Appeal No. UKEATS/0003/14/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 2 May 2014
Judgment handed down on

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

MRS ANGELA MURRAY — APPELLANT

STANDARD LIFE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS D BAIN (One of Her Majesty's Counsel) Free Representation Unit of the Faculty of Advocates
For the Respondent	MR S BROCHWICZ-LEWINSKI (of Counsel) Instructed by: Pinsent Masons LLP 141 Bothwell Street Glasgow G2 7EQ

SUMMARY

PRACTICE AND PROCEDURE – Review

Review of an order for strike out following an unless order. The Claimant made claims of unfair dismissal and discrimination. At the start of a full hearing the Employment Tribunal asked for clarification of the case. The Respondent drafted a list of questions to be answered. The ET made an unless order, to the effect that the answers must be provided in 24 hours. Answers to some questions were provided, and some further information was provided a few minutes after the deadline. The ET decided that the answers were insufficient and that the order had not been complied with. The ET then sat, as a three person Tribunal, and refused a request for review of the strike out order which had been made in light of non-compliance. It refused review under rule 35(3).

The Claimant argued that the order should be reviewed and the case remitted for a full hearing.

Held: the case should be sent for a full hearing. The information supplied by the Claimant was sufficient to give notice of her case. The Respondent had been prepared for a full hearing and the questions raised by the ET had resulted in some confusion. The ET had not shown in their reasons that they had fully considered all submitted to them at the stage of review and had erred in law by not doing so. In all of the circumstances the EAT was in as good a position as the ET to consider the review. The interests of justice required the decision to strike out to be reviewed to enable the case to be determined on its facts.

THE HONOURABLE LADY STACEY

1. This was a full hearing in a conjoined case in which claims connected with disability discrimination and unfair dismissal are made. I will refer to the parties as Claimant and Respondent as they were in the Employment Tribunal (ET). This decision should be read along with my decision under rule 3(10). This case has a long and unfortunate history. The Claimant suffered a haemorrhage and stroke in 2006 and was off work until 2007. She claimed that she had been subjected to disability discrimination when she tried to get back to work. She went off sick in 2009, suffering from stress. The Respondent dismissed her on grounds of capability in 2011. She made a claim for unfair dismissal. There have been case management discussions and there was a date set for a full hearing at which the events with which this appeal are concerned took place. So far there has been no hearing to determine the facts of the case and the legal consequences.

2. The Claimant has been represented by many different people and has also appeared on her own behalf. At latest hearing Ms D Bain QC assisted by Mr C Jones appeared under the auspices of the Free Representation Unit of the Faculty of Advocates. For the Respondent Mr Brochwicz-Lewinski, counsel, appeared. Previously another counsel, Ms Eeley, had appeared for the Respondent. I understand that she was ill, and a request was made in advance for a postponement. I declined that request in view of the age of the case. I am grateful to both counsel for taking instructions and appearing at short notice. Their submissions were very helpful.

3. The decision which the Claimant sought to appeal was sent to parties on 16 April 2013. The decision was to refuse an application for review. The underlying decision related to an "unless order" made 2 October 2012, at a full hearing. The time for compliance with that order

was 5:00pm on 3 October. The solicitor for the Claimant (Mrs Scott) sought a hearing next day on the question of whether the order had been complied with. After the hearing, the ET decided that the order had not been complied with and therefore the claim was struck out. The fact of the strike out was recorded in a judgment dated 9 October 2012. Written reasons were sent to parties on 11 October 2012. From those reasons it is evident that parties were heard on 4 October, on the question of whether the unless order had been complied with. The ET decided it had not; hence the order to strike out. Application was made for review. The ET refused the application. The written reasons at paragraphs 4 and 5 (there is a typing error resulting in duplication) state as follows:-

> **"On 23 October 2012 the Claimant's solicitors lodged an application for review. A hearing under and in terms of rule 35(3) was convened with parties present. However there was confusion as to the ambit and extent of that hearing as the parties believed the hearing to have been convened under rule 36. In these circumstances, and in light of the considerable procedure that has already taken place in this case, it was decided to continue the hearing and for the hearing thereafter to be determined on the basis of written submissions only."**

4. The ET, comprising EJ Porter, Mrs M Taylor and Mr A Mathieson, sat on 12 April 2013, wrongly stated as 12 April 2012 in the judgment, to consider the submissions of parties. Fresh submissions, in writing, were supplied. They have been included in the bundle before me.

5. Review is provided for by the **Employment Tribunals (Constitution & Rules of Procedure) Regulations** schedule 1. Rule 35 (3) provides

> **"The application to have a decision reviewed shall be considered (without the need to hold a hearing) by the Employment Judge of the Tribunal which made the decision ….**
>
> **and that person shall refuse the application if he considers that there are no grounds for the decision to be reviewed under rule 34(3) or there is no reasonable prospect of the decision being varied or revoked."**

6. Rule 36 provides:

> **"(1) When a party has applied for a review and the application has not been refused after the preliminary consideration above, the decision shall be reviewed by the Employment Judge or Tribunal who made the original decision…"**

As can be seen there was confusion about whether the hearing at which parties attended was under rule 35 or rule 36. It was continued for written submissions. The reasons notified to parties on 16 April 2014 do not dispel that confusion. The opening sentence is:

> **"The Employment Tribunal orders that the Claimant's Application for Review is refused."**

It is clear that all three members of the Tribunal sat. The rule which is quoted is rule 35. At paragraph 17 the ET states:

> **"In addressing the issue of whether there are any reasonable prospects of the decision of the Tribunal being varied or revoked under rule 35(3) the Tribunal had regard to the arguments presented by the Claimant in her 'Application for Review'."**

The rest of the reasons set out the ET's views on the application, and ends thus

> **"34. It is for all of these reasons that it is the unanimous decision of the Tribunal that there is no reasonable prospect of the decision to strike out these cases being revoked in terms of Rule 35 (3).**
>
> **35. This application for review is accordingly refused."**

7. Thus it appears that the ET proceeded under rule 35. That rule provides for preliminary consideration of an application for review by the Employment Judge sitting alone. This decision was made by the whole Tribunal. Ms Bain argued that the decision was incompetent as it could not be made by the Tribunal. She argued that the terms of the rule were clear and had not been fulfilled. Further, counsel referred to a letter from the secretary to the ET dated 7 February 2013 to the parties. That letter referred to a "Stage 1 hearing" which had been convened to afford an opportunity to allow the Claimant to provide further explanation of her application for review, rather than its being determined without a hearing as is provided by rule 35(3). The Claimant was represented by counsel, Ms Stobart, and as it became clear to the ET that her

submission went beyond the grounds identified in the application for review, which had not been drafted by her, it was agreed that the stage 1 hearing would be continued and written submissions were ordered. The letter ends thus:

> **"Thereafter, a hearing will take place before the ET and a determination will be reached on the written submissions as presented. If the application for review is not refused at the hearing then the review will be listed for a hearing under rule 36."**

8. Counsel argued that the procedure followed was incompetent. Despite the ET being aware that there had been confusion between rules 35 and 36, it proceeded to decide the case under rule 35 while sitting as a three person Tribunal. She argued that the Tribunal had no power to do that and so the decision could not stand.

9. Mr Brochwicz-Lewinski argued that the rules do not prevent an application being heard by the whole Tribunal; rather they permit preliminary consideration by an Employment Judge sitting alone. In any event, he argued that any failure to adhere to the rule had not been to the disadvantage of the Claimant.

10. I do not regard the decision of the ET as incompetent. It would have been preferable if the ET had stated that it decided to sit as a whole Tribunal, as there is on the face of the papers confusion. However it is clear that the ET did sit and did consider the matter under rule 35, although I have more to say on the merits of the decision below. I accept the argument that the whole Tribunal was entitled to sit if so minded. The rule is one which permits the Employment Judge to make the decision alone; it does not prevent the whole Tribunal from sitting. Even if I am wrong in that, I do not accept that there has been an error of law which is material. The Claimant has had the benefit of the consideration of her application by the lay members as well as the Employment Judge. It is to her advantage that three persons have considered it.

11. Rule 34(3) provides

> **"Subject to paragraph 4, decisions may be reviewed on the following grounds only-**
>
> **(a) The decision was wrongly made as a result of administrative error;**
>
> **(b) A party did not receive notice of the proceedings leading to the decision;**
>
> **(c) The decision was made in the absence of a party;**
>
> **(d) New evidence has become available since the conclusion of the hearing to which the decision relates, provided its existence could not have been reasonably known of or foreseen at the time; or**
>
> **(e) The interests of justice require such a review."**

12. The ET did not set out the terms of the rule, but noted that the application for review sought review on the basis that the interests of justice required it. The ET did set out the terms of rule 35(3) which include the tests to be applied. The ET referred itself to the case of **Neary v Governing Body of Saint Alban's Girls' School** (2010) ICR 473 from which it directed itself that in an application for review a judge should take into account all relevant facts and circumstances and that the list to be found in CPR (the rules of procedure applicable in English courts) is a helpful checklist. It also directed itself in terms of the case of **Thind v Salvesens Logistics Ltd** UKEAT/0487/09 DA in which Underhill J at paragraph 14 stated:-

> **"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 of course has 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 order is an important part of the Tribunal's procedural armoury (albeit one not to be used lightly) and they must be taken very seriously; the effectiveness will be undermined of Tribunal is too ready to set them aside. But that is nevertheless no more than one consideration. No one fact it is necessarily determinative of the course which the Tribunal should take. Each case will depend on its own facts."**

13. The ET also directed itself on the way in which it should exercise its discretion as expounded by Underhill J in **Thind**. Further, it set out paragraph 36 of that case, to the following effect:-

> **"I wish to close by emphasising, in case this judgment is referred to in other cases, that, as I have already observed, all these cases turn on their own facts. I certainly would not wish it to be thought that it will be usual for relief to be granted from the effect of an unless order. Provided that the order itself has been appropriately made, there is an important interest in employment Tribunals enforcing compliance, and it may well be just in such a case for a claim to be struck out even though a fair trial would remain possible."**

14. The ET stated that it considered "the issue of whether there are any reasonable prospects of the decision of the Tribunal being varied or revoked under Rule 35(3)". To do so, the ET had regard to the arguments presented by the Claimant in her application for review. They do not state that they had regard to the written submissions of counsel who was instructed for the review application. It is plain that they read them as they say they were helpful but it is not plain that they dealt with them. The part of the written reasons headed Discussion and Decision deals with the time allowed for compliance with the unless order; with the questions asked in the order, but only to say that there was no objection at the time of making the order. They then move on to the compliance or otherwise with the order and decide there is no prospect of variation or revocation because the solicitor agreed to its being made. They deal with computer difficulties by stating that no information of a specific nature is given about them and so there is no prospect of review on that ground.

15. At paragraph 23 the ET dealt with the substance of the matter by noting that they are asked to have regard to the answers produced for the earlier unless order. Once again they find the fact that the solicitor agreed to the making of second consent order to be conclusive. The ET appears to consider that the agreement at the hearing is decisive when asked to consider whether the order was actually needed.

16. In considering the time allowed for compliance with the unless order, the ET reminded itself that the time limit it had set had regard to the overriding objective and the need to hear cases expeditiously. The ET state in paragraph 19: –

> **"The issue of time for compliance having been considered at the time of the granting of the unless order the Tribunal is not of the view that it is in the interests of justice that the decision then taken should be revisited. The Tribunal is therefore of the unanimous view that there is no reasonable prospect of the decision to strike out this claim being varied or revoked on these grounds."**

17. The ET in paragraph 29 considered the extent of the information sought within the unless order. It found it significant that the solicitor present at the time, Mrs Scott did not object to the terms and extent of the order. The ET decided there was no prospect of review on that ground. It found that Mrs Scott had failed to comply with the order. It noted that in general there were computer difficulties but that was no specification of what they were. They therefore decided that there was no prospect of the decision to strike out being varied or revoked on that basis. The ET considered the Claimant's submission that they ought to have had regard to the content of the earlier answers and decided that as Mrs Scott had agreed that the latter set of answers would be considered as the pleadings, there was no prospect of review. The ET considered the issue of the reason for the default and whether it was deliberate. They noted that no telephone calls were made to the Tribunal office to tell them that there were computer difficulties. The ET considered the issue of prejudice to the Respondents and whether a fair trial would remain possible. They noted that the first case was raised on 26 January 2011 and contained a narrative of events going back to 2006. The second case was raised on 9 January 2012 and referred to the earlier claim. Therefore there would be prejudice to the Respondents because the memories of witnesses would be dimmed by the passage of time. The ET considered whether a fair trial remained possible, and decided that as the unless order had not been answered no fair trial was possible. Therefore they refused the review.

18. In my judgment following the hearing under rule 3(10) I pointed out that the events narrated occurred at a date set for a full hearing. The Respondent had not sought to argue that a full hearing should not be set down in light of the answers provided to the first unless order. I am concerned that the Claimant was in a position of having a case set down for a full hearing and that turned into an attempt to clarify matters which ended in her case being struck out. I am concerned about the fairness of that procedure. I was also concerned and remain concerned about the description of events which tended to show to show that the solicitor appearing for the Claimant may have been confused in her submissions.

19. Ms Bain argued her first ground of appeal, that the consideration of the application for review by the whole Tribunal was incompetent. As stated above I do not agree with her. I do however find that the consideration by the ET was confused. They appear to have been making a preliminary decision rather than making a decision under rule 36 to review or not. They do not set out clearly what test they applied. They make reference to cases in which rule 36 reviews were considered. It is however clear that the ET came to the view that there was no reasonable prospect of success review on the grounds that the interests of justice require a review. They decided that a fair trial was no longer possible. The issue before me is whether they erred in law in coming to that view.

20. The second ground in Ms Bain's argument was that even if the ET was entitled to deal with the application, it had erred in deciding that there was no reasonable prospect of success. The ET had before it a written application for review, and it also had written submissions prepared by counsel, Ms Stobart. Ms Bain argued that the reasons given by the ET showed that it decided that it had made the decision in October that further information was needed; it had made an unless order with the necessary time table for its implementation; and it had decided that it had not been carried out. In its consideration of the application for review, it did not

consider whether these decisions should, in the interests of justice, be revisited; rather it stated that it made the orders, with which the solicitor then instructed agreed, and it had no intention of changing them. There was nothing in the reasons to show that the ET had considered the written submissions of counsel which went to the rationale for making the order in the first place. No consideration had been given by the ET to the evident confusion of Mrs Scott at the hearing in October. They did not address the point made by counsel to the effect that the first unless order had been implemented, and the Respondent had not objected to a full hearing being fixed. The ET did not deal with the apparent unfairness of the situation in which the Claimant was left: she had a full hearing fixed, but at that hearing, a question asked as a matter of courtesy led to a chain of events which ended in her claim being struck out without the facts ever being investigated. The ET had erred in deciding that a fair trial was no longer possible. They provided no reasoning and no evidential base for that decision. They were concerned about the passage of time and the dimming of memories but had not taken into account the size of the Respondent. It was a large organisation with an HR function and with records. That much was apparent from its pleadings.

21. Counsel referred to the case of **Thind**. She accepted that the matters which the ET had considered, namely the seriousness of the default, the reasons for it, prejudice to the opposing party and the possibility of a fair trial were all relevant. She argued that they had not considered other matters which were relevant, being the fact that the problem arose at a full hearing, and that there was apparent confusion on the part of the solicitor. She emphasised that all cases depend on their own facts. Miss Bain reminded me of the quotation from the case of **Neary** contained in paragraph 15 of **Thind**. She accepted that the decision was one for the ET to make and that their exercise of judgment should not be impugned merely because the EAT might, had the decision been for it, have decided differently. She argued that in the present case the ET had not directed itself correctly and that its reasons did not show that it had considered all

relevant matters. She argued that the ET showed itself to be concerned only with importance of respecting an unless order; it did not consider whether notwithstanding that importance, there were grounds justifying relief.

22. Counsel argued that if there was an error of law, then I should exercise my powers under section 35 of the **Employment Tribunals Act 1996** (ETA). The case had been raised a long time ago; there was an interest for both parties in making progress with it. Therefore I should allow the appeal, but should not remit to the ET to carry out a review under rule 36. Instead I should carry out that review myself. She maintained that I was in as good a position as the ET to do so, as Underhill J had decided he was in the case of **Thind**. Thus she sought an order allowing the appeal; reviewing the decision to strike out, and remitting to the ET for a full hearing.

23. Mr Brochwicz-Lewinski for the Respondent submitted that the issue before me was whether the ET had erred in law, and it was not enough that I might disagree with decision they had taken. He argued that counsel for the Claimant was inviting me to substitute my judgment for that of the ET. He submitted that it could not be said that there was any error of law in the ET decision; and could not be argued that there was only one decision the ET could have made. He referred to the cases of **Bournemouth University v Buckland [**2010] ICR 908, **Hellyer v McLeod** [1987] ICR 526 and **Jaffri v Lincoln College [**2014] ECWA Civ 449, all of which he argued set out the current position on the EAT exercising its powers when allowing an appeal. Counsel argued that any decision taken by an ET was potentially subject to appeal to the EAT. Therefore if I remitted to the ET to decide the application for review their subsequent decision could be appealed. In contrast, if I allowed the appeal and decided the review myself, I would deprive the Respondent of one level of appeal.

24. Mr Brochwicz-Lewinski was correct in my opinion on his argument as to the competency of the whole Tribunal hearing the application, for the reasons I have given above. On the merits of their decision, he argued that the ET had considered that no fair trial was possible. They gave a reason for that, being the passage of time. There was nothing irrational about that and so it was a view they were entitled to hold. He argued that the ET had decided the application on the basis of the arguments put before it in the written submissions of Ms Stobart. They were correct to do so. He argued that Ms Bain had introduced new material, or at least had put a new emphasis on matters by concentrating on the apparent difficulties of the solicitor at the time. It could not be said that the ET had erred in law if it decided the case on the basis of what was before it. In any event, counsel argued that the Claimant had to take responsibility for any errors by her representative. He reminded me that it could not be shown that the representative had erred in any way, but even if she had, that did not entitle the Claimant to a fresh hearing. She may have a remedy against the solicitor.

25. Counsel submitted that it was proper to consider all circumstances when the interests of justice were stated to be the basis of the necessity for review. In this case, the ET had perfectly properly sought clarity in the case to be made against the Respondent. That was never achieved. The pleadings from the Claimant were vague. When Ms Eeley drafted the question which formed the basis of the unless order, they were sensible and necessary questions, but they had never been answered. The case the Claimant sought to make was confused and confusing and subject to change. The ET had taken a robust view at the full hearing and had correctly tried to discover the issues at the outset. That was good Tribunal practice. It was correct to say that a full hearing had been fixed, but that did not mean that ET was not entitled to seek clarification before evidence was heard. Thus if one asked what error in law the ET made in what had turned into a difficult situation, the only answer was that they made no error.

26. Mr Brochwicz-Lewinski reviewed the authorities. He argued that **Flint v Eastern Electricity Board** [1975] IRLR 277 (while concerned with the question of evidence not put before a Tribunal when it should have been), showed that while the interests of justice as a ground of review does act as a residual ground and allow a wide discretion, the interests of the public in the finality of litigation have to be considered as well. There is no question of claimants being entitled to a "second bite of the cherry" because they could have put the case differently. He argued that an application which was based on alleged failings by a representative required care. In the case of **Lindsay v Ironsides** [1975] IRLR 318 the representative was said to have been "out of her depth". It was held that allowing review on that basis would be a dangerous path to follow. It might encourage litigants to seek to re argue their cases by blaming a representative. The Tribunal might be involved in inappropriate investigation into the conduct of a representative who was not present or represented at the review. A remedy might be available in other proceedings. Mr Brochwicz-Lewinski referred to the case of **Newcastle v Marsden** UKEAT/09 as an example of a special case in which a claimant was able to show that counsel had told him that he need not attend a hearing, at which his attendance was in fact necessary. Regrettably, it transpired that counsel had misled the Tribunal about the real reason for absence. In those very unusual circumstances a review was allowed. In the Scottish case of **Scottish Ambulance Service v Laing**, Lady Smith had noted that an unless order had effect in striking out as soon as compliance failed. In that case there had been no doubt about compliance nor about the making of the order in the first place. In the case of **Training in Compliance v Dewse** [2001] CP Rep 46, which is not a case about employment, the point is made by Peter Gibson LJ that in general the "action or inaction of a party's legal representatives must be treated under the Civil Procedure Rules as actions or inactions of the party himself". In the case of **Welsh v Parnianzadeh** [2004] EWCA Civ 1832, a personal injury case, the Court of Appeal held that failure to obtain medical reports should not be attributed to the claimant, where she had apparently been energetic in her attempts to get

representation and to deal with the matter. The court acknowledged that she might have a claim against her advisers but thought it unfair that she had to rely on that, which would be uncertain of success and smaller in value than the original claim. Counsel referred to the case of **Mitchell v News Group Newspapers Ltd** [2013] EWCA Civ 1537, for the proposition as he put it "rules are meant to be kept". At paragraph 41 the court makes clear that failure to answer a court order in time is not likely to be excused if the reason amounts pressure of business.

27. Counsel concluded by arguing that the decision of the ET to make the unless order was good case management. No reason had been shown for its being reviewed, and the ET did not err in law in declining to review. Therefore I should refuse the appeal. If I was minded to grant the appeal I should remit the case to the same ET to carry out a review under rule 36. Counsel drew my attention to the decision in **Jaffri**, in particular to the judgment of Laws LJ at paragraph 21 where he stated:

> **"I must confess with great respect to some difficulty with the 'plainly and unarguably right' test elaborated in *Dobie*. It is not the task of the EAT to decide what result is 'right' on the merits. That decision is for the ET, the industrial jury. The EAT's function is (and is only) to see that the ET's decisions are lawfully made. If therefore the EAT detects a legal error by the ET it must send the case back unless (a) it concludes that the error cannot have affected the result, for in that case the error will have been immaterial and the result as lawful as if it had not been made; or (b) without the error the result would have been different, but the EAT is able to conclude what it must have been. In neither case is the EAT to make any factual assessment for itself nor make any judgment of its own as to the merits of the case; the result must flow from finding made by the ET supplemented, (if at all) only by undisputed or indisputable facts. Otherwise there must be a remittal."**

28. Counsel argued that the proper disposal if I were to allow the appeal would be limited to a remit in order that a review be undertaken by the ET.

29. I have decided that the ET did err in law. Its consideration of the preliminary question under rule 35 did not take proper notice of all the matters raised by Ms Stobart in her written submissions. Ms Stobart narrated the history and stated that after the first unless order was answered there was no suggestion from either the ET or the Respondent that the Claimant had

failed to comply with the order. The Respondent did not seek a preliminary hearing on time bar. When the EJ asked about time bar at the full hearing, confusion ensued. The solicitor produced an amendment and then withdrew it. Nevertheless the pleadings were clear enough that the Claimant accepted that some claims might be time barred but if they were, she intended to ask the ET to exercise its discretion to extend the time. The Respondent had clear notice of that. According to Miss Stobart, the question from the EJ about time bar turned into an occasion for Ms Eeley to seek to have the whole case pled again. The Claimant was given a day to respond and asked for longer but that was refused. Her solicitor did respond just before and just after the deadline. She explained that there were computer problems. Ms Stobart made written submissions to the effect that the pleadings taken as a whole made the Claimant's case clear. She asked the ET to take the previous answers into account when deciding if there had been non-compliance. She raised the argument that any deficiency in compliance may have been caused not by the Claimant but by her solicitor. She argued that it would not be proportionate to strike her claim out.

30. The written reasons supplied by the ET do not fully address the arguments made by Ms Stobart. The ET directed itself on law in proper terms but did not apply those directions. There is no discussion by them of the submission to the effect that the order itself had not been necessary in light of the information already supplied. Nor is the there any discussion of compliance, tested in light of the existing pleadings and the answers taken together. There is no discussion of the significance or otherwise of the fact that a full hearing had been fixed and was about to take place without any complaint by the Respondent that they were unaware of the case they had to meet. The pleadings which seek to extend the time bar provisions are not mentioned. The submissions of the solicitor are described as confusing, and it is noted that she changed her position. There is however no discussion of her confusion and rather odd presentation of matters as a potential difficulty for the Claimant. There is no discussion of the

ET's impression of Mrs Scott's position at the hearing. It is correct to state as counsel did that the basic proposition is that a litigant has to accept any deficiency in her representation. No claimant is entitled to litigate the case again by blaming the representative for not putting the case properly. However, as both counsel accepted, the alleged failures of representation do form part of the whole circumstances. In some of the authorities failures by representatives have been taken into account. In this case I have decided that the apparent confusion in Mrs Scott's presentation should have alerted the ET to a difficulty. It was not fair, in those circumstances, to dismiss this case without there being an enquiry into the facts.

31. Further, the reasons do not explain why the ET decided that a fair trial could not take place. They are correct that the passage of time does not make the trial process easier. They do not however explain why the Respondents would not have records and witness statements, which they must have had in preparation for the full hearing, available to them for any subsequent trial.

32. I have decided that I am in a position to exercise my powers under section 35 of ETA. The questions before me are mixed questions of fact and law. The case of **Jaffri** is concerned with questions to be decided by an industrial jury. By that I understand the court to refer to matters of fact, always in the context of the law on employment. In the current case I do not think that the issue is of that sort. Rather the issue is whether on the pleadings it was fair to strike the case out. I have read the written submissions and I have read the pleadings for both parties. I have decided in light of them that the Respondents do have sufficient notice of the case the Claimant seeks to make to enable a full hearing. As I have stated I am influenced in that decision by the fact that the Respondents were of the same view, as they did not object to the full hearing being fixed. In light of the overriding objective of hearing cases justly, expeditiously and fairly, this case I will not remit for the ET to carry out a review. Instead, I

will allow the appeal; review the decision to strike out; and remit to the ET to proceed with the full hearing of the claims. It will be for the ET to decide if a preliminary hearing is necessary to make case management decisions. The pleadings, including the answers to both of the unless orders, are however to be regarded as complete and no further procedure to refine or expand the pleadings should be undertaken unless a request is made by either party to deal with some fresh point not so far raised.

33. There is no need to remit to the same Tribunal, which can cause delay as the three people involved have to be available. The case can be heard by any three person Tribunal.