



EMPLOYMENT TRIBUNALS

Claimant: Mr A Ali
Respondent: Bromley by Bow Centre
Heard at: East London Hearing Centre
On: 26 March 2019
Before: Employment Judge Russell

Representation
Claimant: In person
Respondent: Mr P Maratos (Consultant)

JUDGMENT

1. The Response is not struck out.
2. **UNLESS** the Respondent provides to the Claimant by 9 April 2019 disclosure of documents (including those set out in his application dated 17 December 2018 save for item 8, to the extent set out in the Reasons below) and a bundle, the Response will be struck out without further order. Provision of any documents and a witness statement confirming the searches undertaken and which documents do not exist shall be deemed compliance with the Unless Order.
3. By reason of its unreasonable conduct in dealing with disclosure, the Respondent shall pay to the Claimant the sum of £494 in respect of his preparation time.

REASONS

1. This is the fourth Preliminary Hearing in this claim. It is to consider the Claimant's applications to strike out the Response, for specific disclosure and for a preparation time order. The applications are resisted. The final hearing is listed for 21 to 24 May 2019.

2. In short, the hearing has been required due to ongoing problems with disclosure. On 10 September 2018, Employment Judge Gilbert made an order requiring disclosure of documents relevant to the issues by 8 October 2018. The Claimant complied with this Order, the Respondent did not. It also failed to comply with an Order of Employment Judge Foxwell that it present an amended Response by 8 October 2018. At the time it was acting without legal representation, Peninsula only being instructed 25 October 2018.

3. A Preliminary Hearing took place before Employment Judge Goodrich on 29 October 2018. He set out the history of the claim to date including the non-compliance of the Respondent referred to above. The date for disclosure was amended to 12 November 2018. Employment Judge Goodrich made it explicit that the Respondent needed to be aware that persistent continued failure to comply with Case Management Orders means that the Response would be likely to be struck out.

4. At a further Preliminary Hearing on 6 December 2018, Employment Judge McLaren granted leave to the Claimant to amend his claim but refused to add two named Respondents. She also refused the Claimant's application to strike out the Response under Rules 37(a) to (d), accepting that the Respondent's conduct of the case to date was due to their lack of legal representation and failure by the Tribunal to send out the Preliminary Hearing Summary and Orders made by Employment Judge Goodrich until 19 November 2018 (after the date specified by him for disclosure). In the circumstances, there was no significant default by the Respondent, a fair trial was still possible and strike out would be a disproportionate response. Employment Judge McLaren again varied the date for disclosure, this time to 8 February 2019.

5. On 9 October 2018, the Claimant wrote to the Respondent requesting disclosure of specific documents listed in numbered items 1 to 25. The Respondent did not respond and the request was not considered at either of the earlier Preliminary Hearings. On 17 December 2018, the Claimant repeated his request with a list of what now numbered 28 categories of document. The Respondent's representative replied on 14 January 2019 noting that it had until 8 February 2019 to provide disclosure, questioning the relevance of the documents and asserting that others could not be disclosed due to data protection and confidentiality concerns. By email dated 23 January 2019, the Claimant explained the relevance of the documents sought. They related to the recruitment of Ms Rexhepi and the reasons why she was paid a salary higher than advertised or paid to others of her grade, the allocation of supervision duties to the Claimant from October 2017 said to be an act of victimisation and the handling of his grievance.

6. Disclosure was not provided by the Respondent on 8 February 2019, but only on 14 February 2019. The Claimant applied on 11 February 2019 for an order striking out the Response for repeated failure to comply with case management orders and failure to provide the requested documents. The Respondent resisted the application, explaining that delay in disclosure had been caused by the onerous request for specific disclosure and incorrectly stating that the Claimant had not identified the relevance of the documents and asserting that his request was vague and placed it in a near impossible position to understand or comply.

7. I considered each item requested with the Claimant and Respondent in order to decide whether the request was so onerous as to provide a proper explanation for the Respondent's delay in providing disclosure. Mr Maratos properly conceded that the vast majority of the documents sought by the Claimant were relevant to the issues and are disclosable. The exception is item 8, the file reviews, as the issue is the skill, experience and qualifications of Ms Rexhepi as understood at appointment rather than as demonstrated in her work after appointment. As for the other items, some were requested for an unduly long period or for an unduly wide range of staff. In the circumstances, I limited them as follows:

Item 5 (correspondence between Hamilton and Begum about supervision): for the months of September and October 2017 only.

Item 7 (SLA agreements): from September 2016 only.

Items 9 and 10 (names and supervision details): a list of all employees and trainee advisers supervised and the name of the supervisor of each during the period 2014 to 2018.

Item 27 (senior management team agenda and minutes): only in respect of the Claimant and the grievance raised by Mr Miah and for the period August 2017 to August 2018 inclusive.

Item (list of roles, salary band and ethnicity): limited to advisers for the period 2016 to 2018.

8. These documents must be provided to the Claimant on or before **9 April 2019**.

9. The Claimant remains employed by the Respondent. Some of the documents to be disclosed contain confidential information relating to the salaries and circumstances of other employees. The Claimant understands that disclosure is to be used for the purposes of these proceedings only and that any misuse of disclosed information may properly be subject to disciplinary proceedings and/or sanction by the Tribunal.

10. Having considered the above, I was not satisfied that the specific disclosure request was unduly onerous, vague or irrelevant. If the case handler at the Respondent's representative had addressed her mind to the request as we have done today, this would have been evident. It is not a reasonable excuse for failure to comply with an Order for disclosure. Further, any problem with compliance should have led to the Respondent seeking an extension from the Tribunal and not simply failing to comply.

11. As I made clear to Mr Maratos during the hearing (whilst accepting that the failure to comply was not his personal fault), an Order is not simply a polite request or a vaguely aspirational target within the gift of the parties. It is an obligation placed upon a party by the Tribunal. The Respondent has again failed to comply with its obligations. It could be in little doubt after the warning given by Employment

Judge Goodrich of the importance of compliance and the potential consequences of further failure.

12. The Claimant's application to strike out the Response was again made pursuant to Rule 37, essentially in failure to comply with orders the Respondent was acting unreasonably, abusively and not properly prosecuting its case. Striking out is a draconian sanction and the Tribunal must be satisfied either that the conduct has involved deliberate and persistent disregard of required procedural steps or made a fair trial impossible, before then considering whether strike out is proportionate, see **Blockbuster Entertainment Ltd v James** [2006] IRLR 630, CA.

13. As at the Preliminary Hearing before Employment Judge McLaren, the Claimant submitted that a fair trial was not possible because the Respondent had had sight of his documents and could use the same better to prepare their case. It is certainly true that witness statements have been prepared and exchanged without the Claimant having sight of the disclosable documents referred to above. However, most of these are documents passing between the Claimant and the Respondent in any event. I am not satisfied that it renders a fair trial impossible, not least as the exchange of supplementary witness statements will allow the Claimant properly to address any new evidence. Such supplementary witness statements must be exchanged by **30 April 2019**.

14. It is imperative however that the additional disclosure take place without further delay. Given the history of the case to date and the disappointing and repeated failures on the part of the Respondent to comply with previous orders, I can have little confidence that the Respondent will comply with a further, ordinary case management order. For this reason, I am satisfied that the additional sanction of an Unless Order is reasonable and necessary, not least as the final hearing is less than two months away and supplementary witness statements will be required. Any further failure by the Respondent to comply will seriously damage the Claimant's ability to have a fair trial and may result in a postponement of the listed hearing. That would be neither just nor in accordance with the overriding objective.

15. For the avoidance of doubt, the Respondent will be deemed to have complied with the Unless Order by providing those documents which are found in the disclosure searches and a witness statement from either Ms Tollington or Mr Khan to confirm the extent of the searches and those categories of documents which cannot be found. If it appears at the final hearing that disclosure has not been complete, the Claimant can deal with any deficiency in cross-examination and the Tribunal may draw any adverse inference as to credibility which it deems appropriate.

16. In the circumstances, I am satisfied that it is not appropriate to strike out the Response and that the Unless Orders are a fair and proportionate way of dealing with the Respondent's history of non-compliance with disclosure.

17. The Claimant applied for a preparation time order in respect of 90 hours of work on the case to date. He helpfully split this into six categories: schedule of loss; case management agendas; application to amend; disclosure of documents

and bundle; application to strike out and application for a preparation time order. Today, he added an additional 14 hours in respect of the supplementary witness statements which will now be prepared. The Respondent resisted the application.

18. Rule 76 of the Employment Tribunal Rules of Procedure 2013 provides that:

“A tribunal may make a costs order or a preparation time order and shall consider whether to do so where it considers that:

- (a) a party or that party’s representative have acted vexatiously, feasible, disruptively or otherwise unreasonably in either the bringing of the proceedings or part or the way that the proceedings or part have been conducted; or**
- (b) any claim or response had no reasonable prospect of success it was therefore the making of an order is a two stage process the first question has the relevant threshold being passed the second even if it had is a costs order appropriate.”**

19. The lead authority in deciding whether to award costs in the Employment Tribunal is **Yerrakalva v Barnsley Metropolitan Borough Council** [2011] EWCA CIV 1255, in particular the judgment of Mummery LJ. The Tribunal should consider the whole picture of what had happened in the case and ask whether there had been unreasonable conduct by the party in bringing/defending the claim and its conduct of the case. If so, it should identify the conduct, what was unreasonable about it and the effect it had. The Tribunal should also take into account any criticisms made of the other party’s conduct and its effect on the costs incurred.

20. Applying the principles of **Yerrakalva** to the facts of this case, the Respondent’s conduct has been unreasonable insofar as it has failed properly to engage with the disclosure process as set out more fully above. The particular unreasonable conduct is failure to reply to the October 2018 request for specific disclosure until 14 January 2019, refusal to disclose requested documents which upon consideration are clearly relevant and, with some minor variations, proportionate to the issues to be decided. The failure to comply with three separate dates for disclosure and the lack of any good explanation in respect of the most recent date passes the threshold for a preparation time order.

21. As for the effect of this unreasonable conduct, it had no effect upon the Claimant’s need to prepare a Schedule of Loss or his application to amend. Any effect upon completion of case management agendas was minimal. These were all procedural steps required irrespective of the problems which have arisen in disclosure. I decline to make any preparation time order in respect of these matters.

22. As for the three remaining categories of work identified by the Claimant, the unreasonable conduct has required the Claimant to spend additional time preparing his case both in correspondence with the Respondent and in respect of today’s hearing (but not time at the hearing). The Claimant has stated that this has required 53 hours of work. I consider this to be an unreasonably high amount of time. The Claimant is an intelligent and able man, capable of getting to grips quickly with the issues required to be considered. Some of the work on the bundle

and disclosure would have been required even if there had been proper compliance and the strike out application has not been successful. On balance I consider that 13 hours is an appropriate amount of preparation time resulting from the Respondent's unreasonable conduct. For these reasons, the Respondent shall pay the Claimant the sum of £494 in respect of his preparation time.

Employment Judge Russell

29 March 2019