Case Numbers: 3200453/2017 & 3200076/2018

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Nadershahi**

Respondent: **Cantor Fitzgerald Europe & Others**

Heard at: **East London Hearing Centre**

On: **6 September 2018**

Before: **Employment Judge Brown**

Representation

Claimant: Miss N Ling (Counsel)

Respondent: Ms A Mayhew (Counsel)

JUDGMENT ON PRELIMINARY HEARING (OPEN)

The judgment of the Tribunal is that:-

1. **The Tribunal does not strike out the Respondents' responses.**

2. **The Tribunal makes no order for costs on the application for strike out.**

3. **A Preliminary Hearing shall be listed on 8 October 2018.**

4. **This case is reserved to EJ Brown, to deal with procedural applications in future.**

REASONS

1 By an application dated 17 July 2018 the Claimant asked the Tribunal to strike out the responses of the Respondents to both claims, under *Rule 37(1)(b) Employment*

Tribunal Rules of Procedure 2013, because the manner in which the proceedings had been conducted by the Respondents had been scandalous, unreasonable or vexatious and/or under *Rule 37(1)(e)* because it was no longer possible to have a fair hearing. The Claimant sought the strike out order on the following grounds:

1.1 That the Respondents had made, and then abandoned, an application for a restricted reporting order which was accompanied by a penal notice threatening imprisonment of the Claimant, which was outside the power of the Employment Tribunal and was done in order to intimidate and threaten the Claimant.

1.2 The Respondents had breached the Tribunal Order of Employment Judge Russell to notify the SEC and FCA of the application for a penal notice and/or restricted reporting order.

1.3 The Respondents continued to fail to disclose documents in breach of Tribunal Orders, including a record of an audio call from 15 June 2016, which the Claimant contended proved the making of valid protected disclosures and wrongdoing and which was ordered to be disclosed on 11 April 2018; and that the Respondents had sought to mislead the Tribunal by denying the existence of any other audio files from 17 June 2016, in an effort to conceal those documents from the Claimant and ensure that he did not have a fair hearing.

1.4 The Respondents failed to disclosure documents in breach of another Tribunal Order made on 30 January 2018, including failing to disclose Bloomberg chats, so that the Claimant had been forced to apply for a fourth preliminary hearing on 11 April 2018; the Respondents had misled the Tribunal about the reasons why prior disclosure was not made, blaming human error when this was false.

1.5 The Respondents had misled the Tribunal at the preliminary hearing on 30 January 2018 by stating that a full investigation into every single “wash trade” had occurred, when the Respondents now admitted that some trades were not investigated; the Respondents allegedly knew that this statement could not be true.

1.6 The Respondents were continuing to fail to disclosure further documents in breach of other Tribunal Orders, including not disclosing trade distribution tickets which were created and stored before 30 January 2018; only disclosing these on 6 June 2018, when, pursuant to the Order of 30 January 2018, those documents should have been disclosed in January 2018.

1.7 The Respondents had failed to disclose an audio call from 6 September 2016.

1.8 The Respondents had seriously breached a Tribunal Order dated 11 April 2018 by seeking deliberately to withhold a large tranche of documentation,

in breach of the duty of disclosure, and to ensure that the Claimant did not receive a fair hearing; they had failed to disclose Bloomberg chats which the First Respondent had already provided to the Claimant pursuant to a Subject Access Request in 2017, but which the Respondents failed to disclose pursuant to the Tribunal order dated 11 April 2018, when those Bloomberg chats were relevant and disclosable under 11 April 2018 Order.

2 At the hearing of the application on 6 September 2018 the Claimant clarified that a strike out order was sought only on the following grounds:

2.1.1 That the Respondents had intimidated the Claimant by their penal notice in their draft restricted reporting order, which had hindered his ability to give evidence at trial. The Claimant relied on this as unreasonable conduct of the proceedings.

2.1.2 The Respondents had failed to disclose audio files for a trade on 17 June 2016; the Claimant relied on this as breaching an Order of the Tribunal and unreasonable behaviour.

2.1.3 The Respondents had failed to disclose communications about a series of “wash trades” with two clients, failed to disclose trade allocation tickets and failed to disclose further documents which were obtained and reviewed by Compliance. The Claimant relied on this as unreasonable conduct and as breach of the Tribunal Orders.

2.1.4 The Respondents had failed to conduct searches as ordered by Employment Judge Jones at a hearing on 11 April 2018 and had therefore failed to disclose documents which arose from those searches. In particular, the Claimant contended that, while Employment Judge Jones had ordered the Respondents to search Bloomberg chats, notes, emails and other documents between the named Respondents, the First Respondent and other employees and named clients, and of WhatsApp messages and text messages and audio files between the named Respondents and named clients and named Respondents themselves, using the search terms “Ash, Ashkam, Nadershahi, AN, FCA, fired, wash trad!” the Respondent had not carried out those searches. The Claimant relied on the fact that, in answer to a Subject Access Request, he had been provided with 37 Bloomberg chats which contained of those search terms, but that the Respondents had not disclosed those chats to the Claimant following the EJ Jones Order search.

3 The Respondents opposed the application for strike out. They contended that the Tribunal had ordered the Respondents to produce a draft restricted reporting order and that they had simply done so, based on a standard High Court template. The draft had been seen by Employment Judge Russell on 19 March 2018 and EJ Russell had not

taken issue with the penal notice contained in it. The Respondents contended that they would have been amenable to amending the order, but that the Claimant had never commented on the wording of it. The Respondents contended that they had not, themselves, initiated the application for a restricted reporting order, but that this had been a suggestion of Employment Judge Russell. The Respondents had decided not to pursue a restricted reporting order, in compliance with the overriding objective.

4 With regard to the audio files for 17 June 2016, the Respondents contended that three audio files segments relating to a call on 17 June 2016 were disclosed on 6 April 2018 and only a 15 second fragment was omitted. This was disclosed on 6 June 2018.

5 The Respondents contended that they had undertaken a thorough search for audio files of the conversation the Claimant alleged he had overheard on 6 August 2018. Despite a comprehensive search, it had not found such an audio file.

6 The Respondents produced witness statements from Amina Adam and Gordon McClean, explaining the searches that had been undertaken and the reasons for documents not being discovered or disclosed.

7 The Respondents also contended that they had disclosed documents in relation to cross trades and that there had been an oversight by the Compliance team in forwarding a file relating to January 2016 trades to the paralegal team which was dealing with the disclosure exercise. The Respondent said that the missing information was provided on 6 June 2016.

8 Amina Adam provided a witness statement saying that she was not aware that Compliance had filed documents in particular folders and so could not have picked up on the omission. The Respondents said that documents in relation to another four cross trades had not been included within the Compliance investigation folders, but had been disclosed by the Respondents in any event, pursuant to their ongoing duty of disclosure. The Respondents said that there had been errors in disclosure but that, in the context of a very significant disclosure exercise, involving thousands of pages and a huge retrieval and search operation, some human error was not unreasonable. The Respondents contended that all the documents obtained during the Compliance investigation had now been disclosed. The Respondents said that Compliance officers had viewed some documents on screen and that, therefore, the documents had not been saved to relevant folders. This was why the documents had not originally been identified as documents which were considered by Compliance. Further, additional documents which were disclosed on 6 June 2018 were considered in response to later ongoing investigations; those documents did not fall within the disclosure ordered on 30 January 2018. The documents had nevertheless been disclosed, out of an abundance of caution.

9 With regard to the Respondents' alleged failure to comply with the search ordered by Employment Judge Jones, Amina Adam explained that she and the Respondents' legal team had understood that the search terms set out in Employment Judge Jones's Order were conjunctive; that is, that Employment Judge Jones had ordered that each of the alternative names for the Claimant were to be searched for, along with the terms: either, "FCA", or "fired" or "wash trad!". The Respondents relied on a semi colon in the order separating the names and/or initials of the Claimant from the other search terms. The Respondents contended, as Amina Adam set out in her witness statement, that a

disjunctive search for each of the search terms individually would have produced a wholly disproportionate and unmanageable number of documents. The Respondents told the ET that a search of emails and Bloomberg chats using only the terms "Ash" and "Nadershahi" in the period 1 September 2016 - 27 February 2017 produced 42,845 documents. The Respondent said that Ms Adam had genuinely understood Employment Judge Jones' Order to require a conjunctive search and that her belief was bolstered by the fact that a disjunctive search would have produced a disproportionate and unmanageable result.

10 I heard evidence from the Claimant at the hearing on 6 September. I also heard evidence from Amina Adam, Senior Employment Counsel for the First Respondent and Stewart Edwards, Compliance Investigator. I read the witness statement of Luke Goodland, a Senior Communications Engineer, who had undertaken searches of telephone calls and of Gordon McClean, Compliance Investigator.

11 I consulted with Employment Judge Jones about her understanding of the Order which she had made on 11 April 2018. Her clear recollection was that the search terms were to be used disjunctively and that the semi colon had had no particular meaning.

Relevant Law

12 *Rule 37(1) Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013* gives an Employment Tribunal power to strike out all or part of a claim, inter alia, on the following grounds:

' … (b) that the manner in which proceedings have been conducted by or on behalf of the Claimant or the Respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued…' .

13 In *Barber v Royal Bank of Scotland Plc* [2018] UKEAT/0302/15/ Simler P described the appropriate exercise of the power to strike out:

"… there is nothing automatic about a decision to strike out and such orders are not punitive … in deciding whether to strike out a party's case for non-compliance, Tribunals must have regard to the overriding objective of seeking to deal with cases fairly and justly. That is the guiding principle and requires consideration of all the circumstances and, in particular, the following factors: the magnitude of the non-compliance; whether the failure was the responsibility of the party or his representative; the extent to which the failure causes unfairness, disruption or prejudice; whether a fair hearing is still possible; and whether striking out or some lesser remedy would be an appropriate response to the disobedience in question … "

" .. even in a case where the impugned conduct consists of deliberate failures in relation for example, to disclosure, the fundamental question of any Tribunal considering the sanction of a strike out is whether the parties' conduct has rendered a fair trial impossible.." paragraphs [15] and [16] of her judgment.

14 Simler P referred to the guidance on strike out given by Burton P in *Bolch v Chipman* [2004] IRLR 140:

> (i) There must be a finding that the party is in default of some kind, falling within Rules 37(1).
>
> (ii) If so, consideration must be given to whether a fair trial is still possible and save in exceptional circumstances, if a fair trial remains possible, the case should be permitted to proceed.
>
> (iii) Even if a fair trial is achievable, consideration must be given to whether strike out is a proportionate sanction or whether there may be a lesser sanction that can be imposed.
>
> (iv) If strike out is the only proportionate and fair course to take, reasons should be given why that is so.

15 Simler P also referred to the judgment of Sedley LJ in *James v Blockbuster Entertainment Ltd* [2—6] IRLR 630: "Sedley LJ recognised the draconian nature of the strike out power and that it is not to be readily exercised. He held, even where the conditions for making a strike out order are fulfilled, it is necessary to consider whether the sanction is a proportionate response in the particular circumstances of the case, and the answer to that question must have regard to whether the claim can be tried because time remains in which orderly preparation can take place, or whether a fair trial cannot take place…" paragraph [13] of her judgment.

Discussion and Decision

16 Having heard the evidence of Ms Adam and Mr Edwards, I considered that Ms Adam was truthful in the evidence she gave about her understanding of Employment Judge Jones's order. I asked her how long it would take to conduct a search in the terms ordered by Employment Judge Jones. Ms Adam replied that the Respondents had asked for 8 weeks to conduct the search they had understood needed to be undertaken, on conjunctive search terms. She said that, in general, time is required to conduct the search, obtain the information, review it and, then, redact it as appropriate. She considered that a disjunctive search would take considerably longer than 8 weeks.

17 I accepted the evidence of the Respondents' witnesses about the searches which they had undertaken. I decided that the Respondents had not deliberately withheld any information. I accepted the Respondents' contention that, in the context of a large search exercise, leading to 3,000 pages of documents being disclosed to the Claimant, in 10 lever arch files, it was not unreasonable for the individuals conducting the searches, occasionally, to make mistakes.

18 I considered that the search which Employment Judge Jones had ordered had not been undertaken and that the Respondents were in breach of her Order. However, I also accepted Ms Adam's evidence that the ordered search was, in reality, unwieldly and disproportionate.

19 I decided that it was likely that there were other documents which referred to the Claimant and to the circumstances of his departure from the First Respondent's employment, which had yet to be revealed on a search of communications between the individual Respondents and clients and fellow workers. It was clear that the Subject Access Request had generated a number of results wherein the individual Respondents had talked about the Claimant's departure on Bloomberg chats. This indicated that other records did exist, beyond those revealed by the Respondents' limited, conjunctive search. I decided that it was necessary for a wider search to be conducted, but I was concerned that Employment Judge Jones's search was disproportionate and impractical.

20 I decided that it would still be possible for a fair hearing to take place once a further search had been undertaken, but that fair hearing would not be able to take place on the trial dates which were currently listed.

21 I invited the parties to address the search terms which would need to be administered, in order to conduct an appropriate and proportionate search, which would nevertheless reveal whether the Respondents had discussed the Claimant's departure during the relevant search period.

22 I postponed the hearing to 3, 5 – 7, 10 – 14, 17 and 19 – 21 June 2019 (13 days). This would allow the search to be undertaken and the trial to proceed fairly with all relevant documents available.

23 It was not suggested to me that further delay would interfere with the evidence so as to render a fair hearing impossible.

24 I also accepted Ms Adam's evidence about the extensive searches that had been undertaken for audio records. I accepted the Respondents' evidence that, despite careful and repeated searches, other documents which the Claimant had requested could not be located. I did not consider that the Respondents had been unreasonable in their conduct of the case as alleged in the application to strike out.

25 I decided that the Respondents had drafted a restricted reporting order, using a High Court Template. They did not deliberately set out to intimidate the Claimant. The restricted reporting order was not originally suggested by the Respondents, but by EJ Russell. While the Claimant told me that he had been intimidated by the penal notice, I considered that he had been able fully to participate in the proceedings since the draft restricted reporting order had been sent to him. I was confident that he would continue to do so and would be able to give unfettered evidence at the Final Hearing. He was calm and confident in his evidence at the Preliminary Hearing.

26 I sum, I considered that a fair hearing was still possible, even if the Respondents, through misunderstanding of the EJ Jones 11 April 2018 Order and/or individual error, had failed to comply with Orders of the Tribunal for disclosure of documents. I did not consider that the magnitude of the Respondents' default was such as to make a strike out a proportionate response.

27 I did not order strike out of the Respondents' responses in either claim.

Costs Application

28 The Respondents argued that the Claimant's application for strike out, in itself, had been unreasonable, vexatious and/or scandalous. They contended that I should order the Claimant to pay the costs of this hearing pursuant to *r76 ET Rules of Procedure 2013*.

29 I did not agree with that submission. The Respondents had not conducted the search envisaged by Employment Judge Jones. The Respondents had not disclosed, through human error, relevant electronic and paper documents. There had already been three disclosure hearings wherein specific disclosure had been ordered against the Respondents.

30 I considered that it was not unreasonable for the Claimant to take the view that, in light of further failures to provide disclosure of documents, there was an argument that the Respondents' conduct was such as to render a fair trial impossible, because relevant documents would not available to that hearing. Further, considering the number of applications for disclosure, there was an argument that the Respondents had been unreasonable in the way that they had approached the disclosure exercise. It was therefore not unreasonable for the Claimant to argue that the Respondents' conduct met the test set out in *Rule 37*.

31 While I had not ordered strike out in the case, I did not consider that the threshold in *r76 ET Rules of Procedure 2013* for making a costs order against the Claimant had been met.

32 In order to ensure that the correct and proportionate disclosure exercise was undertaken, I listed a Preliminary Hearing Closed before me on 8 October 2018. At that hearing, I shall also give directions for any outstanding matters which need to be resolved or addressed in preparation for the final hearing. I reserved the case to myself, going forward. In a case of this procedural complexity, it would save time for a judge who was already familiar with the case to determine any further issues which arose.

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Employment Judge Brown – 25.09.2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

25.09.2018

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FOR THE TRIBUNAL OFFICE