Neutral Citation Number: [2022] EAT 13

Case No: EA-2019-SCO-000017-DT

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 18 January 2022

Before :

THE HONOURABLE LORD FAIRLEY

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Between :

MISS K DYKES	**Appellant**
- and -	
WHITBREAD GROUP PLC	**Respondent**

- -
- -

MR M ALLISON, Advocate (instructed by Livingstone Brown) for the **Appellant**
MR M FOSTER, Solicitor (Weightmans LLP) for the **Respondent**

Hearing date: 18 January 2022

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JUDGMENT

SUMMARY

TOPIC NUMBER 8 – Practice and Procedure; Unless Order

The Tribunal made a Rule 38 Unless Order which bore to be in accordance with the power conferred by Rule 31 of the Employment Tribunal Rules. The Order set a deadline for the Appellant to produce certain documents "within your possession" as described in a schedule to the Order. The documents described in the schedule were medical records and reports. The schedule also ordered further and better particulars of the Appellant's claim of disability discrimination. On the day before the expiry of the deadline for compliance with the Order, solicitors instructed by the Appellant wrote to the Tribunal providing the further particulars which had been ordered, and advising that the Appellant did not have any of the documents referred to in the schedule to the order, but had requested them from her GP and other medical practitioners. The Employment Judge concluded that there had been non-compliance with the Order and issued a notice of dismissal the Appellant's claims under Rule 38(1).

Held: The Employment Judge had erred. The Unless Order, insofar as it related to the production of documents, was expressly limited in its scope to documents which were within the possession of the Appellant at the material time. It did not extend to documents in the possession and control of her GP, or to medical Reports which had been instructed by her but not yet completed. A purposive approach to the meaning of the Order such as to imply an obligation on the Appellant to ingather documents from third parties was not appropriate. There was no material before the Employment Judge from which he could properly have concluded that there had been a failure to comply with the Order.

Appeal allowed and case remitted to the Employment Tribunal for further procedure.

THE HONOURABLE LORD FAIRLEY:

Procedural history

1. On 9 December 2017 the Appellant presented a claim form (ET1) to the Employment Tribunal which identified claims of unfair dismissal, disability discrimination and sex discrimination.

2. Following a Preliminary Hearing on 17 October 2018, the Tribunal refused an application by the Respondent to strike out the Appellant's claims. Instead, on 23 November 2018, the Tribunal made what bore to be an Unless Order against the Appellant in the following terms:

> **"In accordance with the power set out in Rule 31 of the Employment Tribunals Rules of Procedure 2013 an Employment Judge ORDERS that:-**
>
> **On or before 11 January 2019 you shall provide to [the Respondent's solicitor], with a copy to the Tribunal at the address shown in the enclosed letter, copies of all documents within your possession which fall within the description set out on the attached schedule.**
>
> **UNLESS THIS ORDER IS COMPLIED WITH BY THE DATE SPECIFIED THE CLAIM SHALL BE DISMISSED ON THE DATE OF NON-COMPLIANCE WITHOUT FURTHER ORDER"**

3. The schedule to the Unless Order identified the documents to be produced as:-

> 1. **A copy of the General Practitioner medical records for the relevant period demonstrating the background and history of your impairments.**
> 2. **A copy of a General Practitioner Report, if available, showing the background and history of your impairments, together with a copy of any reports from specialist practitioners showing the background and history of your impairments.**
> 3. **A copy of any other reports available to you from any other practitioners involved in treating your impairments, such as [practitioners identified by job title].**

4. Although the Order bore to be made under Rule 31 and to relate only to the production of documents, paragraphs 4, 5 and 6 of the schedule set out what were, in fact, orders for further specification of the Appellant's disability discrimination claim.

5. On 10 January 2019, solicitors instructed by the Appellant wrote to the Tribunal responding fully to paragraphs 4 to 6 of the schedule. In relation to paragraphs 1-3, the solicitors advised that the Appellant (i) had requested copies of her GP records and expected to have those by 11 January 2019; (ii) had requested a GP Report and would provide it as soon as it was available; and (iii) had also requested reports from the practitioners identified in para. 3 of the schedule and recognised that these were material to her case.

6. On 15 January 2019, the Respondent's solicitor wrote to the Tribunal to submit that the Appellant had not complied with the Order of 23 November 2018. In particular, it was submitted that the Appellant had failed to provide her GP records and other supportive medical reports by the deadline of 11 January 2019.

7. The Employment Judge thereafter issued a Judgment declaring that there had been a failure to comply with the Order of 23 November 2018 and recording that:-

> **"…the claim was therefore dismissed with effect from 11 January 2019 in terms of Rule 38(1) of the Employment Tribunals Rules of Procedure 2013."**

8. In written reasons dated 24 January 2019, the Employment Judge stated:-

> **"It is clear, in my judgment, that the [Appellant] has failed to comply with the Unless Order in full. The records and reports which were sought in paragraphs 1 to 3 of the Order were not, and still have not been, provided to the Tribunal and to the respondent."**

9. The Judgment of 24 January 2019 was not limited to declaring that the disability discrimination claim was dismissed. It extended also to the claims of unfair dismissal and sex discrimination.

10. On 7 February 2019, the Appellant's solicitors applied for reconsideration of the dismissal of her claims. That application was treated as an application under Rule 38(2) of the Employment Tribunal Rules. A Rule 38(2) Hearing was fixed and took place on 26 June 2019. The Appellant

gave evidence at that Hearing. She is recorded by the Employment Judge as having accepted that she had failed to comply with the Unless Order and as having explained that she has Bipolar Disorder type 1 and was also under significant pressure due to having to care for a premature baby.

11. At that same Hearing, however, the Appellant's solicitor submitted *inter alia* that the Unless Order had, in fact, been complied with by 10 January 2019. He submitted that insofar as the Order had required the Appellant to produce documents, it was expressly confined to documents "within her possession". The documents referred to in paragraphs 1-3 of the schedule were not in her possession at that time, and the Tribunal had been advised of that immediately prior to the deadline for compliance.

12. The Employment Judge rejected that argument, stating:

> **"In my judgment, this is not an argument with any merit. A party to whom such an order is issued must be aware that the purpose of the order is to require them to ingather the information so that at the date if compliance it is within their possession. Otherwise it would be a simple matter to avoid the need to comply with the order by making no effort to secure the records sought…**
>
> **Had [the Appellant] obtained those records within the timescale required, they would have been within her possession at the date for compliance.**
>
> **In any event, when a party is ordered to produce documents, the phrase 'within your possession' does no more than express a simple fact – that a party may only produce documents which are within their possession. Of itself, however, it is my view that it is quite disingenuous to argue that failing to obtain those records should of itself alleviate [the Appellant] of her obligation to comply. It was clear to [the Appellant] that she required to obtain and produce her medical records."**

13. Accordingly, on 20 August 2019, the Employment Judge refused the application to revoke his earlier Judgment of 24 January 2019.

Appeal

14. In terms of the Appellant's third Ground of Appeal (added by amendment), Mr Allison repeated the argument made to the Employment Judge on 26 June 2019 about the limits of the

Unless Order of 23 November 2018. In particular, he submitted that the Order was clearly confined to the production of documents as described in paragraphs 1-3 of the schedule which were actually in the possession of the Appellant at the material time. It could not properly be construed as having imposed upon the Appellant a more onerous obligation to ingather such documents from third parties so as to put them in her possession. Rule 31 of the Employment Tribunal Rules (under which the Unless Order bore to be made) confers upon an Employment Judge the same powers as a Sheriff to make orders for the disclosure of documents. Those powers permit orders to be directed to havers (including third party havers) for the production of documents in their possession. A Sheriff has no power, however, to direct anyone who is not in possession of a document to ingather it from a third party. It follows that an Employment Judge has no such power.

15. For the Respondent, Mr Foster submitted that the Order had been sufficiently clear and specific and had been understood by the Appellant to bear the meaning attributed to it by the Employment Judge. There had never been any application to clarify or vary the Order prior to the expiry of the deadline. An express concession of non-compliance had been made in the Rule 38(2) application in March 2019. The reference to "within your possession" in the Order should be read as meaning documents which were in existence and which the Appellant had the right to obtain from third parties. Whilst paragraphs 2 and 3 of the schedule contained their own limitations by reference to documents "available" to the Appellant, it was clear from the reasoning in the Rule 38(2) Judgment that the Employment Judge's decision was based only upon the failure to produce documents which were in existence at the material time.

Decision and Reasons

16. An order for production of documents may always competently be directed to the haver of the documents in question. The obligation thereby imposed upon the haver is then to produce such documents are in the haver's possession. On its face, the Unless Order of 23 November 2018 was consistent with those principles and was *ex facie* clear as to its scope. Insofar as it related to

documents, it required the production only of documents in the possession of the Appellant. Paragraphs 2 and 3 of the schedule also referred to such Reports as were "available" to the Appellant.

17. The Order of 23 November 2018 did not – either expressly or by implication – place any wider obligation upon the Appellant to ingather documents from third party havers. An Order in such terms could not competently be made by a Sheriff. It follows that it could not competently have been made by an Employment Judge under Rule 31.

18. Whatever the Judge – or even the parties – may have thought was meant by the Order of 23 November 2018, since that Order expressly bore to be made under Rule 31, it cannot properly be interpreted as having implicitly imposed obligations upon the Appellant which could not competently be imposed under that Rule. It follows that no such order could competently be made as an Unless Order under a combination of Rules 31 and 38.

19. Rather, and as its clear terms would suggest, the Order was expressly limited to documents which were within the possession of the Appellant at the material time. It did not extend to documents in the possession and control only of her GP, or to medical Reports which had been instructed by her but not yet completed.

20. As was pointed out in **McCarron v. Road Chef Motorways & Others** UKEAT/0268/18, a claim should only be dismissed for non-compliance with an Unless Order when it can be said without doubt that, on a strict reading of the Order, there has indeed been such non-compliance. That non-compliance must take the form of a failure to comply with the letter of the Order and not merely the spirit of it, even if that spirit was generally understood. An Unless Order should not be construed expansively against the party required to comply with it.

21. It was clear from what was said by her solicitors in their letter of 10 January 2019 that the Appellant did not, at that time, have in her possession any of the documents described in paragraphs 1-3 of the schedule to the Unless Order. It was also clear from what was said that none of the Reports referred to in paragraphs 2 and 3 of the schedule were then available to her. There was no suggestion that the information given in the letter of 10 January 2019 was false.

22. In these circumstances, there was no material before the Employment Judge in January 2019 from which he could properly have concluded that there had been any failure to comply with the terms of the Unless Order. In focussing on what he took to be the purpose (or spirit) of this Unless Order, the Employment Judge erred. That error caused him wrongly to conclude that there had been non-compliance and to issue a declaratory Judgment to that effect.

23. I will therefore allow this appeal on the basis of the third Ground. I will set aside the Judgment of 24 January 2019 (including the "deemed" dismissal of the Appellant's claims with effect from 11 January 2019) and remit all of the Appellant's claims to the Tribunal for such further procedure as is appropriate.

24. Given my conclusions on the third Ground of Appeal, it is not necessary for me to express any view on the other Grounds contained within the Notice of Appeal.