Appeal No. UKEAT/0347/14/DXA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 April 2015

Before

THE HONOURABLE MR JUSTICE MITTING

(SITTING ALONE)

MR G G ENAMEJEWA — APPELLANT

(1) BRITISH GAS TRADING LTD
(2) CENTRICA PLC — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JOEL KENDALL (of Counsel)
For the Respondent	MR DAVID MASSARELLA (of Counsel) Instructed by: Messrs Pinsent Masons LLP 1 Park Row Leeds West Yorkshire LS1 5AB

SUMMARY

PRACTICE AND PROCEDURE - Striking-out/dismissal

Approach to be taken to application to revoke unless order under **Employment Tribunal Rules**, Rule 38(2) - akin to that to be adopted to relief from sanction application in an appropriate case.

THE HONOURABLE MR JUSTICE MITTING

Introduction

1. The Claimant was employed as a Retail Energy Advisor by the employers from 5 March 2012 until his dismissal for gross misconduct on 16 January 2013. By an ET1 form issued on 8 April 2013 the Claimant claimed that he had been wrongfully and unfairly dismissed and had also been the subject of discrimination on the grounds of race. The employers filed Grounds of Resistance, disputing all of his claims.

The Background

2. A case management discussion took place on 4 June 2013. Employment Judge Pearl listed the case for hearing from 4-10 December 2013. To that end he ordered disclosure by the employers on 2 July, by the Claimant on 16 July and thereafter the preparation of an agreed bundle. He also ordered the exchange of witness statements on 6 November. Later, for reasons connected with his health, the Claimant's time for disclosure was extended until 8 October 2013. He provided to the employers' solicitors 71 pages of documents stating:

> **"1. Pls find all 71 pages.**
>
> **2. Pls follow this exact ORDER.**
>
> **3. Do not change the ORDER."**

The employers' solicitors took the view that those demands were unreasonable because the exact order was not chronological and because the 71 pages included one, or perhaps more than one, document relating to an incident that had nothing, in their view, to do with the claim.

3. On 24 October 2013 the employers' solicitors by email objected to the inclusion of that document for the reason that I have indicated. The Claimant responded on the same day insisting on the inclusion of all 71 documents in the agreed bundle, "My reply is final."

4. The employers' solicitors then proposed that, because the document bundle was not agreed, the exchange of witness statements should be postponed until 15 November. On 20 November the Claimant emailed the employers' solicitors, saying he could only send the statements (by which he meant the witness statement) when the employers' solicitors includes "all my 71-page bundle documents". On the same day the employers' solicitor applied to the Tribunal for an unless order requiring the Claimant to provide his witness statement by 27 November. On 21 November Employment Judge Pearl sent a letter to both sides, saying that the Claimant could apply to add the disputed document or documents to the bundle at the trial and must disclose his witness statement "forthwith". If he did not "Employment Judge Pearl will on 22 November 2013 make the "Unless order" that is sought". On 22 November the employers' solicitors said that the Claimant had not provided the witness statement. The Employment Tribunal listed the case for a Preliminary Hearing on 27 November. On the same day the employers' solicitor said that she would send the password to documents which she had already sent electronically to the Claimant but password protected, to permit him to access the documents when she received the Claimant's witness statement.

5. The Claimant's response was as follows:

> **"Sam,**
>
> **1. You are being rude.**
>
> **2. Your offer is rejected."**

6. On 27 November Employment Judge Lewzey gave leave to the Claimant to include the disputed document or documents in the bundle and ordered both sides to exchange witness statements by 12 noon on 29 November. Her order was in these terms:

> **"WITNESS STATEMENTS**
>
> **Having considered the representations of the parties it is ORDERED that unless by 12.00 noon on Friday 29 November 2013 witness statements are exchanged (by sending new copies of the witness statements to the other party by email) the claim or response as appropriate shall stand dismissed without further order."**

7. On 29 November the employers' solicitors emailed their witness statements, unprotected by password, to the Claimant at 11:33am. The Claimant emailed his witness statement to the employers' solicitors at 12:08, eight minutes after the deadline set by the unless order. At 12:19, 11 minutes later, the employers' solicitors emailed the Tribunal, pointing out that the Claimant had not complied with the unless order and inviting the Tribunal to treat the claim as now struck out without further order.

8. 29 November 2013 was a Friday. The Tribunal responded on the following Tuesday, 3 December, in these terms:

> **"Further to the Unless Order made on *27 November 2013* which was not complied with by *12.00 noon on 29 November 2013* the Claimant's complaints has been dismissed under Rule 38.**
>
> **The hearing listed on *4-10 December 2013* has been cancelled.**
>
> **Rule 71 provides for reconsideration of judgments." (Tribunal's emphasis)**

9. On the following day the Employment Tribunal sent a further, longer document explaining what the Claimant should do if he wished the situation to be reviewed. On 9 December 2013, that is to say on what would have been the second last day of the hearing, the Claimant applied for reconsideration of the decision, to make and to give effect to the unless order of 27 November.

The Employment Tribunal Decision

10. That application came before Employment Judge Lewzey on 17 January 2014. In a careful and detailed Judgment, the Reasons for which were sent to the parties on 11 February 2014, she declined to set aside the unless order. The upshot was that the Claimant's claim stood automatically dismissed.

11. Having conducted an extensive review of the procedural history of the matter, which I have set out in the earlier part of this Judgment, she expressed her conclusions as follows in paragraphs 24 to 29:

> **"24. The Claimant is seeking to have the Unless Order made on 27 November set aside.**
>
> **25. In reaching her decision the Employment Judge has taken the following factors into account. The unless order was made against an extensive history. The order for exchange of the statements was originally made at the Case Management Discussion on 4 June 2013 and compliance was set for 6 November 2013. The Claimant became embroiled in acrimonious correspondence … (most of which were already in the bundle) which he said should be included. Orders were made resolving these matters at the preliminary hearing on 27 November 2013 including the documents within the bundle. At the preliminary hearing on 27 November 2013 before this Judge, it was confirmed that both parties had witness statements ready for exchange and an unless order was made against both parties for compliance by 12.00 noon on 29 November 2013. For the sake of clarity it was stated that new copies should be sent to the other party by e-mail. The Claimant was aware of this order at the preliminary hearing on 27 November and yet did not comply in advance. The Respondents provided a password protected set of witness statements on 20 November. The Respondents complied with their obligations under the unless order by sending copies which were not password protected at 11.33 (page 58). The Claimant did not send his until 12.08 (page 59). He has sought to say that this is because of a failure of his online facilities but has produced no evidence of this. The three documents he has produced do not relate to the 29 November. Mr Enamejewa would clearly have been able to send the e-mails at any time in the early morning of 29 November but did not do so. He waited until after he had received the Respondents witness statements.**
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> **26. Mr Enamejewa has complained that it was unfair to put the burden of the unless order on him, but the unless order was made against both parties in this case. There can therefore be no unfairness.**
>
> **27. Mr Enamejewa complains that this is a very serious dispute which should be heard. The Employment Judge notes that it was listed for a full merits hearing over five days from 4-10 December and it is only the failure to Mr Enamejewa to comply with the unless order that led to the cancellation of the hearing.**
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> **28. In any event this is an application for reconsideration of the unless order. The application has not been put on the basis that it was wrong for the unless order to be made. The unless order was imposed because of the history and the failure to comply with the tribunal orders. Both parties were warned that if either did not comply the claim or response would be struck out. The sanction was applied to both parties equally. The application for reconsideration must be for reconsideration of the unless order itself rather than its automatic sanction. Mr Enamejewa has not demonstrated that it is necessary in the interests of justice to revoke the unless order. His complaint is that the unless order became an unconditional judgment striking out his claim. He has not demonstrated to me that it is necessary in the interests of justice to revoke the unless order.**

> **29. In these circumstances it is the judgment of the Tribunal that the application for reconsideration of the unless order is refused and the unless order is confirmed. Accordingly the unless order operated to strike out the claim upon non compliance."**

The Law

12. As the language of her reasoning demonstrates, Judge Lewzey addressed the application on the footing that it should be dealt with under Rule 70 of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013**, which provides:

> **"A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again."**

13. Rule 70 replicates substantially Rule 34 of the **2004 Rules**. It was, by the time that they came to be replaced by the **2013 Rules**, established that an unless order which led to the automatic striking out of a claim could be the subject of reconsideration under Rule 34, now Rule 70, notwithstanding that the unless order was not itself a Judgment. It is unnecessary for me to analyse the learning that led to that conclusion. It was summarised by Wilkie J in **McMichael v East Sussex County Council** UKEAT/0091/11/SM and it was generally accepted that the doubts which Smith LJ had expressed in **Neary v Governing Body of St Albans Girls School and Anr** [2009] EWCA Civ 1190 at paragraph 5 had been laid to rest.

14. Since the coming into effect of the **2013 Rules**, it is no longer necessary for an Employment Tribunal to approach an application to revoke an unless order which has the consequence that the claim or response respectively is struck out under Rule 70. Rule 38 now contains an express and simpler provision. It 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."

Discussion and Conclusions

15. Employment Judge Lewzey was, therefore, in my judgment, in error in failing to address the application under Rule 38 and instead in addressing it under Rule 70. However the error is immaterial. Although the wording of Rule 70 is not identical to that of Rule 38(2) (it refers to "necessary in the interests of justice" rather than simply "in the interests of justice"), the difference in wording, in my judgment, makes no difference. If it is in the interests of justice that a step should be taken in furtherance of the overriding objective to deal with a case justly, then it is necessary in the interests of justice to do so as well. Accordingly, although she addressed the application under the wrong rule, it made no difference.

16. Of greater concern are the remarks that she made in paragraph 28. Mr Massarella for the employers accepts that the language chosen by Judge Lewzey is infelicitous. It suggests a focus upon the reason for making the unless order in the first place. Of course, the reasons for making an unless order in the first place are highly relevant factors. But it does not follow that the focus of the Tribunal is confined only to such factors. Nothing in Rule 38 prohibits an Employment Judge considering whether or not to revoke or set aside an unless order from taking into account events which have occurred subsequent to the making of the order. And there is no reason of principle why that should be so. Something that has occurred subsequent to the making of an unless order can make it in the interests of justice that the unless order should be revoked. Two simple examples will suffice. They can be based on the facts of this case.

17. If the Claimant had been prevented by sudden incapacity from sending his email before 12 noon, it is difficult to conceive that it would not be in the interests of justice to revoke the unless order and to give him any additional time needed to send his witness statement simply because his failure to comply with the order would have been no fault of his. Likewise, if when he was on the point of sending the email there was a sudden power failure which prevented him from doing so until after the deadline had expired, it is difficult to see how that would not be a highly relevant factor in determining whether or not it was in the interests of justice to set aside the order. Provided that it is acknowledged, as it must be, that subsequent events can be taken into account, then there is in reality little difference between considering whether or not to revoke an unless order and whether or not to grant relief from the sanction imposed by it. As is well known Underhill J, as President of this Tribunal, was the driving force behind the simplification and passing of the new rules. He can be taken to have had in mind his own observations in **Thind v Salvesen Logistics Ltd** UKEAT/0487/09/DA in which, commenting upon the clarification of the law produced in **Neary**, at paragraph 14 he made the following observations:

> **"The clarification brought about by *Neary* is welcome. The law in this area had become undesirably technical and involved. It had also, I might note in passing, caused considerable concern in Scotland, where the CPR has of course no application. The law as it now stands is much more straightforward. The tribunal must decide whether it is right, in the interests of justice and the overriding objective, to grant relief to the party in default notwithstanding the breach of the unless order. That involves a broad assessment of what is in the interests of justice, and the factors which may be material to that assessment will vary considerably according to the circumstances of the case and cannot be neatly categorised. They will generally include, but may not be limited to, the reason for the default, and in particular whether it is deliberate; the seriousness of the default; the prejudice to the other party; and whether a fair trial remains possible. The fact that an unless order has been made, which of course puts the party in question squarely on notice of the importance of complying with the order and the consequences if he does not do so, will always be an important consideration. Unless orders are an important part of the tribunal's procedural armoury (albeit one not to be used lightly), and they must be taken very seriously; their effectiveness will be undermined if tribunals are too ready to set them aside. But that is nevertheless no more than one consideration. No one factor is necessarily determinative of the course which the tribunal should take. Each case will depend on its own facts."**

18. Accordingly, in my judgment, Rule 38(2) of the **2013 Rules** is to be read in the sense that I have indicated. A Judge, of course, is addressing the procedural question, whether or not

the order should be set aside on the basis that it is in the interests of justice to do so. The order is the unless order. But, in addressing and determining that question, the Employment Judge is required to have in mind, if it is just to do so, factors which have occurred subsequent to the making of the order as well as those which occurred before it was made. Such factors will include those identified by Underhill J in **Thind** in paragraph 14 of his Judgment.

19. It is necessary for me to determine whether or not Judge Lewzey applied that approach to the decision which she made. Had her reasoning stopped at paragraph 27, I would have had no hesitation in determining that she did apply that approach and in upholding her decision. Although it is true that nowhere in the Decision does she state that the delay was of short length and that by itself, but for the existence of the unless order, it would not have prejudiced the employers and would not have prevented the hearing from taking place on 4-10 December. It was quite unnecessary for her to state those things. It was obvious that the delay was short. She said as much when she said that the witness statements had been served at 12.08, eight minutes after the deadline. It was obvious that, but for the existence of the unless order, no prejudice was caused to the employers. It was obvious that, but for the existence of the order, the trial could have proceeded notwithstanding the eight-minute delay. The omission to state such obvious factors does not, in my judgment, vitiate her reasoning.

20. But her reasoning did not stop at that point. It went on, in paragraph 28, to address what she understood to be the determinative question, whether or not it was wrong for the unless order to have been made. That at least is one reading of her words. It may not be that which she intended but, given the emphasis that she placed, in contradistinction to what she understood the Claimant to want, namely an order setting aside the unconditional Judgment striking out his claim, it is possible that she did misdirect herself and so drew her attention away

from the issues upon which she was required by the case-law, in particular paragraph 14 of **Thind**, to focus on.

21. I, of course, accept that Judgments of Employment Judges must not be scrutinised with a view to finding error but to be construed in the round and making reasonable allowances for infelicity of language. I readily accept Simler J's observation in **Redhead v London Borough of Hounslow** UKEAT/0086/13/LA, at 46:

> **"… The tribunal was not required to adopt a particular form of words or mantra, so long as it was possible to see that the tribunal asked itself whether in the circumstances, the sanction was a just one. …"**

22. It is only because I cannot for certain tell whether Judge Lewzey would have reached the same conclusion had she approached the matter in the way that I have indicated that she should, that I cannot uphold her Decision.

23. There is ample material upon which it could be upheld. For example her reasoning in paragraph 25 demonstrates that the Claimant's failure to serve his witness statement in time was the last straw in the longish list of breaches of the duty to act reasonably even if not in accordance with the letter of orders hitherto.

24. It was a significant and serious breach, in the language adopted by the Court of Appeal in **Denton v TH White Ltd** [2014] 1 WLR 3926, notwithstanding that it was a delay of only eight minutes, which would not, but for the unless order, have made the trial of the claim more difficult. Because of the existence of the unless order it had the effect of automatically vacating the hearing date and so putting the innocent party, the employers, to significant and unnecessary expense and difficulty.

25. If Judge Lewzey had decided that, notwithstanding that the delay was short and could have been put right by an order of the Tribunal made with the co-operation of both sides, nevertheless it was necessary to uphold the unless order, then her reasoning would have been unimpeachable. It is only because I am not certain that, had she approached the issue in the manner that I have indicated, she would have reached that decision that I am compelled to set aside her order.

26. It has not been suggested that if I do I should retake the decision, nor would I consider that to be an appropriate course. There are difficulties for this Tribunal, having identified an error of law in the reasoning of the Employment Judge, in substituting its own view unless certain that view was the only one which could reasonably have been arrived at or which was the one which the Employment Judge would have arrived at if the correct test had been applied. Accordingly, it seems to me that there is no reasonable alternative but to remit the decision to Employment Judge Lewzey for her to retake it in the light of the approach to the law which I have set out in this Judgment and I so order.

27. I order that this matter is remitted to Judge Lewzey to reconsider. I do so, notwithstanding Mr Kendall's submission that I should remit it to another Judge to consider afresh. My reasons for doing so are, first, Judge Lewzey has already had the conduct of this matter and has produced a detailed and careful and reasoned Judgment in support of the decision appealed. I have indicated in my Judgment that her reasoning up until paragraph 28 of her Decision is unimpeachable and need not be revisited. In those circumstances it seems to me that it would be a waste of effort and judicial time to require another Judge to start afresh. Although I acknowledge that Judge Lewzey will not, of course, have a complete recollection of

this case one year later, she will nonetheless be in a better position than would a Judge who had no prior knowledge of the case to read up and retake the decision which I have remitted.

28. Mr Kendall also submits that the Claimant may not have confidence in Judge Lewzey's decision if she is required to retake it. This raises both a question of principle and the factual background to the appeal which I have determined. As originally drafted the grounds of appeal made extensive allegations of racism, fascism, hooliganistic conduct and, to put it at language of a lower temperature, unjudicial conduct on the part of Judge Lewzey and Judge Pearl but in particular on the part of Judge Lewzey. If it were to be thought that, by making allegations of that kind, which have been dismissed as unfounded, a litigant could influence the choice of Judge who was to determine his claim, then it would be open to unreasonable and unscrupulous litigants in effect to select the Judge that they thought most likely to be favourable to their cause. That is something which, as a matter of principle, must not be allowed. If there had been anything in the allegations made by the Claimant against Judge Lewzey, then it would be a different matter. But there is not. In those circumstances there is not only reason why Judge Lewzey should not be invited to redetermine the application, there is every reason why she should be rather than any Judge. For those reasons this application will be redetermined by Judge Lewzey unless for some reason she is unable to do so.

29. I also remit consideration of whether or not to make a costs order against the Claimant to Judge Lewzey for her to decide in the light of her conclusion about the remitted substantive issue. She will be perfectly able to reach the same decision about costs even if she were to decide that the unless order should be revoked for the reasons that she explained in her Costs Judgment, but if she were to revoke the unless order that would be a factor that she did not have in mind when she made her original costs order. Accordingly, although it might well make no

difference, I cannot say for certain that it would make no difference and, as I am remitting the substantive order to her in any event, it will cause no additional cost or inconvenience if I also remit the costs order to her as well and I so order.