EMPLOYMENT TRIBUNALS

Claimant: Mr T Smith

Respondent: Tesco Stores Limited

Heard at: Birmingham Employment Tribunal by way of a hybrid CVP hearing

On: **17 March 2021**

Before: Employment Judge Cookson, sitting alone

Representation
Claimant: In person (but left the hearing shortly after it began)
Respondent: Mr Platt-Mills (counsel)

JUDGMENT having been sent to the parties on 17 March 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

WRITTEN REASONS

Introduction

1. This preliminary hearing followed a previous preliminary hearing conducted by Employment Judge Miller. The hearing before Employment Judge Miller had been the fourth case management hearing in this case, the hearing before me was the fifth.

2. Since the first case management hearing, conducted by Employment Judge Flood on 4 March 2019, various attempts had been made to particularise the claimant's claims. In his case management summary and orders Employment Judge Miller set out a useful chronology of what happened in this case to date. It is a detailed description and I do not repeat or duplicate it here, but I do endorse and adopt that summary. I note that it reflects that only has the claimant been given the opportunity to explain and detail his claims, he has also had the opportunity to make an application to amend his claim, which

was considered by Employment Judge Miller, albeit that application was refused.

3. The hearing before Employment Judge Miller, conducted in person on 16 October 2020, had been ordered by Employment Judge Flood to finalise a list of issues in relation to the claimant's claims and to make further orders for case management. The respondent had prepared a list of issues which the claimant had refused to agree but at that the hearing the claimant had been unable or unwilling to explain his objections. Employment Judge Miller gave the claimant further time to reflect on the issues and listed this case for a further hearing, that is the hearing listed before me on 17 March 2021.

4. Employment Judge Miller made a number of orders at the hearing which are contained in the order confirmed in writing by him on 20 October 2020 and sent to the parties on 23 October 2020. He required the parties to seek to finalise the list of issues in readiness for the hearing listed for my determination.

5. On 12 January 2021 the respondent made an application for the claimant's claim to be struck out on the grounds set out in detail on pages 236 – 238 of the preliminary hearing bundle.

6. That application was listed to be heard before me today. In considering the application I had before me a bundle of documents running to some 250 pages prepared by the respondent and a skeleton argument from Mr Platt-Mills. Mr Platt-Mills made brief oral submissions supplementing that written submission.

Compliance with Employment Judge Miller's orders

7. From the documents in the bundle before me I am satisfied that the respondent had done what Employment Judge Miller had ordered on 16 October 2020. It raised a number of questions with the claimant and presented him again with the neutrally drafted list of issues. I reviewed that list of issues and, despite assertions made by the claimant in correspondence, I can see nothing inappropriate in how that document is set out or how he is referred to. The document seems to me to be entirely consistent with how matters had been expressed by Employment Judge Flood. The claimant however failed to take the steps which Employment Judge Miller had ordered. Rather than engage with the list of issues, on 7 January 2021 he made an application to amend his claim in the following terms:

Dear Sir/Madam

The claimant would like to further amend his claims to include the following for clarification:

1. **Victimisation** to his other prohibited conduct claims:

   Prohibited conduct claims:

   Direct harassment age
   Indirect harassment age
   Direct harassment disability - stress and anxiety related illness
   Indirect harassment disability - dyslexia
   Indirect harassment disability - stress and anxiety related illness
   Direct harassment race
   Indirect harassment race
   Direct age discrimination
   Indirect age discrimination
   Direct disability discrimination - stress and anxiety related illness
   Indirect disability discrimination - dyslexia
   Direct discrimination race
   Indirect discrimination race

2. **To update, add to and simplify the Chronology of events** for ease of use e.g. add page numbers, subsections and diary accounts. (will be forwarded in due course)

3. **To add diary accounts as evidence for the bundle** (will be forwarded in due course)

4. **For disability claims - claimant relies upon dyslexia and stress and anxiety related illness**

5. **Three witness statements from the following perspectives:** (will be forwarded in due course)
   - The Employee
   - The Customer
   - The Claimant

Note: The claimant reasonably believe that none of the above are actually new claims, there are for clarification purposes for the employee's claims against his former employer and to add context, cohesion and ease of navigation for all parties involved.

8. Despite the final comment that "none of these are new claims", the claimant still failed to provide any clarification or comment on the list of issues he had been sent as he had been ordered to do. I have seen nothing to suggest that any meaningful explanation for that failure on his part has been offered. In relation to his application to amend, his statement that "these are not new claims" is surprising in light of the previous discussions about his claims. There is no reference in the orders of Employment Judge Flood to indirect race, disability or age discrimination nor indeed to any "indirect harassment" claims, but the claimant did not in any way particularise these matters in this application nor address why it would be in the interests of justice and in accordance with the overriding objective for these amendments to be allowed. He offers no explanation for why this application is made so long out of time (his employment ended in September 2018).

9. Following receipt of that amendment application, the respondent raised concerns about the nature of the application made by the claimant and pointed out that in consequence it was still impossible to identify the legal

issues which would require determination by the employment tribunal at the final hearing listed for hearing commencing in late November 2021 despite four preliminary hearings over 2 years. The respondent made an application to strike out the claimant's claim on the grounds set out in Rule 37(1) (b) and (e), that is that the way the claimant was conducting the proceedings was scandalous, unreasonable or vexatious, and that because of his conduct a fair trial would no longer be possible. That application had been copied to the claimant and the application was listed to be determined by me at the hearing already listed for 17 March 2021.

10. In anticipation of the hearing, the respondent's counsel Mr Platt-Mills, provided a skeleton argument, a copy of which had been sent to the claimant. That skeleton expanded upon the grounds set out in the respondent's application which refers to a number of matters related to the claimant's conduct including his refusal to cooperate with the respondent to produce a list of issues despite the previous orders of the employment tribunal, particularly those made by Employment Judge Miller, and the claimant's continued insistence on raising further new matters more than two years after his claim had been submitted rather than complying with tribunal directions to ensure that this case would be ready for hearing.

Arrangements for the hearing on 17 March 2021 and the claimant's conduct at the hearing

11. Turning to the hearing before me, this case had been listed originally for an in-person hearing. It was proposed that this hearing be converted to a video hearing using the HMCTS "CVP" system. That was done at the Regional Employment Judge's own initiative reflecting the Tribunal Service's continuing efforts to minimise the number of people attending the employment tribunal given the current pandemic. I have seen correspondence with the claimant in which he raises that he does not have the means to join a video hearing in this way but in which he makes no objection to a CVP hearing being conducted in principle.

12. It is now usual at the Birmingham Employment Tribunal for as many hearings as possible to be conducted by CVP, in accordance with the approach adopted nationally. It is quite common for claimants, and sometimes respondents, not to have equipment available to them to enable them to join hearings remotely. If that is the case the Tribunal Service will arrangements for individuals to attend the employment tribunal, in essence so that they can use the equipment within the tribunal building to enable them to participate in video hearings. That is what happened here. In such cases it is usual for the other parties and the judge, and indeed where appropriate other panel members if it is a final hearing, to attend remotely in what is called a "hybrid hearing".

13. Over the last nine months or so, hybrid hearings have become commonplace and I am entirely satisfied that it is possible for hybrid hearings to be conducted fairly and in accordance with the overriding objective. However, if it became clear that any claimant was struggling to participate in a hybrid, or indeed fully remote, hearing and I was unable to take steps to mitigate

whatever difficulties they faced, I would not hesitate to adjourn that hearing and relist it for another day and I have done so in the past.

14. Where it is proposed that hearing be converted to a CVP hearing, if a claimant indicates that there are other factors which would necessitate a hearing being conducted in-person in addition to them not having the equipment to attend a hearing remotely, that will be arranged. I have conducted a number of those hearings and for a variety of reasons. However, in this case the claimant indicated that he could not attend remotely because he did not have the necessary equipment and for no other reason. He did not suggest any reason why it would be necessary for the respondent and the employment judge to attend in person.

15. Hearing start times are also being staggered in Birmingham to help manage social distancing within the tribunal. The letter to the parties in this case informed that the CVP hearing on 17 March 2021 would be starting at 9.30am. Mr Platt-Mills attended at that time, but the claimant appears to have missed this and he was late for the hearing. I record however that this is a common oversight, and it did not concern me.

16. When the claimant attended the hearing on 17 March 2021 at 10am he was apparently upset that the hearing was not being conducted in-person. He asked the clerk to provide some comments to me about that and this was done. I understand that the clerk told the claimant to explain to me what he had said the clerk to when I joined the hearing remotely. The screen which shows remote attendees is to the side of the parties' desks in the hearing room that the claimant was using. I am aware that the clerk had offered the claimant the opportunity to sit at what is usually the desk used by the witnesses which would have facilitated his participation in the hearing because he would have been sitting facing the screen and the camera in the tribunal room directly, but that offer was refused.

17. The claimant was informed that the hearing was beginning and that I had joined the hearing remotely. Mr Platt-Mills also joined the hearing remotely. The clerk asked the claimant to raise his concerns with me. However, the claimant refused to look at the screen, he refused to address me directly and he persisted making representations to the clerk which he required the clerk to address to me. I told him to stop doing that. I told the claimant he must address me and, when the claimant kept talking, I told him to stop speaking over me. The claimant ignored me entirely. I told the claimant to stop seeking to co-opt the clerk into acting as his representative and to address me as the judge hearing the case. In particular I told him to stop talking over me so that I would explain to him how I proposed hearing this case in the circumstances and asked him to listen to me. I was entirely ignored, and the claimant continued to talk to the clerk, talking over me. The clerk asked him to stop addressing him and to speak to me. That request was ignored. It appeared that the claimant was making comments to the clerk about me and the respondent's representative. I consider that was wholly unreasonable conduct on his behalf which was discourteous to the tribunal and which placed the clerk in an unfair and insidious position. If the claimant had behaved in a proper manner and had addressed me to raise objections to the

hearing going ahead I would have considered them, but that did not happen. I have no doubt the claimant is aware of the way that parties are expected to behave in tribunal hearings having attended four previous hearings.

18. Having refused to turn to the screen to look at me and continuing instead to address the clerk, the claimant then collected his papers and left the hearing room. The claimant gave me no indication that he would comply with my reasonable directions or indeed that he would respect any decision that I made. Based on this conduct I concluded that the claimant had given gratuitous insult to this tribunal.

19. The claimant had not addressed me to offer any good reason for adjourning the hearing. The case had been listed to consider the respondent's application to strike out and it had incurred the cost of instructing counsel to attend the hearing on its behalf. I had given the claimant the opportunity to participate in the hearing before me, but he chose not to listen to me or address me and chose not to give me the courtesy of letting me explain matters to him. He chose to walk out the hearing. In those circumstances I determined that the hearing should continue in the claimant's absence.

20. I then heard oral submissions from Mr Platt-Mills in which he expanded slightly on his skeleton argument to make additional submissions that the claimant's conduct towards the tribunal at this hearing further justified and supported the grounds for strike out already set out.

The law

Rule 37: Striking out

(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.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

21. The power to strike out under rule 37(1) (b) or (e) is a highly draconian one and that it is not a power which I should exercise readily. It will only be appropriate to strike out on the grounds of the claimant's conduct if there has been a deliberate or persistent disregard of required procedural steps and that the conduct of the claimant has made a fair trial impossible. Even if I consider that the claimant's conduct has crossed the high threshold for a finding of scandalous or vexatious conduct, I must still consider whether the striking out of the claimant' claim was proportionate in the circumstances.

22. Useful guidance on the approach that I should adopt can be found in the judgment of Justice Burton in ***Bolch v Chipman*** [2003] UKEAT 1149_02 & UKEAT_1905 and is helpfully summarised by Mr Platt-Mills in his submissions:

    a. First, there must be a conclusion by the tribunal not simply that a party has behaved scandalously, unreasonably or vexatiously but that the proceedings have been conducted by or on his behalf in such a manner.
    b. Second, even if such conduct is found to exist, the tribunal must reach a conclusion as to whether a fair trial is still possible. In exceptional circumstances (such as where there is wilful disobedience of an order) it may be possible to make a striking out order without such an investigation (see De Keyser), but ordinarily it is a necessary step to take.
    c. Third, even if a fair trial is not considered possible, the tribunal must still examine what remedy is appropriate, which is proportionate to its conclusion. It may be possible to impose a lesser penalty than one which leads to a party being debarred from the case in its entirety.
    d. Fourth, even if the tribunal decides to make a striking out order, it must consider the consequences of the debarring order. For example, if the order is to strike out a response, it is open to the tribunal, pursuant to its case management powers under [r 29] or its regulatory powers under [r 41], to debar the respondent from taking any further part on the question of liability but to permit him to participate in any hearing on remedy.

23. It is important to make clear that the word 'scandalous' in the context of rule 37(1)(a) does not have it's more usual colloquial meaning of "shocking" but means behavior which is irrelevant and abusive of the other side (***Bennett v Southwark London Borough Council 2002 ICR 881, CA***).

24. A 'vexatious' claim is one that is not pursued with the expectation of success but to harass the other side or out of some improper motive or which is an abuse of process.

My conclusions

25. I have set out here the particular matters that I have considered the conclusions that I reached following the Bolch guidelines set out above:

a. The claimant's behaviour towards the respondent in failing to respond meaningfully to the draft list of issues and his disregard for his duty of cooperation, his failure to follow the orders of Employment Judge Miller in relation to the list of issues for this hearing and his behaviour in the tribunal on the day of the hearing before could properly be categorised as scandalous, unreasonable or vexatious conduct in the sense that it was abusive of the other side and of process. His behaviour at the hearing was part of a course of conduct that this claimant has chosen to adopt generally as set out by the respondent in its application and demonstrated by the correspondence in the preliminary hearing bundle. The claimant is aware from the extensive process undertaken by Employment Judge Flood and Employment Judge Miller that it would not be acceptable to simply assert a vague list of claims and that specific particulars of claims are required. He is aware from the amendment application before Employment Judge Miller what is required in an amendment application amendment and he had been provided with written reasons for that refusal. Not only did the claimant fail to engage with the list of issues as he had been ordered to do, his application to amend is made in terms which he must or should have been aware was unreasonable in light of what he had previously been told by Employment Judge Flood and Employment Judge Miller. For these reasons the terms in which the amendment application is made appears to be willfully vague and an abuse of process.

b. I gave careful consideration as to whether, in light of my finding on relation to the claimant's conduct, a fair trial was still possible. I took into account the claimant's failure to do what he had been required to do in the past by Employment Judge Flood and Employment Judge Miller which is why so many preliminary hearings have taken place in this case, and his refusal to comply with my instructions or indeed to show me the common courtesy of letting me speak. I have reluctantly concluded that this claimant has shown that he is not prepared to cooperate with the tribunal process. This led me to make the difficult and unusual finding that a fair trial in this case was no longer possible because I conclude that the claimant's behaviour in this regard is likely to be repeated.

c. I then considered whether striking out the claimant's claim was the appropriate remedy. I considered whether there was a lesser penalty that I could impose which might ensure compliance and the possibility of a fair trial, but I was unable to identify one. My judicial colleagues had have already taken considerable steps to try and identify the scope of the claimant's claims and their attempts to do that had been unsuccessful and despite their attempts the respondent is still faced with a vaguely worded application to amend the claim and an unresolved list of issues. A number of orders have been made but not complied with. In light of the difficulty of determining material non-compliance where an "unless order" is made in circumstances where further particularisation of claims is required I did not consider that the option of making such an order was an appropriate one in this case. I concluded that that there was nothing useful that I could do which

would ensure compliance and a fair trial that has not already been tried without success.

d. I have taken into account the consequences of this order and what would happen if I did not make it. I recognise that to strike out a claim is the one of the most draconian measures I can take and of course is a step which is prejudicial to the claimant. However, I have also taken into account the prejudice to this respondent if these proceedings were allowed to continue. More than two years on from the issue of proceedings the respondent finds itself facing significant but unexplained and unparticularised new discrimination allegations and a continued refusal to cooperate with a matter as straightforward as agreeing a list of issues. That would be unsatisfactory in any case, but these proceedings have been the subject of four previous hearings with considerable judicial input into the process of identifying claims and legal issues, particularly by Employment Judge Flood. I do not consider that is in accordance with the overriding objective to expect a respondent to continue to face proceedings being conducted in this way.

26. My conclusion in this case was that the attempts by the employment tribunal and the respondent to deal with this case in accordance with the overriding objective have been frustrated by the claimant's conduct, and his behaviour to date and at the hearing today strongly suggests that any future attempt by the tribunal to manage this case and by the respondent to prepare this case for final hearing in accordance the overriding objective will also be frustrated by him. In those circumstances I reluctantly concluded that I have no alternative but to strike out the claimant's claim under rule 37 (1) (b) and (e).

Employment Judge Cookson

Date 14 April 2021