



# EMPLOYMENT TRIBUNALS

**Claimant:** X

**Respondent:** Y

**Heard at:** Manchester

**On:** 7 and 8 February, and  
13 May 2019

**Before:** Employment Judge Franey  
Mrs A L Booth  
Mr B J McCaughey

## REPRESENTATION:

**Claimant:** In person  
**Respondent:** Ms L Gould, Counsel

# JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The claim is struck out under Rule 37(1)(b) on the ground that the manner in which the proceedings have been conducted by the claimant has been scandalous and unreasonable.
2. The respondent's application for a costs order is rejected.

# REASONS

## Introduction

### Claim and Response

1. By a claim form presented on 29 April 2018 the claimant complained of sex discrimination whilst employed as a telesales agent for the respondent. She complained that she was the only person not paid for 1 March 2018 when the office was closed due to snow, and that on 19 March 2018 the Managing Director and proprietor, (whom we will call Mr R, for reasons set out in paragraph 4 below) invited her to reach a deal and leave employment. She alleged that in that conversation he mentioned an incident in January 2018 where she had been raped. She said that these circumstances caused her to resign.

2. By its response form of 8 June 2018 the respondent resisted the complaints. It said that there were performance concerns which were being managed at the time the claimant resigned. The claimant had not been entitled to be paid on her absence from the office on dependants' leave on 1 March 2018, and it was she who brought up the rape in her discussion with Mr R on 19 March 2018. It was denied that there had been any sex discrimination or any constructive dismissal.

3. The claims pursued and the issues arising were clarified by Employment Judge Aspden at a preliminary hearing on 28 June 2018. There was a complaint of unfair constructive dismissal, and complaints of part-time workers and dependants' leave detriment in relation to the failure to pay the claimant for 1 March 2018. That was in addition to the allegation of harassment related to sex (or direct sex discrimination) in relation to the discussion on 19 March 2018.

4. Employment Judge Aspden also made a restricted reporting order and an anonymisation order. The latter order prevents the public record of this Judgment and Reasons from identifying the claimant, hence the use of initials in the version which appears on the Employment Tribunal decisions website. In these Reasons we will also refrain from providing any further details that might lead to the claimant being identified. Other witnesses will be referred to by a letter not by their name.

5. Following clarification of the claims at the preliminary hearing, the respondent amended its response form on 19 July 2018. All claims were still denied.

### Hearing November 2018

6. The matter was listed for a two day hearing before Employment Judge Porter and members on 6 and 7 November 2018. That hearing had to be adjourned. In breach of case management orders the claimant arrived with a number of documents which did not appear in the joint bundle. The Tribunal refused some applications made by the claimant for documents to be disclosed by the respondent, but granted an application for the claimant to rely on witness evidence from her partner, whom we will call Mr A, which had only been served by email on the

morning of that hearing. In addition, orders were made for the claimant to prepare a bundle of the documents omitted from the joint bundle, to provide that to the respondent by 27 November 2018, and to bring four copies to the hearing. Subsequently new hearing dates of 7 and 8 February 2019 were confirmed.

#### Hearing February 2019

7. Unfortunately, the claimant did not comply with that Case Management Order either. She prepared a bundle but it was not limited to those documents omitted from the joint bundle. In addition, although she sent a copy to the Tribunal in early December 2018, she attended the hearing with only two further copies. There was delay whilst these problems with documents were sorted out. This took up some hearing time and contributed to the fact that the final hearing was not concluded within the two days allocated. The Tribunal heard evidence from the claimant and Mr A, and from the first of the respondent's witnesses, Mrs G. The two respondent witnesses yet to be heard were Mr R and the claimant's manager Mr W. The Tribunal adjourned part-heard on 8 February 2019.

#### After the February Hearing

8. Between the adjournment of the hearing on 9 February 2019 and its resumption on 13 May 2019 the claimant sent a series of emails to the Tribunal, most of which were copied to the respondent. In those emails she raised the following matters:

- (a) She sought to reopen the disclosure applications already determined by Employment Judge Porter;
- (b) She made a number of requests for CCTV footage;
- (c) She made allegations of perjury and tampering with evidence against the three respondent witnesses;
- (d) She reopened the question of a witness order for her counsellor, an application which this Tribunal had heard and rejected on 8 February 2019;
- (e) She sought disclosure of Mrs G's contract.

9. The respondent provided a reply to these various matters by a letter of 22 February 2019. It said that the claimant had been pursuing her case in an unreasonable and vexatious manner. It reserved its position regarding costs.

10. The claimant continued to correspond with the Tribunal. On 25 February 2019 she sent an email which purported to offer some informal advice from an engineer she had contacted through the internet about whether a draft email of 19 March 2018 had actually been sent or not. That email had been the subject of evidence at the hearing in February 2019. The claimant was alleging that the respondent had hacked into her Hotmail email account in the middle of the night and had tampered with her sent emails to make it look like the email had not been sent.

11. On 5 March 2019 she sent an email providing details about her housing situation in which she mentioned disputes with her neighbours and the fact that

hitmen had been hired. She provided a copy of a report she made to Greater Manchester Police by email on 13 February 2019. She mentioned her partner, Mr A, was a professional mixed martial arts fighter and that a neighbour had had in her house men who wanted to slaughter him. There were further communications about her housing situation later in March.

12. By a letter of 15 March 2019 Employment Judge Franey directed that the Tribunal would not consider any further applications or take any steps until the commencement of the hearing on 13 May 2019. The claimant was urged to focus on completing the evidence and concluding the case.

13. In early May 2019 the claimant supplied a timeline of events that had happened outside work. None of it appeared to be relevant to the issues in this case. They were issues with her neighbour.

### Hearing 13 May 2019

14. The hearing resumed on Monday 13 May 2019. A few minutes before it began the Tribunal was given copies of two emails sent by the claimant on the afternoon of Sunday 12 May 2019. The first email at 16:58 raised again the allegations made against the three respondent witnesses and their solicitor of perversion of the course of justice and fabrication of evidence, and conspiracy to do those things.

15. In addition, after a brief summary of recent incidents with her neighbours the claimant made an allegation against the respondent in the following terms:

**“I believe [the respondent] has put me through a very hard time. All these people used to be my ‘friends’. I always knew they were in on a scheme. I fought with patience and love. Until they showed me they wanted my kids taken off me and [to] put me in a mental institution. Planned [Mr A’s] murder. Their plans failed miserably. Joanne XXXX and Tracy XXXXX only befriended me for this case. They showed me exposure on the night they planned murder of [Mr A]. This was due to [the respondent] not having a case on [Mr A]. This all took place the weekend after the court case in Feb. Saturday night. [Mr A] wasn’t with me. They didn’t know this. They assumed he was as he was with me in court that Thursday and Friday. Hitmen were seen coming out of Joanne’s house Sunday afternoon. All this terrified me to the core.”**

16. The second email sent at 17:16 was headed “[Mr A’s] Murder Attempt” and provided copies of an email exchange with the police between 9 and 10 May 2019. Police Constable Pye confirmed that the police had attended to deal with an incident with a neighbour, and although that neighbour had been given words of advice there was no CCTV or independent witness evidence to corroborate the claimant’s complaint and the matter was closed.

17. The emails of 12 May 2019 had not been copied to the respondent. We provided copies at the start of the hearing. After a break to take instructions Ms Gould applied to strike out the claim.

### **Relevant Legal Principles**

18. The power to strike out a claim arises under rule 37 of the Employment Tribunals Rules of Procedure 2013. Rule 37(1) provides as follows:

“At any stage of the proceedings, either on its own initiative or on the application of a party, the Tribunal may strike out all or part of a claim or response on any of the following grounds –

- (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...”

19. In common with all powers under the rules, the power to strike out a claim must be exercised in accordance with the overriding objective in rule 2. That objective is to deal with a case fairly and justly, so far as practicable.

20. The Court of Appeal confirmed in **Bennett v Southwark London Borough Council [2002] ICR 881** that the word “scandalous” in rule 37(1)(a) means irrelevant and abusive of the other side. It is not to be given its colloquial meaning of signifying something that is “shocking”. It seemed to us that the word should bear the same meaning in rule 37(1)(b).

21. Striking out a claim is a draconian measure that should not be imposed lightly. The Court of Appeal made that plain in **Blockbuster Entertainment Ltd v James [2006] IRLR 630**.

22. In cases where the possibility of striking out a claim due to the way in which the proceedings have been conducted arises, the Employment Appeal Tribunal identified steps that should be followed in **Bolch v Chipman [2004] IRLR 140**:

- (a) The Tribunal must conclude that the party has behaved scandalously or unreasonably in conducting the proceedings;
- (b) The Tribunal must then consider whether a fair trial is still possible; if so, an order striking out the claim will not be proportionate;
- (c) Even if a fair trial is unachievable, the Tribunal must still consider whether a lesser penalty is appropriate such as a costs order.

23. In effect the Tribunal should only strike out the claim if firm case management measures would not result in a fair hearing. The Tribunal has to assess the nature and impact of the wrongdoing in issue to consider whether there was any real risk of injustice or to the fair disposal of the case.

24. A recent example of the application of these principles is found in the decision of the Employment Appeal Tribunal in **Chidzoy v BBC UKEAT/0097/17**. In that case the claimant had been warned at each break in her evidence that she must not discuss the case with any other person. On the third day of her evidence she was found to have engaged in a discussion with a journalist during a short adjournment. Evidence about that episode was taken and the Tribunal formed concerns about discrepancies in the claimant's account. It struck out the claim because a fair hearing was no longer possible: the claimant's conduct in flagrant disregard of clear and repeated instructions from the Tribunal meant that the Tribunal could not trust her evidence. The Employment Appeal Tribunal upheld that decision. The Employment Tribunal had considered all other options before concluding that the claim should be struck out.

## **Respondent's Application**

25. In pursuing her application Ms Gould reminded us of the background to the emails of 12 May 2019. The claimant had attended late for the two day hearing in November 2018 and had not complied with the directions regarding bundles. This had resulted in the adjournment to the February 2019 hearing. Even then the claimant produced additional documents which contributed to the case not being completed on that occasion.

26. Through Mr A's witness statement she had made an allegation about an inappropriate snapchat message. Mr A's statement said it was the respondent's proprietor Mr R who had sent the message, but he supplied a subsequent statement saying that he meant the manager Mr W. The claimant had not produced the message in question. Mr W had had to go to the lengths of getting assistance from his teenage daughter to recover a snapchat account to show that he had sent no such message.

27. The claimant had also pursued allegations in the proceedings about the respondent having hacked into her emails at 4.00am to access her Hotmail inbox to make it look as though she had not sent an email and that it was only a draft. Her attempts to explain this by reference to technical evidence had been incoherent, and it was another fanciful allegation.

28. Those matters faded into insignificance, however, compared to the baseless allegation of conspiracy to murder made against the respondent in the emails of 12 May 2019. The effect of these allegations on top of the earlier matters was to make a fair trial no longer possible. Her conduct in making this latest allegation fell well within rule 37(1)(b). Mr R had been in ill health, as recounted in his witness statement, and was now going to have to face cross examination from a person who believed he had conspired with others to arrange hitmen to murder her partner. Mrs G too was extremely upset and disturbed by the allegation brought against her. Although no direct threats had been made, the effect of these allegations was to intimidate the respondent's witnesses. There was a significant risk that the way they gave their evidence would be affected and therefore that a fair trial would not take place.

29. Nor would it be possible, Ms Gould asserted, for the Tribunal simply to ignore the latest allegations. They were relevant to the question of the claimant's credibility. The key exchange between herself and Mr R on 19 March 2018 was one at which there was no-one else present and therefore the credibility of the claimant was at the heart of this case. She might have to be recalled to give evidence about these latest allegations and the witnesses would have to be asked about them too. There was no way of undoing what the claimant had done or of having a fair trial through any other case management measures.

## **Claimant's Response**

30. In reply to the application the claimant maintained the allegation she had made. She said she saw the hitmen come out of her neighbour's house. She said she had evidence of everything. She did not want to come here to cause alarm or distress but her credibility was under question and she was innocent. She had gone

to the police about the matter and they spoke to her neighbour, but the matter was not taken any further forward.

31. She was invited to explain why she considered that this incident was linked to the respondent. She said that two people who befriended her, including the neighbour in question, had links with someone at the respondent, and that they had not turned on her until after the hearing in February.

32. The claimant asserted that she had behaved reasonably in making this allegation and that in any event a fair trial was still possible.

## **Discussion and Conclusions**

### Scandalous, Unreasonable or Vexatious Conduct

33. Having reminded ourselves of the provisions of rule 37 and the overriding objective, and the case law summarised above, we addressed the first issue for the Tribunal. This was whether there had been behaviour by the claimant falling within rule 37(1)(b).

34. We accepted that the claimant's conduct earlier in the case had caused delays, particularly where she failed to comply with Case Management Orders about preparation of the hearing bundle. She had also repeatedly sought to reopen matters which had already been determined. However, we recognised that the claimant was a litigant in person unfamiliar with Employment Tribunal proceedings. That conduct had still been unreasonable, but there would be no question of striking out her claim based on that conduct alone.

35. We noted that despite making an allegation about a Snapchat message inviting her to go away for the weekend with "no strings attached", which she said was an invitation to a sexual encounter, the claimant had not produced a screenshot of the Snapchat message in question. Instead she had adduced evidence of it through her partner Mr A, but on his own admission his witness statement identified the wrong person as the sender. Mr W had been put to the trouble of obtaining some evidence about use of his snapchat account in order to rebut this allegation. We were concerned by this allegation. It was a serious matter and should have been supported by a copy of the actual message, or at the very least an explanation why it was no longer available. Further, it appeared to bear no relevance to the matters raised by the claim and response forms.

36. The repeated contact by the claimant with the Tribunal since the hearing adjourned in February was also a concern. The claimant was persistently seeking to reopen matters which had already been decided, or to raise matters which appeared of no relevance to the proceedings at all. The respondent had already identified in its letter of 22 February 2019 that this conduct was unreasonable, disruptive and vexatious. However, it did not appear to give rise to any risk that a fair trial might not be possible, as it was open to the Tribunal simply to ignore it.

37. None of the foregoing, therefore, gave grounds for striking out the case.

38. The Tribunal took a different view, however, of the emails of 12 May 2019 alleging that the respondent and its witnesses had been engaged in a conspiracy to

act unlawfully, including a conspiracy to have Mr A murdered using hitmen. The claimant had not taken the opportunity in today's hearing to abandon that allegation and withdraw it, but nor had she been able to explain clearly the basis for her conclusion that the respondent had anything to do with the series of disputes with her neighbour. We accepted that the claimant's accounts of disputes with her neighbours were grounded in fact, and if accurate they were doubtless extremely disturbing for the claimant, but the suggestion that the respondent was behind any perceived attempt to murder Mr A was without foundation. We were satisfied unanimously that the making of so serious an allegation by email to the Tribunal on the eve of the hearing resuming was scandalous in the sense of being irrelevant and abusive of the other side. It was also plainly unreasonable.

39. We considered the possibility that the claimant did not actually believe what she was saying and was cynically making these allegations in order to cause difficulty for the respondent. We did not consider that to be the case. The claimant seemed to us to have a genuine belief that the respondent was taking these steps. We were driven to the conclusion that in that respect the claimant was under a delusion. Her belief that the respondent was behind an attempt to murder Mr A was not grounded in reality.

#### Fair Trial Possible?

40. Being satisfied that there had been scandalous and unreasonable behaviour by the claimant in her conduct of the proceedings since the hearing adjourned on 9 February 2019, we addressed the next question: was a fair trial still possible?

41. There were two primary concerns on this point. The first was our conclusion that the claimant was delusional. Given that a key part of the case turned upon the credibility of her account of a meeting with Mr R at which no-one else was present, the conclusion that she was labouring under a delusion about the respondent's actions was a significant problem. Her credibility as a witness had been fundamentally undermined by these latest allegations. Because of their relevance to her credibility they were not matters we could simply ignore.

42. The second concern was that it would not be fair to Mr R and Mr W to have to give evidence and be cross examined by a person who believed they had engaged in a conspiracy to murder her partner, particularly when he would be sitting alongside her in our hearing. The allegations would have to be put to the respondent's witnesses because they were relevant to the claimant's credibility. Even though the claimant had made no threats in her communications with the Tribunal, we accepted Ms Gould's submission that they would be concerned by the possibility that she would make further wild accusations against them, either to the Tribunal or by a report to the police. Those were matters which we were satisfied would affect the ability to Mr W and Mr R to give evidence freely in this hearing. It was unfair to expect them to give evidence in the face of the most serious allegation imaginable, even when made without any foundation.

43. We were satisfied that a fair trial was not possible.



### Other Case Management Measures

44. That left the third question: whether there was any other way of addressing the situation so as to mean that a fair trial became possible with appropriate Case Management Orders and/or costs orders.

45. We could see no way of achieving that aim. The allegations made by the claimant were not severable from the main thrust of her case. The dispute between herself and Mr R about 19 March 2018 was central to the decision we had to make. Their respective credibility was crucial. Even an order preventing the matter from being raised in evidence (had that been appropriate) would have been ineffective to have erased from Mr R's mind what had been alleged against him. It did not appear to us that there was any way in which a fair trial could still be held given that these allegations had been made without any foundation.

46. For those reasons we unanimously decided that the claim in its entirety should be struck out.

### **Respondent's Costs Application**

47. Following delivery of oral judgment with brief oral reasons Ms Gould applied for a costs order on behalf of the respondent. Because the respondent had not been aware of the emails of 12 May 2018 until the hearing, the figures showing what was claimed were not available. Ms Gould proposed to provide them in writing after the hearing and it was agreed that the Tribunal would hear submissions and evidence about the claimant's financial position before awaiting that written application.

48. We heard evidence from the claimant on her financial position. She is not working and is in receipt of Employment Support Allowance of £70 per week. She receives a Child Tax Credit of £150 per week and Child Benefit of £190 per month. She has no other income with which to provide for herself and her three children, although she does get Housing Benefit of £70 per week towards her rent.

49. The Housing Benefit does not account for all her rent, and with the addition of a repayment of a previous Housing Benefit overpayment she has to pay approximately £30 per week towards her housing costs. She has car insurance costs of £200 per month. She does own her car, a Vauxhall Astra which is two years old. She has expenses of £50 per month for her three children to attend the mosque and £40 per month for one of her children to go to school on the bus. She then has general living expenses. She lives within her means so far as possible and does not have any spare money at the end of each month.

50. The claimant does not have any debts or credit card bills, but nor does she have any savings or investments. Her property is rented. Her only asset is her car which is needed for family life.

51. Ms Gould said that the application for costs was in relation to costs of the whole case, or in the alternative in relation to costs since the adjournment of the last hearing in February 2019. We indicated that we did not consider that the case itself had been unreasonably pursued, but it followed from our decision to strike out the case that at least part of the claimant's conduct since the last hearing had been unreasonable. On that basis the power to award costs had arisen.

52. However, having heard from the claimant we decided that this was not a case where we would exercise our discretion to make a costs award, whatever the figures sought by the respondent. That was because of a combination of three factors. Firstly, the Tribunal had concluded that the claimant was deluded but not acting in bad faith: her actions had not been a cynical attempt to behave unreasonably and cause more costs for the respondent. Secondly, the case itself was reasonably brought. Thirdly, the claimant's unchallenged evidence on her means meant that in reality she had no ability to meet any costs order which the Tribunal might make. The majority of her monthly income went on her children.

53. In those circumstances the Tribunal declined to make any order for costs in favour of the respondent.

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Employment Judge Franey

21 May 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

29 May 2019

FOR THE TRIBUNAL OFFICE

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