Appeal No. UKEAT/0158/16/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 October 2016

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR H SINGH APPELLANT

MR S SINGH TRUSTEE RESPRESENTATIVE RESPONDENT
ON BEHALF OF THE GURU NANAK GURDWARA WEST BROMWICH RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JOSEPH SYKES (Advocate) Frontline Advice 107 Fleet Street London EC4A 2AB
For the Respondent	MR MARK STEPHENS (of Counsel) Instructed by: Aspect Law Newhall Works 58 George Street Birmingham B3 1QA

SUMMARY

PRACTICE AND PROCEDURE - Striking-out/dismissal

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

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

Dismissing the appeal:

The ET had demonstrably carried out the requisite balancing exercise and had adequately explained why it had reached the conclusion it had.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and Respondent, as below. This is the hearing of the Claimant's appeal from a Judgment of the Birmingham Employment Tribunal (Employment Judge Goodier, sitting alone on 9 February 2016; "the ET"), sent to the parties on 23 February 2016; by which the ET refused to grant the Claimant's application for the setting aside of the ET's earlier Unless Order or of the dismissal of the Claimant's claim for breach of that Order, such application having been made under Rule 38(2) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules 2013"). Representation before the ET was as it has been before me at this hearing.

2. The Claimant's appeal was initially considered on the papers by HHJ Peter Clark to disclose no reasonable basis to proceed. After a hearing under Rule 3(10) of the **Employment Appeal Tribunal Rules 1993** before Slade J, the appeal was permitted to proceed on two related grounds: (1) whether the ET failed to conduct the relevant balancing exercise in deciding the application for relief from sanction; and/or (2) whether the ET's reasoning was adequate to its task in this regard. These were originally grounds 1 and 3 of the Notice of Appeal; Slade J did not permit ground 2 to proceed. Hereafter, I have adopted the same course as the Claimant, consecutively re-numbering the two remaining grounds of appeal.

The Background

3. The Claimant was employed as a priest at the Gurdwara in West Bromwich from 16 December 2012 until his dismissal on grounds of misconduct on 6 July 2014. On 5 November 2014, he presented an ET claim, which was amended, on 21 January 2015, at a Preliminary

Hearing before EJ Kearsley. The Claimant's claims included complaints of unpaid wages and of unfair dismissal in various forms. One issue arising on the claims related to how many hours the Claimant was required to work for the Respondent. For the Claimant, the figure was initially put at 90 per week; the Respondent said it was 25-27 hours.

4. EJ Kearsley originally listed the matter for a three-day Full Merits Hearing, due to start on 29 April 2015. Orders were made for disclosure and the exchange of witness statements. On 16 April 2015, there was a further Preliminary Hearing, this time before EJ Dimbylow, who dealt with various applications for specific disclosure and was assured by the parties that, if the Orders were complied with, the case could still be heard in accordance with the earlier listing. In fact, however, further difficulties arose with the interlocutory steps. In addition, whilst the Claimant had served a Schedule of Loss as directed, this now put his hours at 110 per week.

5. In the circumstances, the hearing that had been due to start on 29 April was converted into a telephone Preliminary Hearing before EJ Goodier, who undertook a comprehensive review of where the parties had got to in terms of compliance with earlier case management directions, clarified various aspects of the case and gave further directions as appropriate. One such direction related to the Claimant's income, in relation to which the ET recorded:

> **"13.5. The respondent had in its possession documents relating to the claimant's bank account which it considered suggested that he had received payments in amounts inconsistent with his case as pleaded, and as modified in the 23 April Schedule of Loss. Mr Stephens asked me to direct the claimant to disclose copies of all his Bank Statements covering the period material for his claim. Mr Sykes resisted that request, and I did not consider it necessary at that stage to make such an order. Instead, I required the claimant to make clear in his witness statement "full and frank details" of all his income from 1 December 2012 (the start of his employment) to the date of the statement, including the source of his income and "whether [it] derived from employment, self-employment, donations or otherwise howsoever"."**

6. Both parties having sought to enlighten me further as to their respective positions below, I understand that - from the Respondent's point of view - it seemed the documents relating to the Claimant's bank account suggested he was receiving income from sources other than the

Respondent and this further contradicted his claim to be working such long hours for the Respondent. In any event, the ET did not consider it appropriate at that stage to order disclosure of the Claimant's bank statements but did require him to fully explain the position in his witness statement, as recorded in the citation I have given above.

7. Having directed that the Full Merits Hearing should be re-listed for five days, EJ Goodier, relevantly, ordered as follows:

> **"5. <u>Witness statements</u>**
>
> **5.1. By 17 July 2015 the parties shall exchange witness statements of all witnesses on whom the parties wish to rely, including the claimant himself. The claimant's statement shall include full and frank details of:**
>
> **(a) any and all income received by him from 1 December 2012 to the date of the statement;**
>
> **(b) the source of such income; and**
>
> **(c) whether such income derived from employment, self-employment, donations or otherwise howsoever."**

8. On 17 July 2015, the Respondent was ready to exchange witness statements, but the Claimant was not. The Respondent applied to the ET for an Unless Order. The Claimant applied for a variation of the earlier Order to extend time for compliance until 4.00pm on 10 August 2015, explaining:

> **"14.2. … "the case worker who deals with the claimant and his colleagues, who speaks some common language with them, is overseas until 28 July and will need two weeks to put the witness statements … into final form. The writer does not have the necessary language ability. The case worker had been requested to complete the work before going on overseas holiday, but it had proved difficult to schedule the necessary time with the claimant and the witnesses. 10 August is over five weeks before trial …" "**

9. Considering the two applications, EJ Goodier decided to allow both, as he explained:

> **"14.3. … As the claimant's representative had said, exchange on 10 August 2015 still allowed time for the parties to be ready for trial starting on 21 September 2015. I considered that in view of the history of the case there was a serious risk that without an unless order there would be further slippage of time, and the loss of the trial dates. Since 10 August 2015 was the date suggested by the claimant's representative compliance by then was plainly practicable. In my reasons for my Order I noted that even if the case worker mentioned in the application were delayed in returning to the UK, or found himself busy on his return, compliance by 10 August would remain practicable. The claimant's language is East Punjabi. There is a very large Asian heritage population in this City, and no doubt with reasonable industry the claimant's representative could secure the services of an interpreter from that language."**

10. The ET's Order thus provided:

> **"<u>Variation to Order of 29 April 2015</u>**
>
> **The Order made by the Judge on a preliminary hearing on 29 April 2015 is amended so that:**
>
> **(a) paragraph 5.1 of it begins: By 4.00 pm on 10 August 2015 the parties shall exchange witness statements of all witnesses on whom the parties wish to rely …**
>
> **(b) the remainder of paragraph 5 remains as at present; and**
>
> **(c) a new sub-paragraph 5.5 is added at the end of paragraph 5 of it, as follows:**
>
> > ***Unless by 4.00 pm on 10 August 2015 the claimant has complied with paragraph 5.1 of this Order the claim shall stand dismissed without further order."***

11. The Employment Judge continued in his reasons for that Order as follows:

> **"14.5. … "The unless order is intended to be complied with. Any application by the claimant for a further extension of time, or from relief from the consequences of non-compliance, is for the reasons given above most unlikely to succeed"."**

12. Subsequently, the Respondent reported that the Claimant had failed to comply with the Unless Order and on 28 August 2015 the ET wrote to the parties that the Claimant had been dismissed on 10 August 2015 for non-compliance. The Full Merits Hearing listed for 21-25 September 2015 was duly cancelled.

13. The Claimant applied to have the Order dismissing his claim to be set aside on the basis that this was in the interests of justice, that application being made under Rule 38(2) of Schedule 1 of the **ET Rules 2013**. This was the application that came before EJ Goodier on 9 February 2016, after an earlier listing was postponed on the Claimant's application.

<u>The ET's Decision and Reasoning</u>

14. Having provided a detailed narrative of the background and a careful exposition of the law, the ET turned to the questions raised by the application before it. Satisfied that the Unless Order had been properly made and that the requirement upon the Claimant was not merely for the purpose of any Remedy Hearing, the ET rejected the argument that the Claimant could rely

on his Schedules of Loss by way of compliance: what had been required of him was the service of his witness statement, and that which was served on 26 August was, as Mr Sykes had acknowledged, not in full compliance; neither was that subsequently served on 18 September. Being satisfied that the Claimant was indeed in breach of the Unless Order, the ET considered such explanation as had been provided but found it was neither plausible nor satisfactory.

15. Accepting that, in terms of availability and continuing reliability of evidence, on its face a fair trial seemed possible. The ET turned to consider that question in a broader sense. It expressed concern that the terms of the Unless Order had still not been complied with and there was no satisfactory and credible explanation for non-compliance. Allowing that a fair trial must mean trial (a) within a reasonable period of time, (b) with reasonable and proportionate preparatory work on both sides, and (c) commitment of a reasonable and proportionate share of judicial and administrative resources by the ET, the ET questioned whether it could have confidence that a fair trial was still possible in terms of meeting those requirements:

> **"18.7.6. … In my judgment the history recounted above amply shows that there can be no confidence that any of the three provisos noted above would be met. It will be self-evident, for example, that this intrinsically simple case has absorbed a wholly unreasonable amount of the time of Employment Judges. This is quite unfair to other litigants the progress of whose cases must inevitably suffer as a result."**

16. Whilst the ET allowed that the prejudice to the Respondent might be mitigated by an award of costs, it considered that such an award might be available to it irrespective of the decision on the application. The ET also considered the history of the proceedings more broadly. The application for relief from sanction under Rule 38(2) had been made promptly, and the ET had not found the Claimant specifically at fault in respect of earlier Orders, save for the first Order regarding witness statements, which had of course led to the Unless Order. Ultimately, however, the ET considered that it must have regard to public policy concerns:

triable cases must be brought to a hearing if possible and in a proportionate manner; taking all factors into account, the ET did not consider that it should grant the relief sought.

The Relevant Legal Principles

17. The relevant legislative provision is found in the **ET Rules 2013** at Schedule 1, Rule 38 as follows:

> **"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."**

18. I have previously had to consider the approach the EAT should adopt when hearing appeals relating to ET decisions under Rule 38(2), in **Morgan Motor Company Ltd v Morgan** UKEAT/0128/15/DM. The obvious starting point is to note that the ET is bound to determine such applications on the basis of what it considers to be in the interests of justice. The determination of that question necessarily requires that the ET exercise its judgment, and it must do so rationally, not capriciously, and reach its decision in accordance with the purpose of the relevant legislation, taking into account all relevant factors and avoiding irrelevant factors (**Transport for London v O'Cathail** [2013] ICR 614 CA and **Governing Body of St Albans Girls' School v Neary** [2010] IRLR 124 CA). Provided the ET's decision meets these requirements, it is not for an appellate court to re-hear a case or, absent an error of law, interfere with an ET's exercise of judicial discretion in this regard (see **Neary** and paragraph 2 of **Harris v Academies Enterprise Trust and Ors** [2015] IRLR 208 EAT).

19. As for what an ET has to take into account, that will depend upon the particular circumstances of the case. The fact that an Unless Order has been made will be one factor but is not determinative. Indeed, it cannot be said that any one factor will be necessarily determinative of the course an ET should take (**Thind v Salvesen Logistics Ltd** UKEAT/0487/09/DA). What is required is a broad assessment of what is in the interests of justice in the particular case under consideration (**Thind**), which will inevitably involve a balancing exercise on the part of the ET, as should be apparent from its reasoned Judgment (see **BBC v Roden** UKEAT/0385/14/DA at paragraph 39).

Submissions

The Claimant's Case

20. In terms of the approach (ground 1), Mr Sykes observes that the cases of **Morgan** and **Roden** both emphasise the need for the ET to conduct the balancing exercise, albeit that they left open the precise nature of the balance required. In **Thind** the EAT allowed that the factors material to the ET's assessment would vary considerably according to the circumstances of the case. In the present case, the ET had set out the various factors it considered material, had stated it had balanced out those factors, but had not explained how it had done so.

21. Moreover, the ET had identified eight factors as relevant to its consideration in this case: (1) material non-compliance with the Order, (2) explanation for non-compliance, (3) whether a fair trial was still possible, (4) prejudice, (5) alternative sanction, (6) promptness of the application for relief, (7) compliance with other Orders and (8) relevant policy considerations. It had found positively in favour of the Claimant in respect of five of those factors, namely that a fair trial was possible at the date of dismissal of the claim (3), that the prejudice to the Claimant was grave (4), that costs was an alternative sanction (5), that the

application for relief was made promptly (6), and that the Claimant had complied with all other Orders save those in respect of the financial information sought in his witness statement (7). Those five factors demanded the grant of relief, yet the ET apparently gave them no credit; they did not appear to have been put into the balance. The ET instead attributed weight to just three factors: non-compliance with the requirement for financial information to be given in one section of the Claimant's witness statement (1), the lack of credible explanation for this (2), and the poor prospect in the future for a fair trial as defined by the requirements that the ET set out, namely trial within a reasonable time, reasonable and proportionate preparatory work and reasonable and proportionate share of judicial and administrative resources (8). There was no indication of a balancing of these factors. The ET simply attributed weight to three. Accepting that the ET did not have to give a perfect explanation, it still had to be adequate to the task. It needed to explain how the ET had carried out the balance.

22. More specifically, the ET failed to explain what it considered to be the effect of the non-compliance. At paragraph 18.7.6 it referred to the Claimant's non-compliance but had failed to draw any conclusion as to whether that had a material impact on the question of fair trial; a material factor but there was no indication the ET had taken proper account of this. Specifically, the ET did not state at paragraph 18.7.7 (when addressing the question of prejudice) that the Respondent was prejudiced by the non-compliance, and it was material to observe that, although the ET expressly absolved the Claimant from blame for any non-compliance with the ET's Orders at earlier stages (see paragraph 18.7.10), it apparently saw a risk of prejudice to the Respondent arising from a probability that:

> **"18.7.7. … [the Respondent's] costs would be inflamed by further non-compliance with Orders by the claimant or his advisors on his behalf."**

23. The ET had apparently felt that the requirements of the **Civil Procedure Rules** should be imported into the balancing exercise - that was what it was doing in the second part of paragraph 18.7.6 - and had stated it had no confidence that those requirements would be met, but had not - given it had not found the Claimant blameworthy for earlier breaches of the Orders - explained why that should be so. This was a further illustration of the failure to explain how the ET had carried out the requisite balancing exercise. Similarly, when considering the possibility of costs as an alternative sanction, the ET showed no indication it had considered what might be the effect of making such an award at that stage rather than possibly at some point in the future, still less of putting that into the balance. When scrutinised, the Claimant's non-compliance was not of great materiality to the question of fair trial. Whilst he had failed to make a general averment that he was not receiving other income, the other parts of his evidence enabled an inference that he was not doing so. Moreover, the ET had failed to make clear at what point it was considering the position: at the time of the strike-out itself, at the time of the Reconsideration Hearing, or at some future time? By the time of the Reconsideration Hearing greater financial disclosure had been provided, and it was unclear whether the ET had properly taken account of that, albeit its recognition that a fair trial remained possible in terms of the evidence appeared to acknowledge that reality.

24. In terms of the matters that apparently weighed with the ET, it had failed to demonstrate it had followed through on the points in question: for example, whether the fault lay at the door of the Claimant or his representatives and how that might impact upon the issues that weighed with the ET. In particular, there was no indication that the ET had factored into account the Claimant's explanation. Should the Claimant's appeal be allowed, the appropriate course would be for this matter to be remitted for fresh consideration of the Claimant's application for relief; this was not an assessment that the EAT could undertake itself.

The Respondent's Case

25. For the Respondent, Mr Stephens first started by reminding me that the appeal had been permitted to proceed only on limited grounds. Specifically, the first ground contended that the ET had failed to conduct a balancing exercise; that was not permission to argue there was a failure to conduct a *reasonable* balancing exercise. By the second ground, the Claimant was permitted to argue there had been a failure to provide adequate reasoning, although in truth that added little to the first ground. In general terms, the refusal of relief in this case was a permissible decision. The ET had made a judgment call in the context of the case on the facts specific to it. The appeals in **Roden** and **Morgan** had both concerned the failure to take into account relevant factors; that was not the point raised by this appeal.

26. As for the approach to the ET's Judgment, it had a wide discretion and was not required to show its workings. At most, the argument on explanation was raised by the second ground - the **Meek v City of Birmingham District Council** [1987] IRLR 250 CA point - and it had to be borne in mind that there was a clear distinction between the reasoning required on a Full Merits Hearing Judgment and that required on a case management decision such as this. Furthermore, the reasoning had to be read in totality; doing so, it was plainly adequate to the task.

27. In exercising its discretion, the ET had been required to take into account all relevant factors but not to give particular weight to any particular factor - it was not a mathematical calculation - and the EAT in **Morgan** had given a reminder that it was not for the appellate courts to interfere. More than one conclusion was possible, and that had to be allowed for on any appeal. No one factor could necessarily be determinative (see **Thind**).

28. As for the balancing exercise, the ET needed to show *what* had been weighed, not *how* it had weighed it; in so doing, it was apparent that material factors could include, per **Oyesanya v South London Healthcare NHS Trust** UKEAT/0335/13/JOJ:

> **"39. … the need for compliance with rules and procedural timetables, the need to deal with cases expeditiously and fairly, the need to justify, with good reasons, any indulgence such as an extension of time, and the requirement that orders of the court should be treated seriously by those to whom they are directed and complied with. …"**

29. See also paragraph 35 of **Morgan**, where it was allowed that the interests of justice could include consideration of the overriding objective, and see also paragraph 39 of **Harris**. In the Claimant's submissions, it seemed to be suggested that non-compliance ought not to have been weighed against the Claimant, but he had conceded there had been a failure to comply (see paragraphs 18.7.2, 18.7.3 and 18.7.6 ET Reasons). That was a relevant factor to which the ET was entitled to give weight.

30. Further, the Claimant was wrong to suggest that either **Morgan** or **Roden** permitted the EAT to scrutinise the weight given to different factors. They required merely that which this ET had done. It had a broad assessment to make and a judgment call to undertake. There was a real issue as to how the Claimant had sums in his bank account, as he apparently had, when he was allegedly working such long hours. The Respondent had sought specific disclosure of the Claimant's bank statements, but the ET had declined to give that order; the order in respect of the witness statement was seen as sufficient. That was what had led to the order for the specific aspect of the witness statement in issue, and the Claimant had then failed to comply and had first sought an extension with a proposed new date for compliance, to which the ET had agreed, because it would still enable the trial date to be preserved. The Claimant was therefore given the indulgence he had sought, but subject to an Unless Order. He had then again failed to comply. That was admitted, and the Claimant had failed to make good that non-compliance

even at the date of the Reconsideration Hearing. The ET's conclusion as stated at paragraph 19 referred to having weighed and balanced the factors in the preceding paragraphs. It had then exercised a judgment call in coming down on one side of the line but expressly had relied on and referenced to the reasoning in the preceding paragraphs.

The Claimant in Reply

31. In reply, Mr Sykes urged me that the EAT in **Morgan**, specifically at paragraph 42, had referred to the ET's failure to have regard to the importance of compliance with the Unless Order, which had shown that the EAT was entitled to interfere with the weighting given to particular factors (see the example of an ET undertaking the task properly at paragraph 20 of **Harris**). The conduct of the balancing exercise must be adequately explained to show why one factor weighed more heavily than another.

Discussion and Conclusions

32. The issues raised by the two grounds of the appeal are interlinked. The ET plainly listed the various factors it considered relevant, and there is no ground of appeal before me in respect of that, but the question is whether it then in fact carried out the balancing exercise required of it or - if it did - whether it failed to provide adequate explanation of what it had done. As Mr Stephens has reminded me, the ET was engaged in making a judgment call; it is possible that a different ET faced with the same facts might have reached a different decision. Of itself, that would not be sufficient to permit interference by an appellate body.

33. That said, the ET was obliged to reach its decision judicially - that is, applying the correct test, having regard to relevant factors, disregarding the irrelevant - and to demonstrate that it had engaged in a proper assessment of the material circumstances before determining

which side of the line to come down on, in terms of its conclusion as to what was in the interests of justice. That did not mean, however, that the ET had to engage in some kind of tick-box or totting-up exercise; it was not required to count up how many factors seemed to weigh in the Claimant's favour and how many in the Respondent's. Equally, it was not obliged to show its workings as if this was some kind of question in a maths exam. This kind of assessment is simply not capable of such a mechanistic breakdown of factors and weighting. It is an art, not a science. It is properly to be described as a judgment call.

34. All that said, what does have to be apparent is that, as a matter of substance and not simply form, the ET *did* weigh the different relevant factors in the balance (see **Roden**), and in this regard I am not sure that I gain much by differentiating between the reasons that need to be given for a final Full Merits Hearing Judgment and a case management decision. The reasoning had to be adequate to the task, and the task was to demonstrably carry out the requisite balancing exercise. As Mr Sykes reminds me, from the Claimant's point of view this Judgment was the final Judgment.

35. Bearing that in mind, I then turn to the ET's reasoning. In reaching its final conclusion at paragraph 19, the ET expressly stated that it had considered, weighed and balanced the factors that it had considered material in this case, and expressly referred back to the far lengthier reasoning set out in the preceding paragraphs. Mr Sykes has gone through a number of the factors addressed in the detailed assessment set out at paragraph 18 - in particular at paragraph 18.7 and the sub-paragraphs there - and has criticised the ET's assessment in certain regards, but there is no appeal before me in terms of the materiality of the factors taken into account: the issue raised is whether the ET in fact balanced those factors and adequately explained that it had, and how it had done so, in its reasoning. That said, I understand Mr

A Sykes' point to be really more of an illustrative one, his argument being that the ET cannot actually have balanced these factors in its assessment because the reasoning does not demonstrate proper engagement with their materiality in this case.

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36. I disagree. What the ET's preceding reasoning at paragraph 18 demonstrates is, in my judgment, a real engagement with the different factors that the ET considered relevant to its task. The individual sub-paragraphs show a grappling with the particular tensions raised by those factors, thus: the assessment of fair trial simply on the face of the evidence countered by the question of whether it could be a fair trial given considerations of delay and proportionality; consideration of whether the prejudice suffered by the Respondent might be addressed by the alternative sanction of a costs award, but noting that would fail to respect the Respondent's potential right to costs even if relief was not granted; and the issue of non-compliance, where the ET had not been prepared to resolve and award blame in respect of each of the interlocutory spats between the parties but had still been faced with a breach of its own witness Order and then the subsequent Unless Order by the Claimant, which it (permissibly) considered relevant to the potential future conduct of the proceedings.

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37. Ultimately, I consider that the Claimant is in fact urging me to conduct my own assessment of what was material and to which factor or factors most weight should have been given. That, however, is not my role. **Morgan** does not suggest that the EAT is permitted to interfere with the weighing of different factors where different views might legitimately be taken. The reference in that case to the importance of complying with Unless Orders is simply a record of that public policy consideration as a factor (as had been allowed in **Thind**), not a requirement that it should be regarded as having some specific weighing in itself.

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38. The ET in this case was best placed to reach a decision on the various factors material to its consideration. It painstakingly carried out an assessment of each of those factors, in each instance demonstrably balancing the competing considerations and coming to a view as to which side of the line it considered the interests of justice fell. I am satisfied it did indeed undertake the requisite balancing exercise and that it adequately explained how it had done so. It is not for this court to interfere with that judgment call. I duly dismiss the appeal.

39. Having given my Judgment, I received an application for permission to appeal to the Court of Appeal by the Claimant on two points: (1) the ET erred in law in failing to balance the factors against each other relationally, there was no weighing of future non-compliance against past compliance, and the ET failed to explain the point in time at which it was carrying out its assessment (errors which also fed into the EAT's Judgment); (2) there was inadequate reasoning and the EAT had failed to appreciate this was a separate consideration. Further, there were other compelling reasons why this matter should concern the Court of Appeal: the approach to be taken under Rule 38(2) and the reasoning required of an ET were matters of general importance needing clarification and thus justified permission to appeal.

40. I disagree. As I have concluded that the ET demonstrably carried out the requisite balancing exercise and that was adequately explained, I am unable to see there is any arguable point of law. As for the specific points, materiality of non-compliance was a matter best assessed by the ET; that was its role, it was plainly a material point in the issues between the parties, and the ET demonstrably took that into account and was entitled to do so. As for the timing of its assessment, the ET did not restrict its consideration to the point of time that compliance had been required with the Unless Order but, erring in the Claimant's favour, looked also at the point of time of the reconsideration or relief application and hearing and as to

what it might see happening in the future. I can see no error in that approach, which was explained by the ET. As for adequacy of reasons, I took the view, in the Claimant's favour, that the reasoning should not be limited to that which might normally be required for case management decisions, but I also considered this question was interlinked with the first ground. I remain of that view. Given the very full reasoning at paragraph 18 of the ET's Decision (let alone taking the Reasons as a whole), I am unable to see there is any point of law raised in this regard, let alone a point with any reasonable prospect of success. I am also unable to see any other compelling reason for this matter to trouble the Court of Appeal. There is already a body of case law relevant to the question of the approach to Rule 38(2) and to the respective roles of the ET and the EAT.