Appeal No. UKEAT/0316/15/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 15 September 2016
Judgment handed down on 3 October 2016

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MR B WENTWORTH-WOOD & OTHERS APPELLANTS

MARITIME TRANSPORT LIMITED RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellants	MISS KATHERINE APPS (of Counsel) Instructed by: O H Parsons & Partners Solicitors 3rd Floor Sovereign House 212-224 Shaftesbury Avenue London WC2H 8PR
For the Respondent	MR DALE MARTIN (of Counsel) Instructed by: Prettys Solicitors 25 Elm Street Ipswich IP1 2AD

SUMMARY

PRACTICE AND PROCEDURE - Striking-out/dismissal

The Employment Judge made an Unless Order and subsequently gave notice pursuant to Rule 38(1) that the claims of all the Claimants had been dismissed by reason of material non-compliance with the Unless Order. She found, in particular, that Claimants who had served schedules setting out the amounts claimed had not provided "full particulars of the amount of holiday pay claimed" (paragraph 1 of the Unless Order); and that a mistake as regards a particular Claimant meant that confirmation by the Claimants' solicitors that all Claimants were covered by a collective agreement did not materially comply with a requirement (paragraph 3) to say which Claimants' contracts of employment were covered by a collective agreement.

On appeal by the Claimants against that notice, held that on the true construction of the Unless Order:

(1) Those Claimants who had served schedules had complied with the requirement in paragraph 1 to provide "full particulars of the amount of holiday pay claimed".

(2) The Claimants' solicitors had complied with the requirement in paragraph 3 of the Unless Order notwithstanding that they had made a mistake in the case of a particular Claimant.

(3) The claims of those Claimants who had complied with all three paragraphs of the Unless Order had not been dismissed.

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HIS HONOUR JUDGE DAVID RICHARDSON

1. This appeal concerns two sets of proceedings brought by multiple Claimants against Maritime Transport Limited ("the Respondent"). At a hearing on 26 June 2015 Employment Judge Laidler decided that all the claims had been dismissed by virtue of non-compliance with an Unless Order. She gave written notice to that effect as part of a Judgment and Reasons dated 10 July 2015. The Claimants say that she was wrong in law to hold that all the claims had been dismissed; and in any event that she was required to afford them a fair hearing before doing so, and did not do so.

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Unless Orders

2. Rule 38 of the **Employment Tribunal Rules of Procedure 2013** (which are Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**) provides as follows:

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> **"38.** ***Unless orders***
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> **(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.**
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> **(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.**
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> **(3) Where a response is dismissed under this rule, the effect shall be as if no response had been presented, as set out in rule 21."**

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3. "Claim" is defined by Rule 1(1) as meaning "any proceedings before an Employment Tribunal making a complaint" and "Claimant" as the person bringing the claim. "Complaint" means "anything that is referred to as a claim, complaint, reference, application or appeal in any enactment which confers jurisdiction on the Tribunal".

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4. Rule 38 clarifies Employment Tribunal procedure concerning Unless Orders. The Employment Tribunal, usually the Employment Judge alone, is potentially involved at three stages, each involving different legal tests.

5. Firstly, there is the decision whether to impose an Unless Order and if so in what terms. This is a decision to be taken in accordance with the overriding objective set out in Rule 2. As Rule 38(1) makes clear, an Unless Order is effectively a conditional Judgment, dismissing the whole or part of a response without any further Order: see **Marcan Shipping (London) Ltd v Kefalas and another** [2007] 1 WLR 1864 at paragraph 34 (Court of Appeal, Pill LJ) and **Johnson v Oldham Metropolitan Borough Council** [2013] EqLR 866 at paragraph 3 (EAT, Langstaff P). Care is required before making such an Order because of its drastic effect: **Marcan** at paragraph 36, where it was described as "one of the most powerful weapons in the court's case management armoury" which "should not be deployed unless its consequences can be justified" (paragraph 36). Care is also required in drafting the terms of the Order, especially in a case which involves several allegations: see **Johnson** at paragraph 5. The same will be true of a case which involves an Order placing requirements on several Claimants or Respondents.

6. Secondly, there is the decision to give notice under Rule 38(1). This feature was new to the **2013 Rules**. Until that time there was no specific process for declaring whether an Unless Order had taken effect, and there could be doubt or confusion as to whether this had happened. In giving notice the Employment Tribunal is neither required nor permitted to reconsider whether the Unless Order should have been made: it has already been made, and if there has been any material non-compliance the sanction contained within it will already have taken effect. The decision to give notice simply requires the Employment Tribunal to form a view as to whether there has been material non-compliance with the Order: see **Marcan** at paragraph 34

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and **Johnson** at paragraph 7. The notice (or refusal to give notice) sets out its decision on this question and brings clarity to the position for the parties.

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7. Thirdly, if the party concerned applies under Rule 38(2), the Employment Tribunal will decide whether it is in the interests of justice to set the Order aside. This is not the same as asking whether it was in the interests of justice to make the Order in the first place. It is the stage of the procedure at which the Employment Tribunal considers relief against sanction, and it can take into account a wide range of factors, including the extent of non-compliance and the proportionality of imposing the sanction; see **Neary v Governing Body of St Albans Girls' School** [2010] ICR 473 CA at paragraphs 48 to 53. Rule 38(2) was also new to the **2013 Rules**: before that time there was uncertainty for some years as to the correct procedure for making such an application: see **North Tyneside Primary Care Trust v Aynsley** [2009] ICR 1333 EAT at paragraphs 23 and 27 to 29 where the previous Rules were described as "notoriously ill-thought-out". Now there is no doubt as to how relief against sanction can be sought.

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8. At each of these stages there will be a decision for the purposes of section 21(1) of the **Employment Tribunals Act 1996**; so there may be an appeal to the Employment Appeal Tribunal on a question of law. They are, however, separate decisions taken at different times under different legal criteria. An appeal against one is not an appeal against another; and the time for lodging appeals will run from different dates. This point must be kept carefully in mind by any party considering an appeal. In this case, for example, there was no appeal against the imposition of the Unless Order; and (subject to what I will say below) no appeal against the refusal of an application under Rule 38(2). The only appeal is against the decision at the second stage to give notice confirming that all the claims had been dismissed.

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The Unless Order

9. The Claimants in each set of proceedings were former employees of Roadways Container Logistic Limited ("RCL"). The shares in RCL were sold to the Respondent's parent company; and its container transport business was sold to the Respondent. Their employment transferred to the Respondent under the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE"). All the Claimants in both sets of proceedings were represented by solicitors, OH Parsons LLP ("OHP").

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10. The claims contained two quite different complaints. I am not concerned with the merits of the complaints, so I shall describe them only briefly.

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11. Firstly, the Claimants said that the Respondent had not paid the holiday pay due to them: it was calculated on the basis of their basic pay whereas it should also have included various other elements of pay. This claim was brought following the decision of the EAT in **Bear Scotland Ltd v Fulton** [2015] ICR 221 to the effect that the calculation of holiday pay should relate to normal pay including such non-guaranteed overtime as was regularly required by the employer.

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12. Secondly, they said that the Respondent was in breach of section 145B of the **Trade Union and Labour Relations Act 1992**. They were members of a trade union recognised by their former employers; in order to evade collective bargaining the Respondent had made an offer to them and other employees which infringed section 145B.

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13. The Unless Order was made on 30 April 2015. It followed an earlier Order dated 16 February 2015 with which OHP had not complied. I will set it out in full:

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"UNLESS ORDER

Employment Tribunals Rules of Procedure 2013

Rule 38

On the Tribunal's own initiative and having considered any representations made by the parties, Employment Judge Laidler ORDERS that -

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Unless by the 8th May 2015 each of the Claimants provide:

1. Full particulars of the amount of holiday pay claimed by each Claimant.

2. The dates of employment of each Claimant.

3. Which Claimant's contracts of employment it is claimed were covered by a collective agreement?

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the claim will stand dismissed without further order."

14. There was no appeal against this Order. It is not a masterpiece of lucid drafting. In her Judgment at the Preliminary Hearing of this appeal Laing J commented that four construction

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issues arose from it. I agree; each of them will be addressed in this Judgment. I would add, at a more prosaic level, that the Order did not say to whom the information was to be provided.

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The Attempt at Compliance

15. On 8 May OHP sent a letter and attached schedules by email to the Respondent's solicitors in order to comply with the Unless Order.

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16. As to paragraph 1 of the Order, OHP provided schedules for 22 Claimants. Argument before me concentrated upon schedules provided by 11 Claimants (others in any event face time limit issues and no longer wish to pursue holiday pay claims). In each case the schedule was

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prepared by reference to payslips. The schedule identified the weeks in which holiday pay was taken; the basic daily rate during that week; and an average daily rate which (the covering letter explained) was calculated by reference to a 12 week period prior to the day taken. The loss

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taken was the difference between the basic rate (which the Respondent actually paid for

holiday) and the average rate. The individual amounts were added to give a figure for total losses.

17. Three features should be noted, which were the subject of submissions before me. (1) In some cases the schedules set out, in an additional column, the actual holiday dates taken. In others this information was not given; but it was still possible to see the week in respect of which the holiday pay was paid. (2) In some cases there were gaps in the schedule, evidently where pay slips were not available. (3) In no case was there any further explanation of the legal basis of the claim.

18. As to paragraph 2 of the Order, OHP provided dates of employment for 24 employees.

19. As to paragraph 3 of the Order, OHP provided confirmation that in each and every case it was said that the contract of employment was covered by a collective agreement. By the time of the hearing before me it was common ground that this was a mistake as regards one employee, Mr Beddoes, who was never employed by RCL and therefore never covered by a collective agreement.

The Subsequent Procedure

20. On 12 May 2015 the Respondent's solicitors wrote to the ET asking for all claims to be dismissed. The letter pointed out that some Claimants had failed to provide any particulars of the amount of holiday pay claimed and others had failed to provide dates of employment. It submitted that the failure of some Claimants to comply should result in the automatic dismissal of all the Claimants' claims.

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21. On 19 May the Employment Judge made an Order joining the claims and listing a hearing for 26 June. The Order set out a list of issues to be addressed at the hearing, all of a case management nature. There was nothing in the Order to suggest that the question whether the claims had been automatically dismissed was to be discussed at that hearing. I infer that when she made the Order she had probably seen OHP's letter dated 8 May but not the letter dated 12 May.

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22. By 21 May, however, the Employment Judge had seen the letter dated 12 May. She directed that a copy of the letter be sent to OHP for comments within 7 days. OHP did not make comments. On 9 June she sent a follow-up letter asking for comments by 16 June. Again OHP made no comments.

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23. On 19 June the Respondent's solicitors sent what they described as a "case management agenda". Under paragraph 4.2 it listed various preliminary issues including "The Claimants' breach of the Unless Order dated 30 April 2015". There the matter stood until 26 June.

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24. On the day of the hearing both sides were represented by counsel. Counsel for the Respondent came armed with a "position statement" and case law concerning the question whether the claims had been struck out. He made detailed submissions. Then counsel for the Claimant protested. He said the Employment Tribunal had not given notice of the application to the parties (see Rule 63); and the hearing had not been in public.

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25. The Employment Judge did not accept this submission. She said in her Written Reasons:

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> **"17. The Employment Tribunal does not accept that position. There can have been absolutely no doubt whatsoever to OH Parsons acting on behalf of the Claimants that the Respondents considered they were in breach of an Unless Order. The solicitors for the Respondents wrote**

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to the Tribunal and to OH Parsons setting out what they said were deficiencies in the information provided in their letter of 12th May 2015 and the Claimants' solicitors never really commented on that letter. There was a further letter to OH Parsons on 15th June [sic] and again no comment was received.

18. As the Judge made clear to Mr Salter when he made this submission, she could have dealt with the issue of whether these proceedings had been dismissed pursuant to the Unless Order whilst sitting at her desk. No hearing was required. The fact was that the Judge had decided to use the listed preliminary hearing to clarify the position and that does not change, the matter could have been dealt with."

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26. Counsel for the Claimant made no concessions on the question whether there was substantial compliance with the Order; but he said that he was unable to make submissions on that question because he had not been able to obtain instructions. He asked for the matter to be put off to another Preliminary Hearing. The Employment Judge recorded this submission in her Written Reasons; it is plain that she rejected it, though she gave no separate reasons for doing so.

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27. Before I turn to the Employment Judge's reasons I will complete the relevant procedural history. On 24 July OHP wrote to the Employment Tribunal making an application under Rule 38(2) expressly asking for an oral hearing. The Employment Judge refused the application by a Judgment dated 17 September 2015 made on written representations. The Claimants had in the meantime lodged this appeal against the Judgment dated 10 July 2015; they did not appeal against the Judgment dated 17 September 2015.

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The Employment Judge's Reasons

28. I return to the Employment Judge's reasons for giving notice under Rule 38(1). She first said that the claims of Claimants who failed to give particulars of the amount of holiday pay at all, or who did not give dates of employment, would be struck out. That part of her reasoning is not in issue on the appeal.

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29. She then continued as follows:

> **"24. With regard to those who did provide a schedule, the Tribunal accepts as submitted by the Respondent that they are defective and the reasons set out in paragraph 15 of Mr Martin's submissions. There is no statement of the basis for the amounts claimed e.g. the statutory calculation method, nor any contract terms that are relevant to the claim. There is no basis provided for the calculation of the amounts of each claim, whichever statutory basis is used. There is a 12 week formula but there is no inkling of how, if at all, this has been deployed or from what calculation date. There is no identification of the pay elements being included. As already noted, Mr Salter was unable to assist the Tribunal with any submissions on the issue of whether there had been substantial compliance.**
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> **25. The Respondents still do not know the case they have to meet.**
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> **26. With regard to the additional question in the original order of those subject to a collective agreement, all that OH Parsons have said is that all are covered but it has transpired today that Mr Beddows [sic] wasn't and therefore it is not clear whether the answer was indeed correct. There have been no submissions from the Claimants today on that point."**

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30. In the result, therefore, the Employment Judge dismissed all the claims - including claims where a schedule had been provided, dates of employment had been given, and OHP confirmed that the Claimants were covered by collective agreements.

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Submissions

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31. Miss Katherine Apps developed three grounds of appeal on behalf of the Claimants. As regards ground 1, which concerns the sufficiency of the schedules, appeals are pursued on behalf of 11 of those Claimants who submitted schedules; the others faced difficulties with the statutory time limit for making claims. As regards the other grounds, the appeal is pursued on behalf of all the Claimants except of course Mr Beddoes.

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32. She first submitted that the Employment Judge erred in law in concluding that those Claimants who provided schedules had not complied with paragraph 1 of the Order. She submitted in particular that paragraph 1 of the Order required full particulars of the *amount* of holiday pay claimed. This means that it had to say what the amount of the claim was and how it was calculated. This the schedules did - taken with the covering letter dated 8 May which confirmed how the average was calculated. The Order did not require the Claimants to take the

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additional steps mentioned in paragraph 24 of the Employment Judge's Reasons. There was no requirement to state a "statutory calculation method", nor the contract terms relevant to the claim, or identification of the pay elements being included. If any of these additional matters were required, the Order should have said so. Therefore there was no material non-compliance where schedules had been provided. In some cases the schedules were complete. In others any missing figures were only because the Claimants could not find the payslips to make a claim in respect of that period. They were not obliged by the Order to make claims where they did not have evidence. Nor were they obliged by the Order to state precise dates of holiday so long as it could be seen how the amounts were arrived at.

33. In answer on behalf of the Respondent Mr Dale Martin submitted that the Employment Judge's reasoning - largely based on his own written submissions - could be sustained. The schedules did not distinguish between the first four weeks of leave and subsequent leave; the Directive, and the reasoning in **Bear Scotland**, applied only to the first four weeks. The schedules did not identify whether the basis of calculation was derived from sections 221-224 of the **Employment Rights Act 1996** and if so on what basis. The schedules contained errors and omissions; some were incomplete or did not identify precise holiday dates. There was therefore a failure to comply with the Unless Order in material respects.

34. Miss Apps secondly submitted that on any possible view the necessary particulars were given as regards the section 145B claim. It was not enough for the Employment Judge to say that "it is not clear that the particulars were correct". It was no part of the Employment Judge's task to adjudicate on the correctness of the particulars. Since particulars of this claim were given, it should not have been dismissed. The Unless Order should be construed in a non-penal and facilitative manner; it must therefore be applied complaint by complaint.

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35. In answer Mr Martin submitted that the mistake in the particulars as regards Mr Beddoes indeed entitled the Employment Judge to say that there was non-compliance. He relied on **EB v BA** UKEAT/0139/08/DM. In any event non-compliance with other parts of the Order was sufficient to justify the conclusion that the claim was dismissed: see **Johnson**, where non-compliance in respect of two of three claims was sufficient.

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36. Miss Apps thirdly submitted that the Employment Judge erred in law in dealing with the matter at a hearing when no notice had been given that the matter would be addressed at the hearing. She relied in particular on **Rogers v Department for Business Industry and Skills** UKEAT/0251/12/SM.

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37. In answer Mr Martin submitted that Rule 38(1) did not require the Employment Judge to deal with the question of non-compliance at a hearing. She would have been entitled to deal with it at her desk. In any event OHP had ample opportunity to make submissions either in writing or by giving instructions to counsel. There was no unfairness in the Employment Judge proceeding as she did.

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38. Further, Mr Martin submitted that Miss Apps' argument on appeal was not open to her, since counsel for the Claimant had not argued the case in this way below. He accepted that counsel had made no concessions; but that was not sufficient to enable Miss Apps' positive arguments to be made for the first time on appeal. He took me to well known authorities on this question, summarised in **Secretary of State for Health v Rance** [2007] IRLR 665 EAT at paragraphs 48 to 50.

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39. Miss Apps answered that there had been no dispute below as to the principles of law to be applied; there was indeed no argument about them. There was plainly an issue as to the sufficiency of the particulars; the Claimants' solicitors had explained their case in the letter dated 8 May. It was the task of the Employment Judge to apply the non-controversial principles of law and construe her own Order; she would have been bound to apply them even if there had been no hearing at all. No concession had been made; the fact that the Claimants' counsel had been without instructions did not mean that the Employment Judge was entitled to apply the law incorrectly or misconstrue her own Order. Alternatively this was the kind of exceptional case where the Employment Appeal Tribunal ought to entertain her arguments.

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40. It will be recalled that the Respondent's solicitors submitted, in their letter dated 12 May that the failure of some Claimants to comply should result in the automatic dismissal of all the Claimants' claims. Miss Apps submitted that this was incorrect; the Order should be read as if it applied individually to each Claimant - so that effectively 22 Unless Orders were made. Mr Martin was inclined to accept that this was the case. He said that at the hearing before the Employment Judge he "distanced himself" from the submission in his solicitor's letter. The Employment Judge, having decided there was non-compliance in every case, did not have to address this point. But Miss Apps went further: she submitted that the Order should be given a facilitative not a penal construction (see **Johnson** at paragraph 5); and it could be read as applying separately to the two distinct complaints - so that a complaint would not be dismissed so long as there had been compliance with the paragraphs of the Order relating to that complaint. Mr Martin did not agree; he submitted that there had to be full compliance by a Claimant, otherwise that Claimant's complaint would be dismissed.

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41. At the very beginning of her submissions Miss Apps said that her appeal was against the Employment Judge's Judgment dated 17 September as well as against the notice under Rule 38(1). However the Notice of Appeal pre-dated this decision and made no reference to it. When I pointed this out she said that at the Preliminary Hearing of the appeal she said she wished to criticise the September Judgment; and believed that she was given some encouragement in that respect. After some discussion she made an application for permission to amend the Notice of Appeal to appeal against that Judgment. Mr Martin resisted the application, pointing out that even at the time of the Preliminary Hearing the Claimants were out of time for appealing against the September Judgment.

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Discussion and Conclusions

42. I can deal immediately with the last matter. The Notice of Appeal shows that this appeal relates to the decision sent to the parties on 10 July 2015. No Notice of Appeal was lodged against the subsequent Judgment dated 17 September. Nor was there any application - in-time or out of time - to amend the existing Notice of Appeal prior to the hearing of the appeal. No grounds of appeal were formulated as regards the September Judgment; and no good excuse given for failing to present an appeal within the time limit. An original judgment and an application on a subsequent judgment, such as an application for a review, are treated separately: see **Riniker v City & Islington College Corporation** [2010] UKEAT/0495/08 (23 June 2010), especially at paragraphs 60 to 63. An application for permission to amend was the only application Miss Apps could conceivably have made at the hearing of this appeal to bring an appeal against the Judgment dated 17 September; but for the reasons I have given it was doomed to failure. This appeal is only concerned with the decision communicated on 10 July 2015.

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43. As I explained at the start of this Judgment, when deciding whether to give notice under Rule 38(1) the Employment Judge's task was to decide whether there was material non-compliance. For this purpose she would need to attribute the correct meaning to her own Unless Order; as Langstaff P said in **Johnson** "all is likely to depend on the terms of the order" (paragraph 6).

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44. The starting point, in construing an Unless Order, as any other Order, is the ordinary meaning of the words used. The legal and procedural context will always be relevant: for example the context may show that the ordinary meaning cannot have been the meaning in the Order. In any event the party who has to comply with an Order must be able to see from its terms what is required to comply with it; an Order cannot be read expansively against the party who has to comply.

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45. It is convenient to begin with ground one, which relates to the question whether the Claimants who provided schedules failed to comply in any material respect with the Order requiring them to give "full particulars of the amount of holiday pay claimed".

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46. On this question I prefer the submissions of Miss Apps. The Order required full particulars of the amount of holiday pay claimed; it did not require, and would require an expansive construction if it were to require, particulars in any other respect. It cannot be read as requiring the Claimants to give full particulars of every aspect of their legal and factual case. Each schedule set out full particulars of the amount claimed, stating (when read with the covering letter) not only the amount claimed but also the manner in which it was reached. That was sufficient to comply with the Order.

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47. In my judgment the Employment Judge erred in law in accepting the submissions of Mr Martin as she did in paragraph 24 of her Reasons. Her Order did not require the Claimants to identify contractual terms or calculate the amount by reference to any particular statutory method. It did not require the Claimants' legal submissions to be incorporated. While the schedules themselves did not explain how the average daily rate was reached, the covering letter was part of the Claimants' compliance with the Order and it explained how the 12 week period ran. It is true that the schedules did not separate out the elements of pay; but the Order did not require the Claimants to do so; they were at liberty to put their case by taking overall pay figures as representative of normal pay.

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48. Mr Martin criticised the schedules of the Claimants on grounds which the Employment Judge did not mention. He argued that the schedules were bound to give the precise date of each holiday taken; some of them do not do so. I disagree. The Order did not require them to give the precise date of each holiday taken. He argued that some schedules were incomplete; this may be so, but the Claimants were not required by the Order to make every claim which might be open to them. They were only required to give full particulars of what they were claiming.

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49. It is important not to confuse compliance with the Order with the question whether the claims set out in the schedules are factually correct or legally sustainable. The Respondent is at liberty to argue before the Employment Tribunal that the Claimants' claims are factually wrong or legally unsustainable; but all that is required for compliance with the Unless Order is that full particulars of the amount must be given.

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50. I turn to ground two, which concerns OHP's confirmation that all the Claimants were covered by the collective agreement. Although paragraph 26 of the Employment Judge's Reasons is not quite clear, I think it must be read as holding that the Claimants had not complied with paragraph 3 of the Order; it appears that she accepted the submission of Mr Martin to this effect. Mr Martin told me that, although the Employment Judge did not cite it, he referred her to **EB v BA** which was the linchpin of his submission before me.

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51. In my judgment Mr Martin's submission was wrong in law. The Order required OHP to say which contracts of employment were covered by the collective agreement. A response that all the contracts of employment were covered by the collective agreement complied with the Order. Again it is important not to confuse compliance with the question whether, in due course, the answer will prove to be factually correct.

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52. The case of **EB v BA** casts no doubt on this approach. In that case the claimant's wide-ranging allegations potentially involved consideration of no less than 915 projects and proposals. At a case management hearing the claimant said herself that some of them were irrelevant and that she could specify which were irrelevant. She asked for time to undertake that task. She was given time, subject to an Unless Order. Shortly before the expiry of the deadline she replied that there were no projects or proposals which she did not wish to pursue. So she had not done the very thing she said she could do. That is why her claim was struck out: see paragraph 33 and 35 of the EAT's judgment. In this case the Claimants had done what paragraph 3 of the Order required them to do; the fact that the answer was mistaken in one respect does not mean that it did not comply with the Order.

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53. I turn to Miss Apps' third ground of appeal, which concerns the question whether the Employment Judge should have considered question of non-compliance at the hearing in June, given that the notice of hearing had not identified it as a question for consideration.

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54. Rule 38(1) does not require an Employment Judge to hold a hearing before deciding whether to give notice that a claim has been dismissed for non-compliance with an Unless Order. Moreover such a decision cannot be described as a decision upon a "preliminary issue" for the purposes of Rule 54. It is not a "substantive issue which may determine liability": see Rule 53(3). Notice of the issue under Rule 54 was not required.

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55. An Employment Judge, before causing notice to be given under Rule 38(3), must be satisfied that there has been material non-compliance with the Order. But there is no mandatory process to be followed. The Employment Judge's only duty before giving notice is to comply with the overriding objective, which requires cases to be dealt with fairly and justly. In some cases the Employment Judge may be able to see clearly from the file or from correspondence that an Order has not been complied with. In such a case the Employment Judge is entitled to give notice without further reference to the parties. But if there is doubt - for example in a case such as this, where one party writes to the Employment Tribunal to allege that there has been non-compliance with an Unless Order - the Employment Judge will give the other party an opportunity to comment. If there is still doubt, and the Employment Judge wishes to hear argument, the matter may be considered at a hearing. Fairness requires that if the matter is to be considered at a hearing the parties concerned should have sufficient notice of the issue to prepare for it.

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56. In this case the Employment Judge twice gave OHP an opportunity to comment on the Respondent's solicitor's assertion that there had been non-compliance. OHP did not reply. It was plain that the matter would have to be addressed before further case management could take place; and the Respondent's agenda for the hearing made it plain that this was an issue. In my judgment it cannot be said that the Employment Judge acted unfairly in considering the matter at the hearing. It is remarkable that OHP had not addressed the issue in correspondence; and the Employment Judge was entitled to expect that the Claimants' counsel should have been prepared to address her upon it. OHP had ample notice of the issue and should have been prepared for it. So I reject Miss Apps' third ground of appeal.

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57. I turn next to Mr Martin's submission that Miss Apps' arguments were not open to her because they were not raised below. I reject that submission. Whether or not positive arguments were made to the Employment Judge on behalf of the Claimants, it was her task to consider the terms of her own Order and decide whether there had been material non-compliance. This would be the case even if she had been sitting at her own desk. The legal principles were not in any real doubt. In my judgment her reasoning shows that she gave to her own Order a meaning which it did not bear and confused the giving of particulars with the question whether the particulars were true. The submissions of Miss Apps' do not raise a new point of law of the kind which was under consideration in such cases as **<u>Rance</u>**; her submissions challenge whether the Employment Judge erred in law in what was always her core task - to interpret her own Order and decide whether there was non-compliance.

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58. It is now time to take stock. As a result of my judgment so far the position is as follows. Of those Claimants who have appealed:

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(1) Some complied with all three paragraphs of the Order.

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(2) Some complied with paragraphs 2 and 3 of the Order.

(3) Some complied only with paragraph 3 of the Order.

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59. I therefore have to grapple with two further problems of construction inherent in the Unless Order which the Employment Judge did not consider. The first is whether failure by some Claimants to comply with part of the Order will result in the dismissal of all the complaints of all the Claimants. The second is whether failure by a Claimant to comply with part of an Unless Order will result in the dismissal of both complaints, or only a complaint to which that part of the Order was relevant.

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60. I stress that I am only concerned - as the Employment Judge was only concerned at this stage of the process - to decide what the Order actually means. Whether the Order ought to have been made in the first place, and whether it ought to have been set aside under Rule 38(2), are not the subject matter of this appeal.

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61. In my judgment the answer to the first problem is relatively straightforward. The Order does not mean that failure by some Claimants to comply with part of the Order will result in the dismissal of all the complaints of all the Claimants. Although the Order is not well drafted the references to "each" in the heading and in paragraphs 1 and 2 show that this Order was intended to apply severally to each Claimant; and the word "claim" means "the proceedings relating to that Claimant".

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62. The answer to the second problem is less straightforward. On the one hand it can be said that the two complaints, although combined in one claim, were really quite distinct; and there is no reason why non-compliance with one should lead to the dismissal of both. On the

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other hand it can be said that an Employment Judge is entitled to dismiss the whole claim for non-compliance in a particular respect and that such Orders are not unusual (**Johnson** was such a case).

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63. In the end I have reached the conclusion that the Order does require material compliance by a Claimant in all three respects, otherwise the proceedings relating to that Claimant will be dismissed. To read it otherwise would involve interpreting "the claim" as meaning something like "the relevant complaint", and it would still face the difficulty that paragraph 2 of the Order was potentially relevant to both complaints. I reach this conclusion with some regret; given the distinctness of the two complaints the Employment Judge might, if she had heeded the advice in **Johnson**, have made separate provision in the Unless Order for the two complaints; but I do not think she did so, and I cannot ascribe a meaning to the Order which would have this effect.

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64. It follows that the appeal will be allowed to the extent necessary to give effect to this Judgment. There are potential complications in the drafting of an Order given that (1) some of the Claimants who have appealed no longer pursue a holiday pay claim for time limit reasons and (2) there is an Order made following a Preliminary Hearing at the Employment Appeal Tribunal the effect of which needs to be taken into account. I will give the parties an opportunity to make written submissions on these questions.

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