UNLESS ORDERS & RELIEF FROM SANCTIONS IN THE EMPLOYMENT TRIBUNAL - JAN 2015

The procedural rules that govern litigation in the Employment Tribunal and in the Civil Courts have the same beating heart, namely the Overriding Objective. In the Civil Procedure Rules, this is enshrined in CPR Part 1, in the Employment Tribunal Rules 2013 ('the 2013 Rules') this can be found with some differences in detail (there being no equivalent provision requiring the specific consideration of the allotment of an appropriate share of Court resources and enforcing compliance with rules, practice directions and orders) in Rule 2 of the 2013 Rules.

There are other areas of similarity. For instance, CPR Part 31 is effectively incorporated by reference into Rule 31 of the 2013 Rules and notably, both procedural regimes permit Judges to make Unless Orders. An Unless Order is a draconian order which requires compliance with a previous order within a set time frame, in default of which the usual sanction is strike out of the case to which the default related.

However, if a case is struck out due to non-compliance with an Unless Order, in the Employment Tribunal the position upon an application for relief from sanctions is governed by Rule 38(2) of the 2013 Rules and will be successful if it is in the interests of justice to grant relief. In the Civil Courts, CPR 3.9 provides that the Court shall consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need (a) for litigation to be conducted efficiently and at proportionate cost and (b) to enforce compliance with rules, practice directions and orders. It is only if this balance weighs in favour of the defaulting party, that relief will be granted.

Recently, there has been a spate of caselaw in the Civil Courts as to the approach that the Civil Court should take to an application for relief from sanctions, starting with the well-publicised Court of Appeal Judgment in **News Group Newspapers Ltd v Mitchell [2014] 2 All ER 430** which placed the onus on the defaulting party to establish (if the breach is not trivial) that there was a good reason for it not complying with the order. The onus was very much on the defaulting party to justify its non-compliance with the order with a compelling good explanation, supported by evidence. This approach led to a disproportionately large number of otherwise forgivable breaches being denied relief from sanction and so earlier this year, the Court of Appeal clarified that the approach in Mitchell was in reality a more measured one than had been applied hitherto in the conjoined appeals of **Denton and others v TH White Ltd and another [2014] EWCA Civ 906**: The general approach in considering an application for relief from sanctions is now, firstly identify and assess the seriousness or significance of the failure to comply with any rule or order etc, secondly, why the breach occurred and thirdly all of the circumstances of the case.

One might have thought, given the similarities between the two regimes that the caselaw relating to the application of CPR 3.9 would be applicable in the Employment Tribunal. After all, are the interests of justice significantly different depending on whether one is a litigant in the Employment Tribunal or in the Civil Courts?

In recent times, the Employment Tribunal Rules 2004 required a different approach, as was made clear in Governing Body of **St Albans Girls School v Neary [2010] IRLR 124**. In that case, it was held that when an Employment Tribunal is called upon to consider an application for relief from sanctions, whilst the Employment Tribunal is not obliged to expressly consider each factor set out in CPR 3.9, it should nevertheless apply the same general principles as are applied in the Civil Courts.

It would appear from the recent case of **Harris v Academies Enterprise Trust UKEAT/0097/14/KN**, that the differences of detail in the versions of the Overriding Objectives in the two regimes highlighted in the first paragraph of this article still require a different approach in the Employment Tribunal. In Harris, the approach in Neary was re-stated to be the correct one. Langstaff P held that there was no requirement for an Employment Tribunal to approach an application for relief from sanctions as if CPR Part 3.9 was incorporated wholesale into the 2013 Rules.

But is there really a significant difference so as to justify a different approach? In Harris, whilst Langstaff P was clear to underscore the distinction, he also stated that in appropriate cases in the Employment Tribunal, the consideration of the interests of justice could involve the 'insight' given by cases such as Mitchell into that which constitutes justice. He was clear that the interests of justice also involve delivering justice within a reasonable time and at reasonable cost. He also stated that overall justice means that each case should be dealt with in a way that ensures that other cases are not deprived of their own fair share of the resources of the Court. In his view, these considerations could be accommodated within the requirement placed on the Employment Tribunal by the 2013 Rules to deal with cases fairly and justly.

When one considers those factors against the current formulation of CPR 3.9, it can be legitimately argued that there is no material difference on an application for relief from sanctions between the proper exercise of discretion by an Employment Judge with that of his judicial brethren in the Civil Courts. The only difference is in the form of the rule, but the substance of the exercise of discretion is the same.

On that basis, and respectfully despite what is stated by Langstaff P in Harris, the differences are illusory. It is suggested that the proper exercise of discretion in every application for relief from sanctions should involve the consideration of the appropriate CPR caselaw on the prevailing approach to an application for relief from sanctions, as if CPR Part 3.9 applied in the Employment Tribunal. Otherwise, there will be an anomalous difference in the approach to justice solely contingent on which division of the otherwise unified HM Courts and Tribunals Service a litigant happens to bring his claim.