Appeal No. UKEAT/0082/17/JOJ
UKEAT/0083/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 December 2017
Judgment handed down on 20 February 2018

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

UKEAT/0082/17/JOJ

AMEY SERVICES LTD — APPELLANT

(1) MR J BATE & OTHERS
(2) OH PARSONS LLP
(3) MR A JOHNSON & OTHERS — RESPONDENTS

UKEAT/0083/17/JOJ

OH PARSONS LLP — APPELLANT

(1) MR J BATE & OTHERS
(2) AMEY SERVICES LTD
(3) MR A JOHNSON & OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For Amey Services Ltd (in both appeals)	MR DALE MARTIN (of Counsel) Instructed by: Messrs Bird and Bird Solicitors 15 Fetter Lane London EC4A 1JP
For OH Parsons LLP (in both appeals) and Mr J Bate & Others (in UKEAT/0082/17/JOJ only)	MR RAD KOHANZAD (of Counsel) Instructed by: OH Parsons LLP Churchill House Chalvey Road East Slough Berkshire SL1 2LS
For Mr J Bate & Others (in UKEAT/0083/17/JOJ only) and Mr A Johnson & Others (in both appeals)	Respondents debarred from taking part in these appeals

SUMMARY

PRACTICE AND PROCEDURE - Striking-out/dismissal

PRACTICE AND PROCEDURE - Costs

An Employment Tribunal erred in law in granting relief from the sanction of a strike out following the failure to provide particulars pursuant to an Unless Order.

The Employment Judge erred in granting such relief without having ascertained whether further particulars, provided shortly before the hearing, constituted material compliance with the Unless Order.

The Employment Judge further erred in granting relief to all 25 named complainants, having failed to have regard to the fact that there were six individuals in respect of whom no particulars had been provided (they being no longer represented by the solicitors representing the other Claimants) and a further four individuals in respect of whom the late-provided particulars indicated that the information required was not available. In respect of those ten Claimants the EAT directed that the claims be struck out, no alternative course having been open to the Employment Judge. In respect of the remaining Claimants, the matter was remitted to a fresh Employment Tribunal to ascertain whether there had indeed been material compliance such as to entitle the Tribunal to grant the relief sought.

The conjoined appeal as to the quantum of wasted costs awarded against OH Parsons LLP was refused, the Judge having been entitled to make the summary calculation in the manner which he did.

HIS HONOUR JUDGE MARTYN BARKLEM

1. These are two conjoined appeals arising from a Decision of the Employment Tribunal sitting at Watford (Employment Judge Southam sitting alone) on 24 and 25 November 2016. In this Judgment I shall refer to the parties as they were below.

2. On the hearing of this appeal the Claimants were represented by Mr Kohanzad of counsel (who also acted for OH Parsons LLP on the conjoined appeal) and the Respondent by Mr Martin. Each appeared below, although Mr Martin was present only for the first day of the hearing below, Ms Bannerjee (who has not appeared at the appeal) having been present throughout that hearing.

3. The hearing before the ET was in connection with an Unless Order which had been made by Employment Judge Southam on 27 October 2015 requiring the Claimants to serve further information which had been sought by the Respondents in a Request for Further Information ("RFI"). The Order had not been complied with, and the claims had, accordingly, been dismissed. An application under Rule 38(2) of the **ET Rules 2013** had been made seeking relief from the sanction of dismissal. An application for costs and wasted costs had been made by the Respondents, and was dealt with at the same hearing.

4. The Employment Judge granted the relief sought, and thus revoked the sanction, such that the claims could proceed. He also made an award of wasted costs against OH Parsons LLP, the firm of solicitors which had acted for the Claimants, in the sum of £26,000. The Respondent appeals against the granting of relief, and OH Parsons appeals against the Costs Order, although only as to quantum.

5. The procedural history is set out succinctly at the outset of the ET's Judgment:

> **"1. This is a multiple claim for holiday pay. Originally there were four separate groups of claim presented on various dates. There are 25 claimants. I have had responsibility for the management of these claims since they were presented. The first group of claims was presented on 16 January 2015 and a response was filed on 24 February 2015. The second group of claims, led by Mr Hinson, was filed on 6 March [2015]. The third claim was a single claim brought by Matthew Renwick on 6 May 2015. A response to the claim was accepted on 24 June 2015. The fourth group of claims, led by Mr Bate, was filed with the tribunal on 30 June 2015. A response to that group of claims was filed on 5 August in that year.**
>
> **2. The first preliminary hearing conducted in relation to these claims was before me on 12 June 2015. At the time there were three groups of claims including the single claim of Mr Renwick, as it was at that hearing. I ordered the claimants to provide further information in connection with their claims in accordance with a request which had been presented to the claimants by the respondent on 10 June. I did not list that group of claims for a further hearing, until later. After the second Bate group had been added to the multiple, I made an order to those claimants to provide the same further information as their colleagues were required to provide. The information I ordered at the hearing on 12 June 2015 was to be provided by 24 July 2015. In the case of the second Bate group, they were to deliver the further information by 23 October 2015.**
>
> **3. I was then invited to consider making an unless order, on the basis that the information had not been supplied. By letter from the solicitors for the respondent dated 30 September 2015 I was invited to set a new deadline and to make any further order in the form of an Unless Order. The claimants' representatives objected to the making of such an order. They drew a distinction between complying with requirements to fully plead the claim prior to disclosure, which they could do, and complying with the order to provide schedules of loss, which they could not do until after disclosure. The claimants had incomplete records of pay and holiday. I decided to make an unless order and my order was sent to the parties on 27 October 2015. It was restricted to the information requested at paragraphs 2, 3, 4 and 5(a) of the request for further information date 10 June 2015. Paragraph 2 was about the contractual terms said to support the claims. Paragraph 3 related to application, or not, of a collective agreement called the Working Rule Agreement. Paragraph 4 sought an explanation of the basis of the claims by reference to sections 221-224 Employment Rights Act. Paragraph 5(a) required the claimants to specify which elements of pay should be included in the calculation of holiday in individual cases. The order provided that the claim of any claimant who fails to provide such information would stand dismissed without further order or the need for any hearing. I gave reasons for the making of the order within the order itself. They were as follows:**
>
> > **The judge's reasons for making this order are: the claimants' representatives did not complain about the scope of the order I made in June, and the claimants have been given further time in which to comply. The original claimants were to provide information by 24 July. It is only the claimants added by consolidation in 3301896/2015 who had until 23 October to supply the information. I am not told that any information has so far been supplied.**
>
> **4. On 1 December 2015 I gave further directions. No response had been filed by the respondents in the Hinson group and I directed that to be done within 28 days. There was then to be a preliminary hearing before me, which was listed for 28 January 2016.**
>
> **5. The preliminary hearing in January, which I set up for case management purposes became, in effect, an analysis of whether or not the claimants had complied with the unless order. I decided that they had not done so and, in the record of the hearing that day, 28 January 2016, I included notice to the claimants to the effect that their claims were struck out by operation of the unless order and the provisions of rule 38 Employment Tribunal Rules of Procedure 2013. I therefore declared that the proceedings were at an end subject only to the possibility of an application under rule 38(2) to set aside the unless order and any application for costs. My reasons for coming to the conclusion that the claims were struck out were included in a Case Management Summary document sent to the parties on 29 January 2016."**

6. The hearing of 24 and 25 November 2016 was therefore 10 months after the ET had notified the Claimants that their claims had been struck out for non-compliance with the Unless Order and 17 months after the ET had ordered the provision of information set out in the RFI.

7. The day before the hearing, that is 23 November 2016, the Claimants' solicitors served what is described as "*a substantial document*" purporting to deal with Request 2 of the RFI. As the Judge noted at paragraph 16 of the Judgment:

> **"16. I decided to accept that the document should be treated as having been served. There was time for some brief analysis of it, but I could reach no definitive conclusion as to whether or not, in detail, the document complied with the terms of my original order."**

8. It is argued by Mr Martin that there has not even been purported compliance with Request 4 of the RFI. It seems that this may have arisen from a passage in the Judgment of Employment Judge Southam following the hearing on 28 January 2016, which reads as follows:

> **"14. It does not assist the claimants that the respondent accepts that the claimants had provided the information sought at paragraph 3 of the request, and that I was of the view that they had complied with the request for information at paragraph 5(a). The fact that the claimants have not supplied the information requested at paragraph 2 of the request is fatal to these claims. The failure to comply leads inevitably to the claims being dismissed, by virtue of the terms of the order. The question of discretion only arises if there should be an application to set aside the unless order under rule 38(2). Mr Doherty did not have instructions to make such an application today. Under the rule, the claimants have 14 days from the date on which notice is given to the parties that the claims are struck out to make such an application."**

9. It is worth noting at this point that, as the ET had observed at paragraph 13 of the Judgment, six of the Claimants were no longer represented by OH Parsons. These are Mr Johnson, Mr P Evans, Mr B Evans, Mr D Hall, Mr P Schneider and Mr K Sewell. These individuals were, therefore, unrepresented at the hearing under appeal, and, as a matter of logic, cannot have supported the application for relief. They have been debarred from this appeal, but the reality is that nothing has been heard from them.

10. In addition to those six Claimants, in respect of whom there has been no compliance with the Unless Order, the document served on the eve of the hearing provided no information in relation to a further four persons. These are Mr Yates and Mr Bostock (dealt with at paragraph 93 of the document), and Mr Coney and Mr Green (dealt with at paragraph 90 of the document).

11. The Employment Judge, in his conclusions, to which I will turn shortly, did not differentiate between those Claimants in respect of which there had not even been purported provision of information pursuant to Request 2 of the RFI and the remaining 20 Claimants.

12. I have today been taken to a number of authorities by Mr Martin, who acknowledges that his arguments on the relevant principles are broadly similar to those before the Employment Judge. As the Judge gave a short but accurate summary of the legal position, in his Judgment, I shall adopt it:

> **"19. I was referred to a number of authorities by the parties. It is clear from *Neary v Governing Body of St Albans Girls' School* [2010] ICR 473 that an employment tribunal is not required, when considering an application which seeks review of an order imposing a sanction, to give express consideration to all of the factors formerly listed in rule 3.9 of the Civil Procedure Rules, which are concerned with relief from sanctions, but must consider all relevant factors and avoid considering irrelevant ones. The factors in rule 3.9 could be a helpful checklist. That was a case involving the automatic striking out of the claim without further order following a failure on the part of the claimant to comply with [an] Unless Order.**
>
> **20. In *Thind v Salvesen Logistics Ltd* (unreported UKEAT/0487/09/DA), it was said that the relevant circumstances 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 will always be an important consideration. Unless orders are an important part of the tribunal's procedural armoury (albeit one not to be used lightly) and they must be taken very seriously; their effectiveness will be undermined if tribunals are too ready to set them aside. But that is nevertheless no more than one consideration. No one factor is necessarily determinative of the course which the tribunal should take. Each case will depend on its own facts.**
>
> **21. It was also said in *Neary* that any judge thinking of allowing another chance would want to feel some degree of confidence that it would be taken and the particulars would be provided promptly thereafter. The overriding objective requires that the management of the case should result in the case being dealt with justly as between the parties. It also requires the judge to consider the appropriate use of the resources of the tribunal. It is entirely within the overriding objective for a judge to take the view that enough is enough. That stage will more readily be reached in a case of deliberate and persistent failure to comply than one where there is some excuse for it. A party guilty of deliberate and persistent failure to comply with a**

court order should expect no mercy. The fact which the failure to comply has had and the effect which the grant of relief would have on the parties are factors which are far more important in the case of non-deliberate or partially excusable non-compliance.

22. In *Harris v Academies Enterprise Trust* [2015] ICR 617, it was said that: rules are there to be observed, orders are there to be observed and breaches are not mere trivial matters; they should result in careful consideration whenever they occur. Tribunal judges are entitled to take a stricter line than they may have taken previously, but it remains a matter to be assessed within the existing rules and the principles in existing cases.

23. In *Hylton v Royal Mail Group* (unreported UKEAT/0369/14/DA), it was said that, quoting words used in *Thind*, provided the order itself had 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. It was also said in that case that where a claim has been struck out because of a failure to provide information but, by the time of an application for relief, the information has been supplied, a court will grant relief. The purpose of the orders would have been achieved. The approach should be facilitative rather than penal. That cannot apply however where there has been no compliance even at the stage of seeking relief from the order which was made. Orders are made to be observed.

24. In *Opara v Partnerships in Care* (unreported UKEAT/0368/09/LA), the Employment Appeal Tribunal suggested that the main focus will be on the default itself; the magnitude of the default; the explanation for the default; the consequences of the default for the parties in the proceedings; the consequences of imposing the sanction on the parties and the proceedings; and the promptness of the application to remedy the default.

25. In *Enamejewa* [*v*] *British Gas Trading Ltd* (unreported UKEAT/0347/14), the same tribunal held that it was not appropriate for the tribunal to consider, as part of its analysis, whether or not it was wrong for the unless order to have been made in the first place.

26. Lastly, in *Morgan Motor Co Ltd v Morgan* (unreported UKEAT/0128/15/DM), the question arose as to the date on which the question whether a fair trial could be achieved should be considered. Should that matter be considered as at the time of the application or when the sanction had in fact been applied. The difficulty with taking the first of those is that the party in default can later seek to make good the default and argue that a fair trial is now possible. It was said that more than one approach to this is possible. It may be arguable that the tribunal is entitled to consider the matter of the later date, the date of reconsideration, testing that against the interests of justice, but the tribunal must consider whether it is right to look at this question as at the later date."

13. Mr Martin makes the point that, although the Unless Order made reference only to paragraphs 2, 3, 4 and 5a of the RFI, there had not been even attempted compliance with Request 4. This is dealt with briefly by the Employment Judge at paragraph 31 of the Judgment.

14. I turn now to the Judge's conclusions:

"28. The first matter that I considered was the service of the document the day before the hearing began. This was done without any explanation as to the delay before it was served and indeed with no apology for the lateness of its service. It was not possible to analyse it in such a way as to come to a definitive view as to whether or not the document would comply with my order. However, in this respect, I was persuaded by a submission from Mr Kohanzad that what my order required the claimants to do was to identify the terms of the

contract said to support the claim and, if it is available provide a copy of the contract concerned. He submitted that it is not necessary for me at this stage to, in effect, try the case and come to a view about whether or not the claimants have put forward a tenable argument. It is sufficient if they deliver information which is said to support the claim.

29. However, the delivery of this information the day before the two-day hearing before me falls a long way short of the requirement in *Hylton*, that information is delivered by the time the application for relief from sanction is made. In such a case, the court will normally grant relief, but that was not the position here.

30. I therefore consider the other factors. The first is the reason for the default. I think there are two parts to this. This first is that O H Parsons did not have all of the required information. Because of that, the decision was taken to supply only generic information in November. The consequence was that where the information was in their possession, it was not put forward, to the potential detriment of the cases of the claimants who had provided them with the required information. To this extent, the decision as to how to proceed, which I have concluded amounts to a default in compliance with the terms of the order, was a deliberate decision on the part of O H Parsons and therefore a deliberation failure to comply with my order. I do not find that it was defiant or contemptuous. Nor was the failure to comply persistent in the sense that there had been multiple separate failures.

31. Next I must consider the seriousness or perhaps the magnitude of the default. There was a concession that the claimants had complied with request number 3 and I found that they had complied with, request number 5(a). My judgment was silent in relation to request number 4. This amounts to substantial but not material compliance. In this respect I found paragraph 23 of Mr Kohanzad's submissions particularly persuasive. He said that, whilst the written contract will no doubt be helpful in many cases, if a worker's pay during statutory holiday does not correspond with their normal remuneration while working, there will probably be a breach of the Working Time Directive. My view is that if an employer makes an additional payment to a worker employed by him, it is reasonable to infer that the payment is made pursuant to a contractual obligation and I do not think that the respondent is prevented from considering the detail of the case in the absence of production of the particular contractual provision relied upon, which might well not exist in documentary form. In this respect I found the submissions made by Mr Martin at paragraph 2 less persuasive.

32. According to *Opara*, I must consider the explanation for the default. I have dealt with that above. There is consistency in *Thind* and *Opara* as to the next factor, which is concerned with prejudice, although it is expressed differently. In *Opara* there is reference to the consequences of the default for the parties in the proceedings. In my view, the prejudice to the respondent resulting from the failure on the part of the claimants to comply with my order can be compensated for by a costs order. The delay in the case, resulting from the failure to comply, is to the prejudice of the claimants, rather than the respondent. The prejudice resulting from leaving the sanction in place is that claims which have been upheld in principle by the higher courts could not proceed. Leaving the sanction in place enables the respondent to avoid liability in such cases.

33. In *Opara* it is said that I must consider the promptness of the application to remedy the default. The factors in relation to this are two-edged. The application was made promptly but the information necessary to comply with the order was certainly not provided promptly.

34. I also bear in mind that the original order was made by consent, and that it became necessary for me to issue an unless order.

35. The question of a fair trial could be considered at any point in this process, 27 November 2015, 28 January 2016 or today. The answer is the same whenever it is considered. Provided the claimants provide the necessary information, a fair trial is possible. Such a trial is not possible until the information is supplied.

36. I should add for completeness that only one of the four matters relied upon in the original application under rule 38 would have persuaded me to grant the relief sought. Those factors were in turn: that the representatives did not receive notice of the unless order; that the order itself was not clear; that there was substantial although not material compliance and the seriousness of the consequences of the striking-out of the claims. I do not agree with the first, second or fourth of those matters. For some unexplained reason it was the respondent who was unaware that an unless order had been made. The evidence of Mr Welsh makes it clear that the claimants' representatives knew that such an order had been made. There was no

apparent need on the part of the claimants' representatives to seek clarity on the meaning of the order and, to my mind, it was clear. I agree that there was substantial although not material compliance with the order. I do not agree that the seriousness of the consequences of the sanction satisfies the revocation of the sanction in a case where there had been deliberate and persistent failure to comply with the tribunal order, although it may do so in less serious cases. There will have to be other factors, as I have found in this case.

37. I have tried to balance these factors in order to come to my decision. As to whether or not there was compliance with the order, it is impossible to tell because the further information was supplied only the day before the hearing. This does not help the claimants. The default was deliberate on the part of the solicitors but it was not defiant or contemptuous. It resulted from a decision to proceed in a particular way. As to the seriousness or magnitude of the default, I have accepted that there was partial compliance and that the default was less serious than the respondents contended. The arguments about prejudice to the parties lie, it seems to me, in favour of granting the application. If I do not grant the application, claims which, in principle, ought to succeed would be defeated. The fact that the original order was made by consent and that it was necessary for me to make an unless order are factors which weigh against granting the application. As regards the prospects of a fair trial, I accept that a fair trial would be possible once the information is available.

38. Weighing all of those factors in the balance, I consider that the right course is to grant the applications. The weight of argument, as I have summarised matters in the preceding paragraph is in favour of it, and that is my decision.

39. For those reasons, I decided to permit the application."

15. Mr Martin placed considerable emphasis on the fact that the Judge had been unable to reach a definitive conclusion as to whether there had been "*material compliance*" of the requirement to respond to Request 2. He also pointed out, with considerable force, that the absence of any response to Request 4 was highly material, that information being essential in order to assess the appropriate method of calculation pursuant to sections 221 to 224 of the **Employment Rights Act 1996**.

16. He submitted that, by reference to the authorities cited by the Employment Judge (see above) he had failed to carry out the appropriate assessment as to the magnitude or seriousness of the default (see **Opara** and **Thind**) and had failed to take into account the principle established by **Neary** that a person guilty of deliberate and persistent failure to comply with a Court Order should expect no mercy. He also argued that no assessment could validly be undertaken as to whether a fair trial could be possible without an evaluation as to whether the information provided was adequate.

17. Mr Kohanzad's preliminary argument was to the effect that I should conclude that the Judge had indeed concluded that there had been material compliance. He acknowledged that there were difficulties in the argument, not least the Judge's comments at paragraph 37 "*As to whether or not there was compliance with the order, it is impossible to tell …*" and "*I have accepted that there was partial compliance*". However, he argued that I should read paragraphs 28 and 29 as the dominant paragraphs in this regard, and that I should find that the Judge had held (in having accepted Mr Kohanzad's submissions) that there had been material compliance.

18. Ingenious though the submission was, I found no merit in it. It is plain from a fair reading of the Judgment that the Judge had not been able to make any finding as to whether there had been material compliance, due entirely to the late service of the document.

19. Mr Kohanzad went on to stress the need for the Claimants to obtain what was justly theirs, as stated by the Judge.

20. He also argued that the prejudice has been ameliorated by the Wasted Costs Order which he proposed to make. Mr Martin responded to that by arguing that an application for costs was inevitable in any event, and that the Judge erred in holding that a sanction which would have been visited anyway could somehow have compensated for a failure to provide information necessary for a fair trial.

21. In my judgment, the Employment Judge erred in law in making the Order that he did. Those errors came from a failure to adopt the principles in the case law cited to him, notwithstanding his self direction as to the law. In the absence of a finding that there had been material compliance with the Unless Order (in all respects, including Request 4, which he

glossed over, and not merely Request 2) it was not open to him to find that relief from sanction was justified. If I am wrong about that then I would hold that it was a perverse finding that a fair trial was possible. His comment at paragraph 37 "*I accept that a fair trial would be possible once the information is available*" may well be true - as it is in all cases. However, that was not the test.

22. I also find that it was wrong in law and also perverse of the Employment Judge to grant relief from sanction to each of the 25 Claimants, notwithstanding that there had not even been purported compliance with the terms of the Unless Order, even as at the date of the hearing in relation to the ten whose names appear above.

23. I have, thus far, not separated the nine grounds of appeal, not least as they shade into each other. However, I must now do so.

24. The issue as to Request 4 was not resolved below, and I find it impossible to do so myself on the material before me, as is the case, too, with Requests 3 and 5(a) (grounds 1 and 4). Similarly, although I have found that the Judge did not, as he should have, reach a conclusion as to the adequacy of the material provided in the document served late, in relation to Request 2, I am unable to say that there had not been, in fact, material compliance such as would enable a generous ET to grant relief, notwithstanding the delay, at least in relation to 15 of the 25 Claimants (grounds 2 and 3). Ground 5 (application of the fair trial test) and ground 7 (consideration of the merits) is encompassed within the earlier grounds. Ground 6 (prejudice in relation to costs) is largely irrelevant given my overall findings.

25. So far as ground 8 is concerned (those Claimants not represented by OH Parsons) these individuals fall into a separate category along with the four others in respect of whom no information whatsoever was presented in the document served on the eve of the hearing. It seems to me that there is only one possible finding in relation to those individuals that was open to the Judge and that was to dismiss the application for relief. There being only one such option, in accordance with the principles in **Jafri v Lincoln College** [2014] EWCA Civ 449, I direct that the applications of those named individuals for relief fail, and their claims remain struck out.

26. For the remaining Claimants my conclusion is that there must be a remission back to the Employment Tribunal to reconsider the application afresh. That Tribunal must consider the question of compliance with the terms of the Unless Order in full, including all Requests in the RFI which were the subject of the Order.

27. Plainly, as Employment Judge Southam has retired, that exercise must fall to a differently constituted ET. Although a matter for the Tribunal, I would anticipate directions for service of any remaining material to be relied upon by the remaining complainants well in advance of any hearing date, to enable a meaningful analysis as to material compliance and the possibility of a fair trial.

28. I turn now to the appeal on costs.

29. In his skeleton argument, Mr Kohanzad realistically conceded on behalf of OH Parsons that the threshold for a Wasted Costs Order was met. However, it is argued that the Employment Judge failed to consider whether, merely because the wasted costs threshold had

been met, an award should be made. He submitted the Employment Judge erred in law in failing to considering whether, before proceeding to assess the quantum of the wasted costs award, he should exercise his discretion to make any such award. This arises from the third limb of the three stage test set out in **Ridehalgh v Horsefield** [1994] 3 All ER 848 CA viz:

i. has the legal representative of whom complaint was made acted improperly, unreasonably or negligently?

ii. if so, did such conduct cause the applicant to incur unnecessary costs?

iii. if so, is it, in all the circumstances, just to order the legal representative to compensate the applicant for the whole or part of the relevant costs?

30. It seems to me to impose a degree of artificiality, and the impermissible reading of a Tribunal Judgment as though it were a statute to require express words to be used, when the tenor of the decision makes clear that decision posed by the third requirement has necessarily been made. At paragraph 40 the Judge indicated that he had suggested to Mr Kohanzad that "*a costs order would be appropriate*". In the following paragraph he records Mr Kohanzad as conceding that a Costs Order (although not a Wasted Costs Order) should be made because of the failure to comply with the Order. As to where the failure to comply lay, the Employment Judge said this:

> **"47. In my view, the decision made by O H Parsons to answer the request for further information, when faced by the unless order, in the way in which they did amounted to improper, unreasonable and negligent conduct. It amounted to a breach of their duty to the tribunal; it did not permit of a reasonable explanation. In relation to the claimants who had presented information, that information was not being presented to the tribunal. Where they could not supply the information, there was a failure on the part of the claimants' solicitors to ask for the tribunal's indulgence and a variation to the order to facilitate the provision of that information later. There was no hint at any time that the solicitors would have difficulty in complying with the terms of the order and they took the decision to deal with the matter generically. In my view this was negligent conduct, in the light of the fact of the unless order. The claimants were at risk of having their claims struck out. I would not have concluded that this was negligent conduct otherwise, but I would still have held it to be improper and unreasonable."**

31. It is also relevant to note at paragraph 32, the Employment Judge had referred to a Costs Order being something which would compensate for the prejudice caused. Finally, the Judge had set out the three stage test in full at paragraph 42 of his Judgment.

32. In my judgment, there is nothing in that ground of appeal.

33. The second ground of appeal concerns the question whether the costs claimed had reasonably been incurred, Mr Kohanzad pointing out that he had spent much time dealing with the Costs Schedule querying whether costs had been reasonably incurred. He argued that there should have been a two-stage process: first, check that each element of costs claimed had been reasonably incurred, then assess whether such costs which *had* been reasonably incurred were proportionate.

34. Dealing with the quantum of costs, the Employment Judge said this:

> **"49. The respondent's solicitors have presented schedules of costs, which, for the period I indicated above amounted to £58,187.56.**
>
> **50. Mr Kohanzad submitted this was a wholly disproportionate amount. I was provided with a detailed schedule of the work done in connection with all the steps which the respondent's solicitors felt it was necessary to take from 30 November 2015. I considered that schedule. It is not necessary for me to conduct a detailed audit. However, once I took the view, as I did, agreeing with Mr Kohanzad, that the amount of costs claims were disproportionate to the issues I had to consider, some analysis of the schedule became necessary.**
>
> **51. In this multiple there are only 25 claimants. If I allowed the claim for costs in full, I would in effect be ordering the respondent's solicitors to pay the sum of £2,327.50 per claimant. I am bound, I think, to apply Mr Kohanzad's proportionality argument, having accepted its validity. I do not have any information that would enable me to understand the likely the [sic] average amount of the claims. So it might be said that I have no data by which to conclude that the average amount sought is disproportionate. In other multiple holiday pay claims, I have ordered amounts payable as wasted costs varying between about £1,200.00 per claimant to £350 per claimant (also without knowing the potential value of the claims). That is the only data I have available. I nevertheless rely on it. The amount of some of Counsel's fees appear to be out of proportion to the number of claimants in this group. My impression is that the claims have been progressed as if they were major high-value litigation. That would only be true if there were significantly more claimants in this group. My view is that this is low-value litigation multiplied by 25. On that basis, the costs claimed are excessive. An appropriate figure, within the range just indicated, would be £750 per claimant. This would amount to £18,750.00. This is 32% of the amount claimed. I take the view that to order such a sum would be to let the claimants' solicitors off too lightly. The reason that they are in this position is because they took what was in my view a wrong decision about how to proceed with providing the information I ordered. There is no doubt that they have put the respondents to**

the incurring of costs which should not have been incurred. I think the correct way to proceed is to order the claimants' solicitors to pay to the respondent 45% of the costs incurred. That is the sum, when rounded down, of £26,000.00.

Future Case Management

52. The claims will now be listed for a case management hearing. That is likely to be before a different Employment Judge."

35. The Judge was right in saying that he did not have to conduct a detailed audit. Wasted costs are to be dealt with in a summary fashion: see the dictum of Swinton Thomas LJ in **Kilroy v Kilroy** [1997] PNLR 66 at page 73 when he said "*A judge cannot be expected to make a detailed assessment of the costs that have been incurred, but there must be some enquiry …*".

36. It seems to me, as Mr Martin submitted, that a fair starting point must be that the costs which have been wasted are costs actually incurred by the negligent act. That is what the Schedule was. Those costs inevitably flowed from the consequences of failing to comply with the Unless Order. In my judgment, a line by line assessment is inappropriate. There has been no suggestion that work billed for had not been done, and it seems to me that there is no real distinction to be drawn, at least for wasted costs purposes, between proportionality and reasonableness.

37. In paragraph 51 it seems to me that the Employment Judge is simply embarking on an exercise in proportionality having by the clearest inference accepted that the costs were actually incurred. He was testing whether the level of costs are reflective of the size of the litigation, and whether it is proportionate to order that OH Parsons pay all of the fees incurred by the Respondent.

38. Consequently I reject ground 3(i) which contends that the Employment Judge made an Order of costs which were disproportionately high. Grounds 3(ii) and 4 add little: there is

nothing punitive about making an Order of costs which is considerably less than the costs actually incurred. Ostensibly simple claims can incur high costs which may seem, to the outsider, disproportionate to the potential value of the claim from the perspective of a Claimant. A Respondent, of course, has to incur costs if it wishes to defend a claim, regardless of the likely sum which would accrue to a Claimant.

39. I reject the suggestion that the likely value of the claims which the Employment Judge sets out in paragraph 51 were matters which he should have canvassed before the parties. As the outcome shows, having conducted a mental exercise aimed at assessing the likely costs, which seems to me to be by way of attempting to find a yardstick, he concluded that the costs so arrived at would be considerably less than those validly incurred by the Respondent. He therefore increased the costs considerably from that sum. In my judgment this was a valid and permissible exercise of judicial discretion, weighing up factors which, in the final analysis, would have resulted in an award of costs which would have been too low. There is no "tariff" in wasted costs cases, and to suggest that a debate should have been conducted as to value of claims in other cases is to my mind unrealistic.

40. For these reasons I dismiss the appeal of OH Parsons.