Neutral Citation Number: [2023] EAT 161

Case No: EA-2022-000268-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30 November 2023

Before:

GAVIN MANSFIELD KC DEPUTY JUDGE OF THE HIGH COURT

- -

Between:

BAUHAUS EDUCATIONAL SERVICES LIMITED

Appellant

- and -

MR OLUWASEYI ELEMIDE

Respondent

- -
- -

Mr Ed McFarlane (instructed by **Peninsula Business Services Ltd**) for the **Appellant**
The Respondent acted in person

Hearing date: 30 November 2023

- -

JUDGMENT

SUMMARY – Practice and procedure

The Employment Judge erred in finding that the Claimant's claim had not been struck out by operation of an unless order. The order required service of the Claimant's witness statement on the Respondent by a specified date. The Claimant lodged his witness statement with the Employment Tribunal by the deadline, but did not serve it on the Respondent. The meaning of the unless order was clear and the Claimant had failed to take the necessary step.

The Tribunal should have given notice under r.38(1) ETR 2013 that the claim had been dismissed without further order. The Claimant would then have had the opportunity to apply under r.38(2) for the order to be set aside.

The EAT made an order directing the Tribunal to give a notice under r.38(1). The Claimant will have an opportunity to make an application under r.38(1) The time for the Claimant to make an application under r.38(2) will not start to run until the r.38(1) notice is sent.

DEPUTY HIGH COURT JUDGE MANSFIELD:

1. The short point raised in this appeal is whether an Employment Judge erred in holding that the Claimant had complied with the terms of an Unless Order relating to the service of witness statements. The Employment Judge held that the Claimant had complied. The Respondent below appeals on the basis that the Claimant had not complied and that a Notice under Rule 38 of the Employment Tribunal Rules 2013 should have been served confirming that the case had been struck out.

2. As His Honour Judge Tayler recently remarked in the case of **Minnoch**, to which I will return in a moment, appeals against Unless Orders are too large a part of the diet of the Employment Appeal Tribunal. This is an unusual appeal, even in the context of Unless Orders. Normally an appeal is brought by the person who has been struck out against the effect of them being found to have been struck out. This is the obverse of that situation; the Respondent in the Tribunal appeals on the basis that the Tribunal ought to have recognised that the case had been struck out as a consequence of non-compliance with an Unless Order.

3. The background is as follows. The Claimant below – and I shall refer to both parties as they were below as Claimant and Respondent – was a litigant in person who brought claims of unfair dismissal, age and race discrimination, wrongful dismissal and unlawful deduction from wages. Apart from the unfair dismissal Claim which was rejected on grounds of lack of qualifying service, all the rest of the Claims were proceeding to a full hearing. The case had been case managed by EJ Heal who made a Case Management Order in relatively standard terms. The directions for trial preparation included, amongst other things, an order for exchange of witness statements. A five day final hearing was listed for 13 to 15 December 2021. On 14 October 2021 EJ Bedeau made an Unless Order. I need not go into the circumstances in which that order was made and nor have I been addressed on the detail of that, but the Unless Order provides as follows:

> "Unless by 27 October 2021 the Claimant serves a witness statement on the Respondent's representative, the Claim will stand dismissed without further order."

4. On 25 October 2021 the Claimant emailed the Tribunal attaching a copy of his witness statement. He did not copy the Respondent on that email to the Tribunal, nor did he send a copy of the witness statement to the Respondent separately; there is no dispute about that.

5. On 8 December 2021 the Respondent's representative emailed the Tribunal (copy to the Claimant) as follows:

> "We act for the Respondent. It is our understanding that the Claim does stand struck out in accordance with the attached Unless Order given that no witness statements were served upon the Respondent."

The email asked that the hearing, listed to start on 13 December, should be vacated. Within about half an hour of that email the Claimant emailed the Respondent's representative (copy to the Tribunal) saying as follows:

> "Here attached is the witness statement that was sent to the Tribunal and was not appropriately forwarded to the Respondent. Sincerest apologies for the error and we would be grateful if the case not be vacated over a minor technical issue."

6. On 10 December 2021 the Tribunal office emailed the parties as follows:

> "Employment Judge Bedeau has considered the file and the parties' recent correspondence and directed that I write as follows: the Claimant sent a witness statement to the Tribunal on 25 October 2021. She complied with the Unless Order. The case shall proceed as listed on 13 to 17 December 2021."

I note that the reference to "her" and "she" appears in the original email from EJ Bedeau.

7. As to that hearing on 13 to 17 December, I have seen no orders that were made in relation to it but I am told the following by the Claimant and Mr McFarlane, who appears on behalf of the Respondent, did not disagree. At the beginning of the hearing the Tribunal expressed unhappiness that the Respondent had not filed certain documents but also wanted more information relating to the Claimant's statement and the final hearing was adjourned. The case was subsequently further case

managed and relisted but ultimately was adjourned pending the outcome of this appeal; and that is how the position stands in relation to the progress of the Claim.

THE APPEAL.

7. The Respondent appeals against the ruling of EJ Bedeau contained in the email of 10 December 2021 that I quoted a moment ago. There is essentially one ground of appeal, that the EJ erred in deciding that the Claimant had complied with the Unless Order.

UNLESS ORDERS.

8. Rule 38 of the ETR 2013 provides as follows:

> 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 the Claim or Response (or part of it) is dismissed on this basis the Tribunal should give written notice to the parties confirming what has occurred.
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> 38.2. "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.
>
> 38.3. "Where a Response is dismissed under this rule the effect should be as if no Response had been presented, as set out in rule 21."

9. Mr McFarlane took me to the helpful recent summary of applicable principles in the decision of His Honour Judge Tayler in **Minnoch & Others v Interserve FM Ltd**, [2023] IRLR 491. Mr McFarlane quite properly points out that **Minnoch** had not been decided at the time that the Tribunal reached its decision, but I accept his submission that in **Minnoch** Judge Tayler draws together a number of points to be derived from earlier decided cases rather than deciding new points of principle or changing the approach that would have been applicable in 2021.

10. At paragraph 22 of his judgment in Minnoch, Judge Tayler cites the earlier decision of **Wentworth Wood v Maritime Transport Ltd.** [2016] UKEAT 0316/15/JOJ in which His Honour Judge David Richardson identified three stages of judicial decisions each involving different legal

tests. First, is a decision whether to impose an Unless Order and, if so, in what terms. Second, is a decision to give notice under Rule 38(1). Third, if the party concerned applies under Rule 38(2) the ET will decide whether it is in the interests of justice to set aside the order. His Honour Judge Richardson having identified those three stages said this at paragraph 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".**

11. This appeal is concerned with the second stage, whether or not to give a Notice under Rule 38(1) informing the Claimant that the case had been dismissed for non-compliance with an Unless Order. As His Honour Judge Richardson indicated and as adopted by His Honour Judge Tayler, the decision to give notice under Rule 38(1) simply requires the ET to form a view as to whether there has been non-compliance with the Unless Order. The he second stage is addressed in **Minnoch**. His Honour Judge Tayler drew together the strands, as he put it, at paragraphs 33.7 to 33.12:

> **"Stage 2, giving notice of non-compliance.**
>
> **33.7. at this stage the ET is giving notice of whether there has been compliance. It is not concerned with revisiting the terms of the order.**
>
> **33.8. particularly if there has been some asserted attempt at compliance careful thought should be given to whether an opportunity should be given for submissions in writing or at a hearing before the decision is taken.**
>
> **33.9. the question is whether there has been material compliance.**
>
> **33.10 the test is qualitative rather than quantitative.**
>
> **33.11. the approach should be facilitative rather than punitive.**
>
> **33.12. any ambiguity in drafting of the order should be resolved in favour of the party who was required to comply."**

12. It is obvious from the authorities that stage 2 is separate to stage 3, relief from sanction, which involves a broad assessment of the interests of justice. Stage 2 is a matter of construing the meaning of the Unless Order and determining the facts as to whether the order had been complied with or not. The expression used in the authorities, material compliance, must be seen in its context. Often an Unless Order may be complex requiring a number of things to be done. Often the things that are

required to be done require some evaluation as to whether or not the steps have been carried out sufficient to comply with the order. **Minnoch** itself was such a case. The simpler and clearer the order the less need there is for assessment of materiality of compliance.

13. In my judgment, the points at paragraph 33.8 and following in **Minnoch** are not intended to cover culpability for non-compliance or the materiality of consequences of non-compliance. It is a question of construing what the order required to be done. Culpability and consequences are matters for the relief from sanction at stage 3, not at stage 2.

DID THE CLAIMANT COMPLY WITH THE TERMS OF THE UNLESS ORDER?

14. The Respondent's argument is that this order is clear. It required service of the witness statement on the Respondent's representatives and that could be complied with in only one way, i.e. by that document being provided to the Respondent's representatives within the deadline. There is nothing ambiguous or unclear about the order in the Respondent's submission.

15. The Claimant's argument in his skeleton and in his oral submissions today is that the Unless Order required him to provide a particular document and he did provide it within time. He said he served the document on the Tribunal in good time. However, as I have indicated in my recital of the factual background, what the Claimant did was send his witness statement to the Tribunal. He did not and does not say that he sent it to the Respondent. Indeed, he acknowledged in his email on 8 December that he had not sent it to the Respondent.

16. With respect to the Claimant, and having sympathy for the position of a litigant in person managing proceedings on his own, I can see no explanation from the Claimant as to how serving a document on the Tribunal amounts to service on the Respondent's representatives, they being two quite different things. In my judgment, the order is clear and simple: unless by 27 October 2021 the Claimant serves his witness statement on the Respondent's representatives the Claim would be

dismissed. In my judgment, it is obvious as a matter of language that the Claimant had not done what the order required him to do. Not only had the Claimant not sent the witness statement to the Respondent's representatives directly, he had not copied in the Respondent to his email to the Tribunal when he sent the Tribunal the witness statement. That in itself is contrary to Rule 92 of the ETR which provides as follows:

> **"Where a party sends a communication to the Tribunal, except an application under Rule 32, it shall send a copy to all other parties and state that it has done so by use of 'cc' or otherwise. The Tribunal may order a departure from this rule when it considers it is in the interests of justice to do so."**

It seems to me that had the Claimant copied in the Respondent on his email to the Tribunal attaching his witness statement he would effectively have complied with the Unless Order, but he did not do so.

17. In fairness to the Claimant, he did not say that service of his witness statement on the Tribunal amounted to service on the Respondent. He did not indicate that he assumed or believed that it was the responsibility of the Tribunal to serve a document upon the Respondent having received it. He does not make that point but I have considered it. The rules do not require that to happen. It would place an intolerable burden on the Tribunal staff for documents lodged with the Tribunal to be deemed served on all the other parties in the case. As a matter of fact, service on the Tribunal does not amount to service on the other parties and there is no basis to deem it to be.

18. Drawing together the points that I have outlined so far: (a) this order is clear: it requires one step which was either done or it was not, service of the witness statement on the Respondent's representatives. (b) As a matter of fact – and there is no dispute about this – the witness statement was not served in time on the Respondent's representatives. It seems to me perfectly clear that the only correct conclusion that could be reached is that the Claimant had not complied with the Unless Order because he failed to comply with the requirement to serve his witness statement on the Respondent's representative. I have to say that there was an error of law on the part of the EJ in

reaching the conclusion that the Claimant had complied with the terms of the Unless Order by providing the witness statement to the ET.

19. I have heard some argument from Mr McFarlane about the process that the EJ should have followed in reaching his conclusion under Rule 38(1) and about the factors he took into consideration. In my judgment, it is not necessary to address those matters. It is a matter for me to construe the order as a document. Its meaning is clear and comparing the clear meaning of the order to the facts as we know them to be, the only possible outcome, in my judgment, is that the EJ was wrong in reaching the decision that the Claimant had complied with the terms of the Unless Order.

DISPOSAL.

20. I accept Mr McFarlane's submission – and the Claimant did not disagree with it – that if I conclude that the EJ erred in finding that the Unless Order had been complied with the only possible conclusion in the context of this particular Unless Order is that the right answer must be that the Claimant had not complied with the Unless Order. It would follow, therefore, that being the case, that the Unless Order came into effect and that the Claim stood dismissed as at the date of its expiring.

21. There remains though the question as to what order this Tribunal should make and how matters should proceed. Had the EJ taken the correct decision on 10 December he would and should have caused to be served a Notice under Rule 38(1) informing the Claimant that the Claim stood dismissed by operation of the Unless Order. That would have triggered the clock running for a 14 day period for the Claimant to make an application for relief from sanction. Mr McFarlane accepts – and, in my judgment, he is right to accept – that until such Notice is given the clock does not start running for an application for relief from sanction and it will in due course be open to the Claimant to make an application for relief from sanction. I do not express any view on that because that will be a matter to be considered by the Tribunal afresh, the Tribunal not having considered it at the moment. No doubt there are matters that the Claimant will want to raise as to the interests of justice in this situation

(where he only sent his witness statement to the Tribunal and not to the Respondent's representatives) and as to the seriousness or otherwise of his default. Those will be matters for the Tribunal. It seems to me – and I will hear both of the parties if they disagree with this before finalising my order – that it would not be appropriate for the EAT to issue a Notice under Rule 38(1). That is a step that should be taken by the Tribunal and only when it is taken will the time for an application for relief from sanction start to run. It seems to me that the appropriate way forward is for the Employment Appeal Tribunal to make a declaration that the Tribunal judge erred, to make a declaration that the Claimant had failed to comply with the terms of the Unless Order, and state to that it is a matter for the Tribunal now to take the appropriate step following that to serve a Rule 38(1) Notice and the Claim will proceed from there.

22. So that is my decision. It is a matter of some regret that on this somewhat technical point steps that perhaps could have been taken in November and December of 2021 to lead to an effective hearing did not result in an effective hearing taking place; but the process of this matter going forward currently stands struck out but there will be an opportunity for the Claimant to apply for relief from sanction should he wish to do so back in the Tribunal. That concludes my judgment.