**RELIEF FROM SANCTIONS IN THE EMPLOYMENT TRIBUNAL**

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**Introduction**

1. This article explores the relevance of the Civil Procedure Rules (“CPR”) rules pertaining to relief from sanctions to Employment Tribunal proceedings.
2. It is settled law that an employment judge may take the CPR into account when considering relief against sanctions. It is possible that the post-Jackson regime in the civil courts might influence the approach of the Employment Tribunals.

**Civil courts: relief from sanctions and Jackson**

1. Part of the *Jackson* reforms was the amendment to CPR rule 3.9: relief from sanctions. Previously, the court considering an application for relief would consider “all the circumstances” including nine factors set out at rule 3.9(a)-(i). These factors included whether the application was made promptly; whether the failure was intentional; and the impact on the trial date.
2. The Civil Procedure (Amendment) Rules 2013 amended rule 3.9 so that courts “*will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need:*
   1. *for litigation to be conducted efficiently and at proportionate cost; and*
   2. *to enforce compliance with rules, practice directions and orders.*”
3. Any doubts as to whether this change of wording would result in a new regime were firmly dismissed by the now infamous case of *Mitchell* -v- *News Group*[[1]](#footnote-1)*.* What followed thereafter (and to some degree some decisions were pointing in the *Mitchell* direction), was that relief would not be granted save for the most trivial breaches; otherwise, the burden was on the applicant to prove “good reason”, which was interpreted very narrowly by the courts.
4. The impact of *Mitchell* was broadly considered to be impractical with unfair windfalls available to parties.
5. In *Denton -v- T H White Ltd*[[2]](#footnote-2) the Court of Appeal reconsidered and “explained” how applications for relief should be dealt with by courts. A more practical approach was defined, in summary:
   1. The first stage is to consider whether the relevant breach is serious or significant. If the breach was not serious or significant, then there would be no need to spend much time on the second and third stages.
   2. The second stage is to consider why the breach occurred and whether there was a good reason.
   3. The third stage is to consider all the circumstances of the case. A serious breach for no reason was not automatically prevented from relief. Particular importance should be given to 3.9(a) and (b). Therefore if the effect of a breach was to prevent the efficient and proportionate conduct of litigation, then that would weigh against relief being granted.
6. Whilst *Denton* represents a more pragmatic approach, there remains a clear departure from the old rules and a focus on efficiency and proportionality.

**Does the CPR apply in the Employment Tribunal?**

1. Aside from rule 78 (cost orders), the ET rules[[3]](#footnote-3) make no direct reference to the CPR.
2. In *Goldman Sachs Services Limited v Montali* [2002] I.C.R 1251, the EAT considered the lawfulness of a Tribunal decision to overrule a decision to hold a Preliminary Hearing. The EAT observed that the introduction of the Overriding Objective to the rules of procedure (at the time the 2001 ET rules), was:

*“the clearest possible indication that when exercising any power under the Rules, as here, the Employment Tribunal will follow the same principles as those spelt out in the CPR”* **[at 26].**

1. In *National Grid Co plc v Virdee* [1992] IRLR 555 (a pre-CPR case), the EAT found that the jurisdiction of the Employment Tribunal should be exercised in accordance with the principles followed by the County Court and the High Court.

1. In *Maresca v Motor Insurance Repair Research Centre* [2004] 4 All ER 254, the EAT held that whilst CPR rule 3.9 was not expressly incorporated into the 2001 rules, the Employment Tribunal had a duty to have regard to the Overriding Objective and accordingly the approach in rule 3.9 was, by analogy, applicable to the way an Employment Tribunal should approach a similar question. The EAT were persuaded by *Montali* and also by *National Grid*.
2. There then followed a string of cases requiring a strict approach to all of the factors set out in rule 3.9. In *McGuire v Centrewest London Buses Ltd* (UKEAT/0576/06DM) Unreported May 4, 2007, a chairman did consider the CPR r.3.9(1) factors, but not to the satisfaction of the EAT. The EAT were of the view that explicit consideration and clear findings of fact were required in respect of each of the nine factors. In addition, the chairman had to demonstrate that he or she had actively considered the proportionality of the strike-out order and the availability of some other less draconian measure.
3. Maresca was overturned by the Court of Appeal in *Neary v St Albans School for Girls Governors* [2009] EWCA Civ 1190; [2010] ICR 473.
4. *Neary* involved an application for relief from sanctions. The Claimant had been ordered to provide further particulars of his claim. He failed to do so and the employment judge made an unless order. The subsequent failure resulted in the claim being struck out automatically. The employment judge refused to review the decision after confirming that the Claimant was aware of the unless order. The EAT reversed the decision holding that the judge had failed to consider the factors listed at CPR rule 3.9. The Respondent appealed on the grounds that the employment judge merely had a duty to consider all relevant factors.
5. The Court of Appeal held that the Employment Tribunal, when considering an application for relief, is not required to specifically consider all of the factors in rule 3.9. Parliament had introduced an Overriding Objective without incorporating rule 3.9, thus to import rule 3.9 would be contrary to Parliamentary intent (referring to *Afolabi v Southwark LBC* [2003] I.R.L.R. 220, where the Court of Appeal had refused to consider s.33 of the Limitation Act 1980 in extending the time limit for a race discrimination claim.). The employment judge’s duty is to apply the employment rules (to refuse the application unless he thought that the interests of justice required a review or he considered there was a reasonable prospect that, if a review hearing were held, the strike-out might be revoked). Whilst rule 3.9 might provide a helpful checklist, the list might not cover everything relevant and a judge is not under a duty to set out views on each of the factors. In a case where the draconian sanction of strike out has been imposed the employment judge must demonstrate that he has weighed the factors affecting proportionality and reached a tenable decision about it. The employment judge’s decision was upheld.
6. The Court of Appeal referred to *Maresca* and noted that the EAT had said that rule 3.9 had not been impliedly incorporated into the ET rules. However, “*having regard*” to rule 3.9 factors “*seems to have metamorphosed, as the cases came along, into a positive requirement that each and every one be discussed*” **[at 37].** That was clearly the wrong approach:

*It is one thing to say that ETs should apply the same general principles as are applied in the civil courts and quite another to say that they are obliged to follow the letter of the CPR in all respects. It is one thing to say that ETs might find the list of CPR r.3.9(1) factors useful as a checklist and quite another to say that each factor must be explicitly considered in the employment judge’s reasons. I would overrule the line of EAT authority which, in effect, requires specific consideration of all the CPR r.3.9(1) factors on an application involving relief from a sanction in the ET* **[at 47].**

1. Neary was welcomed by Underhill J, the then President of the EAT, who acknowledged that the law in this area “*had become undesirably technical and involved*” (Thind v Salvesen Logistics Ltd*[[4]](#footnote-4)*)*.* Summarising “*the much more straightforward”* law, as it stands in the light of Neary, Underhill J stated **[at 14]**:

*''The tribunal must decide whether it is right, in the interests of justice and the overriding objective, to grant relief to the party in default notwithstanding the breach of the unless order. That involves a broad assessment of what is in the interests of justice, and the factors which may be material to that assessment will vary considerably according to the circumstances of the case and cannot be neatly categorised. They will generally include, but may not be limited to, the reason for the default, and in particular whether it is deliberate; the seriousness of the default; the prejudice to the other party; and whether a fair trial remains possible. The fact that an unless order has been made, which of course puts the party in question squarely on notice of the importance of complying with the order and the consequences if he does not do so, will always be an important consideration. Unless orders are an important part of the tribunal's procedural armoury (albeit one not to be used lightly) and they must be taken very seriously; their effectiveness will be undermined if tribunals are too ready to set them aside. But that is nevertheless no more than one consideration. No one factor is necessarily determinative of the course which the tribunal should take. Each case will depend on its own facts.''*

**Is 3.9 still “useful” to the Employment Tribunal post-Jackson?**

1. The Jackson reforms have not triggered identical changes to the ET rules, therefore the parliamentary intention reasoning in *Neary* remains sound. Whilst the 2013 ET rules present a move towards a more formal structure similar to the CPR, rule 3.9 is not incorporated. Moreover, there are marked differences between the overriding objectives of the two jurisdictions with the CPR focusing on dealing with cases “*justly and at proportionate cost*” compared to the ET Rules “*fairly and justly*”. The ET rules also refer to “*avoiding unnecessary formality and seeking flexibility in the proceedings*” whilst the CPR includes “*enforcing compliance with rules, practice directions and orders*”.
2. *Neary* is clear that there is no requirement for a Tribunal to expressly consider rule 3.9 (which must remain good law despite the changes to rule 3.9). As there is no longer a checklist, it is arguable that the current rule 3.9 is less helpful to an employment judge considering an application for relief. Employment judges may also find the post-Jackson landscape too unsettled at this stage to be useful.
3. However, it could be argued that the drive for efficiency and proportionality within the civil courts reflect a similar drive in the Employment Tribunal. *Neary* approved the application of the general principles of the CPR, so the post-Jackson regime may well set the tone for a more robust scrutiny of applications for relief. *Denton*’s three-stage approach might provide useful guidance to an employment judge, particular if the rule 3.9 principles become more settled and predictable. As such, the current rule 3.9, and its case law, may provide a useful tool for, or perhaps have some influence on, employment judges.
4. Vivienne Gay, Regional Employment Judge, London North and West, writing extra-judicially, gave invaluable advice to practitioners about the importance of compliance with orders and directions: *“you will want to be consistently meeting the proper pattern of compliance before Mitchell and the new, tougher format of CPR rule 3.9(1) become more widely known to* [users] *of the tribunals. My radical solution is that you should comply with orders in a timely fashion.”*
5. This is perhaps an indication that employment judges (and practitioners opposing applications for relief) may find rule 3.9 and its case law, very useful indeed.

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1. [2013] EWCA Civ 1537 [↑](#footnote-ref-1)
2. [2014] EWCA Civ 906 [↑](#footnote-ref-2)
3. Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 SI 2013/1237 [↑](#footnote-ref-3)
4. UKEAT/0487/09*,* [2010] All ER (D) 05 (Sep) [↑](#footnote-ref-4)