Appeal No. UKEAT/0414/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6 May 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MR M HAMDOUN — APPELLANT

(1) LONDON GENERAL TRANSPORT SERVICES LIMITED
(2) ARRIVA LONDON SOUTH LIMITED — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR BARRY BLAKESLEY (Representative)
For the Respondents	MR DAVID McILROY (of Counsel) Instructed by: Moorhead James LLP Solicitors Kildare House 3 Dorset Rise London EC4Y 8EN

SUMMARY

PRACTICE AND PROCEDURE

PRACTICE AND PROCEDURE - Striking-out/dismissal

Paragraph B2 of an order required disclosure to be made, and paragraph B3 provided for subsequent inspection of that which was disclosed. It was not complied with, so the Respondent obtained an unless order, which required B2 to be complied with by a given date. It was, but inspection was not given. The Respondent applied for an order to compel this, since trial was imminent. The Employment Judge made an order recording that the unless order had not been complied with. This was in error, since B2 had been, and it was B3 that was outstanding. The Respondent's argument that the Employment Judge's decision was nonetheless plainly and obviously right was rejected. Though the Employment Appeal Tribunal had some sympathy with the Respondent's position, it could not say that there was only one possible outcome. An application for costs by the Respondent was rejected, since what the Claimant had done did not come within the wording of Rule 34A(1), and if it had done the Employment Appeal Tribunal would not have exercised its discretion to award them. However, nothing in the Judgment precluded the Employment Tribunal from hearing and ruling on any application to strike-out the claim which might hereafter be made by the Respondent, relying on persistent non-compliance.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. On 11 February 2014, Employment Judge Elliott at the London (South) Employment Tribunal recorded that the claim was dismissed. Her reasons were:

> **"The claim stands dismissed with effect from 22 November 2013 due to the Claimant's failure to comply with the Unless Order sent to the parties on 14 November 2013."**

The Claimant appeals against that Judgment.

2. An unless order requires specific actions and, if they are not taken by a specified date, provides for consequences to follow automatically. Those consequences are usually, though need not always be, the striking-out of the proceedings. The advantage of an unless order lies in the parties being clear about precisely what is needed to avoid that draconian consequence and to ensure that they are clear about the consequences and that it requires no further act or decision by the Employment Tribunal. To mark the passing of a claim having been struck-out for non-compliance with an unless order, the **Rules** require that notification be given to the party that this has happened. But the notification is not a step in the striking-out. It is a recognition of a state of affairs which is provided for by the law.

3. In **Johnson v Oldham Metropolitan Borough Council** [2013] EqLR 866 (a case which I am a little surprised has not seen wider reporting) the Appeal Tribunal dealt with some of the principles which had been identified by earlier decisions of the Appeal Tribunal and higher courts in respect of unless orders. An unless order, because of its nature and consequences, and because it is only useful, as I have described, if it is clear, requires care in drafting. It is not to be granted lightly because the consequences of non-compliance for a claim are serious. Compliance must be substantial and within the terms of the order. That is a

qualitative assessment. But if an unless order is complied with, the automatic consequence cannot follow. It does not matter that for other reasons that consequence may be entirely just as between the parties. It does not matter that there is a nearly irresistible argument to that effect. So far as the unless order is concerned, it has to be shown, if the matter is queried, that there has been substantial non-compliance with the precise terms of that order.

4. The grounds of appeal in the present case are that the Judge did not verify the facts with both parties before making a decision on a fact-sensitive issue, did not dispose of the case fairly and justly and that, because the Claimant had fully complied with the exact terms of the order, when the Judge dismissed the claims she was basing herself upon an error of fact or misapprehension of material fact.

5. In summary, the argument for the Claimant is that he did comply with the order and so the automatic consequence did not follow, however justified it might otherwise have been in the general circumstances of the case.

6. The relevant history can be stated fairly shortly. On 19 August 2013 at a case management discussion, Judge Freer made an order which required the disclosure of documents and, separately, the inspection of documents. They were, respectively, B2 and B3. B2 was described in the way in which lawyers, being careful about the use of the word "disclosure" and taking what Mr McIlroy rightly describes as a restricted approach to the word would use it. It referred to the identification by list of those documents which were or had been in the possession or power of the parties relating to the matters in issue.

7. That list was to be supplied by 16 September 2013 and was to include (identification of) any photographs or video recordings which the Claimant held in relation to any of his comparators. Inspection was to be a week later, on or before 23 September 2013. The parties were then to produce to the other parties the documents listed in the list as requested. Plainly that included copies of the photographs or video recordings.

8. 16 September came and went without a list having been supplied by the Claimant, though one was by the Respondent. In a letter of that date by Moorhead James LLP, acting for the Respondent, the solicitors said:

> **"We look forward to receiving by return the Claimant's list of documents (to include reference to mitigation evidence), together with any photographic or video evidence he has in his possession in relation to his comparators. …"**

9. The comparators had not been fully and clearly identified, and the Respondent expressed the hope that photographic or video evidence might assist the Respondent in identifying who was said to be a comparator, that issue relating to the quality of the driving of a bus for which the Claimant ultimately, it was said, had been dismissed.

10. On 27 September, Moorhead James wrote to the Tribunal, to complain about the Claimant's failure to disclose a list. They asked that an unless order should be made by letter dated 27 September 2013. That was refused on 21 October 2013 by the Judge. On 30 October 2013, the documents not yet having been disclosed in the strict sense of the word, Moorhead James persisted in the application for an unless order.

11. On 11 November two matters occurred. The first was an email sent to the Employment Tribunal at Watford in which, on behalf of the Claimant, Mr Blakesley acting as representative recognised that the Claimant had been, as he put it, "non-compliant with orders concerning

disclosures and bundle preparation for some considerable time". He went on to say that he expected to be in a position to get the disclosures to the Respondent by Wednesday 13 November.

12. Also on 11 November, but at Croydon, the Judge made an unless order. This is the critical order in the current case. It provided:

> **"Unless by the 22 November 2013 the claimant complies with paragraph B2 of the Order made on 19 August 2013 the claim will stand dismissed without further order."**

13. Thus the parties should have been clear that what was required was compliance with B2, that is with the disclosure provision of the earlier order. Though inspection was still required, any failure to give inspection was not the subject of the unless order. B3 was not made part of it.

14. The order was commendably clear to a reader who had a copy of B2 in front of them.

15. Just short of a week later, Mr Blakesley wrote to state what the Claimant had in his possession, in accordance with the terms of the order and, within a matter of days, after a query seeking precision by the Respondent, clarified precisely what he was saying the Claimant had. That, he submitted at the time in writing without dispute by the Respondent, fully complied with paragraph B2. Before me, Mr McIlroy has not disputed that the Claimant satisfied B2. What was never observed was the order for inspection consequent upon and following upon the initial disclosure. The letter from Moorhead James LLP on 18 November 2013 to Mr Blakesley said, in its penultimate paragraph, that:

> **"Given that the date for inspection of documents has also now passed, we ask that copies of any photographs and recordings, together with any other disclosure from your client (to include his mitigation evidence) are provided without further delay. …"**

16. That request was repeated in the first substantial paragraph of a letter of 12 December 2013. By 13 January 2014 nothing had been provided. This was in breach of an order made as long ago as August. It was a failure to co-operate with the Tribunal proceedings.

17. On 13 January 2014, Moorhead James wrote to the London (South) Employment Tribunal requesting an order that the Claimant disclose the video footage. That was strictly unnecessary since the order had been made some five months earlier. The letter went on to complain that the material had not been provided. In response, Employment Judge Elliott was said by the Tribunal Officer writing on her behalf to direct that the Claimant:

> **"… must allow the Respondent the opportunity to inspect the material disclosed [in] the Claimant's email of 17 November 2013, or will be in breach of the Employment Tribunal's Order and will once again risk a Strike Out.**
>
> **…**
>
> **The Claimant is to comply by no later than 3 February 2013 [sic]."**

18. By 3 February *2014* (it should have been), there had been no compliance. Moorhead James wrote again. It reported to the Tribunal that the Claimant had had more than enough time to obtain and provide copies. Numerous requests had been made. He had been granted two extensions of time, one in the form of an unless order, and there were concerns that the Claimant might not actively be pursuing his claim.

19. The response to that was the issuing of notification on 11 February that the claim had been struck-out. The problem with the notification is that there had been no such failure to comply with the unless order as alleged. That is because the unless order related only to B2. B2 had substantially been complied with. Mr McIlroy recognised as much as the start of his submissions to me today on this appeal.

20. Accordingly, there was an error by the Judge, which it is not difficult to understand in the context of the correspondence. It is all too easy for Judges under pressure of their caseload to fail to read back into what by now was the small print of the history of the case. The consistent failure of the Claimant had, I suspect, made matters no easier. But the fact remains, it was an error of material fact. A strict approach has to be taken to the automatic effect of a strike-out order. Because it requires no further consideration of a Tribunal before the effect is as stated it will be, in the event of non-compliance, there can be no such automatic termination of a claim for the failure to adhere to the spirit or the intention of an order: the failure is a failure to observe the letter of the order. If matters such as spirit or intent are to be raised, they have to be dealt with by the Judge at a hearing considering a strike-out, of which the party subject to the strike-out has been duly and properly notified in advance.

21. Mr McIlroy argues that this was one of those rare cases in which this Tribunal can say that the Judge's decision was plainly and unarguably right even though vitiated by an error of law. In effect, he argues, had there been a hearing there was no other decision to which she could properly come other than to strike-out the claim made by the Claimant.

22. I have very considerable sympathy with this point of view. The history here is one in which the Claimant says that he has in his possession photographic and video material which shows that others whom he asserts are in a comparable position to his own were not treated with the same severity by his employer as he was. For that matter to be tried fairly, the evidence he relies on plainly needs to be disclosed and considered if it is to play any part at all in the hearing. It is said in the list of documents to be relevant. The failure to provide it is completely unexplained and appears inexplicable.

23. Mr Blakesley argues that it is not for this Tribunal to decide what the Employment Tribunal would have done if it had had an application made to it by the Respondent to strike-out the claim a few days in advance of the hearing due for 24 February. There might be scope for a discussion in respect of the facts. He tells me in summary that he was under stress and difficulty at the time and suggests, therefore, that I cannot be satisfied that this is a case in which, come what may, there was no other alternative decision that the Judge could have reached on the material before her than to strike-out the claim.

24. In the case of **Jafri v Lincoln College** [2014] EWCA Civ 449, the Court of Appeal made it clear that the circumstances in which this Tribunal would make a decision on its own would be relatively rare. See the discussion in the Judgment of Laws LJ in paragraphs 19 to 21.

25. Though I accept that the undisputed fact was that the video footage was not offered for inspection and this was in repeated and unexplained breach of the order, I do not think that I can have such sufficient certainty that this will be regarded by the Tribunal Judge as unconscionable and contumelious default leading to a strike-out or that she should necessarily in the exercise of her discretion strike the case out. Accordingly I do not think that this Decision can be rescued by this particular route. It follows that the appeal has to be allowed.

Observations

26. The appeal is of a technical nature. At its heart, there is a real dispute between the Claimant and his employer in respect of which the failure, as it appears on the documents before me to be, by the Claimant to co-operate with the Tribunal in the fair and proper hearing of that dispute is highly regrettable. I have, however, to decide this appeal upon the basis of the principles which apply to strike-out orders and their automatic effect. Wider considerations as

to the way in which the parties have conducted themselves are not, as I see it, directly relevant to that decision.

27. Their conduct is relevant to the question of costs. Mr McIlroy, though on the losing side to this appeal, argues that the Appeal Tribunal should order costs against the Claimant in respect of the appeal. I should make it clear I draw a distinction between the costs of the Tribunal proceedings and the costs of the appeal proceedings. It is only the latter with which I am concerned. For me to be in a position to make such an order, I have to be satisfied, in accordance with Rule 34A of the **Employment Appeal Tribunal Rules 1993**, that:

> **"(1) … any proceedings brought by the paying party were unnecessary, improper, vexatious or misconceived or that there has been unreasonable delay or other unreasonable conduct in the bringing or conducting of proceedings by the paying party, [in which case] the Appeal Tribunal may make a costs order against the paying party."**

28. Proceedings here relate to proceedings before the Appeal Tribunal. The argument for the Respondent is that the whole appeal was unnecessary. In part this arises because, when the order was made of 11 February, the Claimant applied (23 February) for a reconsideration. That led to questions being addressed first to the Respondent but secondly to the Claimant by a request of 28 February 2014. The Claimant was required to state his position on the assertion that there had been a failure to disclose video footage in compliance with order B2 and simply did not respond. It would have been an appropriate response, which might very well have led to a reconsideration of her order if Mr Blakesley or the Claimant had pointed out that there had been no failure to comply with B2; B3 perhaps, but not B2. But that was not done. The application for reconsideration was rejected.

29. Secondly, when the matter came before this Tribunal for the first time, it passed before HHJ Richardson on paper. He stayed the appeal on the basis that the "obvious remedy" was an

application under Rule 38(2) of the **Employment Tribunal Rules 2014**, that being an application for reconsideration, which he thought would be quicker than an appeal and perhaps on wider grounds, noting that the Employment Tribunal had the power to extend time for that to be made. Mr Blakesley told me that he did not take advantage of that suggestion because he indicated he felt used, in acting for his various clients, to losing on time limits. He did not expect any concession from the Tribunal. The obvious course would have been, he submitted, for the Respondent to have conceded the appeal and the matter to be returned to the Tribunal. There was no need, really, for a hearing.

30. I recognise that, by the time that Judge Richardson made his comment, he may not have appreciated that there had been already one application for reconsideration which had been rejected. That did make it less likely that a second application on broadly the same grounds, which could have been advanced earlier, would have had success. It seems to me that it is difficult to bring the conduct of the appeal as such within the scope of Rule 34A(1). In saying that, I have had regard to whether this appeal was necessary at all in the context of the litigation. I think that with sensible co-operation on both sides it could have been avoided. One possible action might have been for the Respondent to concede the appeal, although a formal order would still have been needed, rather than resist it on the basis it was resisted. In the end I have come to the conclusion that the grounds are not made out and, if they were, I would not in this case exercise my discretion to award costs. I should emphasise that the outcome of this appeal is therefore that the order is set aside, that the case will proceed before the Employment Tribunal. However, I would emphasise I am making no order whatsoever that would prevent a further application being made by the Respondent if it feels it appropriate for either a strike-out of the claim or costs or both. That is entirely a matter for it, and if it makes such an application it is a matter for the Employment Tribunal to resolve.

31. It is on that basis that I allow this appeal.