RM

THE EMPLOYMENT TRIBUNALS

Claimant: **Mr JM Barrera Beltri**

Respondent: **RMS Staffing Services Limited**

Heard at: **East London Hearing Centre**

On: **10 November 2017**

Before: **Employment Judge Barrowclough**

Representation

Claimant: No attendance, no representation

Respondent: Mr J Hawkins (Solicitor)

RESERVED JUDGMENT ON A PRELIMINARY HEARING

The Claimant's claim is struck out as having no reasonable prospect of success, and also because the manner in which these proceedings have been conducted by him has been scandalous, and it is no longer possible to have a fair hearing in respect of his claim, pursuant to Rule 37(1)(a),(b) and (e) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

REASONS

1 The Claimant presented his ET1 claim form, which he apparently completed himself, to the Tribunal on 22 May 2017, initiating complaints of: (i) unfair dismissal; (ii) sex discrimination; and (iii) arrears of holiday pay. The Claimant did not then provide any details of or in support of his complaints, and was accordingly ordered to do so by the Tribunal in its letter to him of 5 June 2017, particulars subsequently being provided under cover of the Claimant's email of 11 June 2017.

2 On 17 July 2017, the Respondent presented its ET3 response. In that form, the Respondent identifies itself as an employment agency or business, introducing and supplying candidates to end user clients for both temporary and permanent roles. The Respondent goes on in its ET3 to dispute all of the Claimant's claims, namely unfair dismissal (whether "ordinary" or "automatically unfair"), sex discrimination (whether direct or indirect, and because of either gender or sexual orientation); and holiday pay. The Respondent accepted that it had employed the Claimant as a lecturer from 8 November 2016, when he commenced work at Barking and Dagenham College. However, the Respondent asserted that it was notified by that college on 22 May 2017 that the Claimant's assignment there had been terminated because he had become involved in an argument with one of his female students, who he had slapped and who had in turn struck him. As a result, the Claimant had been invited to attend a disciplinary hearing by the Respondent on 7 July 2017, which was conducted by the Respondent's branch business manager (Ms Chan Barnaby), and with Ms Jemma Jordan, an HR representative, in attendance. The outcome was that the Claimant was summarily dismissed for gross misconduct, that decision and the reasons in support being communicated to him on 11 July.

3 The Claimant's claim was listed for a Closed Case Management Hearing on 7 August 2017, conducted by Employment Judge Gilbert, when he attended in person and the Respondent was represented by its solicitor Mr Hawkins. The Tribunal then sought to clarify the Claimant's claim and the issues arising, albeit with only limited success. The Claimant confirmed that he was no longer pursing any complaint of sex discrimination (whether direct or indirect); and it was clear that he had insufficient continuous service to support a claim for ordinary unfair dismissal pursuant to ss.94 and 98 Employment Rights Act 1996. However, it was not then possible to determine whether the Claimant was pursuing claims of automatically unfair dismissal, or dismissal/detriment under the Agency Workers Regulations, or breach of contract. The Tribunal therefore decided to stay the proceedings, encouraged the Claimant to seek advice, and he was ordered to inform the Respondent and the Tribunal by 7 October 2017 if he intended to pursue any part of his Employment Tribunal claim, and if so on what ground or grounds the claim was being pursued. Finally, the Tribunal listed the case for a Preliminary Hearing on 10 November 2017, in order to then clarify the issues and make orders leading up to a full hearing.

4 On 21 August 2017, the Respondent wrote to the Tribunal expressing its concern about the manner in which the Claimant had been conducting himself in the pursuit of his claim against them. It was in particular alleged that there had been a very significant number of abusive and threatening phone calls, texts, and emails, by or from the Claimant to both Ms Jordan and Ms Barnaby, as well as to the Respondent's solicitor; and that these had included threats of violence and/or to kill. The Respondent's letter enclosed approximately 80 pages of copy emails, texts, attendance notes and correspondence in support of those allegations.

5 Copies of the Respondent's letter of 21 August and of its enclosures were sent to the Claimant on 13 September, and he was asked to respond within 7 days. In fact, the Claimant replied to the Tribunal on 14 September, in an email in which he alleged that he himself had been followed and assaulted by students

from Barking and Dagenham College, but failed to address or respond to the detailed allegations in relation to his own behaviour towards the Respondent and its staff.

6 On 5 October, the Tribunal wrote to the Claimant directing him to desist forthwith from sending abusive or threatening correspondence and texts to the Respondent's solicitor, and indicated that at the hearing on 10 November 2017 the Tribunal would consider striking out the Claimant's claims under Rules 37(1)(b) and (e) for scandalous/vexatious behaviour, and/or because a fair trial might no longer be possible.

7 On the following day (6 October) the Claimant sent an email to the Tribunal, copying in the Respondent, which reads as follows: *"I sought legal advice and I have been told that according to the facts and ET1, I should proceed with my claim on the grounds of breach of contract, unlawful deductions from wages and automatic unfair dismissal due to whistleblowing (health and safety – criminal offence)."* No further details or particulars of any such complaints were provided by the Claimant, then or thereafter.

8 On 17 October, the Respondent wrote to the Tribunal (copied to the Claimant) indicating that, since the Claimant had not complied with the Tribunal's order of 8 August to specify on what ground or grounds his claim was being pursued, despite having apparently received legal advice, it wished to apply to strike out the claim as having no reasonable prospect of success.

9 On 24 October, the Tribunal wrote to the parties indicating that at the hearing on 10 November the Tribunal would consider striking out the Claimant's claim, under Rule 37(1)(a); and/or (1)(b); and/or (1)(e); as well as the possibility of ordering a deposit and giving a costs warning, pursuant to Rule 39.

10 At the Preliminary Hearing I conducted on 10 November 2017, and as noted, the Respondent was represented by their solicitor, Mr Hawkins. The Claimant initially attended the Tribunal in person on the morning of the hearing, and was apparently ready for it to commence at 10.00am. However, there was a fire alarm at the Tribunal Centre shortly before that time, and everyone in the building had to vacate it, before being allowed to return approximately 15 minutes later. The Claimant did not in fact then return to the Tribunal. He was contacted shortly thereafter by a member of Tribunal staff on the telephone, when he confirmed that he had decided that he would not be attending the Preliminary Hearing after all, which therefore went ahead in his absence and without any representation on his behalf; and when I heard submissions from Mr Hawkins on behalf of the Respondent.

11 Mr Hawkins submitted that the Claimant's claim had no reasonable prospect of success under Rule 37(1)(a) since, despite the Claimant having been given every opportunity and considerable time within which to formulate his complaints and to provide supporting details or particulars, and despite his having apparently taken legal advice, he had completely failed to do so. There was no pleaded case before the Tribunal which the Respondent could respond to, or the Tribunal determine. In the complete absence of any even arguable

case, the claim should be struck out.

12 Secondly, Mr Hawkins submitted that, pursuant to Rule 37(1)(b) and (e), on any view the Claimant's conduct of his case and his behaviour towards the Respondent had been scandalous, in being repeatedly and gratuitously offensive as well as threatening violence; especially his behaviour towards Ms Jordan and Ms Barnaby, the two witnesses on whom the Respondent would inevitably seek to rely in these proceedings; and that a fair trial was no longer possible. In particular, the Claimant had sent Ms Jordan, the HR Officer who had been involved in the Respondent's disciplinary process concerning him, 60 text messages (which included references to gang rape, paedophilia, and neo-Nazism), together with 11 phone calls or voice mails to her phone, over the course of one weekend alone; and towards Ms Barnaby, the Claimant had behaved not only in the manner summarised at paragraph 22 of the ET3 (threatening phone calls, including that the Claimant would ensure that she was imprisoned, and that he would commit suicide); but also the incidents on 14 and 20 August (summarised at pages 24 and 64 in the bundle R-1), when Ms Barnaby was once again threatened with prosecution and imprisonment; and finally the suggestion on 30 October 2017 (page 84) to Ms Barnaby (who is currently pregnant with her first child) that she was the mother of one of the Claimant's tenants, who is also a student at Barking and Dagenham College. In these circumstances, Mr Hawkins said, both Ms Barnaby and Ms Jordan were understandably frightened of and by the Claimant and his unpredictable, threatening and apparently irrational behaviour towards them, and neither wished to have any further contact or dealings with him, including meeting or seeing him again. In these circumstances, since Ms Jordan was the HR officer who had been involved in the disciplinary process, and Ms Barnaby had presented the Respondent's case at the disciplinary hearing which had resulted in the Claimant's dismissal, and they were therefore critical witnesses for the Respondent; yet neither was willing, for perfectly understandable and apparently justified reasons, to attend the full merits hearing and give evidence, it was not possible to have a fair hearing or trial of the case.

13 Finally, Mr Hawkins recognised that striking out a claim was a drastic step for the Tribunal to take, and that the bar to be reached by the Respondent in making such an application was a high one; but submitted that in all the circumstances of this case and on both grounds, there was no alternative but for the Claimant's claim to be struck out.

14 I reserved my judgment at the conclusion of Mr Hawkins' submissions.

15 In relation to the application to strike out the Claimant's claim on the ground that it has no reasonable prospect of success, the Tribunal's approach should be that set out in *Ezias v North Glamorgan NHS Trust [2007] ICR 1126* and *Balls v Downham Market High School [2011] IRLR 217*; essentially whether, on a careful consideration of all the available material, the Tribunal can properly conclude that that particular claim has no reasonable prospect of success. The test is not whether the claim is likely to fail; or whether it is possible that it will fail; nor can it be satisfied by simply considering the potential strength of arguments put forward by the Respondent in its ET3 and/or submissions. The applicable test

is a high one, and the Tribunal should have regard not only to material specifically relied upon by the parties, but also to any relevant matters on the case file.

16 Applying those principles to the circumstances of this case, the simple fact is that there is no material before the Tribunal upon which any of the complaints put forward by the Claimant could possibly succeed. As noted, the Claimant has been given the time and opportunity within which to provide the required information or details, but has not done so, even though he was on notice that any such failure might result in his claim being dismissed. The Claimant was encouraged to seek advice, and on his own account has done so: but that has not resulted in any more substantive information concerning any of his complaints being forthcoming. There has been no suggestion that the Claimant needs more time, or that he has been unable for whatever reason to particularise or clarify his individual complaints; and no application for a postponement or adjournment has been put forward. In the circumstances, the complaints advanced by the Claimant are no more than repeated and unsupported bare assertions, which would appear to be nothing more than an attempt to apply pressure on the Respondent to buy him off for simple economic reasons. In my judgment and on the material before the Tribunal, and in the absence of any pleaded or argued case, the Claimant's complaints and his claim as a whole cannot succeed. Accordingly, I strike out the claim, pursuant to Rule 37(1)(a).

17 Turning to Mr Hawkins second submission, I agree with him that the grounds for striking out under Rule 37(1)(b) and (e) must be taken together. It is generally not sufficient that the manner in which proceedings have been conducted by a party has been scandalous, unreasonable, or vexatious to warrant that party's claim being struck out; in most cases (including this one in my judgment), it is only where the Tribunal considers that, as a result of such conduct, it is no longer possible for there to be a fair hearing that a claim should be struck out.

18 I have no difficulty in concluding that the Claimant's conduct of these proceedings has indeed been what can properly be described as "scandalous", in that the Claimant has graphically and repeatedly misused the legal process of bringing Employment Tribunal proceedings in order to vilify, abuse and threaten his former employers, and in particular anyone connected with their decision to dismiss him.

19 Secondly, I am in no doubt that, in the circumstances of this case, striking out the Claimant's claim is proportionate, and that it would not be possible for there to be a fair trial in relation to any of the Claimant's complaints, should they go forward to be determined at a full hearing. That is because the Claimant has chosen as the primary targets for his abuse, intimidation and threatened violence the two individuals most closely connected with the decision to dismiss him, namely Ms Barnaby, who conducted his disciplinary hearing and took the decision to dismiss him, and Ms Jordan in her capacity as the HR adviser involved in that process. Whilst for the reasons already outlined, the nature and detail of the Claimant's complaints is still far from clear, on the basis

of the limited information provided by the Claimant, including his email to the Tribunal of 6 October 2017, it is inevitable that those two individuals would be the Respondent's main if not only witnesses at any final hearing. Since the Claimant's conduct has resulted in both Ms Jordan and Ms Barnaby being frightened, distressed, and unwilling to attend and give evidence at any such hearing at which the Claimant would be present, and since the Claimant does not apparently dispute his alleged behaviour towards the Respondent and its employees (it is striking that in his response to the Respondent's letter of 21 August the Claimant takes no issue with any of the allegations then advanced), it is not possible to see how the Respondent would be able to conduct a legitimate and proper defence to the Claimant's complaints, if they were allowed to proceed. I agree with Mr Hawkins that the current case is analogous to the situation in *Force One Utilities Ltd v Hatfield [2009] IRLR 45*, where a claimant was threatened with physical violence by a senior employee of the respondent who, whilst not himself due to give evidence, had conduct of the employer's case. In my judgment, the current circumstances go further than that, in that the behaviour repeatedly manifested by the Claimant towards the Respondent's likely witnesses cannot by any means be guaranteed to have come to an end, and any participation by or evidence from either Ms Jordan or Ms Barnaby is likely to be substantially affected by fear of retribution by the Claimant, who has already shown no restraint in contacting them direct. For all these reasons, I conclude that not only has the Claimant's conduct of the proceedings been scandalous, but that as a result it is no longer possible for there to be a fair hearing of the Claimant's claim, which should be struck out on the grounds set out at Rule 37(1)(b) and (e) in addition to those at sub-paragraph (a).

20 In the circumstances, it is not necessary or appropriate for me to go on to deal with whether or not a deposit coupled with a costs warning under Rule 39 would be proper.

Employment Judge Barrowclough

27 November 2017