



# EMPLOYMENT TRIBUNAL

**Claimant:** Mr. K. Couson

**Respondent:** Bidvest Noonan (UK) Ltd.

**Hearing:** Final Hearing

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

**On:** 11-12 October 2023

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

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

## JUDGMENT

1. The Respondent's application under Rules 37(1)(c) (non-compliance with Tribunal orders) and 37(1)(e) (no longer possible to have a fair hearing in respect of the claim) for an order striking out the Claimant's claims of unfair dismissal under ss.94-98 of the Employment Rights Act 1996 and direct race discrimination under ss.13 and 39(2)(c)-(d) of the Equality Act 2010 on the grounds that a fair trial of those claims at the final merits hearing is no longer possible because of the Claimant's failure to prepare and serve a witness statement on the Respondent is granted.
2. The Claimant's claims of unfair dismissal under ss.94-98 of the Employment Rights Act 1996 and direct race discrimination under ss.13 and 39(2)(c)-(d) of the Equality Act 2010 are struck out under Rule 37(1)(e).

## REASONS

### Introduction

3. For reasons given orally at the final merits hearing on 12 October 2023, the Tribunal struck out the Claimant's claims, and issued a Judgment to that effect on 12 October 2023. By para. 1 of an Order of the Employment Appeal Tribunal dated 23 July 2024 (sealed 24 July 2024), the Tribunal was requested to provide written reasons for that decision. Those written reasons are provided below.

Facts

4. By an ET1 presented on 23 January 2023, the Claimant (a security guard) presented claims of unfair dismissal and race discrimination against the Respondent, his former employer. By its ET3 and Grounds of Resistance, the Respondent denied liability.
5. By a Case Management Order made on 26 May 2023 (**CMO**) following a Preliminary Hearing for Case Management, which the Claimant (a litigant in person) attended, the Tribunal listed the Claimant's claim for a final hearing on 11-13 October 2023.
6. Para. 14 of the CMO ordered the Claimant to prepare a witness statement for the final hearing in the following terms: "*The claimant and respondent must prepare witness statements for use at the hearing. Everyone who is going to be a witness at the hearing, including the claimant, needs a witness statement.*"
7. Para. 15 of the CMO stated what the Claimant's witness statement should contain: "*A witness statement is a document containing everything relevant the witness can tell the Tribunal. Witnesses will not be allowed to add to their statements unless the Tribunal agrees.*"
8. Para. 18 of the CMO ordered the Claimant and Respondent to send each other copies of all their witness statements by 1 September 2023.
9. The Claimant did not prepare any witness statements at all, including one for himself, and was not in a position to exchange witness statements on 1 September 2023 as the Tribunal had ordered.
10. By email on 6 September 2023, the Respondent's solicitors applied for an order under Rule 37 striking out the Claimant's claim on the grounds he had not complied with the case management directions concerning, *inter alia*, witness statements.
11. By letter dated 12 September 2023, the Tribunal (EJ Glennie) notified the Claimant he was considering striking out his claim on the grounds that he had not complied with orders of the Tribunal, and stated that the Claimant had until 19 September 2023 to make written representations as to why his claim should not be struck out.
12. By email on 23 September 2023 (4 days late), the Claimant wrote to the Tribunal stating (on the topic of witness statements): "*on the subject of witnesses, regarding exchanging witness statements Mr. Witnesses Mr. Terry Dancy will no longer be a witness for this case due to fact he is going through personal family issues which I have to understand are his priorities at this time also because he has mentioned a personal fear he has standing up to giants.*" The Claimant's email did not address why he had not prepared his own statement ready for exchange on 1 September.
13. By email on 27 September 2023, the Respondent's solicitors applied for an unless order requiring the Claimant to confirm by 29 September 2023 that he would be in a position to exchange witness evidence on 4 October 2023.
14. By email on 2 October 2023, the Claimant notified the Tribunal he objected to that application. He referred to the fact that on 23 September 2023 he had informed the Respondent that Mr. Dancy would no longer be a witness of his. The Claimant's

email did not address why he had not prepared his own witness statement ready for exchange on 1 September 2023 pursuant to the earlier CMO .

15. By letter dated 3 October 2023, the Tribunal (EJ Glennie) notified the parties that (a) an unless order had not been made (b) the date set for exchanging witness statements was varied to 4pm on 5 October 2023 (c) there was a real risk the Claimant's claim would be struck out if the Claimant did not comply with the revised deadline for exchange of witness statements.

16. By email on 3 October 2023, the Respondent's solicitors wrote to the Claimant. Their email stated (in relevant part concerning witness statements):

*"We note your comments regarding your sole witness, Mr. Dancy. However, you are also required to prepare and exchange a witness statement in advance of the hearing, as detailed in the Case Management Orders at paragraph 14 (attachment 1). We have attached a guidance note from the Employment Tribunal which details why you need a witness statement, how it should be set out and what it should contain. Please see paragraphs 10-20 of attachment 2. In light of the above, can you please confirm whether you will be in a position to exchange witness statements by 4pm on Friday 6 October?"*

17. The reference to a guidance note was to Guidance Note 3 (Witness and Witness Statements) in the Employment Tribunals (England and Wales) Presidential Guidance issued on 13 March 2014, reissued on 22 January 2018 (**Presidential Guidance**), para. 14 of which stated:

*"14. A witness statement should be prepared for each witness who is to give evidence. This includes the claimant (and the respondent where he or she is an individual)."*

18. By a separate email to the Claimant on 3 October 2023, the Respondent's solicitors stated (a) the Claimant had acted vexatiously, abusively, disruptively and unreasonably by (inter alia) failing to comply with directions set by the Tribunal (b) the Claimant had not indicated when he would be a position to exchange witness statements (c) if the Claimant continued to pursue his claim the Respondent would make a costs application against him under Rule 76(1)(a) (d) the Claimant was invited to withdraw his claim by 4pm on 6 October 2023 (e) if the Claimant withdrew his claim, the Respondent would not pursue a costs application against him.

19. Notwithstanding the above, the Claimant did not prepare any witness statements, including one for himself, was not in a position to exchange witness statements with the Respondent on the revised deadline of 5 October 2023 or the 6 October date the Respondent's solicitors canvassed, and did not do so.

20. By email on 6 October 2023, the Respondent's solicitors renewed their application for an order striking out the Claimant's claim on the grounds that the Claimant had failed to comply with the Tribunal's direction that the parties exchange witness statements on 5 October 2023.

21. By email on 9 October 2023, the Claimant notified the Tribunal he objected to that application. He referred to his emails of 23 September and 2 October 2023 stating

*“the respondent was informed I no longer have a witnesses [sic] due to the fact Mr. Dancy is dealing with some personal family issues”*. The Claimant’s email did not address why he had not prepared his own witness statement ready for exchange on 5 October 2023.

22. The final merits hearing commenced on 11 October 2023 with all parties in attendance before a full panel. At that point in time, the Claimant had still not prepared witnesses statements for use at the final hearing, including one for himself.
23. On 11 October 2023, the Respondent’s counsel made its application for an order striking out the Claimant’s claim under Rules 37(1)(c) (non-compliance with Tribunal orders) and 37(1)(e) (no long possible to have a fair hearing in respect of the claim) based on the Claimant’s failure to prepare and serve a witness statement. The Claimant objected to that application, claimed he did not know he needed to prepare a witness statement for himself, and offered to do so at the hearing.
24. After deliberating, on 12 October 2023 the Tribunal unanimously granted the Respondent’s strike out application for the reasons given orally that day.

#### Relevant law

25. Rules 37(1)-(2) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provide (in relevant part):
  - (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) ...
    - (b) ...
    - (c) *for non-compliance with any of the Rules or with an order of the Tribunal;*
    - (d) ...
    - (e) *that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or the 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 a party, at a hearing.*
26. A strike out order is a severe, draconian step. The power to strike out must be exercised with restraint. In determining whether to strike out a claim because a fair hearing is no longer possible, the Tribunal must consider whether there is a step open to it falling short of an order striking out the claim which will still allow a fair hearing to be conducted.
27. In order for the power to strike out a claim to arise under Rule 37, it is not necessary for a fair trial to be impossible – it is sufficient that, as a result of a party’s conduct, a fair trial in the trial window is not possible. Cf. Emuemokuro v Croma Vigilant (Scotland) Ltd. [2021] UKEAT/0014/20:

*“In my judgment, where a party’s unreasonable conduct has resulted in a fair trial not being possible within [the trial] 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.” (para. 18).*

Discussion / Conclusions

*Issue #1 – Non-compliance with order of the Tribunal*

28. So far as the facts are concerned, it is not in dispute that by the time the final hearing commenced on 11 October 2023, the Claimant had not prepared a witness statement setting out his own account of the facts of the case. It is also not in dispute that because he did not prepare his own witness statement, the Claimant did not – and obviously could not - serve any such statement on the Respondent.
29. Based on those undisputed facts, the Tribunal was satisfied that the Claimant had clearly failed to comply with:
- a. paras. 14 and 18 of the CMO, which had ordered him to prepare his own witness statement and send a copy to the Respondent by 1 September 2023;
  - b. the direction in the letter from the Tribunal (EJ Glennie) dated 3 October 2023 giving the Claimant until 4pm on 5 October 2023 to exchange his witness statement with the Respondent.
30. The Tribunal was also satisfied the Claimant had no reasonable excuse for his failure to comply with those orders. First, the Tribunal was satisfied that the CMO was sufficiently clear that the Claimant was required to prepare a witness statement for use at the final hearing (it literally said so): *“The claimant and respondent must prepare witness statements for use at the hearing.”*
31. Second, if – as he contended - the Claimant genuinely did not understand he was required to prepare and serve his own witness statement for use at the final hearing, the Tribunal was satisfied that his need to do so was adequately clarified and explained to him in the Respondent’s solicitors’ email sent on 3 October 2023: *“We note your comments regarding your sole witness, Mr. Dancy. However, you are also required to prepare and exchange a witness statement in advance of the hearing, as detailed in the Case Management Orders at paragraph 14 (attachment 1).”*
32. Third, the Tribunal did not know whether the Claimant had read or attempted to read the Presidential Guidance to which that email referred, a copy of which was provided. Had he read it, the Tribunal was satisfied the Claimant would undoubtedly have been put on notice of the need for him to prepare his own witness statement setting out his own evidence about the facts of the case: *“A witness statement should be prepared for each witness who is to give evidence. This includes the claimant (and the respondent where he or she is an individual).”*
33. Fourth, the Claimant’s explanation for not preparing a witness statement and sending a copy to the Respondent was that he was not aware until the first day of the final hearing that he had to do so. The Tribunal made no finding either way about the truth of that assertion. However, the Tribunal did find that regardless of his subjective awareness of the need to prepare and serve his own witness statement,

it was unreasonable for the Claimant not to know he had to do so by 3 October 2023 given the number of times the position had been made clear to him in writing by then.

*Issue #2: Whether a fair trial of the Claimant's claims was no longer possible*

34. The question the Tribunal asked here was not whether a fair trial of the Claimant's claims of race discrimination and unfair dismissal was now impossible but whether a fair trial of those claims at the 11-13 October 2023 final hearing was not possible in circumstances where the Claimant had not prepared his own witness statement and relied on no other witness evidence.

35. For the reasons set out below, the Tribunal's conclusion on that issue was that a fair trial of the Claimant's claims of race discrimination and unfair dismissal at the 11-13 October 2023 final hearing was not possible.

36. First, the Tribunal considered that a witness statement by the Claimant, in a case where that would be the only witness evidence he relied upon, was an extremely important document, as it would have served the following critical functions:

- a. it would have set out, and identified, all the evidence on which he relied in support of his case (which he was personally capable of giving);
- b. it would have identified all the documents on which the Claimant relied, and which parts of those documents the Claimant said were relevant.

37. Second, providing a copy of the Claimant's witness statement to the Respondent in good time before the final hearing on 11 October 2023 would have enabled the Respondent, assisted by its legal advisers, to:

- a. understand how the Claimant put his case;
- b. assess whether the Claimant's statement addressed, and gave evidence in support, of all the necessary elements of all of the claims he brought;
- c. assess whether there were important evidential 'gaps' in the Claimant's case;
- d. assess which key facts in the case (essentially what happened, and why) were agreed (or at least not in dispute) and which key facts were in dispute;
- e. assess which facts in the Claimant's statement were based on his own personal knowledge versus those which were not;
- f. assess whether the Claimant's witness statement gave evidence about primary facts which might tip the burden of proof regarding his race discrimination claim to the Respondent;
- g. identify likely areas of cross-examination for the Respondent's witnesses;
- h. discuss the Claimant's witness statement with the Respondent's witnesses and advisers at a pre-trial conference, and give appropriate legal advice in that context;

- i. prepare appropriate lines of cross-examination of the Claimant.
38. Third, the Tribunal considered that the Respondent having (a) the opportunity (by having a copy of the Claimant's witness statement) and (b) sufficient time, to perform tasks (a)-(i) constituted a critical part of conducting a fair trial on 11-13 October 2023. Suffice to say, because the Claimant did not prepare or send the Respondent a copy of his own witness statement, the Respondent was not able to perform any of those tasks, the responsibility (and fault) for which rested entirely on the Claimant.
39. The Tribunal accepted there was a distinction between the race discrimination claim, where the initial burden of proof rested on the Claimant, and the unfair dismissal claim, where the initial burden of proof rested on the Respondent to show the Claimant had been dismissed for a potentially fair reason. The Tribunal accepted it might be possible for there to be a fair trial of the 'reason for dismissal' issue, as the Tribunal would have some evidence (albeit not from the dismissing officer but from R Dean, the officer who decided the Claimant's appeal against dismissal), which the Claimant could challenge on cross-examination. However, the Tribunal was not satisfied there could be a fair trial of the issue of whether the reason the Respondent dismissed the Claimant (assuming it was conduct) constituted a sufficient reason for dismissal, in the absence of witness evidence from the Claimant setting out the basis upon which he contended that it had been unfair to dismiss him for that reason.
40. Fourth, the Tribunal considered the following steps falling short of an order striking out the Claimant's claim in its entirety, but was not satisfied that taking them would enable a fair trial of the Claimant's claims at the final hearing on 11-13 October 2023:
- a. postponing the final hearing to a completely new date, and giving the Claimant one more chance to prepare and serve a witness statement in the interim period prior to the adjourned trial – by definition, these measures would not have enabled a fair trial of the Claimant's claims at the final hearing on 11-13 October 2023, which was the Tribunal's focus;
  - b. on 12 October 2023 adjourning the final hearing for 24 hours, giving the Claimant a window of time to prepare and send the Respondent a witness statement, resume the trial on 13 October 2023 – the Tribunal was not satisfied this was remotely practical: even if the Claimant could prepare a 'fit for purpose' witness statement in that small window of time, that statement would likely not be served on the Respondent (or at least not be seen by its legal advisers) any earlier than the morning of 13 October 2023 – the last day of trial – and if the Tribunal gave the Respondent a minimum of 24 hours following receipt to perform tasks (a)-(i) above, not only would the trial not conclude by 13 October, the Claimant's cross-examination would not even start that day. Again, taking these steps would not have enabled a fair trial of the Claimant's claims on 11-13 October 2023.
41. The Claimant did not suggest any possible alternative steps to the Tribunal.

*Issue #3: Whether striking out Claimant's claims was a proportionate step*

42. The Tribunal considered whether striking out the Claimant's claims in their entirety was a proportionate step, and for the reasons set out below concluded that it was.
43. First, the Tribunal considered that the Claimant's failure to prepare and serve his own witness statement on the Respondent in good time before trial had made a fair trial of his claims of race discrimination and unfair dismissal not possible at the 11-13 October 2023 final hearing. This was plainly a very serious consequence.
44. Second, the Tribunal was satisfied the Claimant had no reasonable excuse for that failure. See paras. 30-33 above.
45. Third, instead of sitting back (as they could have done), the Respondent's solicitors went out of their way before the final hearing to explain to the Claimant in correspondence his need to prepare his own witness statement. The Respondent cannot fairly be accused of seeking to take advantage of a litigant in person who was unaware of or had misunderstood his legal obligations – those obligations were explained to him.
46. Fourth, on 3 October 2023 the Tribunal had warned the Claimant in writing of the risk that his claim might be struck out if he failed to exchange witness statements by 4pm on 5 October 2023 – regrettably, that warning went unheeded.
47. Fifth, the Tribunal was satisfied that the Respondent complied with its own pre-trial obligations, and was ready for trial on 11-13 October 2023, at least as ready it could be in the absence of any witness evidence from the Claimant. The Respondent's witnesses were in attendance ready to give evidence, and counsel had been instructed and was in attendance. The Respondent had a legitimate, reasonable expectation that whatever the outcome the Claimant's claims would be considered and decided by 13 October and the case would conclude then. The Respondent would be seriously prejudiced if the trial were to be adjourned and the Respondent had to complete the whole exercise again at a later date.
48. Sixth, the Tribunal had already given the Claimant two opportunities to serve his witness statement on the Respondent – first, by 1 September 2023, and second, by 5 October 2023 (an additional 5 weeks).
49. Seventh, in making its decision the Tribunal took into consideration its duty to act so as to further the overriding objectives set out in Rule 2, and was satisfied that striking out the Claimant's claims furthered the aims of dealing with cases in ways proportionate to the complexity and importance of the issues, avoiding delay, and saving expense, and was not incompatible with furthering the aims of ensuring the parties were on an equal footing, and avoiding unnecessary formality/seeking flexibility in the proceedings.
50. Eighth, the Tribunal was satisfied that the Claimant had been given a reasonable opportunity to make representations, which he exercised, before the Tribunal considered what to do and made its decision.



Employment Judge Tinnion

Date of signature: 6 August 2024

Date sent to parties: 9 August 2024

For the Tribunal Office: