Appeal No. UKEAT/0128/15/DM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 2 June 2015

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MORGAN MOTOR COMPANY LIMITED APPELLANT

CHARLES MORGAN RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR PAUL NICHOLLS QC (of Counsel) Instructed by: Wragge Lawrence Graham & Co Solicitors Two Snowhill Birmingham B4 6WR
For the Respondent	MS C HADFIELD (of Counsel) Instructed by: Blake Morgan New Kings Court - Tollgate Chandlers Ford Eastleigh Hampshire SO53 3LG

SUMMARY

PRACTICE AND PROCEDURE - Striking-out/dismissal

Unless Order - Application for relief from sanction - **ET Rules 2013** Rule 38(1) and (2)

On the employer's appeal against the ET's decision to granting the Claimant relief from the sanction of the earlier dismissal of his claim for non-compliance with an unless order.

Allowing the appeal:

The ET had to determine whether it was in the "interests of justice" (having in mind the overriding objective) to set aside its earlier order dismissing the claim for failure to comply with an unless order. That was a matter of judicial discretion. It would not be for an appellate court to interfere unless the ET had failed to carry out the relevant balancing exercise (see per Simler J in **BBC v Roden** UKEAT/0385/14/DA) or taken into account that which was irrelevant or failed to take into account that which was relevant or reached a conclusion that was perverse; **TfL v O'Cathail** [2013] ICR 614 CA, **Governing Body of St Albans Girls School v Neary** [2010] IRLR 124 CA (in particular, per Smith LJ at paragraph 49), **Global Torch Ltd v Apex Global Management Ltd and Ors (No. 2)** [2014] 1 WLR 4495 (see paragraph 13 of the Judgment of Lord Neuberger PSC, approving Lewison LJ in **Broughton v Kop Football (Cayman) Ltd** [2012] EWCA Civ 1743 at paragraph 51), and **Harris v Academies Enterprise Trust and Ors** [2015] IRLR 208 EAT (per Langstaff P at paragraph 2).

As to what was in the "interests of justice", having regard to the guidance laid down in **Thind v Salvesen Logistics Ltd** UKEAT/0487/09, this obviously allowed of a broad discretion, the material factors varying considerably, albeit that they would generally include the reason for the default and whether it was deliberate, the prejudice to the other party and whether a fair trial

remained possible. The fact that an unless order had been made was also said to be an important consideration but would only be one such consideration.

The ET's reasoning did not disclose a full explanation of the breach by the Claimant. Although consideration was given to the question whether a fair trial remained possible, the ET considered that question as at the date of the relief from sanction application (3/12/14) rather than the date on which the sanction was applied (1/8/14). There was no indication that the ET had considered whether it was appropriate to adopt this approach, in particular given other relevant considerations such as the importance of finality in litigation.

Further, having regard to the guidance provided by the Supreme Court in **Global Torch**, a plainly relevant factor was the policy objective behind unless orders, which was not solely a "floodgates" point (as might be suggested by the ET's reasoning); there was no indication that this had been taken into account.

Similarly, the ET had apparently taken the view that an alternative appropriate sanction was the award of costs against the Claimant but there was no indication that account had been taken of the Respondent's argument that such an award should be made whether or not relief from sanction was granted.

This is not a case where the ET failed to carry out *any* balancing exercise but there was an error in the failure to import into the balancing exercise factors that were relevant to the proper exercise of the discretion. The decision was thus rendered unsafe but it could not be said to be necessarily perverse. There being more than one possible outcome on a reconsideration of the point, the matter would be remitted to be considered afresh by a different ET.

HER HONOUR JUDGE EADY QC

1. I refer to the parties as the Claimant and the Respondent, as below. This is the Respondent's appeal against a Judgment of the Birmingham Employment Tribunal (Employment Judge Kearsley, sitting alone on 3 December 2014; "the ET"), granting the Claimant relief from the sanction of the earlier dismissal of his claim for non-compliance with an unless order. Representation before the ET was as it has been before me.

The Relevant Background

2. The Respondent is a well-known manufacturer of specialist sports cars; a family company founded in 1909. The Claimant is a member of the Morgan family and was employed by the Respondent from 1985 until his dismissal on 14 October 2013. He thereafter pursued a claim in the ET in which he made complaints of unfair dismissal, both under section 98 and of automatic unfair dismissal for having made a protected disclosure under section 103A, and also of protected disclosure detriment. The claims, which had been due to be heard over ten days beginning on 11 August 2014, had been the subject of earlier case management orders by the ET and, during June/July 2014, in preparing for the Full Merits Hearing, a dispute arose as to the Claimant's compliance with his disclosure obligations.

3. After correspondence on the point, this culminated in an order by Employment Judge Pirani on 21 July 2014 as follows:

> **"Unless by the 28 July 2014 the claimant responds to the outstanding disclosure queries raised in the respondent's emails of 6, 22, 30 May 2014 and 30 June 2014 within 7 days of the date of this order, the claimant's claim will stand dismissed without further order."**

4. A hearing then took place before Employment Judge Kearsley on 1 August 2014. What took place on that occasion is recorded, as follows:

> **"11. Ms Fernando for the claimant frankly acknowledged that the documents requested were important and whilst she asserted that the majority had been delivered she acknowledged that they had not been delivered by 28 July. She asserted, despite that concession, that the Unless Order had been complied with. She accepted that the metadata requested had still not been disclosed and that only the claimant could do that. She acknowledged that there had been delay in providing the diary notes and the transcription, but that all these documents had been delivered on 31 July 2014."**

5. Notwithstanding that submission the Employment Judge concluded:

> **"19. I have no discretion at this stage. If I conclude that the Unless Order has not been complied with in a material sense, then I must conclude that the claims stands [sic] dismissed without further judgment.**
>
> **20. I have reached that conclusion because by 28 July the claimant had failed to provide the respondents with the information required under the Unless Order which I have identified in my findings of fact above. These were material failures to provide relevant information. Indeed, solicitor [sic] for the claimant acknowledged that the majority of the disclosure had not been made until the evening of 31 July by which time the time limit for compliance had expired and that the documents eventually disclosed were important documents."**

6. At the Reconsideration Hearing on 3 December 2014, counsel for the Claimant revived the arguments of 1 August 2014 but also advanced the argument that there had been material compliance with the unless order by the date of its expiry (see paragraph 11 of the Judgment). Employment Judge Kearsley took the view, however, that:

> **"14. … nothing has changed provided one looks at the situation as at the point when the Unless Order expired and not at the subsequent date of 31 July 2014.**
>
> **15. … the stark fact is, [as] that the date when the Unless Order expired at least 96 pages of material documents had not been disclosed and that default had not been rectified until the evening of 31 July 2014."**

On the other hand the Employment Judge noted:

> **"16. I contrast that situation with the position now. As of today's date the only documents remaining outstanding are the diary entries of the Claimant's for June and July 2013 which he has not disclosed because he considers them to be irrelevant. The metadata about which there was much discussion on 1 August was disclosed on 2 December 2014."**

7. So, considering the position as it had been as at 1 August 2014, the Employment Judge took the view:

> **"17. … my conclusion is that at the expiry of the Unless Order the conclusions I reached on 01 August are unaltered. … I had no discretion at that point but to confirm that the Unless Order had not been complied with. I included in my reasons that it was a matter for the Claimant to**

decide … whether to apply under Rule 38(2) to have the Order set aside on the basis that it was in the interests of justice to do so."

The Claimant promptly made that application; hence the 3 December Reconsideration Hearing.

The Tribunal Reasoning

8. In considering the reconsideration application, the Employment Judge referred to the relevant case-law: that is, **Governing Body of St Albans School v Neary** [2010] ICR 473 CA, **Thind v Salvesen Logistics** UKEAT/0487/09, **Harris v Academies Trust & Ors** UKEAT/0097/14 and **HRH Prince Al Saud v Apex Global Management** [2014] UKSC 64, now reported as **Global Torch Ltd v Apex Global Management & Ors (No 2**) [2014] 1 WLR 4495. Having had regard to that guidance the Employment Judge took the view that he should grant relief from sanction. His reasoning was as follows (albeit in summary form):

(1) By 31 July 2014 the material breach of the unless order had largely been rectified and by 2 December 2014 even the metadata had been provided, the only issue being the content of the Claimant's diaries for June and July 2013 (paragraph 26).

(2) A fair trial would have been impossible in August 2014, because disclosure had been made too late for that to occur. A fair trial still remained possible as at the date of the Reconsideration Hearing, however, and the further delay that had occurred before that hearing was due to the Employment Judge's and counsel's availability (paragraph 27), not the Claimant's default.

(3) The Employment Judge rejected the Respondent's contention that this was effectively opening the floodgates. Whilst the Claimant's attitude had been "relaxed", that was different to the obduracy displayed by both Mr Neary and

Prince al Saud in their absolute refusal to comply with orders even after the sanction of dismissal had been imposed (paragraph 28).

(4) The Claimant had apologised and was genuine in so doing. He had been acting in person during the material time (it is agreed before me that in fact the Claimant was unrepresented for six weeks during the relevant period) and at that point gave assurances that he was in fact unable to meet (paragraph 28).

(5) The appropriate sanction was that the Claimant be required to meet the costs of the Respondent in preparing and attending both the 1 August and the Reconsideration Hearings. That constituted a penalty for failure to comply with the unless order (paragraph 28).

The Appeal

9. The Respondent challenges this conclusion, on the following bases:

(1) The Employment Judge erred in principle in setting aside the strike-out of the claim. Where a party failed to comply with an unless order, the claim should remain struck out unless that party could show some compelling reason for failure to comply.

(2) In deciding whether to set aside the strike-out for breach of an unless order the ET was required to consider the interests of justice in accordance with Rule 38. Here the Employment Judge did not carry out that assessment but simply determined that a fair trial was possible.

(3) Putting it another way the Employment Judge failed to have regard to a relevant factor, namely that the Claimant had no excuse for failing to comply with the unless order.

(4) The Employment Judge erred in his consideration as to whether a fair trial was possible. The relevant time for that assessment was August 2014 not later.

(5) The Employment Judge failed to act in accordance with the public interest in enforcing compliance with the ET's order and thus failed to have regard to a relevant factor.

(6) Alternatively, the Employment Judge's conclusion was perverse.

10. There is no cross-appeal in this case (for instance, from the Employment Judge's conclusion that the Claimant had been in material breach of the ET's order).

11. The matter was considered on the papers by Wilkie J, who took the view:

> **"… this is arguable. It is essentially a perversity challenge. It is said that, in particular, the Employment Judge failed to have regard to the statements in the authorities that emphasise the importance of unless orders and indicate that those who fail to comply should expect little sympathy."**

The Relevant Legal Principles

12. The relevant legal principles are largely a matter of common ground between the parties and it is convenient to set them out at this stage before descending into the submissions.

13. The Employment Judge was concerned with Rule 38 of Schedule 1 of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013**, which provides:

> **"38.** ***Unless orders***
>
> **(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."**

14. The question was thus whether relief from sanction should be granted upon an application under Rule 38(2), something requiring the exercise of judicial discretion by the ET.

15. It is not for this court to re-hear a case or, absent an error of law, interfere with an ET's exercise of a judicial discretion in this regard. See **TfL v O'Cathail** [2013] ICR 614 CA, or, per Smith LJ in **Governing Body of St Albans Girls School v Neary** [2010] IRLR 124 CA:

> **"49. It is often said that decisions of this kind are discretionary. It seems to me that a decision such as this is not so much an exercise of discretion as an exercise of judgment. But this may be a distinction without a difference in that, in both cases, there is a duty on the judge to decide the case rationally and not capriciously and to make his decision in accordance with the purpose of the relevant legislation, taking all relevant factors or circumstances into account. He must also avoid taking irrelevant factors into account. In both cases there may be two correct answers or at least two answers which are not so incorrect that they can be impugned on appeal. Whereas with the exercise of discretion, the question will be whether the judge's decision was permissible on the evidence, with an exercise of judgment, the question will be whether his decision was fair. But provided that the judge has met these requirements, his judgment should not be impugned merely because the appellate court would or might have reached a different conclusion."**

Also see paragraph 2, **Harris v Academies Enterprise Trust & Ors** [2015] IRLR 208 and the reiteration of that principle by the Supreme Court in **Global Torch Ltd v Apex Global Management Ltd & Ors (No 2)** [2014] 1 WLR 4495 at paragraph 13 of the Judgment of Lord Neuberger PSC, approving the Judgment of Lewison LJ in **Broughton v Kop Football (Cayman) Ltd** [2012] EWCA Civ 1743, at paragraph 51:

> **"13. … Given that it was a case management decision, it would be inappropriate for an appellate court to reverse or otherwise interfere with it, unless it was "plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree" …"**

16. That statement was approved in **Global Torch** in the context of a decision made on an application for relief from sanction. The Supreme Court upheld the striking out (or rather the Court of Appeal's earlier upholding of the striking out) of a party's defence for refusal to comply with an earlier High Court order requiring that he sign a Statement of Truth (the objection being made by a member of the Saudi Arabian Royal Family on the basis of a protocol in that country that members of the Royal Family should not personally become

involved in litigation or sign court documents). In giving the lead Judgment of the Supreme Court, Lord Neuberger observed:

> **"23. … The importance of litigants obeying orders of court is self-evident. Once a court order is disobeyed, the imposition of a sanction is almost always inevitable if court orders are to continue to enjoy the respect which they ought to have. And, if persistence in the disobedience would lead to an unfair trial, it seems, at least in the absence of special circumstances, hard to quarrel with a sanction which prevents the party in breach from presenting (in the case of a claimant) or resisting (in the case of a defendant) the claim. And, if the disobedience continues notwithstanding the imposition of a sanction, the enforcement of the sanction is almost inevitable, essentially for the same reasons. Of course, in a particular case, the court may be persuaded by special factors to reconsider the original order, or the imposition or enforcement of the sanction."**

That passage was cited by the ET in the present case (see paragraph 25).

17. Lord Neuberger continued, however, at paragraph 24:

> **"24. In the present case … there do not appear to be any special factors … Further, it is difficult to have much sympathy with a litigant who has failed to comply with an unless order, when the original order was in standard terms, the litigant has been given every opportunity to comply with it, he has failed to come up with a convincing explanation as to why he has not done so, and it was he, albeit through a company of which he is a major shareholder, who invoked the jurisdiction of the court in the first place."**

18. It is right to say that the order under consideration in **Global Torch** arose in the context of High Court proceedings and not in the ET, and the same considerations might not always apply, the **Civil Procedure Rules** not being expressly applied to proceedings of the ET, which are governed instead by the **ET Rules** (and see the observations of Langstaff P to this effect in **Harris v Academies Enterprise Trust & Ors**). That said, the approach to relief from sanction for non-compliance with an unless order is likely to give rise to very similar considerations. See per Underhill P (as he then was) in **Thind v Salvesen Logistics**:

> **"14. … The tribunal must decide whether it is right, in the interests of justice and the overriding objective, to grant relief to the party in default notwithstanding the breach of the unless order. That involves a broad assessment of what is in the interests of justice, and the factors which may be material to that assessment will vary considerably according to the circumstances of the case and cannot be neatly categorised. They will generally include, but may not be limited to, the reason for the default, and in particular whether it is deliberate; the seriousness of the default; the prejudice to the other party; and whether a fair trial remains possible. The fact that an unless order has been made, which of course puts the party in question squarely on notice of the importance of complying with the order and the consequences if he does not do so, will always be an important consideration. … 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."**

19. As that reference suggests the exercise of a judicial discretion of this nature involves a balancing exercise that should be apparent from the ET's reasoning, a failure in respect of which might constitute an error of law (per Simler J in **BBC v Roden** UKEAT/ 0385/14/DA).

Submissions

The Respondent's Case

20. By way of preliminary observation, Mr Nicholls QC reminds me that an unless order is the final order a court or Tribunal will make to secure a party's compliance with orders of that court or Tribunal, where previous orders have not succeeded in doing so. A strike-out for non-compliance might be a draconian step, but the party in default had previous opportunities to comply with the earlier orders and had a choice of compliance with the unless order itself (and the consequences of the failure to do so were clearly spelled out on the face of that order).

21. Rule 38(2) permits a party to apply for relief from that sanction. The test is whether it was whether it was in the interests of justice. But the party making the application is seeking a benefit from the ET. It is therefore for that party to make good its case that it is in the interests of justice. If no grounds are given, the application should fail.

22. The party is seeking to ask the ET to depart from the automatic consequence of the unless order. That will generally require something which takes the case out of the ordinary: that is, provides a basis for not simply allowing the ordinary consequence to apply (see **Thind** and **Global Torch**). That position can be contrasted with that to be adopted in an application for strike out under Rule 37.

23. Turning to the appeal, the first point was that a failure to carry out the balancing exercise *per se* constitutes an error of law, see **BBC v Roden**, a case involving the exercise of a discretion in the continuation of an anonymity order. The ET fell into similar error here: it relied on the fact that the Claimant had rectified his default but failed to weigh that factor in the balance against the other factors relevant to the exercise of discretion.

24. If, contrary to that case, the ET did carry out the relevant balancing exercise, then it failed to take into account all relevant circumstances; in particular, (1) whether the Claimant had demonstrated a convincing explanation (**Global Torch**); and (2) the public interest in complying with unless orders. Moreover the Employment Judge took into account an irrelevant factor; that is, whether a fair trial was possible at the date of the Reconsideration Hearing rather than at the date of the original dismissal of the claim (August 2014). The ET's reasoning in this respect effectively conferred a further benefit on the party in default; it was only if the ET allowed relief from sanction at the relevant date (1 August 2014) that it became a relevant consideration to ask whether a fair trial was possible at the later date.

25. It was important to note that **Harris** was a case involving an application for strike-out, not relief from sanction of an unless order.

26. Furthermore, it was irrelevant for the ET to consider that the award of costs amounted to a sanction in this case; again, that was conferring a further benefit on the party in default. From the Respondent's perspective, the costs award would fall to be made whether or not relief from sanctions was granted.

27. Finally the Respondent contended the conclusion was perverse given the ET's findings; the only conclusion properly open to the ET was that relief should be refused.

The Claimant's Case

28. The Respondent's reliance on the defaulting party establishing a compelling explanation was effectively adopting the language of cases under the **CPR**, but ETs are governed by their own **Rules**, not those of the **CPR** (see paragraphs 39 and 40 of **Harris**). A different approach is taken in the ET, see **Thind** at paragraph 20, which allowed that the fact that a breach of an unless order arose from the carelessness of the party in default or her solicitor would not itself be an absolute reason for refusing relief. That said, the Claimant accepted that it was right for the ET to have some regard to the reason for the default.

29. Turning to the decision in this case, the ET had regard to the relevant case-law; the fact that it did not expressly cite all the paragraphs relied on by the Respondent did not mean it did not have them in mind. As **Neary** suggested, whilst a Judgment had to demonstrate that the ET had regard to all relevant factors, it was not a requirement that they were expressly set out as if a checklist that had been ticked off. Considering the ET's reasoning at paragraphs 26 to 28 it was apparent the ET had regard to relevant factors: the degree of the material breach (paragraph 26), whether a fair trial was possible as at August 2014 (paragraph 27, and see **Thind**), the reason for the further delay before the Reconsideration Hearing (paragraph 27), the reasons for the Claimant's non-compliance (which did not include dishonesty or obduracy) (paragraph 28), and, although not providing an overly long explanation, the ET had heard from the Claimant and the reference to the Claimant having acted in person was not just relevant to the six-week period when he did so but also to the difficulties that continued to arise from this even when lawyers later come on board.

30. Further, it was not that the ET was saying that there should be no sanction. It had obviously taken the view that an award of costs would be the appropriate sanction in this case. Although the Respondent said that could only arise after it had taken a view on the question of relief from sanction (so it was no sanction, in fact) that was an overly technical approach to the reasoning. It was plain that the ET took this into account in the round.

31. As for the balancing exercise, it was to be noted that the Respondent itself - in its proposed balancing - failed to take into account the prejudice to the Claimant. Whilst accepting that was a factor sometimes so obvious it might not need saying, here it was a particularly relevant consideration given the background facts to this case. Taken as a whole, the conclusion fell within the ET's discretion and was not open to interference by this court.

The Respondent in Reply

32. The Respondent refuted any suggestion that its position required the application of cases dependent on the **CPR**. **Global Torch** was of general application to unless orders and relief from sanction. There was certainly no reason why those matters should not be treated in the same way in the ET.

33. As for prejudice to the Claimant, that might be a relevant matter, but compliance was entirely in his own hands. Equally there was prejudice to the Respondent; it was entitled to have the certainty of knowing that unless orders led to a final sanction.

Discussion and Conclusions

34. The decision with which I am concerned is the determination of the Claimant's application for relief from sanction under Rule 38(2) of the **ET Rules**. The test to be applied is

whether such relief is in the interests of justice. The ET's application of that test - in deciding whether it should set aside the order dismissing the claim for failure to comply with an unless order - should have in mind the overriding objective. It is all, however, plainly a matter of judicial discretion and I keep firmly in mind the many injunctions against appellate interference with the proper exercise of such a discretion by the ET (see the cases I have set out above). That said, if the Employment Judge here failed to carry out the relevant balancing exercise, took into account that which was irrelevant, failed to take into account that which was relevant, or reached a perverse conclusion, I am duty-bound to interfere.

35. What then was the Employment Judge obliged to take into account here? What did the interests of justice entail?

36. In **Thind**, it was said this would be a broad assessment; the material factors will vary considerably, albeit they will generally include the reason for the default and whether it is deliberate, the prejudice to the other party and the question whether a fair trial remains possible. The fact that an unless order has been made was also said to an important consideration, but it would only be one such consideration. That is obviously right: the whole point about relief from sanction in this context is that the operation of the unless order need not be determinative; it is possible that the earlier dismissal of the claim by operation of the unless order will be set aside.

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. So what was relevant here?

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

39. Also relevant was any explanation on the Claimant's part for what was accepted to be a material breach. The ET obviously did have regard to the extent of the breach and considered the explanation provided in part, but it cannot be said that paragraph 28 demonstrates engagement with the explanation for the entirety of the default. Either the Employment Judge did not so engage or he did not explain his conclusions fully in this regard.

40. On the other hand, I think it is fair to say that the Employment Judge had regard to the nature of the breach. He seems, on my reading of the Judgment, to characterise it as negligent rather than wilful.

41. The Employment Judge also sought to consider whether a fair trial remained possible, considering that question as at 3 December 2014 rather than 1 August 2014 (when he had already taken the view it had not been possible). Was that an irrelevant consideration? The

question must be whether it was in the interests of justice to look at the question at that time rather than when the sanction had in fact had been applied. The difficulty with the ET's approach is that it leaves the assessment open-ended: the party in breach can later seek to make good the default and argue that a fair trial is now possible. Given the importance of finality in litigation, is such a liberal approach in the interests of justice? Moreover, was the regard had to costs as an alternative sanction an irrelevant consideration given that was an order that could be sought regardless of whether the Claimant succeeded in his application for relief?

42. This was not a case, in my judgment, where the Employment Judge failed to carry out *any* balancing exercise. Where I consider he fell into error, however, was in not importing into that exercise the importance of compliance with the ET's unless order. Whilst I do not say that would be determinative of itself, it was a relevant consideration that I cannot see as having been included within the balance.

43. Connected to that was the question of the relevant date for the consideration of the question of fair trial. I do not go so far as to say that only one approach would be possible when seeking to answer that question. I can see that it might be arguable that the ET is entitled to consider it at the later date - the date of the reconsideration - testing that as against the interests of justice. What I do say, however, is that the ET must consider whether it is right to look at this question at the later date. That is not simply a matter of asking whether the further delay arose from some specific conduct on the party seeking the relief from sanction (although that might well be relevant) or merely whether that further delay has rendered such a fair trial now impossible. The ET must also ask whether it is appropriate to adopt that approach given the original default and bearing in mind the importance of finality in litigation.

44. Similarly, in terms of taking account of cost as a possible alternative sanction, that might be a permissible conclusion. Before deciding that it is, however, the ET should consider whether that penalty would be imposed regardless of the outcome of application for relief from sanction (so, effectively providing no further sanction).

45. Putting all those factors into the balance, alongside the apparent absence of any consideration as to whether the Claimant had provided a full (let alone satisfactory) explanation for his default for the entirety of the period in question, I am not satisfied that the ET's reasoning discloses a proper consideration of all relevant factors. That, in my judgment, renders the conclusion unsafe.

46. Can I dispose of this matter myself? I am not persuaded that there is only one result possible and I do not consider that the conclusion reached by the Employment Judge was necessarily perverse; it is unsafe because it reflects a failure to take into account all the relevant factors, not because it is necessarily wrong. Ultimately, this is properly a matter for the ET not the EAT.

47. As to whether that should be to the same or a different ET, I remind myself of the guidance in **Sinclair Roche Temperley v Heard & Fellows** [2004] IRLR 763. Whilst my Judgment makes some criticisms of the Employment Judge's reasoning, there has been no suggestion of any particular difficulty with him re-hearing the matter; this is not a case where the reasoning was wholly flawed or where there was any question of impropriety or bias. That said, there is equally nothing particular to be gained by sending this matter back to the same Employment Judge. This will inevitably be a short hearing. Pragmatically, it should be quicker to allow it to be relisted before any other Employment Judge rather than this specific one.

Moreover there is always a difficulty (no matter how professional the Employment Judge) in having to revisit a decision of this nature when it has been unpicked on appeal. On balance, therefore, I consider the more satisfactory course is that this matter should be remitted to be heard by a different ET. That can be any Employment Judge other than Employment Judge Kearsley, and on remission that ET will make its own findings and reach its own conclusions on the application for relief from sanction.

48. My order having been made on the appeal and the Appellant having succeeded in its appeal, Mr Nicholls QC has made an application under Rule 34A(2A) for his clients' costs, limited to £1,600, which comprise the £400 lodgement fee for the appeal and £1,200 for the hearing fee. Whilst the Rule provides a very broad discretion for the EAT in deciding whether or not it is appropriate to make such an award, where a party has been successful (and absent any issue relating to means) it is difficult to see any reason why such an order should not be made. I am unable to see one in this case. I therefore grant Mr Nicholls QC his clients' costs limited to £1,600 by way of fees.