Neutral Citation Number: [2025] EAT 7

Case Nos: EA-2022-000949-RS

EA-2022-001458-RS

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 January 2025

**Before**:

**HIS HONOUR JUDGE AUERBACH**

- - - - - - - - - - - - - - - - - - - - -

**Between:**

**MS N SIVANANDAN**

**Appellant**

**- and –**

**INDEPENDENT OFFICE FOR POLICE CONDUCT (1)**
**PENNA PLC (2)**

**Respondents**

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**David Stephenson** (instructed through Advocate) and the **Appellant** for the **Appellant**
No attendance or representation for the **First Respondent**
**Nicola Newbegin** (instructed by Adecco Group UK & Ireland) for the **Second Respondent**

Hearing date: 27 November 2024

- - - - - - - - - - - - - - - - - - - - -

# JUDGMENT

## SUMMARY

**PRACTICE AND PROCEDURE – Unless Order – Relief from Sanction**

An unless order made pursuant to rule 38 **Employment Tribunals Rules of Procedure 2013** may be made in respect of an application for costs, which, for these purposes, falls within the concept of "part of" a claim or a response to a claim. Accordingly, where an unless order has been made in respect of a direction relating to a costs application, and the party concerned complies only after the deadline set by the order, the party concerned may apply for relief from sanction under rule 38(2).

It is not necessarily an error for a tribunal to consider the question of whether there has been failure to comply with an unless order, and the question of whether relief from sanction should be granted, sequentially on the same occasion.

Rule 38(2) provides that, unless the application for relief includes a request for a hearing, the tribunal may determine it on the basis of written representations. That means that both parties should have a fair opportunity to make written representations, but what that requires in the given case depends on all the circumstances of the case.

The test on an application under rule 38(2) is, as set out in the rule, whether it is in the interests of justice to set aside the order. There is general guidance given in **Thind v Salvesen Logistics**, UKEAT/487/09 at [14]. There is no rule of law that there must be exceptional circumstances explaining the failure to comply, in order for relief to be granted.

The decision on a relief application involves the exercise of a judicial discretion which belongs to the employment tribunal. Absent a substantive error of law, the EAT cannot interfere with a decision on such an application unless the tribunal has not considered relevant considerations, taken into account irrelevant considerations or reached a perverse decision.

**HIS HONOUR JUDGE AUERBACH:**

## Introduction

1. In 2013 the claimant in the employment tribunal brought a claim against the body now known as the Independent Office for Police Conduct (IOPC) and Penna PLC (Penna). The claimant had applied for a post with IOPC, in respect of which Penna had conducted the recruitment exercise. She had not been shortlisted for the post. Her complaints in respect of that decision were of direct and indirect sex and race discrimination. She has throughout been a litigant in person.

2. Following a full merits hearing at London Central all complaints were dismissed. Penna then made a costs application. Subsequently directions were given in relation to it. Subsequently an order, which has been described as an unless order, was made, setting a deadline for Penna to table a costs schedule. Penna sent the schedule about 4 ¼ hours after the deadline had expired. The next day it made an application for relief from sanction. The tribunal subsequently granted that application on paper. The claimant applied for a reconsideration, which the tribunal subsequently refused. This is the claimant's appeal in respect of the relief-from-sanction and reconsideration decisions.

## The Procedural Background and the Tribunal's Decisions

3. I need to set out the litigation history in more detail. I take this from the tribunal's decisions, documents in my bundle and points not in dispute before me. I will not cover every communication or every point made in each communication. I will focus on what is relevant to this appeal.

4. At a Preliminary Hearing on 28 November 2013 the claimant was ordered to pay a deposit of £1000 in respect of the complaints of direct race and sex discrimination. The complaints of indirect discrimination were struck out. The claimant unsuccessfully appealed the deposit order, but successfully appealed the strike out of some complaints of indirect discrimination. The matter then came to a full merits hearing in 2016. In a reserved judgment sent to the parties in May 2017 all of the complaints were dismissed. I will call that the liability judgment.

5. On 1 June 2017 Penna made an application for costs against the claimant to which she responded. The tribunal stayed consideration of the costs application in view of an appeal by the claimant in respect of the liability judgment. That appeal was subsequently dismissed by the EAT. The claimant applied unsuccessfully to the Court of Appeal for permission to appeal. A renewed application was refused by the Court of Appeal by a decision of 27 September 2019.

6. On 20 August 2020 Penna's representative emailed the other parties that he had not received anything from the Court of Appeal. A copy of the 27 September 2019 decision was then provided to him by IOPC's representative. He then emailed the tribunal on 21 August seeking to progress Penna's costs application. He followed up with further emails on 12 January and then 3 September 2021.

7. At a hearing on 27 September 2021 EJ Khan directed a hearing on14 April 2022 to determine, in respect of Penna's costs application, whether the threshold for making a costs order was passed, and, if so, whether, in principle, a costs order should be made. Paragraph 1 of the directions provided that Penna "shall by 25 October 2021 provide the claimant with a summary schedule of costs." Paragraph 5 of the narrative explained what the summary schedule should contain. EJ Kahn also directed that at that hearing the tribunal would determine whether the deposit should be paid to the respondents or returned to the claimant. The minute of hearing was sent on 5 October 2021.

8. On 23 October 2021 Penna's representative emailed the claimant indicating that the costs schedule would not be ready in time and asking her to agree a revised deadline of 9 November 2021. On 28 October the claimant replied, declining to agree an extension of time, and giving her reasons.

9. On 8 November 2021 the claimant applied for the costs application to be struck out for non-compliance with the tribunal's directions. She also submitted that there had been unreasonable delay on the part of Penna in progressing the application and referred to the history of communications (or lack thereof) following the final decision of the Court of Appeal in relation to her liability appeal.

10. Penna's representative replied on 17 November resisting that application, and suggesting that,

if the tribunal was minded to make a further order, it should be an unless order giving it a further 14 days to provide the costs schedule "on the understanding that Penna's application will be dismissed without further order if Penna does not comply". He set out his case as to why Penna should not be criticised for dilatoriness; and he submitted that a strike-out on any basis would not be appropriate, as a fair hearing of the costs application on the listed date in April 2022 was still possible. He cited **Emuemukoro v Croma Vigilant (Scotland) Ltd** [2022] ICR 327.

11. On 6 December 2021 the tribunal wrote to the parties at the direction of EJ Khan. The material part of the letter began:

> **"The claimant's application dated 8 November 2021 is refused. As set out below, the respondent shall be given a further and final opportunity to comply with the tribunal's order for service of its schedule of costs. It is relevant that the costs hearing has been listed in April 2021 [sic] and there is sufficient time for the parties to complete their preparation in advance of this hearing."**

12. After referring to the correspondence in October and November, the letter continued:

> **"Given the respondent's failure to comply with the tribunal's order to serve schedule of costs on the claimant by 25 October 2021, without explanation, it failure to remediate this by the proposed date of 9 November 2021 or within 14 days of its letter dated 17 November 2021, the respondent is ordered to serve a schedule of costs within the next 14 days i.e. by no later than 5pm on 20 December 2021, in the terms set out in paragraph 5 of the case management summary and order dated 5 October 2021. Should the respondent fail to comply with this order without a reasonable explanation being given, not later than 20 December 2021, then its application for costs will be dismissed without further notice."**

13. That order has been referred to as an unless order, although, as we shall see, there is an issue as to whether it should be considered as falling within the scope of rule 38 **Employment Tribunals Rules of Procedure 2013**.

14. By an email timed as received by the tribunal on 20 December 2021 at 21.17, sent to the tribunal and copied to the claimant, Penna's representative sent its summary costs schedule.

15. On 21 December 2021 Penna's representative emailed the tribunal a letter, copying in the claimant. The letter apologised for having "narrowly missed" the deadline for tabling the costs schedule and sought what it described as relief from the sanction of the dismissal of its costs

application. It said that the following reasons together caused the deadline to be missed.

> **"Upon working on the schedule late last week, it became apparent that Penna's paper file lacked the costs breakdown for roughly three very busy months of work undertaken by its former solicitors in 2015 and 2016, which had to be backfilled in order to produce a Schedule covering the whole period in which costs are claimed;**
>
> **This required Penna to take a view as to whether it should produce a defective schedule in time or a better schedule even at the risk of over-running. It is hope that the Tribunal would share our view that this was the lesser of two evils, as it would interfere less with the good administration of justice in the long run;**
>
> **Further work undertaken to complete the Schedule on 20th December was lost due to *Word* crashing during 20th December, so this had to be re-done:**
>
> **At short notice the author was required to have his Covid 19 booster jab yesterday, and then had a mild adverse reaction afterwards."**

16. The letter went on to submit that there were no further consequences for the timetable through to the hearing in April 2022. It referred to a number of other factors, including the amount of costs sought, of around £150,000, roughly half of which related to a claim that had been the subject of the deposit order, that the costs schedule would now largely be put to one side until after the next hearing, that the 5pm deadline suggested that the claimant and tribunal would not have been expected to respond before the next business day, and that the claimant's opposition to the payment of (half of) her deposit to IOPC's solicitors meant that the reasonableness of her conduct, and whether her claim had any reasonable prospect of success, would remain in issue in any event.

17. For convenience I will use the terms "unless order" and "application for relief from sanction" to refer to the order of 6 December 2021 and the application of 21 December 2021, but without prejudice, as it were, to the issues about their status to which I will come.

18. On 31 March 2022 the claimant emailed the tribunal submitting that, as Penna had not complied with the unless order, its costs application "stands dismissed because there has been neither an application for a review nor an appeal to the EAT". She asked for the hearing listed for 14 April 2022 to be vacated. Penna's representative replied, drawing attention to its application for relief from sanction and noting that it was waiting to hear from the tribunal in response to it. He therefore opposed the costs application being treated as dismissed. But he did not oppose the forthcoming costs

hearing being vacated, as the outcome of the relief application was not yet known.

19. On 4 April 2022 the claimant wrote to the tribunal reiterating her stance that the non-compliance with the unless order meant that the costs application "stands dismissed", and submitting that a fair hearing on 14 April had been rendered impossible due to what she said were failures by Penna to comply with the orders dated 5 October 2021 in particular regarding the bundle. She also submitted that there had also been unreasonable conduct by both respondents, in respect of their applications for the deposit, such that these could not be fairly heard on 14 April 2022, and so those applications should be struck out. She suggested that her application could be dealt with on 14 April.

20. Penna's representative replied that the parties were in the tribunal's hands as to whether it adjudicated Penna's relief from sanctions application on paper or at the hearing on 14 April. If that application were granted, he agreed that the substantive costs application was not prepared, and so could not now be heard on that date; but he made submissions about the history of communications to the effect that this was the fault, not of Penna, but of the claimant.

21. On 7 April 2022 the tribunal wrote at the direction of the REJ informing the parties that the costs hearing on 14 April 2022 was being postponed owing to lack of judicial resource and asking them to confirm what issues needed to be determined and what the position was regarding compliance with previous directions. On 12 April a notice was sent relisting the costs hearing for 8 August 2022.

22. On 14 April the claimant wrote, inter alia, once again maintaining that the costs application stood dismissed because Penna had not complied with the unless order, objecting to its having been relisted, and indicating that only the respondents' applications for the deposit remained to be resolved. Penna's representative replied referring again to its application for relief from sanction, and maintaining that whether its costs application stood dismissed depended on the outcome of the relief application. Should the relief-from-sanction application be granted, he made proposals as to the way forward regarding the bundle for the costs hearing now relisted to take place in August.

23. Penna's representative emailed again on 22 June 2022 asking the tribunal urgently to respond to its application for relief from sanction, so that the parties could know whether to prepare for the costs hearing in August. He wrote that they needed to know urgently whether the relief application "has been accepted, rejected or set down for further argument at a hearing. If the tribunal takes this third option it may be appropriate to use the existing hearing in August for this purpose."

24. On 24 June 2022 the tribunal wrote to the parties at the direction of EJ Baty. The material part of the letter read as follows:

> **"I note that the parties do not appear to have received a determination of the second respondent's application of 21 December 2021 (which was copied to the claimant) for relief of sanction in relation to EJ Khan's unless order and I apologise for the long delay. EJ Khan is currently away and I am therefore determining that application.**
>
> **It is not in dispute that the second respondent supplied the costs schedule 4 hours later than the deadline in EJ Khan's unless order of 5 PM on 20 December 2021 and that his order clearly stated that "Should the respondent fail to comply with this order without a reasonable explanation being given, not later than 20 December 2021, then its application for costs will be dismissed without further notice." The "explanation" as to why the second respondent did not comply with the order on time came in its application for relief of sanction the next day, 21 December 2021 (i.e. it came later than 20 December 2021 ). The terms of the order were not therefore complied with, such that the conditions for automatic dismissal of the costs application were met. There does not appear to be any dispute about that even from the second respondent.**
>
> **I tum therefore to the application for relief of sanction, which was made in a timely manner on 21 December 2021. I have not seen any comments opposing that application from the claimant; she simply submits that the costs application claim remains automatically dismissed under the terms of EJ Khan's order.**
>
> **I allow that application for all of the reasons set out in it; I do not repeat them here but simply cross refer to the letter of 21 December 2021. However, there were very good reasons for the delay (as set out in that application) and the delay was minimal (the claimant still received the costs schedule on 20 December 2022, albeit 4 hours after the deadline. A four hour delay causes no prejudice to the claimant at all. However, the prejudice to the respondent, were relief of sanction not granted, would be enormous as it would lose its entire costs application. Quite clearly the balance of prejudice is very much in favour of granting relief of sanction and it is in the interests of justice to do so. Relief of sanction is therefore duly granted. The costs application may proceed.**
>
> **Notwithstanding the unfortunate delay in determining this application, it should have been obvious that in the circumstances the decision on it was likely to be that set out above and the parties should therefore have continued to prepare for the costs hearing, particularly when it was earlier this year specifically relisted for 8 August 2022. There is still plenty of time to prepare and the parties are expected to engage with each other to do so. That includes agreeing a sensible bundle for the hearing and trying to agree a list of issues for the hearing if possible. The parties will not need reminding of their duty under the Tribunal Rules to co-operate generally with each**

> **other and with the Tribunal and that a failure to do so may amount to unreasonable conduct of the proceedings."**

25. That was the relief-from-sanction decision.

26. On 30 June 2022 the claimant applied for a reconsideration of that decision. That application included an allegation of bias and a request that it be determined by a judge other than EJ Baty. By a decision sent to the parties on 8 July 2022 EJ Baty declined to recuse himself and refused the reconsideration application under rule 72(1) on the basis that there was no reasonable prospect of the original decision being varied or revoked. That was the reconsideration decision.

27. Both the reconsideration application and the reconsideration decision were long and detailed. As with other communications that I have summarised, I have considered them for their full contents. But, in summary, the main points of the application, and the decision in response, were as follows.

(1) The claimant complained that she had not had a fair opportunity to be heard, because, pursuant to rules 70 – 73 relating to reconsideration, were Penna's application not refused on paper, she should then have been allowed to respond to it, and the parties should have been given the opportunity to request a hearing, and, if it was thereafter decided that there would be no hearing, a reasonable opportunity to make further written representations. EJ Baty's answer was that Penna's relief application fell under rule 38(2), which permitted it to be considered on paper, unless Penna had requested a hearing, which it had not. Had the claimant requested a hearing, this would have been considered, but she had not done so at any stage.

(2) The claimant said it was clear from her correspondence that she opposed the application for relief. EJ Baty agreed, but noted that she had not given any reasons as to why, which she could easily have done. Given that Penna had not requested a hearing, and the delay that there had been, it was proper for him to have proceeded to determine the application when he did.

(3) Relying on rule 71 the claimant contended that the relief application was out of time, because it was made more than 14 days after the date of the unless order. EJ Baty replied that under

rule 38(2) the time limit was 14 days from the date of confirmation that the application stands dismissed. As no such confirmation had yet been issued, in fact time was still running.

(4) The claimant said that the decision had not cited or applied relevant authorities. EJ Baty replied that he had stated that it was in the interests of justice to grant relief, which was the test under rule 38(2). He referred to **Thind v Salvesen Logistics Limited**, UKEAT/087/09, and factors identified there as usually relevant, all of which were raised in Penna's application, to which his decision had cross-referred. He did not accept the claimant's contention that relief could only be granted in "exceptional" circumstances, but in any case there were such circumstances in this case. Penna had been late because of factors beyond its control.

(5) The claimant said that the tribunal had failed to take account of the history of Penna's persistent failure to comply with the original order, and the unless order had expressly given a "further and final opportunity". EJ Baty replied that he had taken the overall context in to account, but still considered it to be in the interests of justice to grant relief from sanction.

(6) The claimant referred to her 14 April 2022 letter. EJ Baty said he had taken it into account, but much of it referred to alleged breaches of order by Penna postdating the unless order, which were also disputed. The claimant referred to her letter of 8 November 2021. EJ Baty had not seen this when he made his first decision, but considered that the claimant had had ample opportunity to state her reasons for opposing the application or refer back to that letter.

(7) The claimant complained that account had not been taken of the prejudice to her, in particular in circumstances where she had had the costs application hanging over her for five years. EJ Baty replied that he did consider this background, but it remained the case that the prejudice to her of receiving the costs schedule four hours late was non-existent or at best negligible.

(8) The claimant alleged bias or apparent bias on the basis that EJ Baty's first decision accepted matters which had no basis or foundation, and all of the statements it made were in favour of Penna. EJ Baty went through the various statements in his earlier decision, setting out why he considered them to be factually correct and/or justified, and responded to other specific

submissions made by the claimant. He rejected the allegation of actual or apparent bias

28. EJ Baty concluded that there was no reasonable prospect of the original decision being varied or revoked, and so he refused the reconsideration application. He declined to recuse himself.

29. In July 2022 the claimant indicated that she was appealing in respect of relief from sanctions and Penna's representative indicated that he would not object to the costs hearing being put off. Later the claimant applied for the August date to be postponed because of personal circumstances, and Penna's representative confirmed that he did not object. The August hearing did not take place.

## The Appeal

30. The claimant's Notice of Appeal of 29 July 2022 challenges both the relief-from-sanction decision and the reconsideration decision. At a rule 3(10) hearing at which she had an ELAAS representative, HH Judge Shanks directed a full appeal hearing. After clarification was sought he confirmed that he had directed all grounds of appeal to proceed.

31. In initial correspondence with the EAT IOPC's solicitors had indicated that it considered that it should not be treated as a respondent to this appeal because it did not make a costs application and the appeal related only to the costs application of Penna. It was removed as a respondent by the sift judge. However at the rule 3(10) hearing HHJ Shanks was persuaded to reinstate it as a respondent on the basis that it was seeking for its share of the deposit to be forfeited, and the outcome of the appeal relating to costs *may* be relevant to that issue. IOPC's solicitors subsequently wrote indicating that they did not intend to take part in the appeal, it being a matter between the claimant and Penna.

32. There are five grounds of appeal. The claimant put in a written skeleton argument addressing them all. At the hearing of the appeal Mr Stephenson of counsel appeared and spoke to all of the grounds on her behalf except for ground 5(b). The claimant spoke to ground 5(b) and made some additional submissions, including in relation to the position regarding the deposit. Ms Newbegin of counsel put in a written skeleton argument, and appeared at the hearing of the appeal, for Penna.

## The Grounds of Appeal, Discussion, Conclusions

33. The most convenient place to start is with ground 1(c). This contends that the judge erred by considering the respondent's application of 21 December 2021 as an application for relief from sanction in respect of an unless order under rule 38(2). The premise is that an unless order under rule 38 cannot be made in relation to an application for costs. The ground contends that it should have been treated as a reconsideration application under rules 70 – 73.

34. Rule 38 provides:

> **"38.—(1) An order may specify that if it is not complied with by the date specified the claim or response, or part of it, shall be dismissed without further order. If a claim or response, or part of it, is dismissed on this basis the Tribunal shall give written notice to the parties confirming what has occurred.**
> **(2) A party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations.**
> **(3) Where a response is dismissed under this rule, the effect shall be as if no response had been presented, as set out in rule 21."**

35. For the claimant reliance was placed on rule 38(3) referring to the consequences of a response being dismissed under rule 38 by reference to rule 21. This is said to show that, in the context of rule 38, "claim" and "response" refer to the overall claim that is started under rules 8 to 14, and the overall response to it under rules 15 to 22, and so the rule does not embrace a later costs application.

36. In my view rule 38 *does* enable an unless order to be made in respect of a costs application. Rule 38(1) enables such an order to be made in respect of the claim or response "or part of it". Rule 1(3) divides decisions of a tribunal into case-management orders and judgments. The definition of a judgment, at rule 1(3)(b), includes a decision which finally determines "a claim, or part of claim, as regards liability, remedy or costs". This shows that the concept of "part of a claim" may include an application for costs. I do not think it can make any difference whether the application for costs is made in, or with, the original claim form, or later on in the proceedings.

37. The same approach must apply to the concept of part of a response. There is no reason why this should not, in the same way, embrace an application for costs made by a respondent, whether in its original response or later. The fact that rule 38(3) spells out what the particular implications are of a response being dismissed under rule 38(3) does not affect the fact that the rule overall is wider and also enables an unless order to be made, not just in respect of a response as a whole, but in respect of part of a response, including a respondent's application for costs.

38. There is no other good reason why an unless order should not be an option available to the tribunal in respect of a costs application. Under rule 3 a tribunal is required to seek to give effect to the overriding objective in interpreting any power given to it under the rules. Even if it is ambiguous, it would not be in accordance with the overriding objective to interpret rule 38 as not permitting an unless order to be made in respect of a costs application, whether made by a claimant or a respondent.

39. EJ Khan's order of 6 December 2021 was, therefore, an unless order properly made under rule 38 and was properly considered by EJ Baty as such. EJ Baty therefore properly considered Penna's application for relief from sanction as an application made under rule 38(2).

40. I was referred to the discussion in the authorities of whether, or if so when, an unless order is *also* amenable to a rule 71 application for reconsideration. But I do not need to go into that, because on this occasion the application, by seeking "relief from sanction" in relation to an unless order, plainly invoked rule 38(2); and it was in any event not an error not to consider it, or consider it additionally, under the rule 70 regime. Ground 1 (relying on the premise that rule 70, and not rule 38, applied) also asserts that the application for relief was out of time, because it was made more than 14 days after the date of the unless order. But as it was made under rule 38, that is not correct.

41. I turn next to ground 1(a). This contends that the tribunal erred by not recognising that the consequence of non-compliance with the order was that the costs application stood dismissed. It was argued that the tribunal should first have given the written notice contemplated by the second sentence

of rule 38(1), which would then have triggered Penna's right to make a rule 38(2) application. In this case, it was argued, the tribunal failed to give the rule 38(1) notice.

42. As to that, the starting point is that, as a number of authorities have explained, the overall rule 38 regime envisages that in a given case there may be three acts by the tribunal: the making of the unless order under the first sentence of rule 38(1), the issuing of a notice under the second sentence of rule 38(1), in a case where there has been non-compliance, and, if an application for relief is made under section 38(2), the determination of that application. In a case of non-compliance, dismissal automatically occurs without further order, and a rule 38(1) notice is merely a declaration "confirming what has occurred", not itself a dismissal. But, in some cases, whether the party concerned has in fact failed to comply with the unless order will itself be disputed, in which case the tribunal will have to adjudicate that dispute in order to decide whether such a notice should be issued.

43. It was argued for the claimant that it is not possible for a rule 38(2) application to be made *until* a rule 38(1) notice has been issued. Reliance was placed on the statement **in McCarron v Road Chef Motorways Ltd**, UKEAT/0268/18, at [48] that "[t]he overall regime of Rule 38 steers a party, rather, towards the option of seeking a reconsideration or review, only if or when it is declared that an Unless Order has bitten." However, that was the last sentence of a discussion of whether, or at what point, an unless order could be amenable to a reconsideration application under rule 72, additionally or alternatively to a rule 38(2) application. The case was not, as such, concerned with this issue. Further, in **Polyclear Limited v Wezowicz** [2022] ICR 125 at [60] the EAT contemplated that in some cases it might be possible, and indeed desirable, where there is both a dispute as to whether there has been non-compliance, and a clear indication that, if so, the party in default seeks relief from sanction, for both matters to be dealt with on the same occasion.

44. I do not agree that the respondent's application in this case could not be considered as a rule 38(2) application because it had been made prior to the rule 38(1) notice being issued. Doctrinally, it is the non-compliance with the unless order which, at that moment, gives rise, without further order,

to the dismissal; and that automatic dismissal is the thing that triggers the right to apply to have the unless order set aside, not the rule 38(1) notice. So, rule 38(2) does not create a 14-day window in which the relief application must be made, but imposes a deadline for doing so of 14 days after the rule 38(1) notice. The defaulting party does not have to wait for the notice before seeking relief.

45. In the present case, as EJ Baty correctly noted in the letter of 24 June 2022, it was *not* in dispute that Penna had not complied with the unless order. That was indeed clear from the fact that it had acknowledged that it had missed the deadline, and expressly applied for relief from sanction. EJ Baty also noted that the unless order had referred to failure to comply "without a reasonable explanation being given", but that the explanation had only come the next day; and he himself concluded in the first part of that letter, in terms, that the unless order had not been complied with, such that the conditions for automatic dismissal were met.

46. Although EJ Baty later opined in the reconsideration decision that no rule 38(1) notice had yet been given, I disagree. Although Penna had admitted non-compliance, EJ Baty rightly considered and determined the position, unambiguously, in the first part of the 24 June 2022 letter, concluding with the statement that the conditions for automatic dismissal of the costs application "were met". That satisfied the requirement in rule 38(1) for the tribunal to confirm what had occurred. The letter then went on to determine the rule 38(2) application.

47. For all these reasons, in this case the tribunal did not err, as such, in dealing with the rule 38(1) declaration and the determination of the rule 38(2) application sequentially, in the same letter. A different question, however, is whether the fact that the tribunal dealt with both matters on the same occasion had any bearing on whether the claimant had a fair opportunity to make representations, prior to the relief-from-sanction application being determined. I will return to that.

48. In argument the claimant and Mr Stephenson advanced the alternative contention that the 6 December 2021 order was a case-management order under rule 29, and so could only be revisited in

the event of a material change in circumstances. Ms Newbegin disagreed, but argued that, if so, there was a material change of circumstances, being the circumstances which caused the late compliance. But in any event I disagree with this strand of the claimant's argument, because I have concluded that this was a rule 38 order, and so in any event amenable to an application for relief under rule 38(2).

49. I turn next to ground 1(b). This asserts that, "[w]here an application is made and has not been determined, an appeal must be lodged." The ground refers to the fact that Penna did not pursue its application for over three months, and did not lodge an appeal. It cites a passage from **Green v Mears Limited** [2018] EWCA Civ 751; [2019] ICR 771 which identifies that the fact that a reconsideration application has been made does not affect the time limit for also appealing the same decision.

50. It is apparent from her skeleton for this appeal, that what the claimant seeks to rely upon is that Penna had not appealed *the unless order* within 42 days of its date (or at all). She herself indicated in her correspondence of 4 April 2022 that she had waited to see if it would appeal, before herself writing on 31 March 2022 to submit that the non-compliance meant that the costs application stands dismissed. But, in so far as it is her case, by this strand of this ground, that, because the tribunal had not determined the application for relief within three months of the date when it was made, and Penna had not, in the time allowed to do so, appealed the unless order, the tribunal *therefore* erred in not *for that reason* dismissing the application for relief from sanction, I disagree. Neither of these things precluded the application from being considered by the tribunal.

51. Ground 1 therefore fails.

52. I turn to ground 2. This contends that the claimant did not have a fair opportunity to be heard prior to the determination of the respondent's relief application, contrary to Article 6.

53. In argument reliance was placed on the rule 70 – 73 regime giving the right to seek a hearing, or a further opportunity to make written representations. But, as I have found, EJ Baty did not err in not treating this application as made under rule 71. Under the applicable rule, rule 38, *Penna* had the

right to request a hearing in its application, but EJ Baty correctly noted that it had not done so. He also correctly observed in the reconsideration decision that it had not requested one in its email of 22 June 2022, as opposed to addressing the possibility that the tribunal might decide to have one.

54. In some circumstances, for example because a party is unusually vulnerable on account of disability, it may be unfair to determine the matter on paper and without a hearing, but this entirely depends on the circumstances of the case: **Bi v E-Act** [2023] IRLR 498. In the present case, although reference was made in argument to the claimant having a disability, I do not think that this is a case where the application could not have been dealt with fairly on the basis of written submissions. This ground also contends, however, that, even if the application was correctly dealt with under rule 38, it would have been just, and ensured that the parties were on an equal footing, at least to allow the claimant 7 or 14 days to make written submissions before a decision was made.

55. As to that, rule 38(2) provides that, unless the application includes a request for a hearing the tribunal may determine it on the basis of "written representations" (in the plural). Of course a party may choose not to make any written representations, but what is required is a fair opportunity. What that requires in a given case is fact sensitive.

56. In this case, in the reconsideration decision EJ Baty noted, correctly as such, that the claimant had not actually, in any of the correspondence following the making of the relief application, made any substantive submissions in opposition to Penna's substantive grounds for seeking relief from sanction. He considered that she had had ample opportunity to do so in the course of the various communications over a period of six months, and that, given also the delay in the tribunal responding to the relief application, he had been right to proceed to determine it when he did.

57. It appears clear that, one way or another, the application for relief had for some time been overlooked by the tribunal. Penna's representative had politely suggested to the tribunal that it was unclear whether the REJ had been aware of it when she caused the 7 April 2022 letter to be written,

and, on 22 June, had requested an urgent adjudication given the impending August hearing. That having been brought to his attention, EJ Baty then, commendably, sought to deal with the matter as swiftly as possible himself (in the absence of EJ Khan).

58. Nevertheless, this was the first occasion on which the tribunal had responded in any way to the relief-from-sanction application. Further, while, for reasons I have explained, I consider that it was open to the tribunal to deal with the rule 38(1) notice and the application for relief on the same occasion, and to do so on paper, it was important to ensure that, if the matter was to be dealt with that way, the claimant had indeed had a fair opportunity to make written submissions. Further, her repeated stance in the emails had been that the costs application stood dismissed, given the default in compliance and the fact that Penna had neither appealed the unless order nor sought what she called a "review". That at least implicitly suggested that (rightly or wrongly) she was not anticipating that the tribunal might determine the relief application without further reference to the parties.

59. In these circumstances, it would have been better, notwithstanding the delay that had occurred, and the time pressure created by the impending hearing, at least to give the claimant a short further period to put in any written submission replying to the substance of the application, before the tribunal proceeded to adjudicate it. However, following the initial decision to grant relief, the claimant then made written representations by way of her application for reconsideration. This set out specific grounds, and detailed supporting arguments. Although in the conclusion of the application the claimant wrote that there were other reasons she could give, but she was unfortunately not well enough to type any more, she did not indicate that she intended to follow up, or ask for more time to do so. I conclude that, in any event, as of the date of the reconsideration decision, a week later, the claimant had had a fair opportunity to make written representations on the relief application.

60. Ground 2 therefore fails.

61. Ground 3 contends that the tribunal erred by failing to consider relevant matters, being, in

summary (a) the principle of finality and certainty in litigation; (b) the fact that the costs application stood dismissed; (c) the prejudice to the claimant; (d) the need to enforce compliance with rules and orders; (e) that the delay was not "minimal" and the circumstances were not "exceptional"; (f) that there was no "good reason" for the delay, and no evidence to support the explanation for the schedule being late; (g) various earlier correspondence to which the ground refers; and (h) that this was not an application to reinstate a claim or response, and so was not of the same level of importance; nor was it a matter of wider public importance.

62. As to (a) to (g) this ground effectively traverses the same territory as was traversed in the claimant's reconsideration application to the tribunal. In light of the tribunal's relief-from-sanctions decision (which referred to, and accepted, points raised in Penna's application) and the tribunal's reconsideration decision (which responded to all of the points raised in the claimant's reconsideration application) I am satisfied that, by the end of the process, all of the points raised at (a) – (g) *had* been considered and engaged with by the tribunal.

63. Ground 3(g) highlights various correspondence in which the claimant had raised the background history and what she said was Penna's dilatoriness, and non-compliance or late compliance with tribunal orders. This included her letter of 8 November 2021 in which she had referred to the history thus far, Penna's email of 17 November 2021, in which it had itself proposed an unless order with a 14-day deadline, and the further correspondence the following March and April. However, in the reconsideration decision the tribunal expressly addressed the correspondence highlighted by the claimant in her application, and her general submission about the background history of the matter. As to (h) the tribunal obviously appreciated that what was at stake was a costs application. It was not contended that the matter had any wider public importance. Penna's application for relief had noted the amount of costs being sought, and the claimant's reconsideration application had highlighted the length of time that the costs application had been "hanging over" her. In the reconsideration decision the judge specifically referred to her submissions in that respect.

64. Ms Newbegin submitted that, although the heading of this ground postulated that the tribunal's error was in failing to consider relevant matters, in reality it amounted to a pure perversity challenge, which was not sustainable, given the established high hurdle for such a challenge. I do consider that elements of this ground, and some of the arguments advanced, did shade in to a pure perversity challenge, in particular the contentions that the delay was *not* minimal, the circumstances were *not* exceptional and there were *not* good reasons for the delay.

65. It is well established that a decision on whether or not to grant relief under rule 38(2) involves the exercise of a judicial discretion, and the well-known high perversity threshold applies. See the discussion of the authorities in **Morgan Motor Co Ltd v Charles Morgan**, UKEAT/0128/15 at [15] and following. Further, EJ Baty was right not to accept that the rule, or the authorities, create a test of exceptionality, as such. As the EAT said in **Morgan** at [37]:

> "**Does there have to be some compelling explanation in order to obtain the relief from sanction? Does the Supreme Court's Judgment in Global Torch so prescribe? I do not read it as doing so in terms. It is one thing to say that the court will not have much sympathy who has failed to come up with a convincing explanation but yet another to say that this will inevitably mean that he or she will fail to be afforded relief from sanction. Can a court only be persuaded by "special factors"? I do not read Global Torch as inserting this as a requirement above and beyond the interests of justice. While enforcement of the sanction might be "almost inevitable" without some compelling explanation or special factor, that again is not the same as being inevitable."**

66. In this case it was not perverse for the tribunal to have regarded the delay, as such, as minimal and not having caused any real prejudice. Nor was it perverse to accept the explanation put forward for the delay, without requiring evidence to be produced to substantiate the assertion that compliance had been affected by Penna's representative having had a Covid booster that made him unwell, or in respect of other parts of his explanation. Nor was it perverse for the tribunal to conclude that this was not a case of deliberate default.

67. For all of these reasons, ground 3 fails.

68. Ground 4 asserts that the tribunal failed to apply the relevant case law; and refers to what it

calls the **Mitchell/Denton** line of cases, **Thevarajah v Riordan** [2015] UKSC 78 and **Morgan**.

69. As to that, what matters, ultimately, is whether the tribunal, in substance, erred in law in the approach that it took. The starting point is that the test is expressly set out in the rule. It is that an unless order may be set aside if it is in the interests of justice to do so. The tribunal expressly applied that test and properly took the approach that that requires consideration of the interests of justice to both sides. It also expressly, in the reconsideration decision, addressed all of the specific points made by the claimant in her reconsideration application about the interests of justice *to her*.

70. The tribunal also, in that decision, cited **Thind v Salvesen Logistics**, UKEAT/487/09. In that case, Underhill P (as he then was) said:

> **"13. The Claimant's original Notice of Appeal, and a subsequent amended version lodged once the Tribunal's Reasons had been received, relied to a considerable extent on the line of authorities which begins with the decision of this Tribunal in Maresca v Motor Insurance Repair Research Centre [2005] ICR 197: these hold that a tribunal considering an application for relief following the activation of an unless order must have regard to the provisions of rule 3.9 of the Civil Procedure Rules. Those grounds have now been undercut by the recent decision of the Court of Appeal in Governing Body of St Albans Girls' School v Neary [2009] EWCA Civ 1190, which has over-ruled Maresca and the cases which followed it and has made it clear that there is no obligation in law on an employment tribunal to proceed by reference to CPR 3.9.**
>
> **14. The clarification brought about by Neary is welcome. The law in this area had become undesirably technical and involved. It had also, I might note in passing, caused considerable concern in Scotland, where the CPR has of course no application. The law as it now stands is much more straightforward. 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."**

71. While it related to an earlier iteration of the rules of procedure, the guidance in **Thind** applies

equally to rule 38(2) of the 2013 rules. See e.g. **Polyclear** at [42]. The present tribunal, in its reconsideration decision, expressly considered the factors highlighted at paragraph 14 of **Thind**.

72. The claimant's skeleton referred to a reference in **Green v Mears** at [44] to **Harris v Academies Enterprise Trust** [2015] ICR 617 in which Langstaff P had rejected a submission that the **Mitchell/Denton** guidance applied to employment tribunals, although, as Underhill LJ put it, he acknowledged that the broad principles underlying that guidance and the CPR generally were also applicable in the tribunal. But, as the foregoing passage in **Thind** explains, a tribunal considering a rule 38(2) application is not obliged to proceed by reference to CPR 3.9.

73. It is certainly important, when considering the seriousness of a failure to comply with an unless order, that the tribunal give due consideration to the relevant context and history, and in particular, in a case where the order has been made because of non-compliance with a previous order or orders, that fact, and the fact that an unless order, in its nature, puts the party concerned squarely on notice of the consequences of non-compliance. But, as I have said, the present tribunal in the reconsideration decision confirmed that it had taken the history into account.

74. The claimant's skeleton cites a reference in **Morgan** to the principles of finality and certainty in litigation and the importance of respect for judicial orders. But, again, her specific points in this regard were expressly responded to in the reconsideration decision. The claimant's skeleton also refers to the discussion in **Morgan** at [43] of whether the tribunal may consider whether a fair trial is possible at a later date than the date of default. Her skeleton also cites **Emuemukoro**. It was contended for her that Penna's conduct had meant that the costs hearing could not have gone ahead in April 2022 as originally listed. Reliance was placed on the fact that, prior to the REJ having postponed it because no tribunal was available, Penna's representative had acknowledged that it would need to be postponed because it was not sufficiently prepared.

75. However, apart from the fact that (as EJ Baty noted) there was a dispute as to whose fault that

was, that argument was not to do with Penna's late compliance with the unless order. The tribunal did not err by failing to conclude that that default had not jeopardized the hearing date. Further, the decision in **Morgan** does not rule out a tribunal considering a later date; and the present tribunal also did not err by taking the view, when it granted the relief application, that the costs hearing could, and indeed should, still proceed on the date in August 2022 for which it was then listed.

76. From the claimant's skeleton, it appears that **Thevarajah** (a case concerning relief from sanctions under the CPR, in respect of which the decision at the Court of Appeal stage was considered by the EAT in **Serco Ltd v Wells** [2016] ICR 768) is relied upon in support of the proposition that this unless order should have been regarded as a case-management order, which should not have been revisited absent a material change of circumstances. But, as I have said, this argument falls away, because this was properly considered as an application for relief under rule 38(2).

77. Ground 5(a) asserts that the tribunal made the same errors in the reconsideration decision as are identified in grounds 1 to 4. For reasons I have already stated I do not agree.

78. Ground 5(b) contends that the reconsideration decision harshly criticised the claimant, and was not even-handed. In her oral submissions, the claimant made clear that this was an allegation of apparent, not actual, bias, although she said she included in that unconscious bias. She added that she was not relying on any protected characteristic. The claimant referred in particular to the multiple references in the reconsideration decision to her having had six months to set out her objections to the respondent's relief application, which she contrasted with the lack of criticism in it of the respondent's representative for his conduct leading to the April hearing being vacated, not following up his application promptly and not appealing to the EAT.

79. The claimant also specifically referred to EJ Baty at one point in the reconsideration decision stating that she was a "highly intelligent person", which she said was simply irrelevant, as she is a litigant in person, who suffers the same stress and problems as any other unrepresented person. She

cited passages in the general guidance given by the EAT in **Tchoula v Netto Foodstores Ltd**, UKEAT/1378/96, a case involving a discrimination claim by a black litigant in person, including that a tribunal should "refrain from making any comment which, however well intentioned, might be taken by a litigant, who may well be suspicious about getting justice, as confirmation of his worst fears"; and it should "avoid personal remarks or comments about a person's personality" whatever the nature of the complaint before it. She also referred to the Equal Treatment Bench Book.

80. My conclusions on this aspect of the appeal are these.

81. First, EJ Baty was, in his reconsideration decision, responding to a very detailed reconsideration application, and did so fully. It is in the nature of things that, in doing so, he was focussing upon the arguments put forward by the claimant. It is correct that the reconsideration decision referred at a number of points to her having had the opportunity to put forward her arguments in the course of the correspondence over the previous months. But that is, on the face of it, because the judge regarded it, on each occasion, as among the relevant considerations. The fact that there is a separate issue (which I have addressed) as to whether he was right to consider that, at the point when he took his original decision, she had had a sufficient opportunity to make representations, does not mean that his taking that view bespeaks apparent bias. Further, the judge did not simply rely on this point, but engaged in the reconsideration decision with all of the claimant's points on their merits.

82. I turn to the judge's statement that the claimant is a "highly intelligent individual". Not all litigants in person have the same skills, abilities or experience to equip them to conduct tribunal litigation without a representative. The judge was responding to the claimant's contentions that she had not had a fair hearing, and her reliance on being a litigant in person, as part of her application, and his response referred to its contents. He said that it was "quite evident from both the content and structure of her reconsideration application that she is not only a highly intelligent individual but someone who is or has made herself very familiar with at least certain aspect of employment law and the Rules." I appreciate that the claimant was offended by that observation, and what she perceived

to be the tone; but, given the content and overall context, I do not think that the fair-minded and informed observer would conclude that there was a real possibility that the judge was biased.

83. For all these reasons ground 5 fails.

## The Deposit

84. Rule 39(5) provides that where a deposit has been ordered, and the issue in question is later decided against the paying party for substantially the reasons given in the deposit order, there are two distinct consequences, at (a) and (b). The first deals with the implications under the costs rules, and the second with payment of the deposit to the other party. Where there is a successful costs application, the deposit is still paid out under rule 39(5)(b), but that payment is then also credited towards settlement of the costs order, in accordance with rule 39(6).

85. As I have noted, in this case a deposit order had been made, in respect of certain of the complaints, in the total sum of £1000. Whether this should be returned to the claimant, or paid to the respondents, as to £500 each, had been listed for consideration at the costs hearing. The claimant contended that Penna's costs application embraced an application in respect of its putative share of the deposit, and that if I allowed her appeal, and directed that the costs application stood dismissed, its putative share should be returned to her. She also contended that both respondents had acted unreasonably by not ensuring that the necessary preparations were made to enable the fate of the deposit to be decided at the April 2022 hearing; and she referred to the strike-out application she had made in that regard in the run-up to that hearing, which she said was outstanding. In relation to IOPC, it was also her case that it had applied for its putative share of the deposit out of time. In the course of argument, she acknowledged, however, that I might not be seized of the matter in relation to IOPC.

86. I note that there are issues between the parties about whether rule 38 actually requires a party to apply for a deposit, or share of one, to be paid to them, whether there is a time limit for doing so, and about the claimant's contentions that both respondents were at fault in respect of their approach

to preparations for the April 2022 hearing, as well as, of course, the substantive issues. Ms Newbegin also disputed the claimant's case that Penna's costs application effectively embraced an application for its putative share of the deposit.

87. However, as the appeal has failed, as the tribunal has made no specific order in respect of the deposit or any part of it, and as there is, perforce, no appeal before me against such an order, I conclude that there is nothing I can or should decide in this regard. These will all be matters for the tribunal, and any further applications or submissions should be directed to it hereafter.

## Outcome

88. For all of the reasons I have given, this appeal is dismissed.

89. The matter returns to the tribunal on the basis that Penna's costs application remains live, and the fate of the deposit remains to be determined. It is an unfortunate fact that we are now more than seven years on from the liability decision. It is to be hoped that matters can be resolved with as little further delay as possible.