EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ms L Coats	**v**	**(1) Great Marlborough Productions Ltd** **(2) Ms S Fell** **(3) Mr B Bocquelet** **(4) Ms E Browne** **(5) Turner Broadcasting System Europe Ltd**

Heard at: London Central **On**: 23 August 2018

Before: Employment Judge Lewis

Representation

For the Claimant: Mr T Coghlin, QC

For the Respondents: Mr S Sweeney, Counsel

RESERVED PRELIMINARY HEARING JUDGMENT

1. The 'smear' claim is not struck out under the rule in Henderson v Henderson.

2. The 'spin-off' claim is not struck out as having no reasonable prospects of success.

REASONS

Claims and issues

1. The preliminary hearing today was fixed to decide the issues set out in the case management summary by EJ Elliott on 18 June 2018. In summary

1.1 Whether the 'smear' claim should be struck out on grounds of Henderson v Henderson

1.2 Whether the 'spin-off' claim should be struck out or a deposit ordered on grounds respectively of no / little reasonable prospects of success.

2. By agreement, the parties completed their submissions by the end of 23 August 2018. They declined an offer to return the next day and finish off. On 24 August 2018, I was sent an email by the respondents at 9.41 am, to which the claimant responded at 10.39 am concerning the claimant's tweets and justification for them. They asked that I also read these emails.

The smear claim

Fact findings

3. The two present claims are for post-termination victimisation under the Equality Act 2010. Claim 2200606/2017 names as respondents Great Marlborough Productions Ltd, Sarah Fell and Ben Bocquelet. It claims victimisation in relation to BAFTA nominations. This claim is not subject to the preliminary hearing today. It also alleges at paragraphs 8 – 12 that Ms Fell falsely told colleagues on 11 November 2014 that the claimant had delivered to her at home an 'unpleasant communication' and that this had intimidated and threatened her, and that she (ie Ms Fell) had been shocked and distressed by the arrival of the letter and the fact that it had been delivered to her home. This is the 'smear' claim.

4. The claimant says this was untruthful. The letter was a copy of a formal grievance to which she had added a polite cover note. Moreover, she says Ms Fell had been expecting the letter to be delivered to her home. The claimant says Ms Fell's 'demonization' of her to her colleagues led to some of them believing she had sent hate mail and behaved in a disturbing manner. Thus Ms Fell had maligned her character and her mental health and caused reputational damage. The claimant said she was very upset when she found out.

5. The smear claim was brought against Marlborough Productions Ltd and Sarah Fell. The alleged protected acts were complaining of victimisation while still employed and previously bringing Equality Act 2010 proceedings under case number 2201055/2015 ('the Hodgson litigation'). The latter case was heard by a tribunal chaired by Employment Judge Hodgson. The hearing took place from 9 – 19 November 2015 and 14 – 23 March 2016 with a further 6 days in chambers. The decision was sent to the parties on 3 June 2016. The claims were not upheld.

6. Case number 2201055/2015 was brought only against Great Marlborough Productions Ltd. The Equality Act claim was for harassment and victimisation. There was also a whistleblowing detriment claim.

7. The proceedings in that earlier claim were patently difficult to case manage. Witness statements were exchanged only on the first day of the

hearing and a list of issues had still not been agreed. Live evidence did not start until the second week. Broadly speaking, the first two days were taken up with getting the case ready to proceed. Issues were discussed, primarily on day two and the balance of the week was for the tribunal to read the witness statements and key documents.

8. The tribunal expressed concern about the time-table from the outset, given the number of witnesses and extent of documentation. The tribunal estimated that at least 20 days would be needed so that the case would go part-heard.

9. Issues were not absolutely finalised until day 15. 40 allegations were listed, several of which subdivided into further allegations. The list included 16 allegations against Ms Fell with two late allegations added on days 11 and day 14 respectively against Ms Fell, ie

   9.1 Allegation 2b: Omitting her name from the writing credits of 'the Money'. This arose from an amendment of the claim already allowed by EJ Lewzey.

   9.2 Allegation 2c: Aggressive and unfriendly behaviour at lunchtime on 25 July 2015. The Reasons state this was a new allegation, added by consent. The claimant says this was not a new issue but arose from a misunderstanding by the tribunal. I was not given sufficient detail to establish whether or not this was an entirely new issue.

10. Having identified the issues, EJ Hodgson said any further allegations would require amendment. The claimant did seek leave to amend during the tribunal discussions, but this was prompted by the Judge, largely where there was of lack of clarity in the claim form.

11. The first the claimant knew of the facts underlying the smear claim were when she received the respondents' witness statements on the first day of the hearing, notably those of Ms Fell, Mr Klein and Mr Locket.

12. Mr Klein in his witness statement said, 'I learned of an incident where the claimant had hand-delivered a note to Sarah Fell's house, and I found this disturbing'. Mr Locket in his witness statement said: 'I was not surprised to hear from Sarah Fell, at a later date, that she was receiving what she described as 'hate mail' from the claimant. I found it distressing that the claimant would do this. I also found it worrying that the 'hate mail' was hand-delivered by the claimant to Sarah's personal address'.

13. Ms Pell's witness statement referred to the claimant's letter, ie a copy of her 8 November 2014 grievance to Mr Stock with a cover note dated 11 November 2014 which said none of the complaint was personal. Ms Fell added: 'It had of course seemed, and continues to seem to this day, highly personal, not least because she had hand delivered it to my home address, which I found threatening, intimidating and unnecessary'.

14. The claimant had texted Ms Fell a few days previously to say she would deliver a blind copy of the grievance to Mr Stock to her at home, marked private and confidential.

15. The claimant cross-examined Ms Fell about her statement that she felt intimidated by the letter's delivery to her home address and she questioned Mr Klein and Mr Locket as to what made them believe the letter was 'hate mail'. Her questioning was brief as this was not in the list of issues. Mr Klein gave oral evidence in March 2016. The claimant says his evidence indicated he had gained the impression that the claimant had conducted herself like a woman who would attach scary notes to an ex-boyfriend's windshield.

16. The Hodgson tribunal referred to the letter as part of its findings on Allegation 32 (that Mr Stirling had informed the claimant that her 8 November 2014 grievance letter to Mr Stock would be ignored). The tribunal noted in its Reasons at paragraph 7.195:

> 'The claimant also provided Ms Fell with a copy of the letter. The claimant hand-delivered it to Ms Fell's home address. Ms Fell felt violated by this.'

Submissions

17. The claimant argues that she was a litigant in person dealing with a large number of claims which had overwhelmed her. She says she had not initiated any application to amend, but rather she had accepted EJ Hodgson's suggestion that she ask to amend on various issues of clarification where he had deemed it necessary. She adds that the general tenor of the tribunal was that it was desirable for her to reduce the number of claims, and the tribunal was concerned about the amount of time which the hearing would take. That would not have been conducive to asking to add new claims had she thought to do so.

18. The claimant further adds that she had sought to add Ms Fell as an individual respondent on some of the existing claims and that had been refused. The respondents point out that it was not necessary to add Ms Fell as a party to raise the new issue against the existing corporate respondents. Indeed, Ms Fell was attending to give evidence in any event.

19. The respondents argue that the claimant could and should have raised the matter and sought leave to amend in the first or second week of the Hodgson tribunal hearing, and that she had a further opportunity to reflect and take advice during the nearly four month gap in the hearing. Even if she was overwhelmed, as she says, at the start of the hearing, there was nevertheless that further opportunity. They state that there were already 16 punchy allegations against Ms Fell and it would have been very simple for the claimant to have raised a further allegation which would have taken no more than 10 minutes to deal with. They argue that the applications to amend in the first week illustrated to the claimant that there was a facility to apply to amend.

20. The respondents further argue that the claimant's application is oppressive and amounts to harassment of the respondents. They say this is illustrated by the claimant's tweets in the public domain, which they say are defamatory of Ms Fell and others. The tweets essentially refer to Ms Fell lying on oath to cover up her mistreatment by Mr Bocquelet when she objected to his nasty prostitute descriptions.

21. The claimant answers that the tweets simply show a pronounced disaffection between the claimant and the respondents including Ms Fell, which is unsurprising where there is a broken employment relationship.

22. On 24 August 2018, the day following the hearing, the respondents' solicitors sent an email to the tribunal attaching an email from the claimant to them earlier that day. The claimant had complained about the respondents collecting her tweets and regarded this as an attempt to gag her and her supporters, whom she said were entitled to comment on facts already in the public domain. The respondents state this is further evidence of the claimant's oppressive intentions in relation to the conduct of her claims, and supports their contention that the pursuit of the smear claim is an abuse of process. The claimant replied to the tribunal the same morning, stating that she is under no obligation to cover up what happened to her during claim 1, which was due to the considered dishonesty of the respondents' witnesses. She attached a more extensive set of tweets for context. I read both letters.

Law

23. The representatives both addressed me on the law. There was no disagreement between them on the principles, merely on their application. Mr Sweeney gave me extracts from the IDS Employment Law Handbooks. I was also given a file of the full authorities. For reasons of length, I do not repeat here all the legal submissions which were made to me, but I took them into account.

24. The modern understanding of the rule in Henderson v Henderson is set out by Lord Bingham in Johnson v Gore Wood and Co [2002] 2 AC 2, HL. In summary, the bringing of a claim in a later case may in itself amount to abuse if the tribunal is satisfied that the claim *should* have been raised at the earlier proceedings. It is not enough that the matter *could* have been raised in the earlier proceedings. The onus is on the party alleging abuse to satisfy the tribunal that this is the case. It is not necessary to identify any additional element, such as a collateral attack on a previous decision or some dishonesty, but where those elements are present, the later proceedings will be much more obviously abusive. There will rarely be a finding of abuse unless the later proceedings involve unjust harassment of a party. The tribunal's decision should be a broad merits-based judgment taking account of the public and private interests involved. The crucial question is whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.

Conclusions

25. I do not strike out the smear claim on the basis of the rule in Henderson v Henderson. I do not consider the claimant is misusing or abusing the court process by raising in claim 2200606/2017 an issue which should have been raised in the Hodgson tribunal. Possibly the claimant *could* have sought leave to amend to introduce the smear claim at that time, but I would not go as far as saying she *should* have. The claimant was a litigant in person seeking to navigate her way through a large number of issues. Although she was given considerable assistance by the Hodgson tribunal that does not mean it was easy for her to manage and keep track of the issues in her mind. She was caught by surprise by what was said in witness statements which she did not see until the first day of the hearing. To go through the mental process of categorising that information as a further 'issue' ie cause of action, as opposed to simply part of the narrative, is a sophisticated distinction.

26. I have taken into account that the claimant had already set out, or had had set out for her, numerous small issues of a similar nature, including several against Ms Fell. Nevertheless, it would have been a difficult thing to think of once thrown into the hearing, when she had so much else to concentrate on, and when the 'mood music' of the tribunal, as Mr Coghlin puts it, was to worry about time and to reduce claims, not increase them.

27. I have also taken into account that there was a four month gap when the claimant could have reflected and taken advice. By that stage, the claimant would have been immersed in the case and cross-examination of witnesses. It is completely understandable that she would not have thought about the possibility of asking to amend to bring in the smear claim as a new issue. Moreover, Mr Klein had not yet given evidence and the full significance of what Ms Fell had told him had not yet become apparent to the claimant.

28. I do not find that the further claim involves 'unjust harassment' of Ms Fell. It is true that she will have to face one more allegation, having already had to face a large number of allegations which were not upheld. I also note that the claimant has sent out some intemperate tweets referring to Ms Fell, amongst others, as concealing evidence and lying on oath. On the other hand, such tweets looked at as a whole are unfortunately rather typical of the type of tweets and hyperbole one sees these days when there is a breakdown in an employment relationship. Ms Fell is already a party to the further proceedings involving the more complex BAFTA claim. The smear claim is a short and self-contained point.

29. The facts underpinning the smear claim had not arisen prior to the start of the Hodgson hearing. It is potentially a serious issue. One can see why, when considering the two areas of post termination victimisation which concerned her (the BAFTA and copyright issues), the claimant singled out the one earlier issue which had emerged at the hearing.

The spin-off claim

30. The 'spin-off 'claim is contained in case number 2207806/2017. In essence, the claim is that the respondents victimised the claimant by failing to negotiate with her spin-off rights for 'Waiting for Gumball' (a spin off from one episode of 'The Amazing World of Gumball') when she approached Ms Browne, Vice President Legal, in July 2017.

31. The claimant co-wrote the structure for the relevant episode, 'The Puppets', on 16 May 2014. The respondents say that the applicable contract was Contract B. The claimant says that the applicable contract was Contract E. Neither explicitly mention the term 'spin-off' rights.

32. Contract 'E' between the 1st respondent and the claimant is dated 28 July 2014. It engages the claimant as a writer and script consultant on the Series ('Amazing World of Gumball' Season 4) for the period 2 June 2014 – 26 September 2014. Season 4 contained the Puppets episode.

33. Contract 'B' between the 5th respondent and the claimant was signed by the claimant on 12 December 2013.The contract engages the claimant as an editor to edit scripts. The start date is 18 November 2013 and end date is 18 November 2014. This would mean the contract covered the period when the Puppets was created. However, the claimant says that when she signed this contract, she did not notice the end date had been tippexed over and changed from when she looked at the draft. The draft had put the end date as 19 November 2013.

34. There were standard terms and conditions attached to Contract B but not to Contract E. There is a broad assignment of rights to the 5th respondent in these terms and conditions. Contract E has a paragraph in its body generally assigning rights to 1st respondent.

35. The claimant argues that neither contract explicitly assigns 'spin-off' rights to the company and that, in the industry, these are always dealt with explicitly. She showed me some examples including a contract with the BBC where there is a distinction between Primary Rights and Secondary Rights including spin-off rights. She says that, had she not brought her previous tribunal claim (subsequent to the issue of the original contracts), Ms Browne would have negotiated spin-off rights with her in July 2017 when the need to do so arose.

36. The claimant says that the correct contract applicable to the Puppets was Contract E (the writers contract) and not Contract B, which was Ms Browne's stated reason for refusing spin-off rights and which Ms Browne must have known was not applicable as it was only an editor's contract.

37. The respondents say Contract E did not apply because it post-dated the Puppets episode. Therefore Ms Browne understandably and correctly referred to Contract B, whose dates did cover the work on the Puppets episode. They argue that the terms and conditions explicitly assigned all rights to the respondents.

38. The respondents state that at the full merits hearing they will say spin-off rights from the Puppets episode were not given to anyone and that their practice is to retain all their rights on all their contracts.

Law

39. Under Schedule 1, rule 37(a) of the ET Rules of Procedure 2013, the tribunal can strike out all or part of a claim on the grounds that it is scandalous or vexatious or has no reasonable prospect of success. However, the case law is very clear that a tribunal must be extremely slow to strike out a discrimination claim at a preliminary hearing on grounds that it has no reasonable prospect of success. Where a strike-out is based on fact findings which are in dispute, it will only be in an extreme case that the evidence does not need testing in cross-examination at a full merits hearing. An exception might be where facts put forward by the claimant are totally and inexplicably inconsistent with undisputed contemporaneous documentation. Moreover, a strike out should only take place in the most obvious and plainest case. 'No' reasonable prospects of success really does mean no. (See Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330; A v B and C [2010] EWCA Civ 1378; Anyanwu v South Bank Students Union [2001] ICR 391, CA; Balls v Downham Market High School & College [2011] IRLR 217, EAT.)

40. Regarding discrimination claims, in Anyanwu v South Bank Students Union [2001] ICR 391 Lord Steyen said:

> For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of process except in the most obvious and plainest cases. Discrimination cases are generally fact sensitive and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of the claim being examined on the merits or de-merits of its particular facts is a matter of high public interest.

Conclusions

41. Although I consider it a weak claim, I do not strike out the spin-off claim on grounds of no reasonable prospects. The claimant says it is an industry norm to address the question of spin-offs explicitly. She further states that the general wording in the two Contracts which assigns rights obviously does not cover spin-off rights and Ms Browne would know this. If she succeeds in proving this, there may be some questions to be explored as to why her approach to discuss the matter was so categorically rejected.

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Employment Judge Lewis on 28 August 2018