Appeal No. UKEAT/0491/13/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 22 April 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MR C MACE — APPELLANT

PONDERS END INTERNATIONAL LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	Written Submissions
For the Respondent	MS SARA IBRAHIM (of Counsel) Instructed by: Martin Shepherd Solicitors 29 Southbury Road Enfield EN1 1YZ

SUMMARY

PRACTICE AND PROCEDURE – Striking-out/dismissal

"Unless order". The "unless order" required the Claimant, a litigant in person, to "provide disclosure of all relevant documents" by a given date. The Claimant did not make a list of documents, but sent some documents to the Tribunal and was informed at the last moment by the Tribunal that they should be sent to the Respondent.

Held: the "unless order" lacked the necessary quality of clarity and certainty to take effect as an order striking out the claim. It was unclear whether the order was intended to require the Claimant to provide a list of documents (the order applied for by the Respondent) or to provide copies of those documents, and if the latter to whom they were to be provided.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Mr Colin Mace ("the Claimant") against a judgment of Regional Employment Judge Gay dated 12 February 2013 declaring that his claim had been struck out by reason of non-compliance with an unless order dated 9 January 2013. The appeal was originally considered on paper and found to disclose no reasonable ground for appealing. The Claimant applied under rule 3(10) of the **Employment Appeal Tribunal Rules 1993** for the matter to be reconsidered. The application came on for hearing before Langstaff P on 6 November 2013. He directed that the appeal should proceed to a full hearing. He identified two issues: firstly, whether the unless order was sufficiently clear and precise to attract the sanction of automatic strike-out; and, secondly, whether there had in fact been substantial compliance with the order.

2. I have today received written submissions from the Claimant and both oral and written submissions by Ms Ibrahim on behalf of Ponders End International Ltd ("the Respondent"). The Claimant has written to say that he does not intend to attend the hearing for reasons connected with his health and that of a close relative. He has not asked for an adjournment, and it seems to me both fair and in accordance with the overriding objective applicable to proceedings in the Employment Appeal Tribunal to proceed with the hearing.

The background facts

3. The Claimant was employed by the Respondent as a warehouse operative from 11 October 2004 until his summary dismissal on 23 August 2012. The Respondent received information alleging that he may have been removing goods without authority and selling them on the internet. It alerted the police. The Claimant was arrested on 20 August and found to have in his home goods of a kind which the Respondent held in its warehouse. The Respondent

dismissed him on 23 August 2012. He appealed internally against his dismissal, saying he had acquired the goods legitimately. His appeal was rejected. It is right to say that he was never charged by the police with any offence. Moreover it is his case that the police returned the goods to him - not to the Respondent, as one would expect if the Respondent had established its ownership of them.

4. On 3 November 2012 the Claimant commenced proceedings for unfair dismissal. He named solicitors, a firm called Howells, as his representatives. They were indeed providing him with advice under the Legal Services Commission Legal Help Scheme; but they were not in a position to represent him, and they evidently e-mailed the Tribunal on 16 November 2012 to this effect.

5. In the meantime, however, the Employment Tribunal had made a case management order dated 6 November 2012. The order listed the case for 13 February 2013 with a one-day time estimate. Its case management orders included an order that the Claimant and the Respondent send to each other by 18 December 2012 a list of any documents "that they wished to refer to at the hearing or which are relevant to the case". The order then provided that they should send to each other a copy of any of those documents if requested to do so.

6. On 27 December 2012 Howells informed the Claimant that they could not assist him further under the Legal Services Scheme. Neither they nor the Claimant complied with the case management order, although the Claimant had, he says, forwarded at least some relevant documents to the solicitors.

7. The Respondent wrote to the Tribunal to say that the Claimant had not complied with the case management order. It asked for an order that unless the Claimant serve "the disclosure list

of documents" his claim be struck out with further consideration of the proceedings or need to give notice under rule 19 or hold a pre-hearing review or hearing. In other words it asked for an unless order.

8. The Tribunal issued the unless order on 9 January 2013. Its terms were as follows:

> **"NOTICE OF ORDERS**
>
> **On the application of the respondent, Employment Judge Southam in exercise of powers conferred under Rules 10 and 13(2) of the Employment Tribunal Rules of Procedure 2004, has made the following order.**
>
> **ORDER**
>
> **Employment Tribunal Rules of Procedure 2004**
>
> **On or before 18 January 2013 the Claimant is to provide disclosure of all relevant documents.**
>
> **CONSEQUENCES OF NON-COMPLIANCE**
>
> **TAKE NOTICE THAT unless this Order is complied with the claim shall by struck out without further consideration of the proceedings or the giving of further notice or the holding of any hearing."**

9. On 14 January the Claimant sent an e-mail to the Tribunal, explaining the position from his perspective. He said that Howells had all his documents. He was still waiting for them to send his documents to him. He had telephoned them again that very day to remind them. He had asked them if they could send the documents direct to the Tribunal, but they said they could not do this.

10. It is clear that the Claimant did send at least some documents to the Tribunal. The Regional Employment Judge, Judge Gay, saw the file on about 17 January. She appreciated from the correspondence that the Claimant had not sent the documents to the Respondent. She caused an urgent message to be sent to him that he must "get a copy of everything he has" to the Respondent by 18 January 2013. He did not do so. He wrote subsequently, on

1 February 2013, to say that he had forwarded his documents to the Tribunal. He had no means of copying and he asked them for them to be returned or passed on to the Respondent.

11. In the meantime, however, the Respondent's solicitors had written to the Tribunal, saying that the Claimant had not complied with the order and on 12 February 2013 Regional Employment Judge Gay issued the following judgment:

> **"The Tribunal**
>
> - **having made an order requiring the claimant to provide certain documents by a specified date,**
> - **which order contained a warning that in the event that the documents were not supplied the claim would be struck out without further consideration of the proceedings or the giving of further notice or the holding of any hearing, and**
> - **noting that the specified date has passed without compliance with the order or any request for an extension of time,**
>
> **now records that the claim has been struck out."**

12. It is convenient before turning to the appeal to complete the story of proceedings before the Tribunal. The Claimant had said to the Tribunal that he wished to appeal the judgment. The Tribunal treated that correspondence as an application for review, and a hearing took place on 28 March 2013. The hearing proceeded on the basis that the claim had been struck out correctly. It considered whether he should be granted relief from the sanction of striking out. The Regional Employment Judge concluded that the Claimant was "probably less culpable than some who were struck out" but took account of what she regarded as the poor prospects of success in the case. She said:

> **"He was probably less culpable than some who are struck out, but being dependent on the mercy of the court requires him to show that it is in the interests of justice to have a full Hearing on the merits ('the right or wrong' as he put it). He has not done it in the circumstances of this case."**

The unless order

13. At the relevant time procedure before the Employment Tribunal was governed by the **Employment Tribunal Rules of Procedure 2004**, Schedule 1 to the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004**. Rule 13(2) provided the foundation of the Tribunal's power to make an unless order:

> **"An order may also provide that unless the order is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice under rule 19 or hold a pre-hearing review or Hearing."**

14. It is well established law that an order of this kind must identify with clarity what is required for compliance. This is necessary for a number of reasons. Firstly, the party who has to comply should be in no doubt what is necessary for compliance. This is important even when a party is legally represented, but it is all the more important in the Tribunal system where many persons are unfamiliar and may misunderstand legal processes and terminology. There should be no misunderstanding about what is required if an order is to carry with it the sanction that the claim is struck out automatically. Secondly, it must be possible for the Tribunal itself to identify whether a substantial compliance with the order has taken place. Thirdly, it is important to avoid satellite litigation as to whether a person has or has not substantially complied with the order.

15. The President raised for consideration the question whether the unless order dated 9 January had this quality. He noted that the order did not give any indication of what documents might be relevant and it did not say to whom disclosure was to be made. I have raised with the Respondent a further point. The order did not say what disclosure was. The Claimant evidently thought it meant the provision of documents, but this is not the normal meaning of the concept of disclosure.

16. On behalf of the Respondent Ms Ibrahim accepted that the order had to be clear and unambiguous for the person who faced the striking out. She submitted that the order was clear. She submitted that, when the orders of 18 December 2012 and 9 January 2013 were taken together with the advice by the Regional Employment Judge to the Claimant to send all his documents to the Claimant, it was plain what the Claimant had to do. She argued that the obligation to "provide disclosure of all relevant documents" meant, in the context of this case, that the Claimant had to provide copies of his documents to the Respondent's solicitors by the date given.

17. I have reached the conclusion that the order dated 9 January 2013 was indeed unclear, ambiguous and incapable of taking effect as an unless order striking out the claim. My reasons are as follows.

18. It is convenient to start with the concept of disclosure. The **Employment Tribunals Act 1996** conferred a power to make Employment Tribunal procedure regulations including provision in England and Wales for "such discovery or inspection of documents, or the furnishing of such further particulars, as might be ordered by a county court on application by a party to proceedings before it" (see section 7(3)). Pursuant to that provision the 2004 Rules of Procedure lay down that a case management order might be made

> **"...(d) requiring any person in Great Britain to disclose documents or information to a party or to allow a party to inspect such material as might be ordered by a County Court (or, in Scotland, by a sheriff." (See Rule 10(2)(d))**

19. Both the 1996 Act and the 2004 Rules distinguish between disclosure of documents and inspection. So, I might add, does rule 31 of the current (2013) Employment Tribunal Rules of Procedure. All these provisions reflect a well-known distinction in civil procedure, clearly set

out in CPR 31, which governs procedure in the High Court and the county court. Disclosure means "stating that a document exists or has existed" (see CPR 31.2). In other words it is the process of listing documents which are liable to be shown to a party to the litigation. Inspection is the subsequent process of showing those documents, which may be done by a physical inspection or the provision of copies or both.

20. Against that legal background, one would expect that an order by a Tribunal which simply says "provide disclosure of all relevant documents" would require a statement or list of documents rather than the physical sending of the documents. That was in fact the order for which the Respondent had asked in its letter dated 19 December. It is unclear whether the Employment Judge intended the order to be for a list, on the one hand, or the sending of copies, on the other. To a lawyer the normal and natural meaning would be the provision of a list. To a lay person the order would simply be unclear. To my mind, an unless order of the kind made here, simply saying that a litigant in person must "provide disclosure of all relevant documents" fell short of the clarity required. It was liable to be misread as an obligation to provide original or copy documents and this was not its natural meaning in context. It did not tell the party what in practice he had to do in order to comply.

21. The Claimant appears to have read the order as requiring him to provide original documents. He sent his documents to the Tribunal when in fact he should have kept them and sent a list of them to the Respondent. It seems that the Regional Employment Judge may have read the order as requiring him to send documents (presumably she meant copies) to the Respondent – for she emphasised the importance of the Claimant sending all his documents to the Respondent when, against its proper legal background, the order might more naturally to refer to the making of a list.

22. Ms Ibrahim submitted that the unless order should be read against the background of the original case management order. This original case management order had wisely avoided the use of the word "disclosure" altogether and made reference to a list. It is true that an alert litigant in person might have read the two together and concluded that disclosure meant the making of a list. Even an alert litigant in person would not have thought that disclosure necessarily meant sending all his documents to the Respondent, for the case management order had not required this to be done. But even if some help could have been derived from the case management discussion order, this does not mean that the unless order is satisfactory. Its meaning should have been clear. If it had followed and repeated the wording of the case management order, it would I think have been clear, but it did not. It was open to misunderstanding and it was in fact misunderstood.

23. If, contrary to my opinion, the order to "provide disclosure of all relevant documents" was an order requiring the provision of copies, it would still be inadequate and unclear - for it did not tell the Claimant how and to whom the copies must be provided.

24. This case shows that it is good practice when drafting orders for disclosure and inspection – especially unless orders – to avoid the use of the word "disclosure" and spell out what the party concerned is actually to do. If the order relates to true disclosure, that is the making and service of a list stating the documents concerned, it should say so (as the case management order rightly did in this case). If the order is intended to encompass inspection as well as or instead of disclosure, it should again spell out what the party concerned is expected to do (again, as the case management order rightly did).

25. Underlying this case is also a general point. Employment Judges have to deal with a great deal of what is commonly known as "box work": that is, correspondence asking for the

making of an order on paper when the Employment Judge does not have the luxury of a hearing and full argument. The making of an unless order is one such kind of box work, but it requires particular care. Unless orders must be clear in their terms and are especially likely to result in injustice and satellite litigation if they are not. It is important to pay detailed attention to the wording and also to consider carefully whether the sanction is proportionate.

26. In this case, in my view, the unless order dated 9 January 2013 lacked the required qualities of such an order and was incapable of being the foundation of an automatic striking out. The appeal must be allowed. The judgment dated 12 February 2013, which effectively declared that the claim had been struck out automatically, must be set aside. The claim remains extant.

27. I should say a word about other points in the appeal.

28. The President raised the question whether it was sufficient for an unless order simply to use the word "relevant" without giving guidance as to documents required. I need not decide that point in this case. I would, however, point out that standard disclosure in civil proceedings is narrower than the order which was made in this case, and Employment Judges would be wise to consider carefully the scope of an unless order, especially in a document-heavy case.

29. There was also a question whether there was or may have been substantial compliance with the order. This, however, is inextricably linked with the meaning of the order. If the order meant that there was to be the provision of a list, plainly there was no compliance. If the order meant that documents or copies had to be provided to the Respondent, again there was no compliance. If it meant that documents had to be provided to the Tribunal, then it would have been for the Employment Judge to consider whether those documents which were provided

were substantial compliance. Plainly not all were provided. There seems, in particular, to have been a question about three receipts which the Claimant did not supply. But the fundamental point is that the order was ambiguous and unclear, and it is for this reason the appeal must be allowed.