Neutral Citation Number: [2023] EAT 103

Case No: EA-2022-000281-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19 September 2023

Before :

MR BRUCE CARR KC Deputy Judge of the High Court

- -

Between :

MR H PARMAR	**Appellant**
- and -	
DPD GROUP UK	**Respondent**

- -
- -

Mr M. Mohzam, solicitor (instructed by Osmans Solicitiors) for the **Appellant**
Edmund Beever, of Counsel (instructed by Freeths LLP) for the **Respondent**

Hearing date: 21 June 2023

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JUDGMENT

SUMMARY

Unfair Dismissal

Appeal against ET's refusal to aside strike out for non-compliance with unless order.

Appeal allowed on the basis that the Employment Judge failed to take into account a number of important factors that were clearly relevant to the interests of justice test applicable to applications under Rule 38(3) ET Rules

BRUCE CARR KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. In this Judgment, I will refer to the parties by reference to their titles as in the Employment Tribunal. This is an appeal by the Claimant (Mr Parmar) against an order dated 10 February 2022 ("**the Relief from Sanctions Order**") and made by Employment Judge Beck ("the **EJ Beck**") who declined to grant relief from sanctions based on the Claimant's failure to comply with the terms of an unless order made by Employment Judge Dimbylow ("**EJ Dimbylow**") on 4 November 2020 ("**the Unless Order**").

2. The Claimant has also appealed against an additional order of EJ Beck refusing reconsideration of an earlier determination of 3 July 2021 in which the Judge had held that there had been material non-compliance with the terms of the Unless Order ("**the Reconsideration Order**"). For reasons which are set out below, this additional appeal in fact adds nothing to the principal appeal and the judgment will accordingly be directed to the appeal against the Relief from Sanctions Order.

Background Facts

3. The Claimant presented his claim in the Employment Tribunal ("**ET**") on 30 December 2019. His claim was that he had been unfairly dismissed by DPD Group Limited ("the Respondent"), for whom he had apparently worked for some 16 years. His claim was accepted by the ET and standard Case Management Orders ("**CMOs**") were set out in a letter to the parties dated 14 January 2020. The CMOs set a hearing date for the claim of 4-5 November 2020 and, amongst other things, required witness statements to be exchanged on 2 June 2020. On 11 February 2020, the Respondent filed a detailed response to the claim.

4. On 29 July 2020, solicitors for the Respondent wrote to the ET pointing out that the Claimant had failed to comply with the CMOs in that he had not provided documents and evidence in support of his Schedule of Loss. The letter went on to state that:

> **"…in light of the Claimant's solicitors continued failure to comply with the Tribunals' directions, we write to request a strike out of the Claimant's claims on the basis of rule 37(1)(b), rule 37(1)(c) and rule 37(1)(d) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the ET Regulations) – unreasonable conduct in proceedings, non-compliance with a Tribunal Order and the claim not being actively pursued.**
> **In the alternative to the above, we write to request an unless order, requiring compliance with the Tribunal's direction to (1) provide the supporting documents to the schedule of loss and evidence that**

> **the Claimant has mitigated his loss; and (2) exchange of their client's index of documents, by a specified date."**

5. On 25 September 2020, the Respondent's solicitors wrote again to the ET complaining that the Claimant had not yet provided a response to their strike out application and reiterating their request that the claim be struck out. The point was made that the Respondent:

> **"..should not have to incur any further unnecessary costs in respect of [this case] whether the Claimant has acted unreasonably throughout the proceedings and the claim is not being actively pursued."**

6. The Claimant responded to this application on 1 October 2020. In an email to the ET, he said that financial difficulties had meant that he had been unable to instruct solicitors to action the orders with which he had not complied. He also referred to family difficulties and a lack of understanding of legal procedure as further explanations for his default. At the same time, he provided a witness statement covering the same points as he had made in his accompanying email. In the event the claim was not struck out and no unless order was made – the case then remained listed for a full hearing on 4-5 November 2020 under the terms of a letter from the ET dated 15 September 2020.

7. The parties duly attended on 4 November 2020 – both sides were represented at the hearing, the Claimant by counsel and the Respondent, by their solicitor. At that hearing, EJ Dimbylow considered a further application made by the Respondent to strike out the claim. The Judge rejected the application but granted a request made in the alternative, for an unless order. The order was made in the following terms:

> "5…….**I order that unless by 4pm on 25 November 2020 the claimant complies with the orders below numbered 7, 8 and 19, the claim will stand dismissed without further order**. My reasons for making this order are that the claimant has been in breach of tribunal orders made on 14 January 2020, and failed actively to pursue his claim.
> …….
> **Up to date schedule of loss**
> 7. The claimant must by **4pm on 25 November 2020** send to the respondent a document setting out how much compensation for lost earning or other losses he is claiming and how the amount has been calculated.
> ……..
> **Documents**
> 8**.** By **4pm on 25 November 2020** the claimant must sent the respondent copies of all documents relevant to his claim. This includes documents relevant to financial losses and mitigation of loss.
> ……..
> **Witness statements**
> ……..
> 19. The claimant must send to the respondent copies of all his witness statements including his own by **4pm on 25 November 2020**.
> ……..
> 21. The respondent must send the claimant copies of all of its witness statements by **4pm on 13 January 2020**."

8. The reference in paragraph 21 of the order to a date in 2020 was clearly an error – the correct date, as would have been understood by the parties was 13 January *2021*. It was therefore clear from

the terms of the order that, somewhat unusually, EJ Dimbylow had ordered sequential exchange of witness statement, with the Claimant, under the terms of the unless order, due to provide his statement to the Respondent by 4.00 pm on 25 November 2020. Under paragraph 1 of EJ Dimbylow's order, the final hearing was postponed until 23-24 September 2021, some ten months later.

9. On 22 November 2020, the Claimant himself sent an email to the Respondent's solicitors in the following terms:

> **"Please can you advise me what is the deadline to serve and file documents.**
> **Kindly please let me know what documents/schedule of loss you need?**
> **If I do not receive a response I will refer to this email."**

10. It is readily apparent from the terms of this email – to which the Claimant does not appear to have received any reply - that he did not have access to the terms of the Unless order and/or did not otherwise have a copy of it or any detailed understanding of its terms. That he did not have a copy of it is unsurprising as it appears that it was not sent to the parties until 27 November 2020, after the expiry of the crucial date of 25 November 2020 on which the Claimant was vulnerable to the consequences of paragraph 5 which contained the strike out provision. Although the Claimant had been represented by counsel at the hearing before EJ Dimbylow at which that order was made, the fact that he wrote personally to the Respondent on 22 November 2020, suggests that, at that date at least, he did not have legal representation.

11. That situation appears however to have changed shortly thereafter in that on 25 November 2020, at 10.28 am, some five and a half hours before time expired for compliance with paragraphs 7, 8 and 19 of the Unless Order, Osmans solicitors (who continue to act for the Claimant) wrote to the Respondent (apparently for a second time), attaching a letter of authority and stating that:

> "We are still waiting for the order passed by the Employment Judge in the preliminary hearing on the 4th November 2020. Can you kindly provide us with the order passed by the Employment Judge.
> In the meantime as per our client's instructions and in the light of your previous application **Please find enclosed up to date schedule of loss, evidence of mitigation losses.**
> **……**
> *In regards to the witness statements, we are ready to exchange the witness statements. We would be grateful if you could let us know when you would be in a position to exchange witness statements*.
> We hope that concludes all outstanding matters. May we take this opportunity to thank you in advance for your cooperation and assistance in this matter. Kindly acknowledge safe receipt."

12. Beneath the email sent to the Respondent's solicitors, was an email that the Claimant had sent to his solicitors in which he enclosed some documents (which were then forwarded to the Respondent's solicitor) and stated that:

"These are the only documentation to serve to the Defendant and there is nothing else to be submitted."

13. Not only did the Respondent's solicitors not acknowledge receipt of the email from the Claimant's solicitors, but they did not address the specific point that had been put to them as to when they would be in a position to exchange witness statements. Whilst they could be forgiven for not providing the Claimant's solicitors with a copy of the unless order – as it had not yet been sent to the parties by the ET – they did not go back to them to set out what they understood the order to have said. It must have been apparent to the Respondent's solicitors that, not only were the Claimant's solicitors unaware of the precise terms of the unless order, but they were proceeding on an entirely incorrect understanding of the order as it applied to witness statements namely that EJ Dimbylow had departed from the more common order for mutual exchange and ordered sequential exchange with the Claimant due to serve his statement on them just over five hours later. Suffice it to say, that it would have taken a matter of moments for the Respondent's solicitors to have notified the Claimant's solicitors that, contrary to the clear understanding of the latter, EJ Dimbylow had ordered sequential exchange, and that the Claimant needed to serve his statement by 4.00 pm, failing which his claim would be struck out. I am not aware of any explanation from the Respondent as to why that straightforward step was not taken by its solicitors.

14. What in fact happened next was that on 27 November 2020, the Respondent's solicitors wrote to the ET by email at 18.36, making a request that "the Claimant's Claim is automatically struck out for failure to comply with the Unless Order issued by the Tribunal on November 2020." The request was made on the basis first, that the Claimant had provided mitigation documents but not copies of any other documents on which he sought to rely and secondly, that they had not been sent copies of the Claimant's witness statements. The email made no reference to the correspondence that had been received from the Claimant's solicitors shortly after 10.00 am on 25 November which had stated that the Claimant's statements were ready to be provided at that point, albeit on the basis of a failure to appreciate that sequential exchange was required. What the email from the Respondent's solicitors did say was that:

> **"The Claimant was informed by Employment Judge Dimbylow that the Order from the Preliminary Hearing may not come out for several weeks but this did not prevent him from having to strictly to comply with the terms of the Unless Order.**

> **…….**
> **The Claimant was in attendance at the Preliminary Hearing, along with a barrister who was instructed to act on his behalf. As such there is no reasonable explanation as to why the Claimant had failed to comply with the Tribunal's Unless Order."**

15. It might be regarded as surprising, to say the least, that the Respondent's solicitors took the view that they should make the request that they did without making any reference to the email sent by the Claimant's solicitors on the morning of 25 November 2020. Whilst the solicitors might have regarded themselves as entitled to conclude that the explanation for non-compliance was not reasonable – in that the Claimant's solicitors should have taken other steps to inform themselves of the terms of the Unless Order – it is plain that they were fully aware of what that explanation was for that default and yet did not provide any of this information in their email of 27 November.

16. The Claimant's solicitors responded by email of the same date, timed at 19.19, sent to the Respondent's solicitors and copied to the ET. Attached to the email were copies of the statements on which the Claimant relied. The email referred to their unanswered communication sent on the morning of 25 November before stating that:

> "**Notwithstanding your failure to cooperate we attach herewith our client's statement and his friend's statement. Furthermore notwithstanding this short delay of two days, it is our view that no prejudice has been caused to the respondent.**
> **In the circumstances we would like to withdraw the application for Strike out.**"

17. The Respondent did not withdraw its strike out request and on 3 December 2020, the Claimant's solicitors applied for relief from sanctions. The application was accompanied by the relevant correspondence, including that which had taken place on 25 November. The letter referred expressly to the (unanswered) request that had been made on the morning of 25 November for the Respondent to agree a time and method of exchange of witness statements.

18. On 5 March 2021, the ET wrote to the parties informing them that there would be a preliminary hearing on 23 June 2021 at which the Judge would decide:

> "**1) If there was material compliance with the unless order**
> **2) If there was not material compliance and the order has taken effect, whether the claimant's application for relief from sanction should be granted.**"

19. On 18 March 2021, the Respondent's solicitors wrote to the ET seeking clarity in relation the forthcoming hearing and stating that:

> **"In view of the claim having not yet been struck out (because whether there has been material compliance with the unless order is being considered at the above hearing) our position would be that it would be premature to consider [the question of relief from sanction] at the above hearing."**

20. In advance of the hearing on 23 June 2021, the Claimant provided a witness statement to the

ET, dated 22 June 2021, in which he again referred to the email that had been sent by his solicitors at 10.26 on the morning of 25 November 2020 and the request made at that time, to exchange witness statements.

21. The Respondent's solicitors provided a full written submission to the ET for use at the 23 June 2021 hearing. In that submission, amongst other points, the Respondent's solicitors said this:

> **"27. The Claimant may argue that as he didn't receive a written copy of the Unless Order until after the date of compliance that he was unaware of the order. This is nonsense as the Claimant was in attendance at the Preliminary Hearing on 4 November 02020, as was his legal representative. Employment Judge Dimbylow was very clear at the Preliminary Hearing that this was the Claimant's last chance and should he fail to do so, his claim would be struck out automatically. Employment Judge Dimbylow also commented at the end of the hearing that it was important that the Claimant/his representative start work on complying with the directions straight away because the Order may not come out straight away. Consequently it cannot reasonable (sic) be said that the Claimant and/or his representatives were unaware of the Unless Order and what was required of them."**

The EmploymentTribunal's decision on material non-compliance

22. The ET issued a judgment on 23 June 2021 ("**the June 2021 Judgment**") under the terms of which the Claimant's claim was dismissed "on the grounds of material non-compliance with the Unless Order dated 4th November 2020." The Judgment also recorded that the Claimant's solicitor had indicated that an application would be made under Regulation 38(2) ET Rules to have the order set aside. Thus, it appears that the Respondent got what it had asked for in its letter of 18 March 2021 in that the issue of relief from sanctions was deferred.

Applications for relief from sanctions and reconsideration of the June 2021 Judgment

23. On 3 July 2021, the Claimant's solicitors submitted their application for relief from sanctions in which they referred to the fact that the Claimant had complied with paragraphs 7 and 8 of the Unless Order but did not comply with paragraph 19 in circumstances in which he was unsure as to whether there should have been mutual exchange of witness statements. The application also set out that the Unless Order had not actually been received until 27 November 2020 (after the date for compliance with its terms) and that the Claimant had requested the Respondent's notes regarding the terms of the order, which notes he had not received from his counsel who attended on 4 November before EJ Dimbylow.

24. The Respondent's solicitors set out their objections to the application in a letter dated 9 July 2021. It was suggested, amongst other things, that if the Claimant's counsel had:

> **"….failed to cooperate with the Claimant's solicitor following the hearing by providing details of what had been ordered at [the hearing on 4 November] ….then that is a potential negligence issue between those parties – it is not sufficient reason to set aside the dismissal of the Claimant's claims."**

25. Although I have not been able to identify the document in which it was contained, the Claimant's solicitors also appear to have submitted a request for reconsideration of the June 2021 Judgment.

Rulings on applications for relief from sanctions and reconsideration of the June 2021 Judgment

26. On 10 February 2021, EJ Beck's Judgment on the Claimant's reconsideration application was sent to the parties. The application was dismissed under Rule 72(1) ET Rule on the basis that there was no reasonable prospect of the original decision being varied or revoked.. On the same day, the ET sent to the parties a letter setting out EJ Beck's reasons for refusing the Claimant's application for relief from sanctions under Rule 38(2) ET Rules. The Judgment and the letter of the same date are, as far as is material, in identical terms and set out the Judge's reasons for rejecting both applications as follows:

> **"This case relates to dismissal in 2019. The Unless Order was imposed on the 4/11/21 after a number of orders had been made by the tribunal for documents and witness statements to be provided had not been complied with by the claimant. (sic) The claimant's solicitors were under the mistaken belief that the Unless Order provided for mutual exchange of witness statements. It was conceded by the claimant's solicitors that counsel who had attended on their behalf on 4/11/20 had not provided notes of the hearing and efforts were not made to chase up the notes or a copy of the order. The claimant's solicitors were under a duty to clarify the terms of the Unless Order and establish what their obligations were. The respondents' solicitors had been attempting to obtain a schedule of loss and other documents and statements since March 2020. The Unless Order of the 4/44/20 entitled them to see the claimant's statement first and then respond. The delay in submitting the claimant's statement made it difficult for them to do this. I accept the statement was provided 2 days later by the claimant.**
>
> **In this case the claimant's unfair dismissal claim was submitted on the 30/12/19,and the ET1 did not contain details of why the claimant alleged the dismissal was unfair. The claimant's solicitors were Twinwood Law Practice between March and August 2020, the claimant acting in person between December 2019 and February 2020 and September to October 2020. Osman solicitors acted from November 2020.**
>
> **In my view there has been substantial delay in this case. The case had been before the tribunal for 18 months when the hearing took place in June 2021. The delay in this case has caused prejudice to the respondent who was without evidence from the claimant and his representative for most of 2020. The matters referred to by the claimant on his ET1 form took place between June and November 2019, over 2 years ago. In my view the impact of these factors means a fair trial is not possible."**

The Legal Framework

27. Rule 2 ET Rules sets out the overriding objective as it applies in the ET and states that it is "to enable Employment Tribunals to deal with cases fairly and justly". Within the same rule is a particular obligation which applies to the parties as follows:

> **"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."**

28. Turning to unless orders, these are dealt with in Rule 39. Rule 39(1) sets out the consequences of non-compliance with such orders which may specify that in the event of non-compliance, a claim or response "shall be dismissed without further order." Where that happens, Rule 38(2) provides that:

> **"A party…. 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 requests a hearing, the Tribunal may determine it on the basis of written representations."**

29. The approach to be taken on a Rule 38(2) application has been helpfully set out by HHJ Tayler in **Minnoch & others v Interserve FM Ltd & Others** [2023] EAT 35 at paragraph 33 as follows:

> **"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"**

30. At least some of that analysis flows from what was said by Underhill J (as he then was) in **Thind v Salvesen Logistics Limited** UKEAT/0487/09/DA as follows:

> **"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."**

31. As far as reconsideration is concerned, the right to apply is contained in Rule 71 ET Rule. The principles to be applied to such applications are set out in Rule 70 which provides reconsideration can take place "where necessary in the interests of justice to do so." The process is set out at Rule 72 and allows – under Rule 72(1) – an Employment Judge to refuse an application if he/she concludes that "there is no reasonable prospect of the original decision being varied or revoked."

The Grounds of Appeal

32. The Notice of Appeal ("**NoA**"), as already stated above, in fact seeks to appeal against two decisions. At paragraph 3 of the NoA, the following appears:

> **"Appeal is against the Judgment dated 24th June 2021 along with the reasons provided on the 10th February 2022. Secondly the appeal is also against the application to set aside dismissal of Claim dated 10 February 2022."**

33. In fact, the "reasons provided on the 10th February 2022" are not reasons for the judgment dated June 2021 but rather are the reasons why the application for reconsideration of that judgment was rejected. Rather oddly however, in setting out the reasons for rejecting the application for reconsideration, EJ Beck reverts to approaching the matter by reference to the Claimant's request for relief from sanctions – as is clear from paragraph 8 of the Judge's reasons. In fact, what the Judge should have been doing was to ask whether there was any reasonable prospect of the June 2021 Judgment being varied or overturned. That judgment on its face did not deal with the question of relief from sanctions but simply referred to the fact that an application was to be made under Rule 38(2) for the order that was made should be set aside. The June 2021 order dealt with the issue of non-compliance and not with the question of relief from sanctions. It therefore appears to me that EJ Beck addressed the wrong question in deciding to dismiss the application for reconsideration under Rule 72(1). That said, I do not think that anything turns on this. As I have already indicated, the Grounds of Appeal set out at paragraph 7 of the NoA purport to apply to both appeals which were being advanced by the Claimant and – as is confirmed by the contents of the Skeleton Argument filed by the Claimant's solicitor – the attack made on EJ Beck's decisions is on basis that relief from sanctions should have been granted and that the Judge erred in not doing so.

34. The practical effect of all of this is that I will treat this appeal as being one against the decision not to grant relief from sanctions as set out in the letter from the ET of 10 February 2022 which sets out the Judge's reasons for not granting such relief.

Ground 1

35. Ground 1 of the NoA states that the Judge failed to consider that, as at 23 June 2021, the Claimant's case was "prepared for the hearing and therefore there was no prejudice for the respondent to go to the full hearing."

36. The Judge's reasoning in relation to this point was two-fold – first that there had been an 18-month delay when the hearing took place in June 2021 and that this had caused "prejudice to the respondent who was without evidence from the claimant and his representative for most of 2020.".

Secondly, the Judge concluded that, given that the events covered by the ET1 form had taken place "between June and November 2019, over two years ago…[this] means that a fair trial is not possible" – which of course, if correct, would amount to significant prejudice to the Respondent.

37. However, what the Judge's analysis in my view appears to involve – and does so despite the reasons having accepted that the Claimant's witness statement was provided within 2 days of 25 November 2020 date contained in the Unless Order – is effectively holding the Claimant responsible for the entirety of the delay that had occurred from November 2020 right through to February 2022. In fact, the Claimant had, as early as 3 December 2020, applied for relief from sanctions. He had been initially informed by the ET that that application would be dealt with in June 2021, over six months after his application had been made. It was the Respondent that had then objected to the scope of the June 2021 hearing, with the consequence that the Judge did not consider relief from sanctions until roughly 8 months later in February 2022. I do not think that it can be the correct approach for the Judge to decide that there was prejudice to the Respondent (for which the Claimant was being held responsible) arising from the whole of the 'delay' from November 2020 to February 2022 when the Claimant had, first, complied with the terms of the Unless Order within 2 days of the specified time and secondly had thereafter promptly applied for relief from sanctions.

38. Furthermore, in dealing with the 'delay' aspect, the Judge in my view made two further errors. Firstly, the Judge appears to have concluded that there was prejudice to the Respondent in that it was "without evidence for most of 2020" – I do not think that the Judge was correct in holding this period against the Claimant given that the claim had not been dismissed despite the Respondent's application to do so made in November 2020. Under the terms of the CMO made by the ET on 14 January 2020, the Respondent was not scheduled to receive the Claimant's witness statement until 2 June 2020 in any event. In addition, the ET had, on 2 November 2020 ordered that the Claimant provide his witness statement by 25 November 2020. In those circumstances, it seems to me that the Judge should have been examining the prejudice caused by non-compliance with the terms of the Unless Order rather than proceeding on the basis of any prejudice arising as the result of events prior to the making to the Order and running right up to February 2022.

39. In addition, the Judge has suggested that, as at February 2022, a fair trial was not possible. No reasons are provided for this conclusion beyond perhaps as a matter of inference, the events leading to dismissal occurred in the later part of 2019. If there was an objective basis on which to conclude on the facts that a fair trial was not possible, then it would be open to the Respondent to make such an application which could be brought irrespective of whether there had been non-compliance with the Unless Order. Absent such an application, I do not think it can be right to reach an unreasoned conclusion that a fair trial is not possible in February 2022 because of the delay to that date in circumstances in which the Claimant had remedied his failure to comply with the terms of the Unless Order by providing his witness statement to the Respondent two days after the date for compliance.

40. I am concerned also by at least one other fact that appears to have been taken in looking at the overall delay in the case and any prejudice which flowed from it. As part of the reasons provided by the Judge, reference was made to the Claimant's ET1 alongside a suggestion that it "did not contain details of why the claimant alleged the dismissal was unfair." Having looked at Box 8.2 of the Claimant's ET1 Form, I do not understand how that criticism can be made, still less taken into account in the Rule 38(2) exercise. From the contents of that box it is clear that the Claimant was saying that his dismissal was unfair in that:

- The allegation which was relied on as justifying his dismissal, namely that he had been abusive to other staff, was untrue and had been defamed by one of his managers who had a hidden agenda against him had made the Claimant feel unwelcome;
- He had been deliberately provoked by the same manager who made covert recording which he then used as the basis for raising a grievance against the Claimant;
- The same manager had then colluded with another manager to put together a case against him;
- A biased investigation into the Claimant was then carried out which led to his dismissal;
- In deciding to dismiss, the Respondent lacked evidence of misconduct and did not take into account the Claimant's length of service.

41. It is also significant to note that the Respondent appears to have fully understood what the Claimant's complaints were, as it submitted detailed Grounds of Resistance, running to 10 pages and 57 paragraphs.

42. I am therefore left with no understanding of why the Judge came to the conclusion that the Claimant's ET1 contained no details of his complaint. Equally, given that it appears within the reasons provided by the Judge for not granting relief, it must be taken that some weight was attached to it.

Ground 2

43. Under Ground 2, the Claimant suggests that the sole reason of delay does not justify that the case should not be heard. It seems to me that this adds little, if anything to, in particular Grounds 1 and 3 and for that reason, I do not propose to address it further.

Ground 3

44. Ground 3 seeks to undermine the Judge's decision not to grant relief from sanctions on the basis that all the facts were not taken into account when making that decision. As is clear from the authorities, the decision on whether to grant such relief is based on a broad assessment of what is in the interests of justice and the factors that are material to that assessment will vary from case to case. In the Claimant's Skeleton Argument, the point is made by reference to this ground of appeal (at paragraph 7) that EJ Beck had failed to take into account the email from the Claimant on 22 November 2020, asking what the deadline was for service and the email from his solicitors of 25 November 2020 at 10.28. The Judge's reasons contain no reference to either of these documents, save by inference based on the apparent acceptance of fact that the Claimant's solicitors were "under the mistaken belief" that statements were to be mutually exchanged – the emails clearly went beyond the limited point identified by the Judge and were plainly material to the question of whether it was in the interests of justice to grant relief from sanctions. It was not merely a case that the Claimant's solicitors were acting under a "mistaken belief" – in fact both the Claimant and his solicitors were clearly under a misapprehension of what was expected of them. But even more significantly than that, both the Claimant and his solicitors had – in advance of the deadline for compliance – made it clear to the Respondent's solicitors that they did not understand, still less have sight of – the Unless Order.

45. Given the duty of co-operation contained within the overriding objective, it seems to me highly relevant to the interests of justice that the Respondent's solicitors have failed to respond either to the Claimant's email of 22 November 2020 or that from his solicitors sent on the morning of 25 November 2020. In particular – and by reference to the latter email, it must have been apparent to the Respondent's solicitors that, in fact, the Claimant was ready to provide his witness statements within the time set out in the Unless Order. The reason for the statements not being provided at that time, was the mistaken belief as to mutual exchange. Rather than request that the statements be provided unilaterally and in accordance with the terms of the Unless Order, the Respondent's solicitors appear, on the face of it, to have elected not to respond at all to the Claimant's solicitors until after the trap had shut and the Claimant was struck out under the terms of that order.

46. I cannot see how the Judge did not regard this is a material factor to be taken into account in determining whether there should be relief from sanctions. I did explore with Mr Beever, counsel for the Respondent, whether there was any 'innocent' explanation for the lack of response to the key email – for example, if it had not been read prior to the 4.00 pm deadline because the relevant person at the Respondent's solicitors was away from the office and unable to access their emails. I did not receive any such explanation and none was presented to the ET in support of the Respondent's case that relief from sanctions should not be granted.

Ground 4

47. Ground 4 again suggests that non-compliance was addressed on 23 June 2021 and that as the case was 'ready for trial' at that date, strike out was not just or fair. Again, this does not appear to me to add anything beyond that which I have covered in relation to Grounds 1 and 3.

Ground 5

48. This ground of appeal references the Court of Appeal's decision in **James v Blockbuster Entertainment** [2006] IRLR 630 and suggests that Tribunal strike out powers should be used sparingly. It then makes an apparently contradictory point in stating first that the Clamant had complied with all orders including service of the witness statement but then goes on to suggest that "the failure is to provide the witness statement on 25th November 2020 at 4.00 pm". I cannot discern

any arguable point of law under Ground 5.

Ground 6

49. Under Ground 6, the Claimant suggests that the Judge failed to take account of the fact that the Claimant complied with the terms of the Unless Order just 2 days later than the specified time and that he had done his best to comply with the order. It is clear from the Judge's reasons that they had in mind that the statement was provided on 27 November 2020 – it was therefore plainly taken into account. As to the point that the Claimant had "done his best to comply with the tribunal order", again, I do not think that this raises any additional point of law beyond that contained within Ground 3.

Ground 7

50. The same point can be made in relation to Ground 7 which suggests that the case could have been ready by 23 December 2020 had the Respondent provided its witness statements and the hearing scheduled for September 2021 could have proceeded. The specific reference to the hearing date scheduled for September 2021 is something that the Judge does not appear to have addressed in the reasons provided and is, in my view, a material factor that should have been considered, particularly given the unreasoned conclusion to which I have already referred namely that, as a February 2022, a fair trial was not possible. Had the Judge considered the fact that the hearing had been scheduled to take place in September 2021, just four months earlier, it seems to me it would have been far more difficult, if not impossible to conclude that, whilst a (fair) trial was contemplated and could have taken place at that earlier date, this was no longer possible in February 2022 as a consequence of any breach of the terms of the Unless Order. The Judge might of course have said that due to listing issues, a trial could not now be scheduled until a much later date in 2022 or even 2023, but even that would not have been fair on the Claimant as it would mean that he would 'carry the can' for the whole of the period from 27 November 2020 to late 2022/2023, in circumstances in which he had provided his witness statement just 2 days after the date set out in the Unless Order.

Ground 8

51. Ground 8 does no more than restate the assertion that the Claimant's claim should be heard

and relief from sanction granted.

Ground 9

52. This ground seeks to advance the appeal on the basis that the Unless Order itself was "procedurally unfair" in requiring sequential exchange of witness statements. However, as the authorities make clear, it is not the role of the ET, either at the stage of determining any issues of compliance, still less in deciding on the issue of relief from sanctions, to revisit the terms of the original unless order – see for example **Minnoch** at paragraph 33.7.

Conclusion

53. The appeal therefore succeeds on Grounds 1, 3 and 7.

Disposal

54. After the handing down of the draft judgment in this case, I invited both parties to provide submissions on the question of disposal. The Respondent provided written submissions on 28 July 2023 to which I will turn shortly. Notwithstanding the fact that their client was successful in his appeal, the Appellant's solicitors have not provided any submissions on the significant question of disposal. Whilst that conduct ultimately does not impact on my assessment of this point, it is both discourteous to the Tribunal and contrary to their own client's interest to do what has been asked on no less than three occasions, namely to set out their arguments on disposal. I proceed on the basis however that their position, if they had taken the trouble to advance it, would have been that I should overturn the ET's decision with the effect that the Appellant's claim would no longer be struck out.

55. As recognised by the Respondent in its written submissions, there are limits on the power of the EAT to substitute a finding following a successful appeal with the guidance – taken from the Court of Appeal's decision in **Jafri v Lincoln College [2014] IRLR 544** being to the effect that where there is more than one possible outcome in relation to the question being remitted to the ET, then it would not be open to the EAT to take its own course rather than allowing the ET to be the ultimate decision maker. There are however, limits to this obligation and, as noted by the Court of Appeal in **Burrell v Micheldever Tyre Service [2014] IRLR 630**, the EAT can be "robust rather than timorous" in conducting the **Jafri** exercise. It should therefore be prepared to substitute a finding

in an appropriate case in which there are no additional findings of fact to be made and where those facts have either been found by the ET or are clear and unarguable from the material before the EAT.

56. I did not read the Respondent's submissions on disposal as suggesting that there were any additional facts to be found by the ET. Rather the submission was put on the basis that it would be for the ET to make the assessment as to the extent to which the Appellant should 'carry the can' for the events at the time that the order was breached and as to the relevance of the correspondence generated at the time.

57. I proceed on the basis that there are indeed no additional areas of evidence or fact finding that need to be undertaken by the ET in this case. I also take the view that any ET, properly directing itself in accordance with the terms of this judgment and having regard to the events of # could only come to one conclusion in relation to the Respondent's application to strike out the Appellant's claim and that is that that application should be dismissed. I do not see how any ET Judge could accede to such an application in the circumstances that I have set out above in particular at paragraphs 9-16 (which deal with the facts in this case) and the conclusions that I have drawn in particular at paragraphs 37-39, 40-46 and 50.

58. For those reasons, I substitute a finding to the effect that the Respondent's application to strike out the Appellant's claim is dismissed. The claim is therefore to be remitted to the ET for case management in the ordinary course.

Costs Application

59. At the hearing before me, the Respondent sought to advance an application for costs based on what it described as a failure by the Claimant to prepare and lodge a bundle for use at the hearing in accordance with paragraph 7.1 EAT Practice Direction. Paragraph 7.1 sets out that it is an Appellant's responsibility to prepare and lodge the bundle for use at any hearing. Given the 28-day time limit for presenting the hearing bundle to the EAT, the time limit in the present case was 24 May 2023.

60. On 18 May 2023, the Respondent, having not heard from the Claimant, emailed his solicitors in the following terms:

> **"Further to the Employment Appeal Tribunal's Orders dated 27 October 2022, please find attached the appeal hearing bundle.**

> **Please can you confirm that this is agreed by no later than 1pm on Monday 22 May. If we do not hear from you by then, we shall assume that the bundle is agreed."**

61. The Order of 27 October 2022 said this at paragraph 6:

> **"The parties shall co-operate in compiling and agreeing and shall, by no later than 28 days prior to the date fixed for the hearing of the full appeal, lodge with the Employment Appeal Tribunal 2 copies of an agreed, indexed and paginated bundle of material documents for the hearing in accordance with the Employment Appeal Tribunal Practice Direction."**

62. In the event, it appears that the Respondent's solicitors did not hear back from the Claimant's solicitors and therefore lodged the bundle that they had prepared with the EAT.

63. The next relevant event for the purposes of the costs application, is the email sent to the Claimant's solicitors dated 20 June 2023 which referred to an Appellant's obligation under paragraph 7.1 EAT Practice Direction to prepare and lodge the bundle for use at the appeal hearing. The email then cites that paragraph in full before stating that:

> **"As we did not hear from you regarding the above, we prepared the bundle and wrote to you on 18 May 2023 (email below) seeking your agreement to this bundle. We did not hear from you by the stipulated deadline and therefore lodged this with the EAT ourselves."**

64. Costs in the sum of £1,583.40 was then claimed for work done on the bundle between 17 and 25 May 2023, with the bulk of the work (to the value of £1,243.80) being done on or before 18 May 2023 and in advance of the email sent to the Claimant's solicitors at 5.27 pm that day.

65. The Claimant resists the application for costs based on the contents of an email from his solicitors dated 5 July 2023 which takes the following points:

(a) The Respondent volunteered to do the bundle without any prior agreement or discussion of costs;
(b) There was no communication regarding the preparation of the bundle;
(c) The costs claimed are excessive – if costs were to be awarded, the sum should be no more than £500;
(d) Any award of costs would be "disproportionate and unreasonable."

66. In their response to these points, set out in an email from their solicitors dated 12 July 2023, the Respondent says as follows:

(a) There was no response to the Respondent's email of 18 May 2023. The Claimant's solicitors had apparently sent an email on 29 May 2023 which contained no comment on the draft bundle. "This inaction implies an irrational expectation that the Respondent would be responsible for ensuring that the parties were ready for the hearing on 21 June 2023."
(b) The only further email from the Claimant was one dated 8 June attaching a Skeleton Argument that should have been filed on 7 June 2023 which "further emphasises the Claimant and his representative's lackadaisical approach to the appeal proceedings."

67. I do not think that this is a case in which costs should be awarded against the Claimant. The Respondent's application starts from the wrong premise, relying as it does on paragraph 7.1 of the

EAT Practice Direction. As is clear from paragraph 1.9 of the Practice Direction, the provisions contained within it are "subject to any specific directions which the EAT makes in any particular case."

68. In this appeal just such a direction was made by the EAT at paragraph 6 of its October 2022 Order pursuant to which it was the joint responsibility of the parties to compile, agree and lodge the bundle for use at the appeal hearing. Whilst the Claimant's side could be criticised for not taking the initiative prior to 18 May 2023, this would not in my view amount to "unreasonable conduct" which might justify an award of costs under Rule 38A EAT Rules 1993. By 18 May 2023, the Respondent had made the decision to put the bundle together itself and had sent a copy to the Claimant with a request for confirmation that the bundle was agreed and stating that, absent any contact from the Claimant, they would assume that there was agreement.

69. Had the Claimant come back to the Respondent on or before 22 May 2023 and confirmed agreement, it seems implausible that the latter would even have considered making any application for costs that it had incurred prior to that date. Similarly, given that no confirmation was received from the Claimant, the Respondent was entitled, on its own terms, to proceed on the basis that the bundle was indeed agreed. Had the Claimant come back at some later date and belatedly challenged the contents of the bundle, there *might* be some basis on which the Respondent could argue that he had acted unreasonably and that some award of costs should be made. But even then, I do not see how it could be said that the costs of initially putting together their own version of the bundle, the Respondent had been put to unnecessary cost as a result of any unreasonable conduct by the Claimant.

70. Finally, whilst it is right that the Claimant did not formally confirm that he agreed the contents of the bundle – notwithstanding letters from the EAT dated 1 and 8 June 2023 requesting him to do so – his Skeleton Argument lodged on 8 June 2023 was drafted expressly by reference to that bundle from which one can readily draw the inference that it was agreed.