Appeal No. UKEAT/0289/19/RN

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 27 April 2020
Judgment handed down on 12 June 2020

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

DR G IJOMAH — APPELLANT

NOTTINGHAMSHIRE HEALTHCARE NHS FOUNDATION TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Mr J Jenkins (of Counsel) Instructed by: Lincs Law Solicitors Greetwell Place Lime Kiln Way Lincoln LN2 4US
For the Respondent	Ms H Barney (of Counsel) Instructed by: Mills & Reeve LLP 78-84 Colmore Row Birmingham B3 2AB

SUMMARY

PRACTICE AND PROCEDURE – UNLESS ORDERS

In a case involving multiple claims of protected disclosure detriment, and a claim of unfair dismissal by reason of protected disclosures, the Employment Tribunal erred in its approach to whether there had been material non-compliance with an Unless Order that was attached to an earlier Order requiring further particulars of the claims. The EAT made observations on the particular perils and pitfalls of making, and construing, an Unless Order that is parasitic on an earlier Order, and that relates to the provision of particulars.

There were also breach of contract claims. The Tribunal correctly concluded that there had been material non-compliance in relation to all of those claims, and that they all stood struck out.

HIS HONOUR JUDGE AUERBACH

Introduction – Litigation Chronology – The Employment Tribunal's Decision

1. I shall refer to the parties as they are in the Employment Tribunal, as Claimant and Respondent. This is the Claimant's appeal.

2. The Claimant was employed as a Consultant Forensic Psychiatrist at Rampton Hospital from 2005 to 2017. He presented a claim form in which he claimed that he had been subjected to detriments on grounds of having made protected disclosures, unfairly dismissed by reason of having made protected disclosures and ordinarily unfairly dismissed. There were also claims for damages for breach of contract. The claim form included particulars of claim giving a wide-ranging narrative of events. The claims were defended. The response form included grounds of resistance giving a counter-narrative of events. However, it also asserted that the protected disclosure and breach of contract claims were inadequately particularised.

3. At a Preliminary Hearing ("PH") on 26 October 2017 the Claimant was ordered to provide a Scott Schedule. On 26 January 2018 he provided a 142-page Scott Schedule. The Respondent considered that it did not provide sufficiently clear or detailed information.

4. There was then a further PH before EJ Evans on 18 and 19 June 2018. The Judge spent the first day reading and the Hearing itself lasted the whole of the second day. The Claimant was in person. The Respondent was represented by Ms Barney of counsel. A minute was subsequently produced. It began with a Case Management Summary ("CMS"). After setting out the history of the litigation thus far, paragraphs 5 – 26 then described, in considerable detail, what happened at the PH itself. They described, in particular, how the Judge spent time

explaining to the Claimant, with examples, and in some detail, what was wrong with the Scott Schedule, and what he needed to do to put it right, as well as addressing some other matters.

5. Under the heading: "Orders" the numbering began again. Paragraphs 1.1 and 1.2 provided as follows:

> **"1.1 The Claimant will complete Appendix One to these orders by no later than 17 July 2018 to provide further information in relation to his claim. The completed Appendix One must be sent to the Respondent and to the Tribunal.**
>
> **(Before completing Appendix One the Claimant will find it helpful to re-read paragraph 1 to 26 of the Case Management Summary to refresh his memory in relation to the discussions at the hearing on 19 June 2018.)**
>
> **1.2 So far as his claim for breach of contract is concerned, the Claimant should provide information relating only to any claim relating to salary, annual leave, study leave, sick pay, and payment for injury related absence. If he wishes to bring a breach of contract claim in relation to any other matter he must make an application to amend his Claim. That application must be made two weeks before the hearing on 24 August 2018 and set out the precise particulars of the proposed new breach of contract claim. The application must be sent to the Tribunal and copied to the Respondent."**

6. Paragraph 1.3 required the Respondent then to provide its response by completing its sections of Appendix One, and sending it to the Claimant and the Tribunal by a set date.

7. The Appendix One template, which was attached, set out the questions to be addressed by the Claimant in respect of each claimed protected disclosure, detriment, and breach of contract, as well as the format for the Respondent to respond to each of these. The disclosures were to be listed chronologically and "information to be provided in relation to each disclosure". The questions to be addressed by the Claimant in respect of each disclosure were:

> **"1. To whom and when: [e.g. Dr Smith on 4 January 2017]**
> **2. What information disclosed: [e.g. describe information disclosed; or, if information contained in a letter or email, give a brief description of the information and provide a copy of the letter or email]**
> **3. How disclosure made: [e.g. in a meeting; or on the telephone; or by email; or by letter]**
> **4. Which part of section 43B(1)(a) to (h) relied on:**
> **5. If section 43B(1)(b) identify the legal obligation:**
> **6. If disclosure made after 25 June 2013, set out the basis on which it is alleged that the disclosure was made in the public interest."**

8. Detriments were also to be listed chronologically, with the following questions to be addressed by the Claimant in relation to each of them:

> **"1. What was said or done:**
> **2. By whom:**
> **3. Date:**
> **4. Relevant protected disclosure(s) (by number): [*include number of relevant protected disclosure(s)*]**
> **5. Why it said detriment made on the ground that claimant made that relevant protected disclosure(s): [*include brief explanation*]"**

9. Under the sub-heading "Breach of Contract" the template stated: "Particulars to be provided in relation to each alleged breach of contract relating to annual leave, study leave and salary." The questions to be addressed by the Claimant in relation to each breach were:

> **"1. Which term of the contract of employment the Respondent breached:**
> **2. Details of the alleged breach:**
> **3. Date of the breach:**
> **4. If breach resulted in failure to pay amount due to Claimant, the amount due."**

10. The matter was listed for a further PH on 24 August 2018. In the run up to it, the Respondent applied for an Unless Order, on the basis that the Claimant had failed to provide a completed Appendix One in accordance with EJ Evans' Order. At that PH again the Claimant was in person and the Respondent was represented by Ms Barney. EJ Clark made an Unless Order in the following terms:

> **"UNLESS the claimant does comply with paragraphs 1.1 and 1.2 of the order of EJ Evans dated 22 June 2018 by no later than 4pm on 7 September 2018, the claims under section 47B and s. 103A of the Employment Rights Act 1996 and the claims of breach of contract (or such of them as any non-compliance relates) will stand struck out without need for further order."**

11. Time for the Respondent to table its response was extended to 5 October 2018.

12. The Claimant sent a completed Appendix One to the Tribunal and the Respondent on 7 September 2018. Under the heading "Public Interest Disclosures" it reproduced the six questions and added the Claimant's answers to each, separately and in succession, for a total of twenty-one claimed protected disclosures. Thirteen of these were said to have been in writing.

For all of those, save one, the document said to contain the disclosure (or, in one case, the first page) was attached. In relation to disclosure 17 reference was made to a letter, but it was not attached. In relation to one of the verbal disclosures, the first page of a note of the meeting at which it was said to have been made was attached. In relation to "Detriments" the document provided answers to the six points, separately and in succession, for a total of fifteen detriments. In relation to "Breach of Contract" it provided answers to the four questions, separately and in turn under each of the following headings: "Wages", "Sick Pay" and "Study Leave".

13. The Respondent tabled a response on 5 October 2018, interposing its item by item responses in the format required by Appendix One. It also submitted that the contents of the Claimant's document materially failed to comply with the Unless Order, and invited the Tribunal to confirm that all of the claims to which it related stood struck out.

14. The matter was considered at a further PH before EJ Moore on 4 December 2018. On this occasion Dr Ahmed of counsel appeared for the Claimant, and Ms Barney once again for the Respondent. EJ Moore gave an oral decision. Her Judgment was to the effect that the Unless Order had not been complied with, and all of the claims to which it related were dismissed. The written Judgment and Reasons were promulgated on 22 January 2019.

15. In her written Reasons, under the heading "Findings of Fact", the Judge said this:

> **"4. On 7 September 2018 at 15:39 pm, in purported compliance with the Unless Order, Messrs Ringrose Law Solicitors on behalf of the Claimant filed further particulars of the protected disclosures, detriments and the breach of contract relied upon by the Claimant. In that document the Claimant set out 21 separate protected disclosures. The Claimant had been ordered to provide (in respect of each protected disclosure) exactly what information was disclosed, to whom and when. Instead the Case No: 2601147/2017 Page 2 of 3 particulars set out a number of generic labels which the Respondent submitted failed to comply with the Order. The Claimant set out the following in respect of the protected disclosures upon which he relied: a. "Concerns regarding staff and patient safety. In particular that a risk assessment and plans should have been put in place to protect staff health and safety at work concerning boundaries." b. "Concerns regarding staff and patient safety in particular that a risk assessment and plans should have been put in place**

> **to protect staff and patient health and safety at work concerning boundaries." c. "Concerns regarding staff and patient safety in particular that a risk assessment should have been put in place to protect the Claimant's health and safety at work."**
>
> **5. This was the extent of the information that was provided in the document. Employment Judge Evans' Order had specifically directed the Claimant at paragraphs 10(a) and 12(a) to ensure that the information he was asked to provide clearly set out the information that had been disclosed to the individuals and it further needed to be broken down to different disclosures; if they were verbal or written and with clear descriptions of what information was provided to each individual on each occasion.**
>
> **6. Turning now to the detriments set out in the Claimant's document filed on 7 September 2018. Some of the detriments that the Claimant provided did materially comply with the Order but this did not cure the failure to comply with the Order as they did not have a supporting disclosure that complied with the Order to rely on. For example, Detriment 3 referred simply to derogatory and demeaning email correspondence. Employment Judge Evans' Order at paragraph 15 and paragraph 14 specifically counselled the Claimant against making generic comments of this nature and gave an example of one that had been previously relayed in the Scott Schedule of "bullying", specifying that the Claimant would need to be specific in setting out what the derogatory comments were, by whom they were made by and when.**
>
> **7. In respect of the breach of contract particulars that were provided, the Claimant accepted that he had omitted to include particulars of the annual leave. Therefore, there had been a material failure to comply with the Order in respect of that particular head of the breach of contract claim. In relation to the other breach of contract claims, I also find that there was a material breach of the Order in so far as insufficient particulars were provided by the Claimant in respect what particular aspects of the Claimant's contract, the Claimant says were breached and in what regard."**

16. After referring to the authorities that were cited to her, and the submissions, under the heading "Conclusions" the Judge said the following:

> **"9. The only relevant matter in question for this hearing is whether or not there had been a material breach by the Claimant to comply with the Unless Order. I have concluded that there was such a material breach in respect of compliance with the Order to provide details of the protected disclosures. I accept that there was no deliberate whole scale failure by the Claimant to comply with the Order and that he had made attempts to comply, instructing professional representatives. However, it was made crystal clear to the Claimant the level of detail necessary for compliance. Some considerable time and effort was made by Employment Judge Evans at both the hearing and the subsequent Order to set out and explain to the Claimant what was required of him. This was not a difficult task or one that was not in accordance with the overriding objective. The Claimant simply had to describe what protected disclosure he made to whom and to when. The three generic labels he used were not sufficient to enable the Respondent or the Tribunal to understand what information the Claimant says he conveyed to whom and when and to consider whether these amounted to protected disclosures."**

17. Pending receipt of the written Reasons, the Claimant applied for relief from sanctions pursuant to Rule 38(2) **Employment Tribunals Rules of Procedure 2013**. He also made an application for reconsideration of EJ Moore's decision under Rule 70. In particular, the latter application complained that EJ Moore had wrongly declared *all* of the complaints struck out,

rather than focussing on the particular respects in which the Respondent had alleged non-compliance; and that the Tribunal had not given sufficient Reasons for its Decision.

18. A Notice of Appeal was also presented on 4 March 2019.

19. On 16 March 2019 a further decision of EJ Moore was promulgated refusing the reconsideration application, but supplementing the original written Reasons as follows.

> **"Further reasons are provided at new sub paragraphs 5 onwards as follows:**
>
> **a) For the avoidance of doubt, these three generic labels purporting to describe the protected disclosures did not in my Judgment sufficiently particularise the information that had been disclosed to individuals or give a clear description of what information was provided on each occasion. There were 21 separate disclosures relied upon all of which quoted the three generic labels set out above to describe the information that was said to have been disclosed. It cannot be said that the same three generic set of words were said or written by the Claimant on each of the 21 occasions. Where verbal disclosures were relied upon the exact words or even the gist of the words used were not set out in the Scott Schedule. This amounted to a material breach of the order.**
>
> **b) Where a written disclosure was relied upon the Claimant had attached a letter but not set out the section of the letter upon which he relied. For example Disclosure 1 relied upon a letter to Mike Harris dated 2 September 2011. The information said to have been disclosed was not described. The letter contained seven paragraphs and the Claimant had not confirmed which of the paragraphs was said to have contained the information that amounted to the qualifying disclosure.**
>
> **c) EJ Evans had explained this to the Claimant in his Order dated 22 June 2018. At paragraph 12 (a): "When he completed Appendix One he needed to describe the information Case No: 2601147/2017 11.11 Judgment on reconsideration – no hearing – rules 70 and 73 disclosed in sufficient detail for the Respondent to be able to respond. If the information had been disclosed in a letter, he should describe the content of the letter very briefly and provide a copy of the letter".**
>
> **d) The Claimant had provided copies of some but not all of the written document relied upon. This alone may not have amounted to a material breach of the order. However what did in my view amount to such a breach was where a written disclosure was relied upon the Claimant had not set out what section of the letter he relied upon as disclosing information. Some letters were three or four pages long. Some other written documents were relied upon such as reports which were longer. It was a material breach of the order to have simply provided copy of lengthy documents and not set out which sections of the document were relied upon as information amounting to a qualifying disclosure.**
>
> **e) It is not for the Respondent to have to try and guess what part of the written document is relied upon as a protected disclosure."**

20. The application for relief from sanctions was considered at a further PH on 24 April 2018 before EJ Clark. By a decision sent out on 4 June 2019 EJ Clark refused that application.

21. On consideration of the Notice of Appeal in November 2019 Choudhury P directed that it should proceed to a full Hearing. At that Hearing, which came before me, Mr Jenkins of counsel appeared for the Claimant, and Ms Barney of counsel again for the Respondent.

The Law

22. Rule 38 (1) and (2) of the **Employment Tribunals Rules of Procedure 2013** provides:

> **"(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."**

23. A number of points are well-established by authority, were not in dispute before me, and therefore may be shortly stated.

24. First, there are, potentially, three distinct decision points for the Tribunal: the decision to make the Unless Order; the decision, in the event of a dispute as to whether the Unless Order has been complied with, on that question; and, if there has been a failure to comply, so that the Unless Order has bitten, and if there is then an application for relief under Rule 38(2), the decision on that application. When considering an appeal which is specifically, and solely, against a ruling on whether an Unless Order has been complied with, the EAT is concerned solely with whether that particular decision has been taken in error of law.

25. Secondly, the test to be applied by the Tribunal, when taking a decision at that second stage, is whether there has been material non-compliance: **Marcan Shipping (London) Ltd v Kefalas** [2007] 3 All ER 365. Where the Unless Order, as here, related to particularisation of a

party's case, the following further guidance was given by Langstaff P in **Johnson v Oldham Metropolitan Borough Council** UKEAT/0095/13/JOJ at [7]:

> **"The phrase used by Pill LJ in Marcan was, "..any material respect": I would emphasise the word "material". It follows that compliance with an order need not be precise and exact. It is agreed by counsel before me that Employment Judge Feeney in adopting a test of substantial compliance therefore adopted one in accordance with the law. I would make this comment however: "material" may be a better word than "substantial" in a case in which what is in issue is better particularisation of a claim or response. That is because it draws attention to the purpose for which compliance with the order is sought; that it is within a context. What is relevant, i.e. material, in such a case is whether the particulars given, if any are, enable the other party to know the case it has to meet or, it may be, enable the Employment Tribunal to understand what is being asserted. To use the word 'substantial' runs the risk that it may indicate that a quantitative approach should be taken: thus, where 11 matters must be clear to enable a party to deal fairly with a claim, of which 9 have been provided but not 2, which remain necessary, compliance has not *materially* been provided because the purpose of seeking compliance has not been achieved in the context; the other party still cannot obtain a fair trial. To adopt a quantitative approach may erroneously lead the Judge in such a case to conclude that there had been sufficient compliance (9 out of 11) even if the further particulars remained necessary before a fair trial could take place. Substantial compliance has thus in my view to be understood as equivalent to material compliance not in a quantitative but in a qualitative sense."**

26. Thirdly, because of the draconian nature of an Unless Order, particular care is required both when making and framing such an Order, and when considering whether there has been material non-compliance with it. The authorities particularly highlight the dangers in cases where there are multiple claims, as, were the Tribunal to find itself striking out a claim that it was "perfectly possible to litigate" and in respect of which "no further particulars were required", on account of failure to comply with an Order in respect of *another* claim, that would "amount to taking a penal rather than a facilitative approach." (See **Johnson** at [4] and [5]).

27. Finally, when considering whether there has been material non-compliance, the following observations in **Wentworth-Wood v Maritime Transport Limited**, UKEAT/0316/15, 3 October 2016 at [44] should be kept in mind:

> **"The starting point, in construing an Unless Order, as any other Order, is the ordinary meaning of the words used. The legal and procedural context will always be relevant: for example the context may show that the ordinary meaning cannot have been the meaning in the Order. In any event the party who has to comply with an Order must be able to see from its terms what is required to comply with it; an Order cannot be read expansively against the party who has to comply."**

28. In the present case the appeal is, solely, against the Decision of EJ Moore arising from the Hearing on 4 December 2018, that there had been material non-compliance with the Unless Order, and that the protected disclosure detriment and unfair dismissal claims, and the breach of contract claims, stood struck out. There is no appeal against the Unless Order itself, nor against the later Decision of EJ Clark to refuse relief from sanctions under Rule 38(2), nor against EJ Moore's refusal of a reconsideration. It was, however, rightly, common ground before me that, in considering whether EJ Moore erred in her Decision under appeal, account should be taken of the additional Reasons that she gave in her reconsideration Decision of 14 March 2019.

The Grounds of Appeal

29. In summary Ground 1, as set out in the Notice of Appeal, challenges the Judge's conclusion that there had been material non-compliance with the Unless Order in respect of the particulars of the protected disclosures. It contends that she erred when she held, at [4], that the phrases that she quoted from the completed Appendix One provided by the Claimant were "the extent of the information provided." It asserts that, when one looks at the contents of the completed Appendix One and its attachments as a whole, this is plainly just wrong.

30. Ground 2 challenges the conclusion that there had been material non-compliance in respect of the claimed detriments. It contends that the Judge erred at [6]. She was wrong to say that the Claimant "had not provided supporting disclosure". She also herself found that, in respect of *some* of the detriments, the Claimant did materially comply with the Unless Order. It was therefore wrong of her to conclude that he had not complied with all of the Order.

31. Ground 3 challenges the conclusion that what it describes as "one inadvertent omission" in relation to the contract claim for annual leave led to the dismissal not only of that claim, but

of all the contract claims. It contends that the Claimant had given the requisite details in relation to the other contract claims.

32. More generally, the Grounds of Appeal sought to place reliance on the fact that the Appendix One document followed upon the provision of the earlier Scott Schedule; and on the Judge's finding, at [9], that there was no deliberate wholesale failure by the Claimant to comply. They contended that, given the draconian effect of a strike out, the Judge should have exercised her discretion to take the more reasonable and proportionate approach, of allowing the Claimant a further opportunity to correct any failings, by providing further information.

The Arguments

33. I had the benefit of written skeletons and oral submissions from both counsel. The following is a summary of what seem to me to have been the most significant arguments.

Claimant

34. Mr Jenkins indicated at the start of his oral submissions that there were two lines of argument raised in the Notice of Appeal on which he did *not* rely. He did not seek to argue that the Judge should have read the completed Appendix One document in conjunction with the Scott Schedule. Nor did he argue that she should have applied a broad proportionality test.

35. Mr Jenkins submitted that the words in the Unless Order: "or such of them as any non-compliance relates", meant that non-compliance in relation to an individual allegation would result in the striking out of that allegation, but not the entirety of the claims. Further, the Unless Order required compliance with paragraphs 1.1 and 1.2 of EJ Evans' Order. The parenthetical words after paragraph 1.1 were a helpful suggestion; but the 26-paragraph CMS contained in

the minute of EJ Evans' Hearing was not part of that Order. However, EJ Moore had wrongly treated those paragraphs as if they were.

36. Mr Jenkins referred, in this regard, to EJ Moore's statement, at [4], that the Claimant had been ordered, in relation to each disclosure, to state "exactly" what information was disclosed, to whom and to when, and the passage at [5], beginning: "Employment Judge Evans' Order had specifically directed the Claimant at paragraphs 10(a) and 12(a)…". Those were paragraphs of the CMS, not the Order. The comment, at [9], that EJ Evans made "crystal clear" the level of detail required, once again conflated the guidance in the CMS with the Order itself. In any event, while paragraph 10(a) of the CMS referred to "exact detail", paragraph 12(a) referred to "sufficient detail", and the example given by EJ Evans at paragraph 16 of the CMS itself was not one in which the exact words relied upon were set out. So, even if the guidance in the CMS *could* be relied upon, it was not itself consistent in the standard that it set.

37. So, submitted Mr Jenkins, in considering whether the Claimant was in material breach of the Unless Order, EJ Moore had therefore held him to too high a standard.

38. Mr Jenkins further argued that, for several reasons, the Judge erred in her conclusion that the use of "three generic labels" did not provide sufficient particulars. First, this was premised on the assumption that EJ Evans' Order required the Claimant to state the "exact" words used on each occasion. Secondly, in relation to the written disclosures, or most of them, and as required by EJ Evans' Order, the Claimant had provided the letter or other document referred to. While the additional Reasons given in the reconsideration Decision recognised this, the critique advanced there, that the Claimant had failed to identify the particular section of

each letter relied upon, was itself misplaced. EJ Evans' Order did not require him to do so, nor even did the guidance in the CMS indicate that he ought to do so.

39. Thirdly, consideration of the overall contents of the responses given in relation to many of the individual claimed disclosures, if not all of them, should have led to the conclusion that the applicable legal test – material compliance sufficient to enable the Respondent to know the case it had to answer – had in fact been met. The fact that the Respondent was able to, and did, set out its case in response to many of the claimed disclosures, without complaining of lack of particulars of them, was tangible demonstration of that.

40. As for the verbal disclosures, while the Respondent had complained of lack of particulars in relation to some of these, these were (mostly) made to third parties, so the Respondent could not, in any case, advance a factual case in the same way that it would be able to in relation to alleged disclosures to its own employees. Even if (which Mr Jenkins did not accept) the verbal disclosures had been inadequately particularised, that should only have led to *those* disclosures being struck out, not to other disclosures being struck out as well.

41. Mr Jenkins said that he did not suggest the Judge had made the error of assuming that a failure to comply with the Unless Order in respect of particularising one protected disclosure would have been fatal to all. Rather, her error was in concluding that the compliance in relation to each and every protected disclosure was deficient, for the same reasons in every case, and in particular because she appeared to have considered that the use of the same generic descriptors made the content relating to each and every one of the protected disclosures fatally deficient.

42. Turning to the particulars of detriment, Mr Jenkins submitted that the Judge had not found that there was any material breach in relation to these particulars, as such. So, had she, as she should have, concluded that there had been material compliance in relation to the particulars of the protected disclosures, she would then have been bound to find that there was material compliance in relation to the detrimental treatment claims.

43. In relation to the breach of contract claims, Mr Jenkins submitted that the Claimant had, properly, separately particularised each of the wages, study leave and sick pay claims. For each, he had, separately, identified the contractual term breached, and how. The Unless Order had not required him to specify more than he did. The Judge's conclusion was perverse. The only information the Respondent had said was lacking was the dates of the breaches. But EJ Moore had not made a finding that that amounted to material non-compliance; and it was not accepted that she would have been entitled to do so. In any event, had that been the only properly found defect, it would have been easily remedied, and the proportionate response would have been to grant relief from sanctions in response to the Rule 78(2) application.

Respondent

44. Ms Barney submitted that it was not open to Mr Jenkins now to run the argument that EJ Moore had erred by drawing on the guidance in EJ Evans' CMS to impose too high a standard upon the Claimant. Before EJ Evans Ms Barney had argued that the guidance was pertinent. Counsel who had appeared for the Claimant on that occasion had not argued the contrary. Further, Ground 1 in the Notice of Appeal did not raise this issue. It challenged not the Judge's *interpretation* of the Unless Order, but only her conclusion that what the Claimant produced was materially non-compliant with it.

45. Ms Barney also submitted that it was not open to Mr Jenkins now to run the argument that the words in parentheses in the Unless Order – "or such of them as any non-compliance relates" – meant that the material compliance test should have been applied to each claimed disclosure separately, each claimed detriment separately, and each claimed breach of contract separately, only striking out those that, considered individually, were found to be non-compliant. This argument, too, she said, was not run in the Tribunal below. Rather, it had been accepted there that the words of the Order were "clear", which Ms Barney described as a concession; and raising this point now amounted to asking the EAT to re-run the whole exercise. Ms Barney also submitted that this point was not articulated in the Notice of Appeal.

46. Ms Barney submitted that, in any event, the Judge had not misconstrued what the Unless Order itself required the Claimant to do. The Judge's comments at the end of [5], and in the penultimate sentence of [9], reflected the task set by EJ Evans' Order, and the template questions which it required the completed Appendix One to address. In any event, said Ms Barney, it would be wrong in principle, to take the approach that the words of the Order in this case had to be construed blindly, without any regard to the guidance in the CMS. That would render the whole exercise – which took a whole Hearing day – of the Judge having given the Claimant detailed guidance, and then setting it out in the minute of Hearing, meaningless.

47. The parenthetical words in the Unless Order did not require a separate consideration of each disclosure in turn, each detriment in turn, and each breach of contract claim in turn. Rather, they distinguished between different claims, which meant that the Judge should consider, as it were, in three separate pots, whether there was material compliance in relation to the protected disclosures, whether there was material compliance in relation to the detriments, and whether there was material compliance in relation to the breach of contract claims. In each

case, the Judge should look at the overall picture, applying a qualitative, rather than a quantitative approach. That was what the Judge had properly done.

48. Ms Barney submitted that it was crucial to keep in mind that the Claimant had presented a wide-ranging and inadequately particularised claim going back many years. He had then produced an extremely long, yet still no better, Scott Schedule. The hearing in June amounted to a tutorial on the right way to do it. The Claimant should clearly have appreciated that using broad generic labels for the claimed disclosures, as opposed to specifying what he said or wrote, was not permissible. A descriptor such as "health and safety" was particularly inadequate in the context of work at Rampton hospital. The Judge rightly concluded that it could not be said that the same three generic sets of words were used on each of 21 occasions. Attaching a copy of a letter, in some cases three or four pages long, was not a substitute for properly identifying the particulars of the claimed disclosure made on the given occasion. Further, in relation to disclosure 17, no letter had in fact been attached at all.

49. In relation to the claimed verbal disclosures, it was especially where these were said to have been made to a third party, that the Respondent needed specific information about who that third party was, as well as what the Claimant alleged he said. He had not even set out the gist of the words said to have been used. The Judge properly regarded that as a material breach.

50. In relation to the claimed detriments, at [6] the Judge had only found particulars of some of the alleged detriments to be sufficient, not of all of them. In respect of at least eight of them (Ms Barney listed them) the particulars were clearly deficient and lacking in the detail ordered.

51. In relation to the breach of contract claims, the content was too broad and non-specific to enable the Respondent to know the case it had to meet. The Judge had said at [7] that there were insufficient particulars not just of which provisions of the contract were breached, but also "in what regard."

52. Ms Barney also submitted that reliance on the Respondent's responses to the Claimant's Appendix One particulars was misplaced. The Respondent had been ordered to provide responses, and it had done its best to do so. That should not be used against it. It had frequently itself had to resort to broad terminology and repetition, precisely because of the lack of specific details provided by the Claimant. The Claimant's position now sat uneasily with the stance of his counsel before the Tribunal, which had been that he should be allowed more time, and an opportunity to give yet further particulars.

Claimant – Reply

53. Mr Jenkins, in oral reply, made the following particular additional submissions.

54. First, the acknowledgement by counsel at the Hearing in the Tribunal, that the terms of the Unless Order were clear, did not amount to a concession, or agreement, that the Order should be interpreted the particular way that Ms Barney had argued.

55. Secondly, this was not a case where, following a trial in the Employment Tribunal, a new and distinct line of argument was sought to be introduced on appeal, which would have involved additional evidence or fact finding below. The Tribunal's task was to decide whether the Claimant had materially complied with the Unless Order, and, if there was some material non-compliance with parts of it, what the consequence was. As part of that task the Judge had

to consider the terms of the Unless Order (and the Order of EJ Evans on which it was parasitic) and interpret them correctly. That was all part and parcel of the process of deciding the compliance issues. If the Judge had erred in this regard, it did not matter whether the particular point had been canvassed in the Tribunal below; it was amenable to appeal.

56. Thirdly, Mr Jenkins disagreed with Ms Barney's interpretation of the parenthetical words in the Unless Order. There were multiple claims of detrimental treatment that the Claimant was seeking to advance, each of which could, were it to proceed to trial, separately succeed or fail. The distinct allegations of detrimental treatment were not parts of one claim. The same was true in respect of breach of contract. This approach was also reinforced by the fact that the Unless Order referred, twice, to "claims" in the plural. Even if that might be grammatically consistent with the detriment complaints having being viewed as part of a single claim (but, considered with the unfair dismissal complaint, one of two claims), that was not consistent with the breach of contract complaints being viewed as, together, one single claim.

Discussion and Conclusions

57. Unless Orders relating to the provision of particulars present particular hazards and challenges. Very often, an Order which was not originally made as an Unless Order is then, on a later occasion, converted into one, but not always with sufficient consideration of whether the language of the original Order is suitable for conversion. The making of an Unless Order in such a case may also, in due course, give rise to a particularly challenging exercise in the application of the test of material non-compliance. Further, where, as so often occurs, the Order relates to a case in which there are multiple complaints, particular care and attention needs to be given, both when making, and interpreting, such an Order, to what it has to say about the consequences of any material non-compliance.

58. The task which faced EJ Moore was, at the highest level, two-fold. First, she had to determine whether there had, in any respect, been material non-compliance with the Unless Order. If so, she then had to determine what, on a proper construction of the Unless Order, the consequences were.

59. I agree with Mr Jenkins, that, in order to perform this task, the Judge had, of necessity, properly to construe the Order itself. To determine whether the Claimant had materially failed to comply with the Order, the Judge had, necessarily, to come to a correct view of what, in principle, the Order required him to do; and, if she considered there was some material non-compliance, she had, necessarily, to construe the Order so as to ascertain the consequences. I agree with Mr Jenkins that, however the arguments were run in the Tribunal below, if the Judge arguably erred in construing the Order, that was amenable to challenge on appeal.

60. Ground 1 challenged the Judge's conclusion that the Claimant had failed to comply with what the Order required of him regarding particularisation of the protected disclosures. That put into play the question of construction of the Order in that respect. Though the Ground itself might have been more fully particularised, I do not consider that Mr Jenkins was precluded from arguing any of the points of construction that he raised before me. They were within scope of the Grounds of Appeal, and developed in Mr Jenkins' skeleton argument; and Ms Barney had a fair opportunity to, and did, respond to them at the appeal Hearing.

61. The starting point of the exercise in construction of what the Unless Order required the Claimant to do, is that it required him to comply with "paragraphs 1.1 and 1.2 of the Order of

EJ Evans." That, unambiguously, directs attention to the words of *those* two paragraphs, and what *they* required the Claimant to do.

62. The wording of *those* two paragraphs was also not problematic. Paragraph 1.1 simply required the Claimant to complete Appendix One. It did not gloss, add anything to, or take anything away from, the content of that Appendix. Paragraph 2.2 made it clear that the Judge had determined that the only live claims of breach of contract related to the topics there identified; and, hence that the completion of Appendix One could not be used as a means to add breach of contract claims concerned with other topics. Again, however, on the question of *what* information was required, the paragraph simply directed the reader to the Appendix.

63. So, pausing there, the net effect was that EJ Moore's first substantive task was to construe correctly what *Appendix One* required of the Claimant, and whether there had been material compliance with *its* requirements. There was, in my view, neither need nor warrant for EJ Moore – if this is what she did – to turn to the content of EJ Evans' Case Management Summary for assistance when carrying out that exercise. I say that for the following reasons.

64. First, and foremost, neither paragraphs 1.1 and 1.2 of EJ Evans' Order, nor Appendix One, nor the wording of EJ Clark's Unless Order, required the Claimant to comply with anything that was said in EJ Evans' CMS. The sentence in brackets beneath paragraph 1.1 of EJ Evans' Order did not do so. That sentence counselled the Claimant that he would find it helpful to re-read the CMS. It did not require him to comply with any part of it. The status of this sentence as distinct from the Order itself, was further emphasised by it being set out separately and in brackets.

65. Secondly, what was said at [44] of **Wentworth-Wood** (above) is pertinent. The starting point is always the ordinary meaning of the words of the Order itself. There may be cases where the wider procedural context, or something said in the course of the narrative leading up to the Order, clearly shows that the words of the Order were intended to have a particular meaning, or to work in a particular way. But this was not such a case. The Judge had set out in Appendix One the particular questions that the Claimant was required to answer, as well as the particular directions to answer the pertinent questions, separately for each claimed disclosure, each claimed detriment, and each claimed breach of contract. This was done clearly, and in ordinary language, which did not require any resort to the CMS to interpret it.

66. Nor do I agree with Ms Barney that to take this approach would be to render EJ Evans' efforts, whether in relation to the time spent at the PH, or in relation to the very full record made in the CMS, pointless. That was a valuable exercise in seeking to explain to the Claimant why the content of his Scott Schedule was not satisfactory, and the nature of the different approach which the Order being made by EJ Evans required, bearing in mind, in particular, his status as a litigant in person. If, in due course, it was properly considered that the Claimant had still not, or not fully, complied with the Order, it might also have been relevant to an assessment of whether there was any prospect of his doing so, if given another chance. But that would be a different question from the one which faced EJ Moore, which was simply whether he had, in fact, materially complied with what had, in the event, become an Unless Order, or not.

67. In any event, it bears repetition that what EJ Moore had to decide was whether there had been *material* non-compliance with the Unless Order, the yardstick, in relation to particulars, being whether the Respondent was fairly enabled to know the case that it had to answer. Even had Appendix One, for example, itself required the Claimant expressly to set out the exact

words that he had used in making a given disclosure, and he had he then only set out the gist, the Judge would still have needed to consider whether there was material non-compliance.

68. I turn to the words appearing in brackets in the Unless Order itself: "or such of them as any non-compliance relates". Once again, construing those words correctly was a necessary part of EJ Moore's task, in order properly to determine, on the wording of this particular Unless Order, the consequences of any material non-compliance. Once again, I consider that this issue was fairly put in play by the Notice of Appeal and skeleton argument, and that Ms Barney was fairly able to, and did, respond to it. My conclusions on this aspect are as follows.

69. First, I have no hesitation in saying that the correct approach was not that the detriment complaints must stand or fall together, as one single claim, and the breach of contract complaints must stand or fall together, as one single claim. I say that for several reasons. First, "claim" was plainly being used here to mean a distinct complaint, as opposed to the entire claim form or litigation as a whole. Used in that way, the natural meaning of the word is to refer to one distinct complaint giving rise to one distinct cause of action, that could succeed or fail, independently of the success or failure of other distinct complaints or causes of action.

70. I agree with Mr Jenkins that, by that test, each of the fifteen alleged detriments was a claim distinct from the other fourteen (and, indeed, distinct from the claim of unfair dismissal by reason of protected disclosures). The same is true of breach of contract. It was (at least) plainly alleged that there had been more than one breach. Each was a separate claim or complaint that could potentially succeed or fail independently of the fate of the others.

71. The words in brackets are, it must be said, compressed to the point of not being wholly grammatical; and such a fundamentally important aspect should have been articulated with greater care by EJ Clark. But the foregoing is still the natural reading. That is, first, given the reference to "claims". It is clear that the Judge must have considered that there was more than one breach of contract claim, and a more natural reading, that the Judge considered that there was also more than one detriment claim. That reading is reinforced by the fact that it was already more than apparent that the Claimant was seeking to bring multiple detriment claims and multiple breach of contract claims; and it would fit with the fact that Appendix One had expressly required him to particularise each such claim separately from each other such claim. Further, if there was any ambiguity, it fell to be construed in favour of the Claimant.

72. Ms Barney argued that EJ Moore had, properly, taken a qualitative rather than a quantitative approach to the question of material compliance in respect of the protected disclosures viewed as a whole; then, separately, the detriment claims as a whole; then, separately, the breach of contract claims as a whole. She submitted that that approach was in keeping with guidance the second half of [7] in **Johnson** (cited above).

73. I disagree. That reading, it seems to me, precisely overlooks the distinction between what is needed to make good one claim or complaint (which may have a number of essential components to it), and a situation in which several distinct claims or complaints are asserted. A single complaint of detrimental treatment on the ground of having made a protected disclosure has a number of essential elements to it. At the broadest level there are three: the making of a protected disclosure, detrimental treatment, and the latter being on the ground of the former. The necessary element of a protected disclosure itself breaks down into the necessary sub-elements of a qualifying disclosure, and the requirement that it be protected. All told, the

overall cause of action may consist of a chain that has eight or more essential links in it. Langstaff P's point, I apprehend, was that, in such a case, particularisation of, say, six out of eight essential elements would not do, because without the other two the cause of action is not established; and so the non-compliance is material.

74. By contrast, where there are multiple complaints, a failure to particularise all the necessary elements of the cause of action in respect of one given complaint will be fatal to *it*, but does no harm to other complaints in respect of which all those necessary elements *have* been particularised. Here, the pertinent passage from **Johnson** is that to which I have referred at [26] above. An Unless Order should not be a punitive instrument, and, in particular, should not have the effect of depriving a party of a claim (or defence) which is properly pleaded and perfectly capable of being fairly litigated. If, nevertheless, an Unless Order has been made which, unambiguously, does have that effect, tying the hands of the Judge who considers the compliance issue at stage two, it may be susceptible to an application for relief from sanctions, to the extent necessary to mitigate that effect at stage 3. But an Order which is ambiguous should be construed at stage 2 so far as possible to eliminate or minimise any such effect.

75. Pausing there, I consider that the correct approach when considering the Unless Order in this particular case, and the Claimant's completed Appendix One, was as follows. First, if there was material non-compliance in respect of a given detriment claim, *that* claim should have been declared struck out, but that should not have affected any of the other detriment claims. The same approach should have been taken to each of the breach of contract claims. Secondly, it was an essential element of each detriment claim that there be at least one protected disclosure relied upon, in respect of which there had been material compliance. The protected disclosures were not themselves claims, but components of claims. But, in substance, if there was material

non-compliance in respect of a particular alleged disclosure, it would effectively stand struck out, in the sense that it could not be relied upon as a building block of any detriment claim that sought to rely upon it. But if a detriment claim sought to rely on several disclosures, that *claim* ought not to be struck out, as long as at least one of those disclosures was properly pleaded (unless that claim lacked some other essential element), as only one disclosure is required to supply this particular component of the cause of action.

76. I turn then to the Judge's actual Decision, and the application of that construction of the Unless Order, and those principles, to what the Claimant actually did in purported compliance.

77. In respect of the protected disclosures, it appears that the Judge considered the completed Appendix One to be deficient, in every case, in its replies to question 2, concerning "What information disclosed." The nub of her findings at [4] was that the Claimant had not properly done this, because he had "instead … set out a number of generic labels", referring to the three phrases, one or other of which he used in answer to that question in all 21 cases. When she added at [5] that "This was the extent of the information that was provided in the document" she was clearly referring to those phrases used in the replies to question 2. That is reinforced by the final sentence of [9], in which she applies the test of whether the Respondent had sufficient information to be able to respond, to the "three generic labels".

78. That, however, fails to consider the words that follow the question in the Appendix template itself. These words plainly *were* intended to describe more precisely what the Claimant was actually required to do in response to this question. They gave him two options: *either* to "describe information disclosed"; *or*, if it was contained in a letter or email, to give a "brief description" and provide a copy of the letter or email. In her original Decision, however,

A the Judge failed, in respect of those claimed disclosures for which documents had been provided, to consider the documents at all.

B 79. What of the additional Reasons? At (a) the Judge focussed, chiefly, on the "three generic labels" again; but her criticism that "it cannot be said" that the same three generic sets of words were said or written on all 21 occasions, is wide of the mark for two reasons. Firstly, it, as such, assumes that only what was stated in answer to question 2 could count, even where C there was an accompanying letter or email. Secondly, it is not clear why it could not, in principle, have been the Claimant's case (or, at least, constituted sufficient particulars of his case) that he did indeed raise essentially the same two or three concerns on multiple occasions.

D 80. At (b) – (e) the Judge did refer to the attachments, and the full wording of question 2. But the essential shortcoming that she identified was the failure to "set out the section of the letter on which he relied", because, as she said at (e), it was not for the Respondent to have to E try and guess what part of the document was relied upon as containing the information amounting to the claimed disclosure.

F 81. Ms Barney submitted that, where the generic labels were so lacking in specific information, and the accompanying documents were sometimes as many as four pages long, that was an entirely justified conclusion. Mr Jenkins, however, pointed out that the wording of G question 2 did not require the Claimant to identify the particular passage in the letter or email, but only to provide a copy of the letter or email. This, he said, the Claimant had done in the case of every claimed written disclosure apart from disclosure 17. That said, he also accepted that, where the Claimant had provided the first page, but not the whole, of a document, he could H only rely on the contents of the page actually provided.

82. As to this aspect, I do see force in the concern that, in a given case, the provision of a long document *might* not be enough to enable the Respondent to identify the nature of the information said to have been disclosed and relied upon in that case. If the Respondent was, indeed, genuinely left guessing, that would not do. But it could not be *automatically* assumed, merely because a document was of a certain length, that the Claimant's case would not be sufficiently clear. The only way to tell would be to consider the actual content of the answer to question 2, together with the actual document attached, reading them together.

83. Nor do I consider that the content of the responses that the Respondent actually provided was off limits for consideration. Ms Barney did not, in fact, go so far as to suggest that. Her submission, that the Respondent's replies should be approached with caution, given that it was itself ordered to respond, and in some cases complained of lack of particulars, and did no more than give a generalised response was, as far as it went, fairly made. However, the fact remains that the responses were not all of a piece, and while some expressly complained of lack of particulars, others did not. What the Tribunal seems to have done is assume or assert that in every case the Respondent was left guessing, without considering, case by case, and with due circumspection, what light the actual replies cast on whether the Respondent in fact had sufficient particulars to enable it fairly to respond.

84. Of the claimed written disclosures, disclosure 17 was different. Although the Claimant identified to whom he said it was made, and in what month, he asserted that it was made by letter, but provided neither the date of the letter nor a copy. In view of that, the Judge was entitled to take a view that the descriptor alone was not sufficient, and that there was a material failure to particularise the information and/or how that disclosure was made. In respect of all

A the other claimed written disclosures, however, the Judge was wrong to conclude, on the blanket basis that she did, that they all failed materially to comply. She did not undertake the necessary case by case analysis, in the way that I have described, and that was an error.

B

85. I turn to the claimed oral disclosures. Here, with one exception, the descriptors given in the answers to question 2 were, in the nature of things, not accompanied by any supporting document. The Judge herself fairly made the point in her further Reasons, that the Claimant C had not set out even the gist of the words used. Ms Barney fairly submitted that this was of particular importance where the disclosure was said to have been oral, and to a third party. It is noteworthy that in all of the third-party cases (disclosures 7, 14 and 16) the Respondent's D response also complained of a lack of particulars. The Judge was certainly properly entitled to conclude that there was material non-compliance in those three cases. In respect of a further group of claimed oral disclosures, Ms Barney fairly submitted that the Respondent had been E thrown back, by the lack of particulars, on a speculative and generic response. These were disclosures 11, 18, 20 and 21. The Judge was entitled to conclude that there was a material failure to comply in respect of these four disclosures as well.

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86. Oral disclosure 4 was different. The Claimant provided part of a note of the meeting at which he said it was made (as well as the date and the name of the person to whom he said he made it). The Judge erred, it appears to me, in failing to consider, whether, reading the answer G to the question and the note together, the Respondent was fairly enabled to respond.

87. Pausing there, I conclude that, in respect of all of the claimed written disclosures other than disclosure 17 (therefore, in respect of written disclosures 1, 2, 3, 5, 6, 8, 9, 10, 12, 13, 15 H

and 19), and in respect of one of the oral disclosures (disclosure 4), the Judge erred in the way that she came to the conclusion that there was material non-compliance.

88. I turn to the Judge's consideration of the detriment claims. The entirety of the reasoning and analysis is contained at [6] of the Reasons. From the first part of the second sentence (beginning: "Some of the detriments …"), and the third sentence, (beginning: "For example, detriment 3 …"), it appears that the Judge considered that, in respect of the conduct said to amount to a detriment, *some* of these claims *were* sufficiently particularised. But the reason she considered that there was still a material breach in respect of all of them, was because "they did not have a supporting disclosure that complied with the Order to rely on." However, as the Judge erred in ruling out *all* of the disclosures, this consequential reasoning also cannot stand.

89. Further, because she relied upon it as providing a complete reason for concluding that all the detriment claims lacked an essential component, the Judge has not vouchsafed which of the detriments she considered otherwise to be compliant. The only one that we know for sure she considered to be materially deficient in terms of the alleged conduct was detriment 3. In respect of that, the Claimant named the perpetrator and the month, but, as the Judge noted, beyond that, referred simply to "derogatory and demeaning email correspondence". The Judge was right to regard that as materially deficient. For the rest of the detriment claims, though, the Judge's conclusion rests an erroneous foundation. It follows also that her conclusion in relation to the section 103A claim therefore cannot stand.

90. I turn to the breach of contract claims. The Claimant only gave answers of any sort to the Appendix One questions under two headings: Study Leave and Sick Leave. The Judge noted at [7] that he accepted that he had failed to provide any particulars in respect of Annual

Leave. She was plainly right to conclude that there was a material breach in respect of that particular claim.

91. In respect of both Study Leave and Sick Leave, while the Claimant identified which term of his contract had been breached, I agree with Ms Barney that the Judge's critique of the replies went beyond that, as signified by the words "and in what regard?" The replies to question 2 were, respectively: "The Claimant did not receive the correct pay for study leave"; and: "The Claimant was not placed on the correct level of sick pay." To question three (date of breach) he replied, in both cases, "continuing", and to question 4 (amount due), in both cases that this was to be determined following disclosure.

92. Had the Claimant provided more information in reply to question 2 in each case, it is not impossible that, overall, the lack of further detail in response to questions 3 and 4 might not have amounted to a material breach. But the replies to question 2 in each case really provided the Respondent with no information at all, beyond repeating the general topic to which the alleged breach related. Though the Judge should have spelled it out a little more, she was right to hold that there was a material breach in respect of each of these claims as well.

Outcome

93. The overall outcome is therefore that I partially uphold Grounds 1 and 2, and dismiss Ground 3. The Judge was right to conclude that there had been material non-compliance with the Unless Order in respect of all of the breach of contract claims, all of which, therefore, she properly concluded stood struck out. She was also right to conclude that there was material non-compliance in respect of detriment claim 3, which also correctly stood struck out.

94. Her conclusion in relation to the remaining detriment claims, and the section 103A claim, rested, however, on her conclusion that, for reasons that she gave, the particulars of every one of the protected disclosure claims were materially deficient. But that reasoning properly supported that conclusion in respect of some, only, of the disclosures. It therefore did not properly support the conclusion that all of the detriment claims, and the section 103A claim, lacked the essential element of even one properly particularised protected disclosure.

95. The outcome is that the Judge's decision stands in respect of disclosures 7, 11, 14, 16, 17, 18, 20 and 21, detriment claim 3 and the breach of contract claims. Whether or not there has been material compliance in respect of each of disclosures 1, 2, 3, 4, 5, 6, 8, 9, 10, 12, 13, 15 and 19 will require fresh consideration by the Tribunal, disclosure by disclosure, following the guidance I have set out. As the Claimant relies on all of them in respect of all of the detriments, if the Tribunal properly concludes that there is material non-compliance in respect of all of those disclosures, that will properly point to the conclusion that there is material non-compliance in respect of all the detriment claims and the section 103A claim. Otherwise, the section 103A claim will stand, and the Tribunal will need to consider, claim by claim, whether there has otherwise been material compliance in respect of each of the detriment claims.

96. Comments have been sought from the representatives on what direction I should give upon remission to the Tribunal to carry out this task. The Claimant asks me to direct that the matter not be further considered by EJ Moore, and suggests that EJ Batten would be best placed to carry it out, as she is currently seized of the ordinarily unfair dismissal claim, which is part heard. Alternatively, the Claimant suggests EJ Evans would have the advantage of some prior familiarity. The Respondent does not agree that I should exclude EJ Moore, nor that there would be any particular advantage to EJ Batten or EJ Evans considering it.

97. I have no doubt at all that, if entrusted with the task, EJ Moore would carry it out conscientiously. But there would be no particular advantage to her doing it, and I think that it would be better for another pair of eyes to be brought to bear upon it. I will therefore direct that the matter not be remitted to her. Beyond that, it appears to me that it might be sensible for EJ Batten to undertake it, given that she is seized of the unfair dismissal claim; and I note that whether or not the section 103A claim is live, is one of the issues that the completion of this task will determine. But it seems to me that the Regional Employment Judge will be best placed to decide which Judge to assign to it. So, beyond saying that it should not be considered by EJ Moore, I will give no further specific direction.