Case Number: 6022779/2024

EMPLOYMENT TRIBUNALS

Claimant: **Mr J Squier**

Respondent: **Native Land Limited**

Heard at: **Croydon via CVP London South** **On:** **22/5/2025**

Before: **Employment Judge Wright**

Representation
Claimant: Mr O Issacs - counsel
Respondent: Mr T Tyndall – solicitor

RESERVED JUDGMENT ON PRELIMINARY HEARING

The respondent's response is struck out per Rule 38 of the Employment Tribunal Procedure Rules 2024.

1. This case was listed for a final two day hearing on 23/12/2024. It was converted to a three hour preliminary hearing by the Regional Employment Judge on the 21/5/2025. The hearing was floated and as such, it was not allocated to a specific Employment Judge on the 21/5/2025.

2. The reason for the conversation was to hear the claimant's assertions of alleged multiple instances non-compliance with the Tribunal's Orders by the respondent.

3. The history was set out by Mr Issacs and it was not disputed by Mr Tyndall.

[1…6]

Procedural Chronology

7. The parties were obliged to follow the ET orders given on 23rd December 2024. These gave dates for disclosure of "*all documents*" by 17th February 2025, for R to prepare a bundle by 3rd March 2025, and for witness statements to be served by 17th March 2025. [25]

8. On 9th February 2025, C set out a detailed list of information that he would expect to see in disclosure. [226 – 230]. That included requests for internal correspondence, emails, text messages or meetings where dismissal was discussed, information relevant to any investigation which took place before dismissal, internal policies and procedures that govern holiday (either the taking or recording), board meeting minutes regarding the "clawback."

9. R suggested in its application for a stay on 12th February 2025, that the "*issues in the case will generate a substantial volume of documentary disclosure*" and sought to have the hearing of 22 and 23rd May 2025 vacated [255].

10. On 13th February 2025, C wrote to the ET noting that R remained bound by the Tribunal's orders and that an unilateral refusal to engage in disclosure was "*procedurally improper*." [559]

11. R's solicitors stated on 13th February 2025 that they did not "*consider that the current case management orders…are adequate."* [261].

12. C provided his disclosure in accordance with the Tribunal Directions on 13th February 2025. [550]

13. On 17th February 2025, R's solicitors suggested that the "*Respondent does not consider it is in a position to carry out disclosure at this time*." [262]

14. On 18th February 2025, C made an application for an unless order [265].

15. Following a further application to stay proceedings made by R [281 – 283] the ET on 25th March 2025 noted that it did not understand *"the respondent's election not to comply with case management orders."* As to disclosure, the ET noted- *The respondent knows what documents it holds which are relevant to the unfair dismissal and wages claim.* The ET made a specific direction for witness statements to be disclosed *"no less than 2 weeks before the final hearing."* [51 – 52]. The ET noted:-

16. *If the final hearing arrives and a fair hearing is not possible because one or other party has not complied with directions, there is the possibility that the claim or response will be struck out. The Respondent in particular is warned, given its unilateral decision not to comply with directions.*

17. A formal order following the dismissal of the application for a stay followed. [53 – 56]

18. On 26th March 2025, C repeated his request for disclosure. C indicated that he expected "*full compliance*." [270]

19. On 14th April 2025, C wrote to R's solicitors advising that the Tribunal's order was clear – that each party was required to disclose relevant documents. [689 – 690]

20. On 15th April 2025, R's solicitor served a disclosure list. [687] R's disclosure list appears at [695 – 698].

21. On 16th April 2025, C noted that R had failed to provide *disclosure* in accordance with the orders. [681 – 684]. C noted that R's "list" which it had prepared omitted key documentation (such as documentation evidencing the process or rationale for dismissal, internal decision making or relevant internal communications or Board level material).

22. On 22nd April 2025, C complained to the ET, that R had still not served documents. C noted that the ET order of 25th March 2025 required *documents* to be disclosed by 15th April 2025 but that this had not happened. [678]

23. On 28th April 2025, the ET ordered that R "*must disclose to the claimant all documents identified as relevant in the list provided to him within 3 days….My direction was for documents to be disclosed within 3 weeks, not a list."* 57 – 58] The ET went on:-

24. I have already found that the respondent has failed to comply twice with case management orders. It seems to me that this will be a relevant factor in considering where responsibility lies if a fair trial cannot take place in the trial window. It seems to me the parties may benefit from consideration of Emuemukoro v (1) Chrome Vigilent (Scotland) Ltd (2) Anr (EA-2020-6-JOJ)

25. On 1st May 2025, R finally provided disclosure. [701] No explanation was given for late compliance but suggested that it was doing so "*in accordance with the recent clarification from the Tribunal."*

26. On 1st May 2025, C noted that the disclosure was 16 days after the deadline but that more importantly the disclosure was presented "*without an index, without pagination, and in no discernible order*." It was noted that there were omissions namely *"no contemporaneous documents evidencing the decision to terminate my employment."* C noted the significant task required of him as a litigant in person, *"to attempt to review this volume of unstructured material alone*." [700]

27. On 5th May 2025, C wrote to the ET regarding R's failure to disclose *"all documents identified as relevant in the list."* [704] C noted that R had failed to provide material documentation in a number of key respects. [705]

28. R failed to engage with that correspondence. That resulted in further correspondence with the Tribunal on 9th May 20225. [711 - 712]. C noted that the *"continued non-compliance is obstructing the preparation of this case and undermining fairness of the process."*

29. In response on 9th May 2025, R sought deflect attention from their own wrongdoing and to complain about C's disclosure. R's solicitors inferred that that could explain non-compliance with providing a statement. [713 - 714] This was despite C's confirmation that he had fully complied with his obligations [690 and 700]. If R was in any doubt as to C's position, he made it plain in his response on 12th May 2025 that there was nothing further to disclose. [713]

30. On 15th May 2025, C wrote to the ET complaining that *"the failure was making it "almost impossible for me to prepare adequately." [*721]

31. No trial bundle was prepared by R.

32. R finally sent to C an email enclosing a statement at 11:13pm on 20th May 2025. C's direct access counsel prepared a bundle containing both party's disclosure.

33. No explanation for the delay was provided or why it had taken so long to "*complete"* the statement.

4. The hearing had been re-timed to 2pm and at 1.55pm, Mr Tyndall sent an email to the Tribunal which said that: the respondent has conceded this claimant's dismissal was unfair; the responded concede that the Tribunal will make an award of compensation in accordance with s.118 to s.126 of the Employment Rights Act 1996; the respondent has agreed to pay the claimant's holiday pay in the sum of £9,2331.60; and the respondent has agreed the claimant's entitlement under s.24(2) Employment Rights Act 1996, any breach of the Acas Code and any issue of costs will be determined a the final hearing.

5. Mr Issacs orally supplemented his six-page skeleton argument.

6. In response Mr Tyndall said the respondent was in the position to proceed with the final hearing. He said that it was the Tribunal's decision to remove from the list the full hearing and that its two witnesses were ready to attend that hearing. He said that he did not excuse the respondent's negligence in respect of disclosure, however, he had not personally been involved in the original directions or the failure to respond. He sought to

blame the claimant for not expressly confirming, in breach of an Order, that he had no further documents relating to his recruitment by Henley.

7. It is not accepted that the respondent was in a position to proceed with the final hearing. Firstly, the respondent did not state this at any time in advance of the hearing, for example in response to the claimant's letter of the 5/5/2025 or 15/5/2025. The respondent did not respond to the Tribunal's letter of the 21/5/2025 to ask for the decision to convert the final hearing to be reconsidered as contrary to the claimant's assertion, the respondent had complied with the Tribunal's Orders and was in fact fully prepared for the final hearing. Secondly, the respondent was asked to upload to the Document Upload Centre the: bundle for the final hearing; witness statement bundle; and bundle for his hearing which Mr Issacs had prepared. Mr Tyndall was asked to do so once this hearing finished.

8. The bundle for the hearing hearing was not uploaded until lunchtime the following day and it bore all the hallmarks of a hastily complied bundle.

9. Rule 38 provides:

Striking out

38.—(1) The Tribunal may, on its own initiative or on the application of a party, strike out all or part of a claim, response or reply on any of the following grounds—

that it is scandalous or vexatious or has no reasonable prospect of success;

a. *(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;*

b. *(c) for non-compliance with any of these Rules or with an order of the Tribunal;*

c. *(d) that it has not been actively pursued;*

d. *(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim, response or reply (or the part to be struck out).*

(2) A claim, response or reply may not be struck out unless the party advancing it has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect is as if no response had been presented, as set out in rule 22 (effect of non-presentation or rejection of response, or case not contested).

(4) Where a reply is struck out, the effect is as if no reply had been presented, as set out in rule 22, as modified by rule 26(2) (replying to an employer's contract claim).

10. The Tribunal is required to consider Rule 3, the overriding objective, when

deciding whether or not it is proportionate to strike out the response.

11. Mr Issacs referred to Emuemukoro v Croma Vigilant (Scotland) Ltd [2022] ICR 327. No witness statements had been prepared in that case, the trial bundle was incomplete and the Tribunal found that a fair trial could not be concluded within the trial window (the five-day listing of the final hearing).

12. Mr Issacs also referred to De Keyser Ltd v Wilson [2001] IRLR 324 which held that 'wilful, deliberate or contumelious disobedience' can lead directly to whether it is proportionate to strike out a party, irrespective of whether or not a fair trial is possible.

13. In the Emuemukoro case, it was accepted that the respondent's failure to prepare for the final hearing was an oversight due to the former case handler having left the respondent's representatives.

14. It goes onto set out that there are two conditions for exercising a power to strike out a response. That the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible (quoting from Blockbuster Entertainment v James [2006] EWCA Civ 684). It noted the two conditions are in the alternative.

15. It is accepted that striking out a claim or a response is a draconian power. It is also accepted that the authorities provide for the Tribunal having to decide whether the respondent's conduct was deliberate and persistent disregard of required procedural steps and that striking out is the only proportionate response.

16. A fair trial was not possible within the two day trial window as the respondent was simply not prepared for the final hearing and it had not demonstrated anything to the contrary. The respondent seems to rely upon the lack of judicial resources, however, the parties were only told that there was not a Judge available to hear the converted public preliminary hearing. Not that there was no Judge available to hear the two day final hearing. Judicial availability is fluid and this was demonstrated by a Judge becoming available to hear the application. Cases settle at all points of a hearing (for example, a four-day case was heard in three-days, a costs application was made which would have been heard on the fourth day, which then itself settled, thus releasing that Judge on day four, which would have been day one of this hearing).

17. As set out in Emuemukoro, it will almost always be possible to have a trial at some future point; that however, does not pay regard to the consequences of delay and costs for the other party. It is inconsistent with the notion of fairness generally and the overriding objective and consideration should be had to those maters.

18. Turing then to proportionality, of course the 'less draconian' option is not to strike out the response. In the chronology set out above the respondent has taken a contumelious stance in these proceedings. Unlike the

Emuemukoro authority, there was no benign explanation by the respondent and indeed the respondent's explanation was that it was in fact ready for the final hearing; yet it was not able when asked, to demonstrate its readiness. The respondent had taken an arrogant approach to this litigation and has demonstrated its wilful, deliberate and contumelious disobedience. It was not prepared to engage with the claimant in order to progress matters and it did not comply with the overriding objective in that besides the other failings, it did not co-operate with either the claimant or the Tribunal to further the overriding objective.

19. For those reasons, the claimant's application to strike out the respondent's response succeeds. As discussed at the hearing, the claim will now be listed for a half-day remedy hearing. The parties are however encouraged not to need the indulgence of further Tribunal time and should be capable of agreeing remedy in light of the concessions the respondent has already made.

_____Approved by _____

Employment Judge Wright

Date_____22/5/2025_____

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/