Neutral Citation Number: [2023] EAT 133

Case Nos: EA-2021-000683-DXA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 31 August 2023

Before :

HIS HONOUR JUDGE BARKLEM

- -

Between:

MR W DAVEY **Appellant**

- and -

HARRODS LTD **Respondent**

- -
- -

Mr W Davey the Appellant in person
Ms A Greenley (instructed by Harrods Legal Department) for the Respondent
Hearing date: 31 August 2023

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JUDGMENT

SUMMARY

Practice and Procedure

An Employment Tribunal erred in striking out a Claimant's claim on the particular facts of the case. No assessment was made as to whether a fair trial remained possible and it appeared that the Tribunal was unaware of emails written to the Employment Tribunal seeking extensions of time which had simply been ignored, no doubt due to pressures of work at that time of Covid.

The only possible outcome on the facts was that the application should have been refused and the matter should progress to a final hearing.

HIS HONOUR JUDGE BARKLEM:

1. This appeal is narrow in scope. It concerns an order by EJ Burns to strike out the claimant's claim for failure to comply with the terms of what was called a "case management/unless order". This took place as long ago as 12 May 2021. In this judgment, I use the titles of the parties as they were before the Tribunal.

2. When the appeal was sifted, it was sent to a preliminary hearing by HHJ Tayler who commented that the decision to strike out may have been disproportionate, even having regard to the history of the claimant's default in compliance with orders. At the preliminary hearing, I directed that the matter should go to a full hearing. I approach the matter today afresh, with the benefit of a full bundle and oral argument from Ms Greenley of counsel who appeared below. Mr Davey has only made brief submissions restating the case as advanced and saying that the Employment Judge unfairly characterised him as having persistently failed in his obligations. He pointed out that he had always been aware of dates, and had written to the Tribunal in advance seeking the extensions which had not been replied to. I am grateful to both for their submissions.

The History in Brief

3. The claimant was dismissed on grounds of redundancy. He asserted that the redundancy was a sham, and by an ET1 lodged on 11 October 2020 brought claims of unfair dismissal and dismissal by the making of protected disclosures in relation to health and safety issues.

4. He brought a claim for interim relief which was dismissed following a hearing on 5 November 2020. At that hearing, EJ Goodman made case management directions, including that the claimant set out full details of his protected disclosures claim by 26 November 2020 and, under the heading "Schedule of Loss", that the claimant should make a calculation of the loss caused by dismissal and an assessment of the award for injury to feelings for public interest disclosures and

send it to the Tribunal and the respondent by 29 January 2021. A list of issues was to be prepared by the respondent and sent to the claimant who was to respond by 29 January 2021. The parties were to complete mutual disclosure of documents by 26 February 2021.

5. The hearing was scheduled for four days starting on 30 September 2021. A document was produced by the claimant dated 20 November containing the list of protected disclosures. It was lengthy, but not in breach of any order. On 19 January 2021, the respondent produced a formal ET3 in response which dealt with the many issues raised. On the same date, it also produced a list of issues. The claimant responded to this, again in conformity with the order which had been made.

6. On 22 January 2021, the claimant wrote to the Tribunal seeking an extension of time, citing his mental health issues. The Tribunal did not reply. It is well-known that the Tribunal staff were under extreme difficulties as a result of Covid, and I make no criticism, but do make the point that the claimant was plainly aware of time limits and was seeking the indulgence of the Tribunal. He was not simply ignoring the orders. The respondent formally objected to the applications, but their emails, too, were not responded to.

7. The claimant wrote to the Tribunal seeking an extension of time for disclosure to 26 March 2021 and then to 26 April 2021. Again, there was no response from the Tribunal to these requests.

8. On 29 January 2021 (the date that the schedule was to be submitted), the claimant emailed the respondent saying, in a nutshell, that the case was not about money. He pointed out that he was unable to work at that time due to mental health issues, and went on to say: "Whatever the court considers a fair basic payment for loss under these circumstances would be acceptable."

9. When I suggested in argument that at least in broad terms the respondent would thereby have known that there was unlikely to be much, if anything, to be offset from a compensatory award by way of new employment, Ms Greenley responded fairly that it was not known if he had

had other work prior to that date and what, if any, other benefits had been received. She acknowledged that the second limb of the schedule could only be a litigant in person's attempt to grapple with an injury to feelings claim, presumably by reference to the Vento bands. The respondent with its legal team was, in my judgment, not in any way prejudiced by not having the claimant's own view as to the Vento element, and I am somewhat surprised that the Employment Judge required a litigant in person to do that at that stage of the litigation.

10. Based on what it described as "repeated noncompliance", the respondent issued a strike out application. There is an email dated 19 April 2021 in the bundle from a member of the respondent's inhouse legal team to the Tribunal referring to previous emails of 27 January and 24 February as to a further preliminary hearing, pointing out that the claimant had asked for an extension of time for disclosure to 26 April which was by then fast approaching. The 24 February email had indicated that the respondent was awaiting a determination by the Tribunal of the claimant's applications for extensions of time.

11. A hearing took place on 30 April 2021 by BT MeetMe, rather than in person. What was before the Employment Judge was an application by the respondent to strike out the claims for non-compliance with orders made. There is no suggestion from the contents of the case management/unless order that the Judge was in any way aware of the applications for extensions of time which had been made by the claimant. The respondent had indicated in the email correspondence I have seen that it was awaiting the Tribunal's determination.

12. The judge made the following orders: "1. By 5.00 p.m. on 7 May 2021 the claimant must serve on the respondent (a) a schedule of loss setting out the money he is claiming in these proceedings and how it is calculated to date; (b) a list of documents relevant to his claims which are in his possession and which do not already appear in the interim relief bundle; and (c) copies of the documents referred to in his list. 2. By 5.00 p.m. on 27 August 2021, the claimant must serve by

email on the respondent his witness statement", and it goes on to make provisions which are not relevant. "3. If the claimant does not comply with the previous paragraphs of this order in full, his claims may be struck out on application by the respondent. 4. The respondent's application to strike out the claims for non-compliance of the previous orders of the Tribunal is dismissed. 5. It is declared that the claimant has acted unreasonably by not complying to date with the directions that he should serve a proper schedule of loss, a list of documents, and give disclosure. His health issues are noted, but these have not precluded him from blogging, engaging with social media about the dispute on the internet, and presenting an EAT appeal at the same time that he was failing to comply with Tribunal directions previously made with his agreement, and notwithstanding correspondence from the respondent seeking to persuade him to comply. His failure to comply made it necessary to hold a lengthy hearing today. The respondent's costs application in relation to his non-compliance including the costs of today is reserved, and it may be pursued by the respondent at the trial or earlier if the claims are struck out as contemplated by paragraph 3." He then made brief orders which sensibly dispensed with further disclosure and the need to produce a list of issues, setting out those issues in about a third of a page, thus demonstrating what a straightforward case this was and is at heart.

13. At 14.22 on 7 May, and in purported compliance with the order, the claimant emailed the respondent and the Tribunal in the following terms: "Dear all. Please find attached a schedule of loss. Please also find attached documents for disclosure." In fact, there was no attached schedule of loss. At 16.02, the respondent responded to the email noting that the schedule had not been received, and warning of the need for it to be received by 5.00 p.m. There was no reply. At 17.53, the respondent wrote to the Employment Judge Judge advising him of this and asking that the claim be struck out.

14. At 8.59 the following morning (that is on Saturday, 8 May), the claimant sent a copy of the

schedule of loss stating that its omission was an oversight and that it had been prepared on time but not sent.

15. By order dated 12 May, the Employment Judge struck out the claim. He repeated the section about blogging and engaging with social media and presenting an appeal to the ET "at the same time he was failing to comply with Tribunal directions". He said that his failure to reply was the reason why a lengthy hearing had had to be held when he made the unless order. At paragraph 18, he said: "It is not in the interests of justice, nor is it fair to the respondent or other Tribunal users, to allow unless orders to be disobeyed and for parties to be able to persist in breaching directions and final orders with impunity. To allow this would not only undermine the authority of the Tribunal and its ability to make effective orders and secure compliance with directions, but the extra judicial and legal time consumed by non-compliance unnecessarily increases costs, wastes resources, and leads to inefficiency in the system generally."

16. The claimant made an application that the judge reconsider, and in his refusal the judge said: "I have accepted the claimant's mental health problems and previously took them into account, giving him a week's grace in the unless order. I also accept his final failure to comply was not deliberate. However, the unless order covered deliberate as well as non-deliberate breaches."

17. Ms Greenley took me to a number of cases in which the importance has been stressed that this Tribunal should not interfere in an ET's decision merely because it would have made a different decision. It is easiest to take them from her skeleton argument with due attribution. She says this:

> "If the ET has applied correct legal principles, the decision on a striking out application is not to be overturned merely because the EAT might have reached a different decision. Rather, it is to be impugned if, and only if, there is an error of law (**Thomas v London Central Bus Company Ltd** [2016] IRLR 9).

Where a discretion falls to be made, it must be made judicially, that is with due regard to reason, relevance, logic and fairness (**Harris v Academies Enterprise Trust** [2015] IRLR 208). There is a 'wide ambit within which generous disagreement is possible'; and it may be, as was put in another case, that there are 'two correct answers or at least two answers which are not so incorrect that they can be impugned on appeal' (**Neary v Governing Body of St Alban's Girls' School** [2010] IRLR 124 CA per Smith LJ).

As Arnold J pointed out in **Bastick v James Lane (Turf Accountants) Ltd** [1979] ICR 778:

> **'Either we must find … that the Tribunal or the EJ has taken some matter which it was improper to take into account or has failed to take into account some matter which it was necessary to take into account in order that discretion might be properly exercised or, alternatively, if we do not find that, that the discretion which was made by the Tribunal or the judge in the exercise of its discretion was so far beyond what any reasonable Tribunal or judge could have decided that we are entitled to reject it as perverse.'**

The guiding consideration, when deciding whether to strike out for non-compliance with an order, is the overriding objective including that such an order must be proportionate (**Weir Valves and Controls (UK) Ltd v Armitage** [2004] ICR 371 at paragraph 17:

> **"But it does not follow that a striking-out order or other sanction should always be the result of disobedience to an order. The guiding consideration is the overriding objective. This requires justice to be done between the parties. The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience.'**

Repeated non-compliance is to be deprecated, and it may give rise to a view that if

further indulgence is granted, the same will simply happen again: see **Harris** at paragraph 26."

18. She also took me to this passage in **Harris** where Langstaff J (then President) said:

> **"Appeals to this Tribunal lie only on a point of law. For the exercise of a discretion to be reversed, it therefore has to be shown that the judge was in error in his approach to the exercise. A discretion must be exercised judicially; that is, with due regard to reason, relevance, logic and fairness. It will usually be only if the judge has misdirected himself on the law that he is to apply, plainly misapplied it, failed to take into account a factor that demonstrably he should have done, left out of account something he should not have, or reached a decision that is so outrageous in its defiance of logic that it can be described as perverse, that his decision may be overturned."**

19. In the present case, the claimant had complied with all directions made other than in respect of disclosure and the service of a schedule of loss. He had applied for extensions of time which had not been acknowledged by the Tribunal, and were apparently not known about by the Employment Judge at the hearing or, if they were, they were certainly not mentioned. From the position of hindsight which, as I have said, which was not available to the judge, he had an incomplete and inaccurate understanding of the position and one which plainly led to a jaundiced view. Although no schedule of loss had been prepared, its value to the respondent had to be minimal, and there is a danger that its relevance was elevated beyond any true significance. Issues of benefits and credit could only be known at the end of the hearing in any event should they fall to be relevant. I am not sure what the critical comments as to blogging and use of the internet, repeated in relation to a period when they were plainly inapplicable, and surely a litigant cannot fairly be criticised for making an appeal to the EAT.

20. The judge did not set out the legal principles, if any, underpinning his decision. Neither did he refer to the guiding consideration referred to above when deciding whether to strike out for the

noncompliance with an order, in other words the overriding objective including that such an order should be proportionate. The suggestion that the claimant had persisted in breaching directions and orders with impunity was not a fair characterisation of this case. Again, this may be because the judge did not know that the ET had simply failed to acknowledge emails from both sides in relation to applications for extensions of time. By the time that he came to make his order striking out the case, every direction then applicable - there was the long-dated one for a witness statement - had been complied with, with five months to go before trial. At the earlier hearing, he had deemed that disclosure was complete. In his reconsideration decision, he expressly acknowledged that the omission was not deliberate. That issue had, of course, been before him when he made the strike out order, and it is not in my view a fresh decision, but rather a statement of a pre-existing acceptance.

21. In all these circumstances, this is not a case in which I am simply disagreeing with the judge below. I consider that, in making his order, he did not have regard to the relevant factors which are in play as to whether a strike out was proportionate. An inadvertent omission cannot be an issue in relation to any of the heads of mischief identified by the judge at paragraph 18 which I have read above.

22. Taking all those factors into account, I consider that the judge must, to the extent that he had regard to it, have misdirected himself as to the correct legal test and/or misapplied it to an extent that amounts to an error of law. On the facts, no strike out of the claim was appropriate.

23. In the circumstances, this appeal succeeds. The decision to strike out is overturned, and the matter is remitted to the Tribunal for further directions leading to trial.

24. When I listed this matter for a full hearing, I dispensed with the requirement that the claimant file a skeleton argument or lodge additional documents. I commend the approach taken by

Judge Burns in dispensing with unnecessary further procedural requirements in his case management order of 30 April, and respectfully suggest that this case is listed for trial with little further ado other than necessary witness statements being exchanged. I note that the claimant prepared a very long one for the interim relief hearing, and little may be required of him. However, these are matters for the Regional Employment Judge and not for me.