EMPLOYMENT TRIBUNALS

Claimant: **Tejashree Tejas Solanki**

Respondents: **1. Wellcare Recruitments Ltd**
2. Wellcare Crewe Ltd
3. Anoop Pappachan
4. Shaiju Devassy

Heard at: **Birmingham (by CVP)** **On: 27 April 2022**

Before: **Employment Judge Edmonds**
Mrs E Shenton
Mr I Morrison

Representation:
Claimant **Ms M Bouffé**
Respondents **Mr H Anyiam**
«resp_others»

JUDGMENT

The claimant's application to strike out the respondents' response under Rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 is refused.

REASONS

1. This application for strike out arose during the course of the final hearing, and was dealt with on 27 April 2022. Oral reasons were provided at the time, however these written reasons are produced pursuant to a request from the claimant's representative at the hearing on 28 April 2022.

Findings of Fact

2. Since submitting her claim, the claimant had relocated to India. As a result, at a preliminary hearing on 15 April 2021, Employment Judge Meichen ordered that the final hearing take place via CVP video link.

3. Since that preliminary hearing, the case of *Agbabiaka (evidence from abroad; Nare guidance) [2021] UKUT 286 (IAC)* has given important clarification in relation to the giving of oral evidence from outside the United Kingdom, and specifically in relation to the process to be followed to establish whether the government of the foreign state in question has any objection to this.

4. At the start of the final hearing on 25 April 2022, a discussion was held between the parties and the Tribunal as to whether the claimant had followed that process to establish that there was no objection to her giving evidence from India. The respondents' representative had prepared an "Opening Note" on the *Agbabiaka* case, in which he had submitted that the claimant should not be allowed to give oral evidence in these proceedings without it. The Tribunal confirmed that witnesses in Employment Tribunal hearings who wish to give evidence from outside the United Kingdom need to contact the Taking of Evidence Unit at the Foreign, Commonwealth and Development Office to gain the appropriate permission in advance. We mention at this point that Presidential Guidance on Taking Oral Evidence by Video or Telephone from Persons Located Abroad was issued on 27 April 2022, which slightly differs from the process discussed between the parties, however that Presidential Guidance had not been released at the point of discussion and the core principle remains unchanged in that it is still necessary for it to be verified through the Taking of Evidence Unit that there is no objection to oral evidence being given from the relevant state (the main change being that the parties can now notify the Tribunal of their intent and HMCTS will then contact the Taking of Evidence Unit on their behalf).

5. The claimant accepted that she had not realised the need to follow this process (a position which we do understand given that the preliminary hearing pre-dated *Agbabiaka* and therefore would not have referenced this), and her representative promptly contacted the Taking of Evidence Unit to take the matter forward. It was agreed between the Tribunal and the parties that we would therefore commence with the respondents' evidence and then either progress to the claimant if confirmation had been issued by the Taking of Evidence Unit, or go part-heard and re-list the remainder of the hearing for another date. The third and fourth respondents were present for these discussions.

6. Evidence then commenced with the third respondent's evidence, but at several intervals during Monday 25 April 2022 and Tuesday 26 April 2022 the Tribunal requested (and were given) updates on the progress of the claimant's communications with the Taking of Evidence Unit. Again, the third and fourth respondents were present for these discussions.

7. On 26 April 2022 at around 2.45pm (at which time the third respondent was still giving evidence), the Tribunal commented on a number of technical difficulties that were occurring over CVP (some of which was specifically in relation to the third respondent) and raised the possibility of the third and fourth respondents coming into the Employment Tribunal building to give their evidence the following day. No objection was made by the third or fourth respondent to this suggestion, and it was agreed to discuss the matter again in around one hour.

8. Once evidence had finished for that day (with the third respondent still part way through his evidence and still under oath), the Tribunal confirmed that it wished the third and fourth respondents to attend the Tribunal in person the following day. At this point the third respondent said that he had a leg injury which meant he was unable to travel and therefore requested that he give evidence by CVP. When questioned about the leg injury, he said that it was a sprained ankle which had occurred the previous day, and that standing caused him pain. This had not been referenced at 2.45pm.

9. At this point the claimant's representative requested a private discussion with the Tribunal. The Tribunal clarified that the respondents' representative should remain present, but it was agreed that the witnesses would leave the CVP hearing temporarily whilst the Tribunal heard what the claimant's representative had to say. The claimant's representative then notified the Tribunal that she had been told at lunchtime that day that the third respondent may be in India himself. She made clear that she had not as yet been able to take specific instructions, did not have any further information about this, and could not guarantee that this was the case, but that she felt an ethical obligation to disclose that information. The Tribunal would mention at this point that it is unfortunate that the matter was not explored earlier in the afternoon, upon the claimant's representative first becoming aware of the possibility of an issue.

10. The witnesses then rejoined the hearing and the Tribunal asked the third respondent where he was currently located, reminding him that he was under oath. The third respondent then said that he was in India. He said that he had been visiting family and had intended to return prior to the hearing but had not been able to and thought that it would be fine to do the hearing from India given that it was via CVP. When asked why he had not told the Tribunal this before, especially given the detailed discussions about India and giving evidence from abroad, he said that he didn't realise it was a problem as he is a British citizen whereas the claimant is not. He also reiterated that he does have an ankle injury. He said that he was not misleading the Tribunal, and apologised. The fourth respondent also confirmed when asked that he had been aware that the third respondent was in India.

11. At this point, given that we were about to finish for the day anyway, we agreed to all reflect on what had happened overnight and to reconvene the following day to discuss the matter further, via CVP. An email was then sent to the parties' representatives to ask them to make any submissions they wished to make about the matter when we reconvened the next day.

12. On 27 April 2022 the claimant then applied for the respondents' response to be struck out, under Rule 37(1)(b) of the Employment Tribunal Rules ("the ET Rules"). This application was opposed on behalf of the respondents, and the Tribunal permitted the respondents' representative to take until 11.45am (and then until 12pm as he needed a few more minutes) to prepare written submissions to support this. We are grateful to both representatives for preparing their helpful submissions at short notice.

Admissibility of evidence

13. Before we address the issue of strike out itself, we wish to first address whether the evidence given by the third respondent prior to it coming to light that he was in India is admissible, as this is relevant to the application for strike out. Neither legal representative was able to source any legal precedent on this specific issue.

14. We conclude that the oral evidence given from India remains admissible. In *Agbabiaka,* the Upper Tribunal did not say that such evidence would be inadmissible, but rather that

> "There has long been an understanding among Nation States that one State should not seek to exercise the powers of its courts within the territory of another, without having the permission of that other State to do so. Any breach of that understanding by a court or tribunal in the United Kingdom risks damaging this country's diplomatic relations with other States and is, thus, contrary to the public interest. The potential damage includes harm to the interests of justice since, if a court or tribunal acts in such a way as to damage international relations with another State, this risks permission being refused in subsequent cases, where evidence needs to be taken from within that State."

    The focus is therefore on the potential consequences for diplomatic relations, and not for admissibility of that oral evidence.

15. Both *Agbabiaka* and *Nare (evidence by electronic means) Zimbabwe [2011] UKUT 443 (IAC)* (which is referenced in *Agbabiaka*) give clear guidance on the process that should be followed by parties when seeking to give oral evidence from outside the United Kingdom. *Nare* makes clear that the witness should make an application to call evidence via video link and be in a position to inform the Tribunal that the relevant foreign government raises no objection to that, but that the decision on whether to grant the application is a judicial one. Of course, in this case there was no application as the third respondent did not inform the Tribunal of his location. We would also mention that decisions of the Upper Tribunal, *Agbabiaka* and *Nare* are not formally binding on the Employment Tribunals, however for the avoidance of doubt we do consider the principles set out in those cases to be helpful guidance which has informed our conclusions.

16. Rule 41 of the ET Rules states that "…The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts". In addition, we have regard to the Overriding Objective to deal with cases fairly and justly, including ensuring that the parties are on an equal footing, dealing with cases in a proportionate manner, and avoiding unnecessary formality, delay and expense.

17. Whilst we make absolutely clear that the third respondent should not have given oral evidence from India without going through the appropriate steps set out above, it has now happened. We conclude that it would not be appropriate to say that the evidence already given is now inadmissible. Were we to do that, we share the concerns put forward by the claimant that this would require his evidence to be re-heard. This would cause significant prejudice to the claimant given that the third respondent would have advance warning of the questions that would be asked of him. It would also result in any re-listed hearing having to be of longer duration to allow time to

hear all of that evidence again. In our view, the more appropriate course of action, in line with the Overriding Objective, is to permit the oral evidence already given to remain admissible, but not to permit the third respondent to give any further evidence from outside of the United Kingdom without the appropriate confirmation from the Taking of Evidence Unit.

Strike Out: Law and Conclusions

1. Rule 37 of the ET Rules states:

   (1) 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) ……

      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) ……

      d) ……

      e) ……

   (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

   (3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

2. We deal first with section 37(2) above. The respondents submitted that they had not been given a reasonable opportunity to make representations. Whilst we appreciate that this issue only arose on the afternoon of 26 April 2022 and the application for strike out made in the morning of 27 April 2022, this was because the issue only arose unexpectedly during the hearing. We conclude that the application was made as soon as reasonably practicable, and was of course caused by a situation of the respondent's own creation. By allowing the respondents' representative 1.5 hours to prepare to deal with the issue this morning, this was a reasonable opportunity to make representations.

3. It was made clear in *Blockbuster Entertainment Ltd v James 2006 IRLR 630, CA*, that the power of strike out under Rule 37(1)(b) was a "draconian power, not to be readily exercised" and that there must be either:

   a. deliberate and persistent disregard of the required procedural steps; or

   b. it has made a fair trial impossible

   and in both cases strike out must be proportionate.

4. Turning first to the question as to whether there was a deliberate and persistent disregard of the required procedural steps, in this case the required procedural step would be to obtain confirmation from the Taking of Evidence Unit that the government of India had no objection to the giving evidence in relation to UK Employment Tribunal proceedings from their territory.

5. The third respondent says that he did not appreciate that this requirement applied to him as well as the claimant as she is not a British Citizen whereas he is. However, the wording used by the Tribunal when discussing the issue on 25 April 2022 was that "witnesses" need to obtain the relevant permission and therefore sufficient information was provided for him to understand that this applied to him. Having said that, we can understand some level of uncertainty as this is a novel area and he is not legally qualified. We can therefore accept that he might not have been sure of the position initially, however we believe that there was sufficient information given to him for him to at least see the need to check the position. He did not.

6. What is more important is that on the second day of the hearing when it was first suggested that he should attend the Tribunal, he did not mention that he was abroad and therefore presumably could not attend in person. We can see no good reason why he did not raise it at that point. Indeed, when he was formally requested to attend the Tribunal at the end of the day, he only referred to his ankle as being a reason for not attending and again did not reference being in India. If he genuinely thought there was no issue with him being in India, then he would have said this as at least being part of the reason why he couldn't attend the hearing in person. It was only when asked the direct question that he said where he was. The respondents' representative submitted that the third respondent had been frank, upfront and direct when questioned about where he was: this was not frank and upfront, it was in fact misleading.

7. Having said that, we do not find that there was a deliberate and persistant disregard for the required procedural steps. We find that it was understandable that he did not realise the issue prior to the hearing, and also find that we can appreciate he might not have been certain of how the issue applied to his situation even when the claimant's situation was discussed at the start of the hearing. What the Tribunal do however take issue with is the fact that the third respondent did not check the position at that point or disclose his location at any time prior to being asked the direct question at the end of the second day of evidence. It is the third respondent's lack of transparency and what we find to be the deliberate misleading of the Tribunal that is at issue here, rather than the failure to take the required procedural step itself.

8. We should also note that, in relation to the fourth respondent, we conclude that he should also have been aware of the issue, given that he was present throughout the hearing and knew that the third respondent was in India. However, we do have some sympathy for his situation, in that he was not actively giving evidence as yet and it was not him who was abroad. Therefore, whilst we do feel he should have said something, we cannot view his conduct as strongly as we view the third respondent's in that he did not mislead the Tribunal.

9. We next address whether a fair hearing remains possible, which must be considered regardless of whether there has been any deceit on the part of the party against whom the application is made. Whilst we take on board the points raised on behalf of the claimant and the various helpful authorities put forward, including the case of *Emuemukoro v 1) Croma Vigilant (Scotland) Ltd and ors 2022 ICR 327,* that it need not be impossible to have a fair hearing for evermore, we find that a fair hearing is still possible.

10. As outlined above, we have concluded that the evidence already provided by the third respondent remains admissible, despite what has happened. Therefore, the third respondent will not be given a second opportunity to give oral evidence on matters already covered.

11. It has also been submitted that re-listing the hearing will cause unfair delay and prejudice to the claimant. We respectfully disagree. The case was going to be part-heard in any case (assuming that confirmation that there was no objection to the claimant giving evidence from India was not received during the course of the hearing, which was unlikely). In addition, whilst we appreciate the claimant's representative would not be aware of this fact when preparing her submissions, the Tribunal is able to offer the same re-listing window to the parties despite the length of the re-convened hearing to be increased to address the third respondent's remaining evidence. There will therefore be no significant delay to the parties.

12. We have also considered whether the third and/or fourth respondent's credibility has been damaged to the point where it is impossible to have a fair trial: this can occur where the Tribunal's trust in a party's veracity has been irreparably damaged. The claimant's representative pointed the Tribunal to two helpful cases in this regard, *Sud v The Mayor and Burgesses of the London Borough of Hounslow and anor EAT 0182/14* (in which credibility was fatally undermined by the claimant having lied about her medical condition and altered documents to mislead the Tribunal) and *Chidzoy v British Broadcasting Corporation EAT 0097/17* (where the claimant discussed her case with a journalist during a break, despite having been told that she should not speak to anyone about her evidence so as she was under oath).

13. We agree that matters such as this can affect credibility, and that is so notwithstanding that the issue was not directly relevant to the subject matter of the case, especially given that the third respondent was under oath at the relevant time. It is our conclusion that the third respondent did mislead the Tribunal by remaining silent when asked to attend the hearing in person, then only referring to his ankle injury, and only admitting that he was in India when directly asked about that. That said, we do not conclude that the veracity of his evidence has been irreparably damaged by this issue alone. We also concluded that, whilst the fourth respondent should have spoken out, he did not mislead the Tribunal.

14. As an alternative to strike out, there is another option open to the Tribunal, which is to continue with the case (on a re-listed date in respect of the third respondent's evidence) but to consider his credibility when it comes to assessing his evidence once the case has been heard in its entirety. We conclude that in this way a fair trial is still possible.

15. Having identified that there is an alternative available to the Tribunal in which a fair trial is still possible, it is therefore our conclusion that a fair trial remains possible and it would not be proportionate to strike out any or all of the respondents' response in this case.

16. However, we do make clear that:

    a. The third respondent has misled the Tribunal under oath and we are entitled to take that into account in due course when it comes to our final deliberations in this case; and

    b. In line with Rule 76 of the ET Rules, we shall be considering whether it is appropriate to make a costs order in relation to any additional time spent (both this week and at the relisted hearing) by the claimant's representative on this matter. We believe it is appropriate to allow the claimant sufficient time to assess what additional costs she has incurred and therefore this will be addressed at the re-listed hearing in due course.

17. The case will go part-heard and has now been relisted for **10 to 14 October 2022**. A separate Notice of Hearing will be sent to the parties. The third respondent is reminded that he remains under oath until his evidence is completed and is therefore prohibited from discussing his evidence with anyone other than in the very specific circumstances set out below.

    a. The Tribunal gives permission to the third respondent for him to take legal advice on the respondents' case more generally and to discuss the merits of his case with his legal representatives (including Mr Anyiam and his solicitor) in order to assess whether he wishes to consider settlement;

    b. The Tribunal gives permission to the third respondent to discuss matters to the extent necessary in order to address any administrative issues required for the re-listed hearing.

    The respondents' representative confirmed to the Tribunal that this was in his view sufficient to cover what was needed in advance of the re-listed hearing. For the avoidance of doubt, the third respondent is reminded that he is not permitted to discuss his evidence with the fourth respondent, with any other witnesses in this case (including but not limited to Vinod Kumar Chakravarthula and Shailaja Godi), and/or with any other employees or former employees of the first or second respondents.

Employment Judge Edmonds
30 April 2022