Case No: 2201864/2018

EMPLOYMENT TRIBUNALS

Claimant: Ms K Kaler

Respondent: Insights ESC Ltd

Heard at: London Central **On:** 16 January 2020

Before: Employment Judge H Grewal
Mr D Carter and Ms S Samek

Representation

Claimant: No Appearance

Respondent: Ms A Macey, Counsel

JUDGMENT

The unanimous judgement of the Tribunal is that:

1 The claim is dismissed.

2 The Claimant is to pay £2,500 of the Respondent's costs

REASONS

1 In a claim form presented on 30 March 2018 the Claimant complained of disability discrimination, unfair dismissal for making a protected disclosure, breach of contract (dismissal without notice) and unauthorised deductions from wages. The case was listed to be heard from 21 to 27 November 2018. The Claimant claimed compensation of a little over £4 million. The Respondent is a specialist school providing education for children with social, emotional, behavioural and mental health needs.

2 At a preliminary hearing on 24 July 2018 the complaint of unfair dismissal under section 103A of the Employment Rights Act was dismissed upon withdrawal. The Claimant's application to add individual employees as respondents was refused. At that preliminary hearing the Claimant was ordered to provide a list of the alleged acts of harassment related to her Asperger's Syndrome. She provided the list on 26 July and listed seventeen acts between May 2017 and January 2018.

3 At a preliminary hearing on 17 September 2018 the Claimant was given leave to amend her claim to include three acts of post-termination victimisation. These were that:

(1) On 31 May 2018 the Respondent sent the police to her house;

(2) On 12 January 2018 the Respondent referred the Claimant to the National College of Teaching and Leadership; and

(3) On or around 19 April 2018 the Respondent delayed in providing a reference to Non-Stop Education and provided a negative reference.

4 The hearing due to start on 21 November 2018 was postponed by the Tribunal due to lack of judicial resources. On 13 December it was re-listed for 8 – 12 July 2019.

5 Disability was a live issue at the start of the hearing on 8 July 2019. The Tribunal decided that as the majority of the claims before it were of disability discrimination, it made sense to deal with the issue of disability first. If it concluded that the Claimant was not disabled, that would dispose of a large part of the claim. At the Claimant's request the Tribunal read the entirety of her witness statement although she had only sworn in evidence the parts of that statement that dealt with disability. The Claimant was cross-examined and both parties made their submissions on 8 July 2019.

6 The Tribunal deliberated on the morning of 9 July 2019 and gave its decision orally at 1.45 pm. The decision was that the Claimant was not disabled at the material time and the Tribunal dismissed the complaints of disability discrimination. The Claimant was upset and made a long speech. She said that she was in meltdown and was not thinking straight, she felt claustrophobic and if people spoke to her she might start swearing and become aggressive. She said that she wanted to appeal and was not fit to continue. In those circumstances, the Tribunal decided not to continue and agreed to list a two-day hearing for the remaining claims.

7 The Tribunal's reasons for concluding that the Claimant was not disabled at the material time (1 January 2017 to early January 2018) in summary were as follows. The disability relied upon was Asperger's Syndrome. There was no evidence that the Claimant had been diagnosed as having Asperger's Syndrome. The Claimant had not disclosed her GP records for prior to 21 December 2017. There was evidence that the Claimant had had mental health difficulties including depression and anxiety. All the evidence indicated that any mental health difficulties the Claimant had did not have an adverse impact on her normal day to day activities. Her evidence was that she was "*high functioning";* she had worked in teaching for some time to a high standard and had been in the Leadership team at the Respondent at the time of her dismissal; she had three employment references that referred to her communication and/or interpersonal skills as outstanding; she had studied to degree level while

running a business at the same time; she could use a computer and prepare written documents; she could write emails, make phone calls and interact with children, staff and parents; she prepared lessons, lesson plans and timetabling.

8 On 15 July 2019 the adjourned hearing was listed to take place on 16 and 17 January 2020.

9 On 12 August 2019 a Clinical Psychologist conducted a neurodevelopmental assessment of the Claimant. The conclusion of the assessment was that she met the criteria for a diagnosis of Autism Spectrum Disorder ("ASD"). According to the report ASD is a lifelong condition. His report said that she had difficulties in communicating effectively with others, difficulties in understanding and sustaining relationships, a restrictive and repetitive pattern of behaviour, interests and activities and a number of sensory interests and sensitivities.

10 The Claimant appealed to the Employment Appeal Tribunal against the Tribunal's decision to dismiss her complaints of disability discrimination.

10 Between July and November 2019 the Claimant sent emails to a large number of the Respondent's employees that were threatening and intimidating. We set out below extracts from some of them.

11 On 14 August 2019 she sent an email to Barbara Quartey (Principal of the school), Zoe Wilson (Vice-Principal), Zoe Poullos (teacher), Beata Watson (Assistant Vice-Principal), Sobia Shah (employee), Bora Avni, Hannah Quartey, J Jess and Shamshair Naga. The first five recipients had made witness statements for the hearing on 8 July 2019. The subject of the email was "*Important for your sake!"* She informed them that she had been diagnosed with autism and went on to say,

> "*You all chose to be malicious towards a disabled person and you will face the punishment for it.*
>
> *You will be delighted to know that I will now be adding all of you as being personally and jointly and severally liable in my £4.5 million disability discrimination claim. You all bullied me for my disability and all signed false statements against me. Being liable in this way means that all your assists* [sic]*, savings and income can be sold/used to pay any judgment awarded in my favour. I will also be writing to the TDA to get each of you struck off from teaching.*
> *…*
> *I can now also contact the police about the discrimination and harassment you forced upon me, a disabled person who is extremely vulnerable and mentally unstable."*

12 On 6 November 2019 she sent an email to Zoe Wilson in which she said, among other things,

> "*I have made an application against you personally and you will be liable for any compensation.*
> *…*
> *I don't know how you sleep.*

The only way I will withdraw is if you write the truth in a statement, if not, I'm going all the way. I have a solicitor now because I have the diagnosis so it is free.

Wake up Zoe, is your job worth your career? If the claim is decided against you, I will then apply to get you struck off. Just so you know what's coming."

That was a reference to a second claim that the Claimant presented to the Tribunal on 16 October 2019 (case number 2204787/2019). That claim was brought against the Respondent as well as against Ms Quartey, Wilson, Avni and Poullos individually.

13 On 8 November the Claimant sent an email to Ms Quartey, Wilson, Avni and Poullos. The email was headed "Without Prejudice". The rule that "Without Prejudice" communications are privileged does not apply to the Claimant's emails. The principle is that where there is a dispute between the parties, any communications between them that comprise genuine efforts to resolve their dispute will not generally be admitted in evidence at a subsequent hearing of the claim. The communications to which we refer were not genuine efforts to resolve the dispute. They were efforts to threaten and intimidate the Respondent to coerce it into giving the Claimant large sums of money. Even if the rule did apply this case falls within the exception which is that exclusion of the evidence would acts as a cloak for blackmail or other unambiguous impropriety. In the email she said, among other things,

"*This is the last time I am going to give you all the chance to save yourselves rather than Barbara, who we all know does not deserve it. If you don't take it and you lose the case, any money you have in the bank, any assets you jointly or individually own, I will force you to sell through a court order and you will be in debt to me…*

You have a lot to lose.

I will also apply to get you struck off from teaching if I win because I will have evidence of misconduct. I will also go to the papers and make a point of pointing out that ZW's husband and brother are police officers and used their influence to assist you all.

…

If you agree to write a truthful statement which proves that I did tell you about my autism and I was in fact bullied, etc, I will withdraw my claim against you personally…

If you don't tell the truth, you will have a year long court case which you and both [sic] *know, you are 99% likely to lose. I will then get a CCJ on your house and then an order of sale. If you don't own a house, you will still get a CCJ which means no mortgage or credit will be available to you until such time as you pay and I agree to remove the CCJ. I will also send bailiffs to your home address, which you will have to disclose to me at the preliminary hearing next month. I will send the bailiffs to the school too."*

14 On 8 November 2019 the Claimant sent Ms Quartey an email in which she said,

"*If I win, I am not going to stop until I put you in jail. This case will prove you are a liar and that will open up a massive can of worms. Once I prove you lied, I will get you struck off from teaching which will be in the papers. Then I will get your*

Queen's Citizen and OBE (or MBE or whatever you scammed) stripped from you. That will also make the papers. Then I will get OFSTED involved which result [sic] *in your school being closed. Then I will get Inland Revenue to investigate you and surely that will bring up something, after all you do have over 10 companies in your name at various addresses. Then I will go to the church that you are a trustee of and inform them. Your children will be ashamed of you!*

…

The claim is for 4 million and I'm likely to get at least half if not all. You know I have evidence for everything. You will have to sell the buildings and your home, maybe your daughter's too.

…

If you pay me £750,000 straight into my bank account by 28/11/2019, this email is confirmation that I will never ever disclose anything about this to the public or anyone in your employ and will not intentionally engage in any activity that would bring the school or you into disrepute.

…

I have looked at all your company accounts in detail as am aware your [sic] *separately own that big house as well as the property in Actin and your daughter's house.*

Maybe she will go to jail too!

…

Don't just react, think – jailtime or money?"

This email was also headed but for the reasons given previously it too is not genuine "without prejudice" discussions and not covered by the rule that it should not be disclosed.

15 Between 11 July and 14 November Webster & Co was on the record as representing the Respondent. Thereafter, they continued to provide legal advice to the Respondent but were not on the record as representing them. These emails were given to Respondent's solicitors and considered by them.

16 On 2 December 2019 Soole J in the EAT ruled on paper that the Claimant's appeal had no reasonable prospect of success. The Claimant applied for a hearing under Rule 3(10) to consider whether her appeal should be allowed to proceed.

17 The Employment Tribunal listed a preliminary hearing on 13 January 2020 to consider the Respondent's application to strike out the second claim.

18 On 28 and 31 December the Claimant applied for this hearing to be postponed until her appeal had been concluded at the EAT. The Respondent opposed that application. One of its reasons for opposing it was that the Claimant was using the case to harass and intimidate several of the Respondent's employees.

19 On 13 January 2020 the Claimant's application to postpone the hearing was refused by me (EJ Grewal). The reasons for refusing it were that that the claims related to matters that had occurred in late 2017/early 2018 and there had already been a considerable delay, the Claimant's disability had no bearing on the claims that were proceeding and her rule 3(10) hearing might not take place until June 2020 and the Respondent objected.

20 The Claimant attended the hearing on 13 January. That hearing was before EJ Grewal sitting alone. The Tribunal made the adjustments by the Claimant. The Respondent made its application to strike out the claim. At the end of the application the Claimant said that she wanted to withdraw the claim. I offered to have a break at that stage so that the Claimant could reflect on what she wanted to do and have time to think about her response to the application. The Claimant then said that she could not take any more and was going to leave and I could make a decision in her absence. She left at about 1 p.m. I reserved my decision.

21 In the afternoon on the same day the Claimant applied again for today's hearing to be postponed. She repeated that it should not go ahead until her appeal had been determined. She also said that she could not handle the hearing because of her autism and asked to be permitted to make written submissions rather than attending personally. She said that she was not stable enough at the time and had been having suicidal thoughts of late.

22 I responded that a full merits hearing could not be dealt with on the basis of written submissions as the Tribunal needed to hear evidence and the parties had a right to cross-examine witnesses. I directed that if the Claimant was not well enough to attend the hearing she needed to submit medical evidence as to why she was unable to attend and when she would be well enough to do so and the basis for saying that.

23 On 14 January the Claimant sent the Tribunal a letter from a doctor at Roodlane Medical. He said that she was not registered with an NHS GP and had consulted with them privately. His letter was unsatisfactory and not helpful for a number of reasons. He said that he understood from her that she *"attended her tribunal yesterday but became unwell and it was decided that she was not in a fit state to continue giving evidence."*. The Claimant did not give evidence at the hearing on 13 January. The Tribunal did not decide that she was not in fit state to continue. The Claimant decided that she could or would not continue. He then stated,

> "*In my opinion I can confirm that Mrs Kaler is indeed suffering with a medical condition which would affect her ability to give evidence or attend a hearing for the next few weeks and I would envisage that she requires a period of one month to undergo necessary treatment back home in Nottingham where she lives."*

He did not specify what the medical condition was or how it impacted upon her ability to participate in a hearing; he did not explain what was his basis for saying that she would not be able to do this "*for the next few weeks";* he did not explain how or why things would change after the next few weeks; he did not explain what treatment the Claimant needed to undergo and why he thought that one month would be sufficient. The Tribunal could not on the basis of that letter decide, if the Claimant was unable to attend the hearing for medical reasons, whether she would ever be well enough to do so and when.

24 The Claimant also sent an email to the Tribunal. She said that she had taken a decision not to attend regardless of whether the hearing was postponed or not. She said that she would be seeking further treatment in the coming weeks if there was any available. The Respondent opposed the application.

25 On 15 January I refused the application to postpone the hearing for the following reasons. It was a very old case and fairness to both parties required that it was resolved sooner rather than later. The Claimant had known of the hearing date since 15 July 2019. The report of the Clinical Psychologist dated 12 August 2018 stated that Autism Spectrum Disorder was a lifelong condition. He set out the impact that it had on the Claimant's activities, the most relevant one in terms of attending a hearing was that it she had difficulties in communicating effectively with others. I explained why the medical report was unhelpful and unsatisfactory. The hearing had been stopped in July 2019 because the Claimant had felt that she could not go on. There was no evidence that she had had any treatment since then. If she had, then on her own account her condition had not improved as a result of it. The Claimant had a lifelong condition. The doctor did not explain what treatment the Claimant would receive or how it would improve her unspecified medical condition in a month's time. I could not on the basis of the previous history and the medical evidence be satisfied that that the position would be any different after one, three or even six months. The Respondent had had the case outstanding against it for nearly two years. In the past few months the Claimant had threatened the Claimant's witnesses and their families with being struck off from teaching, losing their homes, imprisonment for fraud and other actions.

26 The Claimant repeated her application to postpone the hearing.

27 The Claimant did not attend the hearing on 16 January 2020. The Tribunal decided that nothing had changed since the application to postpone had been refused on 15 January and there was, therefore, no need to revisit that issue. Had it done so, it would have refused it for the same reasons.

28 Under rule 47 of the Tribunals Rules of Procedure 2013 if a party fails to attend at the hearing, the Tribunal may dismiss the claim or proceed with the claim in that party's absence. We decided to dismiss the claim.

Application for costs

29 The Respondent applied for its costs, limited to £20,000 on the grounds that the claim had had no reasonable prospect of success and the Claimant had acted abusively and unreasonably in the way that she had conducted the proceedings. The Respondent had incurred costs of £25,000. As far as the abusive and unreasonable conduct was concerned, it relied on the emails that the Claimant had sent the Respondent between July and November 2019. The Respondent argued that the claims of disability discrimination had no reasonable prospect of success because on the evidence available the Claimant had no reasonable prospect of establishing that she was disabled or that the acts of harassment set out in the list were related to her disability. It also argued that the other claims had no reasonable prospect of success.

30 We accept that there was little reasonable prospect of many of the Claimant's claims succeeding but we cannot say on the basis of the pleadings or the Tribunal's judgment of 9 July 2019 that they had no reasonable prospect of success. The Tribunal needed to consider the evidence before it carefully to reach a decision on whether or not the Claimant was at the material time disabled as defined by section 6 of the Equality Act 2010. Whether the alleged acts of harassment were related to the Claimant's Asperger's Syndrome could only be determined after hearing the evidence. The same applies to the other claims. Two of the alleged acts of

victimisation occurred after the presentation of the claim to the Tribunal, which would be a protected act.

31 We were satisfied that the emails that the Claimant sent to the Respondent's employees, many of whom were witnesses in the case, amounted to unreasonable and abusive conduct of the proceedings by the Claimant. The emails were sent while the case was adjourned part-heard. The purpose of those emails was to threaten and to intimidate them in order to get them to change their evidence and/or to extort a large sum of money. There was no evidence before us that that behaviour was attributable to the Claimant's mental health conditions.

32 Rule 76(1) of the Employment Tribunals Rules of Procedure 2013 provides,

> "*A Tribunal may make a costs order …, and shall consider whether to do so where it considers that –*
>
> *(a) A party (or that party's representative) has acted vexatiously, absusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted, or*
>
> *(b) Any claim or response had no reasonable prospect of success…"*

In deciding whether to make a costs order, and if so in what amount, the Tribunal may have regard to the paying party's ability to pay (rule 84).

33 In **Barnsley MBC v Yerrakalva [2012] ICR 420** Mummery LJ stated, at paragraph 41,

> "*The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in McPherson was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the Et had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission, I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumtsances."*

34 As indicated above we concluded that the Claimant had acted unreasonably and abusively in the conduct of these proceedings by sending those emails. We were, therefore, obliged to consider whether we should make a costs order and, if so, for what amount. We had a discretion in respect of both issues.

35 In considering those two issues we took into account the following facts. The unreasonable and abusive conduct was serious and potentially harmful, it lasted over several months and was directed at a large number of individuals. The Claimant had a number of mental health issues but there was no indication that the conduct in question had been caused by the Claimant's mental health conditions. The unreasonable and abusive conduct had not been present throughout the conduct of

the proceedings, but had started about 16 months after the claim was presented. The Respondent had brought the emails to the attention of their solicitors and they had been included in a bundle for the hearing today. Had the matter proceeded the Respondent might have applied to strike out the claim on the basis of those emails; it would almost certainly have used them to cross-examine the Claimant. The Respondent's total costs of defending the claim were about £25,000. It was difficult to work out precisely what costs had been incurred by the Claimant's unreasonable and abusive conduct. We were satisfied that the emails had been used in the preparation of the defence. The purpose of awarding costs was to compensate the Respondent and not to punish the Claimant. As the Claimant was not present, the Tribunal did not have any evidence of her means from her. There was evidence in the bundle that the Claimant had sold a flat on May 2019 for £280,000. Having looked at the picture as a whole, we concluded that it would be appropriate to make an order for the Claimant to pay £2,500 of the Respondent's costs.

Employment Judge Grewal

Date10/2/2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

11/2/2020

FOR THE TRIBUNAL OFFICE