

Neutral Citation Number: [2008] EWCA Civ 327
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
(HIS HONOUR JUDGE REID QC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 4th March 2008

Before:

LORD JUSTICE PILL
LORD JUSTICE KEENE
and
LORD JUSTICE MAURICE KAY

Between:

	CHUKWUDEBELU	Appellant
	- and -	
	CHUBB SECURITY PERSONNEL LTD	Respondent t

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Mr A Ogunbiyi (instructed by Messrs Owoyele Dada and Co) appeared on behalf of the **Appellant**.

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED.

Judgment

Lord Justice Maurice Kay:

1. This is an appeal against an order made by HHJ Reid QC sitting in the

Employment Appeal Tribunal when he dismissed an appeal against a refusal by the registrar to extend time, in circumstances that I shall come to explain, and as a result of that he dismissed the appeal that was pending before the Employment Appeal Tribunal.

2. The background to the case is that the appellant was employed by Chubb Security Personnel for about ten years prior to his dismissal in July 2005. He made two separate applications to the employment tribunal on different dates referring to various claims of unfair dismissal, race discrimination, victimisation and unauthorised deductions from wages. There was a long hearing before the employment tribunal but on 26 June 2006 the tribunal dismissed all his claims. He then sought to appeal to the Employment Appeal Tribunal. It is not necessary to go into detail about the earliest developments when the appeal was lodged there; it is sufficient to pick up the story on 10 January 2007 when the case was considered by HHJ McMullen QC in two stages.
3. For the first part of that day HHJ McMullen sat with two lay members of the Tribunal. They were concerned with what had become known as Grounds 4 and 11 of the Grounds of Appeal to the Employment Appeal Tribunal. They were concerned to assess whether there was anything in relation to those two grounds which justified the matter proceeding beyond the preliminary hearing that was being held that day so as to call for a full hearing. Grounds 4 and 11 are the two that related to the issue of unauthorised deduction from wages. HHJ McMullen and his colleagues decided that those two grounds were such as to merit a full hearing and the first order of that day included these directions:

(1) This appeal limited to grounds 4 and 11 be set down for a full hearing.

(2) The full hearing of this appeal be heard before a Judge and two Members.

(3) Within 14 days of the seal date of this order the Appellant lodge with the Employment Appeal Tribunal and serve on the Respondent further information of the Notice of Appeal in relation to the sums claimed identifying the documents before the Employment Tribunal and relied on for each of the monetary claims and showing as appropriate the periods when the Appellant worked, refused to work or was available to work but did not, and in default of such lodgement and service the appeal be dismissed.”

4. Leave was also given to amend the Notice of Appeal to conform with the claim based on such further information when it was forthcoming and other directions were given. In addition to that order, HHJ McMullen later made a second order on that day as a result of a decision made by him alone in chambers. It was to the effect that a procedural appeal be allowed and evidence and submissions be accepted on the basis that the time for entering a Notice of Appeal was retrospectively extended to 2 October 2006. This enabled the other nine grounds of appeal to have life and HHJ McMullen ordered that the papers be placed before a different judge for a Rule 3(10) hearing. In other words a different judge would decide whether there was sufficient in the other nine grounds of appeal to justify an inter partes hearing.
5. Remaining for the moment with that aspect of the case -- that is to say the other nine grounds -- they were considered by HHJ Birtles on 7 March. Sitting alone he allowed the application under Rule 3(10) and ordered that the matter be set down for a preliminary

hearing where the respondent would be at liberty to be heard and that that preliminary hearing be before a judge and two members. He further ordered:

“The listing of this matter is to be on the 13th day of April 2007 together with the full hearing of Grounds 4 and 11 and the Amended Notice of Appeal. Revised time estimate 1 day.”

In other words, HHJ Birtles was making arrangements for there to be a single hearing on 13 April in the form of a final inter partes hearing in relation to Grounds 4 and 11 but a preliminary hearing in relation to the other nine grounds, which related to the issues of unfair dismissal, race discrimination and victimisation.

6. I now return to what occurred in relation to the first order of HHJ McMullen and his colleagues. In terms it required further information and documents within 14 days, in default of which “the appeal be dismissed”. The necessary information and documentation was not forthcoming within the 14 days. On 23 March, in other words some two weeks or so after HHJ Birtles had made his order, the Registrar refused an extension of time for compliance with the order, requiring further information and documentation in relation to Grounds 4 and 11. The order of the Registrar is in the form of a refusal of an extension of time with reasons attached.
7. The appellant appealed the decision of the Registrar and it was that appeal that was given priority when all the matters that were listed before the Tribunal on 13 April came for hearing before HHJ Reid. HHJ Reid gave a judgment dismissing the appeal from the decision of the Registrar refusing an extension of time. He appears to have accepted that the advocate who had represented the appellant before HHJ McMullen, whilst he had been aware of the 14-day order, had not been aware that it was an “unless” order. Nevertheless HHJ Reid went on to find that the firm of solicitors, if not the individual solicitor in question, had received a copy of the order timeously and he proceeded for a number of reasons to dismiss the appeal from the decision of the Registrar. The final paragraph of his judgment includes this passage:

“So far as I am concerned the position is that the decision of the Registrar was correct, the appeal against her decision is dismissed and it follows that since HHJ McMullen’s order stands the time limit in it has not been complied with and the appeal itself also stands dismissed”.

8. That amounted to a dismissal of the entire appeal, not just the part of it based on Grounds 4 and 11. HHJ Reid’s order states that the appeal from the order of the Registrar be dismissed:

“The consequence that by virtue of the order of HHJ McMullen QC sealed and dated the 12th day of January 2007 the substantive appeal itself stands dismissed”.

9. It may be that some discussion took place at the conclusion of the hearing before HHJ Reid. It seems that the advocate then appearing, Mr Sykes, an employment law consultant, may have tried to contend that the consequence of dismissing the appeal from the decision of the Registrar was limited to Grounds 4 and 11 but that HHJ Reid did not share that view.

10. The appellant sought to appeal to this court; having been refused permission to appeal on the papers he renewed his application on 22 November 2007 when the matter was considered by Rix LJ and myself. Suffice it to say at this stage that we granted permission to appeal.
11. The first question that now arises is whether HHJ Reid was correct in his construction of the order of HHJ McMullen when he concluded that failure to comply with the “unless” order had the result that the entire appeal stood dismissed. The order in question, that is to say the first of HHJ McMullen’s orders, dealt exclusively with Grounds 4 and 11. It referred in terms to “this appeal limited to Grounds 4 and 11” and it seems to me that throughout that order “this appeal” and “the appeal” are references only to the appeal in relation to Grounds 4 and 11 which were the only grounds that the tripartite constitution of the Tribunal was considering on that day. HHJ McMullen sat alone to consider the other aspects of the case, namely the other nine grounds of appeal.
12. If that is correct then the consequence is that, whatever might be the rights and wrongs of the dismissal of the appeal and the decision of the Registrar following non-compliance with the order for further information and documentation in relation to Grounds 4 and 11, the other nine grounds would be unaffected. They were the subject of the order of HHJ Birtles that they be considered at a preliminary hearing in accordance with paragraph 9.7 of the practice direction at which the respondent would be at liberty to be heard. I therefore conclude that HHJ Reid was in error when he construed the first order of HHJ McMullen and, in particular, the “unless” order as having consequences beyond those referable to Grounds 4 and 11. As a matter of construction I would therefore allow this part of the appeal.
13. I should add that there also arises the question of proportionality. The point made on behalf of the appellant is that it is one thing to debar an appellant from pursuing his appeal in relation to those parts of it as to which he is in default of procedural directions; it is quite another thing to debar him from pursuing the other grounds of appeal which are not the subject of that default. It seems to me that that is an additional reason for allowing the appeal in relation to the nine grounds.
14. I therefore turn to Grounds 4 and 11, as to which permission to appeal to this court has also been granted, albeit with some hesitation. Certain facts are beyond dispute. The “unless” order of HHJ McMullen was not complied with. Nothing had been forthcoming from the appellant’s legal advisers by 6 February 2007 and on that date the Tribunal wrote to his solicitors noting that the “unless” order required the further documentation by 26 January 2007. The letter invited the solicitors to lodge the missing documentation by 13 February accompanied by an application for an extension of time providing the reasons for lateness. No application for an extension of time was made until 13 February. When the Registrar refused an extension of time on 23 March she had before her a letter from the solicitors dated 14 March 2007. In essence that letter maintained that although the order of 12 January had been sent out on that day or very soon afterwards it was not delivered to the solicitors in the normal course of post or at all and they knew nothing of it until 7 February when the letter from the Tribunal dated 6 February arrived.
15. The solicitor in question had not been present at the hearing on 12 January but had instructed Mr Sykes, the employment consultant. The letter went on to state:

“Our client’s Advocate, Mr Sykes, advises us that his recollection is that the judge indicated that he would

make directions regarding filing further information of the loss of wages claim and an amended appeal notice. It is not his recollection that the Judge indicated when this was to be done at the hearing since the time would be stated in the Order. In any event, the fact is that the ruling and directions made by the Judge were made into an Order, which unfortunately we did not receive. Our client would have had no problems complying with the same had he received it.”

16. In refusing to extend time the Registrar noted that the appellant had been represented at the hearing and could not have been unaware that he had sought leave to file an amended appeal and to adduce further information in respect of his claims. She added:

“That being so, it is his duty to comply with the overriding objective of any litigation, to progress the case as swiftly as possible. The Appellant would also have been aware that as a notice of hearing had been sent out two days after the case, that time was of the essence.

It is not appropriate to claim that preparation could wait until after receipt of an order. Time runs from the sealed date of the order and if the appellant had regarded this as vital he should have made earlier enquiries. In fact, a letter from the court dated the 6th day of February 2007 prompted the appellant’s enquiries and even then, the amended appeal was not to hand but the appellant took a further 7 days.

The Appellant was given generous permission by the judge as it is the practice of this court to insist on all applications to amend an appeal being accompanied by the proposed amendment but he still failed to comply with the time scales.”

17. When the matter came to be considered by HHJ Reid he had before him the same documentary material as had been before the Registrar and no additional material. Mr Sykes appeared before HHJ Reid. In paragraph 6 of his judgment the judge recites Mr Sykes’s submissions in these terms:

“He says that in fact the order, as it was drafted, was in more detailed terms than had emerged, as far as he was concerned, from the discussion before the Tribunal but that he communicated the substance of the order to those instructing him, albeit he was not aware as to what is described as the “unless element” of the order, i.e. that failure to comply with the order would result in the appeal being dismissed. He further says that I should accept that the sealed order had not been received by those instructing him because there is a letter [ie the letter of 14 March] from his instructing solicitors saying as much.”

HHJ Reid was unimpressed by all of that. At paragraph 7 of his judgment he said:

“So far as all that is concerned, I have no proper evidence from the Appellant’s solicitors that they did not receive in the firm. It would be remarkable if the order was sent to one side but not to the other side. I am entirely happy to accept that the solicitor personally never became aware of the order but it does not follow from that (and I can not in the absence of any evidence assume) that it was never received at the firm at all. In any event, whether or not he was aware of the precise terms of the order, he was aware of the requirement to put in the further and better Particulars, if I may call them that, and to take up, if so desired, the permission to amend within 14 days. Whether or not he knew of the ‘unless’ aspect of the order seems to me to be immaterial. He was well aware that a hearing date had been fixed.”

In a later part of the judgment the judge considered the matter further and said:

“Were this appeal to be allowed then it would be necessary to make a consequential direction for a Respondent’s notice answer and for the Respondent’s skeleton argument. It would therefore be impractical to ask the Respondents to conduct the matter today. The matter would have to go off for somewhere in the region of 3 months until when a new hearing could be arranged but in the meantime the matter would still be in limbo.

12. It has to be remembered that the dismissal of the claimant took place back in 2004. It may be that the Appellant has some remedy against his legal advisers, that is not a matter for this Tribunal: So far as I am concerned the position is that the decision of the Registrar was correct, the appeal against her decision is dismissed and it follows that since HHJ McMullen’s order stands the time limit in it has not been complied with and the appeal itself also stands dismissed.”

18. Mr Ogunbiyi on behalf of the appellant now seeks to challenge that decision in relation to Grounds 4 and 11. The power of this court to interfere with a decision of the Employment Appeal Tribunal is limited to errors of law; accordingly the question is whether HHJ Reid erred in law.

19. I return to the passage in his judgment where he gave the central reasons for dismissing the appeal and, in particular, to the passage in which he concluded that whether or not the solicitor was aware of the precise terms of the order he was aware of the requirement to put in the further documentation within 14 days and was well aware that a hearing date had been fixed. As to that latter aspect of the case it seems to me that HHJ Reid was justified in his finding that the solicitor was well aware that a hearing date had been fixed. Although we have not been shown the original notice of hearing, the Registrar had referred to it in her decision and HHJ Birtles, in making his order in relation to the other nine grounds, had given a direction as to the listing of those grounds:

“together with the full hearing of Grounds 4 and 11...
Revised time estimate 1 day.”

20. It is obvious from that there had been a Notice of Hearing in relation to Grounds 4 and 11 with a hearing date of 13 April and that HHJ Birtles was plugging into that, as a result of his decision, that the matter should proceed to a further preliminary hearing in relation to the other nine grounds.
21. It seems to me that, on the basis of the information that was before him, HHJ Reid was entirely justified in concluding that the solicitor was aware of the requirement to put in the further documentation within 14 days and was aware that the hearing date of 13 April had been fixed. By inference he was also aware of the directions in HHJ McMullen's order in relation to Grounds 4 and 11 which required the respondents to file an answer within 14 days of service of the Amended Notice of Appeal. In other words, looked at from the state of knowledge in the days immediately following HHJ McMullen's hearing, it was clear that directions required activity within 14 days within the context of a time-frame which required further pleading in advance of an early hearing date fixed as 13 April.
22. Bearing these matters in mind I am completely unable to identify any error of law in the decision of HHJ Reid as explained by him. I should add that, although he referred to the absence of proper evidence from the appellant's solicitor, there are before us witness statements from the solicitor in question and his partner. Essentially the solicitor with conduct of the case stands by his letter of 14 March and the partner seeks to explain the way in which incoming post is dealt with in the office, proffering the conclusion that there was no scope for error about whether or not the order had been received.
23. The first point to make about this further material is that it was not before HHJ Reid. There is no reason why it could not have been; equally there is no good reason as to why either HHJ Reid or this court should not have been provided with a statement from Mr Sykes. For my part I would not permit reliance upon this material in the current circumstances of this case, having regard to those omissions. Moreover it cannot be said that the additional material is wholly favourable to the appellant's case. There is, annexed to the solicitor's written statement, an email from Mr Sykes dated 21 June 2007. It is a somewhat curious document but, however one looks at it, it points at the very least to the probability that he had informed the solicitor of the order, albeit not the unless element.
24. For all these reasons I have come to the conclusion that no legal error can be identified in relation to Grounds 4 and 11 and I would dismiss the appeal as to that aspect of the case. As I have indicated earlier I would allow the appeal in relation to the other nine grounds.

Lord Justice Keene:

25. I agree.

Lord Justice Pill:

26. I agree that the first part of the appeal should be allowed for reasons given by Maurice Kay LJ so that grounds other than 4 and 11 should proceed to a preliminary hearing. I also agree that the appeal should be dismissed on Grounds 4 and 11 for reasons given by Maurice Kay LJ.
27. I add a judgment of my own only because the papers reveal that the history of this appeal from the employment tribunal decision of 26 June 2006 has been less than a happy one. HHJ McMullen made the order which, in substance, is the basis for the present appeal on

12 January 2007, date of sealing; the hearing was on 10 January; Mr Sykes, employment law consultant appearing on behalf of the appellant. An unless order was made on that occasion and it was not complied with in circumstances which Maurice Kay LJ has described. Mr Sykes also appeared before HHJ Reid on the appeal against a finding of the Registrar that time could not be extended. HHJ Reid, sitting alone in the EAT, stated at paragraph 6:

“The position it seems to me of the hearing was that Mr Sykes, an employment law consultant instructed as an advocate by the Appellant’s solicitors, had appeared before Judge McMullen QC and the Tribunal. He was therefore aware of the terms of the order that was made. He says that in fact the order, as it was drafted, was in more detailed terms than had emerged, as far as he was concerned, from the discussion before the Tribunal but that he communicated the substance of the order to those instructing him, albeit he was not aware of what is described as the “unless element of the order”, i.e. that failure to comply with the order would result in the appeal being dismissed.”

That potentially was a most important matter because, if an unless order is made, it is important that the effect of it is brought home to those appearing for the party against whom it is made.

28. HHJ Reid dealt with that submission at paragraph 7:

“In any event, whether or not he [that is Mr Sykes] was aware of the precise terms of the order he was aware of the requirement to put in the further and better particulars, if I may call them that, and to take up, if so desired, the permission to amend within 14 days. Whether or not he knew of the unless order aspect of the order seems to me to be immaterial. He was well aware that a hearing date had been fixed.”

29. The unless aspect was, in my view, capable of being central to the entire dispute. It is one of the grounds of appeal to this court that:

“The learned Judge erred in ruling that lack of knowledge of the “unless” aspect of the Order was immaterial since this would cause significant prejudice to the Appellant if, as in the circumstances of this case non-receipt of the Order resulted in failure to comply with it.”

However, there is no statement from Mr Sykes as to the circumstances in which HHJ McMullen’s order was drawn up or as to the parts of it which were orally drawn to his attention, either in the course of the hearing or shortly afterwards.

30. In his own statements, as far as they go, Mr Sykes does not himself take the point. He, at no stage (and we have seen submissions he made on appeal, we have seen an email which he sent) does he state in terms that he was unaware of the unless provision of the order. He raised that point before HHJ Reid; that potentially important aspect of the case was not pursued by him, nor has it been pursued on the appellant’s behalf in a statement at any

stage. It was when the matter came before the Registrar originally that this matter should first have been ventilated, if there were to be merit in it. I cannot in those circumstances hold that it is a basis for allowing this part of the appeal.

31. I will return to that aspect but I do also express misgivings about the sequence of events and the apparent lack of knowledge of judges making decisions as to the decisions which had gone before. This aspect too I would have expected in a statement obtained from Mr Sykes, who appeared for the appellant at the several stages.
32. HHJ McMullen's order was in great detail and considered at considerable length the procedural steps which should follow. The unless order appeared in paragraph 3 and, of course, anyone reading it, subject to the construction by Maurice Kay LJ, with which I respectfully agree, would be aware that all the following paragraphs, in the great detail they were, were of no consequence if the unless order took effect. I am concerned about the contents of that order and the circumstances in which it was made. In my view it is important that the parties at a hearing are aware and made aware, before they leave the court, of the written order which is to follow. I say that not necessarily by way of criticism; in the absence of further information from Mr Sykes no criticism can be laid at the door of the Tribunal.
33. However on the same day HHJ McMullen QC made a second order. A provision of that was that:

“this matter be expedited and the papers be placed for a Rule 3(10) hearing before a different judge.”

I comment in passing that supports the construction of the detailed order which Maurice Kay LJ has put upon it. Clearly there was to be a further hearing on the other grounds and that took place before HHJ Birtles on 7 March 2007, Mr Sykes again appearing on behalf of the appellant and the respondents not being represented. That order too was in considerable detail spelling out procedures to be followed. At paragraph 4, it stated:

“The listing of this matter is to be on the 13th day of April 2007 together with the full hearing of Grounds 4 and 11 of the Amended Notice of Appeal. Revised time estimate 1 day”.

34. It appears unlikely that HHJ Birtles would have made that order had he been aware that those grounds at least were struck out on a proper reading of HHJ McMullen's order on failure to comply with the unless order. Why he was not made aware of the earlier order I do not know; one would have expected Mr Sykes to tell him, Mr Sykes having appeared at both hearings. One would also have had expected the internal procedures of the tribunal to ensure that the earlier order was before HHJ Birtles. The position then was that a preliminary hearing on other grounds and “the full hearing” of Grounds 4 and 11 was to take place on 13 April. Meanwhile, the Registrar had declined to extend time. Her order was made on 23 March and she declined, on consideration of written submissions made to her, to extend time.
35. The matter came before HHJ Reid as an appeal from the Registrar. HHJ Reid appears to have been unaware of the order of HHJ Birtles that on the day of the hearing (that is, 13 April) a full hearing should take place on grounds 4 to 11. Again, why HHJ Reid was

unaware of that I do not know. Mr Sykes again appeared and again one would also have expected the internal procedures of the Tribunal to ensure that HHJ Reid was aware of the earlier orders. HHJ Reid approached the question, beginning his judgment:

“This is an appeal from an order of the Registrar made on 23 March”.

36. He does not refer to, and probably was not aware of, an order of HHJ Birtles that, on that day, 13 April, there should be a full hearing on Grounds 4 and 11, those grounds having on HHJ McMullen’s earlier order already been struck out.
37. This is not a satisfactory situation and the sequence of events will no doubt be considered by those concerned at the EAT. I have nothing to add on the merits of the decision of the Registrar, or of HHJ Reid, neither of whom in my judgment erred in law or in the approach they took to the points raised before them and the issue before them.
38. I only add this in relation to the unless order. An unless order takes effect if it is not complied with. It does not require a further order addressed to the party against whom the order was made. When HHJ Reid in his order confirmed the strikeout he was doing no more than that. The effect of an unless order was considered in Marcan Shipping (London) Ltd v Kefalas & Anr [2007] EWCA Civ 463, 1 WLR 1864. I mention it not because it has any influence on the outcome of this case, otherwise it would have been ventilated in the course of argument, but so that the circumstances in which an unless order should be made and the effect of it are I would hope better understood. Moore-Bick LJ stated at paragraph 36 :

“The third consequence is that before making conditional orders, particularly orders for the striking out of statements of case for the dismissal of claims or counterclaims, the judge should consider carefully whether the sanction being imposed is appropriate to all the circumstances of the case. Of course it is impossible to foresee the nature and effect of every possible breach and the party in default can always apply for relief, but a conditional order striking out a statement of claim or dismissing the claim or counterclaim is one of the most powerful weapons in the court’s case management armoury and should not be deployed unless its consequences can be justified. I find it difficult to imagine circumstances in which such an order could properly be made for what were described in *Keen Phillips v Field* as ‘good housekeeping purposes’”.

39. It follows from that approach, with which I respectfully agree, that it is most important if a court is to make an unless order that the fact it is being made is clearly brought home to the parties.
40. For the reasons I have given, in agreement with those of Maurice Kay LJ, I agree with the order he proposes.

Order: Appeal allowed in part.