THE INDUSTRIAL TRIBUNALS

CASE REF: 17012/18

CLAIMANT: **Jacqui Blain**

RESPONDENT:
1. **Robert G Sinclair & Company Solicitors**
2. **Robert G Sinclair**
3. **Mark Kelly**
4. **Malachy Hagan**

CASE REF: 6067/19

CLAIMANT: **Jacqui Blain**

RESPONDENT: **Robert G Sinclair & Company Solicitors**

DECISION ON A PRE-HEARING REVIEW

The unanimous decision of the tribunal is that the respondents' application for relief from the sanction of strike out of the response on foot of Unless Orders is hereby refused.

CONSTITUTION OF TRIBUNAL

Employment Judge (sitting alone): **Employment Judge Ó Murray**

APPEARANCES:

The claimant was represented by Ms R Best, Barrister-at-Law, instructed by Ms Fitzgerald-Gunn of Worthingtons Solicitors.

The respondents were represented by Mr McNeill, Solicitor of Robert G Sinclair & Company Solicitors.

THE APPLICATION

1. This is an application by the respondents for relief from the sanction of strike out of the response forms following non-compliance with two Unless Orders made at a CMD on 15 August 2019. The deadline for compliance with the Unless Orders was 29 August 2019.

2. The claimant's first claim, presented on 24 October 2018, is for direct discrimination and victimisation on grounds of sex, age and disability. The first claim also contains a claim of equal pay. The second claim, presented on 22 February 2019, contains a claim of unfair dismissal as the claimant was dismissed on 7 November 2018 and contains claims of direct discrimination and victimisation on grounds of sex, age and disability.

3. There is a third claim (case ref no: 10710/19) which was undefended and is the subject of a separate application for a late response to be permitted. That claim is not the subject of this application for relief from sanction as the agreed position is that the outstanding information and documents under the Unless Orders relate to Additional Information and documentation in relation to the first two claims (reference numbers 17012/18 and 6067/19).

4. By agreement however the three claims travelled together in relation to CMDs, but at no point was a formal Order for consolidation made.

THE LAW

5. The Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 (as amended) (hereafter referred to as "*the Rules*") applied at the time of the hearing in this case and they provide where relevant as follows:

(i) **The Overriding Objective**

"3(1) The overriding objective of these Regulations and the rules in Schedules 1, 2, 3, 4, 5 and 6 is to enable tribunals and chairmen to deal with cases justly.

(2) Dealing with a case justly includes, so far as practicable –

(a) ensuring that the parties are on an equal footing;

(b) dealing with the case in ways which are proportionate to the complexity or importance of the issues;

(c) ensuring that it is dealt with expeditiously and fairly; and

(d) saving expense.

(3) A tribunal or chairman shall seek to give effect to the overriding objective when it or he –

(a) exercises any power given to it or him by these Regulations or the rules in Schedules 1, 2, 3, 4, 5 and 6; or

(b) interprets these Regulations or any rule in Schedules 1, 2, 3, 4, 5 and 6.

(4) The parties shall assist the tribunal or the chairman to further the overriding objective."

(ii) **Rule 10**

Rule 10 of the Rules sets out the tribunal's powers to make Orders in proceedings and states as follows:

"(1) Subject to the following rules, the chairman may at any time either on the application of a party or on his own initiative make an order in

relation to any matter which appears to him to be appropriate. Such orders may be any of those listed in paragraph (2) or such other orders as he thinks fit. Subject to the following rules, orders may be issued as a result of a chairman considering the papers before him in the absence of the parties, or at a hearing.

(2) Examples of orders which may be made under paragraph (1) are orders –

...

(b) that a party provide additional information;

...

(d) requiring any person in Northern Ireland to grant to a party such discovery or inspection (including the taking of copies) of documents as might be granted by a county court;"

(iii) **Rule 13**

The Power to make Unless Orders is contained within Rule 13 which provides where relevant as follows:

"(2) A decision or order may also provide that unless the decision or order is complied with the tribunal or chairman may make a decision striking out the claim or, as the case may be, the response on the date of non-compliance without further consideration of the proceedings or the need to give notice under rule 19 or hold a pre-hearing review or a hearing under rule 26."

(iv) **Rule 18**

Rule 18 makes provisions in relation to Pre-Hearing Reviews and provides at 18(7)(e) that a chairman or tribunal may make a decision or Order striking out a claim or response (or part of one) for non-compliance with an Order or Practice Direction.

6. The net position is that the tribunal may make an Unless Order at a CMD for failure to comply with Orders of the tribunal; the party may apply for relief from sanction even after the date for compliance with the Unless Order has expired; a relief from sanction application is heard at a PHR; the tribunal may decide at the PHR either to grant relief from sanction or to confirm the strike out of the response in compliance with the Unless Order.

7. The tribunal notes that there is a difference in the wording of the Rule 13 in Northern Ireland when compared to the wording of the equivalent Rule in GB. The different wording relates to the way in which an application for relief from sanction can be dealt with procedurally. The authorities referred to below relate to the GB Rules but the principles drawn from them apply persuasively in Northern Ireland.

8. The following authorities were referred to and relied upon by Ms Best for the claimant. The citation of each case is given below together with the relevant principle or extract.

(i) In ***Riley v The Crown Prosecution Service (2013) IRLR966*****,** the Court of Appeal stated as follows in relation to the overriding objective:

> *"It is important to remember that the overriding objective in ordinary civil cases (and employment cases are in this respect ordinary civil cases) is to deal with cases justly and expeditiously without unreasonable expense. Article 6 of the ECHR emphasises that every litigant is entitled to "a fair trial within a reasonable time". That is an entitlement of both parties to litigation." (Paragraph 27).*

(ii) In ***Marcan Shipping v Kefalas & Candida Corporation [2007] 1 WLR 1864*** the Court of Appeal stated as follows:

> *"In my view it should now be clearly recognised that the sanction embodied in an "unless" order in traditional form takes effect without the need for any further order if the party to whom it is addressed fails to comply with it, in any material respect. This has a number of consequences, to three of which I think it is worth drawing particular attention. The first is that it is unnecessary, and indeed inappropriate, for a party who seeks to rely on non-compliance with an order of that kind to make an application to the court for a sanction to be imposed or, as the Judge put it, 'activated'. The sanction prescribed by the order takes effect automatically as a result of the failure to comply with its terms. If an application to enter judgment is made under Rule 3. 5(5), the court's function is limited to deciding what order should properly be made to reflect the sanction which has already taken effect. Unless the party in default has applied for relief, or the court itself decides for some exceptional reason that it should act of its own initiative, the question whether the sanction ought to apply does not arise. It must be assumed that at the time of making the order the court considered all the relevant factors and reached the decision that the sanction should take effect in the event of default. If it is thought that the court should not have made the order in those terms in the first place, the right course is to challenge on appeal, but it may often be better to make all reasonable steps to comply and seek relief in the event of default." (Paragraph 34)*

(iii) In ***EB v BA 2008 UKEAT 0139/08***, the EAT (per Elias J.), made clear that strike out operated automatically upon breach of the Unless Orders.

(iv) An IT level decision in Northern Ireland in the case of ***Laurence McGuigan v D J Dickson Limited*** is a decision from 2014 where the principles in ***Marcan Shipping*** and ***EB v BA*** were applied.

(v) ***Smith v Gibson [2013] NI Master 14.*** In this case the Master sets out guidelines on Unless Orders set out by the Court of Appeal in ***Hytec Information Systems Limited v Coventry City Council [1997] 1 WLR 1666:***

"1. An unless order was an order of last resort, not made unless there was a history of failure to comply with other orders. It was the party's last chance to put its case in order.

2. Because it was the last chance, a failure to comply would ordinarily result in the sanction being imposed.

3. The sanction was a necessary forensic weapon which the broader interests of the administration of justice required to be deployed unless the most compelling arguments were advanced to exonerate the failure.

4. It seemed axiomatic that if a party intentionally flouted the order he could expect no mercy.

5. A sufficient exoneration would almost invariably require that he satisfied the court that something beyond his control had caused the failure.

6. The judge would exercise his judicial discretion whether to excuse the failure in the circumstances of each case on its own merits, at the core of which was service to justice.

7. The interests of justice required that justice should be shown to the injured party for procedural inefficiencies causing the twin scourges of delay and wasted costs. The public administration of justice to contain those blights also weighed heavily. Any injustice to the defaulting party, though never to be ignored came a long way behind the other two."

(Emphasis added)

(vi) In ***Johnson v Oldham Metropolitan Borough Council [2013] UKEAT/01095/13.*** Langstaff J held that the test for material compliance with an Unless Order should be approached qualitatively rather than quantitatively.

(vii). In ***Redhead v London Borough of Hounslow [2014] UKEAT/0086/13.*** Simler J stated as follows:

"The factors relevant to an application for relief from sanctions are inevitably case-sensitive and dependent upon the context of the particular case being considered. In Governing Body of St Albans Girls' School v Neary [2009] EWCA Civ 1190, [2010] IRLR 124, at paras 60 to 62, [2010] ICR 473, the Court of Appeal said "It is well established that a party guilty of deliberate and persistent failure to comply with a court order should expect no mercy." This was so, even where a trial remained possible. But factors regarded as important were:

"… the effect which the failure to comply had had and the effect which the grant of relief would have on the parties. It is true

that the [Employment Judge] did not expressly consider those factors. But it seems to me that those factors will be far more important in the context of a case of non-deliberate or partially excusable non-compliance. Where the circumstances were such that the failure was at least to some extent excusable, those considerations may well be determinative. <u>However, where the non-compliance is deliberate and persistent, I do not think those factors are likely to be important in the exercise of judgment</u>." (Emphasis added) (Paragraph 41).

(viii) ***Morgan Motor Company Ltd v Morgan [2015] UKEAT/0128/15***. In that decision HH Judge Eady QC applied the guidance in the ***Thind*** case. She also makes reference to the policy objective behind Unless Orders and referred to the important principle of finality in litigation. At paragraph 38 it is stated:

"One plainly relevant factor was the policy objective behind unless orders, the importance of treating such orders seriously and with an understanding as to why they are made. That is not solely a "floodgates" point, as might be suggested by the Employment Judge's reasoning. It is, rather, a more general concern for the administration of justice within the court and tribunal system."

(ix) ***Thind v Salvesen Logistics Ltd [2010] UKEAT/0487/09.*** In that decision Underhill J stated that there was no obligation in law on an Employment Tribunal to proceed by reference to the Civil Procedure Rules and stated (paragraph 14) that the task for the tribunal is as follows:

"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."

Underhill J further stated at paragraph 36 as follows:

> *"I wish to close by emphasising, in case this judgment is referred to in other cases, that, as I have already observed, all these cases turn on their own facts. I certainly would not wish it to be thought that it will be usual for relief to be granted from the effect of an unless order. Provided that the order itself has been appropriately made, there is an important interest in employment tribunals enforcing compliance, and it may well be just in such a case for a claim to be struck out even though a fair trial would remain possible. As has been pointed out, the case of* ***Blockbuster Entertainment Ltd v James [2006] IRLR 630*** *did not concern an unless order; and the facts of* ***Neary*** *illustrate that a claim may be struck out even though a hearing is still possible – see in particular paragraphs 63 and 64 of the judgment."*

THE RELEVANT HEARINGS

9. The relevant sequence of events and relevant Orders made in various hearings is set out below.

CMD – 20 June 2019

10. At a CMD on 20 June 2019 were Ms Best for the claimant and Mr Anderson, Barrister-at-Law, instructed by the respondents. The following Orders were made by the tribunal:

    (i) That the respondents reply to the claimant's Notices for Additional Information by 27 June 2019. This was an agreed date.

    (ii) That the parties provide relevant documentation to each other by 1 August 2019.

11. By email of 5 July 2019 to the tribunal the claimant's representative Ms Fitzgerald-Gunn stated, firstly, that no response had been received at all from the respondents in relation to two Notices for Additional Information, and secondly, stated that the documentation that had been provided in response to two Notices for documentation was incomplete. Ms Fitzgerald-Gunn requested a CMD to consider the issue of an Unless Order and that CMD was listed for 15 August 2019.

CMD – 15 August 2019

12. At the CMD on 15 August 2019 Mr McNeill attended on behalf of the respondents as legal representative for that hearing in the absence of Mr Anderson BL.

13. In the CMD record of the hearing on 15 August 2019 the following was noted:

> *"3. The agreed position was that the categories of Additional Information and documentation are relevant to the claimant's claim. It was also the agreed position that there had been no replies to the request for additional Information; there had been compliance with categories 1, 5, 6, 7 and 8 of the request for Discovery dated 4 March 2019; and no other documentation had been provided.*

4. The Orders of 20 June 2019 set a deadline for compliance with the Order to provide additional information of 27 June 2019. That date was an agreed date. The deadline set for provision of relevant documentation was 1 August 2019.

5. I considered the submission of both sides and was satisfied that there had been non-compliance with the Orders of the tribunal, that no reasonable excuse had been provided for the delay, that the claimant could not prepare her case without the additional information and documentation requested and that a fair trial therefore would not be possible in the absence of the information and documentation. I was therefore satisfied that a strike out of the defence was appropriate. I considered in light of the authorities, including the ***Darley*** *case, that an Unless Order was appropriate in the circumstances to give the respondent a further chance to comply with the Orders of the tribunal."*

14. The third matter to be dealt with at the CMD on 15 August 2019 was the failure by the respondents to agree the draft legal and factual issues document provided by the claimant's representative on 20 June 2019. An Order was made by agreement on 20 June 2019 that a finalised legal and factual issues document be lodged with the tribunal on 21 June 2019 as Mr Anderson had stated that he had minor amendments to make to the claimant's draft and he would provide them to the claimant's representative by 5.00 pm on 20 June 2019. That promise was not honoured by Mr Anderson or the respondents.

15. A further Order was made on 15 August 2019 that if any amendments were to be made by the respondents to the legal and factual issues document, they had to be provided in writing by the respondents by 22 August 2019 to the tribunal and copied to the claimant's representative.

16. An Order for Costs was considered the respondents having been put on Notice of that application on 6 August 2019 by the claimant's representative. Mr McNeill stated that the sums sought were reasonable. The tribunal was satisfied that the threshold for costs had been passed and made an Order for Costs in the sum of £516.00. The costs remained unpaid despite several written requests by the claimant's representatives. The costs were ultimately paid on 6 January 2020.

17. The terms of the Unless Orders were set out at paragraphs 6 and 7 of the CMD record as follows:

"6. I therefore Ordered that ***Unless the respondents provide outstanding documentation in accordance with the Order of the tribunal made on 20 June 2019 (as set out in the request for discovery by the claimant, dated 4 March 2019 and 24 May 2019), by 29 August 2019, the respondent's defence shall be struck out and the respondent shall be debarred from defending these proceedings, without the need to give any further Notice or to hold any further Hearing****.*

7. I further Ordered that ***Unless the respondents provide the additional information requested by the claimant in the Notices dated 24 May 2019, which said information must be served in***

***writing on the claimant's representative by 29 August 2019, the respondent's defence shall be struck out and the respondents shall be debarred from defending these proceedings without the need to give any further Notice or to hold any further Hearing**."*

Specific Unless Order documents dated 16 August 2019 were also served on 16 August 2019 upon the respondents and Mr Anderson by email.

18. It was made clear in the hearing on 15 August 2019 and recorded in the CMD record that the Unless Orders related to two Notices for Discovery dated 4 March 2019 and 24 May 2019. The Additional Information was set out in the claimant's two Notices dated 24 May 2019. One of those Notices incorporated a previous request for Additional Information dated 4 March 2019. At no point during the hearing or after receipt of the CMD record did the respondents' representative raise any issue about any confusion in relation to which of the claimant's Notices were the subject of the Unless Orders. No application was made to vary the Orders or to extend the date for compliance.

CMD – 11 September 2019

19. In this PHR Mr McNeill accepted that from the respondents' perspective there had not been full compliance by the deadline of 29 August 2019. It is the respondents' case that by 19 September 2019 there was material compliance with both Orders.

20. As the deadline had passed without full compliance a CMD was arranged to consider the way forward. Mr Anderson as the representative for the respondents attended at that CMD which took place on 11 September 2019. The CMD record states in relation to the Unless Orders as follows:

> *"7. In relation to documentation Mr Anderson stated that the respondents served documentation on 24 July 2019 and nothing further was served after that date. Mr Anderson agreed that further documentation needed to be provided by the respondents.*
>
> *8. In relation to the replies Mr Anderson stated that replies to one of the Notices served had been provided before the deadline set in the Unless Order but that there was no reply to the outstanding Notice until after the deadline of 29 August 2019. Mr Anderson further agreed that there was a requirement for the respondents to deal with the issues of inadequate replies which have been raised by Ms Best.*
>
> *9. There had been discussions between both Counsel the night before the CMD and Ms Best stated that there had been a promise by the respondent's side to provide a response to the inadequacies raised by her in relation to replies and documentation, within seven days of the CMD."*

21. After a request for clarification from Mr Anderson, he confirmed that the respondents wished to apply for relief from sanction in relation to the operation of the Unless Orders. A Pre-Hearing Review was therefore listed for 18 October 2019 in order to deal with that application. In advance of 18 October 2019, date of the PHR was moved to 25 November 2019 by the tribunal.

PHR – 25 November 2019

22. The PHR on 25 November 2019 was adjourned on the morning due to the sudden ill-health of Mr Anderson. Mr McNeill appeared on that occasion on behalf of the respondents. The record of that hearing states as follows in relation to the nature of the hearing:

> *"3. The application for relief from sanction relates to two Unless Orders which were made on 15 August 2019 in relation to all three claims for additional information and documentation.*
>
> *4. Ms Best stated that the claimant's position is that there has not been material compliance with either of the Orders in that some replies and documents have not been provided and also the replies that have been provided are inadequate.*
>
> *…*
>
> *7. The hearing on that date will deal with two applications namely firstly, the application for relief from sanction from the Unless Orders and secondly, the application for a late response in the third claim.*
>
> *8. I explained that normally in such applications sworn testimony and/or other evidence is required in order to consider whether there are grounds for granting relief from sanction and for granting an application for a response to be lodged late."*

23. The Employment Judge explained that both sides needed to be in a position to address the issue of whether or not there had been material compliance with the Unless Orders at the relisted PHR. The tribunal also ordered that the respondents' side provide legal submissions in answer to the legal submissions provided by Ms Best. The deadline for provision of the respondents' legal submissions was 5.00 pm on 9 December 2019.

PHR – 11 December 2019

24. The PHR was relisted for 11 December 2019. On the morning of the hearing Mr McNeill attended as representative for the respondents and applied for an adjournment of the hearing due to the non-attendance of Mr Anderson. That application was granted and the record of the hearing states as follows in relation to the reasons put forward for the non-attendance of Mr Anderson:

> *"2. Mr McNeill made an application for the postponement of the hearing due to the non-attendance of Mr Anderson BL. Mr McNeill submitted that he had received an email from Mr Anderson at 6.30 am on the morning of the PHR to indicate that he wished to be "de-instructed" for a number of personal and professional reasons as his position in the case had "become untenable". Mr McNeill stated that the evidence that the respondent intended to call in relation to the applications in this PHR included testimony from Mr Anderson together possibly with testimony from Ms O'Neill the solicitor who formerly dealt with these*

matters before Mr McNeill joined the firm. Ms O'Neill no longer is with the respondent firm of solicitors."

25. At the PHR Mr McNeill stated that he had already consulted with another counsel on a previous occasion and intended to reinstruct that counsel as Mr Anderson had requested to be *"de-instructed"*.

26. The application was granted for the principal reasons set out as follows in the CMD record:

> *"5. I considered the submissions of both sides and acceded to the application for a postponement given the seriousness of the matters to be considered and the fact that sworn testimony will be required from Mr Anderson and possibly others in order for the application to be fully considered*."

27. The deadline for provision of the respondents' written legal submissions in answer to Ms Best's submissions was extended to Friday 3 January 2020 at 12.00 noon. The written submissions provided by the respondents' representative were lodged on 6 January 2020. It was further ordered as follows:

> *"12. Any documentation which is relevant to the applications to be considered at the PHR* ***on 7 January 2020*** *must be provided by the parties to each other by* ***30 December 2019****. Any such documents which are to be provided to the tribunal must be lodged with the Tribunal Office* ***by 12.00 noon on Friday 3 January 2020."***

The respondents' representative failed to comply with that deadline and ultimately provided documentation in relation to the PHR on 6, 7 and 8 January 2020.

28. The record of that hearing also states as follows:

> *"8. Mr McNeill indicated that he intends to instruct another Barrister. On a previous occasion instructions were withdrawn by the respondents from Mr Anderson and another Barrister was consulted. However instructions were reinstated to Mr Anderson shortly thereafter. I explained that the non-availability of a Barrister for the respondents is unlikely to be a good reason to adjourn the PHR which is now listed* ***for 7 January 2020*** *given the history of this case and the delays which have occurred*."

29. A Witness Order was issued on 12 December 2019 and emailed to Mr Anderson at his Bar Library email address on that day.

PHR 7 and 8 January 2020

30. This hearing was therefore the third listing of this PHR to deal with the respondents' application for relief from sanction in relation to the two Unless Orders. The PHR also dealt separately with the respondents' application for leave to present a late response.

The Witness Order

31. At the hearing on 11 December 2019, in view of Mr McNeill's submission that the respondents intended to call Mr Anderson to give testimony in the PHR, the Employment Judge had stated that a Witness Order would be issued to Mr Anderson to ensure his attendance at the PHR. In the PHR on 8 January 2020 Mr McNeill agreed that this was stated in that hearing albeit that this specific point was not included in the written record of that hearing.

32. A Witness Order had therefore been issued on the basis of Mr McNeill's confirmation that evidence would be required for Mr Anderson in relation to the reasons underpinning the application for relief from sanction. At all points Mr Anderson himself, when he did appear in the tribunal, and Mr McNeill, when he was representative for the respondents, placed responsibility and indeed blame on Mr Anderson for any deficiencies or delays in dealing with Orders. The Employment Judge informed Mr McNeill that a Witness Order would be sent to Mr Anderson at the Bar Library and the Witness Order was indeed served by email to Mr Anderson on 12 December 2019 at his Bar Library email address.

33. On the morning of hearing on 7 January 2020 Mr Anderson was not in attendance.

34. Mr McNeill stated that he had had no contact with Mr Anderson either verbally or in writing, either directly or indirectly, following the date of the CMD which took place on 11 December 2019 when Mr McNeill was informed that a Witness Order would be issued to ensure his attendance on behalf of the respondents.

35. Mr McNeill stated that the reason he had not contacted Mr Anderson was because Mr McNeill (in conjunction with a partner in the firm) had decided after the hearing on 11 December 2019 that they would not, after all, require the attendance of Mr Anderson to give evidence in relation to the application but that rather, the respondents would rely on a series of emails between Mr McNeill, Ms O'Neill (a solicitor formerly with the firm) and Mr Anderson. In respect of those emails the respondents waived privilege. Mr McNeill therefore came to the PHR prepared to deal with the application in the absence of any sworn testimony from Mr Anderson or Ms O'Neill. Mr McNeill intended to rely upon the documentation and to make submissions without giving sworn testimony on them.

36. As Mr Anderson had failed to attend the hearing on foot of a Witness Order Mr McNeill was given 30 minutes to make contact with Mr Anderson to ascertain if there was any particular reason why he had failed to attend or to see if he was on his way.

37. When the hearing resumed Mr McNeill stated that he had had a discussion with Mr Anderson on the telephone and Mr Anderson had stated that: he had not received the Witness Order as he had not been in the Bar Library over the Christmas period; that he had no knowledge that an Witness Order had been issued; and that he could not attend on the day of the hearing due to child care commitments.

38. Regrettably the PHR did not complete within the one day allotted to it, albeit that the application for relief from sanction was completed on the first day of the PHR. The PHR was reconvened on 8 January 2020 in order to deal with the remaining

applications. Mr Anderson again did not attend on that date. Mr McNeill stated that he had made telephone contact with Mr Anderson before the second day of the hearing and was informed that Mr Anderson had contacted the Bar Council for advice in relation to the Witness Order and that he would not be in attendance at the reconvened hearing because of child care commitments.

39. At this point the tribunal records its surprise that Mr Anderson, a Barrister, has (so far) failed to provide a direct explanation to this tribunal for his failure to comply with the Witness Order dated 12 December 2019 which was served on 12 December 2019 on his email address at the Bar Library. It is particularly surprising that Mr Anderson failed to do so despite being contacted by Mr McNeill at the behest of this tribunal on 7 January 2020 and was made aware that the PHR was due to run into a second day on 8 January 2020.

Application to Adjourn

40. In view of the questions raised by the Employment Judge about the non-attendance of Mr Anderson in answer to the Witness Order and in view of the point made by Ms Best that she had expected Mr Anderson to attend and be subject to cross-examination (given that a theme throughout these proceedings had been that Mr Anderson had assumed responsibility for deficiencies and delays and the respondents were putting the blame on Mr Anderson for deficiencies and delays), Mr McNeill applied for an adjournment of the PHR whilst maintaining his position that he did not require evidence from Mr Anderson but would instead rely on submissions and emails.

41. Submissions were made by both sides in relation to the adjournment application which Ms Best strenuously opposed. The following decision, rejecting the application for an adjournment, was provided at the hearing orally:

> "*This is an application to adjourn today's hearing by the respondent's representative on the grounds that he became aware today that Mr Anderson was served with a Witness Order at the Bar Library in December 2019. The claimant objects to the application and wants the hearing to proceed.*
>
> *The overriding objective applies in these proceedings and includes the obligation to deal with cases expeditiously and fairly with a view to saving expense. I have to consider the prejudice to both sides in either granting or refusing the adjournment application.*
>
> *This is the third time that this PHR has been listed. The first time it was listed, it was adjourned because of the sudden ill-health of Mr Anderson. The second adjournment on 11 December 2019 was because, on the morning of the hearing, Mr Anderson informed everyone that he was no longer instructed and he would not be in attendance. On 11 December 2019 Mr McNeill had indicated that Mr Anderson would give sworn testimony on behalf of the respondents to ground the applications for relief from sanction and permission to present a late response to the third claim.*
>
> *I stated at that hearing on 11 December 2019 that a Witness Order would be sent to Mr Anderson to attend at this hearing today. The Witness Order was emailed to Mr Anderson at the Bar Library on 12 December 2019.*

Today Mr McNeill indicated that he and a partner in the solicitors' firm decided after the last hearing that they would not present testimony from Mr Anderson or from anyone else but would instead rely on emails from the file between the firm, Mr Anderson and Ms O'Neill the solicitor previously dealing with these matters in the firm.

Mr McNeill therefore attended today ready to present those emails as evidence grounding his applications. Mr McNeill has stated to me today that he made no contact with Mr Anderson verbally or in writing, directly or indirectly following the hearing on 11 December 2019. I am most surprised that Mr McNeill and/or the respondents therefore failed to alert him to the listed date today and to the fact that I had clearly indicated in the hearing on 11 December 2019 that a Witness Order would be served on Mr Anderson as the respondents' witness.

Mr McNeill's application today is that he only became aware today that a Witness Order had been issued and served and that enquiries today of Mr Anderson have revealed that Mr Anderson did not see that Witness Order as he was not in the Bar Library and he is in difficulties today because of child care arrangements.

I have taken account of the overriding objective and the following matters in weighing the prejudice to both sides and whether I should exercise my discretion to adjourn.

(i) The history of this PHR.

(ii) The fact that this is the third time on the list.

(iii) The costs incurred.

(iv) The fact that counsel and solicitor are involved for the respondents and should be aware of the importance of a Witness Order.

(v) The non-communication between the firm of solicitors and counsel despite being told on 11 December 2019 that a Witness Order would be issued to Mr Anderson.

(vi) The fact that nothing has really changed today from the respondents' point of view as Mr McNeill at no point lined up Mr Anderson to attend this hearing.

I am satisfied that the balance of prejudice is such that this hearing should proceed today. The adjournment is therefore refused."

Evidence Provided

42. Documents were provided by both sides in the PHR. In particular, Mr McNeill produced emails between Mr Anderson, Ms O'Neill and Mr McNeill

43. Ms O'Neill was a solicitor in the firm and left the practice on 15 August 2019. Mr McNeill stated that he had had no contact whatsoever with Ms O'Neill in relation

to these claims since then despite making representations at the PHR about what Ms O'Neill knew, did or understood. Mr McNeill explained that his submissions were drawn from his interpretation of the emails and despite (at a previous hearing) being given the opportunity of issuing a Witness Order to Ms O'Neill no such Witness Order was requested and no explanation was given for the decision not to contact her or to call her to give evidence.

The Relief from Sanction Application

44. The reasons advanced by Mr McNeill for the failure to comply with the Unless Orders were principally the following:

(i) Confusion because the first Notice was dated March 2019 and was superseded by one of the two Notices in May and confusion about the two Notices for documentation. This tribunal notes that no such confusion was raised during the hearing when the Unless Orders were made; no request for clarification was ever sought; and no request for variation or extension to those Orders was ever made.

(ii) The non-availability of Mr Anderson in the period from 1 to 20 August 2019 when he was in the South of France on holiday and he was 'out of coverage'. This tribunal notes that this does not address the period up until 29 August 2019 (ie the deadline in the Unless Orders) nor does it address the further period to date.

(iii) Communication issues between the solicitor's firm and counsel. I note that the arrangements for communication between the respondents, Ms O'Neill, Mr McNeill and Mr Anderson were set up by them and any deficiencies relating to that mode of communication lie squarely at the door of the respondents. I find that this is particularly indefensible in a situation where all of the relevant individuals involved are lawyers.

The Claimant's Objections

45. Ms Best for the claimant objected to the application for relief from sanction on the following principal grounds:

(i) That there had been material non-compliance on the respondents' part as at the date of the Unless Orders and persisting up to the date of the Pre-Hearing Review.

(ii) That there had been persistent, and indeed deliberate, failure on the respondents' part to comply with Orders in general and in particular with the Orders underpinning the Unless Orders and with the Unless Orders themselves;

(iii) That there had been undue delay and expense suffered by the claimant;

(iv) That discourtesy and disregard had been shown by the respondents for the claimant, her representatives and the tribunal process.

46. Ms Best provided a chart of the categories contained in the Notices for documentation and Additional Information where the claimant stated that there had been material non-compliance as regards these two claims.

This Tribunal's Conclusions

47. This tribunal finds that there has been material non-compliance with the Unless Orders in several important respects.

48. It was clear that there was material non-compliance before the deadline and this was the agreed position. Whether there was material compliance after the deadline and in the period up to the date of the PHR is one relevant factor in balancing fairness and prejudice.

49. In relation to Additional Information the following are the key deficiencies which this tribunal finds mean that there has been material non-compliance:

    (i) In answer to item 6c (in Notice 1) details of the experience of named male comparators and reasons for any difference in salary in relation to the equal pay claim have been refused by the respondents on the basis that it would not be in compliance with data protection. This tribunal finds that this information is fundamental to the equal pay claim.

    (ii) In answer to item 7 (Notice 1) the respondent failed to specify which allegations made by the claimant against Mr Kelly (one of the respondents) were *"incorrect, false, misleading or depicted without reference to proper context".* This tribunal finds that this information, related to specific allegations rather than a blanket statement, is necessary for the claimant to prepare her claims of sex and age discrimination.

    (iii) In answer to item 8c (in Notice 1) details of the "*sexual innuendos*" allegedly made by the claimant (and specifically relied upon in the response form to the first claim) have not been given. Instead the answer states that these matters were not taken into account in reaching the decision to dismiss. This is at odds with the defence raised in the response form. This tribunal finds that this is clearly a serious matter specifically referred to in the defence and thus warrants the provision of detail to the claimant.

    (iv) Details of the experience and abilities of the younger comparator who obtained a training contract were not given. This tribunal finds this is a key point in the age discrimination claim as the claimant claims she should have been given the contract instead of the comparator.

    (v) The specific reasons for the dismissal have not been clarified. This tribunal finds that this is necessary for the unfair dismissal case and failure to provide it amounts to material non-compliance.

    (vi) At Item 6 (Notice 2) the claimant requests relevant information on an investigation into an incident on 3 October 2018, the claimant's complaints of 26 September 2018 and 3 October 2018 and the outcome of any such investigation. No answer has been provided as the reply relates to the

appeal process. This tribunal finds that this information is relevant and necessary for the claimant's unfair dismissal claim.

50. Item 24 (Notice 1) requests details of complaints made by the claimant and relates to the claimant's allegations about the handling of her allegations of discrimination against Mr Kelly, a key meeting in December 2017 and her grievance raised during the disciplinary process. The information is relevant to the claims of age and sex discrimination but, as the claimant could give evidence of such complaints, the absence of a detailed reply does not affect her ability to prepare her case and to pursue points in cross-examination. This tribunal therefore does not find that there was material non-compliance in this category.

51. The response to the two Notices for documentation relied upon in the PHR was contained in three brief emails namely one dated 24 July 2019 and two dated 18 September 2019. The emails state as follows:

(1) *"Good morning*

Please find our Discovery attached by way of Service.

Please acknowledge receipt.

Robert G Sinclair Solicitors

Patrick McNeill"

(2) "Dear Sirs

In respect of items 13 and 15 – Please be advised that no documents exist of that nature exist.

All other items bar 17 were transmitted in our Discovery of 24.07.19."

(3) "Dear Sirs

In respect of items 2, 3, 4 and 5 – Please be advised that no documents exist of that nature exist.

In respect of item 1 – this was provided in our Discovery of 24.07.19.

Please find enclosed our additional Discovery in respect to items 6, 7, 8 and 9.

Regards"

52. The tribunal finds that there has been material non-compliance in relation to documentation for the following principal reasons:

(i) Nowhere is a response provided by reference to the Notices and several categories are simply not addressed at all. Whilst Mr McNeill at the PHR stated that several of the categories did not exist at all or were contained within a Handbook which had been provided, it was very surprising indeed

that a solicitors' firm chose to respond to Notices for documentation in this way especially when the deficiencies had been pointed out repeatedly in detail and in writing by the solicitor for the claimant. It is not for the claimant to guess at which documents cover which specific categories of documentation in this case.

(ii) Statements referred to in Discovery which were stated to have been obtained from individual members of staff in the investigation process have not been provided. These are clearly relevant and necessary for the unfair dismissal claim. The document which was produced in relation to that category requires an explanation which, even during this PHR was not coherent or satisfactory. For example the document provided appears to be a letter of instruction to an unspecified person to draft a response to tribunal proceedings. The document is numbered pages three to six which implies that pages one and two are missing. The document lists in bullet point form, under individual names, the points made by those individuals and refers to statements they had provided but no underlying statements have been provided nor has an explanation been provided for their absence. In the PHR Mr McNeill stated that the document started at a previous page which was a letter from Mr Sinclair dated 11 April 2019 but Mr McNeill could not explain why (if this was one complete document) the letter was signed by Mr Sinclair but the end of the document was signed by Ms O'Neill. In these circumstances a specific written explanation or the relevant documents ought to have been provided. It was very surprising that this could not be explained at this PHR.

(iii) Documents have not been provided nor their existence confirmed or denied. Documents referred to in the Discovery provided have not been disclosed and no explanation has been given for their absence.

(iv) The most important and key documents (in relation to the discrimination, equal pay and unfair dismissal claims) in summary relate to:

- the choice of a named younger employee for the training contract;
- the promotion of a named male comparator to the post of Operation Manager in the mortgage Department;
- emails referred to in the respondents' defence set out in the first response form;
- statements taken in the investigation of allegations against the claimant;
- handwritten complaints (referred to in discovery) by staff against the claimant;
- documents relating to the written warning issued to the claimant on 22 October 2018;
- appeal documentation.

(v) This tribunal finds that there was a deliberate failure to provide some documentation as evidenced by the email to Mr McNeill from Ms O'Neill dated 7 August 2019 which states as follows:

> *"Please also review the discovery request and discovery documentation available on file to see if there is any additional documentation to be provided. We are not providing statements taken by Robert and David at the Appeal Hearing at this time and they will be required to be typed up for service at a later stage."*

No such statements or typed up documents were provided nor an explanation given for their absence.

(vi) An item of Discovery provided to the claimant was a handwritten record of a meeting dated 25 September 2018 which states as follows:

> *"The disciplinary has arisen due to a number of written complaints in relation to JB, submitted by various members of staff. In addition her conduct on the floor last Thursday 20th Sept will be addressed."*

No such written statements have been provided and no explanation given for their absence.

(vii) Parts of a six page document referred to statements none of which have been provided and no explanation has been provided for their absence.

53. This tribunal fully recognises that it is a grave step to strike out a response and thus deprive a respondent of the ability to defend the claimant's claims.

54. The Unless Orders were made on the basis of the Employment Judge's assessment on that day (15 August 2019) which was that the claimant could not progress with her claims in the absence of a response to the Notices for Additional Information and without the outstanding documentation. Indeed the respondents' representative agreed on that day that the information and documentation was relevant and necessary for the fair disposal of the case.

55. At the time the Unless Orders were made the following were clear:

(i) Mr McNeill raised no issue alleging confusion on the respondents' part in relation to the Notices for Additional Information which were the subject of the Unless Orders.

(ii) It was agreed that the Additional Information was relevant to the claims.

(iii) It was agreed that no response at all to the two Notices for Additional Information had been provided by the respondents.

(iv) The respondents gave no reason for the non-response to the Notices during the period June to 1 August 2019. The absence of Mr Anderson in France from 1 August 2019 was no explanation for the previous period.

(v) Mr McNeill raised no issue of confusion in relation to the Notices for documentation which were the subject of the Unless Orders.

(vi) It was agreed that the documents were relevant and that some documents were outstanding.

(vii) Mr McNeill raised no issue in relation to the deadlines imposed in the Unless Orders averring that Mr Anderson was actively working on the case whilst on holiday in France.

56. This tribunal has considered the balance of prejudice to the respondent in that the respondent will be unable to defend the cases as against the prejudice occasioned to the claimant if the relief sought is granted. This tribunal has also considered the interests of justice, whether a fair trial remains possible, and the overriding objective.

57. One of the factors which is relevant to the assessment of the balance of prejudice and fairness between the parties is the extent to which the respondents have complied with other Orders of the tribunal. As set out in detail above, the following Orders were made and in the main were either not complied with or were complied with outside the relevant time limit with no request for an extension nor an adequate explanation for delay:

(1) The Orders for Replies and documents dated 20 June 2019 which led to the Unless Orders;

(2) The Order to set out any amendments to the claimant's draft legal and factual issues document by 22 August 2019.

(3) The Order dated 25 November 2019 that the respondent provide written submissions by 9 December 2019 was not complied with leading to an extension of time being granted on 11 December 2019 to 3 January 2020. This was complied with by 6 January 2020 (ie late) without an extension or explanation.

(4) Orders made on 11 December 2019, that the respondents provide documents relating to this PHR to the claimant by 30 December 2019 and to the tribunal by 3 January 2020, were complied with by the respondents' representatives on 6, 7 and 8 January without explanation or application for an extension of time.

58. In addition the following promises were made by Mr Anderson at hearings and were not kept:

(i) On 20 June 2019 Mr Anderson stated that he had minor amendments to make to the claimant's legal and factual issues document and would provide them by 5.00 pm on 20 June 2019; and

(ii) On 11 September 2019 Mr Anderson stated that the inadequacies in relation to the Unless Orders would be addressed by 18 September 2019.

59. This tribunal finds that the behaviour of the respondents and their representatives displays a lamentable disregard for Orders of the tribunal and for listed dates. The effect on the claimant is that there has been undue delay and she has been unable to prepare her case either generally or, in particular, in light of aspects of the defence which has been raised. This has caused legal costs and inconvenience but also most importantly has jeopardised a fair trial within a reasonable period.

60. Indeed right up to the date of the PHR there was late compliance with Orders made in relation to the PHR with no explanation nor a request for extensions.

61. This tribunal finds that the overall picture which emerges from this course of conduct by the respondents and their representatives is that there has been repeated and persistent disregard for deadlines set in Orders of this tribunal. The tribunal finds that there was a deliberate decision not to provide at least one category of documentation required by an Order, as evidenced by the email of 7 August 2019 referred to at paragraph 52(v) above.

62. There has been a failure to engage with points properly raised in detail repeatedly by Ms Fitzgerald-Gunn solicitor for the claimant when she set out in writing the specific aspects of non-compliance.

63. Promises of compliance were made at hearings and not followed through without adequate explanation.

64. The tribunal finds that the conduct of this litigation by the respondents displays a disregard for the process, a disregard for the claimant's rights and a regrettable attitude to the respondents' professional colleagues and to this tribunal. This point is relevant generally and also insofar as the conduct to date does not inspire confidence in this tribunal that granting relief would result in a full and timely remediation of the defects identified.

65. There was material non-compliance with the Orders at the date of the deadlines set in the Unless Orders. There was material non-compliance as at the date of this PHR which ultimately took place some four months after the Unless Orders were made.

66. The information, documentation and a full response to the Notice for documentation all remain necessary for a fair trial to take place.

67. The Unless Orders provided the respondents with a last chance to comply with the Orders and its ongoing Discovery obligations. The tribunal finds that the respondents were under no illusions in relation to the nature of the Unless Orders. Nevertheless even at the date of this PHR further time was requested to comply with the Orders. That request for further time to comply wholly was at odds with Mr McNeill's submission which was that there had been material compliance in September 2019.

68. The reason given for non-compliance with relevant Orders was not of sufficient weight and also did not address the deficiencies throughout the period nor the deficiencies which were outstanding on the date of the PHR.

69. It weighs heavily with the tribunal that the respondents are legally qualified, that the first respondent is a firm of solicitors with a litigation Department, and that at all times the respondents have been represented by a legal representative. This tribunal notes that at different points Mr Anderson was described as the legal representative then Mr McNeill was described as the legal representative for particular hearings and that there was a description of Mr McNeill's role as a "*post box*" or "*conduit*" for Mr Anderson. Any blame for any confusion allegedly caused by such swapping of roles lies entirely with the respondents as they chose to conduct this litigation in this way even when there were evident communication deficiencies (for whatever reason) with Mr Anderson at times.

70. Whilst the submissions of the respondents placed responsibility for deficiencies upon Ms O'Neill the previous solicitor and on Mr Anderson, it is clear from the emails to which the tribunal was referred that there was ongoing email, text and telephone communication between the individuals in the solicitor's firm and Mr Anderson even when he was in France. The respondents chose to conduct the litigation in this way and any confusion that may have been caused by that choice does not provide a sufficient explanation for the failure to comply with the Orders.

71. As lawyers the respondents and their representatives understood, or ought to have understood, the importance of Orders and the deadlines set within them. Deadlines set in Orders of any Court or Tribunal are not aspirational or part of a wish list but rather they are obligations which are set by the tribunal in order to comply with the overriding objective and to ensure the efficient and fair administration of justice. For this reason they are extremely important and this should have been evident to legally qualified practitioners. It should also have been evident to legally qualified respondents and representatives that applications for extensions of time could, and should, have been made in a timely way if there were valid reasons to request them.

72. In reaching the decision in this case the tribunal took account of the claim forms and response forms in the first two claims together with the CMD records and the records of previous hearings. The tribunal also took account of the submissions of both sides and the documentation to which it was referred and in particular the email correspondence.

73. The tribunal notes with concern that, despite it being made clear to the respondents' representatives at previous hearings that this application should be underpinned by sworn testimony from someone, no witness was called to give evidence at the hearing. The fact that no witness gave sworn testimony meant that the claimant's barrister Ms Best was deprived of the opportunity to cross-examine. Nevertheless the representations made on behalf of the respondents and the documents presented, even taken at their height and at face value, provided insufficient explanation for any delays and deficiencies and insufficient explanation or excuse for the failure to comply with Orders in a timely way. In the event therefore the lack of sworn testimony did not have to be taken into account as a factor in the assessment of this application. Put simply, the documents presented by the respondents did not support the application but, rather, detracted from it.

74. The respondents' application for relief from sanction therefore is refused for the reasons set out above. The consequence of this decision to refuse the applications

is that the Unless Orders took effect at midnight on the deadline of 29 August 2019. The respondents' responses in the claims bearing reference 17012/18 and 6067/19 are therefore struck out.

Employment Judge:

Date and place of hearing: **7 and 8 January 2020, Belfast.**

Date decision entered in register and issued to parties: