If an Unless Order requires a party to do a certain thing, can it be met by doing another thing? No, according to the EAT.

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The decision of *Bauhaus Educational Services Limited v Elemide* [2023] EAT 161 *considers earlier EAT guidance on Unless Orders.*

1. This is another Unless Order appeal, where the Respondent to proceedings questioned a Tribunal's decision that the Claimant had complied with the terms of its order by doing something different to that ordered.

Background

2. The Claimant (C), a Litigant in Person, brought a number of claims against his former employer, the Respondent (R). While one of his claims was struck out, a number of others were allowed to proceed to a five-day full merits hearing.

3. In anticipation of that hearing, C was subject to an Unless Order which required him to send R his witness statement by 27 October 2021.

4. On 25 October 2021, C sent his witness statement to the Tribunal. He did not copy R and did not immediately send the statement to R under separate cover.

5. On 8 December 2021, R wrote to the Tribunal to seek confirmation that the claim had been struck out on the basis that the Unless Order had been complied with. C replied immediately to R's correspondence explaining that the statement had been sent to the Tribunal, apologising for the error, and suggesting that this was a technical issue.

6. An Employment Judge found that even though C had not done what was asked for, the terms of the Order had been met, and allowed the case to proceed to the final hearing.

Appeal

7. R appealed against that decision, arguing that the Employment Judge had erred in deciding that by sending the statement to the Tribunal not the Respondent, C had complied, and further that there was an error of law not issuing a declaration under Rule 38 (1).

Tribunal Rules

8. Rule 38 Employment Tribunal Rules 2013 ("ET Rules") provides:

> *(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 has been presented, as set out in rule 21.*

EAT guidance in *Minnoch*

9. While the original Tribunal decision was made in 2021, the EAT, in deciding the appeal had the benefit of the EAT's 2023 decision in *Minnoch v Interserve FM [2023] IRLR 491*. 3PB's earlier update, written by Craig Ludlow, gives a full and helpful narrative on the guidance and reasoning in that case; Craig's update can be found **here**.

10. By way of summary, HHJ Tayler gave guidance in *Minnoch* on matters relevant to Rule 38. Noting the earlier decision in *Wentworth Wood v Maritime Transport Ltd [2016] UKEAT*

0316/15/JOJ, HHJ Tayler highlighted that there are 3 stages involved in Rule 38, each involving different legal tests. Those stages can be summarised as follows – Stage 1: the decision to issue an Unless Order; Stage 2: the issue of a notice under 38(1); and Stage 3: any application under 38(2).

11. The guidance from *Minnoch* most relevant to the *Elemide* appeal is that given by HHJ Tayler in relation to Stage 2 -

> *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*

EAT decision on *Elemide* consistent with *Minnoch*

12. In deciding *Elemide* Deputy High Court Judge Mansfield (DHCJ Mansfield) repeated the findings in *Wentworth* regarding the three stages, and noting that the outcome of each stage will amount to a decision for the purposes of Section 21 (1) of the Employment Tribunals Act 1996 (thus allowing an appeal to the EAT on a question of law).

13. Stage 2, said DHCJ Mansfield, is a "*matter of construing the meaning of the Unless Order and determining the facts as to whether the order has been complied with or not. The expression used in the authorites, material compliance, must be seen in context*" (para 12). He noted that culpability and consequences are consideration at Stage 3, not Stage 2.

14. DHCJ Mansfield observed that the Respondent and the Tribunal are '*two quite different things'*. He went on to point out that '*it is obvious as a matter of language that the Claimant had not done what the order required him to do*'.

15. DHCJ Mansfield took account of the fact that C had also not met the expectations of Rule 92 in the actions he took. Had he done so, he may well have complied. He concluded that *'[a]s 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.*' (para 17).

16. He found at para 18 that the Unless Order had been clear, and that the only correct conclusion was that the Claimant had not complied with it. On that basis, the Tribunal had erred in reaching the conclusion that the Claimant had complied.

Disposal

17. At para 21 of his Judgement DHCJ Mansfield notes that had the Tribunal taken the correct decision on the issue of compliance, that would have caused the service of a Notice under Rule 38(1), which, in turn would have allowed C to make an application under Rule 38(2).

18. Considering it inappropriate for the EAT to issue a Notice under Rule 38(1) the matter was accordingly remitted back to the Tribunal to consider the next steps in light of the EAT ruling that the Tribunal had erred in finding compliance, thus allowing the case to proceed from there.

Comment

19. The Tribunal decision in this case predated the helpful guidance in *Minnoch*, and it may be that had that decision been available at the time, a different outcome reached. However, this case is a common sense decision, and reinforces the guidance in *Minnoch*.

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