Neutral Citation Number: [2024] EAT 39

Case No: EA-2022-000253-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 March 2024

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

S WAKEMAN

Appellant

- and –

(1) BOYS AND MAUGHAN SOLICITORS
(2) A BAKER

Respondents

- -
- -

NAOMI LING (instructed through Direct Public Access) for the **Appellant**
TOM BROWN (instructed by Boys & Maughan Solicitors) for the **Respondents**

Hearing date: 28 February 2024

- -

JUDGMENT

SUMMARY

Practice and Procedure

The Employment Tribunal erred in law in its approach to an application to vary or set aside an Unless Order or for relief from sanction. The matter was remitted to the Employment Tribunal for redetermination.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against the judgment of Employment Judge L Burge refusing an application to vary or set aside an Unless Order and refusing "relief from sanction". The hearing took place on 9 March 2022. The Judgment was sent to the parties on 23 March 2022.

2. I will refer to the parties as the claimant (as he was in the Employment Tribunal) and the respondent (the first respondent in the Employment Tribunal).

Procedural History

3. The claimant was employed as a Civil Litigation Solicitor from 23 Oct 2017 to 16 May 2019. He carried out some work in the Employment Tribunal.

4. The claimant submitted a claim form that was received by the Employment Tribunal on 13 September 2019. The claimant brought complaints inter alia of automatic unfair dismissal; age and sex discrimination or harassment; protected disclosure detriment, failure to pay notice pay; unpaid holiday pay; and being owed "other payments".

5. A Preliminary Hearing for Case Management took place before Employment Judge Freer on 5 March 2020. The claimant was represented by Counsel as was the respondent. The Employment Tribunal made orders including: service of a schedule of loss; disclosure by list by 17 April 2020; requests for inspection by 1 May 2020; inspection by copy within 7 days of a request; agreement of a bundle by 29 May 2020; provision of a bundle to the claimant by 12 June 2020 and simultaneous exchange of witness statements by 3 July 2020. The final hearing was listed for hearing from 14 to 18 September 2020 to determine liability and remedy. A deposit order was made which was paid by the claimant. The Order setting out the directions was not sent to the parties until 1 September 2020.

6. The claimant provided the schedule of loss as directed. After correspondence between the parties about varying the date for disclosure lists, the parties each sent their lists to the other by letters dated 23 April 2020.

7. The claimant did not provide copy documents. The claimant contended that the respondent

had failed to disclose important documents. There have been extensive disputes between the parties in correspondence. This has not been assisted by the fact that the claimant will only correspond by post.

8. On 20 May 2020, the respondent sent an email to the Employment Tribunal requesting an Unless Order. The respondent provided a draft Order in the following terms:

> UPON reading the email from the 1st Respondent dated 20 May 2O2O
>
> AND UPON being informed that the Respondents provided their disclosure to the Claimant on 23 April 2020 but have yet to receive any disclosure from the Claimant despite asking again on 12 May 2020
>
> IT IS ORDERED:
>
> 1) UNLESS the Claimant does provide a copy of his entire disclosure list to the Respondents by 16:00 within 14 days of this order his claim will stand struck out.

9. The respondent moved quickly to seek an unless order; not always a wise decision. The respondent did not mention that the claimant had provided disclosure by list. The application was copied to the claimant.

10. On 29 May 2020, the claimant wrote to the Employment Tribunal contending that he had complied with the order to provide disclosure by list but that the respondent had not done so because its list was "highly selective".

11. On 23 June 2020, the claimant wrote to the Employment Tribunal requesting a delay to the exchange of witness statements to three weeks before the final hearing. The claimant also wrote to the respondent to request specific disclosure. On 24 June 2020, the respondent agreed to a variation to the date for exchange of witness statements to 3 August 2020, which would have been six weeks before the commencement of the final hearing that was then listed for September 2020.

12. The application was not dealt with by the Employment Tribunal.

13. The respondent chased the Employment Tribunal about its application for an Unless Order by email dated 1 June 2020:

> We still have not received the Claimant's disclosure, nor his consent to our suggested bundles for the trial, please, as a matter of urgency, can the request for an Unless order be referred to an Employment Judge.

14. The email was not copied to the claimant by post, the only method of communication that he would accept.

15. The respondent chased again by email on 26 August 2020:

> This matter was listed at the previous case management hearing for a 5 day hearing due to take place on 14-18 September 2020.
>
> We have been chasing the Tribunal for many months because, despite our having complied with the directions given by the Tribunal, the Claimant has not provided his disclosure which was due many months ago. We have requested, again for many months, an Unless Order but have not heard anything from the Tribunal.
>
> Also, we have filed our statements in preparation for the trial and have communicated with Mr Wakeman that we are ready to exchange but we have not received Mr Wakeman's statements but Mr Wakeman has made an application to serve his statements 21 days before the hearing.

16. Again, the respondent did not copy the email to the claimant.

17. On 1 September 2020, the Employment Tribunal wrote to the parties stating that the hearing was postponed due to the effects of Covid-19 and a lack of judicial resources. The hearing was not subsequently relisted.

18. The respondent sent an email to the Employment Tribunal (not copied to the claimant) on 4 September 2020:

> We are disappointed not to have received an Unless Order despite this having been requested for several months.
>
> For the avoidance of doubt, we still HAVE NOT received the Claimant's disclosure which was due on 17 April 2020 nor have we received confirmation that the Claimant is prepared to exchange statements despite our requesting, which were due on 3 July 2020. Whilst the hearing has been stood down for now, that does not permit the Claimant to ignore court orders.
>
> We would urgent request, again, that the Tribunal makes an Unless Order.

> This is an expensive exercise for the Respondent, we have complied with the orders and see no reason why the Clalmant cannot.

19. The Employment Tribunal wrote to the parties on 10 September 2020:

> Regional Employment Judge Freer has asked me to write to you as follows:-
>
> The Respondent's request for an unless order will be considered once the time period for paying the deposit has expired.

20. The respondent replied to the Employment Tribunal again on 11 September 2020 (not copied to the claimant):

> Mr Wakeman has already paid the deposit order, However, it is slightly ludicrous that the trial was meant to be starting on Monday and we have not had Mr Wakeman 's disclosure or his witness statements. He is some months after the deadline and we are in the dark as to his position

21. On 21 September 2020 the claimant replied to the letter from the Employment Tribunal dated 10 September 2020:

> I refer to the tribunal's letter dated 10 September 2020, received on 16 September 2020 (copy enclosed).
>
> The tribunal's enclosed letter has been received out of the blue. It makes a bare reference to "[t]he Respondent's request for an unless order".
>
> It is apparent that the Respondents have been communicating with the tribunal without the Claimant's knowledge.
>
> The Claimant is not aware of what "Respondent's request for an unless order" the tribunal proposes to consider.
>
> I am, therefore, naturally concerned that the tribunal might consider a request from the Respondents which the Claimant has not had an opportunity to raise objections to.
>
> In the circumstances, please would you:
>
> (1) Provide me with full details of the "Respondent's request for an unless order" referred to in the tribunal's enclosed letter.
>
> (2) Ensure that the "Respondent's request for an unless order" is not

> considered by the tribunal, until full details of the "Respondent's request" have been provided to the Claimant, and the Claimant has had an opportunity to consider and respond to the same.

22. It is understandable that the claimant did not realise that the application for an unless order was the application the respondent had made on 20 May 2020 (which was copied to the claimant). The claimant was correct in his assessment that correspondence had been sent by the respondent to the Employment Tribunal that had not been copied to him. While the emails were, in large part, chasing the original application for an Unless Order, they also criticised the way in which the claimant was conducting the litigation.

23. On 29 September 2020, the Employment Tribunal wrote to the Respondent asking whether the claimant had disclosed his documents. On 30 September 2020, the respondent sent an email to the Employment Tribunal (not copied to the claimant):

> Unfortunately, no. We have not been provided with either the Clalmant's disclosure or witness statements and would still request an Unless Order.

24. On 4 December 2020, the respondent wrote to the claimant:

> We are astounded that, despite your previous communications, we have still to receive your disclosure or confirmation that your witness statements are ready to be exchanged (ours have already been filed and we are waiting for your confirmation before sending the same to you).
>
> Please note that we intend to pursue our application for an Unless Order and reserve our right to draw this correspondence to the Tribunal's attention on the Issue of costs.

25. On 4 December 2020, the respondent sent an email to the Employment Tribunal (not copied to the claimant):

> We have been waiting since May of this year for an Unless Order, If the trial listed for September had not been stood down for COVID, it could not have proceeded anyway because we still have not received the Mr Wakeman's disclosure or confirmation that his statements are ready for exchange.
>
> Both the writer, and other colleagues, have been chasing this with the Tribunal and have consistently been told that it 'is with the judge'.

> Please can this be dealt with as a matter of urgency, This matter ls dragging on and we still do not know the evidence against us.

26. On 7 December 2020, the Employment Tribunal issued an Unless Order ("the first Unless Order"):

> On the application of the respondent and having considered any representations made by the parties, Employment Judge Balogun ORDERS that -
>
> UNLESS by 30 December 2020 the claimant sends the respondent the following information in accordance with the case management order sent to the parties on 1 September 2020, all claims will stand dismissed without further order.
>
> Information to be provided:
>
> 1. Disclosure of documents
>
> 2. Witness statements
>
> The Judge's reasons for making this Order are that there has been a persistent failure by the claimant to comply with the tribunal's orders without reasonable excuse.

27. At the time the first Unless Order was made the Employment Tribunal had not dealt with the claimant's criticisms about the respondent's disclosure.

28. The claimant states that he received the first Unless Order on 24 December 2020.

29. On 28 December 2020, the claimant applied to have the first Unless Order set aside on the basis that he had not been given sufficient time to comply and because the first Unless Order had been obtained after the Employment Tribunal had considered correspondence from the respondent that the claimant had not seen.

30. The claimant did not comply with the first Unless Order.

31. On 11 March 2021, the Employment Tribunal issued a judgment striking out the claim.

32. On 15 April 2021, the claimant wrote to the Employment Tribunal asking that the judgment be set aside pursuant to Rule 29 **ET Rules**, on the basis that his application to set aside the Unless

Order had not been considered and that the Unless Order was made in reliance on material from the respondent that he had not seen.

33. The claimant wrote to the Employment Tribunal again on 26 April 2021 asserting that he had complied with the order for disclosure by serving a list of documents and asserting that the respondent had failed to provide proper disclosure. The claimant listed the numerous letters that he had sent to the Employment Tribunal to which he had not received a response.

34. On 5 May 2021, the Employment Tribunal made a further Unless Order that was sent to the parties on 7 May 2021 ("the second Unless Order"):

> **On the application of the respondent** and **having considered any representations made by the parties**, Employment Judge Wright ORDERS that
>
> UNLESS by 21 May 2021 the claimant sends the respondent **the following information in accordance with the case management order sent to the parties on 1 September 2O2O**, all claims will stand dismissed without further order.
>
> Information to be provided:
>
> 1. **Disclosure of documents**
> 2. **Witness statements**
>
> **The Judge's reasons for making this Order are that there has been a persistent failure by the claimant to comply with the tribunal's orders without reasonable excuse**. [emphasis added]

35. On 7 May 2021, the Employment Tribunal wrote to the parties:

> This file has been referred to Employment Judge Wright who responds as follows:
>
> The **Judgment of 11 March 2021 is rescinded**.
>
> If the respondents wish to make an application for costs as per their letter of 4 January 2O21 they may do so. There is no need for any direction from the Tribunal.
>
> **The claimant's application of 28 December 2020 is allowed to the extent that the Unless Order is varied to grant the claimant a further**

> **14 days within which to comply with the case management order of 1 September 2020** and to provide the disclosure or documents and witness statements to the respondents.
>
> **The respondents have consistently failed to comply with Rule 92 and to copy correspondence to the claimant. This must be rectified**. [emphasis added]

36. The second Unless Order and the letter were both clearly sent on the instructions of Employment Judge Wright and are to be read together. I consider that the following points are important to note:

36.1. the judgment striking out the claim for breach of the first Unless Order was rescinded in response to the claimant's application dated 28 December 2020 which included his complaint that the first Unless Order had been obtained on the basis of correspondence that he had not seen

36.2. Employment Judge Wright criticised the respondent for consistently failing to copy the claimant into correspondence

36.3. The second Unless Order was made on consideration of "the application of the respondent" rather than of the Employment Judge's own motion. The application of the respondent can only have been the substantive application made on 20 May 2020 (that the claimant had been copied into) and the subsequent emails which chased for an order but also made further criticism of the claimant's conduct (the claimant still had not been copied into that correspondence).

37. On 19 May 2021, the claimant sent CDs containing the documents on his disclosure list to the respondent with a password for access.

38. On 21 May 2021, the claimant applied to the Employment Tribunal to set aside the second Unless Order pursuant to Rule 29 **Employment Tribunal Rules 2013** ("**ET Rules**"), seeking specific disclosure and for an order varying the direction for provision of witness statements with provision for simultaneous exchange

39. As of 21 May 2021, the date for compliance with the second Unless Order, the claimant had

provided his documents but not a witness statement.

40. On 4 June 2021, the Claimant applied for the respondents' response to be struck out on the grounds that its disclosure was incomplete.

41. On 18 October 2021, a telephone Preliminary Hearing for Case Management was held at which an open Preliminary Hearing was listed for 9 March 2022 to consider:

> 1) Whether the unless order of EJ Wright of 5 May 2021 should be varied or set aside;
>
> 2) If not, whether to grant relief from sanction to the claimant to allow the claim to proceed;
>
> 3) If the claim is allowed to proceed, whether the claimant's application of 4 June 2021 to strike out the response should be granted;
>
> 4) If the claim is allowed to proceed, what case management orders should be made. These include an outstanding request for specific disclosure, a final list of issues to be agreed and the usual orders to prepare and list for hearing.

The Preliminary Hearing

42. The Preliminary Hearing was heard by Employment Judge L Burge on 9 March 2022. The claimant and respondent were represented by Counsel. The judgment stated:

> 1. The Claimant's **applications** for the Unless Order of 5 May 2021 to be **varied or set aside** and, if not, for **relief from sanction** are **refused**;
>
> 2. As the Claimant f**ailed to comply with the Unless Order of 5 May 2021 under Rule 38** of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, **the claim stands as struck out**; [emphasis added]

43. The claimant gave evidence. Employment Judge Burge made a number of findings of fact setting out the procedural history. Employment Judge Burge concluded:

> 31. **The Second Unless Order was made against an extensive history**. The **Case Management Order had been communicated to the parties at the Preliminary Hearing on 5 March 2020** where the Claimant, an experienced civil litigator Solicitor who conducted employment litigation, and his Counsel, were present. **The Judgment arising from the First**

Unless Order had been rescinded upon the Claimant's application that he did not have enough notice and because he had not been copied into the Respondents' communications. While **the Claimant seeks to rely on the Respondents' Rule 92 failures in relation to the Second Unless Order, this is not justified. The Judgment arising from the First Unless Order had properly been rescinded for that reason, the historic failure does not taint the making of the Second Unless Order.** When the Second Unless Order was made **the Claimant was in breach of the Case Management Order as he had not provided the Respondent with copies of his disclosure documents nor his witness statement**.

32. **The Claimant's evidence that he did not understand that the Respondents wanted copies of the documents themselves rather than a copy of the list of documents** (that they already had) **is rejected**. He was an experienced litigator and would have known that the Respondents were asking for copies of his documents. The Second Unless Order gave the Claimant until 21 May 2021 to provide his disclosure and his witness statement. The Claimant had provided his list of documents on 24 April 2020 and finally provided copies of the documents contained therein over a year later on 19 May 2021, two days before the expiry of the Second Unless Order. The Respondents had filed their witness statements with the Tribunal in August 2020. The Claimant did not, however, provide a witness statement and so was in breach of the Second Unless Order.

33. **The Claimant wanted an Order that witness statements were to be exchanged 21 days, or 6 weeks, before the final hearing.** Ms Banton submitted that this was a usual Order in many Employment Tribunal proceedings. **However, it was not what had been ordered in these proceedings. The parties had until 3 July 2020 to exchange statements. EJ Balogun then gave a new deadline in the First Unless Order of 30 December 2020 and then the Second Unless Order gave the Claimant until 21 May 2021 failing which his claim would be automatically struck out. The Claimant was put squarely on notice of the importance of complying with the order** and the consequences if he did not do so. This is an important consideration. **The Claimant has not demonstrated to me that it is in the interests of justice to vary or revoke the Second Unless Order taking into account the history of the proceedings prior to the making of the Second Unless Order.** He knew what he had to do and he did not do it.

34. **Further, the Claimant has not demonstrated to me that it is in the interests of justice to revoke or vary the Second Unless Order because of events that have transpired after the making of it**. Enamejewa gives examples were given of where there has been a power cut or where a claimant is prevented by a sudden incapacity and that in those sorts of

circumstances it is difficult to conceive that it would not be in the interests of justice to revoke the unless order and to give a claimant additional time. This claim is far from this type of situation. Having regard to the reasons why the Claimant did not adhere to the deadline, it is not the case, for example, that the Claimant sought to argue that he was unable to adhere due to a medical condition. **It is notable that the Claimant still, some 10 months after the expiry of the Second Unless Order, has not provided a witness statement. It is not accepted that the Claimant could not provide a witness statement before the final bundle was agreed.** Even if he did not have everything, he had the vast majority of the Respondents' disclosure in May 2020. He had his own documentation. He did not provide his disclosure documents until 19 May 2021 so, of course, the Respondents could not have prepared the agreed paginated final hearing bundle prior to that date. **The Claimant could have drafted his witness statement without the final hearing bundle page numbers in it and inserted page numbers at a later date.** If there was further disclosure from the Respondents at a later stage he could have then applied to the Tribunal to serve a further witness statement if that further disclosure showed something that he had not known about before. As an experienced litigator the Claimant would have known this.

35. **Turning to the question of whether to grant relief from sanction** to the Claimant to allow the claim to proceed, I have in mind 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. As explained above, **I have not accepted that the Claimant has provided a valid reason for the default**. He made the **deliberate decision not to comply with the Second Unless Order**. He **wanted further disclosure** from the Respondents, **he wanted a deadline of 21 days (or 6 weeks) prior to trial** but in this case that was not what the Employment Judges had ordered. **Unless Orders are an important part of the tribunal's procedural armoury. The Claimant did not take it seriously, if he had done he would have complied with it.**

36. **Not providing a witness statement is a serious default**. **At the date of the sanction, 21 May 2021, as a result of his default a fair trial did not remain possible**. The Claimant's employment had ended on 16 May 2019. The Claimant had finally provided his disclosure documents two years later but he still had not provided his witness statement. The hearing had originally been listed to take place in September 2020 and while it was stood down for lack of judicial resource it could not have gone ahead anyway due to the Claimant not adhering to the deadlines. There were difficulties caused by the pandemic. Offices up and down the country were closed for long periods but parties up and down the country managed to progress claims and adhere to Tribunal deadlines. **The Claimant knew**

> **about the First Unless Order and did not proceed to meet its deadline.** He adhered to one of the deadlines of the Second Unless Order, but not in relation to his witness statement. **By then the prejudice to the Respondents was too great in having to defend a claim where the Claimant wilfully failed to adhere to Tribunal deadlines.**
>
> 37. **The Claimant's applications <u>are</u> refused**. ***The Second Unless Order therefore stands and as the Claimant did not comply with the requirement to produce a witness statement his claim automatically stood dismissed***. The Tribunal therefore does not need to goon to consider issues III and IV. [emphasis added]

The Law

44. Rule 2 **ET Rules** sets out the overriding objective:

> 2. Overriding objective
>
> **The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly**. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) **ensuring that the parties are on an equal footing**;
>
> (b) dealing with cases in ways which are **proportionate to the complexity and importance of the issues**;
>
> (c) **avoiding unnecessary formality** and seeking **flexibility** in the proceedings;
>
> (d) **avoiding delay**, so far as compatible with proper consideration of the issues; and
>
> (e) **saving expense**.
>
> A Tribunal **shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules**. The **parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal**. [emphasis added]

45. General provision for case management orders is made by Rules 29 and 30 **ET Rules**:

> 29. Case management orders
>
> The Tribunal may **at any stage of the proceedings**, **on its own initiative**

> **or on application, make a case management order**. Subject to rule 30A(2) and (3) the particular powers identified in the following rules do not restrict that general power. **A case management order may vary, suspend or set aside an earlier case management order** where that is **necessary *in the interests of justice***, and **in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations** before it was made. [emphasis added]
>
> 30.— Applications for case management orders
>
> (1) **An application by a party** for a particular case management order may be made either at a hearing or **presented in writing to the Tribunal**.
>
> (2) Where a party applies in writing, **they shall notify the other parties that any objections to the application should be sent to the Tribunal as soon as possible**.
>
> (3) The Tribunal may deal with such an application in writing or order that it be dealt with at a preliminary or final hearing. [emphasis added]

46. Provision for Unless Orders is made by Rule 38 **ET Rules**:

> 38.— Unless orders
>
> (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.

47. Rule 92 **ET Rules** requires that opposing parties are copied into correspondence:

> 92. Correspondence with the Tribunal: copying to other parties
>
> 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 where it considers it in the interests of justice to

do so.

48. In **Minnoch and others v Interserve FM Ltd** [2023] EAT 35, [2023] I.C.R. 861 I summarised some of the key judgements about Unless Orders:

> 32. Appeals concerning unless orders are too large a part of the diet of the appeal tribunal. It may be helpful to draw the threads together, although not with the aim of discouraging reading the judgments I have referred to above for their full subtlety.
>
> 33. The following seem to me to be the key points:
>
> **Stage 1—making an unless order**
>
> 33.1 care should be taken in making an unless order because of the draconian consequence of material non-compliance—unless orders are not just another type of workaday case management order
>
> 33.2 it is rarely a good idea to convert a previous general case management order into an unless order—careful consideration should be given to whether it will be fit for purpose as an unless order
>
> 33.3 an unless order should be drafted so that it will be easy to determine whether there has, or has not, been material compliance
>
> 33.4 an unless order should be drafted so that the consequence of material non-compliance is clear—it need not necessarily result in the strike out of the entire claim—an unless order can be drafted so that failure to comply with it, or part of it, results in part of the claim being struck out
>
> 33.5 although not specifically provided for by rule 38 of the ET Rules, an order could provide for a lesser sanction than strike out on non-compliance, such as a claimant being limited to reliance on the material set out in the claim form if additional information is not provided
>
> 33.6 if a party is required to do more than one thing by an unless order, careful thought should be given to the consequence of partial compliance—particular care should be taken before making an order that will result in the dismissal of all claims if there is anything that falls short of full material compliance with all parts of the order
>
> **Stage 2—giving notice of non-compliance**
>
> 33.7 at this stage the employment tribunal 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 the drafting of the order should be resolved in favour of the party who was required to comply
>
> **Stage 3—relief from sanction**
>
> 33.13 this involves a broad assessment of what is in the interests of justice
>
> 33.14 the factors which may be material to that assessment will vary considerably according to the circumstances of the case
>
> 33.15 they generally include:
>
> > 33.15.1 the reason for the default—in particular whether it was deliberate
> >
> > 33.15.2 the seriousness of the default
> >
> > 33.15.3 prejudice to the other party
> >
> > 33.15.4 whether a fair trial remains possible
>
> 33.16 each case will depend on its own facts.

49. In **McCarron v Road Chef Motorways Ltd & Ors** UKEAT/0268/18/RN HHJ Auerbach commented on the possibility of an application to vary, suspend or set aside an Unless Order:

> 48. I observe that theoretically it would also be possible for a party, after an Unless Order has been made, but before it has bitten or been declared to have bitten, to apply for the Order to be revisited or set aside. That is not catered for by Rule 38, but would theoretically be possible by a party seeking to persuade the Tribunal to exercise its general case management powers. However, the authorities establish that the Tribunal will not ordinarily allow a party a second bite of the cherry, in seeking to have an Order that has been made revisited, unless there has been some significant

> change of circumstances since the Order was made. It may well be deliberate that Rule 38 therefore, does not refer to this option, because it would only be of limited and rare utility. The overall regime of Rule 38 steers a party, rather, towards the option of seeking a reconsideration or review, only if or when it is declared that an Unless Order has bitten.

50. However, a party cannot stop the clock running on an Unless Order by making an application that it be varied, suspended or set aside; Simler J (as she then was) **Redhead v Hounslow** LBC UKEAT/0086/13/LA:

> 57. The "unless order" power is a salutary power designed to ensure compliance with tribunal orders and to ensure that the particular case is dealt with expeditiously and fairly. A party affected by it cannot avoid its consequences or the consequences of disobedience simply by making an application to vary or discharge. A party who chooses not to comply and instead relies on an application to vary does so at real and significant risk that the order will remain in effect as originally made. A party whose conduct has already attracted the sanction of an unless order cannot be entitled unilaterally to disarm it.

51. The approach to relief from sanction was considered by Underhill J (P) (as he then was) in **Thind v Salvesen Logistics Ltd** UKEAT/0487/09/DA at paragraph 14:

> "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."

52. If there is a material difference between the situation as to the possibility of a fair trial at the

date of the failure to comply with the Unless Order and when consideration is given as to whether to set aside the order pursuant to Rule 38(2) **ET Rules** on the basis that it is in the interests of justice to do so consideration will generally be given to the position at the time of the breach; HHJ Eady QC (as she then was) in **Morgan Motor Co Ltd v Morgan** UKEAT/0128/15/DM at paragraph 43:

> Connected to that was the question of the relevant date for the consideration of the question of fair trial. I do not go so far as to say that only one approach would be possible when seeking to answer that question. I can see that it might be arguable that the ET is entitled to consider it at the later date - the date of the reconsideration - testing that as against the interests of justice. What I do say, however, is that the ET must consider whether it is right to look at this question at the later date. That is not simply a matter of asking whether the further delay arose from some specific conduct on the party seeking the relief from sanction (although that might well be relevant) or merely whether that further delay has rendered such a fair trial now impossible. The ET must also ask whether it is appropriate to adopt that approach given the original default and bearing in mind the importance of finality in litigation.

The Appeal

53. Three grounds of appeal were permitted to proceed:

> In refusing to set aside the unless order/to give relief from sanctions the ET:
>
> (a) failed to take account of the Appellant's case that he had not had a fair opportunity to make representations prior to the making of the second Unless Order, and by not, at least, allowing him further time to comply with it;
>
> (b) failed to take account of the fact that the Claimant had not seen the correspondence from the Respondent relied upon in support of making the first Unless Order, which it was to be inferred had also been relied upon by the tribunal when replacing the first Unless Order with the second Unless Order;
>
> (c) erred in relying on its conclusion that the Claimant's non-compliance had, at the time, made a fair trial impossible, because it was not found that this was irremediable by the provision of a statement in the future.

Analysis

54. When Employment Judge Burge held the Preliminary Hearing no notice had been given that the claim had been struck out for non-compliance with the Unless Order. Accordingly, varying or setting aside the Unless Order referred to by HHJ Auerbach in **McCarron** was an option open to Employment Judge Burge as had been appreciated by Employment Judge Manley when setting out the matters to be considered at the Preliminary Hearing. I appreciate that Unless Orders are an important part of the procedural armoury of the Employment Tribunal to deal with recalcitrant litigants. The use of Unless Orders should not be undermined by permitting appeals against any of the three stages; making the order, giving notice of strike out for non-compliance and consideration of any application for "relief from sanction", too easily. The claimant has not help himself by insisting on only accepting correspondence by post and by the combative tone of his letters. However, regrettably I have concluded that there are errors in the analysis of the Employment Tribunal that require me to allow that appeal.

55. While it is correct that the claimant had seen the original application for an Unless Order he had not seen the myriad of emails sent by the respondent chasing for an Unless Order that included further complaints about the conduct of the claimant. The failure to provide that correspondence was a key reason for the decision to revoke the first Unless Order. That remained the case when the second unless order was made. Before the second Unless Order was made the claimant had not been provided with the emails and did not have a proper opportunity to comment. Being provided with correspondence that is sent to the Employment Tribunal by the other party is a key component of fairness which explains the multiple safeguards that should prevent an order being made on the basis of correspondence that a party has not seen. The overriding objective set out in Rule 2 **ET Rules** requires that cases be dealt with fairly and justly. There is an explicit requirement that the Employment Tribunal should so far as practicable ensure that the parties are on an equal footing. The parties are not on an equal footing if an order is produced on the basis of correspondence that the other party has not seen and/or without a fair opportunity to make submissions in opposition to the application for an order. The requirement that so far as practicable the parties should be on an equal

footing must be taken into account when interpreting, or exercising any power given by the **ET Rules**. There are circumstances in which an order has to be made urgently. In such cases it may not be possible to give the party against whom the order is sought an opportunity to provide submissions, but in such circumstances when considering whether to vary, suspend or set aside the order pursuant to Rule 29 **ET Rules** the Employment Tribunal should take into account the fact that the party affected by the order did not have a reasonable opportunity to make representations before it was made. Rule 30 **ET Rules** requires that where a party applies in writing for an order it shall notify the other parties that any objections to the application should be sent to the Tribunal as soon as possible. This was not done when the original application was made, although the application was copied to the claimant. The emails chasing for an Unless Order and making further complaints about the claimant were not copied to the claimant and he was not informed of the possibility of sending objections. The importance of open correspondence is underlined by the specific requirement to copy in the opposing party made by Rule 92 **ET** Rules. The claimant did have an opportunity to complain about the making of the first Unless Order but did not have an opportunity to comment before the second Unless Order was made. I do not consider there was a proper basis for Employment Judge Burge's conclusion that "the historic failure does not taint the making of the Second Unless Order". Employment Judge Burge stated that the first Unless Order "had properly been rescinded for that reason" which included the fact that the claimant "had not been copied into the Respondents' communications". Yet, the position had not changed significantly when the second Unless Order was made. This was a matter that it was necessary for the Employment Tribunal to take into account when deciding whether the second Unless Order should be varied, suspended or set aside.

56. At the time of the Preliminary Hearing no final hearing had been fixed. After the hearing listed for September 2020 had been postponed because of the Coronavirus pandemic it had not been relisted. That was the position at the dates of non-compliance and the Preliminary Hearing. The decision of Employment Judge Burge that at the date of the Preliminary Hearing a fair trial did not remain possible was based on the analysis that "the prejudice to the Respondents was too great in having to

defend a claim where the Claimant wilfully failed to adhere to Tribunal deadlines". This can only refer to the claimant's failure to comply with the original order to provide disclosure and exchange witness statements and the failure to provide a witness statement in response to the second Unless Order. The failure to comply with the first Unless Order could not add significantly to any history of non-compliance as it had been set aside on the basis that is had not been made properly. The view of Employment Judge Burge that there was an extensive history of non-compliance would appear to come from consideration of the emails that the claimant had not seen before the second Unless Order was made. I do not consider that Employment Judge Burge sufficiently analysed the matter when deciding whether a fair trial remained possible, particularly as there was no date for a final hearing. Employment Judge Burge should have considered dealing with the concerns that the claimant had raised about the respondent's disclosure, listing the hearing and providing a new date for exchange of witness statements, supported by an Unless Order if necessary.

57. Although it did not form part of the arguments in this appeal, the procedure at the Preliminary Hearing did not follow the usual steps. The Employment Judge had first to decide whether the second Unless Order should be varied or set aside and, if not, whether there had been any material non-compliance with the order such that notice should be given that the claim had been struck out after which relief from sanction could be considered. It appears that Employment Judge Burge decided not to revoke or vary the order, not to grant relief from sanction and then declared that the claim had been struck out – the written notice being given in the judgment. Remission will provide an opportunity to deal with the required steps in the proper order, albeit that was accepted by the claimant that there was no compliance with the part of the second Unless Order that required the provision of a witness statement.

58. The matter shall be remitted for redetermination. I am not persuaded that there is only one possible outcome so that I should substitute a decision. I have decided that the matter should be remitted to a different Employment Tribunal as the error was fundamental to the decision which will have to be taken afresh. Employment Judge Burge's opinions were expressed forcefully and the

matter would benefit from being considered by a different Employment Judge.

59. Both parties are reminded of the requirement that they **must** cooperate with each other and the Employment Tribunal and assist the Employment Tribunal in achieving the overriding objective.