



EMPLOYMENT TRIBUNALS

Claimant: Mr Anthony Stone

Respondent: Bouygues E&S Solutions Limited

JUDGMENT

The claimant's application to strike out the response, alternatively for a deposit order, is refused.

REASONS

Background

1. This is my judgment on the claimant's application made on 27 November 2023. As recorded in my Case Management Order of that date, it was not fair to determine the application at the preliminary hearing on that date due to its late presentation. The parties were content that I decide it without a hearing following written submissions from the respondent.
2. I ordered that the respondent provide its written submissions by 4 December 2023. In fact it provided its written submissions on 7 December 2023 and failed to mark them for my attention. This prompted a further submission from the claimant which was received on 22 December 2023 arguing that this failure, as well as a separate delay in the respondent providing amended grounds of resistance, amounted to further grounds for strike-out. I have considered all of the written submissions in coming to my decision.

The law

Strike out

3. Rule 37(1) of the Employment Tribunals Rules of Procedure provides that the 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).
4. The power may only be exercised if the respondent has been given a reasonable opportunity to make representations, either in writing or, if requested by the respondent, at a hearing (Rule 37(2)).
 5. The claimant advanced his application on the basis of ground (a), specifically (on my understanding of his application) that the response has no reasonable prospects of success. The submission of 22 December 2023 also refers to ground (a), but the conduct complained of fits more rationally under (c) and I will consider it under that ground.
 6. The power for the tribunal to strike out a response on the ground that it has 'no reasonable prospect of success' requires a tribunal to form a view on the merits of a case, and only where it is satisfied that the response has no reasonable prospect of succeeding can it exercise its power to strike out. The tribunal must take the respondent's case at its highest when undertaking this assessment (see, e.g., *White v HC-One Oval Ltd* [2022] IRLR 576, EAT).
 7. In deciding whether to strike out a party's case for non-compliance with an order under ground (c), a tribunal must have regard to the overriding objective set out in rule 2 of seeking to deal with cases fairly and justly. This requires a tribunal to consider all relevant factors, including:
 - a. the magnitude of the non-compliance;
 - b. whether the default was the responsibility of the party or his or her representative;
 - c. what disruption, unfairness or prejudice has been caused;
 - d. whether a fair hearing would still be possible; and
 - e. whether striking out or some lesser remedy would be an appropriate response to the disobedience — see *Weir Valves and Controls (UK) Ltd v Armitage* [2004] ICR 371, EAT.
 8. The tribunal must consider whether strike out for non-compliance is a proportionate response. As noted in the Presidential Guidance on General Case Management for England and Wales (as amended in 2018): 'In some cases parties apply for strike-out of their opponent at every perceived breach of the Rules. This is not a satisfactory method of managing a case. Such applications are rarely successful. The outcome is often further orders by the tribunal to ensure the case is ready for the hearing.'

Deposit orders

9. Rule 39(1) of the Employment Tribunals Rules of Procedure provides that where the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an

order requiring a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

10. The test of 'little reasonable prospect of success' is plainly not as rigorous as the test of 'no reasonable prospect'. However, to make an order, the tribunal must still have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response: see *Jansen Van Rensburg v Royal Borough of Kingston-upon-Thames and ors* EAT 0096/07.

Discussion

'No reasonable prospects of success' / 'little reasonable prospects of success'

11. The claimant makes 8 points which I shall address in turn.
12. First, the claimant suggests that there is an admission in paragraph 20 of the ET3 that he was contractually entitled to a company mobile phone and was not provided with one, which undermines the denial of a breach of contract in paragraph 27 of the ET3. I do not accept this submission. The acknowledgement in paragraph 20 of the ET3 that the grievance manager recognised that the claimant "should have been provided with a company mobile phone" does not amount to an admission of there being a contractual entitlement. Based on the pleadings I cannot find that the respondent's position has no reasonable prospects of succeeding, nor that it has little reasonable prospects of succeeding. Whether there was such a contractual entitlement is a matter of dispute properly to be resolved at a final hearing.
13. Second, the claimant says that the respondent has not defended the claim he advances under the heading "COVID-19" and is therefore deemed to admit it. The claimant appears to tie his COVID symptoms in February 2022 and refusal to attend work because of them to his dismissal. However, the ET3 pleads a positive case on the part of the respondent as to the reason for the claimant's dismissal. Based on the pleadings I cannot find that the respondent's position has no reasonable prospects of succeeding, nor that it has little reasonable prospects of succeeding. The reason for dismissal is a factual dispute properly to be resolved at a final hearing. The same applies in respect of the claimant's sixth and seventh points, which concern the other reasons he advances in support of his automatically unfair dismissal case.
14. Third, the claimant says that his whistleblowing complaint was investigated 6 months late, in breach of the ACAS Code of Practice. It is true to say that the ET3 does not address the alleged whistleblowing in mid-February 2022 that is mentioned in the ET1, but rather focuses on the claimant's email of 12 July 2022. However, even if there was a delay, that doesn't necessarily mean the claimant succeeds in his whistleblowing claim because the respondent denies there was any protected disclosure. Based on the pleadings I cannot find that the respondent's position has no reasonable prospects of succeeding in this argument, nor that it has little reasonable prospects of succeeding. Whether there were protected disclosures made is a matter of dispute properly to be resolved at a final hearing.

15. Fourth and fifth, the claimant points to his factual allegations of detriment, bullying and harassment, and in respect of time off work due to anxiety. However, these are all matters that are disputed by the respondent on the face of the ET3. I am simply in no position to find that the respondent's position as to why the claimant was treated as he was has no reasonable prospects of succeeding, nor that it has little reasonable prospects of succeeding. These are factual disputes properly to be resolved at a final hearing.
16. The eighth and final point is that the respondent admitted the claimant was entitled to one week's notice pay but this was not paid at the time of dismissal. I understand the amount has now been paid and, accordingly, the claimant withdrew his wrongful dismissal claim at the hearing on 27 November 2022. There is thus nothing to this point as regards the remaining claims.
17. In conclusion:
 - a. I am not satisfied that the response (or any part of it) has no reasonable prospect of succeeding, and therefore decline to strike it out.
 - b. I am not satisfied that the response (or any part of it) has little reasonable prospect of succeeding, and therefore decline to make a deposit order.

Non-compliance

18. The claimant relies upon two acts of non-compliance with my order on the part of the respondent:
 - a. the 3 day delay in the respondent providing its written submissions in response to the claimant's application for strike-out, and the failure to mark the email for my attention; and
 - b. the delay in the respondent providing its amended Grounds of Resistance from 11 December 2023 to 29 December 2023¹.
19. I must ask myself whether the non-compliance identified above justifies striking out the response. In my judgement it plainly does not. The non-compliance is relatively minor. It is, I find, the fault of the respondent's representative rather than the respondent. The claimant's submission of 22 December 2023 does not identify any concrete prejudice caused by the respondent's non-compliance beyond the mere fact of a delay. There is no reason to consider that a fair hearing will not still be possible in March 2024. Strike-out would be wholly disproportionate in the circumstances.
20. All that said, I will take this opportunity to highlight to the respondent the importance of complying with the deadlines set by the Tribunal, given that the claimant is not represented and the final hearing is fast approaching. I trust that whatever error led to the earlier deadlines being missed has now

¹ At the time of the claimant's submission on 22 December 2023 the document had not been provided, but I can see from the Tribunal file that it now has been. The respondent's application for a retrospective extension of time will be dealt with separately.

been rectified, and there will therefore be no further acts of non-compliance.

21. I therefore decline to strike out the response on the basis of non-compliance by the respondent with orders of the Tribunal.

Employment Judge Abbott

Dated: **5 January 2024**

JUDGMENT SENT TO THE PARTIES ON
23 January 2024

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