EMPLOYMENT TRIBUNALS

Claimant: Ms B Sule

Respondent: Shoosmiths Solicitors & Others

Heard at: Manchester **On:** 27 January 2020

Before: Employment Judge Tom Ryan

REPRESENTATION:

Claimant: Litigant in person
Respondent: Mr J Naylor, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

The claims in these proceedings are struck out pursuant rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013.

REASONS

Introduction

1. The purpose of this hearing was to consider whether to strike out on a variety of grounds the 14 separate claims brought to the Tribunal during the course of the summer months of 2019 by Ms Sule against her former employer, Shoosmiths LLP, and a number of people who were, or still are, employed by them.

2. Receiving these claims and in the light of the history which I will relate shortly the solicitor for the respondent, Mr Naylor, who has represented them throughout these many proceedings, wrote to the Tribunal on 8 October 2019 inviting the Tribunal, on the grounds set out in that letter, to decline jurisdiction in these claims, and as a result of that in November 2019 this

hearing was listed, the purpose of which was identified by Regional Employment Judge Parkin in the following terms:

> "A preliminary hearing under rule 37 to be listed to consider the following issues: whether any or all of the claimant's claims should now be struck out or dismissed as being scandalous or vexatious or having no reasonable prospect of success, or as being an abuse of process or for lack of jurisdiction, because of principles of res judicata, issue estoppel or on a Henderson v Henderson grounds."

3. Both parties were given the right to attend the hearing and to make oral or written representations.

4. At the outset of the hearing I was provided with a small bundle of documents containing some correspondence and Judgments of two earlier Employment Judges to which I will refer in my recitation of the history, a skeleton argument prepared by Mr Naylor on behalf of the respondent to which I will need to refer in some detail, and a number of documents from Ms Sule. They consisted of her principal skeleton argument, a document headed "Rejection of Response", a document headed "Order for the Disclosure of Documents", a document headed "Financial Compensation Order" and finally she handed in this morning an additional "proposed outcome of the preliminary hearing" which referred to two matters: the response being invalid because it was not done in accordance with the rules, and a reference to conduct subjecting a child to becoming a child in need should be investigated.

5. I have read all the submissions that have been put before me and I have heard both from Mr Naylor and at length from Ms Sule.

6. It is necessary and only possible to understand the nature of what is now before the Tribunal by making reference to the history of the claimant's claims. The relevant history appears to me to be as follows.

History of the claims

7. The claimant was employed with the respondent for a period of about eight months which ended with her dismissal on 22 July 2016. On 20 September 2016 she presented her first claim to the Tribunal (2403158/2016), a claim of discrimination and harassment relying upon the protected characteristic of race. She describes herself as a black woman of Nigerian origin.

8. At a hearing that took place over two days on 1 and 2 March 2017 the claimant's complaint of harassment in that claim was upheld by the Tribunal, presided over by Employment Judge Sherratt. I shall refer to that as the "Sherratt Tribunal". The claimant was awarded £1,000 compensation for harassment including interest. Her other claims of direct discrimination and victimisation were dismissed at the conclusion of the hearing. On that occasion the claimant acted as a litigant in person.

9. The claimant appealed the outcome to the Employment Appeal Tribunal. The appeal was determined on 28 March 2018 at a rule 3(10) oral hearing at which the claimant was represented by counsel, Ms Rebecca Tuck as she then was. The appeal that the claimant made against the Sherratt Tribunal decision was dismissed at the oral hearing as having no reasonable prospect of success.

10. On 2 April 2018, that is to say less than a week later, the claimant applied to this Tribunal for Employment Judge Sherratt to reconsider the judgment of the Sherratt Tribunal. He refused that application on paper on the grounds it was not in the interests of justice to do so after the appeal to the Employment Appeal Tribunal had already been dismissed.

11. The claimant then, in about May 2018 presented three further claims to this Tribunal (2410253/2018, 2410505/2018 and 2410506/2018).

12. Those claims were resisted by the respondent. They were consolidated and listed for a preliminary hearing before Employment Judge Vincent Ryan on 24 October 2018. In a Judgment of the following day he recorded that the claims of discrimination in relation to the protected characteristics of sex and age were dismissed upon withdrawal; he dismissed the remaining complaints of direct discrimination and harassment based upon the protected characteristic of race and victimisation on these bases:

12.1. That the claims were presented out of time and it would not be just and equitable to extend time;

12.2. Further or alternatively, insofar as the claims duplicated and overlapped the allegations determined by the Sherratt Tribunal, those claims were res judicata (a Latin phrase meaning that they had already been considered and determined); and

12.3. In the further alternative the claims amounted to an abuse of process because the claimant had failed satisfactorily to explain why they had not been presented in claim number 2403158/2016, the claim that was determined by the Sherratt Tribunal.

13. Reasons in writing for that Judgment were sent to the parties on 28 November 2018.

14. The claimant again appealed to the Employment Appeal Tribunal. At the sift stage His Honour Judge Shanks, formed the opinion that the claimant had no reasonable grounds for bringing the appeal and gave the following reasoning:

> "Given the history as set out by the Employment Judge in his Judgment it seems to me completely hopeless to suggest that the Employment Judge was wrong not to extend time and/or to find that the new claims were an abuse of process. There must be finality in litigation. A claimant cannot lose one case after being dismissed and then over a year later start all over against the same respondent, raising new complaints that arose before her dismissal."

15. The claimant again exercised her right to an oral hearing under rule 3(10). On 10 July 2019 she appeared before His Honour Judge Auerbach represented by Mr Liam Varnham of counsel and the appeal was again dismissed. An order to that effect was sent to the parties on 17 July 2019 but, I have not seen the reasons of the Employment Appeal Tribunal. Mr Naylor tells me that he has not received it. I suspect that the judgment of was simply not transcribed.

16. The claimant then presented yet further claims to this Tribunal which are the subject of this judgment. I set them out below by case number, date of presentation, identity of respondents and complaints in tabular form.

Case number	Date	Respondent	Complaints
2410464/2019 1	31/7/2019	Shoosmiths, Mr Simon Boss	Race discrimination, age, disability, protection from harassment, direct discrimination, combined discrimination, protected disclosures
2410490/2019 2	2/8/2019	Mr Simon Boss	Race discrimination, public order act, data protection act, interest disclosure act, crime and disorder act perverting the course of justice act, employment act 1996
2410502/2019 3	3/8/2019	Ms Rachel Morgan	Race discrimination, public order act, crime and disorder, public interest disclosure, employment act
2410506/2019 4	3/8/2019	Ms Barbara Rollin	Race discrimination, protection from harassment, data protection, public order, public interest disclosure, crime and disorder, perverting the course of justice
2410531/2019 5	4/8/2019	Ms Rachel Morgan	Race discrimination, employment act, defamation act, public order act, malicious act, data protection, human right
2410532/2019 6	4/8/2019	Ms Emma Burns	Race discrimination, malicious, defamation of character, public order, human right, data protection
2410533/2019 7	4/8/2019	Ms Joanne Mills	Race discrimination, malicious act, defamation act, public order act, public interest disclosure act, employment right act, data protection act,
2410534/2019 8	4/8/2019	Ms Janine Fox	Race discrimination, malicious act, defamation act, public order act, public interest disclosure act,

			employment right act, data protection act
2410539/2019 9	5/8/2019	Ms Barbara Rollin	Race discrimination, malicious act, defamation act, human rights, employment rights act
2410696/2019 10	9/8/2019	Mr Simon Boss & Shoosmiths	Race and age discrimination, protection from harassment act 1997, human right. Note, this claim appears to be based upon Mr Boss's, rejection of a complaint made to him by the claimant on 28 July 2019
2410710/2019 11	10/8/2019	Mr Simon Boss & Shoosmiths	age discrimination, race discrimination, breach of statutory duty, defamation of character
2410711/2019 12	11/8/2019	Mr Simon Boss & Shoosmiths	Age discrimination, race discrimination, wrongful dismissal-breach employment contract, conspiracy act, health, safety and welfare act work act 2005 employment act of 2008
2410785/2019 13	14/8/2019	Mr Simon Boss & Shoosmiths	Age discrimination, race discrimination, protection against harassment, breach of statutory duty, wrongful dismissal, malicious communications, conspiracy
2411066/2019 14	24/8/2019	Shoosmiths LLP & Barbara Rollin	Race discrimination, abuse of process, non-conformance with regulatory obligations/legislative obligations (claim apparently based on email from SRA 13 August 2019)

17. For the purposes of this judgment I am going to refer to these as claims 1-14, although strictly in the light of what transpired before they should start at number 6, but they are the ones I have to deal with and so I will call them 1-14.

18. Claim 1 was brought against Shoosmiths and Mr Boss and in that and in a number of other claims that followed the claimant alleged consistently race discrimination, but she also then raised age and disability discrimination, protection from harassment, combined discrimination and made a reference to protected disclosures.

19. The subject matter of that claim also contained the fact that the claimant said she had on 28 July 2019 written to Mr Boss, the CEO of Shoosmiths LLP, a letter which I have not seen but essentially asking him to investigate matters

that occurred during the course of her employment. I should say what that letter concerned comes directly from the claimant herself, who in answer to a direct question from me said, "Yes, I was asking Mr Boss to look into matters that had occurred during my employment".

20. That was the subject matter of an amendment that was allowed in relation to later claims in the series of 14, but it may be convenient now just to identify what the claimant says because it comes again and again in a number of the claims that she has made. She referred to this in relation to at least nine of the 14 claims which she numbered at the top of a document headed "Claimant's Particulars of Claim". The claimant recited a brief history of her employment and said her claims arose from the following events in the Sherratt Tribunal case held on 1 and 2 March 2017). She said this:

> "On 28 July 2019 I wrote a formal letter of complaint to Mr Simon Boss that I was not happy with my overall experience and treatment whilst I was in the employment at the firm. I believe that I was not treated with fairness and respect. The memory of everything that I went through at the firm is on repeat playback in my head and I should not be feeling this way. I wanted an avenue to speak with him regarding all the ill treatments that I have been subjected to whilst I was in the employment at the firm but he was not interested. According to him: as he understands it, all matters connected with my employment with the firm and their terminations have been reviewed thoroughly. I assert this was due to my race in accordance with the provisions of section 13 of the Equality Act 2010."

21. Except for this one single allegation which refers to matters that occurred in July/ August 2019 the remainder of the claimant's allegations and the factual basis of each of the 14 claims relates to incidents that occurred during the claimant's employment which ended in July 2016. Again, in answer to a direct question from me, the claimant confirmed the accuracy of this perception from having read each claim form. It was also the submission of Mr Naylor on behalf of the respondent. The particulars of claim, for example, which run to some 38 paragraphs, make it absolutely clear that that is what the claimant's claim is about.

22. The claimant tells me, and for the purposes of this argument I accept, that in the claims before Judge Vincent Ryan she was raising matters that she had raised before Judge Sherratt and some new matters, and she seeks to persuade me today (and for the purposes of the argument I accept) that the contents of the 14 claims are raising matters which the claimant had not specifically pleaded and raised in the earlier litigation.

23. Whether that is accurate, for the purposes of today's hearing, in my judgment it has no practical significance. It is suggested certainly by Judge Vincent Ryan's Judgment that there was overlap between the two sets of proceedings then. I suspect that on a detailed factual analysis of every single allegation in every claim form there will be areas of overlap, but the thrust of the claimant's claim before me now, presented in a period of dates beginning with 31 July 2019, well over two years after her employment has ended with

Shoosmiths, relates to matters that occurred during or arise out of the termination of her employment. As will be seen from the submissions of Mr Naylor on behalf of the respondent, the determination of this application does not primarily rest, in my judgment on whether they are repeated allegations. Of course, if they are repeated allegations then resistance by the respondent of the claimant being allowed to proceed with them is the more strong.

24. The tribunal, receiving these 14 further claims issued case management orders and gave directions. Regional Employment Judge Parkin directed that the claims be copied in accordance with the Rules to the respondent. He dispensed with the requirement of a formal response being made to each claim at this stage. That is a matter in respect of which the claimant has taken issue.

25. The respondent in a letter of 8 October 2019 to the tribunal recognised that position but invited the tribunal to decline to require they expend further time and cost in entering responses or being required to attend a preliminary hearing. It requested that the tribunal decline jurisdiction over these claims.

26. The decision of the Regional Employment Judge was to set this matter down for this preliminary hearing.

27. At the outset of the hearing I identified that, broadly I needed to address four matters.

28. The first of these was the issue with regard to the respondents not being required to submit a response. I attempted to explain to the claimant why a direction to that effect might be made. I explained that it does not prejudice either her rights or those of the respondent. It is a step sometimes taken in litigation where there is an issue of jurisdiction. It might result in a saving of cost if at that stage of the proceedings a response was not required. I also assured the claimant that if I decided that any of these claims should be permitted to proceed I would make an order requiring the respondent to serve responses.

29. Second the claimant had made request for documents. I explained, as I now repeat, that if her claims were permitted to proceed there would be an order for disclosure of documents. Outside the tribunal proceedings she has the right under the Data Protection Act to make a subject access request for any documents that she wishes to see that pertain to her. It is clear from the claimant's submissions that some of the matters she wants to explore are suggestions, made apparently in the course of the evidence before the Sherratt Tribunal, that she might not have been competent to do her job. They were not material to the point that she was then arguing before the Sherratt Tribunal. The claimant feels aggrieved by the suggestion and wants to see what the background is for that allegation, if such it be, being made. That is understandable but does not warrant an order being made at this stage.

30. The third matter was that the 14 claims contained a number of forms of action in respect of which the Tribunal simply has no jurisdiction. As the table above indicates these include: combined discrimination, the Crime and Disorder Act, Perverting the Course of Justice Act, the Protection from Harassment Act, the Defamation Act, breach of statutory duty, the Conspiracy Act, Health and Safety at Work and Welfare Act 2005, malicious communications, conspiracy, abuse of process, non-conformance with regulatory obligations/legislative obligations. I explained to the claimant that in relation to those matters the Tribunal simply had no statutory power to determine such matters and that whatever else I decided I would strike out those heads of claim. The claimant did not seek to resist that nor argue that I should not do so.

31. Having dealt with those matters I turn to the fourth matter the respondent's application.

32. The respondent's submissions were set out in writing in paragraphs 1-29. Paragraphs 4-10 in substance repeat submissions made in the respondent's solicitor's letter of 8 October 2019. For the avoidance of doubt, I record that where there is a reference to "Judge Ryan" in that submission it is a reference to Employment Judge Vincent Ryan, who is also a judge in this region.

33. At some point it is necessary to just address one or two points. Having set out much more briefly the matters that I have set out at length in reciting the history, the respondent's main submission as made by Mr Naylor, appears in paragraph 9:

> "Regardless of the substantial jurisdictional issues already identified by the Employment Tribunal as to whether the 2019 claims disclose any right of action in the Tribunal at all, the respondent's submission is that all matters raised by the claimant must inevitably pre-date 22 July 2016. Therefore for the same reasons already set out by Judge Vincent Ryan and endorsed by the Employment Appeal Tribunal the 2019 claims should not proceed."

34. The respondent's submissions as presented in writing did not distinguish between the July 2019 allegation (see paragraph 20 above) and the others. I heard oral submissions from Mr Naylor in relation to the July 2019 matter. He accepted that the arguments about claims being out of time and having already been adjudicated upon could not apply to the July 2019 allegation. Nonetheless he sought to persuade me to strike that out on the grounds that it had no reasonable prospect of success.

35. In order to deal with that I address the submission of both parties both generally in relation to the earlier historical matters, what I might called the "general matters", and specifically an argument by the respondent under the heading of "Claims Scandalous and Vexatious".

36. The respondent drew my attention in paragraphs 11 and following to the fact that it appeared to them that the claims appear to be part of a broader campaign by the claimant against the first respondent. They referred to:

36.1. a complaint to the Solicitors Regulatory Authority which after enquiry was closed without action;

36.2. in late August and early September 2019 the claimant raised multiple complaints about the respondents to the Information Commissioner, the Legal Ombudsman, the Chartered Institute of Legal Executives (one of the named respondents in the 14 claims was a Legal Executive), the Property Law Regulator and the CLC. These were all raised over three years after the claimant had ceased working with the first respondent;

36.3. Despite being asked on several occasions that she should only correspond with Mr Naylor the claimant persisted in sending correspondence directly to the individual employees causing, it is said, unnecessary distress to them and it appeared to be a deliberate tactic adopted by the claimant.

37. The thrust of the submission was this. The respondent relied upon the decision of the Divisional Court in the case of **Her Majesty's Attorney General v Barker** (CO/4380/98). This was an application by the Attorney General for a restraint order against Mr Barker. It came before the Divisional Court consisting of Bingham LCJ and Klevan J. The issue before the court was whether the respondent in that case had instituted vexatious civil proceedings. There is nothing to be gained by considering the factual circumstances which are wholly different from those with which I have to deal here, but at paragraph 19 the Lord Chief Justice said this:

> "Vexatious" is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of a court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process."

38. Adopting that test, which I understand to be the appropriate test, the respondent submits that these proceedings, save for the July 2019 allegation, properly considered satisfy that test and therefore should be struck out.

39. The respondent's submission then submits that the claims have no reasonable prospects of success. In relation to the general claim, at paragraphs 14-16 the respondent submits that:

> "Whilst it is not usual to strike out a discrimination complaint those concerns should not apply in this case. This is not a case of a Tribunal depriving an individual of their opportunity to have a case heard in full because this matter been exhaustively litigated either because matters have been raised before the

> Employment Tribunal previously and the Employment Appeal Tribunal or, having reference to the principle in Henderson v Henderson, they could have been raised."

40. The claimant in her submissions says otherwise but I will address those below.

41. It is suggested that this is not a case where the claimant as a litigant in person is unaware of her legal rights. The claimant apparently received advice even from the time of her dismissal from the Merseyside Employment Law Centre (the claimant's submissions support that, although she said she was not in a state to engage with them). Furthermore, the claimant has been represented at various stages in the litigation since 2016, on at least two occasions by counsel, Ms Tuck and Mr Varnham in the Employment Appeal Tribunal and in the hearing before Judge Vincent Ryan by Ms Khan of counsel. The claimant said that she had legal advisers acting for her instructing Ms Khan then. Finally, save for the July 2019 allegation the claims are significantly out of time and the claimant has advanced no valid reason why the Tribunal should exercise its discretion to extend time.

42. Under the heading that a fair trial is no longer possible (paragraph 17 and onwards), the respondent submits that if a claim is to be struck out as vexatious then it would inherently not be possible to have a fair trial. It relies again on what appears to be a campaign by the claimant. Not only that, there would have been a very significant delay, even at the time similar claims were before Judge Vincent Ryan in November 2018 there would unlikely to have been a hearing before the summer 2019. These claims would not heard until well into 2021. It is submitted it would be prejudicial to the respondent to have new allegations based on old facts. Therefore it was submitted that if Judge Vincent Ryan was right in 2018 to say, as he did, that a fair trial was no longer possible, that would apply with even greater force now.

43. Mr Naylor also made submissions under the headings of "Res Judicata", "Issue Estoppel" and the rule in **Henderson v Henderson**.

44. I recite the rule at this stage just to show what the principle is. Whilst it may not apply strictly in the Employment Tribunal it is nonetheless relevant in the context of this case to consider it, and it is this:

> The court requires the parties to the litigation to bring forward their whole case and will not except under special circumstances permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest but which was not brought forward only because they have from negligence, inadvertence or even accident omitted part of their case.

45. Indeed, with some prescience, that was in fact what the claimant was saying because the claimant in her submissions to me was to include as part of her submissions the fact that she had learned on 1 and 2 March 2017 new facts

to which I have already referred, such as criticisms of her competence, which she had not been able to bring as part of her original claim.

46. I explained to the parties the Tribunal's powers of reconsideration which could have been exercised by Judge Sherratt in relation to such a matter, for example where fresh evidence comes to light providing it could not have been readily discoverable by the party relying on it prior to the application. In those circumstances they are the sort of special circumstances to which the court was referring in **Henderson v Henderson**, and for reasons which Mr Naylor advances, he says they do not apply here.

47. The respondent's conclusion is a measured one. They acknowledge the right of the claimant to have proper allegations of discrimination heard and determined, and point out it has been reviewed over the course of three years by two previous Tribunals and by the Employment Appeal Tribunal and was subject to review also by the Solicitors Regulatory Authority. The respondent draws attention to the fact that throughout this process it has neither brought to the EAT's attention the suggestion that the claimant is a vexatious litigant nor indeed at any stage sought to recover their costs. Nevertheless for those reasons they submit that the general claims should be struck out.

48. I turn to the specific matter of the July 2019 claim. Although I did not have a copy of Mr Boss's reply in front of me when I gave oral judgment it was read out to me. It has now been provided.

> "Thank you for your recent email and attachments. As I understand it, all matters connected with your employment with the firm and its termination have been reviewed thoroughly by the Employment Tribunals, the Employment Appeal Tribunal, and now the SRA; therefore any further response necessary will be through those channels."

49. There is no dispute that the allegation of discrimination resting on this response and brought in these claims in August 2019 is in time. It could be argued that it arises out of the employment because of the history of the litigation. So I assume, in the claimant's favour, for the sake of this argument that the claimant could raised properly a claim of direct discrimination in these circumstances. The question is then: does it have any reasonable prospect of success?

50. Under section 13 of the Equality Act 2010 the burden is on the claimant at the initial stage to show the difference in race, the difference in treatment and some link between them in order to cause the burden of proof to pass (see the cases of **Igen v Wong** and **Madarassy**). Here the claimant would have to construct a hypothetical comparator because nobody is said to have been in a similar position to her. Such a competitor would be (for example) a white British employee who had been dismissed in similar circumstances, had the same history with the respondent, had brought claims in the same way, had them rejected in the same way and now sought to make a complaint in July

2019 in similar terms to that raised by the claimant with Mr Simon Boss on 30 July 2019 and received a rejection in similar terms.

51. In effect the respondent's submission is that there is no reasonable prospect that a Tribunal would conclude that the response was because of the claimant's race. A response in these terms would be made because of the history that has transpired; the fact that once the matter has been raised as a legitimate claim, dealt with through the Tribunal process and raised with external bodies, the rejection of it (referring as it does to those channels) undoubtedly shows on its own face that the reason for declining to look into it again has nothing at all to do with race.

52. The claimant's skeleton argument in writing on the general matters stated that the Tribunal should allow all her claims to proceed because her daughter has become a child in need since 22 July 2016. She repeatedly uses that expression "a child in need", which may have legal significance in other jurisdictions. I have asked the claimant to explain it to me, and she said what she means is that she is a single mother and since she has lost her job she has struggled to feed her child. I am perfectly prepared to accept that is so and to accept that her daughter is in those circumstances, "a child in need" in that sense.

53. The claimant submitted the Tribunal should order disclosure of documents, reject the response and make an order for financial compensation in all her claims to be paid with immediate effect for her daughter.

54. She referred to the application to the Tribunal for amendment to her claims of 24 November 2019, which the Tribunal allowed and upon which part of her claim now is based.

55. She had requested disclosure of documents from Mr Naylor on 4 December 2019 and then she refers to claims she alleged she submitted on 5, 6 and 9 December 2019 referring to a number of other provisions of the Equality Act and the Employment Rights Act.

56. I pause in summarising the claimant's submissions to clarify to the "claims" the claimant asserted she presented in December 2019. The claimant sent to the tribunal on those dates ET1 forms bearing the numbers of claims 10, 13 and 14 in the table above. She had taken it upon herself to provide further information in those cases and had also altered the date in the "Date received" box to reflect the dates they were sent. They were not further claims. The tribunal acknowledged that the documents provided further information and advised the claimant that she was not to alter the dates in that way. In one of those documents, that relating to claim 14, she reiterated he complaint of direct race discrimination arising out of the July 2019 incident. In all other respects she raised matters arising in 2016.

57. The claimant also submitted that compensation was needed to alleviate her daughter from being in need, "to pay for my losses and restore my sense of belonging" and, finally, she submitted:

"It would be fair, right and proper that all allegations of discrimination" which have caused her daughter to become a child in need and caused her detriments should be allowed to proceed in the interests of justice."

58. The claimant provided other documents but they were all to similar effect.

59. In her oral submissions Ms Sule again addressed the question of the ET3 process to which I have referred. She explained that she had been referred to the Merseyside Employment Law Centre at the original claim stage by the Citizens Advice Bureau. She said, "I couldn't engage with them, I did not seek any legal advice". She said, "I am still raising matters with regard to the employment". She said that she believed that the actions of the individuals whom she had named in claims 1-14 had been deliberate, that she is of a different race. She said that she complained to her employer at the time (that is 6 July 2016). She raised the question of documents again and at that stage we had a discussion concerning the Data Protection Act and making a subject access request. She again repeated her explanation about her daughter being a child in need and said that all her submissions were set out in writing.

The Law

60. The legal framework that a Tribunal has to bear in mind when asked to deal with an application of this sort is as follows.

61. The power to strike out a claim arises under rule 37 of the Employment Tribunals Rules of Procedure 2013. That provides that:

> "(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."

62. There are other grounds, but I do not need to deal with them because that is the sole ground that applies here.

63. The meaning of the word "vexatious" was considered as long ago as 1974 by the Employment Appeal Tribunal in the case of **Marler v Robertson [1974] ICR 72** as being used for a claim pursued "not with the expectation of success but to harass the other side out of some improper motive". I have already quoted the formulation of Bingham LCJ in **Barker.**

64. The expression was also was considered by the Court of Appeal in 1990 in the case of **Ashmore v British Coal Corporation [1990] ICR 485** and the Court of Appeal said that whether a case was vexatious depended on all the relevant circumstances of the case. Considerations of public policy and the interests of justice may be very material. According to Stuart Smith LJ (at page 499 A) case can be an abuse of process without necessarily being "a sham and not honest and not *bona fide*."

65. There is a need for particular sensitivity in discrimination complaints. In **Anyanwu v South Bank Students Union [2001] IRLR 305** the House of Lords said that such claims should not be struck out as an abuse of process except in the most obvious and plainest cases. Lord Steyn went on to say:

> "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 a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."

66. That warning, in my judgment, reflects the reality that in direct discrimination cases there is frequently no direct evidence available to the claimant of the relevant protected characteristic having been in the mind of the decision maker. A finding of direct discrimination may therefore depend on the inferences to be drawn from primary fact. That is why they are termed "fact sensitive". Striking out before the evidence is heard is therefore considered generally not to be appropriate.

67. Where the Tribunal concludes that the manner in which the proceedings have been conducted is unreasonable or vexatious, it is already satisfied there has been a failure to comply with a Case Management Order, it does not follow that the claim should be struck out. I remind myself this is not such a case, this is not about conduct of the proceedings, but even where it is about the conduct of proceedings where a whole claim is vexatious then it is clear that it is inherently impossible to have a fair trial because the whole proceedings are an abuse of the process of the Tribunal.

Conclusions

68. Against that background I reached the following conclusions.

69. First, on the claimant's point about the respondents not being permitted to take part because they have not submitted a response, I reject that argument. The only reason why the respondents have not put a response in is because of the direction of the Tribunal which was a lawful direction and one which has not been challenged.

70. I made no order on the request for documents. They are not necessary in my judgment at this stage and in fact the claimant's own submissions indicated that it was to enable her to understand what had happened to her in the course of her employment. Certainly if any claim were permitted to proceed there would have to be an order for disclosure of documents relevant to that issue.

71. With regard to the claims which raised matters outwith the power of this Tribunal, such as an attempt to pervert the course of justice (see paragraph 30 above), I simply say that any such claim has to be struck out on the ground it has no reasonable prospect of success. This Tribunal, as a creature of statute, only has the power to determine claims that legislation authorises it to determine.

72. I then turn to the application generally. The first question it seems to me is whether it can be properly said that these claims are vexatious within the description laid out in **Barker**.

73. First, the Tribunal has to consider at this stage, that is in the light of the history, "the hallmark of vexatious proceedings has little or no basis in law". In the Tribunal that basis in law includes the question of jurisdiction based upon time. These 14 claims are years out of time. There is no material from the claimant for extending time.

74. Secondly, whilst the submissions of Mr Naylor about the claimant conducting a campaign might appear to suggest that purpose of these proceedings has been to subject the defendant to inconvenience, etc., having heard the claimant I have to say at this stage I am not entirely persuaded that that is right. However, it does not necessarily have to be done with that intention if the effect of it is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant. I am satisfied that that part of the test is amply met. The inconvenience and expense of having to deal with these proceedings is self evident. I also accept there is a degree of harassment in that allegations have been made against several individuals and communications had with them directly which are, on any view, out of all proportion to any gain likely to accrue to the claimant, having regard to what I say about jurisdiction generally.

75. Finally, does it involve the abuse of the process of the court, meaning by that a use of the court process for a purpose (I doubt whether it was on purpose in this case) or in a way which is significantly different from the ordinary and proper use of the court process.

76. Making repeated claims about the same employment 3 years after earlier hearings have determined the issues arising from that employment is undoubtedly using the process in a way which is significantly different from the ordinary and proper use of the process.

77. I therefore find that these claims are vexatious within the term of the rule insofar as they raise any matters save for the allegation in respect of July 2019.

78. Having regard to the earlier judgments of EJ Vincent Ryan and the two appeals to the EAT I also say that the general claims have little reasonable prospect of success for the same reasons as were there given.

79. In relation to the second limb of rule 37 (whether a claim has no reasonable prospect of success) I turn now to consider the allegation that the claimant was directly discriminated against by Mr Simon Boss on grounds of race when on 30 July 2019 he addressed her complaint in the terms quoted at paragraph 48 above.

80. I am satisfied that the respondents have established that the claim of direct discrimination arising from that has no reasonable prospect of success. My

reason for this is that I am satisfied that it is highly unlikely that the claimant will, on her part, establish a link between her race and the decision. I note that no fact indicating such a link is pleaded. Between if such a link were established, it is, conversely, highly likely that the respondent would successfully defeat the claim.

81. Mr Boss, by the self-same letter, indicated that his reason for the rejection was nothing to do with the claimant's race but everything to do with the fact that she continues to persist in raising matters in respect of an employment that at that stage ended three years earlier and which the claimant had pursued through several unsuccessful processes. In my judgment any tribunal is likely, given the history of the litigation and related matters, to accept that explanation and conclude the reason for the treatment was in no sense whatsoever because of race.

82. In reaching that view I remind myself of the matters of law and policy that raise a high level of caution against reaching such a conclusion at this preliminary stage. I recognise also that I have not heard evidence from Mr Boss. Yet I consider that this is an exceptional set of circumstances which justify making the ruling at this stage that there is no reasonable prospect of success in the claimant establishing that complaint.

83. For those reasons I find that all these claims must be struck out.

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Employment Judge Tom Ryan

Date: 27 February 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

28 February 2020

FOR THE TRIBUNAL OFFICE