



EMPLOYMENT TRIBUNALS

Claimant: Miss A Squire

Respondent: Mr Sivagnanam Gnanachandran T/A Dales Off Licence & News

Heard at: Manchester (by CVP)

On: 2 May 2024

Before: Employment Judge Phil Allen

REPRESENTATION:

Claimant: Mr G Pollitt, counsel

Respondent: Did not attend and was not represented

JUDGMENT

The judgment of the Tribunal is that:

1. The application to strike out the response is refused.

REASONS

Introduction

1. This was a hearing listed to consider the claimant's application to strike out the response. It was initially listed to take place on 9 April 2024, but that hearing was postponed at the request of the respondent because he needed to care for his son who had been in a road traffic accident. On 21 and 30 April the respondent made applications to postpone this relisted hearing, the first because his son needed ongoing assistance, and the second because the respondent's son was not well enough to represent him adequately and because the respondent objected to a video hearing (the hearing having been converted to a video hearing to facilitate the respondent's attendance). Those requests were refused. The respondent did not attend this hearing. When telephoned by the clerk after the hearing had been due to start, the respondent was working in his shop and informed the clerk that he could not take part because he was at work. The hearing proceeded in the respondent's absence.

2. An interpreter had been arranged for the hearing to interpret for the respondent. She attended. She was released, as the respondent did not attend.

Procedure

3. The claimant made an application to strike out the response on 15 February 2024 after the respondent had failed to provide any witness statements (at least in a form which could be accessed).

4. A bundle of documents and a written submission document were provided. The claimant's counsel also provided copies of **Weir Valves & Controls (UK) Ltd v Armitage** EAT/0296/03 and **Essombe v Nandos Chickenland Ltd** UAEAT/0550/06.

5. The claimant was represented by Mr Pollitt, counsel, at the hearing. The respondent did not attend and was not represented. The hearing was conducted by CVP remote video technology. The claimant's counsel made oral submissions to supplement his written submissions.

6. I adjourned to consider my decision and returned and informed those who attended of my decision. As the respondent did not attend and I thought it was important that he was aware of the reasons for my decision, I confirmed that these written reasons would be provided even though neither party had made a request for them.

Facts

7. The case has a long procedural history. There have been preliminary hearings on: 14 April 2022; 30 May 2022 (which the respondent did not attend for understandable reasons); 16 November 2022 (which the respondent did not attend); 6 March 2023; and 24 May 2023. The final hearing in the case is due to be heard on 10-13 June 2024 (it was also listed for 14 June).

8. In the case management order made following the hearing on 24 May 2023, Employment Judge Anderson observed that the respondent's engagement with the proceedings before him had been limited. In his orders he recorded that what was ordered was not a 'fresh start'. He recorded that there was a history of non-compliance and if there were any further substantive breaches, the Tribunal would be entitled to consider strike out, costs or other sanctions seriously. Witness statements were ordered to be provided to the other party by 4pm on 27 October 2023. Order 5.3 recorded that any witness statements disclosed after that date may not be relied upon at the final hearing without the permission of the Tribunal.

9. The claimant has not received any witness statements from the respondent. The claimant's solicitors received an electronic file they could not open on 10 November 2023. I was shown numerous emails in which this was explained. The respondent had, on occasion, responded, but he had not provided his witness statement(s) again or in a format which could be accessed.

10. In a letter sent on 14 January 2024, the Tribunal varied the date for (what was said to be) exchange of witness statements, to 2 February 2024. The respondent still did not provide his witness statement(s) to the claimant (or confirm that he was ready to do so). The claimant applied for the response to be struck out on 15 February

2024. Since the application, the respondent has made applications to postpone hearings, but has not provided his witness statement(s) nor has he said when, or if, he will be able to do so.

The Law

11. I have the power to strike out the response under rules 37(1)(b), 37(1)(c) and 37(1)(d) of the Employment Tribunal Rules of Procedure 2013. I will not reproduce those provisions in this Judgment, but I took what was said into account. Even if those provisions applied, the claimant needed to persuade me to exercise my discretion to strike out the response. I need to be persuaded that striking out is a proportionate sanction.

12. The claimant's counsel emphasised the overriding objective. He also relied upon the two cases which I have already referred to and provided copies of them. **Weir Valves and Controls (UK) Ltd v Armitage** confirmed that I must consider all the circumstances, including the magnitude of the default, whether it is the responsibility of the party or his representative, what disruption, unfairness or prejudice had been caused, whether a fair hearing was still possible, and whether strike-out or some lesser remedy would be an appropriate response. The claimant's counsel highlighted that the Judgment said that a Tribunal must be able to apply a sanction in response to wilful disobedience of an Order.

13. The claimant's counsel quoted from the **Essombe** case a passage which explained the public policy argument that Tribunal Orders are there to be obeyed.

Conclusions – applying the Law to the Facts

14. I have summarised what has occurred in this case. I will not recap the full history of the respondent's lack of appropriate engagement in the proceedings and the steps required. That was set out in the application, the submission document, and the numerous case management orders.

15. As I have explained, in his case management order made following a hearing on 24 May 2023 (almost a year ago), Employment Judge Anderson recorded that there was a history of non-compliance (by the respondent) and he said that if there were any further substantive breaches, the Tribunal would be entitled to seriously consider striking out the response.

16. The respondent has breached the case management order made regarding the provision of his witness statement or statements. I noted that an unopenable or corrupted file had been sent to the claimant's solicitors on one occasion, but I concluded that had that genuinely been a witness statement (or statements) it would have been very straightforward for the respondent to have provided another copy in response to the numerous requests made. It would certainly have been easier for the respondent to have provided a statement (if it had already been prepared), than it was to make the applications (including one lengthy email) which he sent seeking to postpone today's hearing.

17. The respondent is working in his shop today rather than attending this hearing. He could have attended and provided some explanation (or, indeed, his

witness statement or statements if they had been prepared). I consider his non-compliance with the case management order to be wilful disobedience of what had been ordered.

18. The claimant, in her application, relied upon rules 37(1)(b), (c) and (d). I was satisfied that (b) and (c) certainly applied. The manner in which the respondent has conducted the proceedings has been unreasonable and he has failed to comply with the Tribunal's orders. The non-compliance has been deliberate and persistent. I also found that (d) applied because the respondent has not actively pursued his response to the claim, albeit I appreciated that it was less clear-cut where the respondent had paid the deposits he was ordered to, to pursue parts of his response. Nothing material turned upon whether only two subsections of rule 37 applied, or all three.

19. I took into account the authorities/cases highlighted by the claimant's representative.

20. I could have struck out the response. The guiding consideration was the overriding objective. It requires justice to be done. I must ensure that the parties are on an equal footing. I must, as far as possible and as is compatible with the proper consideration of the issues, avoid delay. The respondent's default, where we were approximately one month from the final hearing and witness statements were originally due to have been provided in October, was one of significant magnitude. I heard what the claimant's counsel had said, that a fair hearing on the current dates will not be possible if the respondent only provides his witness statement(s) at the start of the hearing, or very late in the day. I had no indication that the respondent was about to, or intended to, provide his witness statement(s) (or, if he did, when that might be).

21. I came very very close to striking out the response at this hearing. I certainly could have done so. I did not for one reason and one reason only. I must consider whether there is an alternative approach or lesser remedy available. I think that there is. The respondent has breached the case management orders and, as it currently stands, without the leave of the Tribunal he is not able to call any witnesses in response to the claim (order 5.3 of the previous case management orders). Ordering that the respondent will not be able to call any witnesses or rely upon the statements of any witnesses, is not as draconian a step as striking out the entire response, but it addresses the failure to comply with the case management orders which I have explained, and it means that a fair hearing can still take place on the dates currently listed.

22. As a result, I refused to strike out the response, as I was requested to do. Instead, I made an order that the respondent is not able to call any witnesses at the final hearing and he is not able to rely upon any witness evidence/statements which he might wish to call.

Employment Judge Phil Allen
2 May 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON

13 May 2024

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