



EMPLOYMENT TRIBUNAL

Claimant: Mr. K. Couson

Respondent: Bidvest Noonan (UK) Ltd.

Hearing: Final Merits Hearing

Heard at: London Central ET (via video/CVP)

On: 11-12 October 2023 (no sitting on 13 October 2023)

Before: Employment Judge Tinnion, Members Mr. Carroll, Ms. Marsters

Appearances: For Claimant: In person
For Respondent: Ms. R. Senior, Counsel

REASONS

Introduction

1. On 12 October 2023, for reasons given orally at the time, the Tribunal dismissed the Claimant's oral application made on 11 October 2023 under Rule 29 for an order (a) directing the Respondent to request a copy of certain CCTV footage from third parties CBRE (facilities manager) and PIMCO (building tenant), and (b) adjourning the final merits hearing pending those parties' responses to that request (the "**Application**").
2. By email on 26 October 2023, the Claimant emailed the Tribunal requesting written reasons for that decision. The Tribunal provides those written reasons below.

Reasons for denying Application

3. The Tribunal dismissed the Application for the following reasons:
4. First, the Tribunal reminded itself of the terms of Rule 29: "*The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. The particular powers identified in the following rules do not restrict that general power.*" The Tribunal was satisfied it had the power to grant the

Application subject to the terms of Rule 30A (power to postpone hearings on party's application made at or within 7 days of hearing).

5. Second, the Claimant accepted that if the Tribunal ordered the Respondent to request a copy of the CCTV footage from CBRE and PIMCO, the final merits hearing – at this stage now already underway - would have to be adjourned pending their responses to that request. The Claimant therefore made an adjournment application.
6. Third, the Claimant did not satisfy the Tribunal that the CCTV footage he was requesting was likely to still exist and be in the possession of CBRE or PIMCO. There was no evidence at all before the Tribunal suggesting it still existed. The Tribunal was concerned that there was a strong possibility that no practical benefit would be obtained by making the order the Claimant was requesting.
7. Fourth, the Claimant accepted the CCTV footage he was asking the Respondent to request – if it still exists – would be in the custody, control or possession of non-parties CRBE or PIMCO. Neither are under the Respondent's control. On that basis, the Tribunal was satisfied the Respondent had not breached its own disclosure obligations by not disclosing the CCTV footage or requesting a copy from them.
8. Fifth, in response to a Tribunal question, the Claimant confirmed he had not made any effort prior to 11 October 2023 to contact CBRE or PIMCO to request a copy of the CCTV footage. The Claimant provided no reasonable excuse for not doing so. The reason the Claimant gave was that any such request would have been rebuffed. In the Tribunal's judgment, that reason seems to be a matter of speculation on the Claimant's part, but even if he was right about this, a request for it would have assisted in clarifying whether it still existed and, if it did, who had it.
9. Sixth, although the Claimant claimed the CCTV footage would prove he was subject to racial discrimination, the Tribunal was not persuaded that was the case. Neither the Claimant (nor for that matter the Respondent) had ever seen the CCTV footage, so neither could say with any degree of certainty what it would (or would not) show. Moreover, while the Tribunal noted the Claimant's assertion that the CCTV footage would prove he was discriminated against, the Claimant did not explain why it would prove that - absent from his submissions to the Tribunal were a list (or even any broad indication) of the specific reasons why he said it would do so.
10. Seventh, even if the Claimant was right that the CCTV footage was evidence which – if obtained – would form an important part of his evidence to the Tribunal on the issue of whether he had been subject to race discrimination, the Tribunal reminded

itself that it was the responsibility of the parties to obtain evidence (and at a minimum, take reasonable steps to obtain evidence) on which they intended to rely at the final merits hearing. The Tribunal was satisfied the Claimant had already had a reasonable opportunity to seek the CCTV footage, which he had not pursued.

11. Eighth, the Claimant had not previously applied for an order directing the Respondent to request the CCTV footage from CRBE or PIMCO. The Claimant provided no reasonable explanation for why he was now making the Application at this late stage when the final merits hearing was already underway.
12. Ninth, the Claimant claimed that at a PHCM held in May 2023, the Tribunal had made a 'verbal order' concerning the CCTV. The Tribunal did not accept that contention. The best evidence of the orders made at the May 2023 PHCM was the Case Management Order (**CMO**) the Tribunal made following that hearing. The Tribunal reviewed the CMO - nowhere in it is there an order specifically relating to CCTV or specifically requiring the Respondent to do anything relating to CCTV.
13. Tenth, Rule 30A restricts the Tribunal's power to make an order adjourning a hearing (like the ongoing final merits hearing) at the hearing itself or the 7 day period before it on the application of a party.
14. An adjournment of the ongoing final merits hearing under Rule 30A(2)(a) would have required (amongst other matters) the consent of all parties. In this case, the Respondent did not consent to an adjournment, so that ground was not satisfied.
15. An adjournment of the final merits hearing under Rule 30A(2)(b) required the application for the adjournment to have been necessitated by an act (or omission) of another party and/or the Tribunal. The Tribunal was satisfied the Application had not been necessitated by an act or omission of the Respondent – the Respondent had not breached any existing case management order by not disclosing the CCTV footage or by not making a request for a copy from CRBE or PIMCO. The Tribunal was also satisfied the Application had not been necessitated by an act or omission of the Tribunal. As noted, the Tribunal did not accept the Claimant's contention that at the May 2023 PHCM the Tribunal had made a verbal order which had not subsequently been reflected in the terms of the CMO made following that hearing.
16. An adjournment of the final merits hearing under Rule 30(A)(2)(c) required the Claimant to establish there were "*exceptional circumstances*". That term is left undefined, so the Tribunal had to consider whether the current circumstances before it were exceptional or not. The Tribunal's conclusion on that issue is that they were

not exceptional. Subject to the Respondent's duty of disclosure – which the Tribunal found had not been breached – the burden rested on the Claimant to obtain all evidence he intended to rely upon in support of his claims, in just the same way that the burden rested on the Respondent at all material times to obtain all evidence it relied upon in support of its defence of the Claimant's claims. The fact of the matter was that the Claimant had not taken any active steps to obtain a copy of the CCTV footage before 11 October 2023. On 11 October 2023, the Claimant made a 'last minute' application to remedy that defect. That was the Claimant's prerogative and right, but the Tribunal found there was nothing remotely exceptional about these circumstances. Parties at court and tribunal hearings and trials often fail to gather all the evidence they rely upon to support their claims, including important evidence – this case was an example of that, and was not exceptional.

Signed (electronically): *Employment Judge Antoine Tinnion*

Date of signature: 23 November 2023

Date sent to parties: 23 November 2023