by the administration of the application for reconsideration, I agreed to it. The initial hearing date was 12 May 2021, but that hearing was cancelled because the respondent's representative was on holiday and he wished to be in attendance because he had personal conduct of the respondent's defence and, importantly, he had been in attendance on 2 November 2020 when the Unless Order was explained to the claimant.

26. The Tribunal received notice of the EAT appeal in March 2021.

27. On 25 March 2021 the respondent confirmed they would attend in person, specifically because of the alleged misleading assertions of the claimant in his application for reconsideration.

28. Notice of hearing was sent to the parties for a hearing on 25 August 2021, but that had to be cancelled because the claimant contracted COVID-19 and wrote to the Tribunal on 22 August 2021 asking for an adjournment, which was granted.

29. Eventually, the matter came before me today for a full hearing.

Documents before me

30. I set out below a list of documents that have been before me today, all of which I have taken into consideration:

(1) The 259 page bundle provided by the respondent with regard to the application to strike out the claimant's claim. (I had read this prior to the hearing on 2 November 2021 and simply reminded myself of the contents of the bundle. I did not read all the documents in that bundle again).

(2) The Tribunal file with all the orders made in this case together with all the correspondence.

(3) The respondent's solicitor's email of 23 February 2021 which enclosed details of the objection to the order sought by the claimant, giving reasons for that in a two page document.

(4) Skeleton submission originally prepared for the 25 August 2021 hearing and which are relevant to this hearing. The documents included the respondent's summary and key points with regard to the claimant's application to have the reconsideration take place.

(5) The claimant's skeleton submissions with regard to the original strike out application of the respondent.

(6) The statement of 14 March 2020. This was a witness statement where the claimant responded to the strike out application in a six page document.

(7) A letter from the claimant dated 10 February 2022 with regard to the appointment of an intermediary for the claimant. Attached thereto was a medical report from Dr Bliss dated 10 July 2020 confirming the diagnosis of autism for the claimant. Dr Bliss' report suggests that the claimant be given extra time to process aspects of communication, especially when he is anxious or emotional, and that he does not cope particularly well with remote communication, such as conference calls or video arrangements, and suggests a video link where Dr Tattersall could only see one person (such as a Judge) rather than the entire courtroom, which Dr Bliss suggests had been used to good effect before and she would support this as a reasonable adjustment for his upcoming court case.

(8) A letter from Dr Lockwood setting out some reasonable adjustments that would help Dr Tattersall when he undergoes any process that includes an interview. The document suggested that it would be helpful for Dr Tattersall to be provided with any interview questions at least 48 hours ahead of any interview conducted. That related to applications for employment.

(9) Also attached to the letter was His Honour Judge Greensmith's orders recorded in the Family Court which suggest that the claimant has an assessment for an intermediary, and the intermediary assessment should be completed by 30 November 2021. If the assessment concluded that an intermediary is required, any future attendances of the intermediary should be met by the HMCTS [sic]. I suspect that the word "cost" was missed out of the order.

(10) Dr Tattersall requested that the usual intermediary company of Communicourt is appointed. Consequently, it was ordered that the Family court should accommodate that request if possible.

(11) A further letter from Dr Lockwood dated 16 December 2021 suggests that a further reasonable adjustment be made on the basis that any formal correspondence or service of legal documents be provided in writing by post as Dr Tattersall was finding it difficult to communicate via email.

31. At the hearing I was also handed:

(1) copies of "Thinking differently at work" from the GMB Union;

(2) a blog entitled "World Autism Awareness" from Martin Whitehorn;

(3) the National Strategy for Autistic Children, Young People and Adults 2021-2026;

(4) statutory guides for Local Authorities and NHS organisations to support implementation of the adult autism strategy;

(5) an insights document headed "What are reasonable adjustments for autism?"; and

(6) "Managing autistic employees and partners".

32. Within the Tribunal file was a report from Veronica Bliss dated 13 May 2019 which confirmed the diagnosis of an assessment for autism, and which emphasised the fact that people who do not have autism often do not understand the kind of differences and therefore there can be a problem with communication. The claimant was diagnosed with autism spectrum disorder level 1 which is, according to Dr Bliss, akin to Asperger's Syndrome. She confirmed that that is the mildest level of the three autism levels and it is given to people who are intellectually able to cope with some social situations so well that others would not know there is any difference in the way they process information. She goes to say that a little time spent with such a person may however show significant areas in which that person struggles to cope with social situations and in managing emotions. She suggests that the claimant should follow up diagnosis with some extra help.

Reasonable Adjustments

33. At various times during this litigation the claimant has complained that reasonable adjustments had not been put in place and that reasonable adjustments

had been refused to him. Furthermore, with regard to the Equal Treatment Bench Book and the Presidential Guidance on Vulnerable Parties and Witnesses, I was accused by the claimant that I have not taken that into consideration when dealing with him.

34. It should be noted that on 18 December 2019 Employment Judge Horne, having seen the report of Veronica Bliss of 30 May 2019, made the following reasonable adjustments available to the claimant in Tribunal when the strike out hearing was to take place. Those reasonable adjustments are:

(1) The claimant will be provided with a private waiting room. For this hearing, he was.

(2) The Tribunal room will be configured in such a way that the claimant will not be able to see the respondent's representative unless he chooses to do so. This will be done by the use of a curtain, screen or by rearranging the desks in the room. This was done for the claimant both at the hearing on 2 November 2020 and also today's hearing by the use of a screen.

(3) The claimant, if he wished, will be escorted into the hearing before the respondent's representative enters the room. The claimant initially requested a security guard who I ordered should be provided and then, when one security guard was ordered to sit with him, he demanded two security guards. I refused the requirement for two security guards as that was unreasonable, but one security guard sat in the Tribunal room throughout the hearing (Mark and John took it in turns). I also made sure that my clerk, Mrs Peters, was available to the claimant throughout and sat in Tribunal for some of the time when the hearing took place.

(4) When the Employment Judge leaves the room, the claimant will have the choice of leaving the room first or waiting for the respondent's representative to leave the room. During the very many adjournments we had during the course of today I made sure that the claimant was asked by me if he wanted to leave the room. In the main he requested Mr Williams to leave the room first, and that request was acceded to.

(5) The claimant may bring a companion of his choice to the hearing, and the claimant was told that the companion would not be provided by the Tribunal. He did not bring a companion with him and his application for an intermediary to be with him was only contained in his letter of 10 February 2022. It was the claimant's choice not to bring a companion and I informed the claimant that there was no intermediary available and that I was not going to, at this point, adjourn the hearing for an intermediary to be appointed. No decision that an intermediary is needed has been made.

(6) The claimant was also able to bring a representative of his choice to the hearing. The claimant brought no representative.

(7) The Employment Judge conducting the hearing will be familiar with the contents of the Equal Treatment Bench Book. I accept, as the claimant wanted me to accept, that the claimant will be regarded by this Employment Tribunal as a vulnerable party, and consequently I considered the Presidential Guidance in that regard. I also accepted that he is a disabled person by reason of his autism. During my dealings with the claimant during this litigation I have had particular regard to the following:

(a) The impact of any actual or perceived or potential intimidation of a party or witness;

(b) Whether the party or witness has or may have a mental disability or other mental health condition;

(c) Whether the party or witness otherwise has or may have a significant impairment of intelligence or social functioning. In that regard I accept that the claimant is an intelligent man who understands the law and the Tribunal's procedures;

(d) Whether a party or witness is undergoing medical treatment. I asked the claimant on a number of occasions if he was feeling well enough to continue the hearing as his health was of the utmost importance to me. Although the claimant told me that he believed I was spouting platitudes, I was genuinely concerned about the claimant's health. At the hearing on 2 November 2020 the claimant requested an adjournment for an ambulance to be called. Today I asked the administration to arrange for an ambulance to be called, and it was, and an ECG performed upon the claimant by the ambulance paramedics and found to be clear. I also had the Court and Tribunal Services first aiders on hand to assist the claimant if necessary. Later on in the hearing, when the claimant was distressed again he called for another ambulance and wanted another ECG. Again I arranged for an ambulance to be called. However, the Ambulance Service would not come out again unless the Board (the decision makers) ordered that an ambulance go out to the claimant. No further ambulance came out nor was a further ECG performed upon the claimant. I later found out that an ambulance did attend but after normal office hours;

(e) The nature and extent of the information before the Tribunal. The issue was very straightforward, which I will come to later in this decision;

(f) The age, maturity and understanding of the party. It was clear in the way that he conducted himself that the claimant was fully aware of the issues before this Tribunal and understood the whole of the process.

(8) I also considered whether any measure, other than the ones put in place, were available to the Tribunal. I considered, in view of the nature of the application, the understanding of the claimant, that no further measure was required.

The conduct of the proceedings today

35. Unfortunately, because of the number of papers I had to read I was not able to come into Tribunal until 11.00am. One hour after the start time. I apologised to the parties and was immediately criticised by Dr Tattersall on the basis that he had become stressed. I asked him if he wanted some time to compose himself, and he requested an adjournment for an intermediary to be available to him. He said that a Judge had agreed this. At that point I had not seen His Honour Judge Greensmith's order and I therefore refused the application.

36. I asked for Mr Williams' view in relation to that and before I could hear from Mr Williams, Dr Tattersall asked that he not be in the room when Mr Williams spoke. I acceded to that request and said that anything Mr Williams said, whilst the claimant was out of the room, would be reiterated to the claimant once he was back in the room.

37. Mr Williams merely went through the history of the application, what documents were in place, and suggested that no assessment had taken place with regard to an intermediary even though the Family Court had asked for one to take place by 30 November 2021. Throughout today's hearing no explanation was given by the claimant as to why an assessment had been prepared, other than to say HMCTS had not set it up.

38. Because the claimant had, before he left the room, accused Mr Williams of, in the past, being guilty of common assault of the claimant, Mr Williams was concerned about that allegation on his professional reputation and on the basis that he was an officer of the court. Mr Williams informed me that at no time had he assaulted the claimant and that the only thing that he could suggest was that the claimant often became upset when in the same room as Mr Williams.

39. At this point, the first application by the claimant to have an ambulance brought to the Tribunal was made. I arranged with my clerk that an ambulance should be called. As on the last occasion in November 2020, my clerk reported to me that the claimant had become concerned that I would continue with the hearing in his absence if he left the building in the ambulance.

40. Eventually, I was able to explain to the claimant, that he had a number of choices – that I could deal with the application for reconsideration on the papers that I already had without the parties being in attendance, and that neither he nor Mr Williams would be in attendance if we went down that route. A second suggestion was that I continue with the claim, with the claimant in the room and with Mr Williams still behind the screen. However, I did make it clear to the claimant that at the

present time, because by now I had found out the ECG was clear, the matter should proceed. When I communicated this to the claimant he clutched his chest and said that he had pains in his chest and therefore wanted a further adjournment, which I granted. When the claimant returned to the Tribunal room at 11.30am he accused me of refusing to allow him to go to hospital. That was not the case. I was concerned about the claimant's health and said that he should go to hospital if he felt that he required hospital treatment. I was informed by my clerk (I accept that I was not informed directly by the Ambulance Service) that the ambulance operatives felt that there was no requirement to take the claimant to hospital and that his ECG was clear, but the Tribunal's first aiders were of the view that if he needed to go to hospital then I should allow him to go to hospital. I was more than happy to do that.

41. The claimant wanted a further adjournment, which I granted immediately, and I instructed my clerk to inform the claimant that if he wanted to go to hospital rather than calling an ambulance we could arrange for a taxi to take him to the hospital at his expense or alternatively he could telephone the Ambulance Service or a taxi service himself.

42. Because the claimant had not been in the room when Mr Williams made his point about the intermediary, I explained to the claimant what Mr Williams had said and set out the history of the case thus far, and that, with regard to the intermediary issue, Mr Williams had said there had been no assessment of the claimant. I then put it to the claimant that I could deal with his application whilst he was in hospital on the papers but he refused to allow me to do that.

43. The claimant then wanted the hearing to be dealt with by video link, or, more accurately, for him to have a video link to the Tribunal room. I reminded the claimant that he had been offered a CVP hearing which he had refused. The claimant said that a CVP hearing was not appropriate because of the technological difficulties and that he would have everybody onscreen, including Mr Williams, and that was not what he wanted.

44. The claimant reiterated that he required an intermediary in the room because he had difficulty with his communication skills.

45. At that point I asked the claimant two questions.

46. Was he happy to have a decision taken on the papers in his absence because of his request for a second ambulance to come? The claimant said no.

47. Secondly, I asked him if he had complied with the request by me to produce his GP notes between 1 January 2016 and 25 May 2018. The claimant said yes, he had supplied all GP notes that were "relevant documents".

48. I therefore asked the claimant a further question: had he supplied GP notes from 2016 to 25 May 2018? The claimant would not answer. He then asked me for a further adjournment. I initially refused and the claimant accused me of badgering him. I turned to Mr Williams to ask him a question as to whether he had received the notes from 2016 to May 2018, to which Mr Williams replied "no". The claimant became agitated because that occurred whilst he was in the room. Consequently, I acceded to his request for another adjournment.

49. However, before I left the Tribunal room the claimant refused to leave the room and continued to argue that he had produced all his GP notes. I asked whether he wanted an adjournment or not? The claimant did not answer. I asked him again if he had produced the GP notes. The claimant said he wanted an adjournment and did not want to continue. By this time it was 12.50pm and I agreed to an adjournment to 1.30pm so that the claimant could have a break and take some refreshment if required. The claimant said he wanted lunch and wanted an adjournment to 2.00pm. I did not accede to that request because I was anxious about the time this matter was taking and said that the claimant could have until 1.45pm at which time both parties should return.

50. I was then informed by the security guard that the claimant wanted an ambulance to come back to the Tribunal building and a glass of water. Again I said that we should call an ambulance and my clerk provided him with a glass of water.

51. When the claimant came back after lunch, he said that he had difficulty communicating and I asked him what he required and his answer was, “well let’s get on with the application and get the hearing over with”.

52. I then received the following further information during the next part of the hearing from the claimant.

53. The claimant volunteered that he had asked his GP in Huyton, at the Nutgrove Villa Surgery, for the GP notes from 2012 to 2018, but could not obtain those notes from his GP. It was not clear why. The claimant then moved to a new Practice later in 2018. Further discussions continued with the claimant, but ultimately he said that there were no GP records between 2016 and May 2018 at all and that although he had in his possession GP notes from his new doctor, Dr Kinsey, he was not prepared to give copies to Mr Williams or the Tribunal because they related to issues after 2018.

54. I asked the claimant why he had not said at any time previously that there were no notes between 2016 and 2018. He moderated his answer by saying that “to his knowledge” there were no notes, and he then went on to say it is a feature of his disability that he had difficulty communicating. He did not say that there were no notes between 2016 and 2018, just that he was not aware of them. However, he insisted that he had complied with the order. He then referred to his autism on a number of occasions with regard to his difficulty in communicating.

55. At 2.30pm the claimant wanted a five minute break, which I agreed to, and he then changed his mind and said he would like longer so I agreed to adjourn the matter from 2.30pm to 2.40pm.

56. At that point it was established that the claimant accepted that he had not provided GP notes from 2016 to May 2018 as required by the terms of the Unless Order. The claimant did not say anything to me that I had not heard at the previous hearing in November 2020. He again suggested that there were no such notes as he thought he had not seen his GP during that period. In those circumstances I felt that I ought to hear from Mr Williams to respond to what the claimant was now saying. The claimant insisted that he could not be in the same room as Mr Williams while he spoke. I arranged for Mr Williams to leave the room so that the claimant

could then leave the room without passing him and then brought Mr Williams back into the room for his submissions. That took a little time.

57. I explained to the claimant, before he left the room, that I would have to, in the interests of justice, repeat all that Mr Williams said to me to him when he returned to the Tribunal room, and the claimant agreed that that would be appropriate.

Mr Williams' Submissions

58. Mr Williams' initial concern was that he was being accused of inappropriate behaviour, common assault and lying, and professionally that was extremely upsetting. He then went on to say that it was very difficult to prepare for a final hearing when the claimant was not able to be present when Mr Williams was in the room, and that his clients wanted him (Mr Williams) to represent them throughout this litigation up to and during the final hearing.

59. However, with regard to the substantive issues for today, Mr Williams confirmed that the actual facts do not support the claimant's interpretation of them. Mr Williams ran through the chronology of the matter and, in particular, the number of times that orders have been made for the claimant to send his medical records to the respondent with which he had not complied, up to my order contained in the minute of 2 November 2020, it was now three years since the first application was made for those records and that he had never heard previously the claimant saying that he did not have any GP records or medical records for the period 2016 to May 2018.

60. Mr Williams made the point that, in the claimant's own witness statement, which he prepared for the strike out hearing at paragraph 13 the following words were contained:

> "The respondent stated that I provided partial disclosure of my GP records up to 2016 only. Whilst this is true, I believe it is misleading in that it omits to make it clear that I had reported difficulties in getting my GP to provide more up-to-date records and had asked that the Tribunal address this by ordering their disclosure by my former GP."

61. Mr Williams also went on to note that the first Unless Order was made in November 2018 by Regional Employment Judge Parkin, and that was the first failure of the claimant to produce the GP records, and that on 19 December 2018 the claimant wrote to the Employment Tribunal in these terms:

> "Unfortunately I have not been able to obtain the medical evidence as ordered at paragraph 7.1 (Employment Judge Ryan's minute) yet. I would have wished to obtain this evidence from a psychologist I have seen, and I have been unable to arrange an appointment within the period of just over two weeks in which such evidence was ordered to be produced. Having sought counsel's advice on this matter, I write to request that this part of the order be set aside as it is not practicable or reasonable to expect me to be able to comply with it."

62. That, Mr Williams suggested, was confirmation that such medical evidence existed but the claimant was having difficulty obtaining it.

63. Mr Williams then asked me to consider the witness statement of the claimant "skeleton argument inaccuracies" (paragraph 22) where the claimant said:

> "As such it is clear that I have complied with orders to the best of my ability. I have made it clear that I have no way of forcing a doctor to release the documents and have suggested on numerous occasions that the Tribunal is asked to make an order that my former GP is to disclose the records. Whilst I appreciate that, as an autistic person, I do tend to interpret things literally (which is obviously relevant and I should not suffer a detriment due to it as part of my disability), I cannot understand how I can be ordered to disclose documents that are not in my possession. I believe that the respondent has failed to seek an order that my former GP disclose the records as they prefer to waste time and money in trying to prevent the substantive issue from being heard."

64. Mr Williams made the point that it was not for him to ask for an order for the GP notes to be disclosed but for the claimant to make every effort to obtain those GP notes.

65. Mr Williams made the further point that the claimant was not saying at that time that there were no GP records, just simply that he was having difficulty obtaining them. In short, Mr Williams' submission was that the claimant accepts that full disclosure has not been given. At paragraph 25 of his witness statement the claimant himself said:

> "As I have repeatedly made it clear that my failure to disclose the entirety of my medical records is due to my former GP simply refusing to respond to my request to disclose them. Again in failing to draw the Tribunal's attention to my letter of 3 January 2019 I believe they are deliberately trying to mislead the Tribunal."

66. Mr Williams made the point that he was not doing anything of the sort, and it is clear that the claimant recognised that he had not disclosed the appropriate records.

67. It was Mr Williams' view, therefore, that there had been multiple failures and that, in effect, I as the Judge on 2 November 2020 stopped him (Mr Williams) from making his application to have the claimant's claim struck out by allowing, yet again, the claimant to have one more chance at producing the GP records. If the claimant's reconsideration was successful the next stage would be for an application from the respondent to strike out the claim on the original basis.

68. Mr Williams also said that the claimant had taken no active steps to comply and that if there, genuinely, were no notes between 2016 and 2018 he could have asked any of the doctors at Nutgrove Villa Surgery or Dr Kinsey to write a one line letter saying that there were no such notes, and that would have been the end of the matter. The claimant has never done that.

69. What the claimant is now saying, Mr Williams suggested, is firstly that there were no notes between the relevant dates, but when challenged on that he said there were no significant notes, and when challenged on that confirmed that there were no relevant notes. In Mr Williams' view it was not for the claimant to decide whether the notes were significant or relevant but for there to be a proper discussion before the Tribunal as to whether they were relevant to the issues at hand.

70. Mr Williams submitted that the claimant was saying, in the same breath, there were no significant documents, no relevant documents or no documents at all, or that Nutgrove may have some documents.

71. Finally, Mr Williams suggested that the claimant had had every opportunity to comply with the orders over the last 3½ years, and that even after the order striking out his claims on 15 January 2021 made by the Regional Employment Judge the claimant had still not produced any notes or suggested why he had not.

72. Mr Williams said that public money was being spent on repeated hearings and that there were no proper grounds to set aside the Unless Order and the consequences of it.

73. Mr Williams then went on to confirm that there was little chance of a fair trial taking place. Because of listing difficulties, any hearing would be in late 2023, which would be 4½ to five years after the events in question. That, he said, was prejudicial to the respondent far more than any prejudice potentially caused to the claimant. Memories fade, witnesses were yet to be identified because the litigation had stalled and witnesses may not be now available to the respondent to give evidence challenging the claimant's claims.

Claimant's return to the Tribunal room to hear Mr Williams' submissions

74. Once Mr Williams had made his points, I asked the claimant to return to the room. I explained to him that I would now set out for him in detail everything that Mr Williams had said in the claimant's absence from the Tribunal room.

75. I started to set out the points raised above and after each point the claimant interrupted me by either arguing that what Mr Williams was saying was not right or that he had not got it down in writing and he needed me to slow down in my dictation. I asked the claimant not to interrupt, primarily so that I could get through the setting out of the submissions for him and we could move on and make sure the hearing was completed.

76. The claimant would not be moved and requested a further adjournment. I refused on the basis that all I was doing was reading out what Mr Williams had said. I asked the claimant not to interrupt and to take a note of what was said. I again started to read out my notes with regard to what Mr Williams had said, and the claimant yet again interrupted, asked me to slow down and disputed the facts that I was setting out that Mr Williams had submitted to me.

77. The claimant refused to go on and said that he wanted an adjournment and that the matter could not be completed today, and that he had to be given the opportunity to write down everything that Mr Williams had said at his pace.

78. At this point it was 4.15pm and I agreed to a five minute adjournment. The claimant refused to accept a five adjournment and wanted half an hour. I then said that he could have 15 minutes to consider the issues (although there was nothing to consider), and then I would continue setting out for him Mr Williams' submissions.

79. The claimant said he could not deal with Mr Williams' submissions and needed the hearing to be adjourned so that he could consider what Mr Williams had said but only once he had written down my dictation.

The return of the claimant to the Tribunal room at 4.55pm

80. At the appointed time, the claimant had not come into the Tribunal room despite my clerk asking him to do so.

81. Eventually, the claimant did attend and I asked him if I could continue to set out for him Mr Williams' submissions. The claimant would not proceed with the hearing. He now suggested that there was too much extraneous noise. I explained to the claimant that I did not believe there was too much noise. In fact no-one had spoken in the Tribunal at all when the claimant was in the room other than the claimant and me, except for one word uttered by Mr Williams. When I asked Mr Williams if he had received the GP notes, Mr Williams had said "no".

82. At that point, for the reasons set out below, I considered that the claimant was acting vexatiously and unreasonably, and that his whole purpose during the day had been to thwart any reasonable discussion with regard to the issues. I explained to him that that was the case and that, in any event, having considered what he had said to me and what Mr Williams had said to me, there was no reasonable prospect of me setting aside the Unless Order and its effects due to non-compliance.

The Law

83. All references with regard to rules are those contained in the 2013 regulations.

84. Strike outs of any application or Judgment or response must be carried out with reason, relevance, principle, and justice.

85. A reasonable opportunity to make representations must be given.

86. No notice need be given where the ground for strike out is non-compliance with an order.

87. I must consider other ways of dealing with matters, such as ordering costs against a party for an unmeritorious claim or unreasonable behaviour.

88. The word "vexatious" in the rules is defined as harassing the other side or being hellbent on causing mayhem and an abuse of process.

89. I had therefore to consider whether the claimant had subjected the respondent to harassment, inconvenience, and expense out of all proportion to any gain likely to accrue, and whether the claimant had acted in a significantly different way from the ordinary and proper use of court processes.

90. I had to consider whether his application to the Tribunal was bound to fail.

91. With regard to no reasonable prospects of success, I had to consider and take a view on the merits of the application for reconsideration, and I must also consider whether a fair trial is still possible.

92. With regard to strike out I must find that a party has behaved scandalously, vexatiously, or unreasonably.

93. With regard to the principles related to a strike out I must consider the principles set out in the judgment in **De Keyser Limited v Wilson [2001] IRLR 3424 EAT** and consider whether a fair trial is possible and note that a strike out is not a punishment.

94. Even if a fair trial is unachievable, the Tribunal will need to consider appropriate ways of dealing with the problem being caused by the party i.e. a lesser penalty such as costs.

95. However certain conduct, such as deliberate flouting of a Tribunal order, can lead directly to the issue of a strike out order.

96. Under the rules appertaining to an Unless Order, the only question is whether there has been compliance in accordance with the order (**Scottish Ambulance Service v Laing EAT 0038 12**).

97. I must have regard to the overriding objective under rule 2 of the 2013 regulations by seeking to deal with cases fairly and justly, and consider the magnitude of the non-compliance, whether default was the responsibility of the party against whom the order was made, what disruption, unfairness or prejudice had been caused, whether a fair trial is still possible, whether a lesser punishment should be imposed, whether a strike out is a proportionate response to non-compliance and, with regard to today, whether I should order an adjournment or not and give the claimant ample opportunity to respond.

98. Where there has been a failure to comply with an Unless Order in any material respect the Tribunal has no discretion and the case must be struck out under rule 70-73. The Unless Order is in effect a conditional judgment which, if not complied with, will render all the claims to be dismissed.

99. I must consider the interests of justice and I can confirm the Unless Order, vary it or revoke it.

100. Only a Judgment can be reconsidered, which is defined in rule 1(3), and is a decision which finally determines a case or part of a claim.

101. Partial compliance of an Unless Order is not sufficient.

102. The clear unequivocal notice of the effect of an Unless Order must be expressed and set out for the party against whom the Unless Order has been made.

103. Rule 38(2) of the 2013 regulations confirms that once dismissal takes effect the relevant party has the right to apply to the Tribunal within 14 days of the date that notice is sent on the basis that it is in the interests of justice to set aside the order.

104. The facts I must take into account are the reasons for the default, the seriousness of the default, prejudice to the other party, whether a fair trial is still possible, and was the claimant's default an oversight or deliberate.

105. If there is a request for a hearing then a hearing must take place, although a reconsideration can always take place on the papers.

106. With regard to Article 6, the interests of justice must be considered and exercised, and again there should be a proper consideration of whether a fair trial can take place (Article 6 of the European Convention on Human Rights and as set out in the UK law by the Human Rights Act 1998). There is a need for a Judge to be independent and impartial.

Conclusion

107. Applying that law and the principles set out above to the issues in this case, I concluded that the claimant's default and behaviour today was deliberate. Ultimately, his behaviour in the Tribunal had nothing to do with his ability or inability to communicate. Indeed, he was more than able to say what he wished to say, was given opportunity to make his submissions and knew what the issue was. But, for whatever reason, the claimant was not able to engage with that central issue which was, could he obtain and release to the respondent's solicitors the relevant and requested GP notes. A simple matter. On that basis I was left with no option other than to warn him of the possible consequences of his behaviour and then to strike out his application to have the Unless Order set aside for the following reasons.

108. Having seen the claimant's application to the Tribunal I was content to reconsider the matter and I was expecting the claimant to have, firstly, complied with the order in any event or, secondly, have given a proper and believable reason as to why he could not comply with the order. The claimant knew of the Unless Order and its potential outcome if he did not comply with it. He knew this on 2 November 2020. I did not accept his denial in that regard. Furthermore, he has had plenty of time, prior to the November 2020 hearing, between 2 November and the date for compliance and since then to comply yet has failed to do so.

109. What transpired today was the claimant making it clear throughout that he did not want the hearing to proceed and that he was both prevaricating and procrastinating. This inability to accept the hearing must proceed had no connection with his disability. The claimant was more than capable of explaining himself. No human rights of his have been breached. He had every opportunity, on his terms, to put forward his arguments. When he recognised that his arguments were flawed he resorted to behaviour specifically to make progress in this litigation impossible.

110. I considered the claimant's disability and I noted, that as someone with autism, it can be difficult for him to communicate. All reasonable adjustments had been put in place, save for his request to have an intermediary. As I understand it, in the Family Courts, the intermediary assessment had not taken place and I received

no explanation from the claimant as to why that had happened. In any event the claimant's argument was initially that he had complied with the Unless Order. This is not what he suggested at the hearing in November 2020.

111. The documentary evidence from the claimant himself shows that he believes he has not complied, but that the reason for non-compliance was that Nutgrove Surgery were not answering his requests to produce the GP notes. He did not suggest that his new doctor, Dr Kinsey, was unable to provide any notes, only that he had notes in his possession from Dr Kinsey that refer to matters after May 2018. However, that argument was disingenuous because, whilst holding those notes in his hand, the claimant suggested that there were references to a medical condition in 2014 and 2015 in the notes from Dr Kinsey.

112. The claimant has never explained why he has not been able to get his notes from Nutgrove Surgery. For the first time at this hearing, he suggested, both to me and to the respondent, that those notes do not exist. However, when challenged in the most passive way this morning the claimant admitted that he only thought that there were no such notes but he was not sure, and then indicated that there were no "relevant or significant notes". He changed his argument two or three times.

113. As Mr Williams pointed out, it is not for the claimant to decide whether his medical records are significant or relevant but for the Tribunal to decide that if necessary. What is required is an open and proper disclosure of all documents either in his possession or control or available to the claimant after reasonable enquiry.

114. I considered the question as to whether all his claims should have been struck out.

115. I accept that the application to the Tribunal from the claimant relates to both disability and PIDA issues. The further and better particulars that are provided by the claimant suggest that the same factual matters relate to both claims. The claimant is guilty of not moving the litigation on generally and has refused to produce GP notes, even when an Unless Order has been made for the second time and he has been given clear notice of what the outcome would be if he did not comply. When his claims were struck out and he applied for reconsideration, he still did not supply, with the reconsideration application, a copy of his notes. The claimant has brought the loss of the chance to pursue his claims on himself.

116. The claimant's attitude at both the hearing on 2 November 2020 and the hearing today has been to obfuscate and delay so that the litigation cannot be moved on. Whenever an issue that he raised was dealt with, for example his request for a security guard to be in attendance, the claimant would place a further obstacle in the path of progress. Some of his requests were unreasonable – for example he suggested that a way forward would be for the respondent Trust to appoint another solicitor or barrister to represent it instead of Mr Williams.

117. In those circumstances it is not appropriate to exercise any discretion in the claimant's favour. The interests of justice are not served by me setting aside the Unless Order or adjourning the hearing and arranging another date. The same difficulties would arise, there has to be some resolution to the impasse and further

hearings would mean the respondent would need to pay further legal costs with little prospect of recovering any monies from the claimant. Furthermore, the prejudice to the respondent outweighed any prejudice to the claimant. Consequently, all his claims remain struck out.

118. These reasons have been given at the request of the claimant. I was in the process of giving him an oral judgment today, but the claimant refused to allow me to do so, explaining that he wanted reasons in writing. Mr Williams however wanted a judgment made so I gave a short judgment orally at this hearing and then agreed to send out to the parties full written reasons.

119. The claimant then asked for costs against the respondent for today's hearing, which I refused on the basis that it would be inappropriate to make such a costs order because the claimant had lost his claim to have the Unless Order set aside.

Further Information

120. During the course of the hearing, I was able to read the claimant's schedule of acts and omissions relied upon as part of his claim since the November hearing, and I conclude that, with regard to each and every point made by the claimant on 1 October 2018 in his further and better particulars, the issue of his health and GP records is relevant. I conclude that the respondent's requirement to see them was not a fishing expedition nor a ploy to make the litigation difficult for the claimant.

121. I considered whether I should recuse myself, but the claimant's criticism in that regard is that "certain" judges in Liverpool are biased against him and he made no specific allegation that I was biased, other than I had made the Unless Order in November 2020.

122. The unless order was not "hidden". Indeed, it was highlighted in bold print in the Order itself.

123. All the reasonable adjustments that the claimant suggested to Employment Judge Horne were put in place. The request today for the claimant to have an intermediary was refused but only because the assessment had not taken place last November as arranged by the Family Court. I could not elicit from the claimant why he had not gone through that process. In any event the claimant confirmed he wanted to get on with the hearing and then proceeded to put obstacles in the way of doing just that.

124. I also considered the points raised by Dr Bliss in her report and understood the importance of allowing the claimant to process each aspect of the hearing and that he be given time to assimilate the information both I and Mr Williams gave to him.

125. I was asked by Mr Williams to describe his deportment and behaviour during the course of this hearing. He was concerned by the allegations of impropriety being levelled at him by the claimant. I need say no more than Mr Williams acted

appropriately and professionally during the hearing as he did at the last hearing in November 2020.

Employment Judge Robinson
Date: 1 April 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
5 April 2022

FOR THE TRIBUNAL OFFICE

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