EMPLOYMENT TRIBUNALS

Between:

Claimant: **Mrs G France**

First Respondent: **Mr M Z Z Khan**

Second Respondent: **A-Z Law Solicitors Limited**

Heard at London South Employment Tribunal on 13 June 2017

REASONS

1 At the conclusion of the hearing the judgment and reasons for it were given by the Tribunal orally. These written reasons have been prepared at the request of the Claimant.

2 I apologise to the parties, and particularly the Claimant, in two respects. An application for a reconsideration of the judgment was made, and in considering that matter I overlooked the request which had been made for written reasons. To some extent these reasons repeat points made in the Secondly I must apologise for the delay is providing these reasons caused solely by substantial pressure on judicial resources.

3 This claim has a substantial procedural history since it was presented on 28 May 2014. There are now approaching 500 separate items of correspondence on the Tribunal case file, many with associated documents. The proceedings have been simplified in that the only head of claim now to be determined is that of unfair dismissal following the Claimant's dismissal on 29 January 2014. The Claimant had previously made other claims to the Tribunal in separate proceedings which had been determined by a Tribunal chaired by EJ Martin. It is not necessary for present purposes to go into those other matters.

4 For the sake of simplicity I will refer to the Respondents as 'the Respondent'. The fact of dismissal is admitted by the Respondent. In the response to the claims. Paragraph 18 of the Grounds of Resistance refers to allegations against the Claimant of 'a failure to manage cases and case cost, failure to carry out HR responsibilities, breach of the First Respondent's policies, unauthorised absences, refusal to follow the terms of her contract, and complaints lodged by members of the firm (harassment and bullying).' Paragraph 20 referred to 'criminal damage to the main office door'. In paragraph 24 it is said that there was a disciplinary hearing on 17 January 2014 (which the Claimant did not attend) and it was concluded 'that the Claimant's actions had caused

serious harm to the Firm and that the finding in relation to breaking the door down amounted to gross misconduct.'

5 On 18 April 2016 Mr Oliver France, the Claimant's son, made an application on behalf of the Claimant that the response be struck out on the basis that certain documents had been falsified or tampered with. The documents in question were stated to be as follows:

> Firm's Office Manual
> Solicitors training contract of Mohammed Umar October 2011
> Email dated 28 November 17:39
> Grievance of Keerthika Krishnarajah
> Claimant's Personnel File

6 There was some correspondence relating to the application. Other procedural matters relating to other heads of claim then being brought by the Claimant intervened of which no more need be said. On 19 May 2017 on my instructions the Tribunal sent a notice of the preliminary hearing the subject of these Reasons. The purpose was stated to be:

> To consider the Claimant's application to strike out the response and (subject thereto) to make any appropriate case management orders.

7 The hearing took place on 13 June 2017. Mr Leonard Ogilvy attended to represent the Claimant but pointed out that he had another hearing at 2 pm and I agreed to an arrangement under which he addressed the Tribunal on questions of law, and Mr France addressed the Tribunal on the factual allegations. Jonathan Heard of counsel represented the Respondents. I was provided by Mr France with a bundle of eight documents which he alleged had been falsified.

8 Mr France stated that he was relying on rules 37(1)(b) and (e) of the Employment Tribunals Rules of Procedure 2013. Those paragraphs are 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—
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> (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;
> (c) – (d) . . . ;
> (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).

9 The first document was the training contract of Mr Umar. It is a standard form issued by the Solicitors Regulation Authority. Mr France alleged that the Claimant's name had been removed from clause 5 where she should have been shown as the training principal, and her signature had been replaced on page 5 of the document. The purpose of the changes, he said, was to seek to demonstrate that the Claimant had not had anything to do with the training of Mr Umar, and that the Claimant was not fulfilling her role.

10 The second document in question was the Office Manual which consisted of 148 pages in all. I was provided with two copies of each of two pages

from different revisions of the document. One was version 1.8 dated June 2012 and the other was version 2.1 of July 2013. Mr France said that the changes had been made to show that Mr Khan held certain roles and that the Claimant had been removed from them. As an example the Claimant was shown in the earlier version as having the key responsibility for Equality and Diversity, whereas the later version showed Mr Khan as having that responsibility. There are other instances of changes in roles. Mr France said that the changes had been made for the purpose of demonstrating a reduction in the Claimant's role, and that there were no other documents evidencing such changes. This, he said, was an attempt to mislead the Tribunal.

11 The third document was an email dated 28 November 2013 (17:39) from Veena Kapila to the Claimant. The email stated that the Claimant was invited to a grievance hearing between 3 and 9 December 2013. Mr France said that the Claimant had not received that email, that it had been fabricated, and that it was another attempt to mislead the Tribunal.

12 The fourth document was referred to as the grievance of Keerthika Krishnarajah dated 16 July 2013. I was told that she was a freelance billing clerk and not an employee. The document contains three specific allegations about the conduct of the Claimant, and in the penultimate paragraph there is reference to the Claimant's 'bullying, harassment, mental and physical torturing at the work place.' Mr France said this was a false picture created retrospectively to discredit the Claimant and that it had first been seen by the Claimant in March 2015.

13 The final document, or category of documents, was the Respondent's HR or personnel file relating to the Claimant. Mr France said that they had been destroyed to prejudice the Claimant's case. In particular Mr France referred to the Claimant's status as a partner.

14 In summary, Mr France said that it was the common practice of the Respondents to falsify documents. It was necessary to correct alleged facts so that the Tribunal was not misled. The Respondent, he said, was seeking to undermine the system of justice, to prejudice the Claimant's claim and to prevent her from having a fair hearing. Mr France referred me to *Peach Grey & Co v. Summers* [1995] IRLR 363 QBD without elaborating. That case established that an individual could be in contempt of court in relation to an Employment Tribunal.

15 Mr Ogilvy then took over representing the Claimant. He submitted that there were very serious issues to be tried and live evidence was required. Allegations of fraud were being made and the Tribunal could conclude that the Respondent had acted unreasonably so that no fair trial was possible. Therefore the response should be struck out. If that were done then it would bring the proceedings to an end and expense would be minimised. Mr Ogilvy referred me to *Osonnaya v. South West Essex PCT* UKEAT/0629/11 and also *A v. B* [2010] EWCA Civ 1378. The paragraph in *Osonnaya* to which I was referred merely seems to me to emphasise the relevance of determining whether or not a document is a forgery when it is material to the issues to be determined. In *A v. B* comments made by Maurice Kay LJ elsewhere were relied upon:

> It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute.

I pause to comment that the application here is not based upon whether the response has no reasonable prospect of success. Mr Ogilvy also referred me to two unreported cases - *Zahoor v. Masood* [2009] EWCA Civ 650 & [2010] 1 All ER 888 and *Alpha Rocks v. Alade* [2015] EWCA Civ 685. I refer to those authorities below.

16 Mr Ogilvy criticised the Respondent saying that no steps had been taken to assist the Tribunal by contacting the Solicitors Regulation Authority to obtain copy documents. He said that all evidence should be before the Tribunal of fact and that it was important that the merits of the entire case be heard. Mr France then intervened to say that it would be wrong to dispose of the Claimant's application without hearing evidence.

17 Mr Heard replied for the Respondent. He referred to previous proceedings between the parties and the judgment of the Tribunal chaired by Employment Judge Martin dated 12 October 2015. It is not necessary for the purposes of my decision to seek to analyse the relationship between the issues in the two sets of proceedings and the relevance of the documents in question to each. Mr Heard, quite rightly in my view, stated that an allegation of the falsification of documents is a very serious one to make.

18 Mr Heard submitted that the Tribunal would have to have full evidence before a decision could be made to strike out the claim and the Tribunal could not strike the claim out at this hearing. Any matters which were relevant could be dealt with at the hearing on the merits of the claim listed to commence on 25 June 2018 with ten days allocated. Mr Heard then referred to each of the documents in turn.

19 The first document is the training contract. Mr Heard said that the Claimant had previously been provided with a copy of the original document without any redactions. Mr Heard said it was not in dispute that the Claimant was Mr Umar's training principal, and that his instructions were that the original document had been signed by Mr Khan, and that the Claimant's signature had not been removed. In any event, he said, the matter was of no relevance to this hearing.

20 The next documents were the Office Manuals. Mr Heard agreed that it was obvious that there were differences, and that the issue was whether the Claimant had adopted certain titles or responsibilities incorrectly. The variations between the two versions were not relevant to the issues to be decided.

21 The next document was the email of 28 November 2013. Mr Heard submitted that this was a bizarre allegation, and he referred me to the bundles for the first set of proceedings between the parties. The copy of the email (and other emails in the chain) provided for this hearing appears to have been printed by the Claimant as it is headed 'Grace France'. I have looked in the earlier bundles and the same sheet is at pages 1223 and 1232b of those bundles.

22 The grievance raised by Keerthika Krishnarajah was not one of the matters upon which the Respondent relied, said Mr Heard, and if of any relevance it was only as background. Any issues concerning the employment status of the Claimant, he said, had been dealt with by the Martin Tribunal.

23 I turn to my conclusions, but before doing so refer to the authorities mentioned by Mr Ogilvy. Mummery LJ opened his judgment in *Zahoor* as follows:

> [1] If there has been serious wrongdoing in legal proceedings by each side, in what circumstances, if any, can the court properly refuse to try the merits of their substantive dispute and simply make an order striking out or dismissing the action?[1]
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> [2] In this lamentable litigation Peter Smith J found that both sides attempted to deceive the court by forging documents. A list of over 50 challenged documents was produced. The trial judge had to hear the evidence of three experts on handwriting issues. He found it impossible to come to a clear conclusion in respect of each document and did not do so. He identified those key documents, agreements and share transfers which he held were not genuine.
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> [3] The judge also found that both sides also lied in their evidence. In some areas of the case his task of evaluating the true facts about the dispute was difficult, if not impossible. Each of the individual parties, by using reprehensible means, set out to improve his own prospects of success, to damage those of the other side and to defeat the efforts of the court to do justice according to law. They abused, obstructed and attempted to undermine the justice system and the legal processes in which they were participating.

24 What occurred in that case was that the trial judge heard all the evidence, came to the conclusion that all the main parties had been 'guilty of forgery and perjury'[2] and declined to strike out the claim at the conclusion of the hearing. There were other issues in the appeal, but the issue on this point was whether the trial judge should have struck the claim out at the conclusion of the hearing. The Court of Appeal held that he was correct in not having done so as it was too late. The sanction was available in theory, but Mummery LJ said that it 'must be a very rare case where at the end of a trial it would be appropriate for a judge to strike out a case rather than dismiss it in a judgment on the merits in the usual way.'[3]

25 Reference was made in *Zahoor* to *Arrow Nominees Inc v. Blackledge* [2002] 2 BCLC 167. Mummery LJ said of that case as follows:

> [71] In our judgment, this decision is authority for the proposition that, where a claimant is guilty of misconduct in relation to proceedings which is so serious that it would be an affront to the court to permit him to continue to prosecute his claim, then the claim may be struck out for that reason. In the *Arrow Nominees* case, the misconduct lay in the petitioner's persistent and flagrant fraud whose object was to frustrate a fair trial. The question whether it is appropriate to strike out a claim on this ground will depend on the particular circumstances of the case. It is not

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[1] With respect to Mummery LJ it appears to me that that was not exactly the issue, but rather whether a claim should be struck out after there having been a trial on the merits. See paragraphs 47 and 76.

[2] See paragraph 63 of the Court of Appeal judgment citing paragraph 151 of the first instance judgment.

[3] See paragraph 72.

> necessary for us to express any view as to the kind of circumstances in which (even where the misconduct does not give rise to a real risk that a fair trial will not be possible) the power to strike out for such reasons should be exercised.

26 *Alpha Rocks* is a case relating to solicitors' costs. Reference was made by Vos LJ to both *Zahoor* and *Arrow Nominees.* This was a case where it was alleged that the 'bills were fraudulently exaggerated or misstated.' I was referred by Mr Ogilvy to paragraph 31 of the judgment in which the court stated that in the circumstances the judge at first instance should not have decided the issue of fraud without disclosure and cross-examination. Of more relevance to my mind are paragraphs 21 and 22 where Vos LJ said the following under the rubric of 'The principles on which the court should act':

> [21] It is important first to emphasise, as did Lord Clarke in *Summers supra*,[4] the range of available remedies when a situation arises in which a party to litigation thinks that his opponent has exaggerated his claim, whether fraudulently or otherwise. Establishing fraud without a trial is always difficult. And it is open to a Defendant to seek summary judgment on the claim under CPR Pt 24.2(a)(i), without seeking a strike out for abuse of process. As *Masood* and *Summers supra* also demonstrate, striking out is available in such cases at an early stage in the proceedings, but only where a Claimant is guilty of misconduct in relation to those proceedings which is so serious that it would be an affront to the court to permit him to continue to prosecute the claim, and where the claim should be struck out in order to prevent the further waste of precious resources on proceedings which the Claimant has forfeited the right to have determined. The other available remedies for such a default follow the proceedings once they have run their course, but are nonetheless important. They include costs and interest penalties and proceedings for contempt of court or criminal prosecution.
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> [22] Returning to the early stages of proceedings, it is, of course, always open to the court to strike out or grant summary judgment in respect of the impugned part of the claim, as opposed to the whole. In my judgment, the court should exercise caution in the early stages of a case in striking out the entirety of a claim on the grounds that a part has been improperly or even fraudulently exaggerated. That is because of the draconian effect of so doing and the risk that, at a trial, events may appear less clear cut than they do at an interlocutory stage. The court is not easily affronted, and in my judgment the emphasis should be on the availability of fair trial of the issues between the parties. As CPR Pt 3.4(2)(b) itself says, "[t]he court may strike out a statement of case if . . . the statement of case is an abuse of the court's process *or is otherwise likely to obstruct the just disposal of the proceedings*" (emphasis added).

27 Each of the authorities mentioned above needs to be read with some care as they all refer to the striking out of claims. Two points are clear. The first is that a claim or a defence cannot be struck out without there being a full hearing as to the merits of the application, with all relevant evidence being adduced. That has not been the case here. That does not, in my judgment however, prevent a determination that the strike out application be dismissed.

28 The second is that proper principles need to be applied when considering the making of a striking out order. One of those principles is summarised in paragraph 21 of the judgment in *Alpha Rocks* where Vos LJ referred to the conduct of the proceedings by a party being so serious as to be an

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[4] *Summers v.*
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affront to the court. Another is in paragraph 22 where Vos LJ added that the court is not easily affronted, and importantly that the emphasis should be on the availability of a fair trial. Those two principles mirror paragraphs (b) and (e) of rule 37(1) upon which the Claimant relies.

29 What is the position here? It is necessary to look at the claim. As mentioned the fact of the dismissal of the Claimant is accepted by the Respondent, and the alleged reasons for it were set out in the response. In my judgment the documents in question can only be of very limited relevance to those issues, if of any relevance at all. The possible exception is the grievance of Keerthika Krishnarajah, but I have recorded that Mr Heard stated that that was not a matter upon which reliance was placed during the disciplinary process. In particular I note that it is pleaded by the Respondent that the alleged breaking down of the door was itself gross misconduct. That of course justifies summary dismissal by definition. None of the documents relates to that allegation.

30 The issue as to the email of 28 November 2013 is indeed odd. It appears to have been printed by the Claimant herself. It was included in the bundles for the hearing before EJ Martin, and presumably no point was taken about it on that occasion or else I would have been informed. Further it appears to me to be totally innocuous in that in it Ms Kapila is simply inviting the Claimant to attend a '2nd Grievance Hearing' between 3 and 9 December 2013. It follows on from an earlier email at 14:38 in which Ms Kapila had invited the Claimant to an investigatory meeting between 6 and 12 December, and had said that she would like to address the second grievance on the same day. There are also other emails in that earlier bundle about arrangements for such meetings.

31 It may transpire that one or more of the documents in question has been falsified (using the Claimant's terminology) but in my judgment the Tribunal which hears the matter, if it comes to that conclusion, will have to weigh that factor in the balance when assessing the evidence and credibility of the witnesses. In my judgment there is not the remotest chance of a fair trial of the issues not being possible.

32 Can it be said that the conduct of the Respondent in these proceedings has been so serious as to be an affront to allow the defence to continue? Again I return to the relevance of the documents to the issues to be decided. I am not persuaded that even on the basis of the Claimant's submissions there has been any misconduct in the conduct of this claim. Certainly it cannot have been such as to be an affront to the Tribunal so that the Respondent should be debarred from defending the claim.

33 I considered whether the matter should be referred to a further preliminary hearing at which further evidence could be adduced, or should be considered at the outset of the full hearing listed to commence on 25 June 2018, or whether the application should be dismissed at this stage. I concluded that the application should be dismissed at this stage.

34 Having considered the representations made on behalf of both parties and the documents in question I decided that there would be no realistic chance of the Claimant persuading a Tribunal to strike out the response,

even if the allegations were substantiated. The making of such an order must be exceptional and can only be made in the circumstances outlined above.[5] I therefore decided to dismiss the application.

35 I emphasised at the hearing that my decision does not prevent the Claimant from seeking to raise these matters as the full hearing, and it will be up to the Tribunal which hears the claim to decide the extent to which evidence can be given on these matters, and the relevance of them to the issues to be determined.

Employment Judge Baron

03 November 2017

[5] The word 'draconian' is often used in this context.