Appeal No. UKEAT/0014/13/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 3 April 2013

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MISS R RICHARDS — APPELLANT

MANPOWER SERVICES LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ABOU KAMARA (Representative) Free Representation Unit
For the Respondent	MS KIRTI JERAM (of Counsel) Instructed by: Field Fisher Waterhouse LLP 27th Floor City Tower Manchester M1 4BD

SUMMARY

PRACTICE AND PROCEDURE – Striking-out/dismissal

Unless Order – non-compliance - effect

The Respondent had failed to comply with an "unless order" and had made no application in any form for relief against sanction. The Employment Judge declined to make an order striking out the Respondent's responses: he ought to have made an order in effect declaring that the effect of the "unless order" was that the responses were struck out automatically: **Scottish Ambulance Service v Laing** [2012] UKEAT/0038/12. The Employment Judge's decision could not be read as granting relief against sanction, but it was still open to the Respondent to apply to the Employment Tribunal for relief against sanction.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Miss Rowena Richards, the Claimant, against a decision of Employment Judge Hutchinson dated 20 November 2012. It was the Claimant's case that Manpower UK Ltd, the Respondent, had failed to comply with an Unless Order in consequence of which its response was struck out. Employment Judge Hutchinson declined to strike out the responses.

2. The appeal has been listed today with some urgency because the full hearing of the proceedings was due to begin on Monday 8 April. I am told, however, that that hearing has now been postponed.

The factual background

3. The Claimant was employed by the Respondent as an Operator Services Adviser with effect from 22 October 2007. In 2010 she brought grievances alleging that she had been subjected to racial discrimination, victimisation and harassment. She was absent from work on grounds of ill-health with effect from April 2010. Her grievances when investigated were upheld in part. The employees against whom she made these complaints made counter complaints. Two other employees also raised grievances, making allegations of inappropriate behaviour against the Claimant. After these grievances were investigated the Respondent began disciplinary proceedings against the Claimant; she was dismissed with immediate effect by letter dated 18 July 2011.

4. The appeal is concerned with two sets of proceedings commenced by the Claimant. In 2010, whilst she was still employed by the Respondent, she commenced proceedings claiming race discrimination; including victimisation and harassment. In 2011 after her dismissal she

commenced further proceedings alleging unfair dismissal, race and disability discrimination. There has been a third set of proceedings but I am not concerned with those proceedings.

5. At a Case Management Discussion held on 1 December 2011, the two sets of proceedings were consolidated so that they would be heard together. The resultant order is dated 7 December 2011. By paragraph 2.7 of that order it was provided:

> **"By not later than 23rd January 2012, the parties shall disclose to each together all documents in their possession, power or control which are relevant to any issue in the case including in respect of remedy whether or not the document supports that party's case."**

There was also an order that a single bundle of documents should be agreed by not later than 6 February, the Respondent to have conduct of preparations of bundle. But this, of course, could only take place once the order for disclosure was complied with.

6. It was the Claimant's position that the Respondent did not comply with paragraph 2.7 of the Order. She set out her case in letters dated 6 March, 14 March and 28 March. The Respondent's solicitors in a letter dated 15 March accepted that the order had not been complied with. They explained that there had been numerous overlapping grievances which the Respondent had to investigate so that there was, "an enormous amount of paperwork".

7. A further Case Management Discussion was held on 11 May. The Employment Judge would not have been able to make an immediate order striking out the responses of the Respondent even if he had been minded to do so since this matter would have required a Pre-Hearing Review. But he could and did make an Unless Order. This provided as follows:

> **"The Respondent shall comply with paragraphs 2.7 and 2.8 of the order of Judge Walker by not later than 4.00 pm on 1st June 2012. All relevant documents and specifically interviews and/or witness statements shall be in an unredacted form, save that it will be permissible to exclude home addresses. If the Respondents fail to comply with this order then its response would be struck out in its entirety without further consideration."**

8. The Respondent delivered four lever-arch files of documents on 31 May, but the solicitors' covering letter indicated that there were further documents to come. The letter said that some grievances impacted on the timing of the outcome of the appeal against the Claimant's grievances. Once they had identified the grievances which "were linked with yours" they would provide a further lever-arch file containing copies of those grievances and the investigation into them. The letter said that the solicitors "were aware of our continuing obligation in respect of disclosure." In due course on 19 July, the Respondent's solicitors served two further files of documents "relating to interlinked grievances". In an email dated 23 July they said that "we consider that this completes full disclosure".

9. In subsequent correspondence the Claimant made it clear that, in her opinion, the Respondent had not complied with the Unless Order in time so that the response should be struck out. The point was made in her letter dated 2 August, again on 14 August and again on 21 September. The Claimant sought further disclosure at a Case Management Discussion which took place on 28 September. The Employment Judge dealt with her application for further disclosure but he did not address the point that the Respondent had not complied with the Unless Order. The Claimant pressed the matter again in a letter dated 12 November. The Respondent's solicitors were asked for their comments. They said that they could see no grounds for an application to strike out. They said they were "unsure exactly what the Claimant is seeking".

10. The matter then came before Employment Judge Hutchinson on paper. He said:

> **"I acknowledge the Claimant's request to strike out the Respondents response on the grounds that they did not comply with the Unless Order issued by Employment Judge Blackwell on 11th May 2012. It appears that the order has been subsequently complied with. The parties have agreed the bundle of documents and the case is ready to proceed to exchange of witness statements. I have already dealt with the issue of whether appropriate documents have been**

provided by my Case Management Discussion notes. The application to strike out the response is therefore refused."

11. It is against this decision that the Claimant appeals.

Submissions

12. The Claimant's submission advanced on her behalf today by Mr Kamara is a simple one. The Unless Order provided for the response to be struck out in its entirety in the event of non-compliance. There was non-compliance: partial compliance will not suffice. Employment Judge Hutchinson should therefore have issued an order confirming that the Respondent's response was struck out. Reliance is placed on **Scottish Ambulance Service v Laing** [2012] UKEAT/0038/12.

13. Ms Jeram who appears today on behalf of the Respondent does not dispute that the Unless Order would take effect in the event of partial non-compliance. Further, she accepts that there was partial non-compliance. At the very least at paragraph 2.8 of the order was not complied with because delivery of the four lever-arch files was so close to the deadline that it allowed no time for compliance.

14. Ms Jeram makes two submissions, the second of which she describes as her primary submission. Firstly she submits that the Respondent complied with paragraph 2.7 of the Unless Order by delivery of the four lever-arch files in time. She submits that the obligation of the Respondent was limited to standard disclosure and that standard disclosure did not require the delivery of the two additional bundles provided. She relies on rule (10)(2)(d) of the Employment Tribunal Rules and part 31.6 of the Civil Procedure Rules.

15. Secondly, she submits that the Employment Judge had power to grant relief against sanction in the Unless Order. She relies on **North Tyneside Primary Care Trust v Ainsley & Ors** [2009] ICR 1333 and **Thind v Salvesen Logistics** [2010] UKEAT/0487/09. She argues that the only reasonable reading of the decision of Employment Judge Hutchinson on 20 November is that he was granting relief to the Respondent against activation of the Unless Order. Once granted that this was the case, she submits that the Appeal Tribunal should not interfere with his decision. She relies on **Governing Body of St Albans School v Neary** [2010] IRLR 124. In any event, she submits that his decision was plainly and unarguably right.

Rules

16. The power to order disclosure derives from section 7(2)(e) of the **Employment Tribunals Act 1996** which authorises regulations to be made providing for: "… in England and Wales such discovery or inspection of documents as may be ordered by a County Court." This power is reflected in rule 10(2)(d) of the Employment Tribunal Rules of Procedure. The power to make an Unless Order is contained in rule 13(2) of the Employment Tribunal Rules of Procedure.

Discussion & conclusions

17. It is plain law that the sanction contained in a properly drafted Unless Order will take effect in accordance with its terms. The law was discussed in **Scottish Ambulance Service v Laing** at paragraphs 15 to 26. Lady Smith summarised the position in paragraph 15:

> **"The power to issue an "Unless Order" was new to Employment Tribunals when first introduced in the Employment Tribunal Rules 2004 (see: rule 13(2)). It is not to be confused with the strike out powers that are conferred by rule 18(7) where notice has to be given under rule 19 and the tribunal has a discretion whether or not to order strike out. In the case of the "Unless Order" the tribunal has no discretion - notice has been given in the order itself and if the order is not complied with then the claim or response is struck out as at the date of non-compliance without any further procedure being required or indeed provided for under the Employment Tribunal Rules. The recipient of an "Unless Order" should be under no illusions - his claim or response will be struck out without further ado if he does not do as the tribunal directs him. Further, partial compliance will not do: see e.g. *Royal Bank of Scotland v***

Abraham **UKEAT/0305/09/DM. If there is a failure to comply whether wholly or partially, the tribunal cannot revisit its decision that failure to comply will result in automatic strike out."**

18. If there is a dispute as to whether there has been compliance with an Unless Order, the ET has of course power to determine that dispute and rule whether there has been compliance with the Unless Order. Moreover, there may be an application for relief from the sanction contained in the Unless Order. The precise route through the Employment Tribunal Rules of Procedure by means of which such an application should be made is not straightforward; see the discussion by Underhill P in **North Tyneside PCT v Ainsley** at paragraphs 23 to 29. There is, however, to my mind no real doubt that the power to do so exists and can be exercised if in no other way by the use of rule 10(1)(m).

19. The difficulty in this case arises because, notwithstanding the repeated references by the Claimant in correspondence to the terms of the Unless Order, neither the Respondent nor the ET specifically addressed the question whether the order had been complied until Employment Judge Hutchinson considered the matter on paper in November. In November Employment Judge Hutchinson seems to have proceeded on the basis that the Unless Order had not been complied with; see the references in his Reasons to "subsequently complied with". In this Ms Jeram now accepts that he was correct.

20. It is, however, convenient at this point to deal with Ms Jeram's first submission; namely that in respect of paragraph 2.7 the Unless Order had been complied with because only standard disclosure was required. I reject this submission. The order for disclosure in this case was a wide order; wider than standard disclosure would be in the County Court. The County Court is, however, not limited to making an order for standard disclosure; see CPR rule 31.5. It was within the power of the County Court and therefore within the power of the ET to make the

order it made and there was reason for doing so. The Respondent's solicitors did not on their own admission comply with it in time.

21. The order not having been complied with, the Employment Judge ought to have recognised that the sanction had taken effect and that an application for relief from sanction was required. This brings me to Ms Jeram's principal submission, namely that the Employment Judge in effect granted relief against sanction. I cannot read the reasons of Employment Judge Hutchinson in this way: to my mind he was addressing the different question whether he ought to make an order striking out the claim. Moreover, there had been no application for relief against sanction and the Claimant had no opportunity to make submissions on such an application. Moreover, Employment Judge Hutchinson did not make an order which gave relief against sanction.

22. It follows that, as the position presently stands, the sanction in the Unless Order has taken effect and I will to that extent allow the appeal and grant a declaration.

23. Ms Jeram, faced with the possibility that I might reach this conclusion, said that the Respondent would wish to make an application for relief against sanction. She said that it was plain and obvious that relief should be granted. I would not go this far. Where there has been non-compliance with an Unless Order this is always an important matter for an Employment Judge to bear in mind: **Thind v Salvesen Logistics** at paragraph 36. But there is a good arguable case that relief should be granted which must be addressed by means of an application to the Employment Tribunal.