EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no: 8000039/2022

Held at Glasgow on 20 February 2023

Employment Judge W A Meiklejohn

Tribunal Member Ms J Ward

Tribunal Member Mr G McKay

Mr Darren Morgan	**Claimant** **In Person**
Orridge & Company Ltd	**Respondent** **Represented by:** **Mr D Milne – Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the application by the respondent for strike out of the claim under Rule 37(1)(b) and (c) of the Employment Tribunal Rules of Procedure 2013 is refused.

ORDERS OF THE EMPLOYMENT TRIBUNAL

The Employment Tribunal makes the following Orders –

(1) Respondent:

(a) By virtue of its power to do so under Rules 29 and 31 of the Employment Tribunal Rules of Procedure 2013 the Tribunal orders the respondent to provide to the claimant, not later than 23 March 2023, the work schedules for all work assigned to and undertaken by the claimant for the respondent between 24 March 2019 and 30 March 2022.

(b) To the extent that such work schedules have not been retained by the respondent in any format and are therefore not available, the respondent must provide to the claimant, not later than 23 March 2023, details of all hotel bookings (including the name of the hotel and the date of the booking) made for the claimant, in connection with work assigned to and undertaken by the claimant for the respondent, between 24 March 2019 and 30 March 2022.

(2) Claimant:

(a) By virtue of its powers to do so under rules 29, 31 and 38 of the Employment Tribunal Rules of Procedure 2013 the Tribunal orders the claimant to provide to the respondent (copied to the Tribunal), not later than 6 April 2023, the following documents and information –

(i) The basis upon which the claimant says he was an employee of the respondent with reference, if appropriate, to any contractual documentation.

(ii) (Having regard to section 43B(1)(d) of the Employment Rights Act 1996) the information which the claimant says he disclosed which, in his reasonable opinion, showed or tended to show that the health or safety of any individual had been, or was likely to be, endangered; in complying with this Order the claimant must specify to whom he made the disclosure and what he said to that person.

(iii) In respect of the monetary claims of failure to pay expenses, failure to pay wages and failure to pay holiday pay brought by the claimant, details of (1) how much is claimed, (2) what is the basis of the claim and (3) how is the amount calculated.

(iv) In respect of all of his claims, a Schedule of Loss detailing all of the sums sought by him in relation to the claims which he has brought against the respondent.

(v) A witness statement containing all of the evidence in chief which the claimant wishes to present to the Tribunal on his own behalf; this must be typewritten and arranged in short, numbered paragraphs.

(b) If this Order is not complied with by 5.00pm on 6 April 2023, the claimant's complaints of unfair dismissal, automatically unfair dismissal, detriment, failure to pay expenses, failure to pay wages and failure to pay holiday pay shall be dismissed without further Order.

[Please insert here the usual information about Orders]

NOTE AND REASONS

1. This case was listed for a final hearing on 20, 21 and 22 February 2023. The claimant appeared in person. Mr Milne appeared for the respondent, accompanied by Ms J Rogers, Solicitor.

Procedural history

2. A preliminary hearing took place on 16 November 2022 (before Employment Judge Doherty). The outcomes were as follows –

   (a) An Order was made extending the time limit for presenting the respondent's ET3 response form to 23 November 2022 (and the ET3 was thereafter duly presented and accepted).

   (b) The claimant was directed to provide details of (i) the basis upon which he said he was an employee of the respondent (employment status being in dispute), (ii) his protected disclosure relating to health or safety and (iii) his various monetary claims, all by 14 December 2022. He was also directed to provide a Schedule of Loss by 23 January 2023.

   (c) Dates were set for the exchange of documents, production of the joint bundle of documents and the exchange of witness statements.

3. On 25 November 2022 the respondent's solicitors emailed the claimant (65) attaching copies of his payslips and a log of jobs worked between 24 March 2019

and 11 April 2022 (66-157). This was the material which the respondent understood the claimant needed to quantify his claims.

4. On 28 November 2022 the respondent's solicitors emailed the claimant (A34-35) attaching the same material in the form of two compressed files. To access these, the claimant would have needed to sign in using his email address, not later than 28 December 2022.

5. On 9, 10, 16 and 17 January 2023 the respondent's solicitors emailed the claimant (A36-38) regarding the exchange of documents. They attached the respondent's disclosure document index (A39-40) to their email of 17 January 2023. Separately on 17 January 2023 the respondent's solicitors emailed the claimant (A41-42) attaching the respondent's disclosure documents in the form of two compressed files. On 24 January 2023 the respondent's solicitors emailed the claimant (A43-44) attaching the hearing bundle, again in the form of a compressed file.

6. On 19 December 2022 the respondent's solicitors made an application to the Tribunal for strike out of the claim. The claimant was directed to provide a response by 4 January 2023. When the claimant failed to do so, the Tribunal issued a strike out warning letter to the claimant on 11 January 2023. The claimant was required to respond to this by 25 January 2023.

7. In his email sent at 23.59 on 25 January 2023 (A45-46) the claimant submitted his reasons for opposing strike out of his claim. By their letter to the Tribunal of 26 January 2023 (A47-48) the respondent's solicitors replied to the claimant's submissions and renewed their application for strike out.

8. It was decided that there should be a preliminary hearing on strike out. A date of 6 March 2023 was assigned for this. The respondent's solicitors pointed out in their email to the Tribunal of 6 February 2023 (A55-56) that this was after the dates listed for the final hearing. This was referred to EJ Eccles who decided that the preliminary hearing on 6 March 2023 should be postponed and the respondent's application for strike out should be considered at the start of the final hearing on 20 February 2023.

Documents

9. We were provided with two bundles of documents. The first of these was the hearing bundle prepared by the respondent's solicitors, as referred to in paragraph 5 above. The second contained the witness statements and additional documents, including those relating to the strike out application. We refer to these above and below by page number, prefixed by "A" in the case of the additional documents.

Rule 37 (Striking out)

10. This provides, so far as relevant, as follows –

> *(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) 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).*
>
> *(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….*

Submissions

11. We heard submissions on the respondent's application for strike out.

For the respondent

12. Mr Milne invited us to strike out the claim on the basis of Rule 37(1)(b) – that the claimant had behaved unreasonably in his conduct of the proceedings – or Rule 37(1)(c) – that the claimant had not complied with orders of the Tribunal. Mr Milne acknowledged, under reference to ***Blockbuster Entertainment Ltd v James [2006] IRLR 630***, that strike out is a draconian step. In that case the Court of Appeal (per Sedley LJ at paragraph 5) said this –

"This power, as the employment tribunal reminded itself, is a Draconic power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response."

13. Mr Milne reminded us that unreasonable conduct could include a failure to provide particulars ordered by the Tribunal – ***Governing Body of St Albans Girls' School and another v Neary [2010] IRLR 124***.

14. In relation to whether a fair trial remained possible, Mr Milne referred to ***Emuemukoro v Croma Vigilant (Scotland) Ltd [2022] ICR 327*** where the Employment Appeal Tribunal (per Choudhury J at paragraph 18) said this –

"*There is nothing in any of the authorities providing support for Mr Kohanzad's proposition that the question of whether a fair trial is possible is to be determined in absolute terms; that is to say by considering whether a fair trial is possible <u>at all</u> and not just by considering, where an application is made at the outset of a trial, whether a fair trial is possible within the allocated trial window. Where an application to strike out is considered on the first day of trial, it is clearly a highly relevant consideration as to whether a fair trial is possible within that trial window. In my judgment, where a party's unreasonable conduct has resulted in a fair trial not being possible within that window, the power to strike out is triggered.*

Whether or not the power ought to be exercised would depend on whether or not it is proportionate to do so."

15. Mr Milne referred us to paragraph 21 of the decision in ***James*** –

"It is not only by reason of the Convention right to a fair hearing vouchsafed by article 6 that striking out, even if otherwise warranted, must be a proportionate response…...The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists… Proportionality...is not simply a corollary or function of the existence of the other conditions for striking out. It is an important check, in the overall interests of justice, upon their consequences."

16. In relation to non-compliance with an order of the Tribunal, Mr Milne referred to the decision of the EAT In ***Weir Valves & Controls (UK) Ltd v Armitage [2004] ICR 321*** (per Richardson HHJ at paragraph 17) –

"But it does not follow that a striking out order or other sanction should always be the result of disobedience to an order. The guiding consideration is the overriding objective. This requires justice to be done between the parties. The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair trial is still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience."

17. Mr Milne submitted that the claimant had acted unreasonably and had breached the Tribunal's case management orders. Mr Milne referred to the matters listed at paragraph 2(b) above. In contrast, the respondent had been required to provide payslips and had done so on 25 November 2022. In relation to the requirement on the claimant to provide a witness statement, Mr Milne noted that the claimant had sent the respondent's solicitors a blank statement, containing only a heading but no text (A3).

18. With reference to the matters which, per ***Armitage***, we required to consider, Mr Milne submitted -

(a) The magnitude of the claimant's non-compliance was severe. The respondent did not know the details of his alleged protected disclosure and whether it related to health or safety, nor the basis for the claimant's monetary claims, and this affected their ability to prepare for cross-examination.

(b) This meant there had been a lack of fair notice, such that the respondent had not been able to prepare for the hearing. Provision by the claimant of his witness statement might have addressed this.

(c) The respondent was prejudiced by the claimant sending a blank witness statement, whereas he had now had the benefit of sight of the respondent's witness statements for two weeks.

(d) It was not possible to have a fair trial within the period listed for the hearing. Without the information from the claimant about his alleged protected disclosure, the respondent was unable to check the factual accuracy of that disclosure and to determine what witnesses were required.

19. Mr Milne argued that the claimant had been guilty of wilful disobedience, and this amounted to unreasonable behaviour. The relevant grounds for strike out had been triggered. Strike out was, Mr Milne submitted, the least drastic step. If more time were to be allowed to the claimant, the respondent would also require more time. It might be necessary to obtain a precognition from the third party to whom the disclosure was made and potentially to call that person as a witness. This could not happen within the listing period and inevitably additional cost would be incurred by the respondent.

For the claimant

20. The claimant said that his only failure had been in relation to providing his witness statement. He had prepared this as a Word document and believed that he had attached it to an email. He no longer had access to Word and had unable to locate his statement. He only became aware that the respondent did not have his witness statement when he received the bundle of documents.

21. The claimant said that he had not received the email of 25 November 2022 from the respondent's solicitors. He accepted that he had received the ensuing email which had compressed files attached to it. However, he had not accessed these because he was not prepared to use what he described as a "*third party system"* which involved providing his email address. His position was that the respondent had not provided the information which he needed in a "*reasonable and viable format"*.

22. In relation to the employment status issue, the claimant said that he understood this was to be determined at the final hearing. He did not believe that he was required to do anything (in advance of that).

23. In relation to his protected disclosure, the claimant said that it was clear from their ET3 that the respondent already knew what the disclosure was. In these circumstances, he did not consider that he was required to do anything more.

24. In relation to his monetary claims, the claimant said that he did not provide details because he had not been provided by the respondent with the information he needed to quantify those claims. He did not agree with the assertion by the respondent's solicitors that the information had been sent to him on three occasions.

25. The claimant referred to his email to the Tribunal sent on 25 January 2023 (A45-46). Not all of the material he needed to provide details of his monetary claims was within the hearing bundle. Specifically, his work schedules were not included and he needed these for the names of the hotels where he had been accommodated while working for the respondent.

26. The claimant asked us to adjourn the hearing. He argued that there would be no prejudice to the respondent. There would simply be a delay until he received all the information he needed. In contrast, if he was required to proceed with his evidence today, he would have to do so from memory.

Reply for respondent

27. Mr Milne submitted that the claimant had not, as he alleged, been *"forced"* to access a third party system. Providing documents in the way that the

respondent's solicitors had done was normal in Tribunal proceedings. The claimant had not at the time raised any issue about this.

28. Responding to the claimant's assertion that he had not been provided with the information he needed to quantify his claims, Mr Milne said that the details of jobs worked and payslips had been sent, and were in any event contained in the hearing bundle which had been delivered to the claimant on 11 February 2023. Despite this, the claimant had provided nothing and the result was that the respondent found itself in the same position as at the preliminary hearing in November 2022.

Discussion

29. We adjourned to consider the respondent's application for strike out. We began by reminding ourselves of the overriding objective. This is found in Rule 2 of the Tribunal Rules –

> ***2 Overriding objective***
>
> *The overriding objective of these Rules is 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 with each other and with the Tribunal.*

30. We were unimpressed with the manner in which the claimant had behaved in his conduct of these proceedings thus far. His explanations for believing that he did not require to do anything by way of compliance with the directions EJ Doherty had set out in her Note following the preliminary hearing on 16 November 2022 were unconvincing.

31. With regard to the employment status issue, EJ Doherty recorded at paragraph 9 of her Note the parties' agreement that it was not appropriate to have a separate preliminary hearing on employment status. She went on to say this at paragraph 10 –

"*It was agreed that the claimant should provide the following information:*

(1) If the claimant's position is that he was an employee of the respondents, he could set out the basis upon which he says he was an employee, with reference, if appropriate, to any contractual documentation."

32. Thereafter, at paragraph 23 of her Note, EJ Doherty said this –

"*Where information is required of the claimant this should be provided by* ***14 December 2022****…."*

We did not regard the claimant's belief, that this meant he was not required to do anything in advance of the employment status issue being addressed at the final hearing, as reasonable.

33. With regard to the claimant's argument that he did not provide details of his monetary claims because the respondent had not given him the information he needed to quantify those claims, we were satisfied that (a) the respondent had provided the claimant with the logs of work and payslips on three separate occasions, and again when these were included in the hearing bundle, and (b) the claimant had been unreasonable in choosing not to access these because he was not prepared to use a third party system.

34. As Mr Milne pointed out, the method adopted by the respondent's solicitors to provide the claimant with access to the information which they understood he was seeking was normal practice in Tribunal proceedings. If the claimant had reservations about using that method, he could and should have approached the

respondent's solicitors to discuss the matter. To do so would have been what Rule 2 requires in terms of the parties co-operating with each other.

35. The claimant's explanation to us, that he did not want to provide his email address, made no sense. The email to which the compressed files were attached had been sent by the respondent's solicitors to the claimant's email address. In his ET1 claim form the claimant had provided that email address and had indicated that his preferred method of communication with the Tribunal was by email. We considered that the claimant was being unnecessarily stubborn in his attitude to accessing the files which had been emailed to him.

36. With regard to the claimant's protected disclosure, EJ Doherty said this in her Note –

> "*12. It is accepted by the respondents that the claimant contacted their client, and there is no dispute about the date by which this contact was made.*
>
> *13. There is however a requirement for clarification as to the information which was provided to the respondent's client by the claimant, which is said to amount to a protected disclosure on the grounds of health and safety.*
>
> *14. The claimant should therefore provide the following:*
>
> *(1) What information does the claimant say was disclosed, which in his reasonable belief showed, or tended to show that the health or safety of an individual had been or is likely to be endangered…."*

37. The direction to the claimant at paragraph 23 of EJ Doherty's Note, which we have set out at paragraph 32 above, applied equally here. EJ Doherty and the claimant had sight of the respondent's draft grounds of resistance in advance of the preliminary hearing. We did not consider the claimant's position, that he did not require to do anything because it was clear from the ET3 that the respondent already knew what the disclosure was, to be reasonable. At the very least, the claimant could and should have responded timeously to EJ Doherty's direction by setting out his position, as subsequently described by him in his email to the Tribunal of 25 January 2023.

38. We found that the claimant had, as set out above, behaved unreasonably in his conduct of these proceedings and had failed to comply with Orders of the Tribunal, given in the form of directions by EJ Doherty. We reminded ourselves that Rule 1(3) of the Tribunal Rules provides –

An order or other decision of the Tribunal is either –

(a) a "case management order", being an order or decision of any kind in relation to the conduct of proceedings, not including the determination of any issue which would be the subject of a judgment; or

(b) a "judgment", being a decision, made at any stage of the proceedings (but not including a decision under rule 13 or 19), which finally determines –

(i) a claim, or part of a claim, as regards liability, remedy or costs (including preparation time and wasted costs);

(ii) any issue which is capable of finally disposing of any claim, or part of a claim, even if it does not necessarily to do (for example, an issue whether a claim should be struck out or a jurisdiction issue);

(iii) the imposition of a financial penalty under section 12A of the Employment Tribunals Act.

39. The directions given by EJ Doherty following the preliminary hearing on 16 November 2022 came within the meaning of *"an order or decision of any kind"* in relation to these proceedings so that, even although not expressed as an Order, they had the same status. This meant that failure to comply with those directions was non-compliance with an Order of the Tribunal within the meaning of Rule 37(1)(c).

40. We found (under reference to ***James***) that there had been deliberate and persistent disregard by the claimant of required procedural steps, namely compliance with EJ Doherty's directions. This was unreasonable behaviour on his part in the conduct of these proceedings. It meant that Rule 37(1)(b) of the Tribunal Rules was engaged.

41. We also found (under reference to ***Emuemukoro***) that a fair trial was not possible within the trial window (being 20-22 February 2023). The respondent did have fair notice of the case they were required to answer. They did not know the detail of what was said by the claimant when he made his alleged protected disclosure. They did not have any details of his monetary claims. That meant that they did not know if the two witnesses they had arranged to give evidence would be able to deal with all aspects of the case, or whether there might need to be additional enquiries made and additional witnesses called. These were not matters which could be resolved within the trial window.

42. Having decided that Rule 37(1)(b) and (c) were engaged, we turned to the question of whether strike out was appropriate in this case. We approached this by considering whether striking out the claim was proportionate. That involved looking at whether there was some less drastic means of achieving the end for which the strike out power existed (per ***James*** – see paragraph 15 above). Before doing that, however, we considered the matters mentioned in ***Armitage*** (see paragraph 16 above).

43. We had regard to the magnitude of the claimant's default. Mr Milne described this as *"severe".* We found that the claimant had chosen not to do anything by way of compliance and had not sought to provide an excuse until literally the last minute (at 23.59 on 25 January 2023). We believed that this amounted to a significant default on the claimant's part.

44. We had no doubt that the default in compliance was the responsibility of the claimant. No-one else was involved.

45. We considered the disruption, unfairness and prejudice caused. We found that the respondent was prejudiced by the lack of fair notice of the claims it had to answer. This impacted adversely on the respondent's ability to prepare for the final hearing, as did the claimant's failure to provide his witness statement.

46. In terms of whether a fair trial remained possible, we were bound following the EAT's decision in ***Emuemukoro*** to find that it did not. That was because the EAT required us to look at the question of whether a fair trial was possible within the period set down for the hearing. But for the EAT's decision in that case we

would have inclined to the view that a fair trial remained possible as the events to be considered were still fairly recent and the evidence of the respondent's witnesses had been captured in the witness statements.

47. We reminded ourselves that we should be guided in our approach by the overriding objective. This required (per ***Armitage***) justice to be done between the parties, and consideration of all the circumstances. We took into account that there were disputed issues which could only be determined following evidence and argument. There would be prejudice to the claimant if denied the opportunity to argue his case. Conversely there would be prejudice to the respondent if required to defend claims which ought properly to be struck out.

48. We considered what alternatives were open to us. We could grant the respondent's application for strike out. We could refuse that application and proceed with the hearing. We could refuse that application and adjourn the hearing, giving the claimant more time to comply. We could issue a deposit order under Rule 39 of the Tribunal Rules (for which the respondent's solicitors had applied in the alternative when first seeking strike out).

49. We came to the view that granting the application for strike out was not consistent with doing justice between the parties where there were disputed issues which, it seemed to us, were capable of being brought into sufficiently sharp focus. To achieve that, the claimant would need to do what EJ Doherty had required of him.

50. We also came to the view that it would not be appropriate to proceed with the hearing until the claimant had provided the necessary details to give fair notice to the respondent. We decided that the claimant should be given a final opportunity to do so, and that this should be done in the form of an unless order under Rule 38 of the Tribunal Rules. Our Order above (so far as it relates to the claimant) reflects this and, for the claimant's benefit, we explain below what this means.

51. We decided that a deposit order would not be appropriate, at this stage. Without the further details which the claimant will need to provide, we did not believe that

we were in a position to assess whether his claim, or part of it, had little reasonable prospect of success.

52. We announced our decision on the application for strike out orally when the hearing resumed. This Note is intended to confirm and amplify that decision.

53. Rule 38 of the Tribunal Rules (**Unless orders**) provides, so far as relevant, as follows –

> *(1) An order may specify that if it is not complied with by the date specified the claim or response, or part of it, shall be dismissed without further order. If a claim or response, or part of it, is dismissed on this basis the Tribunal shall give written notice to the parties confirming what has occurred.*
>
> *(2) A party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations….*

54. The claimant should understand that if he does not comply with the Order set out above (so far as it relates to him) the consequence is likely to be the dismissal of his claim. Irrespective of what the respondent is able to produce in compliance with our Order (so far as it applies to the respondent), and also irrespective of what he may already have done or said, the claimant must still comply with all of the elements of the Order even if that involves repeating information given previously.

55. The claimant has brought a claim in which he alleges *"There is also the matter of expenses owed getting paid as well that is part of the claim including things such as travel days owed and unpaid shifts".* The claimant must accordingly have had in mind when he presented his claim that there were monies due to him. It is for him to articulate what monies are said to be due to him, and why.

56. The claimant's attention is drawn to the note set out above about Orders. In the event that the claimant seeks to have our Order(s) varied or set aside, he must

make an application to that effect to the Tribunal and should do so before the time limit for compliance.

57. While we indicated at the hearing that the periods for compliance with our Orders would be calculated with reference to the date upon which those Orders are sent to the parties, we decided on reflection that we should, for the avoidance of doubt, specify fixed dates for compliance.

58. Finally, we record that date listing letters are to be issued with a view to identifying suitable dates for a three day in person final hearing.

Employment Judge: **W A Meiklejohn**
Date of Judgment: **24 February 2023**
Entered in register: **27 February 2023**
and copied to parties