Appeal No. UKEAT/0175/19/RN

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 19 November 2019

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

DUNCAN LEWIS SOLICITORS LTD — APPELLANT

MISS M PUAR — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR OLIVER ISAACS (Of Counsel) Instructed by: DWF Law LLP 1 Scott Place 2 Hardman Street Manchester M3 3AA
For the Respondent	MISS M PUAR (The Respondent appearing in Person)

SUMMARY

PRACTICE AND PROCEDURE – Striking-out/dismissal

The Claimant's claims were automatically struck out for breach of an 'unless' order by failure to serve further particulars of her claims. The Claimant applied under ET Rule 38(2) to set aside the strike-out order. The ET granted the application. The Respondent appealed the decision on various grounds. The EAT allowed the appeal on the grounds that the ET had failed to give **Meek**-compliant reasons for its decision and remitted the application to be heard afresh by the same ET.

THE HONOURABLE MR JUSTICE SOOLE

1. This is an appeal by the Respondent employer against the Decision of the Employment Tribunal at Watford (Employment Judge Bedeau) dated 2 March 2018, following a hearing on 9 February 2018, which set aside a previous Order dated 18 August 2017 which had struck out the Claimant's claim for failure to comply with an unless order for the provision of further information in respect of her claims. I shall to refer the parties as they were below, i.e. as Claimant and Respondent.

2. The Claimant was employed by the Respondent solicitors as a caseworker from 4 August 2016 until dismissal with effect from 8 December 2016. The stated grounds of dismissal were in respect of her alleged performance and conduct during her probationary period.

3. The Claimant issued her ET1 claim form on 2 March 2017, claiming wrongful and unfair dismissal, race discrimination, bullying/harassment, victimisation and notice pay. On the form she gave her postal address and email address and in the relevant box indicated preference for documents to be sent to the latter. By its ET3 the Respondent replied to the claim with detailed Grounds of Resistance. In respect of the victimisation claim it stated, amongst other things, that the Claimant had failed to particularise the alleged protected acts and detriments and requested further particulars. There was no such request in respect of the other claims. Jurisdiction for the unfair dismissal claim in the absence of 2 years' service was challenged; and that claim was subsequently struck out.

4. A Preliminary Hearing was listed for 1 June 2017. On the previous day the Claimant emailed the Tribunal and the Respondent, stating that she was due to start employment on that date and asking for the hearing to be put back for the afternoon or relisted. The application was refused.

5. At the hearing, Employment Judge Skehan ordered a further Preliminary Hearing to take place on 21 August 2017. The Order recorded the Respondent's understanding of the Claimant's claim in respect of the claims of wrongful dismissal and race discrimination (see paragraphs 5 and 6) and ordered the Claimant to provide further information in the following terms:

> **"8. The Claimant is ordered within 14 days from receipt of this order to provide to both the Respondent and the employment tribunal an amended document setting out in relation to each and every claim she wishes to pursue in the employment tribunal;**
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> **8.1. the date of the allegation;**
>
> **8.2. what was said or done or the gist of what was said or done;**
>
> **8.3. who was present;**
>
> **8.4. identifying where that claim is contained within the original form ET1; and**
>
> **8.5. specifying the nature of each allegation i.e direct discrimination on the grounds of race, direct discrimination on the grounds of religion or victimisation."**

6. The Order was not sent to the parties until 5 July 2017. In the case of the Claimant this included sending it to the email address identified by her in her ET1: see page 134 of the appeal bundle. By the combined effects of **Employment Tribunal Rules** 86(3) and 90, to which it seems the Judge was not referred, the Order is deemed to be duly delivered to the Claimant "unless the contrary is shown."

7. On 4 August 2017 the Respondent applied on notice for the claims to be struck out for non-compliance with the Order of 1 June 2017, alternatively for an unless order. On 14 August an unless order was issued and sent to the parties. It provided "The Claimant is to comply with

Tribunal orders sent to the parties on 5 July 2017 (copy enclosed) **by 17 August 2017** or the claim will be struck out without further order."

8. By letter dated 18 August 2017 the Employment Tribunal notified the parties that the Claimant's claims stood struck out. The notice was in the following terms "Further to the Unless Order sent to the parties on ***14 August 2017*** which was not complied with by ***17 August 2017***, the claim has been dismissed under Rule 38."

9. On the same day the Claimant applied to set aside the orders and thereby for relief from sanctions. Her primary case was that she had not received the Orders of 1 June or 14 August 2017 until receipt by email on 18 August; and that accordingly she had not been in default. A hearing of the application was listed for 9 February 2018.

10. The relevant provision in such an application is **Employment Tribunal Rule** 38(2), which provides:

> **"A party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations."**

11. At the conclusion of the hearing on 9 February 2018 Employment Judge Bedeau set aside the previous order dismissing her claims. He then proceeded to a case management discussion; and made a CMS containing further directions towards a full hearing on liability. As to the issues, the CMS noted the Claimant's substantial agreement with the wording of the issues on wrongful dismissal and race discrimination as set out in paragraphs 5 and 6 of the CMS of 1 June 2017; the information which she had supplied in respect of a claim of victimisation; and that she was to provide clarification of her claim of harassment: see

paragraphs 6 to 12 of the CMS. The Employment Judge then made an Order for further information in the following terms:

> **"1.1. The claimant is ordered to provide and serve further information in respect of her direct race and/or religion or belief and harassment claims replying to the issues as set out in paragraph 8 of the Case-Management Summary and Orders promulgated on 5 July 2017, by no later than 4.00pm 23 February 2018."**

12. In his skeleton argument for this appeal, Mr Isaacs submitted that the effect of the CMS and consequent Orders made on 9 February 2018 and dated 2 March 2018 was that the Claimant had only been ordered to provide further information in respect of her claim of harassment. However in argument, having considered the terms of the Order in paragraph 1.1, he drew back from that apparent concession.

13. On 22 February 2018 the Claimant supplied a document headed "The Claimant's amended Particulars of Claim." She contends that this complies with the Order to supply further information, but acknowledges that it involves a widening of her claims. This document has triggered an application by the Respondent for an Order to strike out the particulars. That application is now listed for hearing on 16 January 2020. There may also be a pending application by the Claimant, but the position is not clear to me.

14. In the meantime on 12 February 2018 the Respondent applied for Written Reasons for the Decision to set aside. On 4 April 2018 Employment Judge Bedeau refused the Respondent's application for a reconsideration of his judgment on the application to set aside the Order striking out the claims. That refusal stated in particular "The Claimant has set out her claims in the ET1, before Employment Judge Skehan, and in her further information…."

15. The Written Reasons for the 9 February decision to set aside were supplied on 19 October 2018. These Reasons identify the issues for consideration as:

> **"2.1. What was or were the reasons for the claimant's failure to comply with the tribunal's order and or Unless Order?**
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> **2.2 The seriousness of the default?**
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> **2.3 The prejudice to the other party; and**
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> **2.4 whether a fair trial is still possible?"**

16. Subject to the issue of whether the Claimant had received the relevant Orders and thus whether she was in default, there is no dispute that those were the relevant factors to be considered in this application. In **Thind v Salvesen Logistics Ltd** [2010] UKEAT/0487/09 Underhill P, as he then was, cited the clarification which had been provided by the Court of Appeal in **Governing Body of St. Albans Girl's School and Anor v Neary** [2009] EWCA Civ 1190. He observed that the assessment under Rule 38(2) will generally include, but may not be limited to, the four factors. Thus having considered the Decision in **Neary**, he stated that it was now clear that there was no obligation on a Tribunal to proceed by reference to CPR 3.9. He continued:

> **"14. 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 has of course 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 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."**

17. As to the limits of appellate interference with such a decision, Underhill P again cited **Neary**, stating:

> **"15. Neary also contains a convenient restatement of the limitations on this Tribunal interfering with the decision of an Employment Judge whether or not to grant relief in a case of this kind. At paragraph 49 of the judgment, Smith LJ says this:**

> **'It is often said that decisions of this kind are discretionary. It seems to me that a decision such as this is not so much an exercise of discretion as an exercise of judgment. But this may be a distinction without a difference in that, in both cases, there is a duty on the judge to decide the case rationally and not capriciously and to make his decision in accordance with the purpose of the relevant legislation, taking all relevant factors or circumstances into account. He must also avoid taking irrelevant factors into account. In both cases there may be two correct answers or at least two answers which are not so incorrect that they can be impugned on appeal. Whereas with the exercise of discretion, the question will be whether the judge's decision was permissible on the evidence, with an exercise of judgment, the question will be whether his decision was fair. But provided that the judge has met these requirements, his judgment should not be impugned merely because the appellate court would or might have reached a different conclusion.'**
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> **I direct myself accordingly."**

18. In his Written Reasons the Judge did not deal separately with the question of whether the Claimant was in default. In effect he rolled up that question with the question of the reason for default. Thus he stated:

> **"22. Dealing with those matters in turn, the reason for the default was that the claimant said that she did not receive the Unless Order, the Strike Out Order and Case Management Orders until 18 August 2017. In relation to whether she received these documents in the post, she said that she moving to a new address and was in the process of packing up her possessions for the move. I did not consider these as good reasons for the default and do entertain a degree of scepticism as she told me that both means of communicating information from the tribunal to her failed, namely email account postal address. She studied law and should be familiar with litigation. It was up to her to prosecute her case before a tribunal and that means complying with the orders made. If that was the only factor I would have no hesitation in rejecting her application."**

19. As to the seriousness of the default, the Claimant had not complied with the Order which required her to clarify her claims. However, he continued:

> **"23. ….. She told me, and I was prepared to accept her account that she was focusing on this hearing to set aside the Strike Out Order and did not believe she had to comply with the Case Management Orders made on 1 June 2017 by Employment Judge Skehan which were promulgated to the parties on 5 July 2017."**

20. As to prejudice:

> **"24. …. I accept that the respondent does not have the full picture of the claimant's claims and how she put her case against it, but it engaged in a detailed internal process in addressing the claimant's performance and conduct; the decision to terminate her probation; and the appeal process. There are documents documenting the steps taken which are likely to act as aide memoirs to any potential witnesses it may call. There is the inevitable delay in having to wait for the final hearing. Although I do accept that the respondent will suffer some prejudice, I am of the view that the prejudice can be overcome."**

He continued "Were I to reject the claimant's application the reality is that she will not have any recourse against the respondent in relation to her claims."

21. As to whether a fair trial was possible, the ET Judge stated:

> **"26. … Mr Isaacs takes a neutral position in respect of this. I have come to the conclusion that a fair trial is possible. The claimant can give her account of events, although I am told, which is acknowledged, that she suffers from short-term memory loss. She has, however, provided a very detailed witness statement in support of her case and according to Mr Isaacs she has added to that which may involve, in due course, an application to amend."**

He concluded:

> **"27. Balancing as I do, all those factors, I have and I must say, quite candidly and with some reluctance, fall on the side of the Claimant. I will set aside the judgment and allow the claimant to proceed with her claims against the Respondent."**

22. The first ground of appeal is that the judge erred in the assessment of the seriousness of the default. Mr Isaacs submits that the judge wrongly focused on the Claimant's excuse for the failure to comply; and did so in circumstances where he had already determined that there was no good reason for the default. Thus in substance he did not truly consider this factor. Mr Isaacs pointed to a decision of the Court of Appeal in the related area of relief from sanctions under CPR 3.9, where it was stated that "The very fact that X has failed to comply with an "unless" order (as opposed to an "ordinary" order) is undoubtedly a pointer towards seriousness and significance": **British Gas Trading Ltd v Oak Cash and Carry Ltd** [2016] EWCA Civ 153 at paragraph 41.

23. The second ground of appeal is that the judge erred in his assessment of whether a fair trial was still possible. The Respondent's skeleton argument for the hearing had stated "In light of the failure to particularise the claims, R has no knowledge if a fair trial is possible. It is unclear as to whether or not all relevant players remain employed by R, whether it has retained all relevant documentation, etc." Mr Isaacs submits that contrary to paragraph 26 of the Judgment, the Respondent's statement was not a "neutral position" but was a reflection of the continuing failure to provide the necessary particulars of her claims. As had been advanced in all its written and oral submissions, the issue of a fair trial could only be determined once the

claims had been clarified. No such clarity had been provided. Accordingly a fair trial was not possible.

24. For this purpose Mr Isaacs also pointed to the Judge's acceptance, on the separate issue of prejudice, that the Respondent "…does not have the full picture of the Claimant's claims and how she puts her case against it."

25. Mr Isaacs supports all this with the observations of Langstaff P in **Hylton v Royal Mail Group** [2015] UKEAT/0369/14. In that case, concerning the task of assessment under Rule 38(2), he stated:

> **"21. The purpose of case management orders is in general to secure, where that remains possible, that there should be a fair hearing of the allegations made by one party against the other. Where accusations have been made on a very generalised basis, as here, clarity of the accusation is needed. The Respondent is entitled to know what acts it is being accused of, and the Tribunal cannot adjudicate properly unless that is the case. Unless and until that is done, it is difficult if not impossible to have a fair trial. As observed in Johnson v Oldham, parties are entitled to know the case against them.**
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> **22. It must usually be the case that, where a claim has been struck out because of a failure to provide such 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. Again, as observed in Johnson, the approach should be facilitative rather than penal. That cannot, however, apply 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. As was said by Underhill J (as he was) in the case of Thind v Salvesen Logistics Ltd [2010] UKEAT/0487/09, every case turns on its own facts, and it should not be thought to be usual that relief will be granted from the effect of an unless order (paragraph 36):**
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> > **"… 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. …"**

26. As matters stood on the date of hearing, the Claimant had still failed to comply with the orders for clarification of her case. For that purpose it was no answer for the Claimant to state (as the Judge had accepted when considering the issue of seriousness of the default) that she had been focusing on the hearing to set aside the strike out order and did not believe that she had to comply with the Order for information in the meantime. Furthermore the fact that the Claimant had suffered memory loss problems was a fact against, not in favour of, the exercise

A of any discretion in her favour. Accordingly there was no rational basis on which the Judge could have concluded that a fair trial was possible.

B 27. The Notice of Appeal and skeleton argument contend that the further information as subsequently served by the Claimant on 22 February only strengthens the case that a fair trial was not possible. The particulars involve an expansion of the Claimant's claims for which no permission had been obtained; and, contrary to the Orders made on 1 June 2017 and following C the hearing on 9 February 2018, failed to identify the dates that the alleged acts took place or who was present. Mr Isaacs drew back from that argument in oral submissions, contending that, in the event that the appeal was allowed and the matter remitted for consideration, it would D be wrong in principle for account to be taken of the content of particulars supplied after the hearing under appeal.

E 28. The third ground of appeal is that the Judge's reasoning was not "**Meek** compliant." In particular the Judgment failed to give any adequate explanation for the Judge's conclusion that any prejudice to the Respondent would be overcome or that a fair trial would be possible notwithstanding the Claimant's failure to supply further information. As the Judge had F acknowledged, the Respondent still did not have a full picture of the Claimant's claims and how she put her case. In oral submissions, he added that this ground also applied to the Judge's Reasons on the issue of the seriousness of the default.

G 29. The fourth ground of appeal is that the only possible conclusion in the circumstances was that it was not in the interest of justice to set aside the strikeout of the Claimant's claims.

H 30. In her Answer to the appeal, the Claimant made the following particular points.

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31. As to ground 1, she contended that "it was already established by the Tribunal that there was no default of the order." In oral argument she supported that contention on the basis of remarks reportedly made at the hearing. The Answer described the Order of 1 June 2017 as perverse, unclear and badly drafted and worded. The Claimant reiterated that she had not become aware of that Order until 18 August 2017, i.e. the day her claims were struck out. More broadly, she referred to the decision in **Neary** and to the overall test in Rule 38(2) which is focused on the interests of justice.

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32. As to ground 2, she contended that the Respondent had raised no objections about insufficient particulars at any point prior to this appeal. In oral argument she rightly did not pursue that point. Her general contention was that the judge was right to conclude that a fair trial was possible; and that there was no basis to interfere with his decision.

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33. As to ground 3, the Decision was adequately reasoned. The Judge's observation in paragraph 25 ("Were I to reject the Claimant's application the reality is that she will not have any recourse against the Respondent in relation to her claims)" reflected his correct focus on the test of the interests of justice.

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34. As to ground 4, she submitted that the Decision reflected the overriding objective in **Employment Tribunal Rule** 2; and for that purpose made a wide range of submissions on the merits of her various claims.

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35. The Claimant's skeleton argument included the following particular submissions. First, that the Respondent by its appeal is raising matters which have not been raised before and are accordingly precluded under the principles of *res judicata* and/or abuse of process under

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Henderson v Henderson. This is advanced on the basis that the Respondent had not until this appeal contended that she had not served the requisite particulars by the time of the hearing on 9 February 2018. In argument she rightly did not pursue these contentions.

36. Secondly, that she was not in breach of the Order of 1 June 2017; nor therefore should the unless order have been made. This again reflects her previous evidence and primary case that she did not receive any of the relevant orders until 18 August 2017.

37. Thirdly, that cases should not lightly be ruled out on a procedural technicality without determination on the merits. She says that further evidence obtained since the hearing of 9 February 2018 supports her case on the substantive merits of her claim of discrimination.

38. In considering this appeal, I keep firmly in mind the restraint on appellate interference with decisions made under Rule 38(2): see the restatement of the position by the Court of Appeal in **Neary** in **Thind** at paragraph 15. The need for that restraint is further demonstrated by the language of the rule with its broad test of the interests of justice. In consequence, and as the authorities make clear, these decisions are intensely fact-sensitive.

39. However I am persuaded that the decision in this case is vitiated by a lack of adequate reasoning and must be reconsidered afresh.

40. Before dealing with the four grounds of appeal, I should start with the question of whether or not the Judge held that the Claimant was in default. It would have been better if the Judgment had made a clear and express finding on that point. Paragraph 22 refers only to "a degree of scepticism" on the Claimant's account of non-receipt of the Orders before 18 August

2017. However the implication (or at least inference) from that paragraph is that the Judge was satisfied that the Claimant had received the Orders before that date.

41. On the first ground of appeal, I accept the submission that the Judge gave no adequate reasons on the issue of the seriousness of the default. Indeed the relevant paragraph of his decision (23) does not contain an express conclusion on that factor. Whilst there is authority to the effect that where compliance takes place very shortly after the relevant deadline, the default may not be treated as serious or significant (see **British Gas** at paragraph 42), I consider it very questionable whether the reason given by the Claimant for the failure to provide the requisite particulars by the date of the hearing could be a mitigating factor when assessing the seriousness of the breach. However the real difficulty on this issue is that the Judge did not express any conclusion on this factor.

42. As to the second and third grounds of appeal, I agree that it is a mischaracterisation to describe the Respondent's position on the issue of whether it was possible to have a fair trial as 'neutral'. The cited statement in its skeleton argument for the 9 February hearing was not one of neutrality but a submission to the effect that the Tribunal could not be satisfied that a fair trial was possible in the absence of the ordered particulars.

43. However, as Mr Isaacs rightly accepted in argument, it does not necessarily follow from the absence of the requisite particulars that a fair trial is impossible and/or that a Rule 38(2) application must inevitably be refused in such circumstances, nor that this is the effect of Langstaff P's cited observations in **Hylton**. There may be cases where the interests of justice require that the party in breach is given one last chance to comply. However I am persuaded that the Judge gave no adequate reasons for his conclusion that a fair trial was possible

notwithstanding the continuing absence of the ordered particulars. The Judge had accepted that the Respondent did not have the full picture of the Claimant's claims and how she put her case (paragraph 24) and noted that she might in due course be making an application to amend (paragraph 26). However his reasoning gave no real explanation for the conclusion that a fair trial was nonetheless impossible.

44. For this purpose it may be relevant that the Judge's Case Management Summary (CMS), which followed on from the decision to set aside, had noted essential agreement by the Claimant on the issues arising under claims for wrongful dismissal, race discrimination and victimisation. As the CMS records (paragraph 12), the outstanding information essentially related to the claim of harassment. It may be that the further order that he made for the provision of further information (i.e. the Order in paragraph 1.1) should be seen in that light. However it is simply not clear whether that is what the Judge had in mind.

45. Before turning to my conclusion on disposal, I should deal with some particular points raised by the Claimant in her Answer and skeleton argument and maintained in oral submissions.

46. I do not accept that there was any error or lack of clarity in the Order of 1 June 2017; or that the Judge accepted that there had been no default in compliance with that or the subsequent Order of 14 August 2017. Furthermore the Claimant's various submissions on the merits of her claims against the Respondent and her reference to fresh evidence in respect of her discrimination claims are of no assistance to the issues raised in the Rule 38(2) assessment.

47. My conclusion is that the application to set aside must itself be set aside and then considered afresh. However, I do not accept Mr Isaacs' submission, reflecting appeal ground 4, that reconsideration of the application admits of only one answer; or that accordingly there is no need to remit the application to the Employment Tribunal. I think it necessary for the fact-sensitive exercise to be considered completely afresh. For the avoidance of doubt, that includes the question of whether the Claimant was in default; and in turn the issue of when she received the relevant Orders.

48. I accept Mr Isaacs' submission that that reconsideration should not take account of the particulars served on 22 February. As a matter of principle, to do so would allow a party in default to obtain a potential advantage from the process of appeal. However the parties have sensibly agreed that, in the event of a decision to remit, this should be to the same judge. I would suggest that the reconsideration should be listed to be heard on the same occasion, but immediately before, the application(s) listed for 16 January 2020.