Case Number: 2302806/2015
2301477/2016
2302373/2016

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THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**
(sitting alone)

BETWEEN:

Ms Y Ameyaw **Claimant**

AND

Pricewaterhousecoopers Services Ltd **Respondent**

ON: **10 March 2017**

Appearances:

For the Claimant: Peter Herbert, Counsel

For the Respondent: Laura Bell, Counsel

JUDGMENT

1. The Respondent's application that the Claimant's claims be struck out is refused.

REASONS

2. The purpose of the hearing was to consider the Respondent's application for the Claimant's claims to be struck out in their entirety. The Respondent made the application under Rule 37(1)(b) and (e) of the Tribunal Rules in paragraph 1 of a letter to the Tribunal dated 6 February 2017. The Respondent relied on the conduct of the Claimant at a hearing before Employment Judge Hall-Smith on 31

January 2017 at which, amongst other things, an application for amendment was refused by the Judge.

3. I first dealt with the parties' submissions as to how this application ought to be approached. In particular the Claimant had made a late application to adduce witness evidence – her own and that of a family friend who had been present at the hearing on 31 January. The Respondent made it clear that it did not intend to call witness evidence and that it objected to the Claimant's application to do so. Its preferred approach was to base its application on the account of the hearing on 31 January set out at the end of Judge Hall-Smith's reasons for his case management orders. Those reasons include his account of what happened after he communicated his decision to refuse the amendment application. I noted that the reasons associated with Judge Hall-Smith's order were received by the parties on 3 March and subsequent to that there has been no application to vary suspend or set aside the order or reasons under Rule 29 of the Tribunal Rules. The jurisdiction to vary or set aside a case management order arises when it appear to the Tribunal dealing with the application that variation or setting aside of the relevant order would be in the interests of justice. According to Rule 29, this may be the case in particular where a party affected by the order did not have a reasonable opportunity to make representations before the order was made. However no Rule 29 application has been made in this case.

4. I took the view that the status of Judge Hall-Smith's reasons and his account of the hearing is that of findings of fact as to what occurred. They are unusual only in that the conduct that they described was unusual. It is, as Ms Bell submitted, commonplace for Tribunals to make findings as to the conduct of parties and witnesses during the course of proceedings before them. Mr Herbert submitted that Judge Hall-Smith's comments were tantamount to witness evidence, but he proposed that instead of following that suggestion to its logical conclusion and holding a full trial of what occurred on 31 January (which would of course have to take place outside this Tribunal region) that I conduct the hearing of the Respondent's strike out application by counterbalancing the observations of Judge Hall-Smith and the Respondent with written statements by the Claimant and Mr Reed. These statements had not been shown to the Respondent prior to the hearing. Ms Bell resisted that application partly on the basis that witness evidence was not necessary and partly due to the late production of the proposed witness statements.

5. I did not accept Mr Herbert's characterisation of Judge Hall-Smith's reasons as tantamount to witness evidence. If I had accepted it, it would follow that we would be in the situation described by Ms Bell in which all Judges are potential witnesses of fact as to what occurred during the course of the hearings before them and open to challenge and cross examination accordingly. If that were to be the case the administration of justice would be impeded and imperilled. Tribunals are trusted to be arbiters of fact unless they reach decisions that are perverse. Case management orders may be appealed if there is an error of law associated with them, or set aside if it is in the interests of justice to do so. No applications for appeal or for a set-aside had been made by the Claimant. I saw

no reason in that case why I should not rely on Judge Hall-Smith's reasons as an objective account of the unusual events at the end of the 31 January hearing.

6. In light of those observations I was not prepared to admit the written statements prepared by the Claimant and Mr Reed. As I have noted, the Respondent did not rely on any witness evidence in support of its application to strike out and based its application on Judge Hall-Smith's reasons and the account set out at the end of his case management orders. I accepted that account as objective. I considered the Article 6 issue raised by Mr Herbert but I did not agree that the Claimant's right to a fair trial of the issue of whether her claims should be struck out was vitiated in this instance by my decision to exclude the witness statements. The Claimant was represented before me and was therefore able, through her representative, to make such submissions as she wished on that application, as was the Respondent. As neither side was putting forward witness evidence the parties were proceeding on an equal footing with an equal opportunity for a fair hearing of the arguments that they wished to make.

7. To summarise, my approach was that I would hear no witness evidence and would use as the basis of my decision the written reasons given by Employment Judge Hall-Smith for the order that that he made on 31 January. I also read the Respondent's solicitors' letter of application of 6 February but not the note of hearing that was referred to in it. I considered the oral submissions of Mr Herbert and the oral and written submissions of Ms Bell and I am grateful to both of them for their helpful explanations.

8. I also considered the authorities to which they referred me and in particular the decisions in ***Bolch v Chipman [2004] IRLR 140*** and ***Blockbuster Entertainment Limited v James [2006] IRLR 630.*** The decision in ***James*** sets out the approach that a Tribunal must take in deciding whether or not to strike out a claim and in particular a claim that raises important issues of potential discrimination by an employer. That said the ***James*** case was a case concerning unreasonable conduct and in its application today the Respondent says that the conduct that it relies on goes further than unreasonableness and is also scandalous and vexatious. I have also considered the principles set out in ***Bolch*** and whether Ms Bell is right to say, following that case, that the Claimant's behaviour at the hearing on 31 January amounted to wilful, deliberate or contumelious disobedience of the Tribunal such that the circumstances are exceptional and there is no need for me to consider whether a fair trial is possible.

9. Notwithstanding the guidance in ***Bolch*** I consider that the Court of Appeal's judgment in ***James*** requires me to be slow to reach the conclusion that there is no need to consider whether a fair trial is still possible. It seems to me also a clear requirement of the overriding objective that in all but the most exceptional cases consideration must be given to whether a fair trial is possible on the particular facts of the case. I consider the following passage from the judgment of Lord Justice Sedley in ***James*** to be particularly helpful in this case and one on which all the parties could usefully reflect. He says:

> **'The first objective of any system of justice is to get triable cases tried. There can be no doubt that among the allegations made by Mr James are things which, if true, merit concern and adjudication. There can be no doubt either that Mr James has been difficult, querulous and uncooperative in many respects. Some of this may be attributable to the heavy artillery that has been deployed against him though I hope that for the future he will be able to show the moderation and respect for others which he displayed in his oral submissions to this Court. But the Courts and Tribunals of this country are open to the difficult as well as to the compliant, so long as they do not conduct their cases unreasonably'.**

10. The question for me was whether the Claimant had on 31 January, conducted herself in such a way (whether by scandalous, vexatious or unreasonable conduct) that a fair trial was no longer possible. I confirmed with the parties before adjourning to consider my decision on the application that I would focus on the words used in the reasons of Judge Hall-Smith. I also accepted Mr Herbert's submission that the focus must be on the Claimant's behaviour and not that of others. The Respondent also accepted this and in its application and in the submissions made by Ms Bell pointed in particular to paragraph 5, 20 and 26 to 37 of those Judge Hall Smith's reasons.

11. Turning to those paragraphs I make the following observations. In paragraph five the Claimant started to address Judge Hall-Smith, he says, in a loud voice, notwithstanding the presence of her legal representative. This appeared to have occurred at the same time as the hearing was being disrupted by intervention from the Claimant's mother. Judge Hall-Smith's warning, requiring more respectful and restrained behaviour was given in response to conduct of both the Claimant and her mother. Although parties may show disrespect to the Tribunal and the Judge by talking loudly that conduct is not necessarily unusual in Employment Tribunal proceedings where emotions may be heightened by the nature of the case or by particular events during the proceedings. It is not possible to tell from this paragraph the extent to which it was the Claimant's behaviour as distinct from that of her mother that made Judge Hall-Smith's warning necessary.

12. The next point made by Judge Hall-Smith was that the Claimant's representative on 31 January, Mr Milsom, was in difficulty having regard to his instructions. There was a disagreement about the nature of Mr Milsom's instructions, which I return to below. This plainly caused considerable problems at the hearing – it seemed in fact to have been the principal source of them. Judge Hall-Smith also alludes in paragraph 17 to "the disruptive conduct of both the Claimant and her mother", but again does not differentiate between the Claimant's behaviour and that of her mother. In the absence of a full trial of the facts of what occurred during the hearing, which for the reasons I have already given is not in my view the right approach to an application of this sort, I cannot on a balance of probabilities draw any firm conclusions about the degree to which the Claimant herself was culpable at this point in the hearing.

13. I also accept Mr Herbert's submission that the Claimant was likely to have been upset by her perception that the instructions that she gave to her Solicitors had been misunderstood or were being disregarded. Although I cannot make detailed

findings of fact as to the nature of the misunderstanding that arose between the Claimant and her Solicitors it is clear from paragraph 18 of Judge Hall-Smith's reasons that the Claimant had told the Tribunal four days before the hearing that she was asking her Solicitors to withdraw a letter that she said that had been sent without her instructions. The gist of that letter was that the Claimant would not be proceeding with certain amendments to her claim. The Claimant was very clear in her email to the Tribunal on 27 January that that was incorrect. It is not surprising that she felt aggrieved when she discovered that the hearing appeared to be proceeding as if those were indeed her instructions. This is not to condone disrespectful behaviour but it makes it more difficult in my view to characterise such behaviour as unreasonable, scandalous or vexatious. On the basis of paragraph 18 of Judge Hall-Smith's reasons there was an explanation for the Claimant's conduct and an explanation as to why she felt angry and expressed herself forcefully.

14. The Respondent then relies on a longer passage from Judge Hall-Smith's judgment, paragraphs 26 to 37. In those paragraphs Judge Hall-Smith first refers to the Claimant interrupting him to disagree about when the Respondent became aware of a particular issue. He also describes the Claimant having shouted over the Respondent's representative Ms Bell. Talking over a Judge and shouting at the Respondent's representative are not appropriate ways to behave in an Employment Tribunal hearing, although alas they are not uncommon. The Claimant then became embroiled in an argument with her own representative.

15. In light of the misunderstanding about Claimant's instructions it is not surprising that the Claimant and Milsom were in difficulty. The matter perhaps should have been discussed outside the Tribunal room during an adjournment. Judge Hall-Smith described the Claimant as having shouted when she was told that he had made his ruling. That was disrespectful and inappropriate, but not without explanation in the circumstances. Feelings may be entirely justified but the manner of their expression reprehensible. The Claimant then appealed to the Judge and said she felt prejudiced by the course of events. She was persistent in making that point and when Judge Hall-Smith repeated that he had made his ruling she left the Tribunal apparently in a state of anger.

16. Paragraph 32 of Judge Hall-Smith's reasons caused me some difficulty. He says:

> **"Because of the continued disruptive behaviour by the Claimant a security guard had been alerted by the disruptive conduct in the Tribunal room but had remained at the back of the Tribunal after the Claimant had left the room. I informed the guard that he could leave in circumstances where I then believed that there would be no more disruption following the withdrawal of the Claimant from the Tribunal."**

17. It is not clear from the reasons when the guard was called or what particular act or conduct required the presence of the security guard, or whose conduct it was. I do not consider that it would be just for me to make assumptions about the reasons behind Judge Hall-Smith having called the security guard or to conclude from it that there was conduct by the Claimant during the course of the hearing that was scandalous, vexatious or unreasonable to the exceptional degree

submitted by the Respondent. There was then a sudden further interruption when the Claimant and her mother re-entered the Tribunal. The Claimant's mother then began to behave in what could properly be described as a disgraceful manner. Paragraphs 33 and 34 of the reasons allude to this:

> **"A minute or two later both the Claimant and her mother flung up the door to the Tribunal room and entered the Tribunal. The Claimant's mother was shouting aggressively waving her arms and shouting you have not heard the end of this – stop smiling – you have not heard the end of this – something will happen you will not get away with this. The conduct of the Claimant's mother was both aggressive and threatening I repeatedly pressed the alarm bell behind my chair to alert and to summon security to return to the Tribunal room. Security did not respond to my frequent alarm calls and in an endeavour to diffuse the situation I said that I was rising and that the Respondent should leave the room. Ms Bell on behalf of the Respondent stated that she was not happy to leave the room because she felt threatened. By this time the Claimant had pulled her mother out of the room but she remained in the corridor outside the door of the Tribunal. Understandably Ms Bell and her instructing Solicitor were fearful about the presence of the Claimant and her mother who remained in the Tribunal building near the room."**

18. I note that the Claimant did in fact pull her mother out of the room. In the remaining paragraphs of the reasons Judge Hall-Smith does not, it seems to me, distinguish between the behaviour of the Claimant and that of her mother save to say that the Claimant's behaviour was disruptive and her mother's was aggressive and threatening. He goes on nevertheless to describe the conduct of both of them as disgraceful but it is not clear to me on precisely what grounds he considered that that was the appropriate description for the way that the Claimant behaved at this juncture. The fact that the Claimant pulled her mother from the room is plainly open to a number of interpretations but it is certainly possible that she was endeavouring to restrain her mother from the intemperate outburst that she had engaged in when she entered the Tribunal room. It is not clear from the description given by Judge Hall-Smith whether it was in fact the Claimant and her mother who pushed the door open or whether the Claimant's mother had pushed the door open by herself with the Claimant feeling that she had no option but to enter the room with her. These are matters that I cannot determine categorically given the material before me but it seems to me that there is considerable doubt as to where culpability lay in relation to that particular sequence of events.

19. My conclusion from the materials on which I based this decision is that the Claimant undoubtedly lost her cool at times during the hearing and behaved reprehensively but did not do so without justification. Something had broken down in her communication with her solicitors and she found herself at a hearing with matters not proceeding in accordance with her instructions. Her mother's intervention plainly was disgraceful and singularly unhelpful and I am reassured by Mr Herbert's assurance that the Claimant's mother will not be participating in any future proceedings in this case. However all are agreed that the Claimant's mother's conduct cannot be attributed to the Claimant. The Claimant's conduct on its own, although at time uncontrolled and unacceptable, does not in my view on these particular facts amount to conduct that is so exceptional that I need not consider whether a fair trial is still possible.

20. Applying that consideration I do consider that a fair trial is still possible. There are no grounds for a firm conclusion at this stage that the Claimant's conduct, which was on 31 January explicable if not reasonable, is bound to recur at a future hearing such as to vitiate the possibility of a fair trial. Having said that I give the Claimant a very clear warning that there must not be any occurrence of uncontrolled and disrespectful behaviour at any future hearing of this case. Parties are given some allowance for the emotional intensity that can characterise Tribunal proceedings, but all participants are nevertheless expected to conduct and express themselves with restraint and courtesy.

21. For the same reasons I have given in respect of the main application I do not consider it appropriate to award costs against the Claimant on this occasion in respect of the 31 January hearing or today. The Claimant must however engage fully with the process of preparation for trial and further consideration will be given to an award of costs or other sanctions if preparation for the very lengthy hearing in this case is prejudiced by any failure to cooperate with the Respondent or comply with the case management timetable.

CASE MANAGEMENT ORDERS

1. The case management orders made previously in the case are varied as follows:

2. The trial bundle has been substantially prepared by the Respondent. The Claimant is to notify the Respondent of any additions to the bundle by no later than 4pm on **Friday 17 March 2017**.

3. The Claimant is also by 4pm on **Friday 17 March 2017** to send to the Respondent any final comments or suggestions on the list of issues.

4. By no later than 4pm on **Friday 24 March 2017** the parties are to simultaneously exchange witness statements.

5. The parties are to cooperate to agree a chronology and cast list by the start of the hearing on **18 April 2017.**

6. The Claimant should prepare a schedule of loss as soon as possible but should not allow its preparation to interfere with finalisation of the bundle, the witness statements and the list of issues.

7. I am not prepared to make these orders on an unless basis at present but plainly the full hearing of the case is rapidly approaching and any slippage in this timetable is likely to prejudice both the Respondent and the possibility of a fair trial of the issues.

8. The Claimant's representatives have undertaken to endeavour to limit the number of allegations and issues relied upon by the Claimant in this case. They

are strongly encouraged to do so and to co-operate with the Respondent's representatives accordingly, bearing in mind the requirements of the overriding objective.

9. The parties must notify the Tribunal without delay if there is a realistic prospect of the length of the hearing being shortened.

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Employment Judge Morton

Date: 17 March 2017