EMPLOYMENT TRIBUNALS

Claimant: Mr Anthony Stone

Respondent: Bouygues E&S Solutions Limited

JUDGMENT

The claimant's application of 11 January 2024 to strike out the response is refused.

REASONS

Background

1. This is my judgment on the claimant's application made on 11 January 2024. The respondent provided a response to the application by email on 19 January 2024. Although the claimant has requested a preliminary hearing to discuss the issues raised in his application (by his email on 12 January 2024), the respondent resists this. In view of the imminence of the final hearing, which is listed for 4-7 March 2024, and having considered the application and response, I am satisfied that the overriding objective is best given effect by determining this application without a hearing.

2. This is the second application for strike out of the response that I have determined – I refused the claimant's application of 27 November 2023 for reasons set out in a judgment dated 5 January 2024 but which was sent to the parties only after the present application was made, on 23 January 2024.

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)). Here, the respondent has responded in writing to the application and has not requested a hearing, so this requirement is met.

5. The claimant advances his present application on the basis of grounds (b) and (e). However, in considering whether a claim should be struck out on the grounds of scandalous, unreasonable or vexatious conduct, a tribunal must consider whether a fair trial is still possible (see *De Keyser Ltd v Wilson* [2001] IRLR 324, EAT). In that case, the EAT explained that, in ordinary circumstances, neither a claim nor a defence can be struck out on the basis of a party's conduct unless a conclusion is reached that a fair trial is no longer possible. Accordingly I will consider the two grounds raised by the claimant together.

6. In the case of *Bolch v Chipman* [2004] IRLR 140, the EAT set out the steps that a tribunal must ordinarily take when determining whether to make a strike-out order:

    a. The Tribunal must find that a party or his or her representative has behaved scandalously, unreasonably or vexatiously when conducting the proceedings.
    b. Once such a finding has been made, the Tribunal must consider whether a fair trial is still possible, as, save in exceptional circumstances, a striking-out order is not regarded simply as a punishment. If a fair trial is still possible, the case should be permitted to proceed.
    c. Even if a fair trial is unachievable, the tribunal will need to consider the appropriate remedy in the circumstances. It may be appropriate to impose a lesser penalty, for example, by making a costs or preparation order against the party concerned rather than striking out his or her claim or response.

7. The word 'scandalous' in this context means irrelevant and abusive of the other side. For a tribunal to strike out for 'unreasonable' conduct, it must be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible; and in either case, the striking out must be a proportionate response (see *Blockbuster Entertainment Ltd v James* [2006] IRLR 630, CA). A 'vexatious' claim or defence has been described as one that is pursued not with the expectation of success but to harass the other side or out of some improper motive.

The application and response

8. The present application raises allegations of fraudulent behaviour against the respondent. These are serious allegations and ones that should not be made lightly. It is suggested that the respondent deliberately omitted a critical page from a document that it has disclosed and placed in the bundle for the final hearing. The page in question is a "Schedule of Benefits" that was attached to the claimant's statement of employment particulars. The suggestion is that this page was hidden because it undermines the respondent's case that he was not contractually entitled to a company mobile telephone.

9. The respondent's response comes in the form of an email from its solicitor. She explains that the version of the statement of employment particulars that was originally provided to her Firm and disclosed to the claimant did not include the Schedule of Benefits. However, following receipt of the claimant's application, further investigations have confirmed that the claimant's statement of employment particulars did include an appended Schedule of Benefits which includes the statement "*You will be provided with a company mobile telephone in accordance with the rules contained within the Employee Handbook*". She confirms that the missing page will be included in the final hearing bundle.

Discussion

10. The first question I must ask myself is whether the respondent or its representative has behaved scandalously, unreasonably or vexatiously when conducting the proceedings. I am not satisfied that this hurdle is met. Considering the claimant's case at its highest, I can conceive of two arguments:

    a. That the failure in the disclosure process was unreasonable conduct. However, on the basis of the material before me, this is a one-off omission. Nor can I be satisfied it was deliberate. It is not unusual for documents to be missed in the process of disclosure, even where parties act diligently. That is not to excuse the respondent for its error here, but to contextualise it. Moreover, I can see no basis on which a fair trial is not possible, given that the missing page is now, plainly, in evidence. I do not have before me any indication of widespread or persistent and repeated disclosure failings, but a single page of a single document. I have no basis upon which to assume that the respondent's wider disclosure process cannot be trusted. In any event, if the claimant does consider there are other documents missing, that is a matter he should (i) raise with the respondent now, and (ii) can, if the Tribunal considers it relevant, raise at the final hearing in his questioning of the respondent's witnesses.

    b. That maintaining the denial that the claimant is contractually entitled to a company mobile telephone is unreasonable or vexatious. However, the scope of any contractual entitlement will involve consideration of the Employee Handbook, which is not before me. This is a matter that is apt to be determined at the final hearing along with the many other issues in the case. I can see absolutely no

reason why a fair trial of that question is not possible. The claimant could well prove to be vindicated on this point, but that does not provide a basis for me to (as requested) strike-out the entirety of the respondent's response.

11. I have considered considerations of whether a fair trial is still possible in the discussion of whether the conduct is 'unreasonable'. For the avoidance of doubt, even if I was satisfied that the first hurdle was met, I can see no credible basis on which to conclude that a fair trial is not still possible. This is not the kind of situation where, e.g., a party has behaved so unreasonably that one can conclude they would be willing to deliberately mislead the tribunal in a material manner so only a strike-out would facilitate a fair hearing. Furthermore, strike-out in these circumstances (i.e. where a single disclosure deficiency has been identified) would be wholly disproportionate.

12. I therefore decline to strike out the response. The application is refused. The case will proceed to final hearing on 4-7 March 2024.

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Employment Judge Abbott

Dated: **24 January 2024**

JUDGMENT SENT TO THE PARTIES ON
24 January 2024
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FOR THE TRIBUNAL OFFICE