Strike Out: seriousness of default and possibility of a fair trial require careful consideration

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Duncan Lewis Solicitors v Puar **UKEAT/0175/19/RN**
(Judgment published on 14 January 2020)

The Facts

The Claimant (herein after referred to as "**C**") was employed by the Respondent (herein after referred to as "**R**") as a caseworker from 4 August 2016 until her dismissal on 8 December 2016, with the grounds for dismissing her being ones of conduct and performance during her probationary period.

By way of an ET1 issued on 2 March 2017, C pursued claims of wrongful and unfair dismissal (later struck out due to lack of requisite service), race discrimination, bullying/harassment, victimisation and for her notice pay. R filed an ET3 and Grounds of Resistance, including requesting further particulars in respect of C's victimisation complaint.

A preliminary hearing was listed for 1 June 2017. The day before that hearing, C made an unsuccessful application to postpone as she was starting a new job.

The hearing took place and EJ Skehan ordered a further preliminary hearing to take place on 21 August 2017. Further and better particulars were ordered as follows:

> *The Claimant is ordered within 14 days from receipt of this order to provide to both the Respondent and the employment tribunal an amended document setting out in relation to each and every claim she wishes to pursue in the employment tribunal;*
>
> *8.1. the date of the allegation; 8.2. what was said or done or the gist of what was said or done; 8.3. who was present; 8.4. identifying where that claim is contained within*

the original form ET1; and 8.5. specifying the nature of each allegation i.e. direct discrimination on the grounds of race, direct discrimination on the grounds of religion or victimisation

That order was not sent to parties until 5 July 2017 (by email in the Claimant's case, which was specified as her preferred method of communication).

On 4 August 2017, R applied on notice for the claims to be struck out for non-compliance with the 1 June 2017 order and, in the alternative, for an Unless Order.

On 14 August 2017, an Unless Order was issued which confirmed that the Claimant was to comply with the order sent on 5 July 2017 by 17 August 2017 or the claim would be struck out without further order.

By 18 August 2017, the ET notified parties that the Claimant's claims stood struck out.

C, on the same date, applied to set aside those orders and therefore sought relief from sanctions. She advanced the fact that she had not received the orders from 1 June (the original order to particularise) or 14 August 2017 (the unless order) until receipt of the email on 18 August 2017.

A hearing was listed for 9 February 2018 before EJ Bedeau. At that hearing, the order dismissing C's claims was set aside and the claims were case managed through to a final hearing. EJ Bedeau also ordered C to provide further information as follows:

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

On 12 February 2018, R applied for written reasons for the decision to set aside from the hearing on 9 February.

On 22 February 2018, C supplied a document titled "The Claimant's Amended Particulars of Claim".

The Respondent's application for reconsideration of EJ Bedeau's decision to set aside the automatic strike out was refused on 4 April 2018. Reasons for that refusal were supplied on

19 October 2018. EJ Bedeau recorded the issues for consideration relevant to the application by the claimant on 9 February in his written reasons as follows:

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

When R appealed against EJ Bedeau's decision the EAT agreed that, ignoring the issue of whether the claimant received the orders prior to 18 August at all, these were the right considerations for the EJ upon which to focus (by reference to Thind v Salvesen Logistics Ltd [2010] UKEAT/0487/09).

The Law

Rule 38 of the Employment Tribunal Rules gives tribunals the power to make "unless orders". Rule 38(1) provides that:

"*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.*"

Rule 38(2) of the Employment Tribunal Rules provides that:
"*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*."

The EAT Decision

R's grounds of appeal before the EAT were as follows:

(1) The Judge erred in the assessment of the seriousness of the default
(2) The Judge erred in his assessment of whether a fair trial was still possible
(3) The Judge's reasoning was not "*Meek* compliant"

(4) The only possible conclusion in the circumstances was that it was not in the interests of justice to set aside the strikeout of the Claimant's claims

The EAT reiterated at the outset of its judgment that case management decisions of this nature are "intensely fact sensitive"[1]. However, it was persuaded that the case had been "vitiated by a lack of adequate reasoning".

There was a preliminary issue about whether EJ Bedeau had held that C was in default. The Judgment from the ET referred to a "degree of scepticism" about the non-receipt of orders before 18 August 2017. It was acknowledged by the EAT that a clear and express finding on this point would have been preferable.

In terms of the grounds advanced, the EAT was satisfied that the EJ gave no adequate reasons on the issue of the seriousness of the default (Ground 1). The EJ had failed to express any conclusion on the factor. On the second and third grounds, the EAT agreed with R's contention that it was a mischaracterisation to say R was "neutral" on the fair trial issue, and instead that R's position had been that a Tribunal could not be satisfied that a fair trial was possible in the absence of the ordered particulars.

It was accepted that the absence of fully particularised claims does not always mean that a fair trial is impossible and/or that a Rule 38(2) application should fail. There may be cases in which the interests of justice mandate that a party be given one final opportunity to comply. The EJ in this case, however, had failed to give adequate reasons for his conclusion that a fair trial was possible.

The EAT concluded that the application to set aside must itself be set aside but rejected Ground 4 of R's appeal grounds and remitted the whole exercise back to the EJ to be considered afresh .

Comment

This decision to set aside the strike out was overturned by the EAT principally for two reasons: 1) the EJ did not properly address the seriousness of C's default in compliance with the unless order; and 2) the EJ did not properly explain how a fair trial was still possible

[1] Paragraph 38 EAT Judgment

despite the fact that C had still not properly particularised her case in accordance with the unless order. This case is likely to be of practical significance to many solicitors who regularly act for Respondents; Although this case related to the setting aside of automatic strike out following non-compliance with an unless order, applications to strike out claims are frequently made under Rule 37 which includes the grounds of non-compliance with orders. This case reiterates the key factors which a Tribunal will want to turn its mind to when determining such applications. Whilst evidently a fact sensitive decision and one that relates to unless orders, it may also be helpful for those solicitors and advocates drafting applications to strike out for non-compliance generally.

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