Appeal No. UKEAT/0183/20/VP

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On: 13 May 2021

Judgment Handed Down on:
23 June 2021

Before

HIS HONOUR JUDGE JAMES TAYLER

POLYCLEAR LIMITED — APPELLANT

MR DANIEL WEZOWICZ & OTHERS — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	RAD KOHANZAD (of Counsel) Instructed by: Peninsula Business Services Ltd The Peninsula Victoria Place 2 Cheetham Hill Road Manchester M4 4FB
For the Respondent	LANCE HARRIS (of Counsel) Instructed by: The Werenowski Consultancy Suite 411 Wellington House 90-92 Butt Road Colchester Essex CO3 3DA

SUMMARY

TOPIC NUMBER: 8, PRACTICE AND PROCEDURE

An unless order was made requiring the respondent to disclose documents. The respondent contended, after the event, that compliance with the literal wording of the unless order was impossible. The respondent made some attempt at compliance. The attempt was determined not to have constituted material compliance, with the consequence that the response had been struck out. The respondent applied, pursuant to Rule 38(2) ET Rules, for "relief from sanction". In rejecting the application, the employment judge erred in law in failing to take account of the attempt that the respondent made to comply with the unless order, or to analyse the extent of the failure in material compliance, in weighing up the interests of justice.

Observed; where there has been a total failure to comply with a clearly worded unless order the situation is relatively straightforward. Considerable problems can arise where there is an attempt to comply with an unless order, particularly if it is unclear, so that there is a genuine dispute about whether there has been material compliance and, if not, whether relief from sanction should be granted. A possible approach to case management in such circumstances is considered in in this judgment.

HIS HONOUR JUDGE JAMES TAYLER

The Appeal

1. This is an appeal against a Judgment of Employment Judge Wright made at a hearing on 11 April 2019 refusing an application pursuant to Rule 38(2) **Employment Tribunal Rules 2013** (ET Rules) after the respondent's response was dismissed in consequence of the breach of an unless order. EJ Wright refused to grant what is commonly referred to as "relief from sanction".

Background

2. The respondent manufactures plastic materials. The employees are referred to as the claimants, as they were before the employment tribunal. The claim was brought against the employer as first respondent and the managing director, as second respondent. The claim against the second respondent was withdrawn. I shall refer to the company as the respondent, unless it is relevant to distinguish it from the second respondent, in which case I shall refer to it as the first respondent.

3. The claimants submitted claim forms to the employment tribunal in February 2018.

4. A preliminary hearing for case management was held on 12 June 2018. The claims were identified as unfair dismissal for health and safety reasons, in the case of one of the Claimants "ordinary" unfair dismissal contrary to section 98 of the **Employment Rights Act 1996**, breach of contract, unpaid holiday pay and race discrimination. The race discrimination complaint was brought against the first and second respondents. Amongst other complaints, the claimants

A alleged that Polish workers such as themselves were assigned to work on machines that required them to work harder than Indian workers who were assigned to other machines.

B 5. Disclosure orders in fairly standard form were made at the preliminary hearing for case management.

C 6. On 10 December 2018 the claimants' representative made an application for disclosure of job sheets to allow an analysis of the work carried out on the machines to which the claimants (and other Polish workers) were allocated in comparison to the machines they claimed were operated by Indian employees. The request included the following;

D

> **"Accordingly, we ask for disclosure and copies of 30 job sheets for machine numbers 3, 5 and 10 and 30 job sheets for machine numbers 8, 14, & 16. We ask that the same date be used and that the sheets deal with a time the Claimants were still employed." [emphasis added]**

E 7. Mr Konanzad, for the respondent, contends that on a literal reading this required all of the job sheets to be for the same day. This would require roughly 10 sheets per machine per day. The respondent contends that job sheets may cover more than one day and that literal compliance with the request was impossible.

F

8. The matter was considered at a further preliminary hearing for case management before Employment Judge Emerton on 20 December 2018. At paragraph 25, in response to the above

G request for specific disclosure, he made an order in the following terms:

> **"25. The issue of comparing the evidence relating to tasks carried out by Polish employees, and those of Indian extraction, is central to the discrimination claims, and the material requested is relevant and may be probative. The first respondent is to disclose copies of the job sheets referred to in the penultimate paragraph on page 2 of the letter …"**

H

9. The respondent's representative did not explain at the time that compliance with the literal wording of the request would not be possible.

10. On 8 January 2019, the respondent contends that its representative sent a letter by email that included a link to a cloud site from which 256 pages of documentation could be downloaded. The respondent contends that because the manufacturing processes might take place over a number of days and could involve more than one machine it was not possible to comply with the literal wording of the request, but that the documentation disclosed would allow a meaningful comparison to be made. The claimants' representative contends that he did not receive this email.

The decision to make the unless order

11. The matter came on for a further preliminary hearing for case management before Employment Judge Harper MBE on 14 January 2019. He set out the procedural history and noted at paragraph 1.1:

> **"This is the third PH. The first was before me on 12th June 2018 and the second was before EJ Emerton on 20th December 2018. There was much non compliance with the Orders I made on 12th June 2018. Orders are made to be adhered to; they are mandatory not simply for guidance only. I explained to Miss Jackson that I was not impressed by the respondents' non compliance and she acknowledged that the respondents had difficulties on this issue. Non compliance produces serious consequences for the defaulting parties. I indicated that I was not confident that this Order would be sent out today but it was to be noted that the Orders made below are operational now and not when the parties receive this document."**

12. He concluded that a link to the documentation had not been sent as asserted by the respondent. At paragraph 1.2 he stated:

> **"1.2 The first Respondent was ordered on 20th December 2018 to " disclose the quotation and contract of 18th October 2016…" by 8th January 2019. Miss Jackson said that this had been disclosed by the sending of an email with an iCloud droplink. She was unable to tell when this had been done. Mr. Werenowski said that he had not received it. It was apparent, in the absence of any proof that it had been done, that it had not been done and the first respondent is in breach of the order. I made an unless order in paragraph 2 below."**

13. Employment Judge Harper made an unless order in the following terms:

> **"3. Unless the first respondent discloses to the claimants and the tribunal the job sheets referred to in the claimant's email of 10th December 2018 and referred to paragraph 25 of the Order of 20th December 2018 by 4pm on Wednesday 16th January 2019 the response of the first respondent will stand struck out without further order."**

14. The making of the unless order has not been appealed.

The attempt at compliance

15. On 16 January 2019 at 15.33, in response to the unless order, the First Respondent's representatives sent an email that included a link that permitted documents to be downloaded:

> **"We write on behalf of both Respondent's, and following the order dated 14 January by Employment Judge Harper.**
>
> **We understand the strict deadline, and in order to avoid breaching this order, please see attached the link to the respective job sheets.**
>
> **It is understood that the documents alone may be difficult for the Claimant, and the Tribunal, to draw inferences from, and therefore the Respondent is in the process of collating these documents into a short bundle.**
>
> **It is submitted that an index will be provided which will allow a more simple analysis to take place.**
>
> **Unfortunately, the Respondent's bandwidth was struggling to send the capacity of the documents and these have only been received by the Respondent's Representative recently. In any event, this will be formatted before the end of the day."**

16. The respondent did not explain in that email that the documentation did not comply with the strict requirements of the unless order because it was not possible.

17. A further email was sent on 16 January 2019 at 18.33, after the time for compliance with the unless order, attaching a paginated and indexed version of the documentation. Nothing further was written about the extent to which the documentation provided complied with the unless order.

The claimants contend the order has been breached and ensuing correspondence

18. On 21 January 2019, the claimants' representative wrote to the ET, noting the receipt of the email sent by the respondent on 16 January 2019, but contending that the respondent had not materially complied with the unless order. The letter referred specifically to what had been sent on 16 January 2019 by the respondent:

> **"We received by email with a link to We Transfer containing 183 pages of Job Sheets from the respondent's representative on 16 January 2019, at 15.32. The email was copied to the tribunal at such time.**
>
> **Once again, those Job Sheets concern work undertaken on a broad range of dates from as early as 25 August 2017 to as late as 14 October 2017, and therefore they are not a snapshot of one day as ordered. By doing so, this means there is no snapshot, and this allows the respondent to disclose what it wants the tribunal to see, and not what it has been ordered to provide.**
>
> **At the hearing on 14 January 2019 Employment Judge Harper made it abundantly clear that any further failure to comply with disclosure by the respondents would mean that their response would be struck out without further order. In reply on 14 January 2019 the respondents' representative, Ms K Jackson, specifically confirmed that she understood the consequences of non-compliance with the unless order given.**
>
> **As the respondents are in breach of the unless order the respondents' response is struck out."**

19. On 21 January 2019 at 16.30, the respondent's representatives sent an email contending that the response should not be struck out. The respondent argued that it had provided information that would permit a valid comparison to be made.

20. On 22 January 2019, an email was sent on the instruction of Regional Employment Judge Pirani, stating that if there had been a material breach of the order there would have been an automatic strike out of the response; that being the necessary consequence of a breach of an unless order. He stated that he was unclear whether the respondent was contending that there had been material compliance.

21. The respondents' representatives wrote again on 22 January 2019. They stated:

> **"With regard to the third order, the Respondent was ordered to provide 60 job sheets for 6 different machines on the same day during the Claimants employment. The Respondent maintains the position as per the correspondence sent yesterday and would refer the Tribunal to the disclosure index provided. In that 60 job sheets have been provided, with 58 inclusive of a 12 day period during the period of the Claimants employment. It is noted, that one out of four Claimants were only employed for 4 months, and therefore the ability to provide such information was significantly limited.**
>
> **It is submitted that insofar as reasonably practicable, the Respondent has complied with the unless order."**

The decision that there had been non-compliance so the response had automatically been dismissed and response

22. On 23 January 2019, a letter was sent on the instructions of Regional Employment Judge Pirani under the heading "Confirmation of Dismissal of Response" stating that the unless order sent to the parties on 14 January 2019 had not been complied with and therefore the response of the respondent had been dismissed. That determination has not been the subject of an appeal.

23. On 29 January 2019, the respondent's representatives wrote by email attaching a letter in which they applied to "set aside" the dismissal of the response. Surprisingly, the letter referred to the attempted compliance on 8 January 2019, but not to the emails sent on 16 January 2019. The letter also, for the first time, asserted that compliance with the strict wording of the unless order was impossible:

> **"The default occurred because the terms of the "unless order" were not accomplishable by the 1st Respondent. It is the Respondents' case that the lead Claimant would have been fully aware that activities across all 6 machines in question on a single date would not generate 60 job sheets or more. This is because one job sheet could require multiple reels of plastic to be produced over a period spanning across several days or weeks. Quite simply, it is impossible to produce 30 job sheets demonstrating activity on machines 3, 5 and 10 and 30 job sheets reflecting activity on machines 8, 14 and 16, relating to the same date. With respect, the Tribunal appears to have been misled into making an unachievable order calculated to secure an unjust default judgement. Considerable time, expense and resources have been expended by the Respondents."**

24. A further telephone preliminary hearing for case management was held before Regional Employment Judge Pirani on 1 February 2019. He made directions for a hearing to consider relief from sanctions.

25. I am informed that on 8 February 2019 the respondent produced ten more job sheets that all related to the same day.

The hearing of the application pursuant to rule 38(2) of the ET Rules

26. The hearing took place on 11 April 2019 before Employment Judge Wright. The application was refused. The background was considered from paragraphs 12 to 22 in which the sequence of relevant events up to the date of the making of the unless order was set out. Of the unless order Employment Judge Wright stated:

> **"23. It would seem the unless order was made against a background of a general disclosure order being made in June 2018 at PH1, a specific discovery order being made in December 2018 at PH2 and a final hearing due to start approximately a fortnight later.**
>
> **24. As the parties are aware, the Tribunal is rarely persuaded to make an unless order, due to the draconian consequences. At no point until the application of 29/1/2019, did R1 say, what it now says, which is in essences that the unless order was ambiguous and/or unreasonable (in terms of man hours) or that it was unclear or difficult to comply with. Even once the unless order was made <u>and presumably R1 tried to comply with it</u>, it did not set out its difficulties." [emphasis added]**

27. Employment Judge Wright noted that the claimants' position in respect of the further documentation provided by the respondent on 10 February 2019:

> **"32. The claimants say that in early February, R1 substantively or materially and belatedly complied with the unless order."**

28. At paragraphs 25 to 31 Employment Judge Wright set out steps that could have been taken in an attempt at compliance, or partial compliance, with the unless order:

> **"25. There are several things R1 did not do, which it should have done, whilst seeking to comply with an unless order; or knowing that it would not be able to comply.**
>
> **26. It could have (in accord with Overriding objective) explained its difficulties to claimants and said would the claimants be satisfied with what it could produce and what it eventually did produce? It could have explained that the information it was directed to supply was not in the format the claimants had anticipated, but it could still have supplied it. The Tribunal finds it disingenuous of R1 to say, the claimants wanted a job sheet in respect of a specific machine for a 24-hour period, which didn't exist; but for example, a job sheet did exist which covered that machine for a 3-day period. In view of the overriding objective, that information should have been supplied with an explanation.**
>
> **27. Similarly in respect of the man-hours, R1 could have produced the job sheets for one machine and one comparator machine and said to claimants, it has taken 'X' number of hours to produce that information and sought to agree what disclosure did or did not establish.**
>
> **28. R1 could have applied to vary, or suspend or set aside the unless order, under Rule 29. It could have alerted the claimants and Tribunal to any difficulties it was experiencing. The final hearing was imminent, however, rather than loose it, the date for compliance could have been varied (even at PH3 R1 was granted 'a little longer' to comply). It was also open to R1 to say complying with the unless order was disproportionate.**
>
> **29. R1 could also have taken any one of these steps at a much earlier stage in the proceedings, such as when the application for specific disclosure was made or specific disclosure was ordered. If R1 had properly complied with that order, it would have realised the difficulties which it said now became apparent.**
>
> **30. R1 could have appealed the unless order." [emphasis added]**

29. I consider the most natural reading of the words in paragraph 26 "what it eventually did produce" is as a reference to the job sheets sent on 10 February 2019.

30. At paragraph 31 Employment Judge Wright stated:

> **"31. Instead, R1 did none of those things, the unless order took effect and the end result was that the response of R1 was dismissed without further order."**

31. There is no specific reference in the judgment to the fact that documentation was disclosed on 16 January 2019 or any analysis of the extent to which, if any, the employment judge considered it amounted to partial compliance with the unless order. The most natural reading of the judgment is that the employment judge considered there had been no attempt to comply with the unless order until it had expired, with the eventual disclosure of documentation on 10

February 2019 demonstrating that, at least, partial compliance with the unless order would have been possible within time.

The refusal of the application pursuant to Rule 38(2) of the ET Rules

32. Employment Judge Wright concluded that:

> **"35. The significance of the failure by R1 in not complying with the unless order resulted in very serious consequences; documents which should have been disclosed to the claimants had not been. R1 had opportunities before and after PH2 and PH3 to point out any difficulties it was experiencing and to take any of the steps which are set out above. The significance of which was that the final hearing at the end of January 2019 was lost, which has resulted in a further year or more delay.**
>
> **36. The default occurred by R1 not engaging with the process, bearing in mind it was represented at all times and it simply did not follow case management orders; or more pertinently it did not alert the claimants or the Tribunal to any issues it was experiencing. Particularly in view of the fact the Tribunal had been persuaded to take the rare step of granting an unless order, any of the points which R1 now raises could and should have been raised much earlier.**
>
> **37. The Tribunal has evaluated all of the points advanced, the evidence it heard and the submissions made. It concluded however, it is not in the interest of justice to allow the application to set the unless order aside."**

The original grounds of appeal

33. The respondent appealed against the refusal of the employment tribunal to grant relief from sanction by notice of appeal dated 29 May 2019. There were three grounds of appeal: (1) that the employment judge erred in deciding that there had not been material compliance with the unless order, and (2) the employment judge failed to take into account the attempt by the respondent to comply with the unless order, and (3) the employment judge erred in failing to determine the extent to which the respondent would be able to participate in the remedy hearing.

Rule 3(7) of the Employment Appeal Tribunal Rules 1993

34. The matter was considered on the sift by HHJ Martyn Barklem who, by an order with seal date 6 January 2020, decided that there were no reasonable grounds for bringing the appeal. The

respondent challenged that determination in respect of the first two grounds pursuant to rule 3(10) of the **Employment Appeal Tribunal Rules 1993** ("EAT Rules).

Rule 3(10) and the amendment to ground 1

35. The matter came before me for the Rule 3(10) hearing on 19 August 2020. I noted that the decision that there had not been material compliance with the unless order made by REJ Pirani had not been subject to an appeal. I permitted an amendment of the first ground of appeal to contend that at the hearing to consider the application pursuant to Rule 38(2) ET Rules it would have been open to Employment Judge Wright to conclude that, notwithstanding the determination of REJ Pirani, there had been material compliance with the unless order, because the application pursuant to Rule 38(2) was comparable to an application for reconsideration.

The law

36. Rule 38 ET Rules provides:

> **"38.—(1) An order may specify that if it is not complied with by the date specified the claim or response, or part of it, shall be dismissed without further order. If a claim or response, or part of it, is dismissed on this basis the Tribunal shall give written notice to the parties confirming what has occurred.**
>
> **(2) 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.**
>
> **(3) Where a response is dismissed under this rule, the effect shall be as if no response had been presented, as set out in rule 21."**

37. The potential judicial decisions to be made in in respect of an unless order were set out by HHJ David Richardson in **Wentworth-Wood & Others v Maritime Transport Limited** UKEAT/0316/15/JOJ:

> **"4. Rule 38 clarifies Employment Tribunal procedure concerning Unless Orders. The Employment Tribunal, usually the Employment Judge alone, is potentially involved at three stages, each involving different legal tests.**
>
> **5. Firstly, there is the decision whether to impose an Unless Order and if so in what terms. ….**
>
> **6. Secondly, there is the decision to give notice under Rule 38(1). … The decision to give notice simply requires the Employment Tribunal to form a view as to whether there has been material non-compliance with the Order …**
>
> **7. Thirdly, if the party concerned applies under Rule 38(2), the Employment Tribunal will decide whether it is in the interests of justice to set the Order aside. …**
>
> **8. At each of these stages there will be a decision for the purposes of section 21(1) of the Employment Tribunals Act 1996; so there may be an appeal to the Employment Appeal Tribunal on a question of law. They are, however, separate decisions taken at different times under different legal criteria. An appeal against one is not an appeal against another; and the time for lodging appeals will run from different dates. This point must be kept carefully in mind by any party considering an appeal. " [emphasis added]**

38. In this case there are no appeals against the decisions at stage one, making the unless order and its terms or stage two, the decision to issue the Rule 38(1) letter confirming that the response had been dismissed because of material non-compliance. The only appeal is in respect of the stage three decision, hence the necessity for an amendment to the grounds of appeal.

The care required in making unless orders and the difficulties that can arise if the unless order lacks clarity or may not be capable of being complied with

39. It is well established from the authorities that particular care must be taken in making unless orders because the automatic consequences of noncompliance are so draconian. This was noted by HHJ Auerbach in **Uwhubetine and others v NHS Commission Board England and others** UKEAT/0264/18/JOJ at paragraph 51.

40. There are some cases in which a party is not engaging with the process so that after a number of orders have been breached an unless order can be effective, particularly where there

is no attempt to comply within the time limit imposed, which brings the matter to a close without the need for a hearing with the waste of time and cost involved.

41. Things are more difficult where a party is attempting to engage in the tribunal process but fails to comply with orders to the satisfaction of the other party and the employment tribunal. Problems may occur where an unless order is made and there is some attempt at compliance. The problems are likely to be substantial if the unless order is ambiguous so that it is difficult to determine whether there has been material compliance, or something that falls short of material compliance, but should be taken into account in deciding whether to grant relief from sanction.

"Relief from sanction"

42. I consider that the decision of Underhill J in **Thind v Salvesen Logistics Ltd** UKEAT/0487/09/DA (decided before the current scheme for unless orders was introduced by the 2013 ET Rules) still provides helpful guidance as to the appropriate approach to "relief from sanction":

> **"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."**

Reconsideration

43. Because the respondent contends that the stage three decision is analogous to reconsideration, it is worth noting the provisions in the ET Rules for reconsideration of judgments. Rule 70 ET Rules provides that:

> **"A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ('the original decision') may be confirmed, varied or revoked. If it is revoked it may be taken again."**

44. Rule 1(3) ET Rules that defines the term "judgment":

> **"(3) An order or other decision of the Tribunal is either—**
>
> **(a) a 'case management order', being an order or decision of any kind in relation to the con-duct of proceedings, not including the determination of any issue which would be the subject of a judgment;**
>
> **(b) a "judgment", being a decision, made at any stage of the proceedings (but not including a decision under rule 13 or 19), which finally determines—**
>
> **(i) a claim, or part of a claim, as regards liability, remedy or costs (including preparation time and wasted costs);**
>
> **(ii) any issue which is capable of finally disposing of any claim, or part of a claim, even if it does not necessarily do so (for example, an issue whether a claim should be struck out or a jurisdictional issue) …"**

The approach the EAT should adopt to analysing decisions of the ET

45. Mr Harris, for the claimants, urged on me the importance of not adopting an over-fastidious approach to the reasoning in a judgment of the employment tribunal. He referred me to the observation of Lord Hope in **Hewage v Grampian Health Board** [2012] ICR 1054:

> **"26. It is well established, and has been said many times, that one ought not to take too technical a view of the way an employment tribunal expresses itself, that a generous interpretation ought to be given to its reasoning and that it ought not to be subjected to an unduly critical analysis."**

46. Mr Harris relied, in particular, on the important statement of Lord Phillips MR in **English v Emery Reimbold & Strick Ltd** [2003] IRLR 710 at paragraph 21:

> **"21. When giving reasons a judge will often need to refer to a piece of evidence or to a submission which he has accepted or rejected. Provided that the reference**

> **is clear, it may be unnecessary to detail, or even summarise, the evidence or submission in question. The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the judge's decision."**

47. However, Mr Harris accepted that, conversely, a decision that does not deal with a key issue cannot be made good by the EAT. As Sedley LJ put it in **Anya v University of Oxford** [2001] ICR 847:

> **"The courts have repeatedly told appellants that it is not acceptable to comb through a set of reasons for hints of error and fragments of mistake, and to try to assemble these into a case for oversetting the decision. No more is it acceptable to comb through a patently deficient decision for signs of the missing elements, and to try to amplify these by argument into an adequate set of reasons. Just as the courts will not interfere with a decision, whatever its incidental flaws, which has covered the correct ground and answered the right questions, so they should not uphold a decision which has failed in this basic task, whatever its other virtues."**

48. There was no dispute between the parties as to the approach to be adopted by the EAT in considering a judgment of the employment tribunal, derived from the above authorities and a myriad of others. A judge in the EAT must not be excessively fastidious and should give a fair, and reasonably generous, reading to a judgment of the employment tribunal, noting that reasons should be kept reasonably concise, so that it is not necessarily appropriate to refer to every matter of fact or argument that was canvassed. However, the EAT cannot ignore patent defects in a judgment.

Ground 1

49. Mr Kohanzad contends that Employment Judge Wright did not have regard to the fact that the respondent had attempted to comply with the unless order, and so did not analyse the extent of non-compliance, in determining whether it was appropriate to grant relief from sanction.

50. Mr Harris accepts that there is no mention in the judgment of the email of 16 January 2019 at 15.33, in which the respondent sent a link to documentation in an attempt at compliance,

within the time set in the unless order; but contends that on a fair reading of the judgment, as a whole, Employment Judge Wright must have taken the attempt at compliance into account.

51. Mr Harris relied on:

a. the sentence in paragraph 37 where the employment judge stated: "The Tribunal has evaluated all of the points advanced, the evidence it heard and the submissions made." I do not consider that this coverall statement can be sufficient to establish that the email of 16 January 2019 was taken into account. The attempt at compliance was not a minor or subsidiary point, but was a vital element in analysing whether to grant relief from sanction;

b. the sentence in paragraph 35: "documents which should have been disclosed to the claimants had not been". Mr Harris suggests that this demonstrates that the judge appreciated that some documents had been disclosed. I consider that the statement is equally consistent with the judge having concluded that no attempt at compliance was made.

c. The sentence in paragraph 26: "It could have (in accord with Overriding objective) explained its difficulties to claimants and said would the claimants be satisfied with what it could produce and what it eventually did produce?" As explained above, I consider that must be a reference to the further disclosure given in February 2019, after the time for compliance with the unless order had expired, to which the employment judge did refer.

52. Having read the judgment with care I cannot find anything in it that demonstrates that the employment judge had regard to the disclosure provided on 16 January 2019. There is no reference to the email which was a crucial document in considering relief from sanction. Not only

was there no reference to the attempt to provide disclosure that might allow the claimants to compare their work with those employees of Indian origin working on other machines, there is no analysis of how far what was provided fell short of material compliance.

53. The employment judge set out a list of things that the respondents could have done, but had not done, but made no reference to what the respondent had done in an attempt to comply with the unless order.

54. In the circumstances of this case, these were matters that had to be considered to deal fairly with the application pursuant to Rule 38(2) ET Rules so that the failure to do so constituted an error of law. Accordingly, I allow the appeal in respect of ground 1.

Ground 2

55. I have come to the conclusion that ground 2 (the extent to which at stage three an employment judge could conclude that there had, in fact, been material compliance with an unless order, despite the decision previously made that there had not been material compliance as a result of which the Rule 38(1) letter was sent), does not arise for determination in this case. At the hearing before Employment Judge Wright the respondent did not contend that there had been material compliance with the unless order, but argued that compliance was impossible, and it had done the best that it could. That was also the essential argument of Mr Kohanzad in the appeal. He contended that on a literal reading, the unless order required that 60 job sheets be disclosed, all of which were for the same day. He contended that that was impossible. As the employment judge noted, that was something that should have been raised by the respondent before the making of the original order for disclosure, and when it was converted into an unless order. The fact that it may not have been possible to materially comply with an unless order might be a reason to

challenge the decision to make it, but does not, of itself, turn a failure to comply into material compliance, although it may be a factor of considerable importance in determining whether relief from sanction should be granted and when considering any attempt that has been made to comply.

56. However, as the issue of whether an employment judge can decide at stage three that there was material compliance with an unless order was the subject of argument, and potentially gives rise to some important issues to be considered in case management related to unless orders, I will make the following observations. **Wentworth-Wood** establishes the three unless order decision points. At stage one there is a judicial decision whether to make an unless order and, if so, the terms upon which the order is to be made. At stage two there is a judicial decision as to whether there has been material compliance with the unless order, even though it is a determination of whether there has already been an automatic strikeout of the claim because of the non-compliance with the unless order, as a result of which the letter provided for Rule 38(1) should be sent.

57. Where there has been no attempt at compliance, there is little to decide at stage two. Where there has been an attempt at compliance, it may be much more difficult to determine whether the attempt constitutes material compliance, particularly if the unless order is lacking in clarity. Even where the unless order is lacking in clarity, the judge at stage two cannot revisit the making, or terms, of the unless order, but is required to do the best s/he can in determining whether there has been material compliance. That is a judicial determination that may be very difficult if the unless order is not well worded. At stage three, providing the defaulting party makes the necessary application, a judicial determination is made as to whether it is in the interests of justice to grant relief from sanction. The mechanism by which relief is granted if the application under Rule 38(2) is granted, is by setting aside "the order", which must mean the original unless order, with the consequence that once the unless order has been set aside there cannot have been material non-compliance, and so the automatic strikeout is treated as not having occurred.

58. Mr Kohanzad's argument is that because the stage three decision turns on the interests of justice, it is in the nature of a reconsideration, including of the stage two decision as to whether there has been material non-compliance. I do not accept that this follows from a reading of the rule. Allowing an application under Rule 38(2) results in the original unless order being set aside, rather than the substitution for the stage two decision that there had been material non-compliance with a determination that there has been material compliance. The setting aside of the original unless order has the consequence that the stage two decision has become a nullity.

59. Mr Kohanzad's proposed approach at stage three would also have the undesirable consequence that where, as often will be the case, the stage three decision is taken by a different judge than the one who made the stage two decision, the second judge would be called upon to reconsider a decision made by the first. Reconsideration of judgments under rule 70 should, where practicable, be conducted by the judge who made the original decision. There are good policy reasons for this as it avoids a situation in which one employment judge is determining something akin to an appeal in respect of the decision of another employment judge. Accordingly, I do not consider that at the stage three hearing the employment judge can determine of the stage two decision, that there had not been material compliance with the unless order, was incorrect. However, an important aspect of making the stage three decision is determining the extent to which there was an attempt at compliance with the unless order. The judge at stage three may conclude that the material non-compliance was extremely limited, and might, with the benefit of more relevant information and better argument, find it difficult to put their finger on precisely what the non-compliance was.

60. Because the effect of the stage two decision is that there has been material non-compliance with the unless order, it might be argued that this is a decision that (although in theory only

confirming the dismissal of the claim that has occurred automatically by reason of the breach of the unless order), finally determines a claim, or part of a claim, and so would be susceptible to an application for reconsideration under Rule 70. This raises the prospect of applications being made both under Rule 70 for reconsideration of the stage two decision and under Rule 38(2) for relief from sanction. That could give rise to some difficult issues of case management. In a case in which there is a real issue about whether there has been material compliance with an unless order, and where, if it was to be decided that there had not been material compliance, the party in default has made it clear that an application for relief from sanction will be made (such an application being required by the rules), it may be wise for the judge to consider whether one hearing should be fixed to deal with both the stage two and stage three decisions; so that one judge can determine both whether there has been material compliance and, if not, whether relief from sanction should be granted. A party that finds itself potentially in breach of an unless order might request that the tribunal deals with the matter in this manner, if it is able to do so before the stage two decision is taken.

61. Having regard to the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, the matter shall be remitted for consideration by a new employment tribunal to minimise delay and because to do so is proportionate as the application pursuant to Rule 38(2) will have to be considered afresh.