

Neutral Citation Number: [2023] EAT 84

Case No: EA-2022-SCO-000131-DT

EMPLOYMENT APPEAL TRIBUNAL

In Chambers
52 Melville Street
Edinburgh EH3 7HF

Judgment handed down on 1 June 2023

Before :

THE HONOURABLE LORD FAIRLEY

Between :

MR DANIEL TANASE
- and -
BARCHESTER HEALTHCARE LIMITED

Appellant
Respondent

Hearing on the papers alone

Hearing date: 23 May 2023

JUDGMENT

SUMMARY

TOPIC – Practice and Procedure; unless order; strike out.

By a Judgment dated 10 November 2022, the Tribunal dismissed the appellant’s claims of unfair dismissal and race discrimination. It did so on the basis that the appellant had purportedly failed to comply with an unless order dated 3 October 2022.

Held: The order of 3 October 2022 was not an unless order under Rule 38. It was simply a case management order under Rule 29. That was clear on the face of the order of 3 October 2022, as well as being implicit in the fact that a strike out warning letter had been issued under Rule 37 in respect of the alleged failure to comply with it. The appellant had then exercised his right to ask for an oral hearing in terms of Rule 37(2), but no such hearing had even been held before his claims were dismissed. In these circumstances, the Judgment of 10 November 2022 was procedurally incompetent and was set aside and the claims of unfair dismissal and race discrimination remitted to the Employment Tribunal to proceed as accords.

Observed: Aspects of the case management order of 3 October 2022 concerned matters entirely outside the appellant’s control and with which it would never have been within his power to comply. The terms of the order of 3 October 2022 should be reconsidered by the Tribunal following remit.

THE HONOURABLE LORD FAIRLEY:

Introduction

1. By a Judgment and Reasons dated 10 November 2022, an Employment Judge sitting at Aberdeen dismissed the appellant’s claims of unfair dismissal and race discrimination.

The Judgment is in the following terms:

“Further to the Unless Order dated 3 October 2022 which was not complied with by 19 October 2022 the claimant’s claims for unfair dismissal and race discrimination are dismissed”

2. The appellant has appealed against the dismissal of his claims. Parties are agreed that his appeal should be determined on the basis only of the papers and written submissions and without an oral hearing.
3. Having considered the appeal on that basis, I have concluded that the Employment Tribunal’s Judgment of 10 November 2022 was procedurally incompetent and should be set aside.
4. The Order dated 3 October 2022 on which the Judgment of 10 November 2022 purported to be based was not an unless order under Rule 38. Had it been expressed as an unless order, it would have been a conditional judgment (see **Scottish Ambulance Service v. Laing** EATS 0038/12). It was not so expressed. Rather, on its face, it was expressed as a case management order under Rule 29.
5. This was also implicit in the fact that in an e mail dated 12 October 2022, the Employment Judge issued a strike out warning pursuant to Rule 37. That warning stated:

“[The Employment Judge] is considering striking out your claims for unfair dismissal and race (*sic*) on the following grounds:

- **of non-compliance with the Order dated 3 October 2022 in terms of Rule 37(1)(c) of the Rules contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations, 2013”**

Had the order made on 3 October 2022 been an unless order under Rule 38, there would have been no need for a strike out warning under Rule 37.

6. Correctly, the strike out warning of 12 October 2022 advised the appellant of his right under Rule 37(2) to request an oral hearing at which representations could be made by him. The letter stated that if he wished such a hearing, he should advise the Tribunal of that by 17 October 2022. He did so by e mail sent to the Aberdeen Tribunal at 0901 hours on 17 October 2022. Notwithstanding that e mail and his right under Rule 37(2) no such hearing was ever fixed. Instead, his claims were simply dismissed on 10 November 2022.
7. In these circumstances, the Judgment of 10 November 2022 was procedurally incompetent because:
 - a. the order of 3 October 2022 was not an unless order under Rule 38; and
 - b. even reading the order of 3 October 2022 as a Rule 29 case management order which was then followed by a Rule 37 strike out warning letter, an important procedural step – the oral hearing requested by the appellant – was missed.
8. For these reasons I will set aside the Judgment of 10 November 2022 and remit the claims of unfair dismissal and race discrimination to the Employment Tribunal to proceed as accords.

9. In so doing, I require to make some further brief observations about the terms of the order of 3 October 2022. Even to the extent that it purports to be a case management order directed to the appellant, paragraphs (c) and (d) are not matters with which it could ever have been within the power of the appellant to comply. Each of those paragraphs sets out things that are to be done only by the respondent's solicitors and / or by a potential witness. Each paragraph is, however, subject to the same general introductory words, of the order, viz "The claimant shall within 7 days of the date of this order do the following:..." The effect of this is that the order reads:

"The claimant shall within 7 days of the date of this Order do the following:

...

- c) The Respondent's solicitors shall contact [named witness] and ask her to respond in writing within the next 7 days. Her response shall either be in her own handwriting or in a typed written document signed and dated by her.**
- d) Once the respondent's solicitors have had an opportunity of considering [the witness] statement they shall indicate formally if her evidence can be agreed or if there are any aspects of her evidence that are still in dispute."**
10. Plainly, none of the things described in paragraphs (c) and (d) were things that the appellant could competently be directed to do pursuant to a case management order. They were matters entirely outside of his control. The order of 3 October 2022 is not the subject of this appeal. Its terms should, however, be reconsidered by the Tribunal following remit.