Neutral Citation Number: [2024] EAT 8

Case No: EA-2022-001043-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17 January 2024

Before:

HER HONOUR JUDGE KATHERINE TUCKER

- -

Between:

(1) MR VIKTOR KISELIOV

(2) ERIKAS KURTKUS

(3) PAVEL ILJIN **Appellants**

- and -

ALPHA VEHICLES LIMITED **Respondent**

- -

- -

The Appellants did not appear and were not represented
MR SAPANDEEP SINGH MAINI–THOMPSON (instructed by **Fraser Chambers**) for the **Respondent**

Hearing date: 17 January 2024

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JUDGMENT

- -

SUMMARY

PRACTICE AND PROCEDURE

On the findings the Employment Judge himself made, the Judge erred in the exercise of his discretion to refuse the Claimant's applications to have a notice of the dismissal of their claims set aside pursuant to r.38(2) on the grounds that it was in the interests of justice to do so.

The Judge found that there had been significant compliance with the provisions of an Unless Order. In addition, the Claimants had previously sent the asserted missing information to the Tribunal and to the Respondent on a number of occasions. Analysis of that which had been sent, and that which the Respondents actually suggested they needed before the case could proceed to hearing revealed that all was before the Tribunal. The Judge failed to consider relevant issues. Appeal allowed.

HER HONOUR JUDGE KATHERINE TUCKER:

1. This is an appeal against the decision of Employment Judge James, which was made at a full hearing conducted via CVP in Leeds on 8th July 2022. The Judgment and Reasons were sent to the parties on 22nd July 2022. The Appellants, Claimants before the Tribunal were Mr. Kiseliov, Mr. Kurtkus and Mr. Iljin. I will refer to the Appellants as the Claimants and to the Respondent to the appeal as the Respondent, as they were before the Tribunal.

2. The Judgment of the Tribunal which is the subject of this appeal provided as follows:

> **"The application to set aside the dismissal of the claims and the response to counterclaim, Rule 38(2) Employment Tribunal Rules of Procedure 2013, is refused."**

3. Consequently, the Claimant's claims and defence to counterclaim stood dismissed pursuant to r.38(2) of the Employment Tribunal Rules of Procedure 2013 (ET Rules 2013) for non-compliance with an Unless Order. The Claimants contend that the Judge erred in law in refusing to set aside the dismissal of the claims and response to counterclaim.

4. Rule 38(2) of the ET Rules 2013, which is referred to in the Tribunal's Judgment, provides as follows:

> **"38.— Unless Orders**
>
> (1) An order may specify that if it is not complied with by the date specified, the claim or response, or part of it, shall be dismissed without further order. If a claim or response, or part of it, is dismissed on this basis the Tribunal shall give written notice to the parties confirming what has occurred.
>
> (2) A party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations.
>
> (3) Where a response is dismissed under this rule, the effect shall be as if no response had been presented, as set out in rule 21."

The procedural and factual background which is relevant to this appeal

The Unless Order of 9th March 2022 and dismissal of the Claimant's claims and Response to Counterclaim

5. There is a significant procedural background to this case. I focus only on the most recent Orders, relevant to the decision subject to this appeal. The first relevant Order was an Unless Order made by Judge Lancaster on 9th March 2022. On that date, Judge Lancaster made an Order as follows:

> "Unless by 12.00 p.m. on 15th March 2022, the Claimants comply with all outstanding directions to send a list and copy of documents due on 15th December 2021; confirm or submit a proposed variation to the list of issues due on 20th January 2022; and send to the Respondent a copy of their witness statements due on 17th February 2020 but put back without formal extension by the Respondent to 24th February; and confirm in writing to the Tribunal that they have done so, the claims and the response to the employer's contract claim will stand dismissed without further order".

6. That Order, therefore, required the following to be done by the Claimants by noon on 15th March 2022:

i) Comply with all outstanding directions regarding lists of documents.

ii) Confirm the list of issues, or submit a varied list;

iii) Send their witness statements to the Respondent;

iv) Inform the Tribunal that (i) to (iii) had been done.

7. This appeal is not concerned with the validity of the making of that Unless Order. Brief reasons for making it were set out in five paragraphs after the Order. There may be some minor typographical errors in respect of some dates set out in the Order and the reasons for it. (For example, there is a suggestion that in February 2020, there was an issue about failure to comply with Orders made in December 2021.) However, by this stage of the proceedings, there had been many different applications to strike out made by the

Respondents and issues raised about compliance with Orders. Navigating through the correspondence, tracking back through those applications and documents which had been received, alongside relevant Orders which had been made, will not, I anticipate, have been an easy task.

8. On 10th March 2022, the Respondent made a further application to strike out the Claimants' claims or, alternatively, to bring forward the date for compliance with the Unless Order of 9th March 2022. No direction or order was made in respect of that application. However, on 15th March 2022, the Respondent applied for confirmation that the Claimants' claims had been struck out.

9. That lead to the second document which is relevant to this appeal. On 16th March 2022, the Tribunal sent a letter to the parties which provided as follows:

> "Further to the Unless Order sent to the parties on 9th March 2022, which was not complied with by 12.00 p.m. on 15th March 2022, the claims have been dismissed under Rule 38".

The Claimants' application under r. 38(2) of the Employment Tribunal Rules 2013 for relief from sanction

10. On 16th March 2022, promptly, as the Judge later found, the Claimants applied for relief from the sanction imposed by r.38(2) of the Employment Tribunal Rules 2013. Their email stated as follows:

> "Further to the email and Order we have received from court today, we make an application under Rule 38(2) of the Employment Tribunal Regulations.
>
> We also attach an email confirming that the documents were sent to the court at 11.59 a.m. and we also attach an acknowledgment email from the court at 12.00 p.m. confirming that our documents had been received by the court. We request a hearing to deal with our application to have the order set aside as it is in the interests of justice to do so. We request an oral hearing. We have already explained that

> we have already sent all the documents and complied with the orders sent in April 2021, November 2021, January 2022 and again yesterday. Please can you advise as to what else we need to do and what other documentation we can provide because we have sent everything four times now to the court and to the Respondent. We will get all our documents together in a bundle for the hearing with proof that we have complied with the order. Can the court tell us when the hearing will be so that we can send it to the Respondent please? We have also been told that we can request an extension of time for the Unless Order and we would like to make that application as well please."

The letter was signed as being sent from the Claimants. It appears to suggest that all documents had been sent to the Tribunal in advance of the time limit identified in the Order of 9th March 2022, and may therefore have asserted that they had complied with, at least, the directions identified in paragraphs 6(i),(iii) and (iv) above.

11. In any event, that letter led to the hearing on 8th July 2022 and the Judgment set out above against which the Claimants now appeal.

The information about the detail of the Claimant's claims which was already before the Tribunal on 8th July 2022

12. Before turning to the decision of the Judge in more detail, I return to the beginning of the litigation process in these Claims. I do so because I consider it is necessary in order to fairly consider the issues in this appeal, having regard to the overriding objective, and, in particular, the principle of proportionality. It is also necessary to do so in order to properly understand the alleged noncompliance and the Claimant's letter of 16th March 2022.

13. The Claims were sent to the Tribunal on 19th September 2020. The Claim Form of each Claimant appears to have been in near identical form. Each set out (at para. 8.2) that, "[t]he Claimant commenced employment on 1st August 2019". The Claimant's role was described as either that of a dismantler or as a supervisor. Each continued:

> "The Claimant's hours of work were Monday to Friday, 8.00 a.m. to 6.00 p.m., and Saturday, 8.00 until 1.00 p.m. The Claimant worked an average of 55 hours per week. The Claimant was not paid the national minimum wage during this period of employment. The Respondent has the employment records, which will confirm the amount paid by the Respondent to the Claimant. On 5th May 2020, the Claimant resigned from his employment as he was not being paid properly.
>
> 1. The Claimant has not been paid the national minimum wage since commencing employment;
>
> 2. The Claimant is entitled to one week's notice pay;
>
> 3. The Claimant, during his employment, did not take any annual leave and, as such, is entitled to be paid for accrued holidays up to the date of termination of employment."

14. Responses were lodged and served by the Respondent to each Claim. In those documents, the Respondent asserted that the Claimants had not adequately particularised their claims. However, on the basis that the Claimant was pursuing claims for national minimum wage, unlawful deduction from wages, notice pay and holiday pay claims only, the Respondents set out a substantive response to those Claims. The Response stated that it was agreed that the Claimant had resigned without giving notice; it was denied that the Claimant worked, on average, 55 hours a week, suggesting that the Claimants were each contracted to work 86.76 hours a month on a part-time basis. The Response set out that the Claimants were paid a gross rate of pay of £8.21 per hour, which was in accordance with the national minimum wage. The Respondent denied that any unlawful deduction of wages had taken place, denied that any notice pay was due, as each Claimant was said to have resigned summarily, and made no admissions in respect to any claims for holiday pay.

15. In addition, the Respondent made a counterclaim. The Respondent asserted that it was an implied term of the Claimants' contracts that they would exercise reasonable care and skill in the performance of their duties, that that term had been breached and that, as a result, the Respondent had suffered loss and damage. The Respondent stated that it would seek

damages or compensation but that the quantum of that claim would be "confirmed in due course".

16. The Claimants then served detailed particulars of their claims. An example of those particulars was set out at ps.133 and 137 of the appeal bundle. The document set out the specific dates of the Claimants' employment, the role that the Claimant undertook, who, at the time, were directors within the Respondent's business, and the hours and days that the Claimant worked. The hours set out in the particulars were slightly in excess of that asserted in their Claim Forms. For example, Mr. Kiseliov stated that his hours were about 65 per week, whereas Mr. Kurtkus stated that his were 57.5 hours per week. The particulars asserted that the Claimants had not been provided with a contract of employment, or statement of main terms and conditions of employment. It was asserted that the Claimants were paid less than the national minimum wage.

17. The particulars which the Claimants provided also asserted that after the institution of the furlough scheme as a result of the COVID19 pandemic in March 2020, each Claimant was furloughed. Each Claimant stated that, nonetheless, they were forced to continue working for the Respondent for the same hours as they were previously, but were only paid the rate of pay which was provided by the furlough scheme. Specific figures were set out, for example, in Mr. Kiseliov's particulars, at para.14; Mr. Kurtkus's at para.14; and for Mr. Iljin's at para.14.

18. The Claimants asserted that they believed that the Respondent had declared the Claimants as being furloughed and sought to obtain money from the Government through the furlough scheme but that, in fact, and in breach of the terms of and the spirit and purpose of that scheme, the Respondent continued to require them to work their usual hours whilst only

being paid the furlough rate of pay. Each of the Claimants stated that when they complained about this, they were threatened with dismissal. Ultimately, the Claimants resigned.

19. In addition to those particulars, the Claimants also provided detailed Schedules of Loss. Those Schedules provided details of wages, sums paid, amounts said to be due, the amount sought by way of holiday pay, and that which was claimed for failure to provide a statement of terms and conditions of employment, and that the Claimants sought an uplift to be made for failure to comply with relevant ACAS Code of Practice.

20. On 23rd June 2021, the Respondent provided some details of their counterclaim. The Respondent asserted that the Claimants had damaged vehicles and that as a result, the Respondent had lost contracts. The Respondent sought to recover figures for the (possibly estimated) value of the contracts, one contract of some £30,000 and in respect of another of some £200,000, less a figure which they state to be an approximate figure, claiming a total loss of £146,000. The Respondents also amended their Response, responding to the specific figures that the Claimants have provided by way of particulars of their claims.

21. In 2021, the Claimants asserted that they had been subject to threats by one of the Respondent's directors. As a result, the case was listed for a Preliminary Hearing in May of 2021, for the Tribunal to determine whether or not the Respondent's Response should be struck out because of those factual allegations. It appears that some witness statements were then provided by the Claimants. Only a copy of one witness statement is within the appeal bundle. That appears to be a witness statement of Mr. Kiseliov. That is a detailed witness statement with a space for his signature at the end of the document. It is dated 25th May 2021. It does not contain a statement of truth. The statement sets out that the statement should be read in conjunction with the Schedule of Loss. It deals with issues relating to the

Claimant's employment and the details of his claim, but it also deals with threats that he said he had received in or around October 2020.

22. The Claimants assert that all of the Claimants had provided witness statements. As I set out further below, it appeared from the Tribunal's Judgment and Reasons following the hearing on 8th July 2022 that four witness statements (i.e. one for each of the Claimants in the case) were sent to the Tribunal and were before the Tribunal.

23. It is clear from the documents I have described above that there was no dispute that the three Claimants who now bring this appeal were employed by the Respondent. They asserted that they were not provided with basic employment documents and they asserted that the Respondent were in possession of all of the relevant documents which did exist. They asserted that they have been underpaid. They asserted that the Respondent had acted improperly, possibly fraudulently, by (a) requiring them to work when they had been furloughed; (b) by only paying them the amount that the Respondent recovered through the furlough scheme whilst requiring the Claimants to work their usual hours; (c) they asserted that the Respondent had asserted through the furlough scheme that the Claimants had been furloughed, whereas they had not been.

24. In submissions, I asked the Respondent's counsel to clarify what it was, by way of detail or information, that was missing from that which the Claimants had provided to the Tribunal and to the Respondent which (a) had prevented the Respondent from preparing for the trial and (b) led to the noncompliance with the Tribunal's Order. The Respondent submitted that what was needed was details of the fraud that the Respondent was said to have committed; further, that the only statement that the Respondent had received was that of Mr. Kiseliov, whereas all that the other Claimants had done was to submit their Particulars of Claim as their statements, without expressly stating that that is what they had done. Further, it

was submitted that the Claimants' counsel failed to say, expressly, that the documents which had been submitted by the Claimants were the documents which they relied upon, and no more. It was submitted that had led to considerable uncertainty. I found that submission to be difficult to follow. The fraud alleged appeared to be clear on the face of the documents: see the summary at paragraph 23 above; statements appeared to be before the Tribunal from all of the Claimants (see paragraph 22 above, and paragraph 39 below); and, the email from the Claimants appeared to set out that they had sent all their documents and had no more to send.

25. As noted above, during the course of the proceedings before the Tribunal, there had been a significant number of occasions when the Respondent had asserted that the Claimants had failed to comply with Orders, sought further Orders for compliance, or asserted to the Tribunal that there had been numerous occasions of non-compliance.

26. Viewed objectively, I consider it a realistic possibility that that extensive series of applications and correspondence may, rather than assisting in the preparation of the case towards trial, in fact, have served to obscure the reality of the position. The reality was that the Claimants' claims were relatively clear and easy to understand. They had provided details of their claims and the Respondent appeared to have been able to respond to those claims. What appeared to remain unclear and unresolved were the disputed facts between the parties. It was not obvious why it was asserted that the Respondent could not, at different points, have provided the witness statement which eventually it did provide and were set out at the back of the appeal bundle.

The Judge's decision not to allow the Claimant's application for relief from sanction

27. I return to the decision made by the Judge. The Judge was required to make his decision on the basis of the material before him at the time he considered the Claimant's application. It is clear that, at the hearing on 8th July 2022, there were issues about the

preparation of the bundle, its content and ease of navigation. There were also issues about the manner in which the Claimants were represented by counsel. All of those issues is likely to have added to what was already a difficult task of navigating the extensive procedural background of the litigation and finding clarity about what had, in fact, occurred during the litigation.

28. The Judge set out the relevant legal principles at paras.14 to 17 of the judgment as follows:-

> "There is some guidance on the test in Rule 38(2) in Wentworth-Wood v Maritime Transport Limited UKEAT/0316/15/JOJ at paragraph 7 which reads as follows:
>
> > "Thirdly, if the party concerned applies under Rule 38(2), the ET 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 ET 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 paras 48-53."
>
> 16.Reference is made in Neary to the factors set out at CPR 3.9(1) of the CPR. Not all of those factors need to be considered in an application under Rule 38(2). For the sake of completeness, the CPR 3.9(1) factors are:
>
> (a) the interests of the administration of justice;
> (b) whether the application for relief has been made promptly;
> (c) whether the failure to comply was intentional;
> (d) whether there is a good explanation for the failure;
> (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;
> (f) whether the failure to comply was caused by the party or his legal representative;
> (g) whether the trial date or the likely date can still be met if relief is granted; (h) the effect which the failure to comply had on each party; and
> (i) the effect which the granting of relief would have on each party.
>
> 17.At paragraph 60 of Neary the court said:
>
> "Given that this was a deliberate and persistent failure to provide the particulars, it seems to me difficult to criticise the EJ's conclusion. One of the conditions set out by Sedley LJ in Blockbuster had been complied with. It is well established that a party guilty of deliberate and persistent failure to comply with a court order should expect no mercy. It seems to me that the EJ was entirely justified in taking the view that a review of the automatic strike out had no reasonable prospect of success. It would have been better if he had said so in terms. However, he did say

> that the circumstances justified the strike-out and it seems to me that that must have meant that he considered it to be just."

29. The Judge recorded that the Claims had been submitted in September 2020, that Responses were filed in November 2020 and a response to the Counterclaim was provided, albeit not within time. The Judge also noted the request for further particulars. The Judge did not record that detailed particulars were provided or that detailed updated schedules of loss were provided.

30. The Judge also recorded that a number of applications to strike out the Claimants' claims had been made and that there had been an application to postpone the Preliminary Hearing, which had then taken place on 25th and 26th May 2021, and that the final hearing then being listed for March 2022. The Judge stated that the issues were identified within the Order made following the Preliminary Hearing, but also noted that they were not discussed at the preliminary hearing due to a lack of time. The Judge did record that witness statements were sent to the Tribunal on 25th May 2021.

31. At paragraph 29, the Judge recorded the terms of the Unless Order made on 9th March 2022, and the fact that the terms of that Order were required to be complied with by 15th March 2022. At paragraph 30, the Judge stated as follows:

> "At 11.59 a.m. on 15th March 2022, an email was sent by the Claimants to the Tribunal with a copy to the Respondent's solicitors which stated, 'This is the fourth time we have written to the Tribunal. All of our information was already provided to the Respondent's legal representative and the Tribunal at the hearing on 26th May 2021 by our representative. We have attached proof of those emails sent to Judge Buckley at the hearing on 26th May 2021 to this email. The only documentation that has been sent after this is the translations dated 19th October 2021. We do not therefore understand why we have been provided with an Unless Order, especially given the fact that the Respondent has been able to prepare a bundle which contains the documents which we have provided them with. We attach a copy of this bundle.' The email notes that it was the Respondent that sought additional time to prepare a witness statement. The email continued, 'It is in the public interest for this claim to be heard because this claim

> deals with fraud and abuse of government furlough scheme by the Respondent. At present, we do not have a legal representative and we have already told the Respondent that we agreed to the draft list of issue subject to any legal advice that we will be given prior to the hearing'."

32. The Judge continued (at paragraph 21):

> "At 16.20 on 15th March 2022, an email was sent to the Tribunal cc'ing the Respondent's solicitors attaching an email with a PDF with four witness statements attached. The covering email stated, 'The witness statements of all four Claimants were sent by the Claimants themselves to the court before the case on 25th May 2021, when the hearing in front of EJ Buckley took place. This is why the Claimants were able to give evidence at court at the hearing on 25th and 26th May 2021. We have also attached these emails to the Tribunal separately as well'."

33. The Judge continued:

> "The statements attached run to four pages each and are broadly the same. No reference is made in them to any of the pages in the final hearing bundle since they are statements made in relation to the issues before the Tribunal on 25th and 26th May 2021."

34. I pause at this point. If all four of those witness statements were in a similar form to the one that I have seen at the end of the bundle, it appears that they, not only, addressed issues relating to the alleged threats, towards the end of the statement, but they also set out details of the claims that the Claimants made, particularly when the statements are read alongside with the Particulars of Claim and Schedules of loss.

35. The Judge noted that the Claimants' email of 15th March 2022, sent at 16.20 and 11.59 was not included in the bundle prepared by the Respondent's solicitors for the preliminary hearing on 6th May 2022, and nor was it in the bundle for the hearing on 8th July 2022. He stated:

> "That is a notable and inexplicable omission. the Tribunal is only aware of the contents of that email and the attachments because it was sent by the Claimants' counsel on 6th May 2022."

36. I agree with that observation. The emails make it abundantly clear that all the material the Claimants wished to rely upon had been sent to the Respondent and to the Tribunal. The Judge then recorded that the application made by the Respondent for confirmation that the claims had been dismissed.

37. The Judge's conclusions were set out as follows:

> "The decision on this application to set aside the dismissal of the claims has not been an easy one. The issues are finely balanced. Following careful consideration, however, it is the judgment of the Tribunal that the dismissal should not be set aside. The following factors, in particular, have been taken into account in arriving at this decision.
>
> 37. It is noted and accepted that the application for relief from sanction was made promptly. Further, in the judgment of the Tribunal, the failure to comply was not intentional but due to language difficulties and because the Claimants were representing themselves in-between hearings. There is therefore a partial explanation for non-compliance in that the Claimants are foreign nationals who speak Lithuanian, not English. Allowance is to be made for all that. However, there comes a point in time at which the Tribunal must draw a line, especially where the continuing failure to comply with Tribunal deadlines and orders has interfered with the proper administration of justice. Hearings have had to be adjourned on three occasions now, taking into account the last hearing on 6th May 2022, which could not proceed at that time for reasons which will be considered in due course.
>
> 38. One of the concerning issues in relation to this matter is that the Respondent's application for dismissals of the claims was not entirely accurate. Whilst the Tribunal is not suggesting that was deliberate, it is incumbent on professional representatives to put a full and accurate picture before the Tribunal in relation to any application made. The contents of the email sent at 11.59 on 15th March 2022 can reasonably be read as confirming that the Claimants did not have any additional documents to provide and therefore that the bundle was, in effect, agreed and did not have anything to add to those lists of issues."

38. Pausing there, the Judge noted therefore that the Claimants applied for relief from sanction promptly; that the non compliance had not been intentional; that it was, at least, partly explained by a lack of legal representation between hearings and difficulties for parties whose first language is not English. The Judge also found that the application for dismissal of

the claims was not accurate and criticised the Respondent. The Judge also accepted that the Claimants had complied with the requirements of the Unless Order in respect of paragraphs (i) (ii) and (iv) set out at paragraph 6 above. At paragraph 39 the Judge stated:

> "Of more significance is the failure to inform the Tribunal that the email sent at 16.20 on 15th March contained four witness statements, not two, although it is accepted that, in any event, all four witness statements were written for the purposes of the preliminary hearing in May 2021 and not for the final hearing. It also concerns the Tribunal that the email sent at 16.20 on 15th March 2022 was not only absent from the bundle of documents prepared for the preliminary hearing on 6th May 2022, at which the application to set aside was first considered, it has also been omitted from the much larger bundle prepared for the purposes of this hearing. That is an important document and it should have been included in the bundle."

39. That paragraph records that the email of 15th March 2022 contained four witness statements. It does not appear to be the case, therefore, that the Respondent had not had sight of those documents, as may have been suggested through some of the information counsel obtained from those whom he was representing in this hearing. The Judge commented that the omission of the email sent at 16.20 on 15th March was a significant omission: the document was plainly relevant to the application before the Tribunal on the 6th May 2022 and on the 8th July 2022.

40. It is also important to note that the focus, in paragraphs 38 and 39 of the Judge's decision is not upon the merits of the Claimants' application. Rather, in those paragraphs, the Judge criticises the Respondent in some robust terms for not having properly placed before the Tribunal full information about the extent to which there had been compliance with the Unless Order.

41. In terms of analysis of the decision whether to grant the Claimant's application, the Judgment in para.37 accepts that there was partial explanation for non-compliance. The Judge

also recorded that hearings had had to be adjourned. The reason why the adjournments were required is less clear. The Judge continued at para.40:

> "Whilst these matters are of some concern, ultimately, they do not persuade the Tribunal that it would be in the interests of justice to set aside the dismissal of the claim. The Tribunal is reminded that this judgment is not concerned with whether or not the order and subsequently the dismissal order should have been made in the first place but with whether it is in the interests of justice to set the latter order aside. It remains the case that full and sufficiently detailed witness statements were not provided in time for the final hearing. If indeed it was the case that the Claimants did not intend to provide any further witness evidence for the final hearing other than that presented at the preliminary hearing in May 2021, that could and should have been stated at a much earlier stage. At the preliminary hearings in May and October 2021, at which relevant orders were made, the Claimants were represented by counsel. If the Claimants did not intend to give any further evidence about their claims, that could and should have been made clear on one of those occasions."

42. This paragraph contains Judge's reasoning. Whilst the Judge expressly identifies the issue of whether it was in the interests of justice to set the dismissal order aside, the initial statement suggests that the Judge considered whether the Respondent's failure to include relevant documents or present an inaccurate account of the events which had taken place 'persuaded' the Tribunal that it was in the interests of justice to grant the Claimant's application. The Judge also concluded that (i) insufficiently detailed statements were not provided and (ii) if the statements were all that was going to be provided, the Claimants should have said so at an earlier stage, particularly when represented by counsel.

43. The Judge continued:

> "Further, the witness statements that have been provided are brief, running only to four pages each, part of which relates to the issues as to whether or not the Claimants were subject to threats. That was a matter to be considered at the May 2021 preliminary hearing and which was no longer relevant to the remaining issues in the case. The statements do not refer to the page numbers in the final hearing bundle and nor do they, in the case of Mr. Kiseliov, make any reference to the counterclaim. Further, none of the statements have a statement of truth from a person who confirms that they have read the contents of the

> statements to each of the Claimants. Finally, and in any event, the email containing those four brief witness statements was not sent until 16.20, over four hours after the deadline for complying with the Unless Order had passed. Whilst relatively short in itself, that specific non-compliance stands to be Judged in the context of the numerous instances of non-compliance set out in detail in the facts section above, non-compliance which has continued in relation to this hearing as noted below."

44. That reference to non compliance appears to be a reference to a costs application and a wasted costs application against the Claimants' counsel. Paragraphs 42 and 43 continued:

> "Had the claims not been dismissed when they were, it was highly likely that the hearing listed for eight days from 22nd March would have had to be adjourned. Were the claims to be allowed back in at this stage, it would be six to nine months before they could be relisted for hearing. Bearing all of the above in mind, it is the Tribunal's judgment that the dismissal of the claim should not be set aside since it would not be in the interests of justice to do so. If judgment were set aside and the claim relisted for hearing, further directions would need to be made to enable that to happen. The Tribunal remains unconvinced on the basis of the history of these proceedings to date and the numerous instances of non-compliance that those orders would be properly complied with in a timely fashion. The application is therefore refused."

45. In this paragraph the Judge set out that, had the claims not been dismissed, it was likely that an eight-day hearing due to commence on 22nd March 2022 would have had to be adjourned and that the claims could not be relisted for some six to nine months. The Judge also stated that s/he was unconvinced that, in the light of the history of the proceedings and the numerous instances of non-compliance that the orders would be complied with.

46. The factors therefore which the Judge considered appeared to be as follows:

i) That sufficiently detailed statements were not provided because (a) the statements did not refer to the page numbers in the final hearing bundle; (b) one did not refer to the counterclaim; and (c) the statements did not contain a statement of truth from a person who confirmed that they had read the contents of the statements to each of the Claimants;

ii) The four statements were not included in an email until some four hours after the date set for compliance in the Unless Order;

iii) The Claimants had failed to confirm that no other witness statement was to be relied upon at an earlier stage.

iv) The Respondent had omitted important documents from the bundle at two hearings when compliance with the unless order was considered.

v) The Respondent's application for dismissal of the claims was not entirely accurate.

vi) The non-compliance was unintentional and partly due to a combination of the Claimants' language ability, English not being their first language, and the fact that they were not represented between hearing.

47. The Judge did not appear to expressly weigh in the balance the fact that the Claimants asserted that they had sent the witness statement to the Tribunal on a number of occasions, prior to the expiry of the time limit set out in the Unless Order, although that is referred to in paragraph 29 of the Judge's decision. That was said by the Claimants in the email sent at 11.59 a.m. on 15th March. That email stated that the Claimants did not know what else it was that they were meant to do.

48. In their grounds of appeal the Claimants contended that the Tribunal erred in law in refusing their application because the decision of the Judge was perverse. They submitted, by reference to a detailed chronology of the proceedings, that had the Judge considered that which they had sent, repeatedly, to the Tribunal it would have been clear that all the information which the Unless Order sought to elicit had already been provided, that the Respondents had made repeated (and at times unjustified applications to strike out the Claimant's claims, referring, in particular, to the criticism of the Regional Employment Judge when that Judge refused to strike out the claims on 21st January 2021) and that, in breach of the overriding objective, the Respondent's conduct had obscured the reality of the position which was that there had been very limited non-compliance over the course of the proceedings, and that the Respondent had omitted key documents from the bundles it prepared which further misled the Tribunal. The Claimant submitted that it was in the interests of justice to grant their application.

49. The Respondent accepted that, in terms of compliance with the Unless Order, the Judge had considered that the Claimants had done all which they were required to do in respect of disclosure, lists of documents and lists of issues (i.e., the directions set out in paragraph 6(i) and (ii) above. The remaining non-compliance was in respect of witness statements only. It was submitted that the Claimants had failed to comply with the directions order in respect of both the content and timing of the statement.

50. The Respondent stressed the high hurdle any party must overcome in appealing a decision of the Tribunal on grounds of perversity, that task being all the more difficult in respect of a case management decision such as this, where the Tribunal has a very broad discretion. The Respondent submitted that the Judge had correctly identified the legal principles and reached a decision which was well within the Tribunal's discretion and that, consequently, the appeal should be dismissed, the Claimants simply seeking to impermissibly re-litigate that which was determined, both factually and legally by the Tribunal.

Analysis and conclusions on the appeal

51. At the heart of any consideration of whether to grant relief from sanctions in respect of an application under r.38(2) of the ET Rules of Procedure 2013, lies an analysis of whether it would be in accordance with the interests of justice to do so. That affords a Tribunal a broad discretion and one which this Tribunal should be cautious to interfere with. As set out in *Neary,*(a case cited by the Judge) a Tribunal considering relief from sanctions is not constrained by considering any 'set' or particular checklist of factors. What it must do, however, is consider all the factors relevant to the interests of justice and avoid consideration of, or reliance upon, irrelevant ones. It must be possible to see that the Judge has done that and asked her or himself whether, in the circumstances the sanction has been just. Parties who act in persistent breach of court orders can expect to be dealt with robustly. The

cornerstone, however, in assessing an application under r.38(2) is that which is required by the interests of justice.

52. It is important, in my judgment, to recognise that the consequence of not allowing the Claimant's application was that the Claimants were debarred from proceeding with their claims or having them adjudicated upon by an independent Tribunal. In addition, the apparent breach of the Unless Order was in respect of one aspect regarding witness statements (that the translator, it appears, had not signed a statement of truth, and the statements did not cross refer to page numbers in the bundle for the final hearing). The Judge also considered that the default was unintentional and at least partly, explained by a combination of lack of legal representation throughout the proceedings, and language difficulties. The Judge was also, rightly, critical of the Respondent's conduct, having omitted key documents from bundles and having made an application on an inaccurate basis.

53. The Judge also referred to previous alleged non-compliance with orders. The difficulty that there is with that statement is that none of the documents that I have read appear to set out the details of the asserted non-compliance. That which the Judge records is also at odds with the detailed chronology provided by the Claimants which suggests that there had been only one (relatively small) prior non compliance by the Claimants regarding a response to counter claim which was subsequently remedied. It is certainly not clear from the Judgment what the previous non compliance consisted of and how, if indeed the Judge had done so, the Judge had determined any factual dispute regarding the allegations of prior non compliance which the Claimants did not accept had taken place.

54. Further, when the Claim Forms, Response, Particulars of Claim, Schedule of Loss and witness statements are consider, it is clear, in my judgment, that the relevant information was before the Tribunal, and with the Respondent, for the matter to proceed to trial. What

appears to have occurred is that through repeated assertions that there was a need for further orders and repeated assertions that there had been a failure to comply with those orders, the procedural aspects of the case had taken on a life of their own. Relatively straightforward issues, which were disputed and required determination, became secondary issues amidst the repeated procedural applications.

55. I consider, taking all of the documents that I have seen into account, and having considered the Respondent's submissions, that the decision of the Judge was plainly wrong and was one that no reasonable Judge could have reached. I consider that the Judge's decision can properly said to be perverse.

56. Taken at their highest, the claims and allegations made by the Claimants were significant, alleging that the Claimants had been required to work when they were meant to be on furlough and in circumstances where claims had been made against public funds for furlough payments. If the claims were not restored, the Claimants were unable to access justice and have their claims determined by an independent tribunal. Whilst not determinative, this factor was an important one to consider when considering whether it was in the interests of justice to allow the Claimants claim for relief from sanction. The Judge does not expressly engage with that issue or identify it as a relevant factor. In addition, the Judge appears to have considered whether the Respondent's improper conduct in excluding relevant documents as set out above had 'persuaded' the Tribunal to grant the application. I recognise that at other places the Judge correctly focused on the whether it was in the interests of justice to grant the application. However, the language used by the Judge at this point raises a real concern that there had been an incorrect application of the legal principles. The Respondent's conduct was one aspect of the case which required consideration, and which may have been considered to be a factor in favour of granting the application, but it

was not the case that that conduct had to be of such magnitude to persuade the Judge to exercise their discretion.

57. In addition, the Judge did not weigh in the balance the respective prejudice to the Claimant and Respondent, depending on the basis on which the decision may be made. Rather, the Judge appears to have focused on the fact that a final hearing was adjourned, and the administrative difficulties which would arise in relisting the claim. The Judge did not, however, set out any factual determinations about how and why the final hearing was adjourned given the material which was before the Tribunal on 15 March 2022. Nor did the Judge consider how, if it had done so, the Respondent's conduct impacted on that decision to adjourn the final hearing. Administrative difficulties about the length of the delay in relisting the claim appear to have taken precedence over such an analysis. There is little and certainly insufficient analysis of the extent to which there had been compliance with the orders, nor was there any analysis of whether or not a fair trial was possible on the basis of the information that was in existence before the Tribunal at the date that the decision was made.

58. The Respondent, in my judgment, even at the appeal hearing, failed to identify in submissions what it was that was not known such that they could not proceed to trial. The issue of proportionality of the sanction, in the context of the non compliance, was not addressed or considered.

59. I consider that the decision was plainly wrong and I allow the appeal. I invited submissions as to disposal.

60. The Respondent invited me to remit the Claimants' application to a different Judge so that the question of whether or not the application to set aside the dismissal of the claims should be allowed or refused.

61. Having regard to the judgment that I have just given, and the principles in **Jafri v Lincoln College** [2014] IRLR 544 I consider that there is, in my view, only one right outcome to this application and that is that the balance of justice required that dismissal of the claim to be set aside. On the Judge's own conclusions, the non-compliance was relatively limited; it was unintentional and at least partially explained by issues relating to lack of legal representation and language difficulties; the issues were clear and a fair trial could take place; the Respondent was not free from criticism and had not assisted the Tribunal in furthering the overriding objective; whilst relisting the trial would take some time, not granting the application would mean that the disputed issues would not be determined by an independent tribunal. In my judgment, on the facts before and determined by the Judge, the interests of justice clearly fell in favour of granting the application whereas the sanction of dismissal of the claims was disproportionate to the default. Therefore, my judgment is that EAT can and should take the decision that was before the Tribunal and allow the decision to set aside the dismissal of the claim and response to counterclaim.

62. The matter should now be returned to the Employment Tribunal to be heard by a different Judge. It may be appropriate for it to go before the Regional Employment Judge with a view to listing it as soon as is practicable for trial.