EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110800/2019 (C)

Reconsideration on papers on 19 October 2020

Employment Judge W A Meiklejohn

Mr G Tobias	**Claimant** **Represented by:** **Ms A Buchanan - Solicitor**
Pizza Cake (Ayr) Ltd	**Respondent** **Represented by:** **Dr A Gibson - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's application for reconsideration, under Rule 70 of the Tribunal Rules, of the Judgment ordering that the claim be struck out under Rule 37(1)(e) of the Tribunal Rules (the "original Judgment") is refused and the original Judgment is confirmed.

REASONS

1. This case came before me for a preliminary hearing, conducted remotely by video using the Cloud Video Platform ("CVP"), on 20 August 2020. Ms Buchanan represented the claimant and Dr Gibson represented the respondent. The preliminary hearing dealt with an application from the respondent to strike out the claim under Rule 37(1)(e) of the Tribunal Rules. I heard evidence from Mr J Fisher and Ms L Tobias, both directors of the respondent and proposed witnesses for the respondent at a final hearing scheduled to take place on 24-27 August 2020.

Strike out decision

2. In my Judgment (the "original Judgment") following that preliminary hearing, sent to the parties on 27 August 2020, I decided to strike out the claim under Rule 37(1)(e) of the Tribunal Rules as I considered that it was no longer possible to have a fair hearing. I found that Mr Fisher and Ms Tobias had been intimidated by an anonymous email sent to Mr Fisher on 20 July 2020.

Application under Rule 70

3. On 9 September 2020 the claimant submitted an application for reconsideration of the original Judgment. I did not refuse that application as having no reasonable prospect of success under Rule 72(1). On 29 September 2020 the respondent opposed that application. Both parties agreed that the matter should be dealt with on the basis of their respective written submissions. I dealt with the reconsideration based on those written submissions and without a hearing on 19 October 2020.

Applicable rules

4. These are Rules 70 and 72 which, so far as relevant, provide as follows –

70 Principles

A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

72 Process

(1) An Employment Judge shall consider any application made under Rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked….the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and

seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations….

5. I make reference below to Rule 2 (**Overriding objective**) so it is appropriate that I set out that Rule here –

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable –

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

Consideration of application

6. I will deal with the application for reconsideration by quoting some passages from it which I believe give a fair picture of the claimant's grounds for the application and will where appropriate record what is said for the respondent in reply.

"Despite the fact that the Tribunal made no specific finding in fact in relation to who sent the email in our submission the Tribunal has been overly influenced by the written submissions by the Respondent and evidence from the Respondents' witnesses that they strongly suspected the Claimant or someone close to him sent the email."

7. The respondent's answer to this was that the Tribunal had rightly focussed on the impact which the email had rather than who sent it, there being no application under Rule 37(1)(b) (which refers to the manner in which the proceedings have been conducted being *"scandalous, unreasonable or vexatious"*). I found that the email was a threat which intimidated Mr Fisher and Ms Tobias. Paragraph 60 of the original Judgment refers. I made that finding because I found the evidence of Mr Fisher and Ms Tobias to be credible. If I had not done so, no amount of eloquence in written submissions by or on behalf of the respondent would have persuaded me otherwise.

8. I made no finding in fact as to who sent the email because I had no evidence from which the identity of the sender could be established. There was however evidence which indicated that the sender of the email had knowledge about matters involving Mr Fisher and Ms Tobias and, as Dr Gibson had submitted at the hearing on 20 August 2020, the fact that they could not be sure where the threat was coming from *"added to the fear of consequences"*.

9. ***"There was no evidence led at the Tribunal to prove one way or the other who the sender of the email was and the Tribunal upheld objections to the Claimant's representative seeking to ask questions about matters contained in the email being within public knowledge. This is important as there is no decision to strike out on the grounds of the Claimant's conduct of the proceedings which distinguishes this case from all other***

authorities for strike out on the grounds where there has been intimidation."

The respondent's answer to this refers to paragraph 60 of the original Judgment. I applied myself to the same issue again and came to the same conclusion as recorded in that paragraph.

10. ***"In our submission the cases of Bolch v Chipman EAT/1150/02 and Force One Utilities Ltd v Hatfield UKEAT/0048/08 are to be distinguished from the current case on the basis that there is no finding in fact about who sent the email or the conduct of the claimant in relation to the proceedings."***

This was in essence the same point as in the preceding paragraph. I recognised that this case differed from other authorities on strike out in that, in those cases, the identity of the perpetrator of the intimidation was known. However, as I said in paragraph 60 *"it* [this case] *was on all fours in the sense that a fair trial was no longer possible where a witness was sufficiently intimidated to affect his ability to give evidence without fear of consequences".* My view upon reconsideration remains the same.

11. ***"In our submission the Tribunal has also failed to properly assess the degree of fear resulting from the intimidation to render it no longer possible to have a fair hearing….In our submission there was not sufficient basis or evidence that the respondents' witnesses were so intimidated as to render a fair trial no longer possible."***

It seemed to me that this was linked to the claimant's argument to the effect that if the respondent's witnesses were able to give evidence at the preliminary hearing on strike out, they could not be too frightened to give evidence at the final hearing scheduled for a few days later. It was akin to saying that there could still be a fair trial so long as the effect of the intimidation was not too serious. That was not a proposition which commended itself to me.

12. I have given the *"degree of fear"* question further thought but I have found no reason to depart from my conclusions in the original Judgment. I remain of the view that (a) the evidence given by Mr Fisher and Ms Tobias was not exaggerated, (b) they were intimidated, (c) they faced the prospect of giving evidence at the final hearing with *"fear of consequences"* and (d) a fair trial was no longer possible.

13. ***"In our submission the Tribunal has failed to properly consider alternative means available under Rule 50 of dealing with any issue of intimidation of the respondents' witnesses in a more proportionate manner."***

The only argument advanced by the claimant at the preliminary hearing on 20 August 2020 was in relation to the potential use of Rule 50. I agree with the respondent that the suggestion that a CVP hearing would provide more control regarding privacy is incorrect. It is the nature of the hearing, whether it is held in public or private, which dictates the degree of privacy. I can find no reason to depart from what I said at paragraph 63 of the original Judgment.

14. The same applies to what I said at paragraphs 64-66 in the context of whether the case should be sisted pending the outcome of the police investigation. I gave this due consideration because I appreciated the draconian nature of strike out and I believed it was right to look for any alternative course of action. Having revisited this, I remain of the view that strike out was the proportionate response.

15. ***"Allowing strike out goes against all of the other principles of the overriding objective."***

I have some difficulty in understanding this assertion. It appears to stem from what I said at paragraph 64 of the original Judgment when dealing with my consideration of whether the case should be sisted – *"It would cause delay which would run contrary to the overriding objective".*

16. Looking at the other matters referred to in Rule 2 –

(i) I cannot see that granting an application for strike out offends against *"ensuring that the parties are on an equal footing"* in a case where both parties were legally represented.

(ii) I cannot see that it amounts to a failure to deal with the case *"in ways which are proportionate to the complexity and importance of the issues"*.

(iii) I cannot see that it represents a failure to avoid *"unnecessary formality"* or to seek *"flexibility in the proceedings"*.

(iv) I cannot see that it entails a failure to save expense.

17. ***"….denies the Claimant any legal remedy contrary to article 6 of the European Convention of Human Rights providing for the right to a fair trial in the determination of his civil rights."***

The key words here are *"fair trial".* Rule 37(1)(e) of the Tribunal Rules gives the power to strike out when 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)"*. I see no difference in meaning between *"fair trial"* and *"fair hearing".* There cannot be a *"fair trial"* where the witnesses for one of the parties have been intimidated so that they would not be giving their evidence *"without fear of consequences".*

Decision

18. As will be apparent from what I have said above, my decision is to refuse the application for reconsideration and to confirm the original Judgment. I believe that the approach I took to the respondent's application for strike out under Rule 37(1)(e) was correct, but I recognise that strike out is a draconian sanction to be used sparingly and so I welcomed the opportunity to revisit my decision.

19. Having done so, I remain of the view that strike out was appropriate in this case. I recognise that the authorities (a) relate to circumstances where the intimidatory conduct could be laid at the door of the respondent whereas here

the identity of the person or persons making the threat was unknown and (b) would engage Rule 37(1)(b) under the current Rules as well as (or instead of) Rule 37(1)(e). However, there was credible evidence of intimidation towards two witnesses for the respondent which had the effect that they would have required to give their evidence at the final hearing with *"fear of consequences"*. That meant there could not be a fair hearing and I do not believe that the interests of justice require my decision to that effect to be reconsidered.

Employment Judge: Sandy Meiklejohn
Date of Judgment: 20 October 2020
Entered in register: 11 November 2020
and copied to parties