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EMPLOYMENT TRIBUNALS

Claimant ***Respondent***

D **AND** **(1) Defence Unlimited International Limited (London)**
(2) Defence Unlimited International Limited (Ottawa)
(3) Edward Banayoti

HELD AT: **London Central** **ON:** **14 October 2019**

BEFORE: Employment Judge Glennie (Sitting alone)

Representation:

For Claimant: **Mr C Milsom, of Counsel**
For Respondent: **Neither present nor represented**

JUDGMENT ON APPLICATION TO STRIKE OUT THE RESPONSE

The judgment of the Tribunal is that the response is struck out.

REASONS

1. These reasons relate to the Claimant's application to strike out the response which was presented on behalf of all four, at the time, now three Respondents. The application is made pursuant to Rule 37(1) of the Rules of Procedure, which provides that a claim or response may be struck out on grounds which include:

(a) the manner in which the proceedings are being conducted by or on behalf of the Respondent has been scandalous, unreasonable or vexatious; and
(b) for non-compliance with any of these rules or with an order of the Tribunal.

2. The application is made on a combination of these two grounds.

3. The claim was presented on 21 November 2018 and it made complaints of sexual harassment or harassment related to sex, direct discrimination because of sex, victimisation, and breach of contract. As I have said, there were originally four Respondents to the claim. The claim against one of them was withdrawn and there therefore remain three Respondents, two companies and one named individual. One single response was presented on behalf of all of the Respondents that made a brief challenge to the factual basis of the claims, but really no more than that. There was a preliminary hearing on 21 March 2019 before me at which the Claimant was represented, as today, by Mr Milsom, and the Third Respondent in person represented all four Respondents by telephone. The relevant Orders that were made on that date were as follows:

> 3.1 Order 3, the parties shall by 11 April 2019 notify each other and the Tribunal of any applications to be made at the subsequent preliminary hearing (to which I will refer).
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> 3.2 Order 5 "The parties shall by 2 May 2019 give mutual disclosure by way of lists with copies of all documents in their possession or control that are relevant to the issues in the case. Documents that are relevant must be disclosed whether they are helpful or unhelpful to a party's case."
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> 3.3 Order 8 "The parties shall by 2 September 2019 exchange signed written statements from all witnesses to be called at the hearing, including the parties themselves. The statements should be cross-referenced to the agreed bundle and should contain all of each witness's evidence in chief as further oral evidence in chief will not be allowed without the express permission of the Tribunal".

There was further explanation of the matter of further applications in the note of the case management discussion at paragraph 4. I made reference there in 4.1 to the issue as to whether the Tribunal had jurisdiction to hear the claims against the Second and Third Respondents who are a Canadian company and the named individual, who states that he is a Canadian national. I said that if this point was to be pursued, the Claimant and the Tribunal should be notified of this as soon as possible. The further preliminary hearing was listed for 13 May.

4. I pause here to return to Orders 5 and 8. It is perhaps a little dangerous for the judge who actually made the orders to comment on whether they are clear or not, but I feel bound to do so. I believe that they are clear and they set out in terms what it is that the parties are expected to do.

5. There was a further preliminary hearing before Regional Employment Judge Potter on 13 May 2019. The Orders made then are at page 65 onwards in the bundle. Again Mr Milsom attended on behalf of the Claimant.

There was no attendance of any form on behalf of the Respondents. The Third Respondent had sent an email on 2 May stating that the point about being Canadian national and Canadian registered company was still being pursued, and so it may be that it could be argued that this was an indication of what the point about jurisdiction was. But in any event Judge Potter said that that this was not sufficient to challenge the Tribunal's jurisdiction, and that if they wished to do so they should participate in the proceedings and not simply stay away.

6. Importantly, Judge Potter noted that there had not been compliance with the order for a provision of a list of documents and in clause 4 of the orders made on that date Judge Potter said that a warning was given that the Tribunal was considering striking out the response on the basis of:

(a) failure actively to pursue the claim;
(b) unreasonable conduct of the proceedings;
(c) failure to comply with the Employment Tribunal's Orders.

Then clause 5 of the orders provided that if the Respondents resist strike out they are to provide their reasons in writing to the Tribunal and the Claimant by 3 June 2019. There was a further warning that the matter would proceed to the hearing which is listed today.

7. The position is that the Respondents have not sent a list of documents. That is in my judgment a serious default. They have sent some copies of documents which they evidently believe are potentially helpful to their defence of the claim, but there is no list so there is no opportunity for the Tribunal or the Claimant to see what, if any, attempt there has been to comply with the obligations under the order. As I have said, I consider that it was made clear to the Respondents that they were not simply to provide documents that were helpful, but anything that was relevant. Without a list it is impossible to see whether that has happened, or been attempted.

8. It is also the case that the Respondents have not provided any witness statements. So far as that is concerned, on 2 October the Respondents sent an email to the Claimant and to the Tribunal which said in respect of witness statements "we said before we don't have witnesses at this time, we welcome the statements of the Claimant's witnesses". Also on 2 October the Claimant's solicitors applied for an Unless Order in respect of the witness statements. That was replied to on 10 October by a letter sent on the instruction of Acting Regional Employment Judge Wade which addressed the question of the Unless Order and other matters that had been raised by the Respondents.

9. The Respondents were by this time seeking to postpone the hearing or to attend by telephone or video link, saying they were not able to be present at this hearing. The letter read as follows, and it is said to be an Order by Judge Wade:

1. The Respondents may not give evidence by telephone or video link, not least because they have failed to provide witness statements.

Even if statements are provided their evidence is pivotal and should be in person.

2. Whilst no Unless Order is made, the Employment Judge will consider striking out the responses at the start of the hearing for failure to comply with Orders and because of the manner in which the litigation has been conducted.
3. The hearing will not be postponed.
4. If the Respondents have failed to exchange witness statements in time, making it impossible for the Claimant to prepare for the hearing, this will be another reason for striking out the claim [sic].
5. Due to the complexity of the situation and the nature of the claims it is not appropriate to strike the Respondents out before the hearing and if the responses are struck out at the hearing there will still need to be a hearing to decide the case.

10. The final piece of correspondence arrived at 06:40 this morning from the Respondents, again to the Tribunal and to the Claimant's solicitors. This is headed "urgent request (witness statements)" and it reads as follows:

> "We respectfully request from the Employment Tribunal to allow the Respondent some time for preparing witness statements from the different parties. The delay came from the misunderstanding for the term witness statement, as in North America. Thank you for looking favourably to our request.

11. In terms of the principals to be applied, I have had regard to **Blockbuster Entertainment Limited v James [2006] IRLR 630** which related to Rule 37(1b). Here the Court of Appeal said that the Tribunal should consider striking out where unreasonable conduct has taken the form of a deliberate and persistent disregard of required procedural steps or it has made a fair trial impossible. Mr Milsom agrees that this is not the latter situation, but relies on the former. I either of those conditions is fulfilled, then the Tribunal should consider whether striking out is a proportionate response to the conduct in question. In **Rolls Royce Plc v Riddle 2008 IRLR 873** Lady Smith in the Employment Appeal Tribunal said that strike out was open to a Tribunal in circumstances where a fair trial is possible but there has been failure to comply with an order of the court amounting to wilful, deliberate, or contumelious disobedience.

12. There has been clear default in this case. The Respondents have failed to comply with the orders for disclosure of documents and the provision of witness statements. There has been no explanation as regards the failure to produce a list of documents. There has been a purported explanation of the failure to exchange witness statements which is in the email of 14 October which I have just read. To the extent that that email is saying, if it is, that the Respondents did not understand what was meant by that order, I do not believe it. I reject the assertion, if that is what it is meant to be, that the failure to provide a witness statement or statements has come about because of a misunderstanding of what was required. In my judgment that order made it clear what was required. Furthermore, the Respondents were warned by

Judge Potter that strike out was being actively considered because at that stage they had failed to comply with the order for disclosure and were failing to participate in the proceedings.

13. All of these matters lead me to find that it is the case that there has been deliberate or contumelious default on the part of the Respondents. I also consider that they have conducted the proceedings unreasonably.

14. I therefore have to consider whether it would be proportionate to strike out the response. First, I take into account what I have found as to the lack of explanation for the failure to give disclosure of documents, and what I found to be either an incomprehensible, or (more likely it seems to me) untrue attempted explanation of the failure to provide witness statements. I take into account that there would be little prejudice to the Respondents in the circumstances were I to strike out the response. They are not present, there is no indication that they are going to be present, and they have been informed that the hearing is going to proceed in any event.

15. Another matter was briefly touched on by Mr Milsom, namely that the email received this morning indicates that there is some prospect that the Respondents will seek to intervene or to make assertions in the course of the hearing if it proceeds, albeit at a distance and by email. One of the effects of an Order striking out the response is that pursuant to Rule 21(3), which is brought into the equation by Rule 37(3), where a party's response has been struck out they can only participate in the hearing to the extent permitted by the Employment Judge. The strike out order emphasises that the Tribunal has control over any participation that the Respondents might attempt to make.

16. Therefore, I have struck out the response. The practical effect is that the hearing will proceed on the basis that the Respondent has ceased to contest the claim. Under the Employment Tribunals Act s.4(3)(g) the hearing should be heard by an Employment Judge alone, and therefore I will proceed with the hearing.

Employment Judge Glennie

Dated: 22 Nov 2019

Judgment and Reasons sent to the parties on:

25/11/2019

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For the Tribunal Office