



EMPLOYMENT TRIBUNALS (SCOTLAND)

5 **Case No: 4103144/2019** **Held in Glasgow on 12 December 2019**

10 **Employment Judge M Kearns**
Members: Mrs P McColl
Ms N Bakshi

15 **Stevenson Bros (Avonbridge) Limited** **Appellant**
Represented by:
Ms S Duff
Advocate

20
Kim Munro **Respondent**
HM Inspector of Health and Safety **Represented by:**
25 **Mr J Herd**
Solicitor

30 **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous Judgment of the Employment Tribunal was that the appellant's application to strike out the response is refused.

35

40 **REASONS**

1. The appellant is Stevenson Bros (Avonbridge) Limited, a family business engaged in road haulage. By application to the Employment Tribunal dated

E.T. Z4 (WR)

21 March 2019 they appealed against an Improvement Notice issued to them by the respondent. The respondent resists the appeal. By application made at the outset of the third day of the full hearing the appellant seeks strike out of the response under Rule 37(1)(e) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (“the ET Rules”) on the ground that it is no longer possible to have a fair hearing.

Applicable Law

2. Rule 37(1)(e) provides as follows:

“37(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:-

.....

(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).

(2) A claim or response shall 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 the party at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.”

3. Rule 41 of the ET Rules, provides that:

“The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in

5 *the overriding objective. The following rules do not restrict that general power. The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts.”*

4. In exercising its powers under the ET Rules, the Tribunal is also bound to have regard to the overriding objective, as provided by Rule 2:

10 *“The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable –*

(a) ensuring that the parties are on an equal footing;

15 *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

20 *(d) avoiding delay, so far as compatible with proper consideration of the issues; and*

(e) saving expense.

25 *A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.”*

30 **Background**

Initial submissions for the Appellant

5. At the outset of the third day of the full merits hearing in this case Ms Duff made the following submission on behalf of the appellant. For reasons that will become apparent we quote the submissions verbatim. Ms Duff: *"It had*
5 *been my intention to raise a concern with the Tribunal this morning due to certain events which took place yesterday. However, my concerns have been further amplified this morning. The respondent's witness Mrs Ross was put on oath at the beginning of her evidence and was told not to discuss her evidence with any other person on each occasion the court adjourned.*

10 *After court yesterday, I went to the bathroom while Ms Turner [instructing solicitor for the appellant] shut up her laptop. Ms Turner saw Mr Herd with Mrs Ross at the back of the Tribunal Hearing Room. She initially thought nothing of it, assuming that Mr Herd was giving Mrs Ross the standard*
15 *instructions about when to return. However, she heard Mr Herd say to Mrs Ross: "Much better. She's such a pain in the ass. The Tribunal is with us. You saw them. I told you at lunchtime if you toned it down it would be better. You saw the Tribunal. It's much better now you have toned it down."*

20 *It was immediately clear to Ms Turner and me that despite the Employment Judge's repeated warnings not to discuss her evidence that Mrs Ross was discussing her evidence with Mr Herd. It was clear there had been an earlier discussion at lunchtime while she was in the middle of being cross examined.*

25 *Yesterday [through the glass panel in the door of the respondent's waiting room] I could see Mrs Ross sitting at a table with a blonde woman. I don't know if the blonde woman is Mrs Jack, who is still to give evidence.*

30 *I was aware yesterday in cross examination of a change of tone and demeanour in Mrs Ross's evidence. Also, there was a point yesterday when Mrs Ross looked directly at Mr Herd. I thought it very odd. It was my intention to raise those matters this morning. However, this morning when I was returning from coffee I looked into the [respondents' waiting] room and saw*

Mr Herd with his notebook – the one he is writing in just now - on his lap in conversation with Mrs Ross. I asked an independent solicitor from the claimant’s waiting room, Paul Deans of Pinsent Masons to accompany me to the door of the respondent’s waiting room. Mr Herd was flicking through his notebook. This continued and I recorded on my mobile [filmed through the glass panel in the door of the respondent’s waiting room] Mr Herd and Mrs Ross in conversation with his notebook. Mrs Ross became aware of me through the door and Mr Herd closed his notebook and went to sit in another part of the room.

This is a matter that goes to the heart of our whole process.”

Initial submissions for the respondent

6. Mr Herd responded as follows: “I did speak to the witness at the back of the court when it finished last night. I just made some general comments about how she was doing. My principal reason for speaking to her was to discuss further witnesses because she is also the instructing client. The main thing we were talking about was whether or not to have a further witness, Nikki Jack led today. We decided not to call Nikki Jack.”

7. The Employment Judge asked Mr Herd to respond to the allegations sentence by sentence. Mr Herd accepted that he had said the following things to Mrs Ross: “Much better. She is such a pain in the ass (referring to Ms Duff). The Tribunal is with us, you saw them....You saw the Tribunal.” He denied that he had said: “I told you at lunchtime if you toned it down it would be better. ...It’s much better now you have toned it down.” Mr Herd admitted having had an earlier discussion with Mrs Ross at lunchtime on Wednesday 11 December, but said this was not about her evidence. In relation to the conversation in the respondent’s waiting room this morning (12 December) with the notebook, he said: “I was asking about the HGV issue, whether HGVs are covered by the PUWER provisions.”

Ms Duff's further submissions

5 8. Ms Duff then submitted: *"It is appropriate that Mrs Ross be questioned about the circumstances of what has taken place. Subject to Mrs Ross being questioned about that Mr Herd cannot continue to represent the HSE"*. Ms Duff submitted that the Tribunal should make an order to that effect. The EJ then asked Ms Duff: *"Do you have authority for that proposition?"* Ms Duff replied: *"Mr Herd has admitted to the Tribunal that he has spoken to a witness during the course of her giving evidence. He said: "I was asking about the HGV issue" and that's a clear breach of procedural propriety in these proceedings. Where there is a judicial admission of improper conduct by the solicitor then he cannot continue. I will need to search for the authorities."* She suggested the Tribunal may have the power at common law. The EJ explained to Ms Duff that the Tribunal is a statutory body that only has the powers given to it by statute and the Tribunal Rules and the Tribunal did not have common law powers. The EJ stated: *"If you are submitting that we have power to order that Mr Herd cannot represent the HSE we need you to address us on the authority for that proposition"*.

20 9. Ms Duff stated: *"These proceedings are tainted by Mr Herd's conduct. The proceedings should be abandoned due to the conduct Mr Herd has admitted in part before this Tribunal. This witness's evidence is clearly tainted and she is the Inspector who issued the Improvement Notice. No independent party could conclude that this hearing could fairly continue after what has taken place. This particular hearing is sufficiently damaged because of the conduct of the respondent and her solicitor that it cannot fairly continue"*. The EJ said that Ms Duff would need to address the Tribunal on what application she was making under the ET Rules and identify which Rule she relied on.

30

Mr Herd's further submissions

10. The EJ told Mr Herd that she had noted which of the allegations he accepted and in particular the conversation this morning (12 December) with the witness about the issue of whether HGVs are covered by the PUWER Regulations. The EJ asked him: *“Do you accept you were discussing the evidence?”* Mr Herd replied: *“No, I was asking about the applicability of the provisions to HGVs”*. The EJ asked him whether this was with a view to asking a question about this in re-examination and Mr Herd said: *“potentially yes”*.

11. The Employment Judge asked Ms Duff how much time she required to prepare her application. She said *“until 11.30”*. The EJ instructed Ms Duff to intimate her application to Mr Herd by 11.30. She then asked Mr Herd how long he required to prepare his response. He agreed that half an hour would be sufficient. The Tribunal adjourned at 10.55 am until 12 noon.

Appellant’s application for strike out of the response

12. The hearing resumed at 12 noon. Ms Duff said the appellants’ application was for strike out of the response to the appeal in terms of Rule 37(1)(e) on the grounds that it was *“no longer possible to have a fair hearing in respect of the appeal because of what had occurred in the course of the evidence of the Health and Safety Inspector about the Improvement notice which was the subject of this appeal”*.

13. In support of her application Ms Duff made the following submission: *“Mr Herd has made a judicial admission that he discussed the evidence given by Mrs Ross while she was still in the course of giving her evidence. He said he had been asking about the HGV issue and whether it was covered by the PUWER provisions; asking about the applicability of the provisions and whether they applied to HGVs. The Employment Judge had asked him whether this had been with a view to asking questions about that in re-examination and Mr Herd had said ‘potentially yes’. He had been discussing a witness’s evidence with her and giving advance notice of topics in on-going*

re-examination. Mr Herd had accepted he spoke to Mrs Ross after court yesterday afternoon. The application is also in terms of Rule 2, the overriding objective to enable the Tribunal to deal with cases fairly and justly. Given what has occurred it would be impossible for this tribunal or any other
5 to reach conclusions based on untainted evidence. Given the significance of the witness and what has occurred, a fair hearing is no longer possible because of what has occurred both by the respondent and by the respondent's solicitor on behalf of Mrs Ross. Any subsequent hearing would still have what has occurred in this hearing as an issue. Therefore, the only
10 fair outcome is to strike out the response. If the response is struck out, there would be no response to the appeal and the Improvement Notice would fall." Ms Duff corrected the last point to say that in fact an order would be required from the Tribunal to say that the Improvement Notice was cancelled. The Employment Judge said that even if the appeal was unopposed, it would not
15 necessarily be the case that the Improvement Notice would be cancelled without a hearing.

Respondent's response to strike out application

20 14. Mr Herd opposed the application for strike out of the response to the appeal under Rule 37(1)(e). He submitted that it was not the case that it was no longer possible to have a fair hearing and that it was not appropriate or proportionate to strike out the response.

25 15. The Tribunal adjourned to consider the application.

Discussion and Decision

30 16. We considered the authorities on strike out. It is trite law that the striking out of a claim or response is a draconian measure which should not be imposed lightly. (Blockbuster Entertainment Ltd v James [2006] IRLR 630).

17. In Bolch v Chipman [2004] IRLR 140 the EAT UKEAT/0097/17/BA the EAT overturned a tribunal's decision to strike out the response of an employer who had threatened the claimant with physical violence. In doing so, the EAT set out the steps a tribunal must ordinarily take in determining whether to make a strike out order. Not all of these are relevant in the case before us because the strike out application here is restricted to paragraph (e) - that a fair trial is no longer possible. Thus, in the present case we must consider firstly whether or not a fair trial is still possible. If a fair trial is still possible, the case should be permitted to continue. If not, we must consider whether strike out is proportionate or whether a less draconian penalty should be imposed. In Bolch the EAT held that while the employer's conduct was reprehensible, there had been insufficient evidence on which the tribunal could conclude that his behaviour amounted to 'unreasonable conduct of the proceedings'. Furthermore, the EAT was satisfied that the employer's behaviour would not prevent a fair trial.

18. Similarly, in Laing O'Rourke Group Services Ltd v Woolf EAT 0038/05 a tribunal struck out an employer's response after its representative had failed to attend a hearing believing it would be adjourned by consent. The EAT overturned the decision saying: "*Courts should not be so outraged by what they see as unreasonable conduct as to punish the party in default in circumstances where other sanctions can be deployed and where a fair trial is still possible*".

19. In the recent case of Chidzoy v British Broadcasting Corporation UKEAT/097/17/BA, during a short break in the course of giving evidence at the full hearing of her claim, the claimant had a conversation with a journalist which included some discussion about the case and a particular aspect of her evidence given shortly before the break. The matter was brought to the attention of the Tribunal. Concluding that the claimant had indeed been party to a discussion about her evidence in flagrant disregard of the warnings given by the ET on six separate occasions that she must not do so when still giving

evidence, the ET concluded that it had irretrievably lost trust in the claimant and could no longer fairly hear her case. It considered whether there were any alternatives to striking out the claim but concluded that there were none and it therefore struck out the case.

5

20. The claimant appealed, but the Employment Appeal Tribunal held that the Tribunal had correctly addressed the questions identified in Bolch. Adopting an entirely fair process, it had been entitled to make the findings it did as to what had taken place and had permissibly concluded that the Claimant had thereby unreasonably conducted the proceedings. The ET had gone on to consider whether it could still conduct a fair trial of the Claimant's case but, having concluded that trust had broken down, had concluded it could not. Asking itself whether it was proportionate to strike out the claim, the ET had considered whether there were any alternatives but had concluded there were none. In the circumstances, the EAT held that that was a conclusion that had been open to the Tribunal and the challenge to its decision to strike out the claim was dismissed.

10

15

20

25

21. The Tribunal in Chidzoy had found that the fact of the claimant's discussion with the journalist and its contents, including a reference to matter raised in cross examination that morning, had been reinforced by the "doubtful veracity" of the report of events by her solicitor which had altered significantly between Thursday and Monday. They concluded in these circumstances that the trust which they should have had in the claimant had been irreparably damaged.

30

22. We turned to consider the facts relied upon by Ms Duff in support of her application for strike out. Although she had originally suggested calling Mrs Ross to give evidence about what had been said to her by Mr Herd, she did not ultimately do so. Nor did she call either Ms Turner or Mr Herd. Instead, in support of her strike out application she relied upon the points which Mr Herd had admitted. We have accepted as fact all the points admitted by Mr Herd. We are not in a position to make findings on any of the facts in dispute

in the absence of oral evidence. For clarity therefore, the facts before us are these:

- 5
- (i) Mrs Ross, a Health and Safety Inspector with the respondent is their principal witness in this case. She is also a party in the case and is the client from whom Mr Herd seeks instructions. The case concerns an Improvement Notice which Mrs Ross issued on 1 March 2019.
- 10
- (ii) Mrs Ross was put on oath and began giving her evidence at 11.18 am on Tuesday 10 December 2019. She finished her evidence in chief at around 3.30 pm that day and was cross examined by Ms Duff until around 4pm. The hearing resumed the next day at around 10.05 am with Ms Duff's continued cross examination of Mrs Ross. The hearing was adjourned for lunch at 1pm. Mr Herd had a discussion with Mrs
- 15
- Ross at lunchtime on Wednesday 11 December.
- (iii) At some point during the lunch adjournment on Wednesday 11 December, Ms Duff looked through the glass panel in the door of the respondent's waiting room and saw Mrs Ross sitting at a table with
- 20
- Mrs Jack, whom she understood at that stage to be a witness for the respondent still to give her evidence. The respondent is no longer calling Mrs Jack to give evidence.
- (iv) Ms Duff continued her cross examination of Mrs Ross when the
- 25
- Tribunal hearing resumed after the lunch adjournment at 2.05pm on Wednesday 11 December. The cross examination concluded at 3.45pm and Mr Herd re-examined Mrs Ross until around 4pm when the hearing concluded for the day. Mr Herd indicated that he would continue his re-examination the following morning and Mrs Ross accordingly remained under oath. The Tribunal rose and left the room.
- 30
- Shortly thereafter, Ms Duff left the room and went to the bathroom. Ms Turner, solicitor for the appellant remained in the room to shut down her laptop. At this point, Mr Herd and Mrs Ross were at the back of the

court room. Mr Herd said to Mrs Ross: “*Much better. She is such a pain in the ass* (referring to Ms Duff). *The Tribunal is with us, you saw them.... You saw the Tribunal.*”

5 (v) The following morning, Thursday 12 December 2019 Mr Herd was in the respondent’s waiting room with Mrs Ross. He had his notebook open in front of him. He asked Mrs Ross about the ‘HGV issue’ and whether HGVs are covered by the PUWER provisions. He was asking about the applicability of the Regulations with a view to potentially asking Mrs Ross a question about this in re-examination.

10

(vi) Ms Duff asked a solicitor from the claimant’s waiting room to accompany her to the door of the respondent’s waiting room. She then filmed Mr Herd and Mrs Ross on her mobile phone through the glass panel in the door of the respondent’s waiting room until Mrs Ross became aware of her through the door and Mr Herd closed his notebook and went to sit in another part of the room.

15

20 23. Per Harvey on Industrial Relations and Employment Law (Division R Annotated Statutory Instruments; 2013 ET Rule 37) and the authorities set out above, the operation of Rule 37 requires a two-stage test:

(1) Has one of the grounds for strike-out in rule 37(1)(a)–(e) been established on the facts?

25

(2) if so, is it just to proceed to a strike-out in all the circumstances (including whether other, lesser measures might suffice)? *Hasan v Tesco Stores Ltd* UKEAT/0098/16 (22 June 2016, unreported) (applying *HM Prison Service v Dolby* above). At paragraph 19 the EAT said this:

30

"The second stage exercise of discretion in Rule 37(1) is important, not just where the striking out ground established is minor or excusable; it is a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit." The basis for this is that rule 37 is permissive, not mandatory.

5

24. Addressing the first test above, the ground relied upon is (e) – which requires ‘that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the response’. We considered this in light of the facts found above. We noted that there had been a discussion between Mr Herd and Mrs Ross on Wednesday lunchtime. No allegations had been made that any evidence given prior to 2pm on Wednesday 11 December was tainted. The allegations about the discussions on Wednesday lunchtime were not specified beyond an allegation that Mr Herd had told Mrs Ross to ‘tone it down’. This was denied by Mr Herd and we did not feel able to make a finding in fact about it for the reasons given above.

10

15

25. The members of this Tribunal are all experienced in considering issues of credibility and reliability of evidence. We are capable of considering the evidence given before and after the lunchtime discussion; of forensically assessing the possibility that a discussion may have tainted the evidence heard after it and of comparing the evidence given before and after that time for possible inconsistencies. It is fair to say that Mrs Ross made a number of concessions in cross examination both before and after 2pm on Wednesday. Any inconsistency in these or in her testimony generally would be apparent from the Judge’s notes of her evidence and may lead to that part of her evidence or her evidence generally being given less weight. We considered that the present Tribunal would be better able to assess Mrs Ross’s evidence fairly than a fresh Tribunal who would not know the reason for relisting of the case.

20

25

30

26. Mr Herd was frank with the Tribunal about the content of the discussion he had had with Mrs Ross on the morning of Thursday 12 December and he

volunteered details against his own interest. When asked by the Judge, he immediately conceded that he was potentially going to ask a question in re-examination about the subject of that discussion. His explanation was that this was on the basis that she was his instructing client. This is not a case like Chidzoy (see above) where the claimant's solicitor gave a report of events which was of "doubtful veracity" and which "had altered significantly between Thursday and Monday". We did not conclude, like the Tribunal in that case, that we had irretrievably lost trust in either Mrs Ross or Mr Herd and therefore that a fair hearing of the case was no longer possible. We noted that Mrs Ross was responding to a question from Mr Herd on the Thursday morning and we did not find as fact on the basis of the evidence before us that she discussed the case at any other time. (It was accepted that a discussion had taken place with Mr Herd on Wednesday lunchtime but Mr Herd denied that it concerned the case and no evidence was led about the content). Thus, since we do not consider that it is no longer possible to have a fair hearing, we do not find that this ground has been established.

27. In arriving at this conclusion, we have taken into account the stage in the hearing at which the application for strike out was made and the basis given by Ms Duff for the application, which primarily concerned the conversation after court on 11 December and the admitted conversation between Mrs Ross and Mr Herd on the morning of 12 December, prior to Mrs Ross's continued re-examination. The fact is that Mrs Ross is almost at the end of her evidence and given Mr Herd's statement yesterday that he was not calling Mrs Jack, the respondent's case is almost concluded. Because we found as fact on the basis of Mr Herd's admission that he had discussed a matter with Mrs Ross which related to a potential re-examination question, although we have concluded that the hearing should continue, we consider that a proportionate response to the conduct in question would be to rule that Mr Herd is not permitted to continue his re-examination of Mrs Ross and that her evidence will come to an end. We consider that we have the power to make this ruling under rule 41 set out above. We concluded that adopting

this step is a proportionate response which is sufficient to render a fair trial possible.

5 28. In Force One Utilities Ltd v Hatfield [2009] IRLR 45, the EAT held that a tribunal had been entitled to strike out an employer's response in circumstances where the employer had made threats of physical harm to the claimant when he left the tribunal building during an adjournment. The EAT stated that there were three questions for the tribunal to answer in such an application: *"(i) whether the conduct related to the manner of the*
10 *proceedings; (ii) whether the conduct made it impossible to hold a fair trial; and (iii) whether there is some response short of barring the wrong-doing party which would be proportionate."* It was said that questions (ii) and (iii) are inter-related. If steps short of a strike out can properly be considered a
15 proportionate response, that can only be because they are sufficient to render a fair trial possible.

20 29. In the present case, for all the reasons given above, we conclude that the truncation of Mr Herd's re-examination of Mrs Ross and the conclusion of the respondent's case (which was, in any event anticipated by Mr Herd's decision not to call Mrs Jack) is a proportionate response to the conduct in question and would be sufficient to render a fair trial possible. Striking out the response and abandoning the hearing at this point would, in our view be
25 a wholly disproportionate response to what has occurred and not in line with the overriding objective. Contrary to Mr Herd's accepted statement to Mrs Ross recorded in the findings in fact above, the Tribunal have formed no view whatsoever on the merits of the case at this stage. We simply make the general observation that the case concerns health and safety and it is
30 generally in the public interest that such cases are fully heard and considered.

Employment Judge:

M Kearns

Date of Judgement:

13 December 2019

Entered in Register,

5 Copied to Parties:

13 December 2019