



EMPLOYMENT TRIBUNALS

Claimant: Mr G Cocker

Respondent: Kelsey Publishing Limited

Heard at: London South by CVP **On: 4 January 2021**

Before: Employment Judge Khalil sitting with members
Ms Moore
Mr Townsend

Appearances

For the claimant: in person
For the respondent: Mr Bellm, Solicitor

JUDGMENT

The respondent's application to strike out the claim under Rule 37 (1) (b) and/or (e) is refused. The Tribunal did however decide to postpone the full merits Hearing.

Reasons

The application, documents and appearances

1. The Tribunal considered an application from the respondent to strike out the claim under rule 37 (1) (b) and/or (e) on the grounds that the claimant's conduct in the manner in which had proceeded was scandalous, unreasonable or vexatious.
2. The application was made on 30 December 2020. The Tribunal enquired of the claimant if he was ready to deal with and answer the application, he confirmed he was.
3. This was the first day of a 4 day Hearing which had been listed in May 2020 following a Case Management Hearing.
4. The claimant appeared at that hearing and was represented by his union representative, Mr Wheal from the National Union of Journalists. He appeared in person today. The respondent appeared by Mr Bellm, Solicitor.
5. By way of summary, the respondent's application had 4 limbs:

- That the claimant had caused exchange of witness statements to be delayed and take place on 24 December 2020, the last working day before the Hearing. (Exchange of witness statements had been Ordered to take place on or before 25 September 2020).
 - That the claimant had served his own bundle of documents on 24 December 2020 which included documents not previously disclosed.
 - That the claimant had been dishonest with the respondent and the Tribunal by insisting he had not received unredacted documents from the respondent. The documents sought had then appeared in his bundle when served on the respondent on 24 December 2020. Further, the claimant had been dishonest to the Tribunal when asserting that the respondent had agreed with the claimant on 12 October 2020 to exchange witness statements on 7 December 2020.
 - That the claimant was placing reliance in evidence/disclosure on unlawfully obtained documents/video footage.
6. The above summary was agreed by the parties save that the respondent added that the claimant had misled the Tribunal by stating that he required unredacted documents to complete his witness statement.
 7. The Tribunal heard oral submissions from the respondent who made its application and the claimant who opposed it.
 8. The Tribunal was taken to various documents in the parties respective bundles. The Tribunal also had the written application of the respondent and were also directed to read paragraphs 24-41 of Sam Hammond's witness statement, the former Head of HR & Payroll for the respondent.
 9. The Tribunal was directed to read:
 - Documents 212 (from the claimant's bundle) and 224 (from the respondent's bundle) in relation to documents purported by the respondent to be fabrications/manufactured/concocted by the claimant.
 - Documents 78, 89, 374, 212 from the claimant's bundle in relation to documents alleged to have not been disclosed before by the claimant during disclosure.
 - Documents 190, 159, 313, 224, 186, 259 (illustratively) from the claimant's bundle which the respondent said had been sought from the respondent unredacted, yet appeared in C's bundle unredacted.
 - Documents in relation to an internal investigation regarding video surveillance installed and forward on of emails to the claimant from an email account of Matt Tate (employee of the respondent) (320-323).

Applicable Law

10. Rule 2 of the Employment Tribunals Regulations, Schedule 1, 2013 sets out the Tribunal's Overriding Objective:

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable:

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

11. Rule 37 (1) of the Employment Tribunal Regulations Schedule 1 2013 provides:

At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the 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;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

Findings and conclusions

12. By case management orders dated 15 May 2020, disclosure was due to be completed by 5 June 2020 (video footage by 19 June 2020) and the Bundle by 17 July 2020.

13. Witness statements were due to be exchanged by 25 September 2020.

14. A bundle was sent to the claimant on 14 August 2020.

15. The claimant made an application for specific disclosure on 1 September 2020. By a letter dated 6 October 2020, the Tribunal wrote to both parties stating that the claimant must write to the respondent requesting documents and explaining why they are relevant.
16. The claimant pursued the application and stated he was seeking several documents, unredacted. The claimant wrote to the respondent on 13 October 2020 attaching a schedule and then to the Tribunal on 21 October 2020.
17. The Tribunal wrote to the respondent seeking its views. The application was opposed in an email dated 20 November 2020.
18. The claimant also stated to the Tribunal on 23 November 2020, that he had agreed with the respondent (on 12 October 2020) to exchange witness statements on 7 December 2020. This was not agreed by the respondent.
19. The Tribunal observed that 5 of the 6 documents referred to illustratively by the respondent had appeared in the claimant's bundle. The Tribunal compared this with the claimant's schedule attached to his application for disclosure. Thus the Tribunal found, he was in possession of many of the documents he was seeking from the respondent. There was no explanation or plausible explanation offered by the claimant in this regard.
20. The Tribunal could not resolve without hearing evidence (including from the respondent's Solicitor) whether anything had been agreed on 12 October 2020 regarding delaying witness statements.
21. The parties were polarised in relation to how the video footage in the workplace came to be installed. The respondent alleged the claimant had installed it without the permission or knowledge of the respondent and that this was unlawful. The claimant alleged the respondent had installed it themselves. Further, the respondent claimed the claimant had set up a forwarding of an employee's (Matt Tate) emails to an email account in his name. Again, the respondent said this was unlawful.
22. The claimant claimed he had been provided documentation (including the video footage which showed other employee wrong-doing) and including the text of an email 212 which was in an irregular email format, by a whistle-blower.
23. In response to Tribunal questioning, the claimant disputed there had been a discussion about the identity of the whistle-blower at the case management hearing. The respondent said there had been (based on their own note of that hearing) but the claimant was not forthcoming. The Tribunal checked during its deliberations any notes of the case management hearing and found these accorded with the respondent's own notes. The claimant appeared to have said that he would need to speak with his representative about disclosing the identity and separately, his representative stated he did not think the identity of the whistle-blower should be made known. The Tribunal concluded that the claimant was not frank with the Tribunal in this regard which cast some doubt on his credibility. He would or should have known his position on this unambiguously.

24. The Tribunal concluded, having regard to the foregoing, that the claimant had not been truthful to the Tribunal in relation to the unredacted documents in his possession (and his position on the discussion around the identity of the whistle-blower). This was scandalous and/or unreasonable and/or vexatious conduct. This did not mean however that the claimant could not be believed about all or other aspects of his case, but it was a serious criticism of his conduct and credibility.
25. Notwithstanding, the Tribunal felt striking the case out on this basis was too draconian and not proportionate. A fair trial was still possible. The late service of additional disclosure and witness statements was unreasonable conduct too but it was not commensurate or proportionate to strike out the claim on this basis either or in conjunction with the above conclusions. A fair trial remained possible.
26. However the Tribunal were unanimous in their view that the case was not ready for trial. In consequence of last minute disclosure, the Tribunal was not satisfied about how much additional disclosure had been made by the claimant on 24 December 2020. The respondent estimated between 4 and up to 100 documents (in the limited time available), though some may not be relevant. The claimant indicated only 2 additional documents had been disclosed by him. This was an unsatisfactory state of affairs. The position on alleged non-disclosure by the respondent (asserted by the claimant) remained completely unclear too.
27. In addition, as the claimant had been evasive in relation to the identity of the whistle-blower, the Tribunal felt compelled to Order this to be revealed. This aspect of the case went beyond the alleged unreasonable conduct of reliance on unlawfully obtained documents. The Tribunal could not determine that today. It also went directly to the issue of the respondent's alternative case for dismissal based on post termination knowledge which would have a potentially significant impact on remedy.
28. Having regard to the overriding interest to deal with cases fairly and justly, a postponement was considered necessary. There was a risk that the trial could otherwise be part heard or the Tribunal would resolve the issues without proper disclosure or evidence before it.
29. In consequence of the above, case management orders were made related to documents, information, the bundle and evidence.
30. Any applications including costs occasioned by today are reserved for the full hearing.

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Employment Judge Khalil

6 January 2021