



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss Q

**Respondent:** Ben Adams Architects Limited

## RECORD OF A PRELIMINARY HEARING

**Heard at:** Croydon South

**On:** 22 March 2022

**Before:** Employment Judge Hart

### Appearances

For the Claimant: Ms A Nanhon-Robinson (counsel)

For the Respondent: Mr R Cater (consultant)

## JUDGMENT

### The Judgment of the Tribunal is that:

1. The Claimant's application to strike out the Respondent's response for non-compliance with any Rule or Order of the Tribunal (namely disclosure of certain documents) was dismissed.
2. The Respondent's application to strike out the Claimant's claim, on the grounds that the manner in which the proceedings had been conducted by or on behalf of the Claimant in seeking disclosure of those documents has been scandalous, unreasonable or vexatious, was not pursued.

## REASONS

1. These are the reasons for the Tribunal's decision to dismiss the Claimant's application to strike out the Respondent's response. Oral Judgment was given

at the hearing. Full written reasons have not been requested but the Claimant requested that summary reasons be provided. The Tribunal has agreed to set out reasons only to the extent that it considered it proportionate to do so.

2. By email on 10 May 2021 the Claimant renewed her application to strike out the Respondent's case as a result of their conduct and the negative impact on the Claimant's health. This application was considered by the Tribunal at the Preliminary Hearing on the 22 March 2022. The conduct in question was in relation to non-disclosure of certain documents. In support of the application the Claimant relied on a bundle of documents amounting to 128 pages, which included an unsigned witness statement dated 30 November 2020 from Mr John Patrick Stewart, the Claimant's lay representative. The Respondent's counter application to strike out dated 24 January 2021 was not pursued. It was however taken into account as part of the Respondent's submissions in response to the Claimant's application.
3. The claim form was submitted on the 29 March 2018 and the response form was submitted on the 20 June 2018. There was an initial lengthy delay in listing for a hearing due to reasons that are not relevant to this application. Eventually there was a Preliminary Hearing (case management) before Employment Judge Hyde on the 30 August 2019. The parties were ordered to disclose documents by 29 November 2019, with the aim of an agreed hearing bundle being produced by 20 January 2020. The final hearing was listed for 7-15 December 2020.
4. Unfortunately by 30 November 2020 there was still a dispute between the parties over non-disclosure by the Respondent. There was no agreed bundle and witness statements had not been exchanged. The Claimant made an application to strike out the Respondent's case, postpone the hearing, and applied for costs. Accompanying the application was a GP letter dated 27 November 2020 stating that the Claimant *"has been suffering from increased stress and anxiety with poor sleep. This is directly related to the stress from an upcoming tribunal and the preparation required for this. We are providing support for her mental health and reviewing her. Please consider these medical factors that are affecting her at present."*
5. On 2 December 2020 a joint application was made to postpone the final hearing, and for the Tribunal to order that the Respondent disclosed all documents by 14 December 2020 and that the bundle shall be completed by the Respondent by 18 January 2021. The parties agreed that the question of costs in relation to the postponement be addressed at the conclusion of the proceedings.
6. On 15 December 2020 the Claimant made a further application to strike out the Respondent's response for failure to disclose documents by the agreed date of 14 December 2020. This application was considered by Regional Employment Judge Freer on 4 January 2021. The application to strike out was "refused at this stage on the basis that fresh directions have been made which includes disclosure". The directions referred to were those set out in the email of the 2 December 2020 seeking postponement of the hearing. The case was to be re-listed for seven days.

7. On the 14 January 2021 the Claimant renewed her application for strike out. On 24 January 2021 the Respondent made a counter application for strike out on the grounds of the Claimant's unreasonable and vexatious conduct in pursuing disclosure. The Claimant made a further request for disclosure of specific documents on 27 April 2021 and renewed the application for strike out by email on the 10 May 2021. Since this date there has been no further progress and the final hearing had not been re-listed.
8. The above is not a complete chronology of all the requests for disclosure by the Claimant, and the Respondent's responses, but it gives an indication that this matter has been an ongoing issue for over a year. The Tribunal makes no finding as to where the fault lies, since it was not necessary to do so, on the facts of this case, in order to determine the strike out application. These are matters that may be subject to an application for costs in due course.
9. At the Preliminary Hearing before me, the Respondent confirmed that there was a hearing bundles of 435 pages (a final version yet to be served on the Claimant). The Claimant confirmed that outstanding disclosure was only in relation to certain documents and that these were:
  - 9.1 Further emails surrounding the office cycle events that were planned (the issue being that the Respondent had not disclosed any documents relating to the cycle event in July 2017).
  - 9.2 Emails regarding Ben Meyers and his involvement in Wade Street.
  - 9.3 The Claimant's emails to the Respondent evidencing that she worked late hours and on weekends (e.g. Charlotte's wedding).
  - 9.4 The email confirming that the Sketch Up vs Rhino issue was not an issue and that it was the Respondent's fault for not communicating properly.
  - 9.5 The "some records of staff calling the Respondent to let it know they are running 10 minutes late because of traffic or whatever" referred to in the email from Ms Patricia Hall dated 14 December 2020.
  - 9.6 Any further documents in the Respondent's possession regarding the incident re X, the disciplinary, the meetings [including notes made by Sheila, Franscesa, Alex, Michael]". The Claimant accepted that she has been provided with disclosure of formal meeting notes but is seeking disclosure of any handwritten notes made by those present.
10. The Claimant submitted that a fair trial was no longer possible. It was conceded on her behalf that there were no medical reasons why the hearing could not proceed. The application was put on the basis that the Claimant had lost trust in the process due to repeated non-disclosure by the Respondent. It was accepted that at times the Respondent had been cooperative but the majority of the time it had not. The Claimant did not make the application lightly and it was the behaviour of the Respondent that was in issue. The parties were not on an equal footing because the Respondent was intentionally not producing documents.
11. The Respondent submitted that a fair trial was still possible, that there may be issues regarding disclosure but that was a matter for cross examination and submissions. The hearing bundle was very nearly complete and that the parties could work cooperatively to resolve any outstanding disclosure, including the Respondent confirming if a document did not exist.

12. The Tribunal has the power under the Employment Tribunal Rules of Procedure rule 37(1)(c) to strike out all or part of a claim or response for non-compliance with any of the tribunal Rules or with an Order of the tribunal. When considering its powers to strike out under this rule the tribunal should take into account the overriding objective to deal with cases fairly and justly. This requires the tribunal to consider all the relevant factors including: the magnitude of the non-compliance; whether the default was the responsibility of the party or his or her representative; what disruption, unfairness or prejudice has been caused; whether a fair trial would still be possible, and whether striking out or some lesser remedy would be an appropriate response to the disobedience: **Weir Values (UK) Ltd v Armitage** [2004] ICR 371 (EAT).
13. Applying these factors the Tribunal has concluded that a strike out would not be a proportionate response to non-compliance with the Order for disclosure. It is a draconian power and should only be used as a last resort. In this case this point had not been reached. In particular, on the facts there has at least been partial disclosure and there is now a substantial bundle in existence. The outstanding disclosure appears to be in relation to some discrete matters. More importantly a fair trial is still possible in this case, and there are less draconian measures that could be considered to show disapproval of a party's conduct, including an application for costs.
14. The Claimant may be correct that the Respondent has documents in its possession which it has not fully disclosed. However that is not a reason to strike out the Respondent's response. The failure to disclose can be dealt with through cross examination and submissions at the final hearing. Negative inferences can be drawn against the Respondent if the Tribunal concluded that there are documents that should have been disclosed which have not been. In the case management orders the Tribunal will identify those outstanding documents and if they are not disclosed then this Order can be referred to at the final hearing.
15. The impact that these proceedings are having on the Claimant's health is a concern but the Tribunal noted that the only medical evidence before the Tribunal is a GP letter dated 27 November 2020, some time ago. Further it does not suggest that the Claimant would be unable to attend a final hearing. Measures can be put in place by the tribunal to assist a party to fully participate in a hearing. The Claimant should make an application if any such measures are required in this case.

Employment Judge Hart  
30 March 2022

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