

LONDON SOUTH

BETWEEN

DR. CHRISTOPHER DAY

Claimant

-and-

(1) LEWISHAM AND GREENWICH NHS TRUST

~~(2) HEALTH EDUCATION ENGLAND~~

Respondents

CLAIMANT'S APPLICATION FOR STRIKE OUT OF THE RESPONDENT'S RESPONSE

1. The Claimant seeks strike out of the Respondent's response.
2. On Monday 4 July 2022, the tribunal made a case management order in the following terms:
 1. The Respondent is ordered to conduct a discovery exercise which interrogates written and electronic communications of the following individuals:
Dan Harding, Duncan Brooke, Janet Lynch, Elizabeth Aitken, Mehool Patel, Peter Luce, David Cocke and Ben Travis.
 2. The discovery exercise should involve conducting a reasonable search for documents relevant to the issues in the claim, including those specifically related to:
 - 2.1. Any document to or from Janet Lynch relevant to the issues;
 - 2.2. The making and drafting of the public statements of 24/10/18, 4/12/18, 10/1/19 including all iterations of those documents;
 - 2.3. Any communications about the fact of any without prejudice position put forward by any party to the litigation;
 - 2.4. Any communications to stakeholders about the Claimant's case including those made on 4/12/18.
 3. The Respondent is ordered to provide disclosure of all relevant documents identified as a result of the search to the Claimant by 12.00 midday tomorrow.
 4. The Respondent is ordered to provide the Claimant by 12.00 midday tomorrow with a statement in the form of a witness statement which sets out the mechanism and methodology used to conduct the original disclosure exercise and the mechanism and methodology of the new discovery exercise bearing in mind the provisions of the Practice Directions to CPR 31."
3. The 12.00 midday deadline was suggested by R and agreed by C.
4. On Tuesday 5 July 2022, following an application by counsel for the Respondent, EJ Martin permitted the Respondent some additional time to 2.30pm to comply with paragraphs 3 and 4 of the case management order.

5. At 14:38 on 5 July 2022, R's solicitors sent a witness statement from Mr Rowland, Partner at Capsticks Solicitors. In that document it was apparent that:
 - a. The discovery exercise carried out in 2020 had been inadequate in the following regards:
 - i. The precise identity of those whose emails were searched has not been revealed but it clearly did not involve all of the relevant people;
 - ii. No document preservation or retention instruction appears to have been either given or alternatively adhered to – documents that should not have been deleted have been said to have been permanently deleted;
 - iii. The nature of the exercise does not seem to have been reasonable – were people (perhaps via their PAs) merely asked to search their own emails?
 - iv. An extraordinary amount of potentially relevant documentation has been said to be permanently deleted. There is no evidence from any IT expert to confirm this and C finds it difficult to accept that e.g. emails from Doctors and other NHS staff could be rendered permanently unavailable in the manner suggested;
 - v. The explanation given for the permanent deletion of Janet Lynch's emails is difficult to accept, given that she was the primary instructing client (BT w/s para 9); therefore of clear relevance to the matters that C had raised not only in his claim form presented on 6 March 2019 [365] but also in his application submitted on 11 December 2018 [133] (which was still being dealt with at appellate level when Ms Lynch left); and Ms Lynch's departure from R took place *after* both of those events;
 - vi. Mr Rowland's evidence is about what he has been told by R. Given that this is a case in part about concealment, someone needs to take responsibility for what has happened to the documents.
 - b. The failure of the discovery exercise carried out this week has also not been satisfactorily explained in the following regards:
 - i. The searches that have taken place seem inadequate – searching for 'Day' 'stakeholder' and 'statement' (AR para 20) – what about the terms 'claimant', 'MP', 'key partners', 'website', 'iteration', 'case', 'claim'?
 - ii. [if this is the case – it isn't clear] Why can Drs Harding, Brooke, Patel and Luce's and others emails and other electronic communications not be searched remotely by people other than those Doctors – remembering again that this is a case about concealment in which one of the Respondent's witnesses has already admitted to deleting potentially relevant material;
 - iii. No explanation has been given at all for the unavailability of Mr Travis's emails prior to 25 May 2019 (AR para 21(e)); and Mr Brooke's emails that are more than 60 months old (AR para 21(f)).

1. In any event 60 months (5 years) ago is July 2017 – and therefore doesn't prevent the interrogation of Dr Brooke's emails for the relevant period.
6. At 15:01 on 5 July 2022, a second witness statement was sent by R's solicitors from David Cocke and most egregiously of all, Mr Cocke has admitted deleting a substantial amount of potentially relevant material on Monday morning this week (DC 2nd w/s para 18). Even this action provokes further questions rather than a resolution:
 - a. How is it possible for a deletion on Monday morning of this week to have been rendered immediately permanent? There is no IT expert evidence about this – only Mr Cocke's assertion.
 - b. It was stated in R's solicitor's email of Monday 4 July 2022 at 7:23 that Mr Cocke had "rechecked his email folders to search for these new documents and has not found them". That is not consistent with the account given by Mr Cocke in his 2nd w/s.
7. 59 pages of additional disclosure was sent by R at 6:52 pm on 5 July 2022. This comprised a further 76 emails and 3 other documents:
 - a. Email 17/10/18 11:29 from David Cocke to Kristen Edwards, forwarding:
 - i. Email 17/10/18 10:47 from Janet Lynch to David Cocke
 - ii. Email 17/10/18 10:28 from Janet Lynch to Val Davis and Ben Travis
 - iii. Email 17/10/18 10:05 from Val Davison to Ben Travis and Janet Lynch
 - b. Email 13/11/18 18:35 from Elizabeth Aitken to Ben Travis, cc'd to David Cocke, Janet Lynch, Kirsten Edwards, Lynn Saunders;
 - c. Email 13/11/18 17:46 from Ben Travis to unknown recipients, including "David";
 - d. Divergent email 13/11/18 at 17:28 from David Cocke to unknown recipients, including following emails:
 - i. Email 13/11/18 15:26 from Tommy Greene to Kirsten Edwards
 - ii. Email 12/11/18 (unknown time) from Kirsten Edwards to unknown recipients;
 - iii. Email 08/11/18 14:42 from Tommy Green to Kirsten Edwards;
 - iv. Email 07/11/18 13:47 from Tommy Greene to unknown recipients "Kirsten";
 - v. Email 06/11/18 15:57 from Tommy Greene to unknown recipients, "Kirsten";
 - vi. Email 06/11/18 09:31 from Tommy Greene to unknown recipients, "Kirsten";
 - vii. Email 05/11/18 12:29 from Tommy Greene to Kirsten Edwards;
 - viii. Email 05/11/18 1:22 from Kristin Edwards to unknown recipients, "Tommy";
 - ix. Email 05/11/18 12:11 from LG Communications to David Cocke, Kirsten Edwards;
 - x. Email 05/11/18 11:59 from Tommy Green to LG Communications
 - e. Email 16/11/18 10:55 from David Cocke to Ben Travis, Janet Lynch, Elizabeth Aitken, cc'd Lynn Saunders, Kirsten Edwards;

- f. Email 16/11/18 14:49 from David Cocke to Ben Travis, Janet Lynch, Elizabeth Aitken, cc'd Lynn Saunders, forwarding:
 - i. Email 16/11/18 14:40 from Martyn Halle to David Cocke;
 - ii. Email 16/11/18 10:51 from Martyn Halle to David Cocke;
- g. Email 23/11/18 15:53 from David Cocke to Ben Travis, cc'd Lynn Saunders, Janet Lynch, Elizabeth Aitken;
- h. Email 23/11/18 15:31 from David Cocke to Ben Travis, cc'd Lynn Saunders, Janet Lynch, Elizabeth Aitken;
- i. Email 04/12/18 18:06 from David Cocke to Trust Board, attaching "Statement on the Chris Day whistleblowing case 4 December 2018";
- j. Email 04/12/18 11:38 from David Cocke to Ben Travis, Angela Helleur, Val Davison, Janet Lynch, Lynn Saunders, Elizabeth Aitken, Angela Helleur, Sophie Gayle, cc'd Scott Bartlett, Kirsten Edwards, Mary McDonald, Julie Vouillemin, Alicia Lyons, Rachel Sugarman;
- k. Email 31/11/18 13:18 from Janet Lynch to David Cocke, Elizabeth Aitken;
- l. Email 31/11/18 12:38 from David Cocke to Elizabeth Aitken, Janet Lynch;
- m. Email 31/12/18 12:38 from David Cocke to Elizabeth Aitken, Janet Lynch, attaching:
 - i. Letter 22/12/18 from Capsticks to Ben Travis and Janet Lynch;
 - ii. Letter 21/12/18 from Capsticks to Ben Travis and Janet Lynch.
- n. Email 03/01/19 14:11 from Elizabeth Aitken to Cheryl Spencer;
- o. Email 03/01/19 14:08 from Cheryl Spencer to Elizabeth Aitken;
- p. Email 03/01/19 14:05 from Elizabeth Aitken to Cheryl Spencer;
- q. Email 03/01/19 11:23 from Cheryl Spencer to Elizabeth Aitken;
- r. Email 03/01/19 11:20 from Valerie Richards to Cheryl Spencer;
- s. Email 03/01/19 16:50 from David Cocke to Trust Board, Jim Lusby;
- t. Note of unknown provenance, titled: "PRIVATE AND CONFIDENTIAL Summary from meeting arranged by Norman Lamb 14 January 2018 Portcullis House";
- u. Email 09/01/19 17:41 from David Cocke to Trust Board, Jim Lusby;
- v. Email 14/01/19 12:24 from Elizabeth Aitken to David Cocke;
- w. Email 14/01/19 11:13 from David Cocke to Elizabeth Aitken, Dan Harding, cc'd Ben Travis;
- x. Email 14/01/19 10:33 from Tommy Greene to David Cocke;
- y. Email 11/01/19 7:20 from Tommy Greene to unknown recipients, "David";
- z. Email 11/01/19 18:17 from David Cocke to unknown recipients, "Tommy";
- aa. Email 11/01/19 19:08 from Tommy Greene to David Cocke;
- bb. Email 11/01/19 18:02 from David Cocke to unknown recipients, "Tommy";
- cc. Email 11/01/19 18:53 from Tommy Green to David Cocke
- dd. Email 11/01/19 (unknown time), email incomplete;
- ee. Email 11/01/19 17:06 from Tommy Green to unknown recipients, "David";
- ff. Email 11/01/19 4:44 from David Cocke to unknown recipients, "Tommy";
- gg. Email 11/01/19 14:26 from Tommy Greene to David Cocke;
- hh. Email 11/01/19 10:21 from Tommy Greene to unknown recipients, "David";
- ii. Email 10/01/19 16:02 from Tommy Greene to David Cocke;
- jj. Email 10/01/19 4:47 from David Cocke to unknown recipients, "Tommy";
- kk. Email 10/01/19 15:41 from Tommy Greene to David Cocke;
- ll. Email 10/01/19 3:40 from David Cocke to unknown recipients, "Tommy";

mm. Email 10/01/19 14:39 from Tommy Greene to David Cocke;
 nn. Email 10/01/19 10:16 from David Cocke to unknown recipients, "Tommy";
 oo. Email 09/01/19 16:30 from Tommy Greene to David Cocke;
 pp. Email 09/01/19 12:07 from David Cocke to unknown recipients, "Tommy";
 qq. Email 09/01/19 10:39 from Tommy Greene to David Cocke;
 rr. Email 09/01/19 10:24 from David Cocke to unknown recipients, "Tommy";
 ss. Email 09/01/19 10:01 from Tommy Greene to David Cocke;
 tt. Email 24/12/18 at 12:21 from David Cocke to unknown recipients
 "Tommy";
 uu. Email 24/12/18 12:18 from Tommy Greene to David Cocke;
 vv. Email 24/12/18 09:17 from David Cocke to unknown recipients, "Tommy";
 ww. Email 21/12/18 18:43 from Tommy Greene to David Cocke;
 xx. Email 21/12/18 17:21 from David Cocke to unknown recipients, "Tommy";
 yy. Email 21/12/18 17:21 from Tommy Greene to David Cocke;
 zz. Email 21/12/18 18:16 from David Cocke to unknown recipients, "Tommy";
 aaa. Email 21/12/18 17:14 from Tommy Green to David Cocke;
 bbb. Email 21/12/18 6:06 from Tommy Greene to unknown recipients,
 "Tommy";
 ccc. Email 21/12/18 5:49 from David Cocke to unknown recipients,
 "Tommy";
 ddd. Email 21/12/18 16:24 from Kirsten Edwards to Tommy Greene,
 cc'd David Cocke;
 eee. Email 21/12/18 16:11 from Tommy Greene to Kirsten Edwards;
 fff. Email 20/12/18 6:00 from Tommy Greene to unknown recipients,
 "Kirsten";
 ggg. Email 20/12/18 5:46 from Kirsten Edwards to unknown recipients,
 "Tommy";
 hhh. Email 20/12/18 13:40 from Tommy Green to Kirsten Edwards;

8. This is in addition to the 4 emails from Friday night and the 10 emails from Monday morning. Some of the material is familiar – much of it is new. Taken as a whole the new material points towards aspects of Mr Cocke and Mr Travis's witness statement evidence and Mr Travis's oral evidence being unreliable.
9. C sought further information arising from the content of Mr Rowland and Mr Cocke's witness statements of 5 July 2022.
10. C sought and was granted additional time to submit a 2nd supplementary statement and that statement was sent at around 7.30pm on 6 July 2022. The content of that statement will not be repeated here – but C clearly has genuine and concrete concerns about R's behaviour in relation to disclosure.

Strike out of R's case

11. The relevant part of Rule 37 of the 2013 ET Rules states:

37 Striking out

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

- (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;
- (c) for non-compliance with any of these Rules or with an order of the Tribunal;
- (d) that it has not been actively pursued;
- (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 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 the party, at a hearing.

12. Whether or not a fair hearing is possible is an important consideration under all the grounds for strike out – as well as being a free-standing ground.

13. Rule 2 of the 2013 ET Rules contains the Overriding objective which states:

2. Overriding objective

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;
- (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;
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and
- (e) saving expense.

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.

14. Article 6(1) of the European Convention on Human Rights, replicated at Part I, Schedule 1 to the Human Rights Act 1998 states:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

15. This applies to *both* parties in civil litigation.

16. Mr Cocke's actions as described in his witness statement at paragraph 18 may amount to a civil or criminal contempt or perverting the course of justice. That is a matter in itself for other authorities. However, if he is to be cross examined, he will need to be cautioned as to his right to remain silent and as to any consequences if he does not remain silent. That could be an artificial mechanism for the delivery of any evidence that he can give.

17. The concern for the tribunal is whether taken in concert with R's patently inadequate disclosure, this case has reached the point at which R's response should be struck out.

18. C contends that this tribunal should strike out the response on the grounds that:
 - a. The manner in which the proceedings have been conducted by or on behalf of R has been scandalous, unreasonable or vexatious (rule 37(1)(b));
 - b. R has not complied with ET rules or with an order of the tribunal (rule 37(1)(c));
 - c. It is no longer possible to have a fair hearing (rule 37(1)(e)).
19. This is a whistleblowing case which both parties agree that it is likely to turn on the issue of causation. Like discrimination, direct explicit evidence of whistleblowing detriment is rare. The tribunal will therefore need to examine the materials before it in order to determine whether inferences can be drawn as to whether R subjected C to detriment on grounds that he had made protected disclosure. The meaning of 'on grounds that' is '*disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower*' - Elias LJ in **Fecitt and ors v NHS Manchester** [2012] ICR 372 at para 45.
20. It is therefore important that evidence be fairly obtained and disclosed in a timely fashion.
21. The events of this week and the statements supplied on 5 July 2022 have demonstrated that a proper discovery exercise did not take place in 2020 and now it is effectively asserted by R that it cannot take place given the amount of material that is said to have been permanently deleted.

s37(1)(b)

22. Per *Bolch v Chipman* [2004] IRLR 140 (para 55), when considering strike out under 37(1)(b) there are three questions to be asked:
 - a. Have the proceedings been conducted in a manner that was scandalous, unreasonable, or vexatious?
 - b. If so, is a fair trial possible nonetheless?
 - c. If not, is strike out proportionate?
23. The duration and character of the unreasonable conduct must be taken into account: *Blockbuster Entertainment Ltd v James* [2006] EWCA Civ 684, [21] per Sedley LJ. In the present case, the failure has been an ongoing failure of disclosure – in a context in which a judge has already found that there was a failure of disclosure [585] – amounting unreasonable behaviour over a period of years which has played a significant part in preventing a fair hearing coupled with a deliberate act of destruction of evidence on Monday morning by Mr Cocke.
24. The impact on other litigants is significant. Much judicial resource has been taken up on these claims to date and this expenditure can no longer be justified. Per Langstaff J in *Harris v Academies Enterprise Trust* [2015] IRLR 208 at [33] “overall justice means that each case should be dealt with in a way that ensures that other cases are not deprived of their own fair share of the resources of the court”.

25. What amounts to scandalous, unreasonable or vexatious behaviour depends on the facts of each individual case. Mr Cocke's behaviour as set out in paragraph 18 of his witness statement certainly amounts to such behaviour. In addition R's failure to give adequate disclosure additionally amounts to unreasonable behaviour.
26. This is not a defect which can be rectified. It has placed the tribunal in a difficult position. In C's submission, a fair trial cannot now take place.
27. Strike out is proportionate. This has all happened because R did not comply with its disclosure obligations – and now it is saying that it cannot comply with them (and indeed in Mr Cocke's case, he has taken a deliberate step to ensure that those obligations cannot be complied with).

s37(1)(c) failure to comply with orders / rules

28. R has failed to comply with the disclosure order made by EJ Andrews on 13/11/20 [489 @ 490-491, paras 4 and 5]. R has also failed to comply with the overriding objective.
29. The same criteria apply as above. If R is correct about the permanent unavailability of deleted documents, this is not a situation that can be rectified by unless orders or more time to complete searches.

s37(1)(d) fair hearing

30. The manner in which clearly relevant material has been disclosed:
- a. late, after the drafting of witness statements, after C has given evidence, after two of R's three witnesses have given evidence)
 - b. with the destruction of evidence; and
 - c. the realisation that a proper discover exercise was not carried out in the first instance,
- means that it is no longer possible to have a fair hearing of C's case. It is now well over 3 years since the matters complained of.

Summary

31. On all three of these arguments, taken individually or together it is proportionate to strike out the Respondent's response. This is a draconian penalty but it is more than justified in this case.

Andrew Allen QC
Outer Temple Chambers
6 July 2022