EMPLOYMENT TRIBUNALS

Claimant: Miss E Scott

Respondent: Alder Hey Children's NHS Foundation Trust

HELD AT: Liverpool **ON:** 23 October 2019

BEFORE: Regional Employment Judge Parkin

REPRESENTATION:
Claimant: In person
Respondent: Mr E Williams, Solicitor

RESERVED JUDGMENT UPON A PRELIMINARY HEARING

1) By way of relief against sanctions, the claimant's protected disclosure claims dismissed under the Unless Order are reinstated.

2) However, the respondent's application to strike out the protected disclosure claims because of the claimant's scandalous, unreasonable or vexatious conduct of the proceedings succeeds and the reinstated claims are struck out.

REASONS

1. <u>The claim and case management orders</u>

The background to the proceedings and the course of the case management hearing on 6 June 2019 is set out under "Discussion" in the Case Management Order sent out on 19 June 2019 following that hearing. The claimant had commenced her proceedings by ET1 claim form presented on 28 October 2018, following early conciliation between 30 August 2018 and 24

September 2018. The respondent presented its ET3 response on 11 December 2018. The case management hearing listed on 1 February 2019 did not proceed effectively since the claimant did not attend and the next hearing listed on 26 April 2019 was postponed. Despite referring in correspondence to her legal advisers, the claimant has throughout represented herself in the proceedings.

2. The case management hearing 6 June 2019 was therefore the first effective case management hearing. Correspondence from the parties was received even before the Case Management Order was sent out: letters from the claimant dated 6 June (two letters), 7 June and 8 June 2019 and then 10 June 2019 after the respondent's own letter dated 10 June 2019. A further letter dated 17 June 2019 from the claimant had been received at the Tribunal but was not referred to the Judge before the Order and letter were sent on 19 June 2019. Another case management hearing had already been listed for 23 October 2019 in the Order sent on 19 June and that hearing was extended to include considering the respondent's application to strike out the claims dated 3 July 2019.

3. On 22 July 2019 the respondent applied for a Unless Order requiring that the claimant comply with paragraphs 1 (further information of disability discrimination and protected disclosure claims) and 2 (medical evidence in relation to disability discrimination claims), since she had failed to comply with all aspects. An Unless Order repeating those first 2 paragraphs was sent to the parties on 2 September 2019, requiring compliance by the claimant by 13 September 2019. In response, by letter dated 12 September 2019 she sent her further information by list of protected disclosures and detriments, albeit maintaining that the list was "not exhaustive". The list ran to 27 pages, comprising over 20 identified disclosures which the claimant relied upon as protected qualifying disclosures, each alleged to have caused her to be subjected to various acts of detriment, some disclosures being made internally within the respondent and others externally to the media, the CQC and Alfie Evans' lawyers. Whilst not limited to the case of Alfie Evans, there were several references to his treatment and death as a central theme of her wide-ranging concerns about the hospital's medical and HR mismanagement, including calling the treatment of Alfie Evans criminal negligence and "potentially murder". There were also several references to her Aspergers syndrome (which had not been formally diagnosed whilst the claimant was in employment) and to having an Aspergers shutdown and among her detriments she claimed that she had suffered PTSD, depression and Stockholm Syndrome.

4. Since there was still no compliance with paragraphs 1(3) and 2 of the Order and the Unless Order, relating to the disability discrimination claims or providing the medical evidence supporting them, the Tribunal confirmed the dismissal of the claimant's claim in its entirety by letter dated 4 October 2019.

5. <u>This hearing</u>

Nonetheless, the Judge directed that the claimant's email dated 2 September 2019, together with her letter and attachments providing further information of disclosure claims received on 12 September (which had not been seen by him before the final compliance date under the Unless Order expired, since he was away from the office) be treated as an application to vary the Unless Order or for relief against the sanction imposed by the Unless Order and that the original hearing date be retained in the list.

6. At the hearing, the Judge offered and allowed the claimant breaks, acknowledging that she on many occasions found the hearing distressing and started to cry. However, at most times through the day, the claimant demonstrated a full understanding of the issues under discussion and put forward her views and arguments effectively on her own behalf

7. The claimant confirmed at the hearing that she was not seeking to have her disability discrimination claims reinstated; indeed, she contended on a number of occasions that it was her understanding following the earlier hearing that only her protected disclosure claims were proceeding. In respect of the "whistleblowing" claims, she explained that she very much wanted those protected disclosure claims to proceed and that she was concerned about matters of principle and not compensation for herself.

8. The Judge discussed the position regarding the Unless Order with the parties, in particular with the respondent having regard to the overriding objective at Rule 2 as well as Rules 29, 38 and 73 of the Employment Tribunals of Procedure 2013. The Judge noted that the claimant had complied with part of the Unless Order under paragraph 1 in providing particulars of her protected disclosures and detriment claims. Upon taking instructions, the respondent did not consent to the reinstatement of the claimant's protected disclosure claims but did not actively object to the Tribunal granting relief against sanction and reinstating those claims.

9. <u>Relief against sanction</u>

   After the lunch adjournment, the Judge granted relief against sanction reinstating only the protected disclosure claims, given the draconian nature of a Unless Order and the claimant's compliance with part of paragraph 1. Having regard to the overriding objective, in circumstances where the claimant's continued non-compliance related entirely to the disability discrimination claims, it was appropriate to reinstate the protected disclosure claims and allow them to proceed further.

10. <u>The respondent's strike out application</u>

    However, the respondent then pursued the application to strike out the ongoing claims under Rule 37(1)(b) based upon scandalous, unreasonable or vexatious conduct of the proceedings in accordance with its original application made by letter dated 3 July 2019. The respondent relied in particular upon a "With heartfelt sympathy" card sent by the claimant to the

respondent's Chief Executive, Louise Shepherd, in June 2019 following the claimant's email dated 6 February 2019 again to the Chief Executive. The respondent did not rely upon legal authority, contending that it was obvious from the contents of these documents which were threatening, intimidating and deeply unpleasant that the claimant had acted scandalously and unreasonably and vexatiously. Her email was that of a qualified nurse writing to the Chief Executive, who she knew was not responsible for medical care. The content included: "… You know about murder… you will live in terror … God have mercy on you…" and referring to Alfie Evans' parents: "…You killed their baby … do you think they will ever forgive you?... You killed that baby. You made a pact with multiple devils. Start praying now for the courage to do the right thing…And compassion to you, Louise. Save your soul. Elaine".

11. The sympathy card, with wording: "Those we love don't go away; they walk beside us every day… Unseen; unheard; but always near. Still loved; still missed, and very dear. Thoughts are with you", had written inside:

    "Dear Melissa Swindle a.k.a Louise Shepherd

    "What's it all about? Alfie" Cilla Black

    My account details are held on record at Alder Hey."

    It was explained that Melissa Swindle was a deliberate mis-spelling of Melissa Swindell's, the respondent's HR Director's, name following the claimant's contention that the Chief Executive had deliberately substituted herself for that HR director at a Freedom to Speak Up meeting, which contention the respondent strongly refuted. Set alongside the earlier email, this sympathy card was sinister and disgraceful. The reference to the claimant's bank account suggested she was notifying the respondent the proceedings were going to be horrible and high profile unless it paid her now. Although a report was made about this behaviour to the police, it was not suggested that an allegation of blackmail was made, but the reference to her bank account was extremely odd and appeared to suggest how the respondent's difficulties could all be made to go away. In marked contrast to her case at this hearing that she was only concerned with matters of principle and the safety of people, the claimant showed no concern for the respondent's employees' health and safety and the impact on them of accusations of murder. A fair trial was impossible; there cannot be a fair trial when the other party is threatening and behaving in this way, scaring and intimidating the witnesses. The right to bring a claim does not give the right to threaten and accuse people of murder.

12. Further, the respondent contended the claimant had even misled the Tribunal at the hearing. She maintained that her understanding of the last hearing was that she was not pursuing her disability discrimination claims which was untrue. Much of the previous hearing concerned the disability discrimination claims, with the Tribunal taking the claimant to the Equality Act provisions and, although the claimant was upset, she agreed that the Tribunal was to order her to provide medical evidence, as her emails on 6, 7 and 8 June 2019

clearly show. When the respondent's representative pointed out the inconsistency of her approach in the letter of 8 June, on 10 June 2019, she still contended the respondent had general knowledge of her disability. The Tribunal wrote in its letter accompanying the Case Management Order that it would be difficult to hold a fair hearing of her disability discrimination claims without full disclosure of medical evidence and the claimant never said then that there were no such claims. She had acted scandalously, unreasonably and vexatiously and, after detailed correspondence over several months, saying something completely different at the hearing was the final example of this. For whatever reason, she had sought to mislead the tribunal. In these exceptional circumstances, it would be proportionate to strike out her claims since no fair hearing could be held of the protected disclosure claims.

13. The claimant's reply and objection

In reply, the claimant fully accepted the email and the card were sent by her but contended that the respondent had only presented part of the communications from her. She disputed any link between the February email and her card sent in June, saying that she had made many other attempts to correspond with Louise Shepherd as a senior person at the respondent other than in a threatening manner. She accepted her card was very curious, addressed on the outside to Louise Shepherd but really sent to Melissa Swindell, the HR Director. She had written in a very conciliatory and reasonable manner to the respondent for many years, with nobody listening to her or explaining what was going on and instead threatening her such as by suspending and disciplining her. When she consulted lawyers, they did not respond and give her legal advice but rather closed the case again and failed to support her. She felt she had been reasonable for a very long time.

14. This prompted an enquiry from the Judge whether she was acknowledging that her February email and June card were unreasonable conduct of the proceedings. The claimant strongly maintained that the June card was not unreasonable but also, when pressed, considered that the February email too was not unreasonable, whilst acknowledging that murder was probably too strong a word. Since she had been constantly ignored and "gaslighted" by the respondent, she didn't know what to do any more. It was unfair that the respondent was allowed to tell her she was mentally ill, a bully and a bad person and to speak out but she could not when she didn't know how to save patients at the hospital any more. Ultimately, she had a diagnosis of Asperger's disease and also "face blindness" but did not believe she had misled the tribunal about the disability discrimination claims; she believed the Judge at the earlier hearing was saying she probably didn't have a case such that, in her own mind, those claims were not going forward. In not complying with the Order to provide medical evidence, she was trying to protect her reputation rather late after it had been claimed she had a mental illness of a delusional nature. She felt most aggrieved that the private consultancy she had gone to for a diagnosis had followed it up with Lancashire Mental Health Service and claimed to them that she had a delusional disorder; this was a substandard conclusion with no evidence or basis for such a diagnosis. She

thought the respondent was seeking to examine her medical records to discredit her and she had only not told the Tribunal earlier she was not pursuing the disability claims because in her mind those claims were not going forward. She remembered saying at the earlier hearing that what concerned her was patient care and felt she had been told that, even if she pursued those claims, she could not have her job back. She had not remembered the Judge specifically asking her whether she was pursuing disability discrimination claims, but, if he had done so and she had said yes, she had to accept that. Ultimately the discriminatory behaviour was more a detriment in her case as a result of her whistleblowing activities. She particularly wished the Tribunal to take into account the events around her meeting with the Freedom to Speak Up Non-Executive Director and the person claiming to be Melissa Swindell (who was actually Louise Shepherd) as a reason not to strike out the claims, because she had given Louise Shepherd full information at that meeting; it was only in January 2019 that she found out the person claiming to be Melissa Swindell was not, but was actually Louise Shepherd. Accordingly, the claimant contended, no claims should be struck out because she did her best to save the patients from harm and it was the respondent's conduct in that regard which was in fact unreasonable or vexatious.

15. The Law

The remaining claims fall within the protections at Part IVA, V and X of the Employment Rights Act 1996, establishing important rights against being subjected to detriment for workers and employees and being unfairly dismissed for employees for having made protected qualifying disclosures.

Rule 37 of the Employment Tribunals Rules of Procedure 2013 states:

(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—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(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) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(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).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing…

16. Whilst there is much case law on these individual provisions, the clear import of the authorities is that Rule 37 gives the tribunal draconian powers which are exercised infrequently and only after careful consideration in the clearest cases. The Tribunal seeks where possible to determine claims fully after hearing oral evidence and submissions. In respect of Rule 37(1)(b), it is the conduct of the proceedings and not just conduct generally which is to be considered and the words set a high threshold. The Tribunal followed the Court of Appeal guidance in Blockbuster Entertainment Ltd v James [2006] IRLR 630 and the EAT guidance in Bolch v Chipman [2004] IRLR 140 and Force One Utilities Ltd v Hatfield [2009] IRLR 45. As well as determining first whether the claimant had conducted the proceedings scandalously, unreasonably or vexatiously, it expressly considered whether a fair hearing was still possible and whether a less onerous sanction would suffice.

17. Conclusion

The Tribunal was satisfied that the claimant's conduct was part of the conduct of and within the proceedings. The claimant accepted fully that the email letter and card were sent by her. The letter of 6 February 2019 was written to the Chief Executive within a few days of the ineffective case management hearing on 1 February 2019. The sympathy card was received by the Chief Executive on 21 June 2019, at a time when the claimant was in correspondence with the Tribunal and the respondent about disclosure of medical evidence. It is post-marked by Royal Mail at 18.46 on 20 June 2019 and was probably sent shortly after she received the Tribunal's letter dated 19 June 2019 (sent by email that day, accompanying the Case Management Order from the hearing on 6 June 2019). Her compliance or non-compliance with the case management orders was very obviously her manner of conducting the proceedings.

18. The Tribunal sought to stand back and consider objectively the claimant's conduct of the proceedings and the impact upon its capacity to hold a fair hearing within the full context of the proceedings, set as they are against the tragic backdrop of the Alfie Evans medical treatment and litigation with the massive regional, national and international interest and involvement that case gave rise to. With a strong commitment and sense of needing to expose what she considered to be instances of medical mismanagement of patients as well as poor HR and employment practices, the claimant had wished to speak out to senior management and within the NHS "Freedom to Speak Up" procedures and still more widely. However, on two highly significant occasions having left employment and commenced these legal proceedings, the claimant lost all proportion and conducted the proceedings in a manner that was certainly scandalous, unreasonable and vexatious; the high threshold is reached. There is no need to repeat the strong terms in which the respondent's representative put the application; the claimant herself

understood that “murder was probably too strong a word” and only explained or excused her actions by her feeling that the respondent was ignoring or not listening to her. The Tribunal agreed with the respondent’s summary: her conduct of the proceedings on these two occasions was disgraceful and completely inappropriate and showed a deep-seated disregard for the respondent’s personnel and witnesses’ position, suggesting that she was entitled to determine guilt on the part of its employees.

19. The Tribunal had regard to the close proximity of timing of each of these incidents with stages of the proceedings: the first a few days after the ineffective case management hearing and the second just a fortnight after a long case management hearing which lasted most of a Tribunal working day but, more importantly, the day after the Tribunal’s Case Management Order and accompanying letter were received by the claimant. The claimant’s conduct is such as to make the respondent’s witnesses giving evidence openly much less feasible than should be the case. Where the respondent’s Chief Executive, likely to be one of its main witnesses at a final hearing, had active threats made against her with accusations of murder, the Tribunal was satisfied that a fair trial was no longer possible.

20. This conclusion was supported by the claimant’s direct conduct of the proceedings in relation to the Tribunal’s initial Case Management and Unless Orders. Whether she was deliberately seeking to mislead the Tribunal or not, her suggestion at this hearing that she did not provide an impact statement and medical evidence to the Tribunal and the respondent because she thought the disability discrimination claims were not proceeding contradicts entirely her correspondence on 6, 7, 8 and 10 June 2019 early after the hearing on 6 June 2019 and cannot be accepted. That correspondence, which evidences an about-turn from being prepared to disclose even more medical evidence than was ordered on 6 June and then refusing to do so at all (apparently on legal advice) two days later, still shows a full understanding of the order to provide medical evidence for her disability discrimination claims but also a disregard for the Tribunal’s case management at the hearing on 6 June 2019. The Case Management Order when sent on 19 June 2019 and the accompanying letter from the Tribunal were explicit about her ongoing disability discrimination claims. Although she has now confirmed that she does not seek to have her disability claims reinstated, her unreasonable conduct in relation to those claims and the evidence supporting them and her failure to make clear earlier that she did not wish to pursue them is still relevant to wider consideration of a fair hearing and reinforces the Tribunal’s conclusion that this is not possible.

21. In these circumstances, the Tribunal concluded that it was proportionate to strike out the protected disclosure claims in their entirety since a fair trial was not possible and no lesser sanction short of striking out the claims was appropriate and proportionate. These being the only remaining claims, the proceedings are now concluded.

Regional Employment Judge Parkin

Date: 6 November 2019

ORDER SENT TO THE PARTIES ON

6 November 2019

FOR THE TRIBUNAL OFFICE